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DEFENDANT

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FEATURING:

THE SCIENCE OF MOLD - PART II

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MICHAEL CAULFIELD*

President's Column

Thanks to the efforts of Jeanne Cygan, Kristin Shea and many other members our four part CLE "trial school" has been completed with eighteen lawyers having participated. The combination lecture/demo format was well received.

The Amicus Committee headed by Andrew Zajac contributed to a defense win in the NY Court of Appeals in Blake v. Neighborhood Housing, a would be Labor Law 240 case.

The Past Presidents' Dinner was well attended and preceded by a CLE talk on Civility by Saul Wilensky. Our Annual Pinckney Award Dinner honoring Presiding Justice Prudenti of the Appellate Division Second Department was a great success as well. Our thanks to Martin Hayes and Andrew Zajac for pulling that event together.

I have had the opportunity to attend two DRI events and see the defense bar at work on a larger scale. DANY can contribute much to DRI as DRI's presence is not as strong in New York as it is elsewhere in the country. Likewise, DRI has resources that could help DANY project itself more in this area.

Looking ahead, we anticipate a Spring CLE program and the golf outing in July.

I would be remiss if I did not acknowledge the hard work and conscientious attention to detail exhibited by our Executive Director, Tony Celentano.

* *Michael Caulfield is a partner in the Caulfield Law Offices located in New York.*

JOHN J. MCDONOUGH, ESQ.*

The Science of Mold

Part II

III. THE NEW YORK RULE

The standard used to determine the admissibility of scientific expert evidence is well-settled in New York. The rule, known as the Frye test, was first pronounced in a case wherein the defendant sought to admit an expert witness to testify to the connection between blood pressure and truthfulness. Frye v. United States, 54 App.D.C. 46(1923). In precluding the proffered testimony, the Court in Frye stated that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye at 47 (emphasis added). New York courts first relied on this standard as early as 1938 wherein the court denied a defendant's motion requesting a lie detector test be performed. People v. Forte, 167 Misc. 868, 872, 4 N.Y.S.2d 913, 917 (Kings Cty. Ct. 1938). In denying defendant's request, the Court cited Frye for the proposition that proffered expert testimony must have gained "such standing and scientific recognition among...[the] authorities [in that field] as to justify the admission of [such] expert testimony..." Forte at 870, 915; see also People v. Wernick, 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996) (stating that the Court of Appeals has "often endorsed and applied the well recognized rule of Frye v. United States"); People v. Wesley, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97 (1994)("[t]he long-recognized rule of Frye v. United States is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has "gained general acceptance" in its specified field") People v. Alston, 79 Misc. 1077, 362 N.Y.S.2d 356 (Bronx Cty. Sup. Ct. 1974)(applying Frye, the Court granted defendant's motion to preclude testimony concerning a test which the

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* *Mr. McDonough is a partner in the Manhattan office of Cozen O'Connor and is Chairman of the firm's Product Liability and Complex Tort Group.*

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State alleged would determine gender by a blood test which was not generally accepted.)

The Frye test also is unquestionably controlling in civil cases, including cases where claims of exposure to toxic substances are alleged. See Oppenheim v. United Charities of New York, 698 N.Y.S.2d 144 (1st Dept. 1999) (affirming summary judgment against plaintiff based upon ruling which precluded plaintiff's expert from testifying with respect to multiple chemical sensitivity ("MCS") because plaintiff "failed to adduce evidence sufficient to raise an issue of fact as to whether [an MCS] diagnosis ha[d] gained general acceptance in the scientific community after the defendants had made a *prima facie* showing that it ha[d] not."); Collins v. Welch, 178 Misc.2d 108, 678 N.Y.S.2d 444(Tompkins Cty. Sup. Ct. 1998) (wherein the Court granted defendant's motion to preclude testimony that plaintiff suffered from multiple chemical sensitivity ("MCS"), allegedly caused by dust, fumes, and particles in her office as a result of roofing work, because such a syndrome had not gained general acceptance in the relevant scientific community; Hammond v. Alekna Construction, Inc., 703 N.Y.S.2d 332 (4th Dept. 2000)(wherein the Court granted summary judgment in favor of defendants on the count alleging MCS because "[p]laintiffs failed to adduce evidence to raise an issue of fact whether such a diagnosis has gained general acceptance in the scientific community...")' see also Selig v. Pfizer, 185 Misc.2d 600, 713 N.Y.S.2d 898 (New York Cty. Sup. Ct. 2000) (granting summary judgment in a "Viagra" case where plaintiff's expert "ignored dozens of clinical studies [which were contrary to his] and, in doing so, he failed to follow accepted scientific method"); Stanski v. M. Ezersky, 228 A.D. 311, 644 N.Y.S.2d 220 (1st Dept. 1996)(applying Frye in a legal malpractice action stemming from a medical malpractice action); Castrichini v. Rivera, 175 Misc.2d 530, 669 N.Y.S.2d 140 (Monroe County Sup. Ct. 1997) (applying Frye wherein defendant sought to preclude results of a spinoscopic exam).

Thus, under New York law, expert testimony is admissible only if the underlying principles or procedures upon which the proffered expert testimony (and conclusions) are based have gained general acceptance in their particular scientific field. See Oppenheim v. United Charities of New York, Index No. 121185/94 (Sup. Ct. New York Court, Dec. 18, 1998) (Miller, J.) aff'd 698 N.Y.S. 144 (1st Dept. 1999) Frye, supra.

While under Frye, the Court does not determine whether a scientific methodology is actually reliable, the Court must determine whether most scientists in the field believe it to be reliable. See Collins, 178 Misc2d at 109, 678 N.Y.S.2d at 446; Castrichini, 175 Misc.2d at 537, 660 N.Y.S.2d at 145 ("the Frye test emphasizes "counting scientists" votes, rather than on verifying the soundness of a scientific conclusion") (quoting Jones v. United States, 548 A.2d 35, 42 (D.C.Ct. App. 1988); People v. Roraback, 242 A.D.2d 400, 662 N.Y.S.2d 327, 331 n.2 (3rd Dept. 1997); Selig, 185 Misc.2d at 605-06, 715 N.Y.S.2d at 982. If not generally accepted in the scientific community, the proposed expert testimony based on such methodology is inadmissible and should be precluded. Under Frye, where a proffered expert uses a methodology accepted by a minority of scientists in the relevant field, that "is a basis for exclusion, because that fact manifestly negates 'general acceptance". "Castrichini, 175 Misc.2d at 539, 669 N.Y.S.2d at 146, n.3. Under Frye, general acceptance in the relevant scientific community is the sole question for the Court. See Castrichini, 175 Misc.2d at 535, 669 N.Y.S.2d at 143 (contrasting to the federal test under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which includes general acceptance as one of four criterion which must be considered but not individually attained in the "more flexible""admissibility determination applicable in federal courts). Simply put, in New York, if the methodology, principle, or procedure relied upon by the expert is not generally accepted in the relevant scientific community, the proffered expert testimony is inadmissible.

Generally, courts can make a determination as to whether the Frye standard has been satisfied "by reference to scientific literature or judicial opinions." People v. Coulter, 182 Misc. 2d 29, 35, 697 N.Y.S.2d 498, 502 (Dis. Ct. Nassau Cty. 1999). If these sources are insufficient, the Court must conduct a hearing at which expert testimony will be taken on the issue of "general acceptance" in the relevant scientific community. Id. (granting motion to hold a Frye hearing to determine the admissibility and scientific reliability of the expert concerning Munchausen Syndrome by Proxy).

Peer review by way of independent validation or replication of an expert's techniques, together with associated critical analysis in peer reviewed literature is highly relevant to the general acceptance question. See Castrichini, 175 Misc.2d at 537, 669 N.Y.S.2d at 144. Similarly, "a complete failure to publish in a peer reviewed scientific journal" is also highly relevant. Id. However, "peer review and general acceptance are not

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coterminous" and peer review publication alone does not establish "general acceptance." Id. at 175 Misc.2d at 538, 69 N.Y.S.2d at 145.

Courts have precluded proposed expert opinion in cases involving alleged exposure to toxic or chemical substances where the diagnosis made by a plaintiff's proposed expert had not gained general acceptance in the scientific community. See Oppenheim, 698 N.Y.S.2d 144 and the lower court decision of Justice Miller. Therein the plaintiff alleged that she was exposed to "noxious, poisonous and otherwise dangerous substances" as the result of water leaking into her office from the floor above. Plaintiff alleged that the exposure "caused or exacerbated symptoms related to a physical condition termed Multiple Chemical Sensitivity Syndrome ("MCS"). Defendants moved for summary judgment on the grounds that plaintiff's proposed scientific evidence regarding MCS was inadmissible under Frye. The Court held that plaintiff's evidence did not establish the scientific validity of MCS or plaintiff's expert's related theories that plaintiff's alleged exposure to toxic elements caused or exacerbated plaintiff's alleged illness. See Collins, 178 Misc.2d 107,678 N.Y.S.2d 444 (holding that MCS was not a generally accepted diagnosis in the relevant scientific community and opinion testimony related thereto inadmissible). Hammond v. Alekna Construction, Inc., 269 A.D.2d 773, 774 703 N.Y.S.2d 332, 335 (4th Dept. 2000) (summary judgment on MCS claim because "[p]laintiffs failed to adduce evidence to raise an issue of fact whether "such a diagnosis has gained general acceptance in the scientific community").

Mold Class Actions

Although a class action can be used in most tort claims (e.g., consumer fraud, product liability, securities fraud), it is becoming popular in mold exposure claims. Oster, "*Insurers Blanch at Proliferation of Mold Claims,* " Wall St. J. June 6, 2001, at B1. Indeed, defendants such as building owners, property management companies, and employers could be particularly vulnerable to class claims because of the creation of a relatively new toxic tort known as "sick building syndrome." (SBS) The typical SBS case arises when occupants complain about the indoor air quality (IAQ) of the building in which they work. The potential litigants "quickly target the alleged presence of unspecified molds and other organic compounds in their workplace – and not their homes – as a potential cause of their ailments." Woodward & Taddeo, "*Mold and the Hypersensitive Plaintiff*" Mold: Mealey's Lt. Rep. Vol. 1, No. 5 (May 2001), at 26.

Although the SBS class action is a relatively new and relatively unproven cause of action, a number of these cases have recently surfaced. Munoz v. Phipps Plaza South, No. 109895/99 (N.Y.Sup.Ct. filed September 11, 1998) pending class action: tenants of two apartment buildings sued their landlords alleging personal injuries and death from toxic mold); Muttart v. American Mortgage & Guaranty Co., 1998 Del. Super.LEXIS 30, 1998 Westlaw 110067 (dismissing class allegations in a SBS case); Ferguson v. Riverside School District No. 416, No. CS 00-0097-FVS (E.D. Wash. 1997) (pending class action: teachers and students of a school in Spokane assert that they had suffered injuries from mold exposure in the air at the school). In addition, on May 23, 2001, two University of California, Berkeley students filed a class action lawsuit on behalf of approximately 800 students who live in the residence halls, claiming injuries as a result of mold exposure.

In any class action, regardless of subject matter, if a defendant seeks to defeat the class action allegations, requiring that the plaintiff proceed on an individual basis, the defendant must demonstrate that essentially, as a matter of law, the plaintiff cannot satisfy all of the class action requirements. Rose v. Medtronics, Inc. 107 Cal. App.3d 150, 154-55, 166 Cal. Rptr. 16, 18 (1980). Nearly every state has a procedural rule governing class actions that is a counterpart of Federal Rule 23. In virtually all of these rules, section 23(a) sets forth the requirements of numerosity, commonality, typicality, and adequacy of representation. Then, the plaintiff must also satisfy one of the subsections of section 23(b). Rules 23(b)(1) (inconsistent adjudications) and 23(b)(2) (injunctive relief) are generally more applicable to injunctive, as opposed to monetary, relief. Thus, in the personal injury toxic tort case, a plaintiff will almost always seek certification through the predominance and superiority inquiry of Rule 23(b)(3).

As the following discussion illustrates, although a defendant may exercise its right to "challenge every aspect of the rules applicability, ultimately, a defendant's strongest argument to defeat certification will be based on the predominance inquiry in Rule 23(b)(3)". 3 *Newberg on Class Actions* §17.03, at 10 (3d ed. 1992). A defense attorney should concentrate on this provision because the requirements of the first part of the class action inquiry (Rule 23(a) or its equivalent) are often subsumed into the predominance inquiry.

The predominance inquiry is plainly the most difficult obstacle for toxic tort plaintiffs to hurdle. Fortunately, plaintiffs must satisfy this requirement because most sick building syndrome cases (and, for that matter, most toxic torts) seek monetary damages as a remedy. A class claim must be denied if the plaintiff cannot demonstrate that

> The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed.R.Civ.P.23(b)(3).

In determining whether to certify a class under Rule 23(b)(3), a court may consider such factors as the preference of the individual members of the class to control their own litigation, pending litigation with the same or a similar factual basis, the most appropriate forum, and manageability. When a court performs this analysis, the predominance requirement becomes an imposing obstacle for a toxic tort plaintiff seeking class certification due to the inevitable highly individualized issues of causation and damages.

Nearly all of the decisions on certification rely in part on the predominance inquiry, focusing on the causation and damages issues, because those issues are so unique to each putative class member and, therefore, common issues could never predominate. Although courts have certified toxic tort class actions in the "air quality" context, Mullen v. Treasure Chest Casino, LLC, 186 F.3d. 620, 629, (5th Cir. 1999); Klocke v. A&D Limited Partnership, 90 Ohio App.3d 317, 321, 629 N.E.2d 49, 51 (1993), the better-reasoned decisions recognize that certification is inappropriate due to the plaintiff-specific nature of these claims. Neenan v. Carnival Corp., 199 F.R.D. 372 (S.D.Fla. 2001); Muttart, supra, 1998 Del. Super. LEXIS 30.

Class certification is often denied in toxic tort litigation. For example, sick building syndrome claims are generally not appropriate for class relief because the alleged mass tort has a myriad of factual and legal issues particular to the individual plaintiffs that must be tried separately. (In contrast, certain massive torts, such as an airplane crash, have one discrete incident at the root of the litigation. Accordingly, toxic tort claims are better served in individual trials due to the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." Note of the Advisory Committee, Fed.R.Civ.P.23(b)(3).

In Neenan v. Carnival Corp., supra, plaintiffs filed a class action lawsuit alleging that the defendant cruise line failed to maintain, among other things, "an operable sanitary system, operable air conditioning, and operable engines." 199 F.R.D. at 373. The lawsuit arose when the cruise ship on which the plaintiffs were traveling caught fire; as a result, they were confined to an unventilated room full of smoke. Id. The plaintiffs also alleged that because the sanitary system malfunctioned, they were forced to inhale the pungent smell of human waste. They also claimed that the fire damaged their personal property and caused them general discomfort and nausea.

The court dismissed the plaintiffs' negligence class action lawsuit, finding, *inter alia*, that the plaintiffs could not satisfy the predominance inquiry because of the varying causation and damages issues that would be plaintiff-specific. Id. at 376. Specifically, the court recognized that each individual plaintiff would need to separately prove causation and injury. Each plaintiff would need to demonstrate, for example, "whether the passenger reported to an indoor or outdoor muster station; whether the passenger retreated to an indoor muster station with air conditioning; where the passenger stood in relation to the fire...[and] whether the passenger suffered nausea as a result of the Defendant's negligence."Id. The relevant inquiry was to what extent, if any, the events that occurred on the cruise ship caused harm to the passengers and which specific passengers suffered harm. This holding is consistent with the Notes from the Advisory Committee for Rule 23(b)(3), which recognize that "an action conducted nominally as a class

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John J. McDonough
EDITOR IN CHIEF

STAFF

Anthony Celentano

Denise LaGrua

Alexandra M. McDonough

Carl J. Schaerf, Melissa Welch, Dawn C. DeSimone, Lisa Schreiber and Andrew Zajac

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action would degenerate in practice into multiple lawsuits separately tried" and would be uniquely appropriate for a motion to dismiss. The court's reasoning in Neenan also follows the reasoning in a relatively recent Supreme Court decision that barred certificate because, *inter alia*, mass torts affect different individuals in different ways, complicating the causation and damages issues that plaintiffs must prove in each case. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997).

Similarly, in Puerto Rico v. M/V Emily S, 158 F.R.D. 9 (D.P.R. 1994), the plaintiffs filed a class action lawsuit and immediately sought certification of a class that alleged injuries as a result of an oil spill. The defendants, connected with the barge that leaked the oil, filed an opposition motion soon after the plaintiff filed the complaint. The plaintiffs claimed a panoply of injuries as a result of the spill, including

> Severe headaches, respiratory ailments and allergies, skin allergies and eruptions, nausea, dizziness, severe throat and nose ailments, severe eye irritation, and other related allergic and/or intoxicating reactions and/or symptoms as well as severe emotional pans, anguish and distress. Id. at 11. The court, in analyzing the plaintiff's request for certification, recognized that toxic tort personal injury cases represent the type of class action that the drafters of Rule 23 determined inappropriate for certification. Specifically, the court stated that the plaintiffs would need to prove, "in addition to any negligence or other fault on the part of one or more of the defendants, the fact of each class member's personal injury and the causal link between that individual's injury and the spill." Id. at 12.

In recognizing that the plaintiffs could not meet their burden, the M/V Emily S court held that they could not demonstrate that common questions predominated over individual questions with respect to the alleged exposure to the fumes from the oil spill. Id. at 19. The court noted that plaintiffs cannot satisfy the predominance inquiry simply by demonstrating that the cause of actions arises out of a common nucleus of operative fact. On the contrary, for a class action to overcome the predominance inquiry, the core issues of the claim or claims must be common to the whole class. Accordingly, in M/V Emily S, the plaintiffs were unable to demonstrate predominance because each individual plaintiff's injuries would be dependent on, among other things, his or her level of exposure and any individual preexisting conditions.

Further, the M/V Emily S court found that the plaintiffs could not satisfy the superiority requirement of Rule 23(b)(3) because they could not establish that their cause of action was best suited for a class action treatment over other methods of adjudication. The court noted that this case was not the superior method of adjudication because a class action would be unmanageable due to the difficulty of providing notice and arranging for the necessary opt-out procedures. Because, as in most personal injury cases, causation and damages are highly individualistic, consolidation of claims would be a more effective use of judicial resources.

Finally, in Jones v. Allercare, 2001 U.S.Dist. LEXIS 1574 (N.D.Ohio), the plaintiffs sought class certification for reactions they allegedly suffered as a result of using the defendants' powder and spray designed to control household dust mite allergies. The plaintiffs claimed that the defendants knew or should have known that the powder and spray would cause adverse reactions among consumers in general, as well as the product's target group (i.e. people who suffer from asthma and allergies). The powder contained benzyl benzoate and fragrance, which the plaintiffs alleged cause attacks, such as difficult in breathing by asthmatics or difficulties in allergen sensitive individuals.

In denying the plaintiffs' motion for class certification, the court held the class representatives could not overcome the predominance inquiry despite the plaintiffs' argument that the common issues of liability and general causation predominated. The court recognized that the plaintiffs could not establish that common issues predominated because "each named plaintiff has a different complaint with different symptoms, point of onset, and duration." 2001 U.S.Dist.LEXIS 1574, at *42. Moreover, the plaintiffs could not establish that a class action was a superior method of handling the lawsuit because, much like predominance, "there are so many individual issues of cause and effect, [that] trying this case as a class action would require an overwhelming number of mini-trials on these issues." Id. at *54.

The most typical approach to defending toxic tort class actions is to raise predominance arguments in response to the plaintiffs' motion to certify the class (often after expensive and time-consuming class discovery has been completed). Many times, these issues can be raised preemptively (i.e. before the class action proceedings

gain momentum). As the foregoing discussion illustrates, toxic tort class actions are replete with factual nuances that allow a defendant to argue the inappropriateness of class certification. The defendants in Neenan v. Carnival and Jones v. Allercare did not attempt to have the class action allegations removed from the litigation until after the plaintiffs sought certification. Although other procedural or strategic reasons may have supported doing so, the often better approach of defending toxic tort class actions in general and, as an example, sick building syndrome class actions, is to file a preemptive motion to dismiss the class allegations of a complaint as soon as practicable; the motion will be based on Rule 12(b)(6) of the Federal Rules of Civil Procedure: "failure to state a claim upon which relief can be granted." The filing of this motion enables a defense lawyer to save a client a tremendous amount of time and money.

Rule 23(c)(1) of the Federal Rules of Civil Procedure provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." The language of this rule is tailored to invite a defendant to attack the class action allegations of a complaint even before the plaintiff has filed its motion for certification. Brown v. Milwaukee Spring Co., 82 F.R.D. 103 (E.D. Wis.1979). Accordingly, the defendant is afforded the opportunity to illustrate to the court that the class allegations should be dismissed as a matter of law for failure to state a class claim that can sustain the fundamental requirements of Rule 23. A preemptive motion to dismiss the class allegations of a complaint, therefore, is the most appropriate vehicle for achieving this objective.

Although many plaintiffs' lawyers may argue that a Rule 12(b)(6) motion is inappropriate to determine whether the complaint alleges facts sufficient to satisfy Rule 23, courts do allow defendants to challenge the class allegations of a complaint through a motion to dismiss. "A class is not maintainable as a class action by virtue of its designation as such in the pleadings," In re American Medical Systems, Inc., 75F.3d 1069, 1079 (6th Cir. 1996), and, as such, a court "may address the substance or merit of the plaintiff's case [in a motion to dismiss] in order to determine whether the requirements of Rule 23(a) have in fact been met." Reilly v. Gould, Inc. 965 F.Supp. 588, 594 (M.D.Pa. 1997).

Because of the individualized reactions usually involved in indoor air quality claims, such an approach may be particularly inappropriate. Muttart v. American Mortgage & Guaranty Co.,*supra*, provides an excellent example of the effectiveness of a preemptive motion to dismiss the class action allegations of a complaint alleging injuries as a result of poor indoor air quality. The plaintiff, Hillard Muttart, claimed that mold, dust, and fumes caused his "personal injuries as a result of inadequate ventilation and poor maintenance of the HAVAC system in the building where [he] worked." Sweeney & Woodward, *Sick Buildings: Is the rising Tide About to Turn?*, June 2000 For the Defense 49, 51.

The plaintiff filed the original complaint against the defendants on September 27, 1998. Several months later, he filed a motion to amend his complaint to add class action allegations and consolidate his case with actions separately filed by two of his fellow co-workers. In the amended complaint, the plaintiffs contended that they should be representatives for a class of approximately 200 of their fellow employees who alleged similar injuries stemming from "dangerous conditions" caused by "contaminated air" in the building. The plaintiffs' employer, a third-party defendant in the case, immediately filed a motion to dismiss the class action allegations in the amended complaint, arguing that the types of claims asserted by the plaintiffs were inappropriate for class action treatment because, *inter alia*, individual issues of causation and damage predominated. In support of its argument, the employer demonstrated that the plaintiffs' allegations were individual in nature by asserting that each putative plaintiff's alleged injury could have been caused by different mechanisms in the work environment, at different locations of the building.

After some procedural issues specific to the case, the Muttart court analyzed whether it was appropriate for the plaintiffs' employer to file a motion to dismiss the class action allegations of the complaint and determined that a Rule 12(b)(6) motion was the appropriate vehicle to attempt such a dismissal. 1998 Del.Super.LEXIS 30, at *6,7. In reaching its decision, the court relied on Reilly v. Gould, Inc., supra, where plaintiffs sought to represent a class consisting of homeowners allegedly injured from exposure to lead and other hazardous material in the air and water of their neighborhood. The Reilly court ultimately determined that a motion to dismiss was proper and that, because the plaintiffs could not, as a matter of law, demonstrate commonality, typicality, adequacy of representation, and predominance, the motion should be granted.

Just as the Reilly court had, the Muttart court then examined whether, as a matter of law, the plaintiffs alleged facts that could satisfy the predominance inquiry. 1998 Del.Super.LEXIS, at *8 (stating that plaintiffs' employer did not dispute any of the elements in Rule 23(a)). In addressing the issue raised by the plaintiffs in Brown v. Milwaukee Spring Co., supra, the Muttart court "assume[d] all pleaded facts to be true and determine[d]

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whether a tort action of this nature [could] meet the requirements of Rule 23(b)(3)."

The Muttart court held that "Plaintiffs' case involves a non-discrete mass tort where individual issues will inevitably dominate over issues common to the class...The nature of the allegations by the plaintiffs inevitably will contain individual issues of causation, as they relate to varying exposure to the building contaminants, and issues of pre-existing medical conditions." Id at *13-14. The court further recognized that common issues could not predominate because the defendants could raise defenses (e.g., statute of limitations, assumption of the risk) that would be specific to each individual.

The defendants in Muttart were able to overcome the plaintiffs' argument that it would be premature for the court to rule on the certification issue without the benefit of discovery. By preemptively moving to dismiss the class action allegations, the plaintiffs' employer prevented class-wide discovery and, therefore, was able to avoid considerable costs. The motion to dismiss also prevented the plaintiffs from conducting class-wide discovery on issues involving various aspects of the building as a whole. For example, because the only remaining relevant inquiries focused on the individual plaintiffs, the plaintiffs could not conduct "building-wide" discovery to determine if any other claims and any other alleged dangerous conditions existed. On a class-wide basis, this information would have been relevant to determine if other parts of the building allegedly caused workers to suffer similar symptoms. Because the class action allegations were eliminated, this information became irrelevant to the plaintiffs' claims as individuals. Moreover, with the specter of the class allegations removed, the defendants could focus defense efforts on the specific claims of the individual plaintiffs far more effectively.

Is "Deliberately Broad" Preemption Under ERISA Still Deliberate or Broad?

CARL J. SCHAERF, ESQ.*

MELISSA WELCH, ESQ.**

Introduction

The Employee Retirement Income and Security Act of 1974 ("ERISA") has effectively federalized and unified the law concerning most group insurance benefits secured through the work place. Whether Congress intended this result in 1974 is debatable - Congress specifically placed a "savings clause" into ERISA designed to avoid preemption of state laws that regulate the insurance industry. 29 U.S.C. Sec. 1144(b). However, for many years, the trend in ERISA case law has been to construe the "savings clause" narrowly, and to interpret ERISA preemption as "broad" in scope. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

Under ERISA, an insurer no longer needs to contemplate 50 individual state systems in place in the event of claimant or judicial disagreement with a benefits determination. In place of a 50 state patchwork of "bad faith" laws, there is a largely unified (although some variations do exist by circuit) body of ERISA case law. Generally, under ERISA, the insurer is required, in all states, to make determinations reasonably, and within the scope of whatever discretion it might have under the program of group insurance in question. According to Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989), a plan can give an administrator or fiduciary "discretionary authority" to determine eligibility for benefits and/or to construe the terms of the Plan. If so, judicial deference is mandatory, absent a finding of conflict of interest.

Although there is substantial disagreement on this point, it has and can be argued that the federalizing of group benefits litigation has been a benefit to employers and employees as well as insurers. The effect of subjecting plans to a single, predictable, standard of review, in Federal Court, has reduced litigation expenses. ERISA cases are typically expedited. Discovery is often curtailed, with depositions being the exception rather than the norm in many cases, and document production often limited to the administrative record considered by the insurer at the time of the denial or termination of benefits in question. This enables insurers to provide insurance at lower cost to employers, who then have greater incentive to make those group benefits available to their employees.

Role of Preemption

Preemption is a very critical part of the mechanics of the ERISA statute. If a group insurer were subject to suit under 50 sets of state "bad faith" laws, the uniformity goal of ERISA would be frustrated.

The preemption provisions of ERISA are often referred to as "deliberately broad." Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1328 (5th Cir.), cert. denied, 506 U.S. 1033 (1992). ERISA preemption is so broad, in fact, that since its enactment, ERISA issues have surfaced in fields that might appear to have nothing to do with employee benefits. In addition to group insurance, these areas include medical malpractice and lien collection and recovery.

Section 514(a) of ERISA provides that its provisions "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). As the Supreme Court has held, a state law "relates to" an employee benefit plan when "it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983). Even a state law which is not specifically designed to have an impact upon a benefit plan, or with only a mere indirect effect upon a benefit plan, "relates to" the plan for preemption purposes. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

There are signs that ERISA preemption, although still broad, may have some important limits. The Supreme Court, as well as some lower courts, have taken some recent, and possibly troubling, steps towards narrowing the scope of ERISA preemption, and, concurrently, giving meaning to the "savings clause."

"Late Notice" Provisions

Logically, "late notice" provisions in a group insurance policy "relate to" the administration of the group insurance program and plan, and would seemingly fit within the scope of ERISA preemption. Indeed, it is hard to contemplate a more "administrative" rule than one concerning "late notice," a rule whose purpose is to guarantee that the insurance carrier is given notice in a period sufficient to enable it to meaningfully investigate the bona fides of the claim.

The Supreme Court, however, has concluded otherwise. In UNUM Life Ins. Co. of America v. Ward, 119 S.Ct. 1380 (1999), Justice Ginsburg, speaking for the Court, held that

Continued on page 8

* *Carl J. Schaerf is a member of the law firm of Lester Schwab Katz & Dwyer located in Manhattan.*

** *Melissa Welch is an associate with the law firm of Lester Schwab Katz & Dwyer located in Manhattan.*

Continued from page 8

while "late notice" rules are, on their face, preempted by ERISA, they are also within the "savings clause" provided for state laws that "regulate insurance." ERISA § 514(b)(2)(A), 29 U.S.C. Sec. 1144 (b)(2)(A).

Justice Ginsburg attempts to distinguish "late notice" rules from "bad faith" rules, which the Supreme Court held in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) were preempted and **not** saved by the "savings clause" for state laws that "regulate insurance":

> "We do not find it fair to bracket California's notice-prejudice rule for insurance contracts with Mississippi's broad gauged "bad faith" claim for relief. . . .[t]he notice-prejudice rule is distinctive most notably because it is a rule firmly applied to insurance contracts, not a general principle guiding a court's discretion in a range of matters."

However, there are a whole range of state bad faith laws that can only, by their terms, apply to insurers. Justice Ginsburg's "distinction" confuses, but does not clarify.

In permitting the "late notice" provision to be saved from ERISA preemption, we suggest that the Court opened a Pandora's box. Prior to Ward, everyone knew that ERISA preemption was broad, and the savings clause regarding insurance, was narrow and often without meaning or effect. Post-Ward, the "savings clause" clearly has some teeth, but the law lacks a reasoned test to determine its applicability.

The Supreme Court Searches for a Reasoned Test — Kentucky Assoc. of Health Plans, Inc. v. Miller

In 2003, the Supreme Court rendered its decision in Kentucky Assoc. of Health Plans, Inc. v. Miller, — U.S. —, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003). The issue was applicability of a state "any willing provider" law in the face of an argument of ERISA preemption. The Court used this decision to revisit the scope of the savings clause, holding:

> "for a state law to be deemed a 'law ... which regulates insurance' under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. See Pilot Life, supra, at 50, 107 S.Ct. 1549, UNUM, supra, at 368, 119 S.Ct. 1380; Rush Prudential, supra, at 366, 122 S.Ct. 2151. Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements."

Again, we believe that the Supreme Court's analysis confuses rather than clarifies. Pilot Life holds that "bad faith" laws are preempted, and not saved. However, applying the Miller test to "bad faith," it is far from clear that the same result should apply, although the Court cites Pilot Life in a manner that suggests that "bad faith" laws would continue to be preempted under ERISA. There is no reasoned basis for the distinction, and the practitioner is left without guidance for future issues of this sort.

The Rosenbaum Decision - "Bad Faith" Revisited

It did not take long for a Court to pick up on the quandary created by Ward and Miller. In Rosenbaum v. UNUM Life Ins. Co. of Am.,2002 WL 1769899 (E.D.Pa. 2002), reconsideration denied, 2003 WL 22078557 (E.D.Pa. 2003), Judge Newcomer considered this recent Supreme Court precedent and came to the conclusion that Pennsylvania's bad faith statute is not preempted by ERISA, Pilot Life notwithstanding. Judge Newcomer's approach has been roundly criticized within his own district. See Kirkhuff v. Lincoln Technical Inst, Inc., 221 F.Supp.2d 572, 575-76 (E.D.Pa.2002); Bell v. Unumprovident Corp., 222 F.Supp.2d 692, 697-98 (E.D.Pa.2002); McGuigan v. Reliance Standard Life Ins. Co., 256 F.Supp.2d 345, 347-48 (E.D.Pa.2002); Morales-Ceballos v. First UNUM Life Ins. Co. of Am., 2003 WL 22097493, at *2 (E.D.Pa. May 27, 2003). Such criticism is misdirected. The Supreme Court, by creating ambiguity concerning the scope and breadth of ERISA preemption and savings, invited the result reached by Judge Newcomer in Rosenbaum. In essence, preemption and savings have become a litigant's "wishing well." All viewpoints are supported by the law, and everything is arguable. While such uncertainty is favorable to the litigator's bottom line, it is a policy that is hardly consistent with the uniformity and cost-effectiveness goals of ERISA.

Conclusion

The word "deliberate" connotes, in its dictionary definition, "to think about or discuss issues and decisions carefully." In the wake of Ward and Miller the term "deliberate" would appear an ill-chosen qualifier for the once broad scope of ERISA preemption. Rosenbaum, although an aberrational decision, is hardly an irrational one given current Supreme Court precedent. The ERISA case law concerning preemption and savings is becoming less predictable, and less manageable from the perspective of the group benefits insurer.

"Deliberately broad" ERISA preemption is no longer deliberate, nor is it broad. Uniformity and predictability are the casualties of this apparent shift in judicial policy. Ultimately, a lack of predictability operates to the detriment of the very employees and their families for whom ERISA was originally intended to streamline the securing of such fringe benefits through the workplace. If an employer or insurer cannot make reasoned judgments as to risk, provision of benefits becomes less attractive and more expensive. Certainly, this is not what Congress intended when it passed ERISA back in 1974.

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The Court of Appeals' Decision in Blake: A Report from the Committee on the Development of the Law

ANDREW ZAJAC**

On behalf of DANY, the Committee on the Development of the Law submitted an *amicus curiae* brief to the New York Court of Appeals in Blake v. Neighborhood Housing Services of New York City, Inc. On December 23, 2003, the Court of Appeals issued its opinion, which is highly beneficial to the defense community. Blake, ___ N.Y.2d ___, ___ N.Y.S.2d ___, 2003 WL 22998497.

The Court of Appeals held that a plaintiff could not recover under section 240(1) of the Labor Law where the plaintiff's conduct, rather than a violation of the statute, was the sole proximate cause of the accident. The Court's decision in this case is a major pronouncement on Labor Law §240(1), and its impact is clear: The Court rejected the argument, advanced by both the plaintiff and the New York Trial Lawyers Association as *amicus curiae*, that 240(1) liability should lie even if the fault lay entirely with the plaintiff in improperly placing or operating the device. Thus, the Court of Appeals rejected the further expansion of the application of Labor Law §240(1) sought by the plaintiffs' bar and in so doing set forth excellent language that can be utilized in the defense of cases of this nature.

The facts in Blake were relatively straightforward: Plaintiff Rupert Blake sustained personal injuries as a result of an accident which occurred during the renovation of a private home. Plaintiff was performing work on the project as the sole proprietor and President of Blake Contracting, who had contracted to perform work for the homeowner. The defendant Neighborhood Housing Services of New York City, Inc. (hereinafter "NHS") was a not-for-profit lender who offered low interest rate loans to low and moderate income homeowners so that they could rehabilitate their homes. NHS did make such a loan to the homeowner in this case. However, NHS lacked the responsibility to direct or control any of plaintiff's work.

The accident involved an extension ladder, which plaintiff himself brought to the job site. By plaintiff's own admission, the ladder was in perfect working order. In fact, the plaintiff testified that the ladder was in good working condition, was not broken, shaky or defective, there was no reason to have the ladder steadied, and it was the appropriate type of equipment to use for the job. The accident occurred when plaintiff extended the ladder to the point where he wanted it, which was a total height of approximately 16 to 17 feet. Plaintiff then climbed onto the extension portion of the ladder. Apparently as a result of plaintiff's failure to engage the hooks on the ladder, the extension portion of the ladder began to slide down and somehow his right ankle got caught between the extension of the ladder and its mainframe, causing him to sustain a serious fracture.

Consequently, plaintiff commenced an action against NHS seeking to recover under Labor Law §240. Plaintiff contended that NHS was an "agent" within the meaning of the statute. This matter proceeded to trial, where the jury determined that although NHS had the authority to direct and control plaintiff's work and was thus a statutory "agent", the ladder plaintiff was utilizing at the time of the incident was so constructed and operated as to provide him with proper protection within the meaning of Labor Law §240(1). Plaintiff thereafter moved in the trial court to set aside the jury's verdict and for judgment as a matter of law in his favor. The trial court denied the motion, and plaintiff appealed to the Appellate Division, First Department. The Appellate Division affirmed, holding that a factual issue was presented as to whether the accident was caused by an inadequacy of the ladder or was solely attributable to the way in which plaintiff used it. Further, the Appellate Division affirmed the jury's findings of fact. 301 A.D.2d 366, 754 N.Y.S.2d 244.

On appeal to the Court of Appeals, plaintiff sought to have those affirmed findings of fact set aside and to have judgment as a matter of law entered in his favor pursuant to Labor Law §240(1). Plaintiff argued that such relief was

* *Dawn C. DeSimone is an appellate attorney with Fiedelman & McGaw, Jericho, New York , and is a member of the Committee on the Development of the Law for DANY.*

** *Andrew Zajac is a member of Fiedelman & McGaw, Jericho, New York, and he chairs the Committee on the Development of the Law for DANY. Mr. Zajac is also the vice-president of DANY.*

warranted inasmuch as NHS had a non-delegable duty to furnish, erect, construct, place and operate appropriate safety equipment for the protection of plaintiff and that the "collapse" of the ladder was prima facie proof of a violation of Labor Law §240(1).

The Court of Appeals disagreed, accepting instead the arguments advanced by both Carol Finocchio, on behalf of NHS, and DANY.

After reviewing the history and purpose of the statute, as well as the concept of strict liability, the Court made clear that "an accident alone does not establish a Labor Law §240(1) violation or causation." Rather, the Court continued "causation must also be established." Noting that plaintiff failed to establish any Labor Law §240(1) violation and that the jury implicitly found that the fault of the accident was entirely plaintiff's, the Court concluded that plaintiff's conduct was the sole proximate cause of the accident and, as such, plaintiff could not recover under the statute. Interestingly, in its discussion of proximate cause, the Court of Appeals noted cases from the Appellate Divisions where a defendant was not found liable under Labor Law §240(1) where there was no evidence of a violation and the proof revealed that plaintiff's own negligence was the sole proximate cause accident, i.e. where a ladder was inadequately secured due to plaintiff's improper use of it, or where there was misuse of a safety device.

The brief submitted by DANY made the point that to accept plaintiff's argument (as the Court characterized that "he would be entitled to recover in the face of a record that shows no violation and reveals that he was entirely responsible for his own injuries"), would impermissibly convert the liability of NHS to that of an insurer, a result far beyond the scope of the Legislature's intent in enacting the statute. The Court of Appeals appreciated the significance of that argument, in noting that:

> To be sure, we have long held that "the statute is one for the protection of [workers] from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Quigley v. Thatcher*, 207 N.Y. 66, 68 [1912]). But to impose liability for a ladder injury even though all the proper safety precautions were met would not further the Legislature's purpose. It would, instead, be a sweeping and dramatic turnabout that the statute neither permits nor contemplates. As we recognized in a related context, the language of Labor Law §240(1) "must not be strained" to accomplish what the Legislature did not intend (*Martinez v. City of New York*, 93 N.Y.2d 322, 326 [1999]). If liability were to attach even though the proper safety devices were entirely sound and in place, the Legislature would have simply said so, or made owners and contractors into insurers. Instead, the Legislature has enacted no-fault workers' compensation to address workplace injuries where, as here, the worker is entirely at fault and there has been no Labor Law violation shown.

The language from the Court on this point is succinct and telling, and evidences its reluctance to further expand the protection of the statute.

Finally, not to be overlooked was the Court's discussion of agency and its application to a Labor Law 240(1) analysis. To remind the reader, in Blake, NHS was not an owner or contractor. It lacked the authority to supervise or control the plaintiff's work. NHS merely offered low interest rate loans to low and moderate income homeowners so they could rehabilitate their homes. NHS made such a loan in this case.

Clarifying the concept of agency, the Court held that an "agency relationship for purposes of section 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute." Since here, NHS was a lender who did not involve itself with the details of how the work was completed, it could not be deemed an "agent" within the meaning of the statute.

Whether Blake is a major pronouncement on proximate cause as it relates to 240(1) of the Labor Law, or, as some see it, a clarification of the mistaken views held by practitioners and Appellate Divisions on the issue, the message is clear: A fall in and of itself will not establish liability under the statute, and the causation elements, such as who set up the safety device and whether there were any defects, must be explored and argued in any such case.

The Committee on the Development of the Law, which has been in existence for seven years, is currently comprised of Andrew Zajac and Dawn C. DeSimone of Fiedelman & McGaw, Kathleen D. Foley of Congdon, Flaherty, O'Callahan, Reid, Donlon, Travis & Fishlinger, and Elizabeth Anne Bannon, a solo practitioner in Manhattan. The members of the Committee provide their services on a voluntary basis, free of charge. Printing costs have been borne by DANY for the amicus curiae briefs submitted by the Committee.

Any inquiries regarding the Committee should be directed to its Chair, Andrew Zajac, Fiedelman & McGaw, Two Jericho Plaza, Jericho, New York 11753-1681, (516) 822-8900.

Any suggestions for an *amicus curiae* brief to the Court of Appeals are welcome, as is assistance in defraying the costs of printing expenses.

Please direct your suggestions and offers of assistance to Mr. Zajac for consideration by the Committee.

LISA SHREIBER*

ADDITIONAL INSURED COVERAGE

Additional insured coverage is determined by the policy provisions. The contractual obligations between the additional insured and named insured, including the indemnification provision and the additional insured's or named insured's actual negligence or fault are not deemed relevant to additional insured coverage, unless the policy specifically addresses these issues. Con Ed Company of New York v. Hartford Insurance Comp., 610 N.Y.S.2d 291 (1st Dept. 1994); Tishman Interiors Corp. Of New York v. Fireman's Fund Insur. Comp., 653 N.Y.S.2d 367 (2nd Dept. 1997). Rather, the contractual provisions are only relevant to additional insured coverage if the policy requires that there be a written contract for additional insured coverage. Similarly, negligence is only relevant if the additional insured endorsement provides that there will only be coverage for vicarious liability. The most common additional insured endorsements, however, make no reference to negligence and merely require that liability "arise out of" the named insured's work. Thus, even if the named insured is not liable itself there may be additional insured coverage, especially if the injured party is the named insured's employee. Consolidated Edison Co. of N.Y. v. Hartford Ins. Co., 610 N.Y.S.2d 291 (1st Dept. 1994).

Frequently the only indication of additional insured coverage provided to an entity is a certificate of insurance. Certificates of insurance, however, will not create an obligation on the part of the insurer to provide additional insured coverage unless the policy to which it corresponds contains the appropriate additional insured endorsement, or if the certificate of insurance was issued by the insurer's agent. American Ref-Fuel Comp. Of Hempstead v. Resource Recycling, Inc., 1998 WL 015965 (2nd Dept. 1998).

The coverage obligations to an additional insured are identical to those of a named insured. Thus, if the four corners of the complaint allegations are sufficient to meet the policy requirements for additional insured coverage, then a defense obligation is triggered with respect to the additional insured. Tishman Interiors Corp. Of New York v. Fireman's Fund Insur. Comp., 653 N.Y.S.2d 367 (2nd Dept. 1997). Thus, if the only requirement is that liability "arise out of" the named insured's work and the underlying complaint alleges that the plaintiff is an employee of the named insured who sustained injuries during the course of employment, additional insured coverage is triggered. Consolidated Edison Co. of N.Y. v. Hartford Ins. Co., 610 N.Y.S.2d 291 (1st Dept. 1994). Further, once an insurer's obligation to provide coverage to an additional insured is established, it will only cease if it is determined that the injury did not "arise out of" the named insured's work. Town of Oyster Bay v. Employers Ins. of Wausau, 702 N.Y.S.2d 630, 269 A.D.2d 387 (2nd Dept. 2000); Petracca & Sons, Inc. v. Capri Construction Corp., 264 A.D.2d 829, 695 N.Y.S.2d 403 (2nd Dept. 1999). Finally, since the additional insured is treated the same under the law as a named insured it is necessary to issue the appropriate reservation of rights letters and/or disclaimers and the failure to do so in a timely fashion could waive the policy conditions or exclusions or could create coverage by estoppel.

The priority of coverage as between a general liability policy under which an entity qualifies as a named insured and any other general liability policies under which an entity qualifies as an insured is determined by the policies' "other insurance" provisions. If the "other insurance" provisions of the policies call for sharing and/or pro rata coverage then the insurers will be required to provide their mutual insured with co-insurance. National Union Fire Insur. Co. Of Pittsburgh, Pa. v. Hartford Insur. Com. Of the Midwest, 677 N.Y.S.2d 105 (1st Dept. 1998); B.K. General Contractors, Inc. v. Michigan Mutual Insur. Comp., 612 N.Y.S.2d 198 (2nd Dept. 1994); U.S. Fidelity & Guar. Co. v. CNA Ins. Companies, 618 N.Y.S.2d 465, 208 A.D.2d 1163 (3rd Dept. 1994). If the policies do not have matching clauses the Courts will generally give effect to the policies' provisions. Therefore, if a policy has a provision indicating that it will be excess to any other

Lisa Shreiber is a member of the law firm of Cozen O'Connor and is located in the firm's New York office.

coverage available to the insured, that provision will be enforced if the other policy's provision does not have a similar "other insurance" clause.

If, on the other hand, the provisions are in conflict and both policies' provisions say the coverage is to be excess, then the clauses will again cancel each other out and the court will not enforce either provision. In such cases, the Court will have the insurers share pro rata in the coverage as long as both policies are general liability policies as opposed to a general liability policy and an excess or umbrella policy. State Farm Fire and Cas. Co. v. LiMauro, 492 N.Y.S.2d 534, 65 N.Y.2d 369 (1985); Northbrook Excess and Surplus Ins. Co. v. Chubb Group of Ins. Companies, 113 A.D.2d 319, 496 N.Y.S.2d 430 (1st Dept. 1985); United Nat. Ins. Co. v. Lumbermens Mut. Cas. Co., 1990 WL 176614 (S.D.N.Y. 1990); Castricone v. Riggi, 259 A.D.2d 815, 686 N.Y.S.2d 175 (3rd Dept. 1999).

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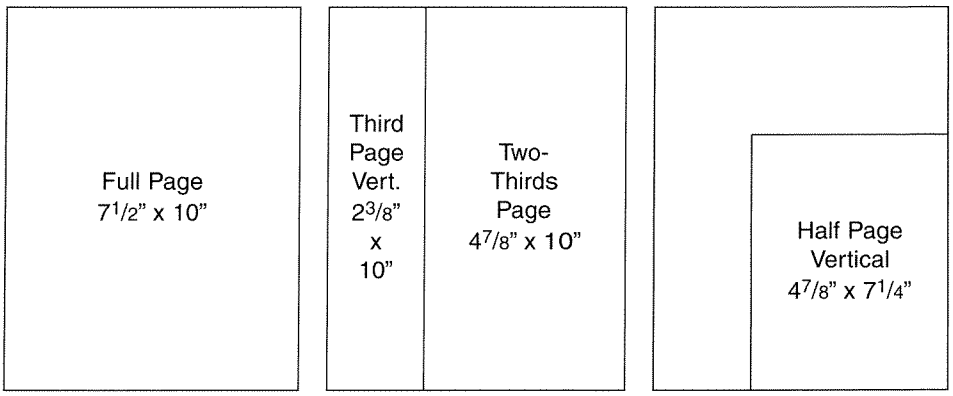

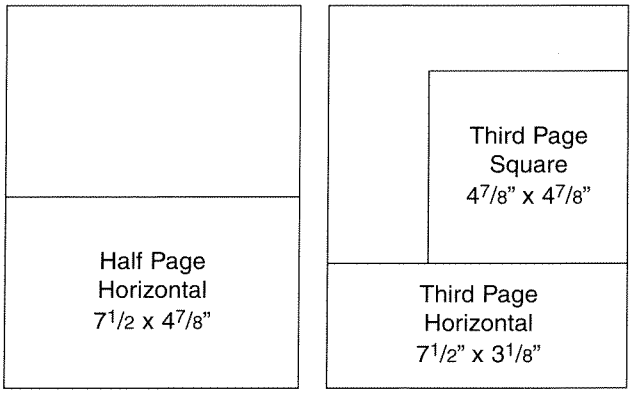

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