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DEFENDANT

THE JOURNAL OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

FEATURING:

THE SCIENCE OF MOLD

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FOLLOWING THE FALLING OBJECT CASE

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David J. Zaumeyer & Associates
1675 Richmond Road
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Tel 718-980-9639
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MICHAEL CAULFIELD*

President's Column

Defense litigation, as we know it, is changing. OCA continues its emphasis on Standards and Goals. The plaintiffs' bar continues its efforts to expand liability. Carriers look harder and harder for ways to cut costs. There is constant pressure to move cases, develop new defenses and keep costs reasonable.

The challenge for defense counsel in this environment is to provide a quality work product and favorable, cost-efficient results on each case. However, beyond a case by case approach we must work together to encourage and educate each other.

This association has a history of providing quality CLE, long before mandatory CLE. We have a more recent, but equally significant, history of submitting amicus briefs on cases of importance to our clients. We have regularly recognized through awards and scholarships those who have favorably impacted defense litigation and those with the potential to do so.

With CLE, amicus briefs, awards and scholarships have come the opportunity to project this association beyond its present loyal membership. Early planning through calendar, budget and committee work should enable us to further stretch and grow as an association.

By the time this column is published I hope to have already met with our officers and begun the planning process. When I sit down to write my next column, I hope to report specific plans and goals for 2003–2004.

Thank you for the opportunity to serve our association.

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

JOHN J. MCDONOUGH, ESQ.*

The Science of Mold

In the past few years we have seen a rapid proliferation in litigation involving "mold-related" damages. Moreover, we have seen a precipitous rise in litigation seeking to target "mold" as a cause of any number of physical ailments. As these causes flourish and proceed, they implicate a number of questions regarding the scientific connection between mold and physical ailments. Moreover, the purpose of this brief paper is to first discuss the current state of the "science" of mold; discuss the Frye and Daubert issues raised by the mold litigation; and identify the reasons why class certification in mold related litigation may not be feasible.

I. MOLD: THE SCIENCE

As an initial matter, we are presented with a basic question: "what is mold"? We all know that microbiologists study mold, but what is it that they study? According to Webster's College Dictionary, Microbiology is defined as the branch of biology dealing with microscopic organisms. It may be further divided into four disciplines, one of which is Mycology. Mycology is the scientific study of fungi (The Dictionary of the Fungi, 1995); or the branch of biology dealing with fungi (Webster's College Dictionary). All mold is fungi, but not all fungi is mold.

Fungal cells are eukaryotic meaning they have a true nucleus. The genetic materials - DNA of fungal cells are organized into chromosomes and exist in a nucleus. In addition, the cellular structures are often highly compartmentalized.

Most fungi are free-living as saprobes[1] or parasites of plants. A few fungi are parasitic or opportunistic pathogens of animals and humans. Of the types of fungi found growing indoors or in similar environments most are saprobes, weak plant pathogens, or opportunistic pathogens. Some fungi are known to produce a wide variety of secondary metabolites[2]. Some secondary metabolites may be used to human's benefit. Penicillin,

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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.*

cephalosporins, and cyclosporines that are derived from fungi are used extensively in treating bacterial infections or in bone marrow or organ transplant patients. A few fungi (such as Aspergillus fumigatus) are important opportunistic pathogens used in hospitals or health care facilities. Other fungi produce metabolites that are toxic.

Fungi known to produce mycotoxins are conveniently termed toxigenic fungi. A recent review suggests that fungal species in 46 genera are capable of producing some type of mycotoxin. The major fungal genera, including species that produce mycotoxins are: Aspergillus, Fusarium, Gliocladium, Memnoniella, Penicillium, Stachybotrys and Trichoderma. This is not -by any means - an exhaustive list of mycotoxin producing fungi. Moreover, it is important to note that the majority of fungi have not been screened for their mycotoxin-producing capability.

Fungi do not contain chlorophyll and, therefore, can not synthesize carbohydrate and sugars. Therefore fungi must obtain nutrients by absorption from the surroundings. To aid in this process, fungal cell walls contain chitin and glucans. Moreover, many types of fungi are capable of producing cellulases to break down cellulose into simple sugars which can then be absorbed as food. This is why certain types of fungi are commonly found on building materials that have been water damaged. Some known cellulolytic fungi that may be found indoor are Trichoderma species, Stachybotrys chartarum, Chrysosporium pannorum, Oidiodendron griseum, O cerealis, Gliomastix murorum, and Memnoniella echinata.

Some fungi grow into colonies with a well-marked mycelium or spore mass. These fungi are known as molds. This is in contrast to some unicellular fungi — such as yeasts. Some fungi are biphasic meaning that they may exist in a filamentous mold phase, yeast phase, or both, depending upon the various factors in their environment such as temperature or food source.

Fungi are ubiquitous in all environments and play a vital role in the Earth's ecology by decomposing organic matter. "Mold" is the common term for multicellular fungi that grow as a mat of intertwined microscopic filaments. See American College of Occupational and Environmental Medicine, *Adverse Human Health Effects Associated with Molds in the Indoor Environment* (Oct. 27, 2002) available at http://www.acoem.org/guidelines/articles.asp?ID=52

Other than allergies or asthma, illnesses are not common to mold exposure in the home. According to the Centers for Disease Control and Prevention,

> "[f]ungi account for 9% of nosocomial infections, that is infections originating or taking place in a hospital. Ingestion of foods contaminated with certain toxins product by molds is associated with development of human cancer [e.g., aflatoxin]. Many respiratory illnesses among workers may be attributed to mold exposures. Uncommon illnesses that collectively can be called hypersensitivity pneumonitis are caused by chronic exposures to high concentrations of mold and are almost exclusively limited to certain agricultural workers in particularly mold environments. *Common illnesses caused by molds include allergic conditions such as hay fever and asthma.*"
>
> *State of the Science on Molds and Human Health*, Statement of Stephen C. Redd, M.D., Chief, Air Pollution and Respiratory Health Branch, National Centers for Environmental Health, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services (July 18, 2002) (emphasis added) [hereinafter CDC Statement"] [available a http://www.cdc.gov/nceh/airpollution/images./moldsci.pdf.]

Moreover, the CDC states that, although molds are "ubiquitous in the environment, and can be found almost anywhere samples are taken", there are "no accepted standards for mold sampling in indoor environments or for analyzing and interpreting the data in terms of human health." Rather, "most studies have tended to be based primarily on baseline environmental data rather than human dose-response data. For those reasons, and because individuals have different sensitivities to molds, setting standards and guidelines for indoor moldy exposure levels is difficult and may not be practical." CDC Statement, *supra*.

A report produced by the American College of Occupational and Environmental Medicine, *Adverse Human Health Effects Associated with Molds in the Indoor Environment* (October 27, 2002), http://www.acoem.org/guidelines/article.asp?ID52, states that molds and other fungi may adversely affect human health in three ways: 1) allergy; 2) infection; and 3) toxicity.

Allergy. According to the report, the "most common form of hypersensitivity to molds" can lead to allergic asthma or allergic rhinitis. However, the existence of a

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"vague" relationship among mold colonization, mold in foods, and a "generalized mold hypersensitivity state" is not supported by reliable scientific data.

Infection. The report states that opportunistic fungal infections in which there is deep tissue invasion "are primarily restricted to severely immunocompromised subjects."

Toxicity. Some species of fungi, including some molds, can produce mycotoxins. Not all mycotoxins are harmful - for example, penicillin is a mycotoxin. Mold plaintiffs frequently allege that inhalation of mycotoxins causes a variety of symptoms. The report states "Current scientific evidence *does not* support the proposition that human health has been adversely affected by inhaled mycotoxins in the home, school or office environment."

Importantly, the mere presence of fungi that are capable of producing mycotoxins does not establish that mycotoxins are also present. "The amount (if any) and type of mycotixin produced is dependent on a complex and poorly understood interaction of factors that probably include nutrition, growth substrate, moisture, temperature, maturity of the fungal colony and competition from other microrganisms." Moreover, mycotoxins are not significantly volatile, i.e. they do not float around in the air. Therefore, any inhalation exposure requires the generation of a fungal "aerosol".

The report concludes:

> "Adverse effects of molds and mycotoxins have been recognized for centuries following ingestion of contaminated foods. Occupational diseases are also recognized in association with inhalation exposure of fungi, bacteria, and other organic matter, usually in industrial or agricultural settings. Molds growing indoors are believed by some to cause building-related symptoms. Despite a voluminous literature on the subject, the causal association remains weak and unproven, particularly with respect to causation by mycotoxins. One mold in particular, *Stachybotrys chartarum*, is blamed for a diverse array of maladies when it is found indoors. Despite its well-known ability to produce mycotoxins under appropriate growth conditions, years of intensive study have failed to establish exposure to *S. chartarum* in home, school, or office environments as a cause of adverse human health effects. Levels of exposure in the indoor environment, dose response data in animals, and does-rate considerations suggest that delivery by the inhalation route of a toxic dose of mycotoxins in the indoor environment is highly unlikely at best, even for the hypothetically most vulnerable subpopulations.'

II. APPLICABILITY OF DAUBERT & FRYE IN MOLD CASES

Under the general rule, the admission of expert testimony depends upon whether the testimony will be reliable and helpful to the court under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). As is well-known, the Daubert Court abandoned the "general acceptance" test for the admissibility of expert scientific evidence originally set forth in Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923). Instead, the Court adopted new standards based upon the Federal Rules of Evidence.

The Daubert Court held that, under Fed. R. Evid. 702, the trial court, as gatekeeper, must:1) determine whether the expert's testimony reflects "scientific knowledge," a requirement that goes to reliability, and 2) whether the testimony will assist to the trier of fact to understand or determine a fact in issue, a requirement that goes primarily to relevance. The Court, emphasizing that the inquiry under Rule 702, is a "flexible one," noted a number of factors that a trial court could consider in determining admissibility: 1) whether the theory or technique has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate error for a particular scientific technique; and 4) the theory's or techniques' acceptance in the relevant scientific community. See Daubert, 509 U.S. at 593-94. The Court noted, however, that "[a] reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." Id at 594.

While not specifically addressing Frye or Daubert, a recent Texas decision sheds light on the admissability issue. In Ballard v. Fire Ins. Exchange, No. 99-05252 (Tex. Dist. Ct., Travis County, June 1, *2001)(cited in Jury Awards $32 Million to Texas Homeowner in Mold Coverage Action*, Vol. 6, No. 12, Mealey's Emerging Insurance Disputes, at 11 (June 20, 2001)) the court rejected the proffer of plaintiff's expert testimony on mold causation of illness, finding it unreliable. In Ballard, Mr. Allison, husband of Melinda Ballard, asserted claims for toxic encephalopathy allegedly resulting for his exposure to toxic mold. Allison

sought to introduce at trial the testimony of experts who would testify that the mold found at Ballard's home caused illnesses like those at issue. The insurance company moved to exclude the causation opinions, contending that they were not sufficiently reliable to establish that molds can cause personal injury. *Carrier Moves to Exclude Expert Testimony in Texas Ballard Case*, 6, No. 5 Mealey's Emerging Ins. Disputes 18 (March 6, 2001). The court granted Farmers' motion. Ballard Order (May 9, 2001) (reported in Vol. 15, No. 30, Mealey Litigation Report: Insurance, at Section H (June 12, 2001)).

In granting Farmers' motion to exclude, the trial court reasoned that the underlying scientific data was not reliable under the ruling of the Texas Supreme Court in Merrell Dow Pharmaceuticals Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), cert. Denied, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Eded 939 (1998). *See Jury Awards $32 Million to Texas Homeover in Mold Coverage Action*, Vol. 6, No. 12, Mealey's Emerging Insurance Disputes, at 11-12 (June 20, 2001).

The Havner case addressed the admissibility of evidence from epidemiological studies, which "examine existing populations to attempt to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition." Havner, 953S.W.2d at 715 (citations omitted). As a rule, Epidemiological studies provide only statistical information and cannot establish the actual cause of a particular individual's disease or condition. The Havner court held that evidence from such studies is *generally* admissible in toxic tort cases if it shows that: 1) there is a doubling of the risk of injury when exposed to the substance at issue; and 2) that there is a high probability (95%) that, if the pertinent studies were repeated, they would produce the same results 95% of the time.

In Ballard, the court concluded that the evidence proffered by Ballard's experts did not meet the Havner standard and was therefore not admissible. See *Jury Awards $32 Million to Texas Homeowner in Mold Coverage Action*, Vol. 6, No. 12, Mealey's Emerging Insurance Disputes, at 12 (June 20, 2001).

The Court of Appeals for the Third District of Texas affirmed that trial court's rulings granting defendant insurance company's motion to exclude Allison's causation experts. See Allison v. Fire Ins. Exchange, No. 03-01-00717 CV (Tex. Ct. App., 3rd Dist., Austin Dec. 19, 2002) (reported in Andrews Insurance Coverage at Document Section A (January 3, 2003). The appeals court noted that, if an expert relies upon epidemiological studies, then those studies must meet the criteria specified in Havner. Because Allison's court held that the district court had not abused its discretion in excluding the testimony of Allison's causation experts. On February 21, 2003, the Texas appeals court denied Allison's petition for a rehearing. See *Rehearing Denied in Ballard Coverage Suit*, Vol. 17, No. 19, Mealey's Litigation Report, Insurance, at 17 (March 18, 2003). Of course, Havner will not necessarily be applicable to toxic mold cases outside the State of Texas, but it is instructive as to how courts will view epidemiological studies in "toxic Mold" cases.

Similarly, in National Bank of Commerce of El Dorado v. Associated Milk Producers, Inc., 191 F.3d 858, 863 (8th Cir. 1999), the Eight Circuit Court of Appeals affirmed the trial court's refusal to admit expert testimony that plaintiff's laryngeal cancer was caused by workplace exposure to aflatoxin, a mycotoxin. The appeals court, reviewing the trial court's decision for abuse of discretion, concluded that the trial court, in its gatekeeping role, had correctly determined that the plaintiff's proffered expert testimony did not meet the Daubert standards for reliability and relevance. See also Davis v. Henry Phipps Plaza South and Phipps Housing Services, Inc., No. 116331/98 (N.Y. Sup. Ct. Oct. 11, 2001) (refusing to admit plaintiff's proffered expert testimony that mold caused plaintiff's brain injury under Frye standard, finding the scientific community had not generally accepted link between mold exposure and cognitive impairment). See Susan M. Hickman & Jason G. Wehrle, Ballard: *Where We Are Now and What We Have Learned*, Vol. 8., No., 5 Mealey's Emerging Insurance Disputes, at 28, 30 (March 2003))) (discussing Davis).

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John J. McDonough
EDITOR IN CHIEF

STAFF

Anthony Celentano

Denise LaGrua

Alexandra M. McDonough

James Connors, Julian D. Ehrlich,
Lisa Shreiber and Brian Walsh

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But some courts have permitted juries to consider "expert testimony" on causation issues involving mold and health. For example, in Mondelli v. Kendel Homes Corp., 631 N.W.2d 846, opinion modified on denial of reh'g, 641 N.W.2d. 624 (Neb. 2001), the Nebraska Supreme Court held that the trial court had abused its discretion in excluding plaintiffs' expert testimony that mold causes injury. In *Mondelli*, plaintiffs alleged that mold resulting from leaking exterior walls in their home caused breathing difficulties and asthma. The expert would have testified that, based upon a peer review of the scientific literature, molds are a cause of asthma and allergic rhinitis. At the time of trial, Frye applied, and the trial court found that there were no accepted standards of environmental air in residences and that the expert's testimony would not have general acceptance in the scientific community.

The Nebraska Supreme Court reversed, finding that the expert had established the requisite general acceptance and noting that the expert had a background in toxicology and biology, had studied numerous publications concerning allergies and immunology, and had reviewed the test data on plaintiffs' home. Based upon that evidence, the court concluded that the expert's opinion "was probative on the issue of causation." Mondelli, 631 N.W.2d at 856. See also Centex-Rooney Const. Co., Inc. v. Martin County, 706 So.2d 20, 26 (Fla. Ct. App. 1997), rev. denied, 718 So.2d. 1233(Fla. 1998)((occupants of county courthouse had signs and symptoms consistent with work-related asthma; under Frye, holding admissible expert testimony linking exposure to toxic mold in buildings with health risk - "Dr. Morey and Dr. Hodgson each testified about numerous publications accepted in the scientific community recognizing the link between exposure to the highly unusual toxigenic molds and adverse health effects.")

In New Haverford Partnership v. Stroot, 772 A.2d 792 (Del. 2001), the Delaware Supreme Court also affirmed the trial court's admission of plaintiff's expert testimony linking mold and health effects, but under Daubert, rather than Frye, as in Mondelli, supra.

In Stroot, Plaintiff Stroot alleged a worsening of asthma symptoms and specified cognitive deficits; plaintiff Watson alleged the development of a permanent mold allergy. The court rejected defendant's argument that the expert causation opinions proffered by plaintiffs were flawed because the experts had not excluded other possible causes of plaintiffs' injuries — plaintiff Stroot, for example was a smoker and had a dog, even though she was allergic to dogs. The court noted that one of plaintiffs' experts testified that he had followed "the scientifically accepted procedure of obtaining a medical history and a detailed questionnaire from the plaintiffs [and]...then ruled out other possible causes of plaintiffs' health problems by reviewing that information together with the blood test results and the data collected from the apartment buildings." Stroot, 772 A.2d at 800. The court opined that [t]he foundation for an expert's causation opinion need not be established with the precision of a laboratory experiment." Id.

One writer has suggested that the more severe and specific the illness or injury alleged, the less likely it is that a court will admit expert causation testimony. See John Payne, Daniel A. Berman, and Patrick Schoenburg, *Latest Developments in Mold Exposure Litigation*, 17-FALL Nat. Resources & Env't 132, 134 (Fall 2002). Arguably, the cases do indicate that courts appear less likely to admit a plaintiff's expert causation testimony where there are allegations of brain injury or cancer than where there are allegations of asthma or respiratory problems. Payne *et al.* suggest that the more severe the illness allegedly resulting from mold exposure, the easier it is for a defendant to demonstrate that there is no credible medical evidence demonstrating a link between mold and the malady. See id. Whether a court relies upon Frye or Daubert to determine admissibility will also be a factor.

■

Part II continues in our next issue.

[1] A saprobe is any organism that derives its nourishment from nonliving or decaying organic matter.

[2] A metabolite is a substance essential to the metabolism of a particular organism.

FOLLOWING THE FALLING OBJECT CASE

JULIAN D. EHRLICH*

When the Court of Appeals addressed the application of Labor Law §240 to falling objects in the 2001 case of *Narducci v. Manhasset Bay Assoc.*[2], the decision was heralded as a "major step in redefining"[3] the statute and an example that we are in a "era of contraction"[4] of liability under §240.

In the wake of *Narducci*, plaintiffs asserting §240 claims were required to prove that "the object fell, while being hoisted and secured because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*emphasis in original*).[5]

Although Narducci has been cited frequently in reported decisions during the last two years[6], it would be an exaggeration to say that Labor Law §240 has been applied consistently in falling object cases and that all issues in these types of cases have been resolved. In addition, some decisions involving falling objects have curiously not relied on *Narducci*.

For example, the First and Second Departments have reached different outcomes in similar cases involving plaintiffs injured by falling fire escape ladders that they were attempting to use to access work areas.

In *Monir v. 393 Jericho Turnpike LLC*, the Second Department, citing Narducci, dismissed §240 where a retractable fire escape ladder fell onto plaintiff's arm and leg. The court found that since the plaintiff's injuries did not result from his fall from either the ladder or a falling object that was being hoisted or secured as part of his work, there was no elevation related risk.[8]

However, in *Acosta v. Kent Bentley Apartments, Inc.*[9], the First Department found that §240 applied where a retractable fire escape ladder fell onto the plaintiff's hand. Without mentioning *Narducci*, the court reasoned that the ladder was a safety device within the purview of Labor Law §240 since fire escapes were used to provide workers with access to different elevation levels.[10]

Indeed, *Acosta* is difficult to reconcile with the earlier First Department case of *Almanzar v. Goval Realty Corp.*[11] where a retractable fire escape ladder that plaintiff was repairing fell on his arm. Citing *Narducci*, the court dismissed the §240 claim even though "plaintiff's injuries may have occurred because the fire escape ladder was inadequately secured."[12]

The Departments are also split on cases involving coworkers inadvertently dropping materials.

In *Isabelle v. U.W. Marx, Inc.*[13] the Third Department dismissed a §240 claim where the plaintiff's co-worker, operating a crane failed to see plaintiff and dropped a 40-foot, two ton steel H-beam four feet onto the plaintiff's foot. The court, citing *Narducci*, rejected arguments that the clamp was inadequate and that other types of safety devices were used for this task on other jobs.

However in *Van Ecken v. Consolidated Edison Company of New York*[14], a divided Second Department found that §240 applied where the plaintiff and a co-worker were in a trench 16 to 18 feet deep when a third co-worker unintentionally dropped a piece of plywood. The second worker attempted to deflect the plywood and dropped his jackhammer on to the back of the plaintiff's legs. In a 2 to 1 decision contrasting *Narducci*, the court found the fact that the plywood did not strike the plaintiff of was of no moment since the co-worker's effort to deflect the falling object was "not of such an extraordinary nature or so attenuated as to constitute a superseding cause..."[15]

Van Ecken is notable for extending causation beyond an injury directly caused by a falling object[16] but it is also difficult to reconcile with the earlier Second Department case of *Belcastro v. Hewlett-Woodmere Union Free School District Number 14*[17]. In that case, the court dismissed the §240 claim where the plaintiff was struck on the head by a piece of wood thrown or dropped from a roof above where work was in progress.[18]

The court in *Van Ecken* noted that the single sheet of plywood was being lowered without a safety device[19] but did not discuss whether a hoist was supposed or expected to be used for that task.

Should the expectation of whether the falling object was to be secured or hoisted differently always be considered?

In dismissing the Labor Law §240 claim in *Narducci*, the court stated that "This is not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary *or even expected (emphasis added)*." [20]

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[1]* *Julian D. Ehrlich is a member of the Law Offices of Alan I. Lamer in Elmsford, NY.*

Following the Falling Object Case

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What determines when it is a necessary for an object to be hoisted? Does a judge or jury decide? Does expert testimony as to custom, codes and rules have a role?

In 1985, the Court of Appeals declared in *Zimmer v. Chemung County Performing Arts Inc.*[21] that §240 was a "self executing statute"[22] creating absolute liability[23] that did not defer to any rule making body[24], rendering expert testimony as to "circumstantial reasonableness" irrelevant[25].

Does *Narducci* reintroduce industry custom and usage or practice to the standard of duty in §240 cases?

The Court of Appeals recently followed *Narducci* finding in *Roberts v. General Electric Co. Inc.*[26] that §240 was inapplicable to injuries caused by deliberately dropped falling objects.

What if the object is dropped in a deliberate but dangerous way?

It seems axiomatic that the application of §240 to falling object cases will always be a question of law for the court and therefore that claims brought under the statute would be either dismissed or judgment would be granted on liability. Pursuant to *Zimmer*, once a court determines that proper safety devices were absent, the only question for the jury is whether the absence was a proximate cause of the injury.[27]

Nonetheless, courts citing *Narducci*, have on occasion denied summary judgment motions by plaintiffs by finding issues of fact as to whether the absence of a device caused the accident.[28]

Is it ever appropriate to have a fact finder decide whether a falling object should have been secured differently?

In the perfect 20/20 hindsight of litigation, almost any falling object that caused an injury arguably could have been secured differently.

Also, *Narducci* repeatedly references hoisted and secured *loads* and *materials* but the decision does not specifically address other objects that fall frequently at construction sites such as tools or equipment.

Does a hammer, crowbar or hand tool dropped by a worker above the plaintiff come under the purview of Labor Law §240? Does it matter if the tool is being used or stored when it fell? Arguably a worker using a hand tool at a height is also "securing" it from falling when using it properly but is this the type of securing the Court of Appeals meant?

Falling object cases also raise related negligence and Labor Law §241(6) theories such as the adequacy of overhead protection or barricades. While these may be fact issues for a jury, it is summary judgment under Labor Law §240 that starts interest running.

While *Narducci* offered a degree of clarification, practical and conceptual issues remain and are likely to continue absent further guidance from the legislature or Court of Appeals.

This discussion is by no means an exhaustive review of all remaining issues in falling object cases but is intended to highlight some emerging and divided approaches.

Because the absolute and vicarious nature of liability imposed by Labor Law §240 combined often result in all-or-nothing outcomes, the evolution of case law continues to be compelling.

■

[2] 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).

[3] "Court of Appeals Redefines Labor Law §240" by Harry Steinberg New York Law Journal December 27, 2001.

[4] Pendulum Swings Back on the 'Falling Objects Test'" by Justice Andrew V. Siracuse New York Law Journal April 2, 2002.

[5] 96 N.Y.2d. at 268, 727 N.Y.S.2d at 41.

[6] A recent check of Westlaw revealed over 30 reported cases citing Narducci since it was issued by the Court of Appeals on May 10, 2001.

[7] 293 A.D.2d 585, 741 N.Y.S.2d 78 (2d Dept. 2002).

[8] 293 A.D.2d at 587, 741 N.Y.S.2d at 80.

[9] 298 A.D.2d 124, 747 N.Y.S.2d 507 (1st Dept. 2002).

[10] Id., 747 N.Y.S.2d at 508.

[11] 286 A.D.2d 278, 729 N.Y.S.2d 133 (1st Dept. 2001).

[12] Id. at 280, 729 N.Y.S.2d at 135.

[13] 299 A.D.2d 701, 751 N.Y.S.2d 324 (3d Dept. 2002).

14 294 A.D.2d 352, 742 N.Y.S.2d 94 (2d Dept. 2002).

[15] Id. at 353, 742 N.Y.S.2d at 95.

[16] Van Ecken relies on Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 562,606 N.Y.S.2d 127,131 (1990), which held defendants liable for all "normal and foreseeable consequences of their acts." However, it has been argued that foreseeability is the gauge of duty in negligence cases but §240 imposes a statutory duty without regard for foreseeability. "In Scaffold Cases, Courts are Moving From Absolute to Relative Liability" by Justice Andrew V. Siracuse New York Law Journal March 10, 1999.

[17] 286 A.D.2d 744, 730 N.Y.S.2d 535 (2d Dept. 2001).

[18] Id. at 745, 730 N.Y.S.2d 538.

[19] Van Ecken at 353, 742 N.Y.S.2d at 95.

[20] Id. at 268, 727 N.Y.S.2d at 42.

[21] 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985).

[22] 65 N.Y.2d 513, 522, 493 N.Y.S.2d 102 at (1985).

[23] Id.

[24] Id. at 522.

[25] Id. at 523.

[26] 97 N.Y.2d 737, 742 N.Y.S.2d 188 (2002).

[27] Id. at 524.

[28] Anarumo v. Slatter Associates, 751 N.Y.S.2d. 208 (2d Dept. 2002); Brinson v.Kulback's & Assoc. 296 A.D.2d 850, 744 N.Y.S. 621 (4th Dept. 2002).

BRIAN WALSH*

TERRORISM RISK INSURANCE ACT OF 2002

LISA SHREIBER**

On November 26, 2002, President Bush signed into law the Terrorism Risk Insurance Act of 2002 ("TRIA"). The TRIA provides a federal backstop for losses caused by certain certified acts of international terrorism as defined in the TRIA. The TRIA was designed as a temporary program through which the federal government will share the risk with the insurance industry of future losses posed by the terrorist threat. The purpose of the TRIA is to protect consumers by addressing market disruptions to ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risks. In addition, the TRIA allows for a transitional period for the private markets to stabilize, resume pricing of terrorism insurance, and build up the capacity to absorb future terrorism losses, while preserving State insurance regulation and consumer protections.[1] To enforce the provisions of the TRIA, the TRIA establishes a Terrorism Insurance Program ("Program") within the Department of the Treasury. The TRIA expires on December 31, 2005.

I. TRIA REQUIREMENTS

The TRIA requires: (1) that certain insurers make coverage for acts of terrorism available and provides for reimbursement to such insurers for a portion of insured losses; (2) that additional disclosure be delivered to property and casualty policyholders regarding the terrorism coverage provided and the cost of that coverage; and (3) the Secretary of the Treasury to recoup the costs of the Program through a surcharge on property and casualty insurance policies.

A. Availability of Terrorism Coverage

The TRIA requires that in 2003 through 2004, all issuers of "property and casualty insurance" make available coverage for all "insured losses" caused by "acts of terrorism." The TRIA mandates that coverage for "acts of terrorism" be offered on terms that do not materially differ from the terms, conditions and amounts of coverage available for non-terrorism losses. The TRIA allows the Secretary of the Treasury the discretion to expand this coverage requirement through the end of 2005.

1. Definition of "Property and Casualty Insurance"

Section 102(12) of the TRIA defines "property and casualty insurance" to include all commercial lines of property and casualty insurance, including excess insurance, workers' compensation insurance, and surety insurance, but expressly excludes the following types of insurance:

(i) crop and livestock insurance;

(ii) private mortgage and title insurance;

(iii) financial guaranty insurance;

(iv) medical malpractice insurance;

(v) health and life insurance;

(vi) flood insurance; and

(vii) reinsurance and retrocessional reinsurance.

Under the TRIA, the Secretary of the Treasury is obligated to undertake an expedited study on whether group life insurance is affected by terrorism and has the discretion to apply the provisions of the TRIA to providers of group life insurance. Furthermore, the Secretary of the Treasury has the discretion to apply the TRIA to certain classes of captives and self-insurance programs.

2. Definition of an "Act of Terrorism"

Section 102(1) of the TRIA requires that in order to qualify as an "act of terrorism" subject to the provisions of the TRIA, the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, must certify that the act:

(i) was an act of terrorism;

(ii) was a violent act or an act that is dangerous to:

(I) human life;

(II) property; or

(III) infrastructure;

(iii) resulted in damage within the United States, or outside of the United States in the case of:

* *Brian Walsh is a partner in the New York office of the international law firm Cozen O'Connor.*

** *Lisa Shreiber is an associate in the New York office of the international law firm Cozen O'Connor.*

(I) certain air carriers or vessels; or

(II) the premises of a United States mission; and

(iv) was committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

The Secretary of the Treasury may not certify an act as an "act of terrorism" if:

(i) the act is committed as part of the course of a war declared by the Congress, except that this clause does not apply with respect to any coverage for workers' compensation insurance, or

(ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed $5,000,000.

The TRIA expressly excludes acts of domestic terrorism from the definition of terrorism. As such, attacks such as the Oklahoma City bombing would not fall into the TRIA's definition. The TRIA states that determinations regarding whether an act qualifies as an "act of terrorism" under the TRIA must be made by the Secretary of the Treasury, and that the Secretary of the Treasury may not delegate the determination to anyone else, and that the Secretary of the Treasury's determinations in this regard are final and not subject to judicial review.

3. Definition of Insured Loss

Section 102(5) of the TRIA states that the term "insured loss" means any loss resulting from an act of terrorism[2] that is covered by primary or excess property and casualty insurance if such loss (A) occurs within the United States; or (B) occurs to certain air carriers, to a United States flag vessel (or a vessel based principally in the United States, on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), regardless of where the loss occurs, or at the premises of any United States mission.

B. New Disclosure and Filing Requirements

The TRIA requires that insurers make two new disclosures to all current and future property and casualty policyholders. A disclosure notice must be given to both applicants and policyholders which clearly sets forth the portion of premium related to terrorism coverage. Insurers must also disclose that the federal government will compensate the insurer for a portion of insured terrorism losses. For policies in force on November 26, 2002, the disclosures had to be provided by February 24, 2003. For new policies issued before February 24, 2003, the disclosures had to be provided at the time of any offer, purchase or renewal of such policy. For policies issued after February 24, 2003, however, the premium for terrorism coverage must be set forth as a separate line item. Any policies that do not comply with these disclosure requirements are not eligible for the backstop coverage reinsurance under the TRIA.

State filings of rates and policy provisions that address terrorism losses covered under the TRIA are exempt from prior approval and any waiting periods under applicable state laws and regulations through December 31, 2003. The TRIA, however, does not preempt the ability of any state to invalidate a rate as "excessive, inadequate, or unfairly discriminatory."

C. Private Insurer Reinsurance and Recoupment

Under the TRIA, the federal government pays 90% of all insured losses resulting from acts of terrorism in excess of prescribed insurer deductibles. The TRIA caps federal reimbursement obligations for aggregate losses under the TRIA at $100 billion per year for each of the Program's three years. Private insurers remain responsible for paying the remaining 10% plus their deductible. Insurer deductibles per program year are calculated as a percentage of that insurer's direct earned premiums from the preceding calendar year for property and casualty insurance issued for locations in the United States or issued for air carriers, United States flag vessels or the premises of United States missions ("Direct Earned Premiums"). The insurer deductible for the Transition Period of November 26, 2002 to December 31, 2002 was 1% of the insurer's Direct Earned Premiums for 2001. The insurer deductible for Program Year One, i.e. January 1, 2003 to December 31, 2003, is 7% of the insurer's Direct Earned Premiums for 2002. The insurer deductible for Program Year Two, i.e. January 1, 2004 to December 31, 2004, is 10% of the insurer's Direct Earned Premiums for 2003. And the insurer deductible for Program Year Three, i.e. January 1, 2005 to December 31, 2005, is 15% of the insurer's Direct Earned Premiums for 2004.

The TRIA allows private insurers to obtain reinsurance for their deductibles and 10% share of insured losses. Any amounts paid by the government through the Program are not reduced by any reinsurance recovery provided that the aggregate amounts recovered by each insurer from all sources, including through the Program, may not exceed the aggregate amount of insured losses. Furthermore, the TRIA does not alter, amend or expand the terms of coverage under any reinsurance agreement as in effect on November 26, 2002.

Amounts paid to insurers under the TRIA are subject to recoupment through a surcharge on property and casual-

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ty insurance policies by the United States government to the extent that the insurance industry's aggregate retention for claims relating to acts of terrorism subject to the TRIA is less than $10 billion for 2002 and 2003, $12.5 billion for 2004 or $15 billion for 2005, but exceeds the losses that the insurers are required to retain under their deductibles and 10% quota. The recoupment is accomplished through a surcharge on all property and casualty policies that will be collected by insurers and remitted to the Department of the Treasury (the "Mandatory Surcharge"). The Mandatory Surcharge may not exceed 3% of any premium paid for a policy in any year. The Secretary of the Treasury has discretion as to the timing of the Mandatory Surcharge and, additionally, to recoup additional amounts beyond the Mandatory Surcharge.

II. CURRENT TERRORISM EXCLUSIONS ARE VOID

Under the TRIA, any terrorism exclusion in a property and casualty insurance policy that was in force on November 26, 2002 is void to the extent that it excluded from coverage terrorism losses that are otherwise subject to the TRIA, including terrorism exclusions approved by any State prior to November 26, 2002. The TRIA allows insurers to reinstate a preexisting terrorism exclusion provision only if one of following conditions is met:

(1) the insurer receives a written statement from the insured that affirmatively authorizes such reinstatement, or

(2) the insurer has provided notice to the insured at least 30 days before any such reinstatement and the insured fails to pay any increased premium charged by the insurer for providing such terrorism coverage.

Moreover, the TRIA expressly states that the TRIA's definition of terrorism "shall be the exclusive definition of that term for purpose of compensation of insured losses under this title, and shall preempt any provision of State law that is inconsistent with that definition, to the extent that such provision of law would otherwise apply to any other type of insurance covered by this title."

III. EXCLUSIVE FEDERAL JURISDICTION

In accordance with Section 107(a) of the TRIA, if the Secretary of the Treasury determines that an "act of terrorism" has occurred, all causes of action for all "property damage, personal injury or death arising out of or resulting from such act of terrorism" are required to be brought in Federal court. All state causes of action arising out of, or resulting from, acts of terrorism are preempted. After the occurrence of an act of terrorism, the Judicial Panel on Multidistrict Litigation will designate one or more federal district courts to have original and exclusive jurisdiction for claims arising from such acts of terrorism.

IV. NAIC MODEL BULLETIN

Through its release of a Model Bulletin on December 2, 2002, the National Association of Insurance Commissioners ("NAIC") is seeking uniformity among the States for compliance with the TRIA, while still mandating the necessity of individual State regulation. Except as specifically provided in the TRIA, the provisions of the TRIA do not affect the jurisdiction or regulatory authority of the insurance department of any State. In conjunction with the NAIC's release of its Model Bulletin, the NAIC also released two model disclosure forms to assist insurers in complying with the TRIA. The model disclosure forms may be used by insurers as a safe harbor to meet their obligation under the TRIA to inform policyholders of the status of current coverage, and in some cases, make a selection regarding future insurance coverage for acts of terrorism.

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[1] Terrorism Risk Insurance Program: Overview, United States Department of the Treasury, Office of Domestic Finance.

[2] including an act of war, in the case of workers' compensation insurance

JAMES P. CONNORS*

TRANSFER OF SIDEWALK LIABILITY FROM THE CITY TO COMMERCIAL LANDOWNERS – *"Building Owners Beware"*

On July 16, 2003, Mayor Bloomberg signed into law an amendment to the Administrative Code of the City of New York transferring liability for injuries arising out of alleged negligent repair and maintenance of sidewalks to the property owners abutting those sidewalks except in those instances where the sidewalks abut one, two or three family residential properties used exclusively for residential purposes.[1]

While the amendment to the Code has gained some coverage by the press, it is clear that the impact of this change has not been highlighted to those who will be affected, i.e., commercial property owners, residential buildings in excess of four units, schools, universities, hotels and other commercial businesses.

New York City, as many municipalities, had in place a somewhat illogical bifurcated legislative framework wherein the City mandated that every owner, lessee or occupant having charge of any building or lot of ground in New York City which abutted upon any sidewalk, to both maintain that sidewalk and to remove snow, ice or materials such as dirt within a specified time period.[2]

The abutting landowner could be assessed a fine for failing not only to clean, but to maintain the sidewalk adjacent to its premises[3] and could be assessed the cost of repairing the sidewalk where he had failed to undertake repairs pursuant to that responsibility[4]. Generally, however, the municipality, not the abutting owner, was subject to claims by third parties injured as a result of the lack of maintenance of the sidewalk.[5] The primary exception to this assumption of liability by the municipality was where the abutting landowner had made "special use" of his sidewalk deriving some benefit such as creation of a driveway or a basement trap door. In such an instance, the plaintiff could hold the abutting landowner liable if, (1) the dangerous condition existed on the portion of the sidewalk put to a special use,(2) that a condition proximately caused the injury, and (3) the defendant had either actual or constructive notice thereof.[6] Other exceptions to the general rule exempting the abutting landowner from liability for defects in the condition of the sidewalk are where the owner himself creates the condition or attempts to do repairs, but does so in a negligent fashion.[7]

As might be expected, so drastic a shifting of responsibility was not done without study and in fact a report was prepared by the Committee on Transportation of the Council of the City of New York. The report reached several conclusions. It noted that while the law, as it then existed, was designed to encourage the quick repair of defective sidewalks by the owners of the adjacent property, that such was often not the actual result. Furthermore, by assuming liability onto itself, the City was subjected to numerous suits by those claiming to have been injured as a direct result of alleged sidewalk defects.[8]

In a stop gap measure to deal with the volume of suits which had been brought against New York City, the City Council enacted more than 20 years ago the "prior notice law" more commonly referred to as the "pothole statute."[9] This law required written notice of defective, unsafe and dangerous conditions at least 15 days prior to the incident and led to the formation of the Big Apple Pothole and Sidewalk Protection Committee of the New York State Trial Lawyer's Association. This entity, which began in 1982, prepared maps depicting defects in sidewalks which were sent to the New York City Department of Transportation as legal written notice of defects presumably so as to effectuate more timely repairs. To no avail, the number of claims and financial payments made by the City as a result of sidewalk claim injuries continued to grow with payments made averaging in excess of $50 million a year between 1999 and 2002

* *James P. Connors is a principal in the New York law firm of Jones Hirsch Connors & Bull P.C.*

with $76 million being paid in 2001 alone as a result of an attempt by the City to accelerate the settlement of many of these cases that had languished in the system for a number of years.[10]

This new legislation, while designed to place responsibility with the party whose legal obligation it is to maintain the sidewalk, carries with it a significant transfer in liability exposure which building owners will need to be aware of if they are to protect themselves from unexpected loss. This concern is heightened by the fact that lawsuits arising as a result of negligent maintenance of sidewalks were more difficult to commence when the City was the only possible defendant. Standing in the way as a roadblock to such litigation, was the 90 day limitation requiring notice of the claim. This served as an extremely restrictive statute of limitation.[11] This, when coupled with the written notice requirements enacted in 1980, placed major hurdles to the commencement of such lawsuits. Added to these were the practical implications of commencing litigation against New York City which inevitably led to 50-H hearings or pre-suit deposition with accompanying costs both to client and counsel. There also existed inordinate delay associated with litigation against the City of New York who was assigned, in many courts, its own calendar in order to deal with an extremely lengthy backlog of pending matters. None of these restrictions will any longer have any practical effect on containing such lawsuits. For the most part, commercial building owners, hotels, universities and schools are seen as "ripe targets", if not deep pockets as they are for the most part insured. It seems likely that a case that might have been rejected by plaintiff's counsel before enactment of this most recent change in the law might now be accepted and litigated with the thought in mind of a faster and/or easier resolution than had counsel been required to await his turn on the City calendar after having overcome the procedural hurdles cited above.

Ramifications of this law, not taken into consideration by the City Council nor discussed in any reports of its enactment, include a likely rise in insurance premiums for commercial building owners, as well as schools, churches and residential buildings in excess of four units. Such potential defendants would be well advised to review with their insurance broker whether their coverage is adequate to meet these new risks and whether any self-insured retention or deductible in place is still practical in light of the fact that repeated claims could result in financial exposure beyond their expectations. Insurance companies will no longer be able to successfully defeat such claims by summary judgment motion arguing that legal responsibility lies with the City. Accordingly, they will need to adjust the manner in which they reserve such losses both from the defense and indemnity standpoint.

This new law will also make it more important for those landowners having services performed outside their premises to assure that vendors arrange for sufficient insurance naming them as additional assureds and to make sure that contractual indemnity and hold harmless provisions in contracts are properly set out so as to meet with the restrictions of the General Obligations Law.*12*

Whether the legislation has the intended effect of reducing the number of pedestrian injuries on sidewalks and brings about a more timely repair of such walkways remains to be seen. What is not subject to speculation however, is that the costs of litigation associated with sidewalk claims have not disappeared but only been transferred from the municipality to the pockets of the various abutting landowners who must take the necessary steps not only to make sure that their sidewalks are maintained appropriately but that their financial interests are protected by appropriate contractual provisions and insurance so as to avoid financial "slips and falls".

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[1] Administrative Code of the City of New York, Title 7, Chapter 2, Section 7-210 (2003).

[2] Administrative Code of the City of New York, Title 16, Chapter _ Section 16-123 (a) (2003). The Code requires that snow, ice or dirt be removed within 4 hours after it is deposited on the sidewalk or after the snow ceases.

[3] Administrative Code of the City of New York, Title 16, Chapter 19, Section 19-152 (2003)

[4] Id. at (K)

[5] D'Ambrosio v. New York, 55 N.Y.2d 454, 450 N.Y.S.2d 149 (1982). See also, Restatement, Second, Torts §349.

[6] Lane v. Epstein's Edco Process Dry Cleaners Co., 11 N.Y.2d 255, 228 N.Y.S.2d 811 (1962).

[7] See Davenport v. Apostol, 26 A.D.2d 874, 273 N.Y.S.2d 991 aff'd 22 N.Y.2d 943, 295 N.Y.S.2d 68 (1968).

[8] Report of the Infrastructure Division, Committee on Transportation, to council of the City of New York, November 12, 2002

[9] Administrative Code of the City of New York, Title 7, Chapter 2, Section 7-201 (2) (2003)

[10] See report of Infrastructure Division, supra pg. 4.

[11] New York General Municipal Law, Section 50e(McKinney's 2003)

[12] NYS General Obligations Law limits to what extent indemnification agreements will be deemed enforceable See §5-322.1 (McKinney's 2003)

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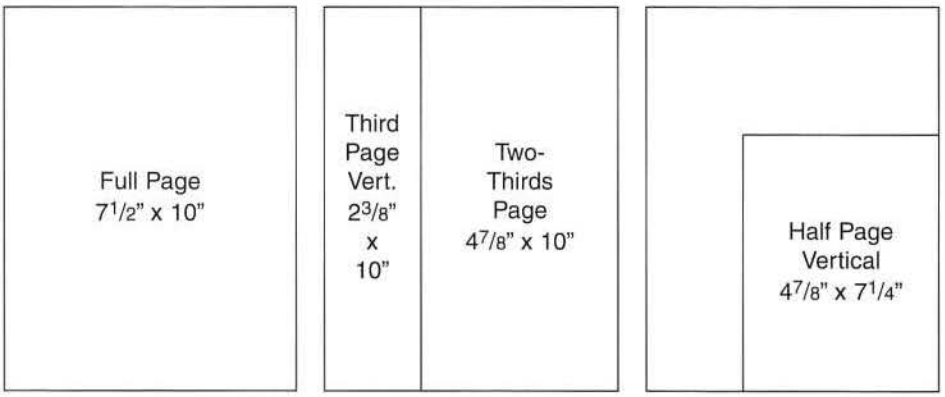

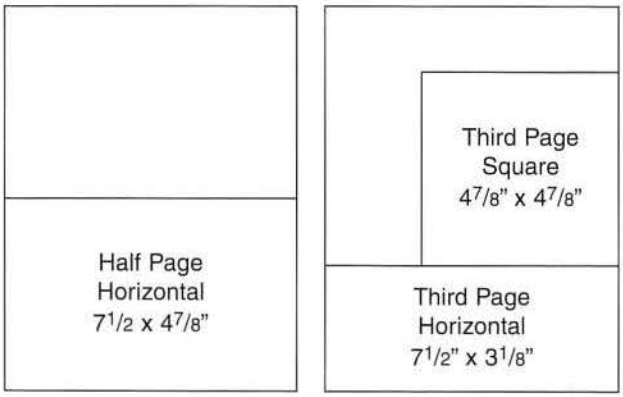

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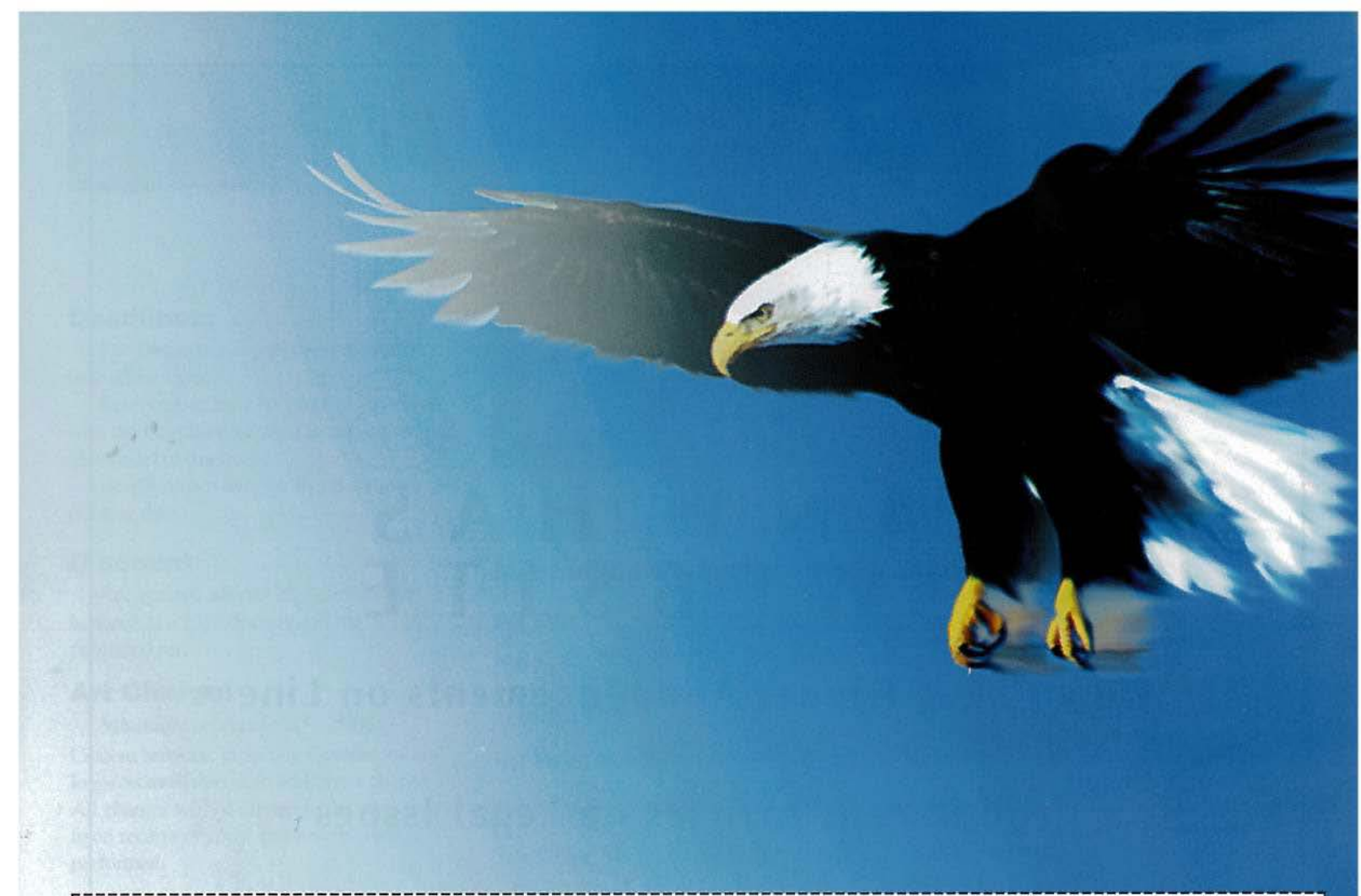

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