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2018 EDITION

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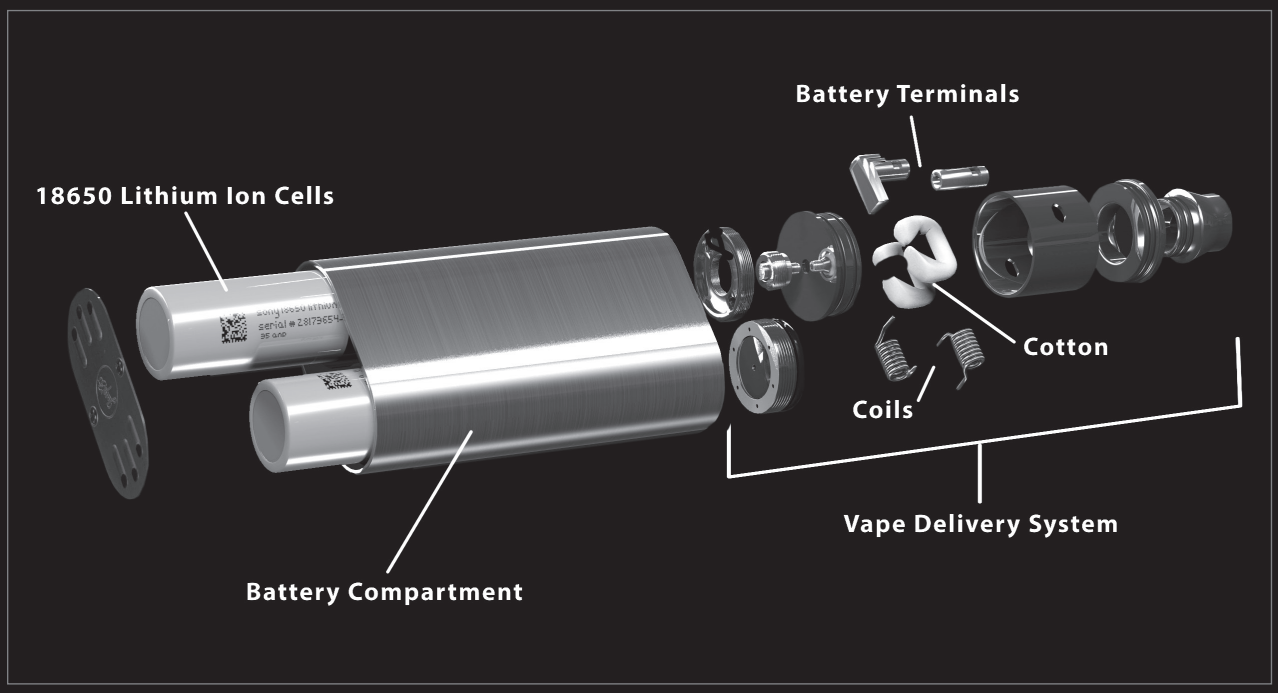

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Founded in 1993, The Network of Trial Law Firms, Inc. remains committed to the art of strengthening strategic business relationships amongst the country's leading trial law firms. To that end, our meticulously selective membership process is centered on smart growth. A brief glance at our membership will show preeminent legal representation within key geographical jurisdictions. Leading publications and legal awards consistently recognize our members as dominant in their respective fields.

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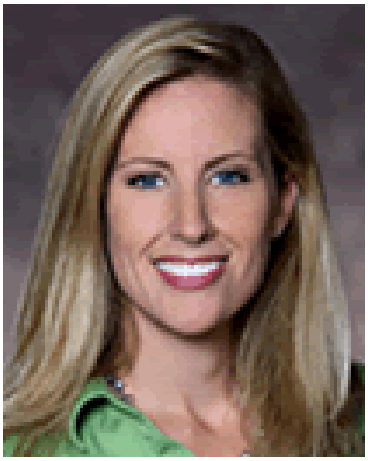

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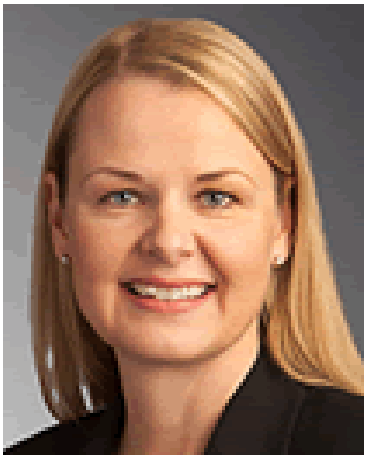

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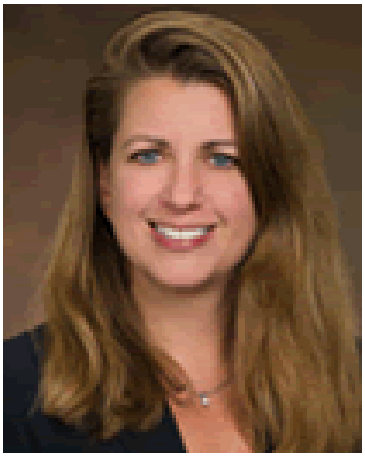

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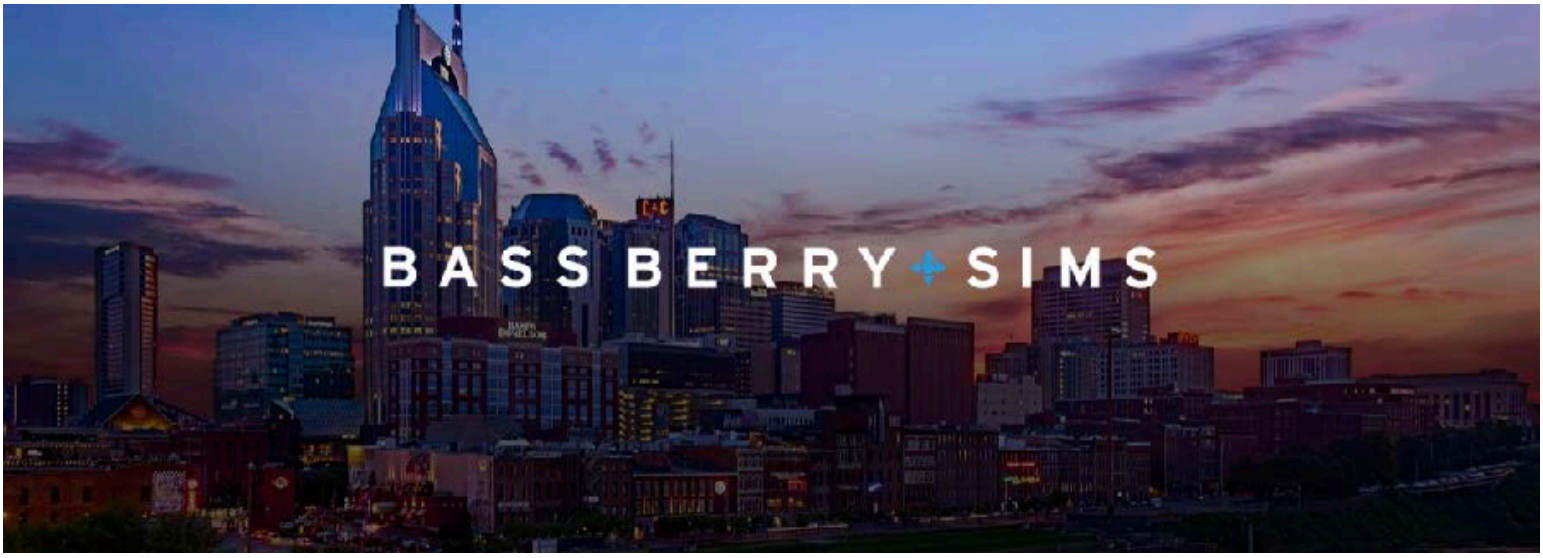

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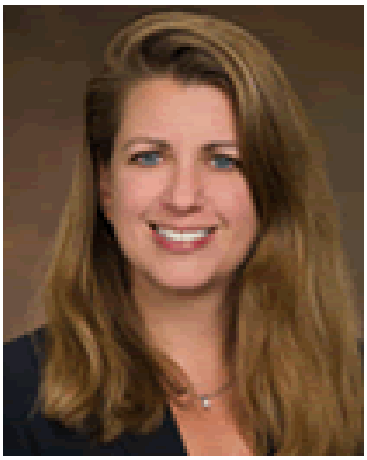

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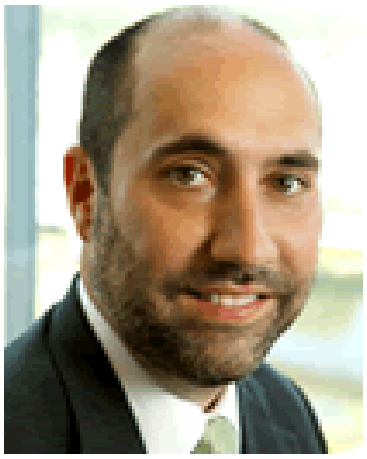

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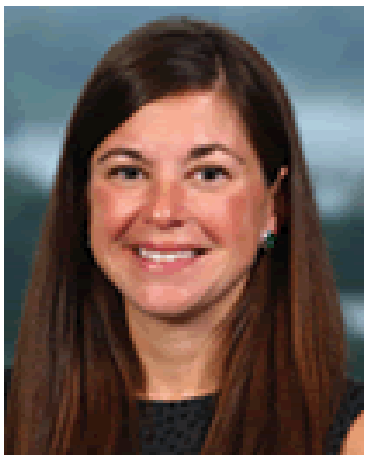

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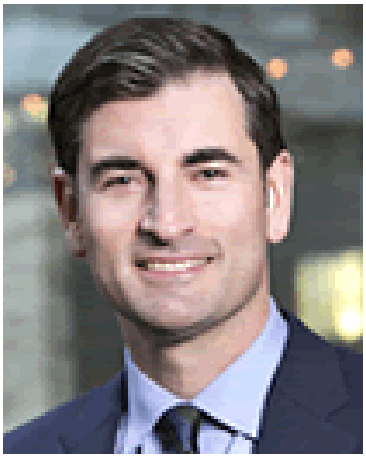

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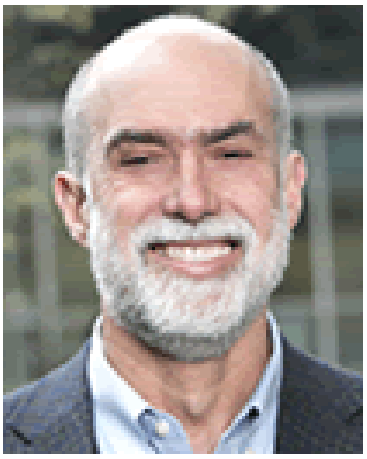

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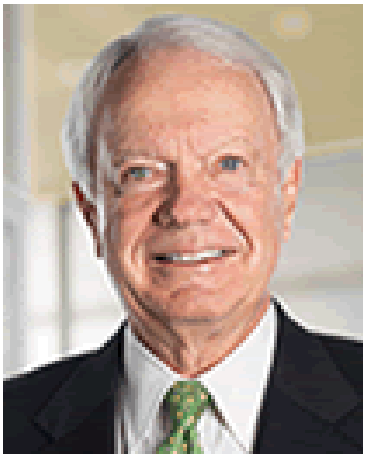

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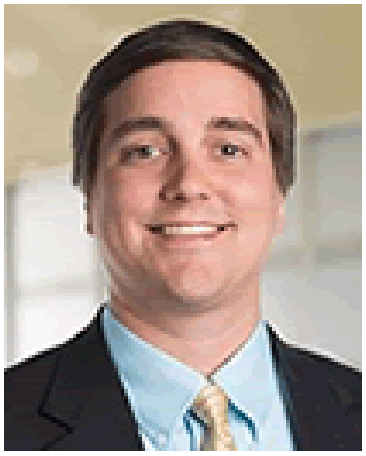

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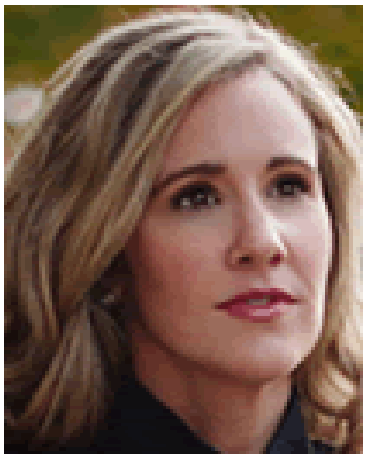

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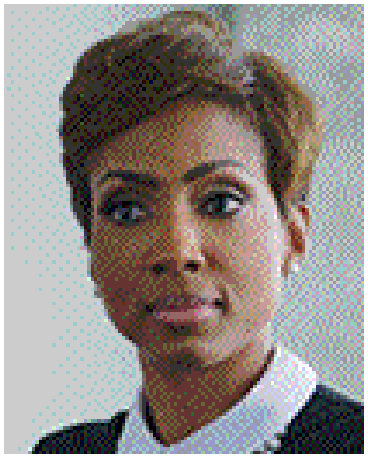

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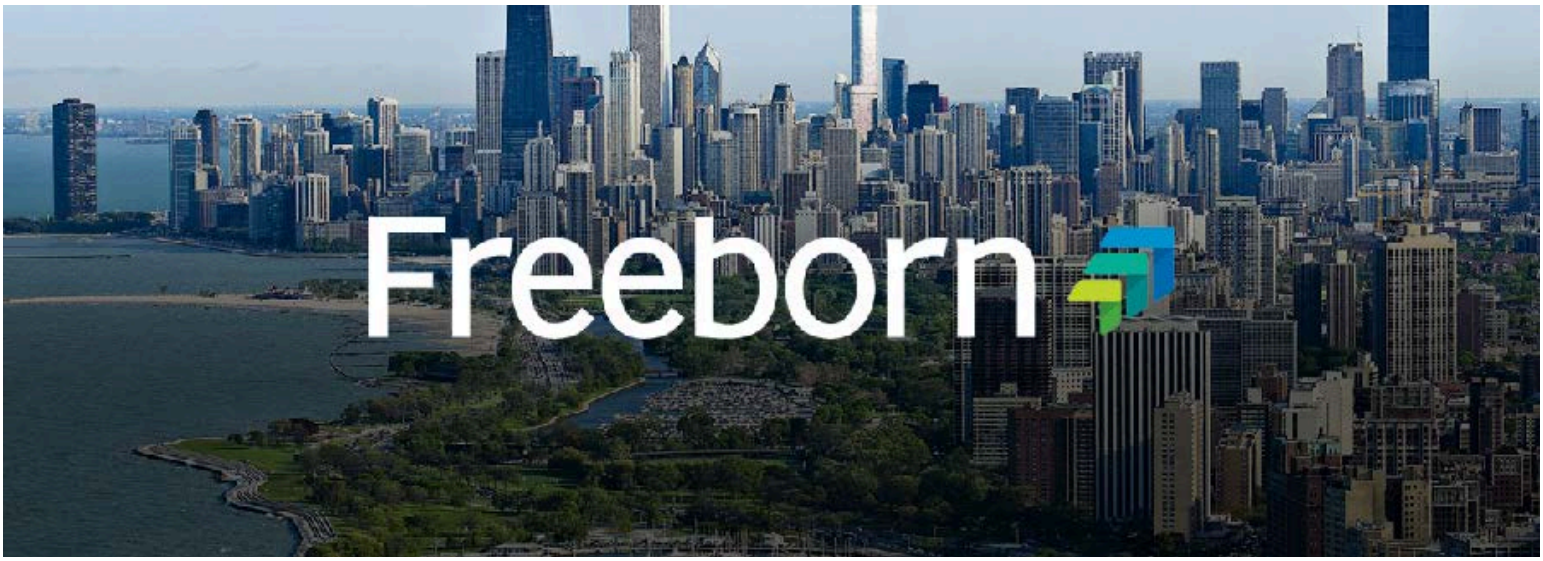

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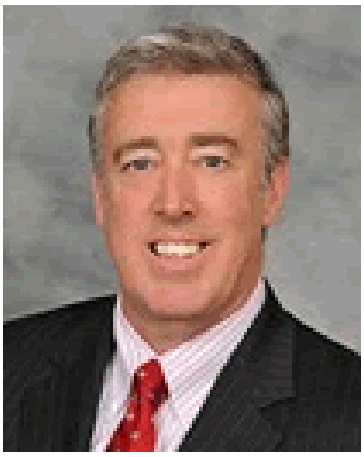

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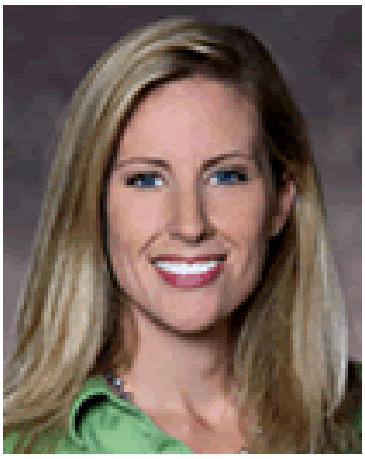

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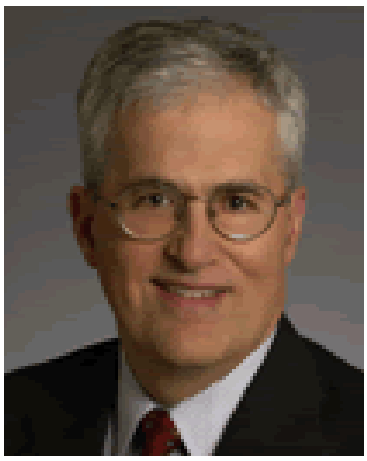

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The Hood Law Firm, LLC is a boutique trial law firm. Established in 1985 by Robert H. Hood, Sr., the Hood Law Firm has grown to more than 25 lawyers who are dedicated to providing their clients with top-quality trial litigation services in state and federal courts. For over thirty years, the Hood Law Firm, LLC has consistently maintained its focus on trial practice. This singular focus serves the firm's clients well whether a good result is defined as early resolution, verdict or appeal. The Hood Law Firm, LLC represents individuals and corporate clients throughout the country in addition to serving as national trial counsel. As a trial law firm, the scope of practice for the firm is broad including, but not limited to, product liability, drug and medical device litigation, professional negligence, commercial litigation, maritime, construction litigation, nursing home litigation, Section 1983 claims and insurance coverage and bad faith.

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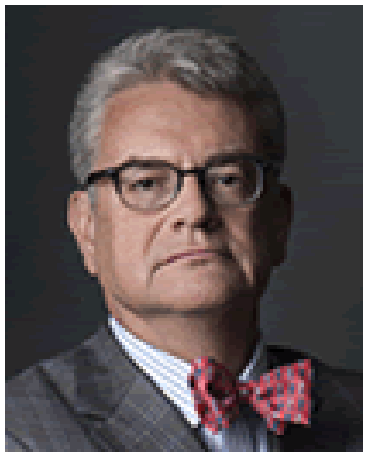

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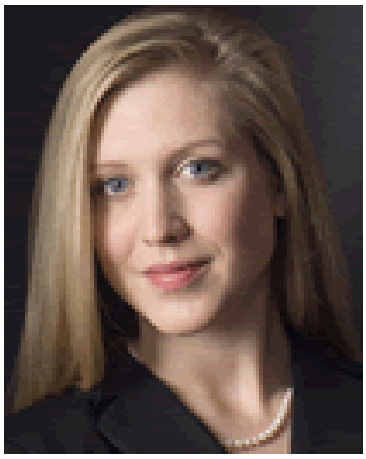

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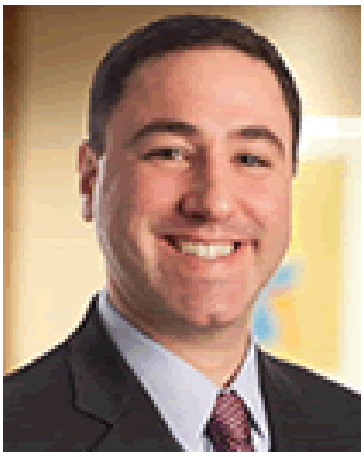

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NORTH CAROLINA

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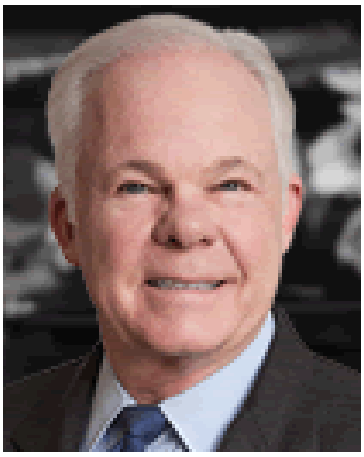

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NEW YORK, MASSACHUSETTS

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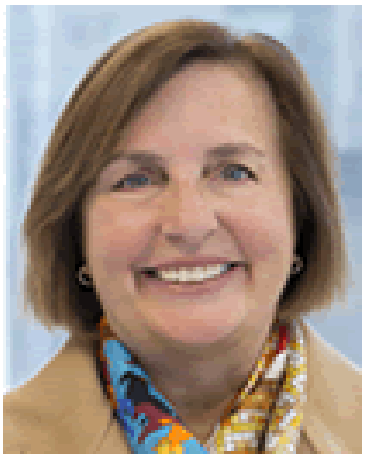

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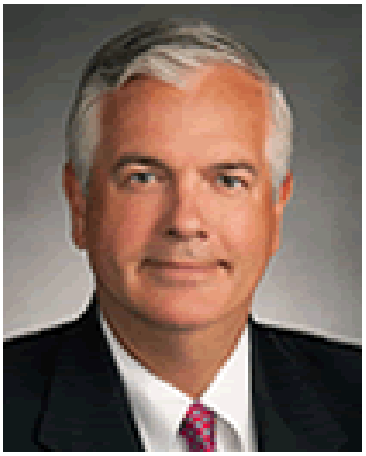

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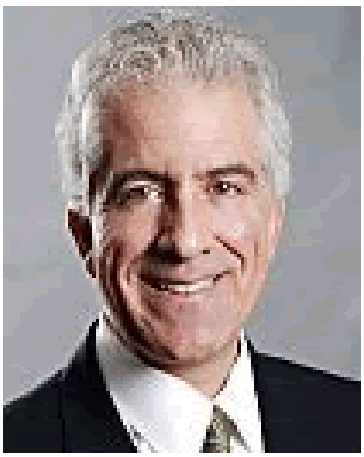

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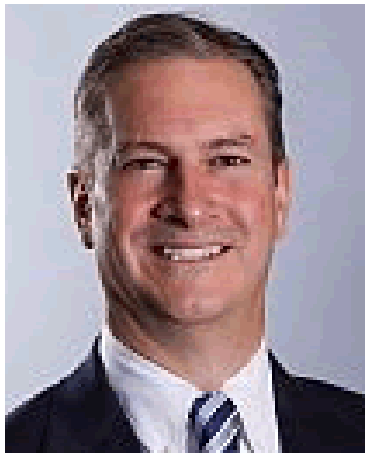

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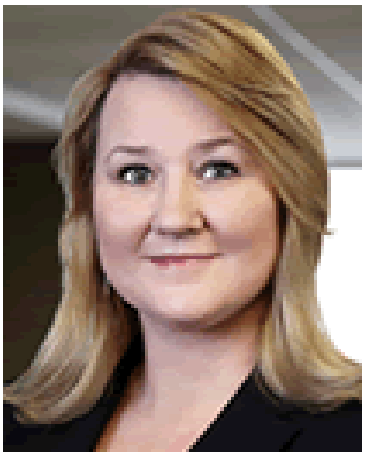

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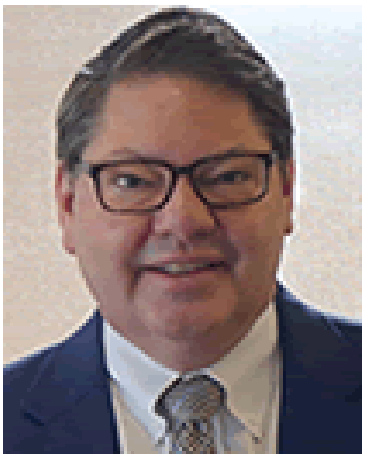

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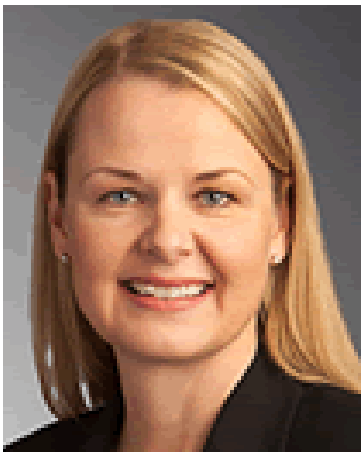

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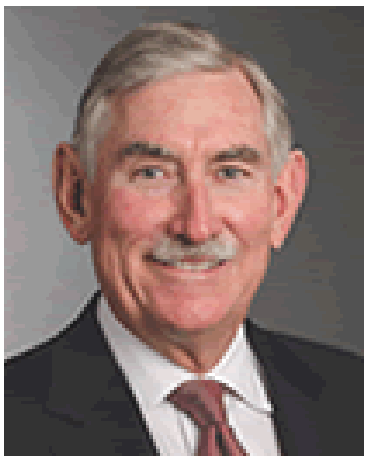

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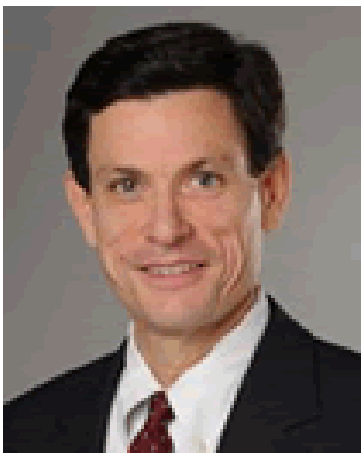

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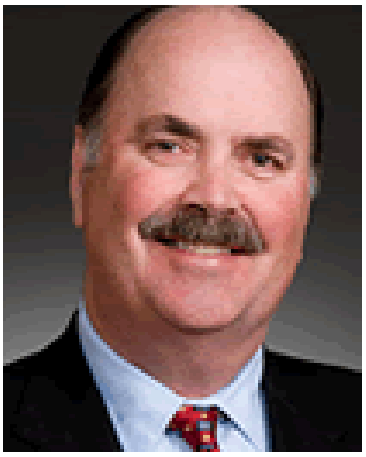

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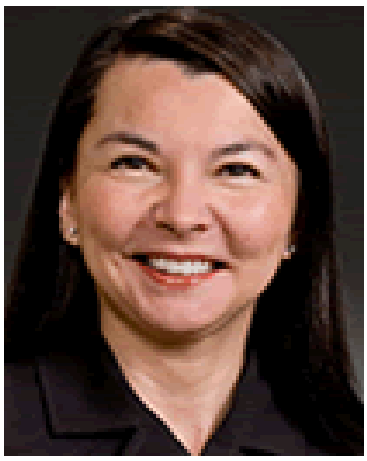

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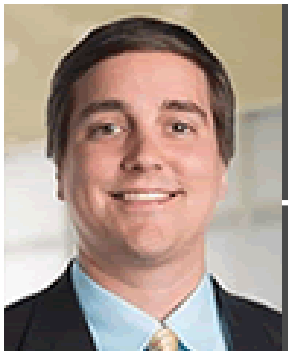

DEFENDING AGAINST RES IPSA LOQUITUR IN PRODUCTS LIABILITY LITIGATION

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Another Reason to Hate Latin: Defending against Res Ipsa Loquitur in Products Liability Litigation
Ray Lewis

Res ipsa loquitur, or "the thing speaks for itself," is a form of circumstantial evidence developed to help a plaintiff prove negligence when direct evidence of said negligence is lacking. This obscure Latin phrase (with questionable origins) has harassed defense counsel since it first appeared in tort law. In the realm of products liability, reliance on res ipsa loquitur is most common and most effective in a manufacturing defect claim. The doctrine fits well with the negligence aspects of a manufacturing defect claim and, more important, plays directly into a lay juror's analytical process.

We suggest a two-pronged attack using the specifications of the product and a differential diagnosis tactic that forces plaintiffs and their experts to either (1) stick their head in the sand and fully commit to res ipsa loquitur or (2) admit that the very methodology they used to rule-in a manufacturing defect also prohibits them from benefiting from res ipsa loquitur. If the circumstances permit it and when used correctly, these suggested tactics can significantly undermine, if not completely remove, all effect res ipsa loquitur has in the case.

The History of Res Ipsa Loquitur: A Doctrine Built on Lies.

Before we get to the defense strategy, it is interesting and beneficial to know where the doctrine comes from. Most lawyers would be shocked to learn that the legal maxim res ipsa loquitur is built entirely on a bed of lies. This influential doctrine and firmly imbedded rule of circumstantial evidence has its origins in the Pro Tito Annio Milone ad iudicem oratio (Pro Milone) speech made by Marcus Tullius Cicero in defense of his friend Titus Annius Milo. Milo was accused of murdering his political enemy Publius Clodius Pulcher. Cicero is perhaps one of the most famous lawyers in Roman times and his defense speech Pro Milone is often held up as an example of his greatest work as a lawyer. Pro Milone is also the first recorded use of res ipsa loquitur.

The doctrine's origins in Pro Milone are, frankly, humorous. First, the Pro Milone is one of the very few cases Cicero ever lost and his client, Milo, was exiled from Rome as the result of it. Second, Cicero completely lied about the facts and he made those lies the foundation of his entire case. Third, a transcript of the original speech at the trial does not exist; what we do have is a highly edited version of his speech he personally wrote after the trial was over and he lost. In fact, many commentators have suggested that his res ipsa loquitur argument (below) did not actually take place in the real trial, but was added later by Cicero:

> Let us now examine the central point- whether the place they met was better suited to Milo or to Clodius as a place of ambush. On this point,

> gentleman, can there be any further doubt, or need for reflection? The Incident took place in front of Clodius's house, where at least a thousand strong men were occupied in excavating the basement, a megalomaniac scheme. In this location, and with his enemy occupying a commanding position on higher ground, did Milo really imagine that his own situation was superior, and therefore make this spot his particular choice for the battle that ensued? Is it not more likely that someone who knew that the situation was favourable to himself was lying in wait for him here and planning an-attack? The facts speak for themselves, gentleman: they always carry the greatest weight.[1]

Based on other accounts from unbiased observers, all of the "facts" Cicero argued spoke for themselves were fictitious. In reality, Milo was traveling with a large group of bodyguards and the fight was escalated by Milo's side. Clodius moved to take refuge in a nearby Inn to tend to his wounds and Milo followed him there to continue and end the fight. Cicero's creative writing in Pro Milone is the only example Classical scholars have seen of him doing something like this, and many of those scholars now question the credibility of his legal career.[2]

For over 1,900 years after Pro Milone the doctrine largely disappears. Then, in 1863, the penchant of 19th century lawyers and judges in Britain to cite Classical literature and speeches of Cicero led Lord Chief Baron Charles E. Pollock, Judge of the Court of Exchequer, to permanently inject res ipsa loquitur into the arena of tort law. In Byrne v Boadle3 a barrel of flour fell from a second-story hold and hit the plaintiff on his head. No witness saw how the barrel fell out and hit the plaintiff. The lower court granted the defense's directed verdict because the plaintiff could provide no evidence of negligence. The appellate court concluded that the circumstances and fact of the accident itself provided sufficient circumstantial evidence to establish the breach of a duty of care:

> Secondly, assuming the facts to be brought home to the defendant or his servants, these facts do not disclose any evidence for the jury of negligence. The plaintiff was bound to give affirmative proof of negligence. But there was not a scintilla of evidence, unless the occurrence is of itself evidence of negligence. There was not even evidence that the barrel was being lowered by a jigger-hoist as alleged in the declaration. There are certain cases of which it may be said res ipsa loquitur, and this seems one of them.[4]

A barrel fell out of the sky; thus, its owner must have failed to secure it.

Since Byrne, the case law, commentary, treatise articles, and presentations discussing and analyzing res ipsa loquitur could fill many libraries. Perhaps the most succinct analysis is that of William Prosser; who, in condemning the doctrine and its history, has argued that it is nothing special and represents basic concepts of circumstantial evidence. In his mind, use of the Latin maxim results only in confusion: "The Latin catchword is an obstacle to all clear thinking. It is the illegitimate offspring of a chance remark of an English judge… There is no case in which it has been anything but a hindrance."[5]

Res Ipsa Loquitur: The Basics.

In the United States, res ipsa loquitur exists in some form in almost every jurisdiction.[6] The traditional view in the United States has been that for a plaintiff to use the doctrine successfully, the plaintiff must prove that (1) the event is not one that normally occurs absent negligence, (2) the event is attributable to an agency or instrumentality within the defendant's exclusive control, and (3) the plaintiff has not voluntarily contributed to the accident-causing event.[7] The Restatement (Second) of Torts § 328D test for res ipsa loquitur is similar to the traditional view but does not require that the defendant have exclusive control over the instrumentality:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when:
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the

1 http://officialinformationact.blogspot.com/2012/10/the-thing-speaks-for-itself-usually-but.html#!/2012/10/the-thing-speaks-for-itself-usually-but.html

2 Id.

3 (2 Hurl. & Colt. 722, 159 Eng. Rep. 299, 1863).

4 2 Hurl. & Colt. at 725, 159 Eng. Rep. at 300 (emphasis added).

5 William L. Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 MINN. L. REV. 241, 271 (1936); Prosser, Res Ipsa Loquitur in California, 37 Cal L Rev, 183, 234 (1949).

6 1 Stuart M. Speiser, The Negligence Case: Res Ipsa Loquitur § 6 (2018).

7 1 Speiser, The Negligence Case: Res Ipsa Loquitur § 2:1; see also, 2 Marshall S. Shapo, The Law of Products Liability ¶ 24.02 (3d ed. 1994).

> conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.[8]

Some states have, at times, added a fourth requirement to the Restatement test: that explanatory evidence be more readily accessible to the defendant than to the plaintiff.[9] This element has not been applied uniformly even among states embracing the fourth element.[10]

The procedural application and effect of res ipsa loquitur varies. Ultimately, the practical question is whether res ipsa loquitur creates a presumption or an inference of negligence. A presumption is a rule of law that gives probative value to a specific fact.[11] An inference is a permissible, but not required, deduction or conclusion by a trier of fact based on the evidence.[12] Analyzing and trying to determine a clear stance from state court decisions can be cumbersome, the decisions are often inconsistent and the terms "presumption" and "inference" are often misused or applied incorrectly. However, a majority and minority view have developed with enough clarity to define a split amongst the states.

The clear majority view is that the doctrine permits, but does not require, the trier of fact to draw an inference of negligence from the fact of the injury and the related circumstances; it furnishes circumstantial evidence to be weighed by the jury.[13] The U.S. Supreme Court embraces the majority view.[14] The following states also embrace the majority view: Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.[15]

The minority view of the doctrine's procedural effect is that it creates a rebuttable presumption of negligence, and the jury must presume the conduct sued upon to be negligent unless the defendant puts on evidence to counter the presumption.[16] The following states embrace the minority view: Alabama, Arkansas, Colorado, and Virginia.[17]

The Two-Pronged attack against res ipsa loquitur in manufacturing defect cases.

Every jurisdiction in the country recognizes a subset of products liability claims known as manufacturing defect claims, sometimes referred to as a construction or composition claim. The common understanding of a manufacturing defect is when an individual product varies in too great a degree from the specified design of the product.[18] In the United States, thirty-one states have enacted comprehensive statutory schemes applicable to product liability claims, almost all of which have enacted some kind of statutory rubric for manufacturing defects.[19] The remaining jurisdictions have either adopted all or parts of the Restatement of Torts applicable to product liability claims or have developed the cause of action through appellate court opinions.[20]

Section three of the Restatement (Third) of Torts: Products Liability has adopted key components of res ipsa loquitur into manufacturing defect claims:

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

> (a) was of a kind that ordinarily occurs as a result of product defect; and

8 Restatement (Second) of Torts § 328D.

9 Matthew R. Johnson, Rolling the "Barrel" A Little Further: Allowing Res Ipsa Loquitur to Assist in Proving Strict Liability in Tort Manufacturing Defects, 38 Wm. & Mary L. Rev. 1197, 1203 (1997); see generally 1 Speiser, The Negligence Case: Res Ipsa Loquitur § 2:27 (discussing states that require this fourth element).

10 Johnson, Rolling the "Barrel" A Little Further, 38 Wm. & Mary L. Rev. at 1203; see also Restatement (Second) of Torts § 328D cmt. g.

11 1 Speiser, The Negligence Case: Res Ipsa Loquitur § 3:3.

12 1 Speiser, The Negligence Case: Res Ipsa Loquitur § 3:3.

13 1 Speiser, The Negligence Case: Res Ipsa Loquitur §§ 3:4; 3:6-9.

14 Sweeney v. Erving, 228 U.S. 233, 240 (1913).

15 1 Speiser, The Negligence Case: Res Ipsa Loquitur §§ 3:4; 6:1-88.

16 1 Speiser, The Negligence Case: Res Ipsa Loquitur §§ 3:5; 3:11-13.

17 1 Speiser, The Negligence Case: Res Ipsa Loquitur §§ 3:5; 6:1-88.

18 See generally, Restatement (Third) of Torts, Products Liability §2(a) (1998); La. Rev. Stat. § 9:2800.55 ("A product is unreasonably dangerous in construction or composition if, at the time the product left its manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer.")

19 Stuart Speister, et. al., § 18:10. State statutes, in 5 American Law of Torts.

20 Id.

> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.[21]

There is case law in Pennsylvania, Michigan, South Carolina, and Texas that states or suggests res ipsa loquitur is not allowed at all or is not allowed in manufacturing defect cases.[22]

The evidentiary benefits of res ipsa loquitur, whether they are an inference of negligence or presumption of it, are undeniable in a manufacturing defect claim. In addition to it effectively relieving the claimant of their burden of proof, the doctrine plays directly into the jury's logical, knee-jerk reaction that things happen for a reason. Jurors want and seek out closure; they want, and believe, everything has an explanation. Res ipsa loquitur effectively puts the ball in the defense's court to give them that closure and explain what happened.

The typical application or jury instruction of res ipsa loquitur does not "technically" shift the burden of proof; however, in the eyes of the lay jurors, the judge's instruction is tantamount to shifting the burden to the defense. To combat this pseudo shifting of the evidentiary burden, the defense strategy in a manufacturing defect claim that involves res ipsa loquitur should be a two-pronged attack. First, painstakingly focus on the specifications for the product and how each of those specifications were followed and/or made it into the product. Second, plaintiff uses res ipsa loquitur as an evidentiary diagnosis of exclusion and we must turn this process into a differential diagnosis.

Remember that combating res ipsa loquitur at trial is essentially two trials; one to the judge and another to the jury. In almost all jurisdictions, the trial court must determine the question of the applicability of the doctrine but only does so after all facts and evidence have been presented. The defense's case must be presented to prove to the judge that the jury should not be given the res ipsa loquitur instruction in the first place. Because the defense may not know if a res ipsa loquitur instruction will be given, it must also set the stage for and prove to the jury that res ipsa loquitur does not apply. Both of these trials are equally important and using the themes of Specifications and Differential Diagnosis as a one-two punch is the best method of winning both of those trials.

Specifications.

Design specifications and schematics, inspections, and quality control processes are the cornerstone of every defense of a manufacturing defect claim. In real estate, the winning mantra is "location, location, location." In manufacturing defect claims, that mantra is "specifications, specification, specifications." Your opening line in your closing argument should be a tongue-in-cheek mea culpa to the jury for the number of times you said the word "specifications."

In its most simple terms, the claimant is saying you made the thing wrong. Your job is to make that claimant state exactly what aspect of the thing was made wrong, what piece was missing, or how it deviated from the step-by-step instructions your client's manufacturing floor uses.

- Please state the basis for your allegation in your Petition that [the product] is unreasonably dangerous and defective due to the manufacturing process by the [manufacturer].
- Please identify each and every one of the [manufacturer's] specifications for [the product] that you allege were not followed.
- Please identify each and every aspect of [the product] that deviated from the [manufacture's] specifications for [the product].
- Please identify each and every document from [manufacturer's] design file or schematics that you contend establish the specification(s) for [the product].
- Please identify each and every one of the [manufacturer's] quality control processes that you contend [the product] did not pass or did not comply with.
- Please produce any and all documents that you contend are [the manufacture's] specifications for [the product].

21 Restatement (Third) of Torts, Products Liability §3 (2018).

22 Johnson, Rolling the "Barrel" A Little Further, 38 Wm. & Mary L. Rev. at 1202; 1 Speiser, The Negligence Case: Res Ipsa Loquitur §§ 6:38; 6:69; 6:71; 6:75; Elmazouni v. Mylan, Inc., 220 F. Supp. 3d 736, 741 (N.D. Tex. 2016) ("Texas law does not permit the inference of a defect to be drawn from the mere fact of a product-related accident. Allegations which rely on res ipsa loquitur are not sufficient to state a product liability claim based on a manufacturing defect.").

- Please produce any and all documents relating to or substantiating the allegations in your petition that [the product] is unreasonably dangerous in construction or composition or suffers from faulty workmanship.

- Please produce any and all documents relating to or substantiating your allegation that [the product] deviated from [the manufacturer's] specifications.

In many respects, an objection or a non-responsive answer from the plaintiff is the best thing that can happen for your defense. Never accept an objection or "none at this time" or "all will be disclosed by our expert at a future date." File motion after motion after motion to compel an answer. Aggressive motion practice over written discovery will result in two things; it will make them commit to the res ipsa loquitur strategy or force them to answer your questions before they are really ready to do so.

During voir dire, do not pass up the opportunity to start the "specification" indoctrination process. Make sure you have a dedicated line of questioning that drives home the point that the case is about specifications:

- Have you been responsible for checking whether the product meets specifications?

- Worked for a manufacturer of a product that must be built to specification?

- Have you been injured by a product that deviated from specifications?

- Will you assume that, because plaintiff filed suit, the product must have deviated from specifications?

- Consider results of testing designed to determine whether met specifications?

- Consider whether an expert analyzed, requested, or was provided testing before offering an opinion on specifications?

If you are in a federal court jurisdiction that has adopted the growing trend of the judge taking over voir dire, submit your proposed questions about specifications to the court.

The direct- and cross-examinations of experts is where the importance of specifications comes to life for the jury. Your experts' energies need to be put towards identifying the litany of specifications for the product, how those specifications were met, and how opposing counsel's expert does not know what they are talking about. During cross-examination, develop a specifications checklist that you can meticulously grill their expert on.

When addressing the product's specifications, you have the rare opportunity to use your own corporate engineers, design professionals, or quality control supervisors as pseudo-experts. These individuals know more about the product than anyone and their testimony will have a sense of pride behind what they make and how they make it. More important, particularly for the ones with advanced degrees, they can be portrayed as having the same pedigree as any other expert. Using your corporate representatives in conjunction with the litigation-savvy expert generates credibility for both individuals and provides two mouthpieces for your specifications theme.

Closing argument when res ipsa loquitur is in play you should focus on preparing the jury for the tag lines they have heard from opposing counsel and the ones they may hear from other jurors during deliberations. "This shouldn't have happened… Something had to have gone wrong…This shouldn't have failed like this…How else could this have happened"; these are the kinds of statements that you must respond to in your closing. The case you have built around the specifications will not only prove there was no manufacturing defect but it also perfectly sets up the differential diagnosis analysis that more directly answers these kinds of questions lingering in the jurors' minds.

Differential Diagnosis

The differential diagnosis tactic can be used to completely defeat res ipsa loquitur and present a host of other potential causes for the product's failure to the jury. Essentially, how we suggest using the differential diagnosis concept in these kinds of cases is a variation of how plaintiff's medical experts often attempt to prove medical causation in toxic tort or medical malpractice cases.

The differential diagnosis process forces the opposing side's expert to admit that they either (1) merely relied on the idea that the product failure spoke for itself or (2) they ruled-in a manufacturing defect as the cause by ruling-out other potential causes. What self-respecting expert is going to say that their methodology was based on an obscure Latin phrase that permitted them to essentially do nothing? Almost every time, the expert will admit that they performed a rule-out process to rule-in a manufacturing defect. By admitting to a rule-in/ rule-out methodology, their expert has effectively admitted that the thing does not speak for itself, and takes res ipsa loquitur off the table.

If you properly set up the differential diagnosis defense, you can actually get rid of res ipsa loquitur and control the terminology and discussion of the other potential causes for the entire case. The sources of the other potential causes can come from anywhere. Focus on the discrete phases of the product's life cycle immediately after it came off the manufacturer's production line: shipping to point of sale, the seller, the buyer, subsequent purchaser or user, maintenance and repair, etc. Break down all aspects of these life cycles and look for things like:

- How it was stored or kept;
- How it was used;
- Misuse & Abuse
- Human Error
- Modifications
- Maintenance
- Repairs
- Accidents
- Custodians
- Component Part Issues
- Pre-/Post-Use Routine
- Education & Training

Explore all options and leave no stone unturned; one never knows where other potential causes are hiding.

While your discovery process will build the other potential causes needed for the differential diagnosis analysis, this defense is best applied through your and their experts. Once their experts admit their methodology was to rule-in a manufacturing defect by ruling out other potential causes, your experts can fully explore each of those other potential causes, offer additional potential causes, or, better yet, focus on how a combination of all the other potential causes far outweighs the potential for a manufacturing defect to have been the culprit. The other beneficial trick at this stage is that when ruling-in the other potential causes the burden is simply a possibility; however, the analysis and methodology for ruling-out those other potential causes should be by a preponderance of the evidence.

If res ipsa loquitur puts the focus on the defense, forcing a differential diagnosis analysis out of the plaintiff or the experts turns it back where it belongs. Instead of the thing speaking for itself, put the burden on them to admit res ipsa loquitur cannot apply and then to disprove all the other potential causes. It takes the case from their proving one thing to their having to disprove four to five to ten things.

Conclusion.

Res ipsa loquitur is an evidentiary and practical windfall for the plaintiff in a manufacturing defect case. Apart from providing a presumption or inference of negligence on the part of the manufacturer without requiring direct evidence of said negligence, it makes sense to lay jurors. Focusing on specifications and then using the differential diagnosis tactic provides as good a playbook as one can have in manufacturing defect cases where plaintiff is trying to prove the case through res ipsal loquitur.

Another Reason to Hate Latin: Defending against *Res Ipsa Loquitur* in Products Liability Litigation

DeutschKerrigan

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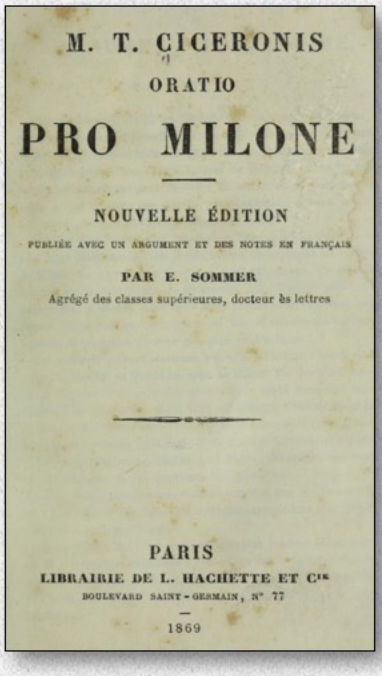
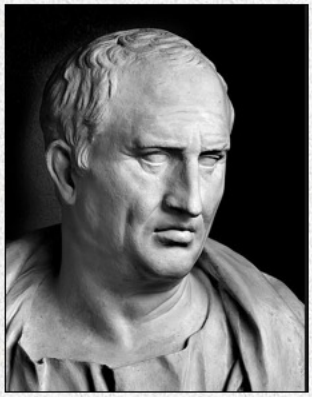
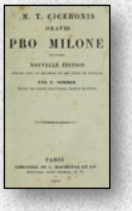

M. T. CICERONIS
ORATIO
PRO MILONE
NOUVELLE ÉDITION
PUBLIÉE AVEC UN ARGUMENT ET DES NOTES EN FRANÇAIS
PAR E. SOMMER
Agrégé des classes supérieures, docteur ès lettres
PARIS
LIBRAIRIE DE L. HACHETTE ET Cie
BOULEVARD SAINT-GERMAIN, N° 77
1869

Marcus Tullius Cicero

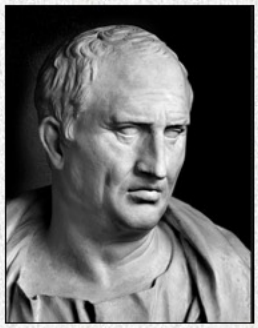


"Let us now examine the central point- whether the place they met was better suited to Milo or to Clodius as a place of ambush. On this point, gentleman, can there be any further doubt, or need for reflection? The Incident took place in front of Clodius's house, where at least a thousand strong men were occupied in excavating the basement, a megalomaniac scheme. In this location, and with his enemy occupying a commanding position on higher ground, did Milo really imagine that his own situation was superior, and therefore make this spot his particular choice for the battle that ensued? Is it not more likely that someone who knew that the situation was favourable to himself was lying in wait for him here and planning an-attack? **The facts speak for themselves, gentleman: they always carry the greatest weight**."



Why let the facts get in the way of a good story…

"Let us now examine the central point- whether the place they met was better suited to Milo or to Clodius as a place of ambush. On this point, gentleman, can there be any further doubt, or need for reflection? The Incident took place in **front of Clodius's house**, where at least a **thousand strong men** were occupied in excavating the basement, a megalomaniac scheme. In this location, and with his **enemy occupying a commanding position on higher ground**, did Milo really imagine that his own situation was superior, and therefore make this spot his particular choice for the battle that ensued? Is it not more likely that someone who knew that the situation was favourable to himself was **lying in wait for him here and planning an-attack**? The facts speak for themselves, gentleman: they always carry the greatest weight."



52 B.C.

1,915 years

1863

132 BYRNE v. BOADLE. [CHAP. III.

BYRNE v. BOADLE.

Court of Exchequer of England, Michaelmas Term, 1863. 2 Hurl. & C. 722.

DECLARATION. For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that, by and through the negligence of the defendant by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified. Plea, not guilty.

At the trial before the learned assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follow: A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north; defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned assessor was of that opinion, and non-suited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with £50 damages, the amount assessed by the jury. Rule nisi to enter verdict for the plaintiff.

POLLOCK, C. B. We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no

Byrne v Boadle
(159 Eng. Rep. 299, 1863)

Res Ipsa Loquitur

- Merely a rule of evidence, permitting the jury to draw from the occurrence of an unusual event the conclusion that it was the defendant's fault.
- "A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it."

The Restatement (2nd) of Torts § 328D. *Res Ipsa Loquitor*

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when:

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Restatement (Third) of Torts: Products Liability § 3 Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

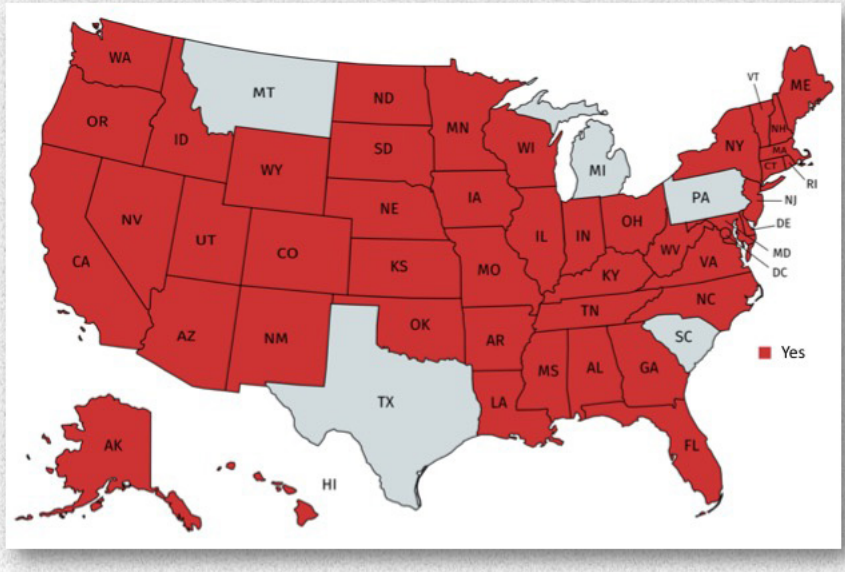
(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

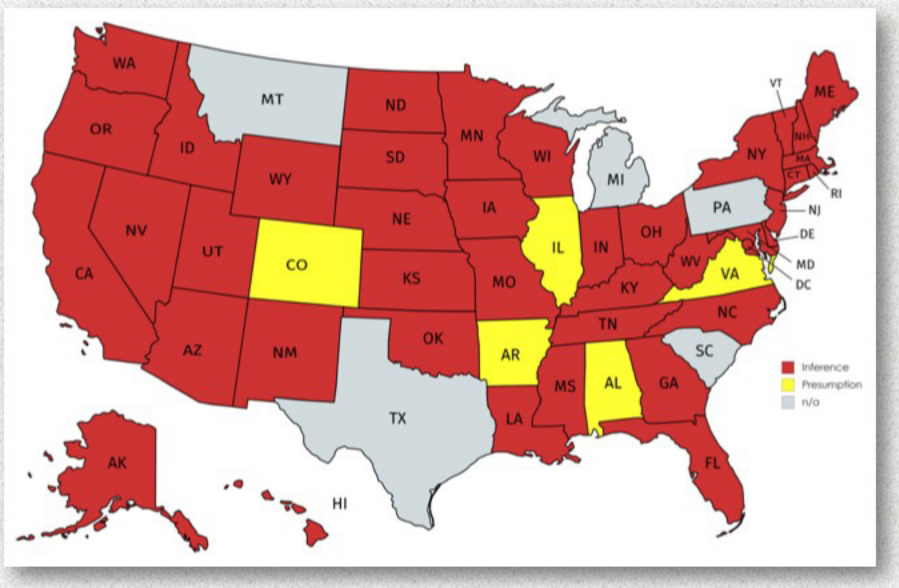
So, how do we combat *res ipsa loquitur* in a manufacturing defect case?

The Doctrine at a Glance

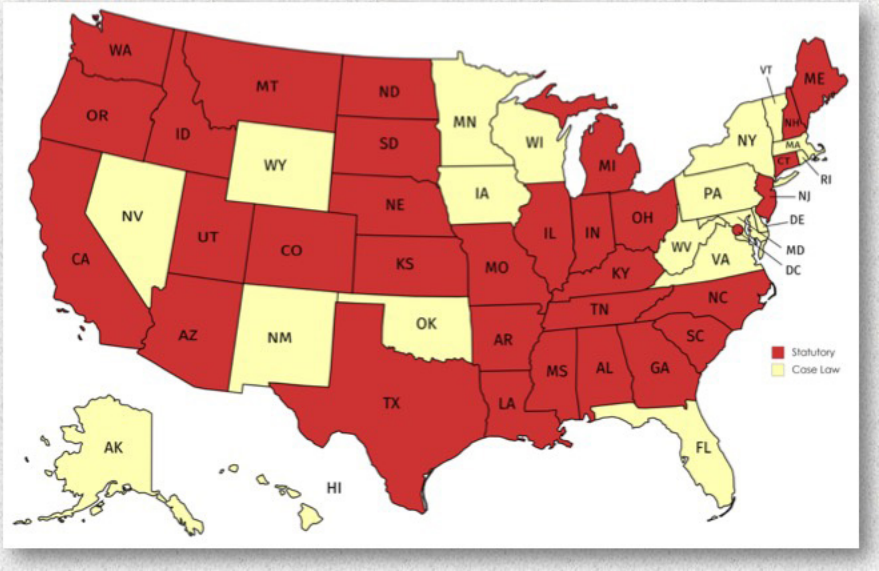
Allow *Res Ipsa Loquitur*



Inference vs. Presumption



Product Liability Act Jurisdictions



Two-Pronged Attack

Specifications

Differential Diagnosis

Two-Pronged Attack

Specifications

Differential Diagnosis

Specifications

Goal:

Eliminate that the product deviated from the manufacturer's specified design.

Specifications

Discovery

Voir Dire

Experts

Closing

Interrogatories

Please state the basis for your allegation in your Petition that [the product] is unreasonably dangerous and defective due to the manufacturing process by the [manufacturer].

Please identify each and every one of the [manufacturer's] specifications for [the product] that you allege were not followed.

Please identify each and every aspect of [the product] that deviated from the [manufacture's] specifications for [the product].

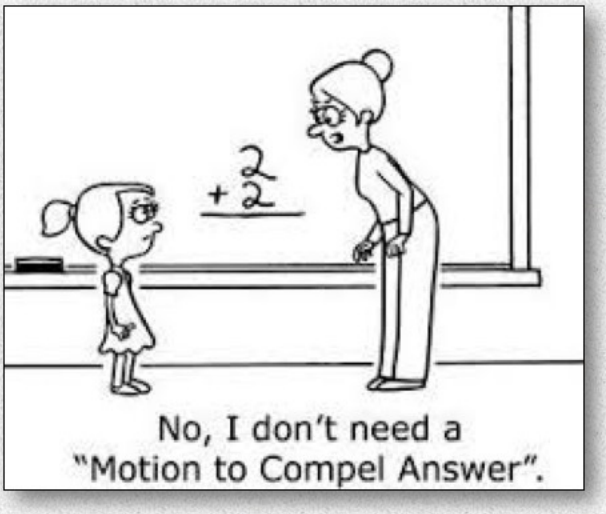
Please identify each and every document from [manufacturer's] design file or schematics that you contend establish the specification(s) for [the product].

Requests for Production

Please produce any and all documents that you contend are [the manufacture's] specifications for [the product].

Please produce any and all documents relating to or substantiating the allegations in your petition that [the product] is unreasonably dangerous in construction or composition or suffers from faulty workmanship.

Please produce any and all documents relating to or substantiating your allegation that [the product] deviated from [the manufacturer's] specifications.



Specifications

Discovery

Voir Dire

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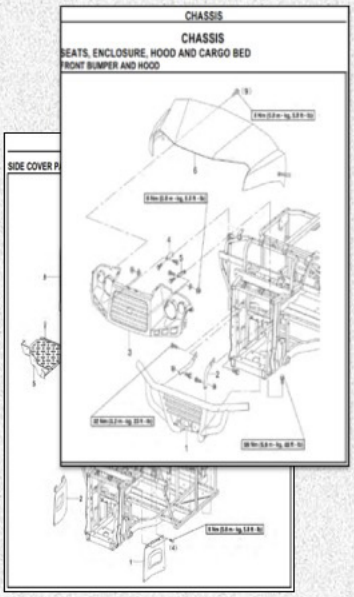
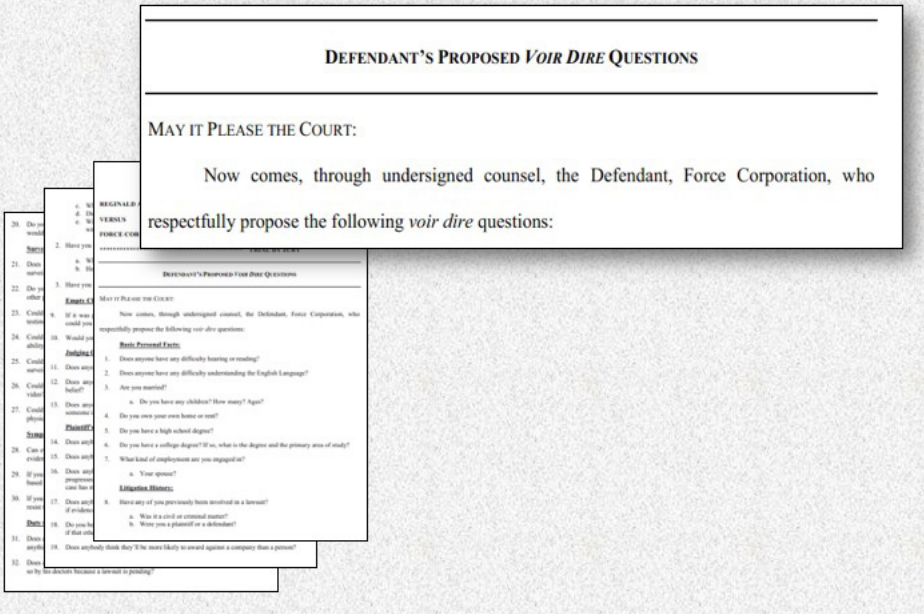
Closing



Must Prove Deviation From Specifications

- Been responsible for checking whether product meets specifications?
- Work for manufacturer of product that must be built to specification?
- Been injured by a product that deviated from specifications?
- Will you assume that, because plaintiff filed suit, product must have deviated from specifications?
- Consider results of testing designed to determine whether met specifications?
- Consider whether expert analyzed, requested, or was provided testing before offering opinion on specifications?



DEFENDANT'S PROPOSED *VOIR DIRE* QUESTIONS

MAY IT PLEASE THE COURT:

Now comes, through undersigned counsel, the Defendant, Force Corporation, who respectfully propose the following *voir dire* questions:

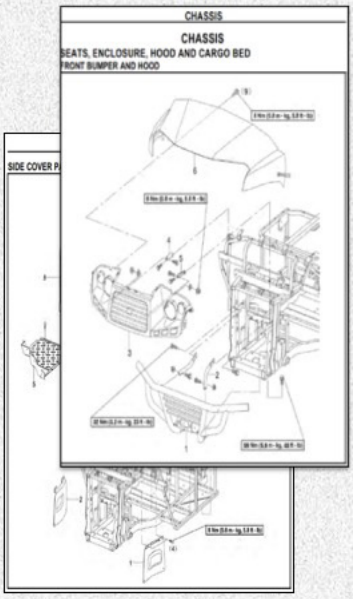
Specifications

Discovery

Voir Dire

Experts

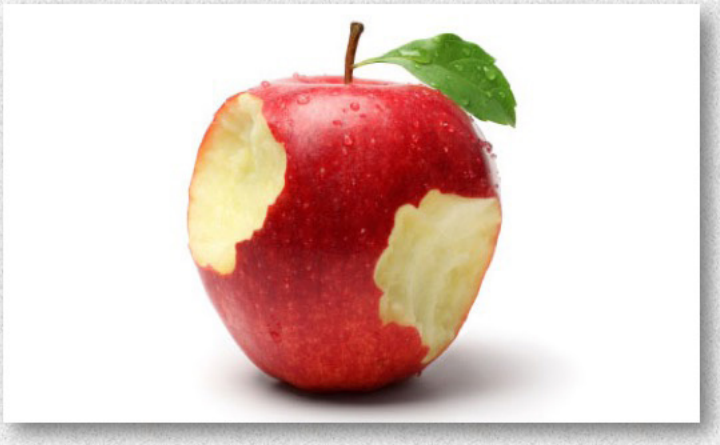
Closing



Specifications Checklist

- ✓ Suppliers
- ✓ Defined "Spec Sheet
- ✓ Product Description
- ✓ Components
- ✓ Materials
- ✓ Dimensions/Weights
- ✓ Tolerances
- ✓ Testing Requirements
- ✓ Inspection Requirements
- ✓ Packaging Specifications
- ✓ Shipping Specifications

Rare Opportunity for Two Bites at the Apple



Two-Pronged Attack

Specifications

→ **Differential Diagnosis**

Differential Diagnosis

Goal:

(1) Commitment to *res ipsa loquitur* and no methodology;

or

(2) Admission that methodology involved a rule-in through ruling-out process

Differential Diagnosis

Goal:

(1) Commitment to *res ipsa loquitur* and no methodology;

or

(2) Admission that methodology involved a rule-in through ruling-out process

Differential Diagnosis

Step One:

Get their expert to admit methodology was to rule-in manufacturing defect by ruling-out other "potential causes"

Differential Diagnosis

Step Two:

Get their expert to identify the other "potential causes" that were ruled-out

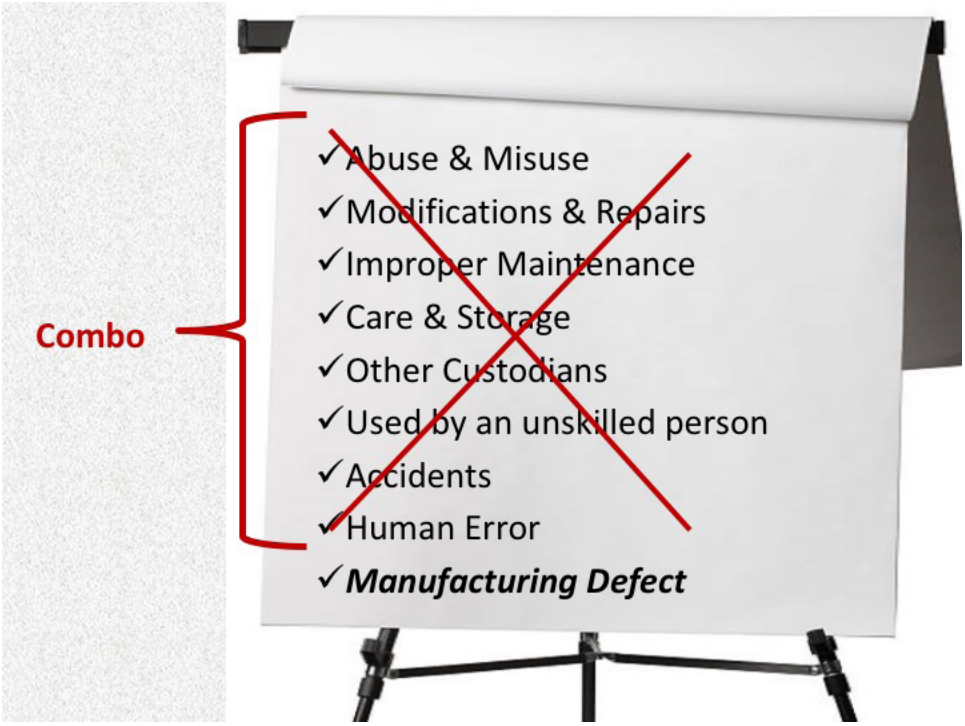
Differential Diagnosis

Step Three:

Attack ability to rule-out those other "potential causes"


✓Abuse & Misuse
✓Modifications & Repairs
✓Improper Maintenance
✓Care & Storage
✓Other Custodians
✓Used by an unskilled person
✓Accidents
✓Human Error
✓Manufacturing Defect


Combo
✓Abuse & Misuse
✓Modifications & Repairs
✓Improper Maintenance
✓Care & Storage
✓Other Custodians
✓Used by an unskilled person
✓Accidents
✓Human Error
✓Manufacturing Defect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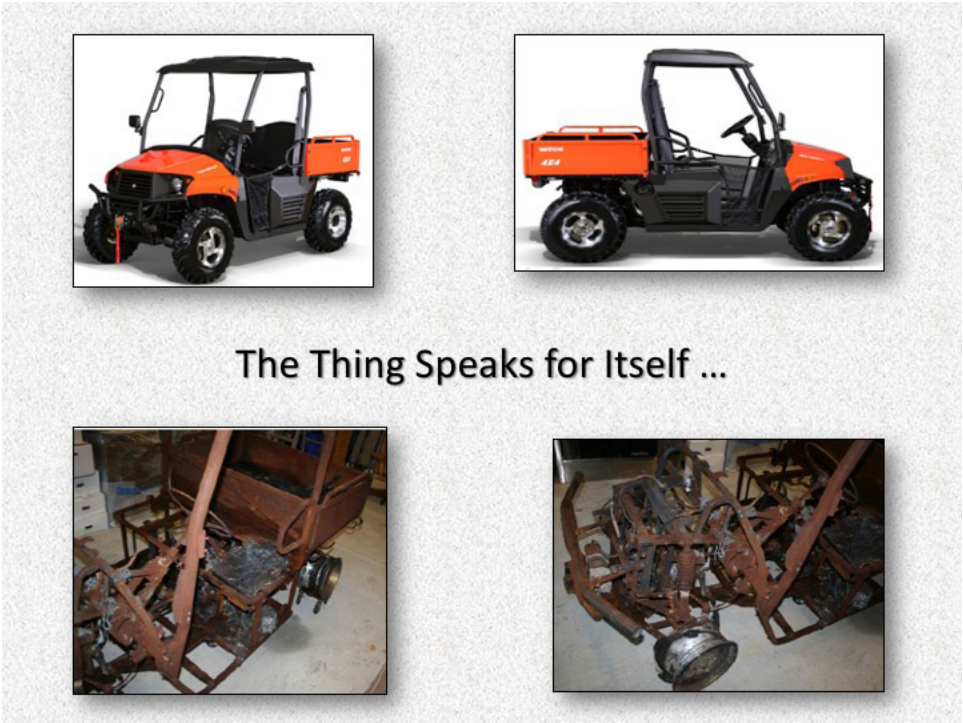
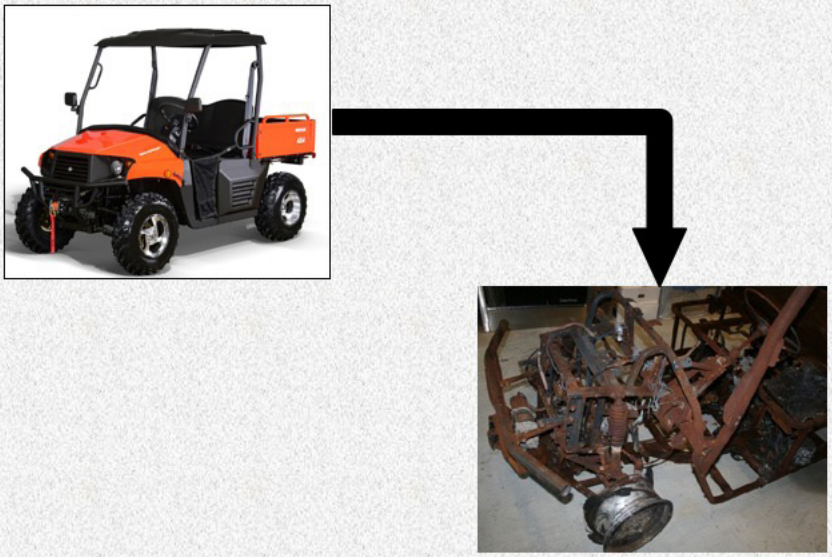

The Thing Speaks for Itself ...

The Thing does ***Not*** Speak for Itself …



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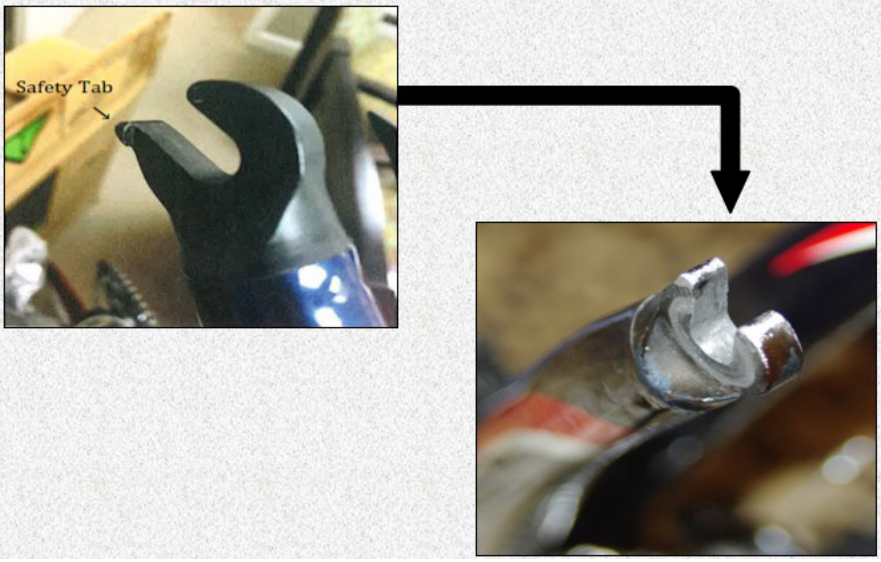


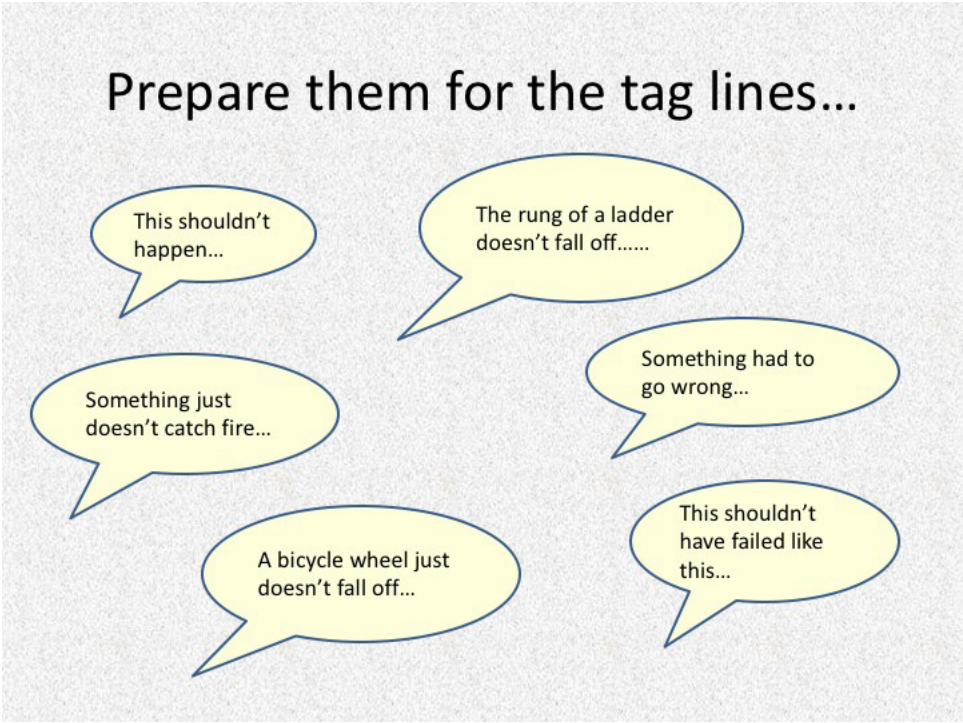
Two-Pronged Attack

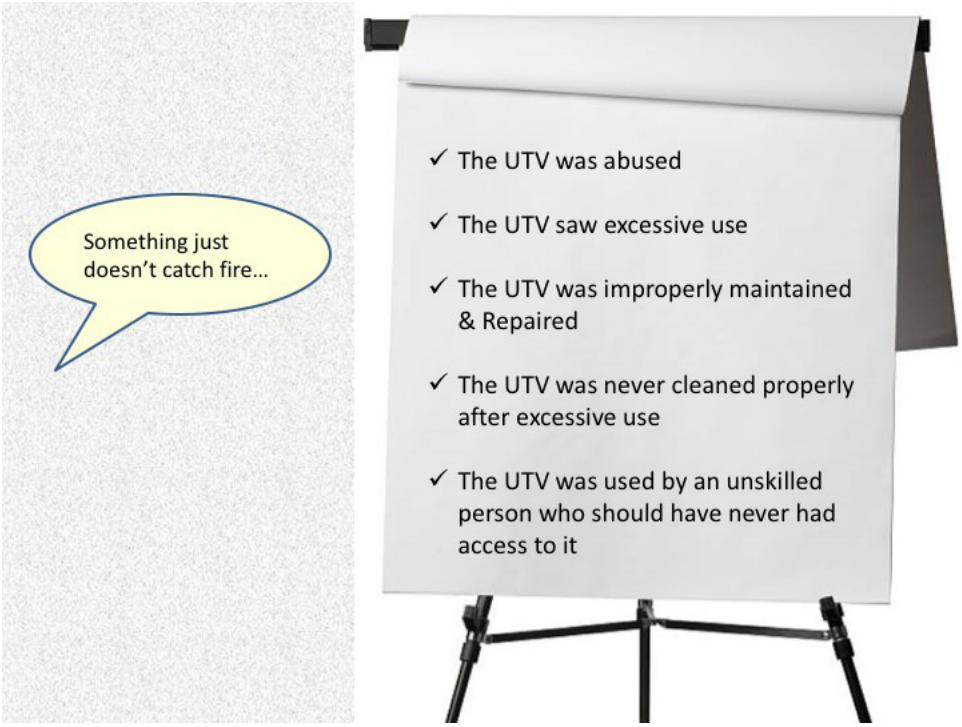
Discovery

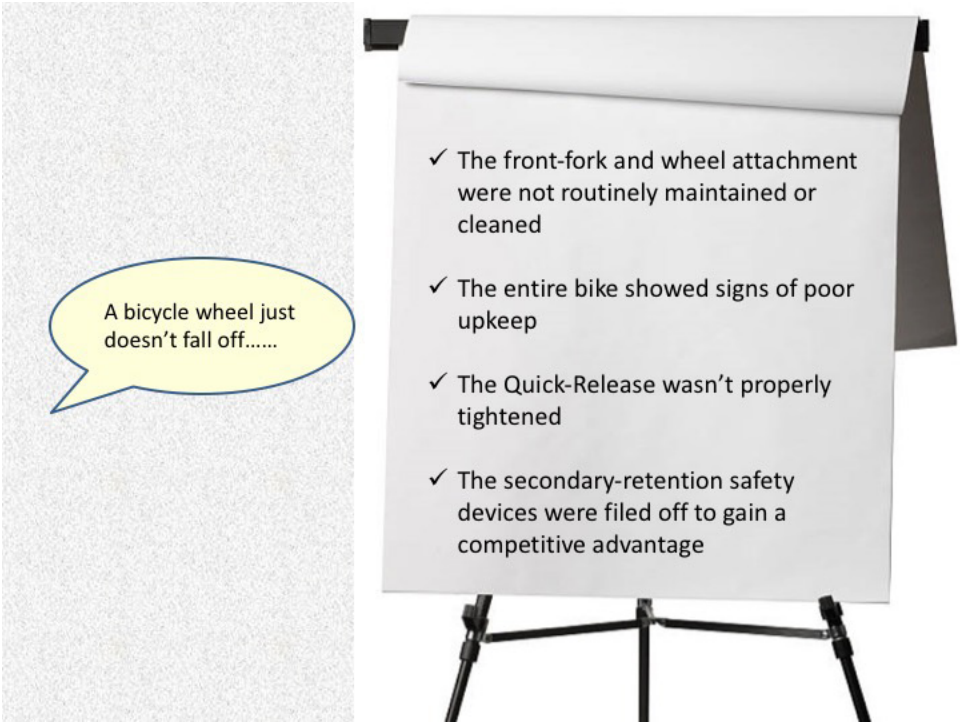
Voir Dire

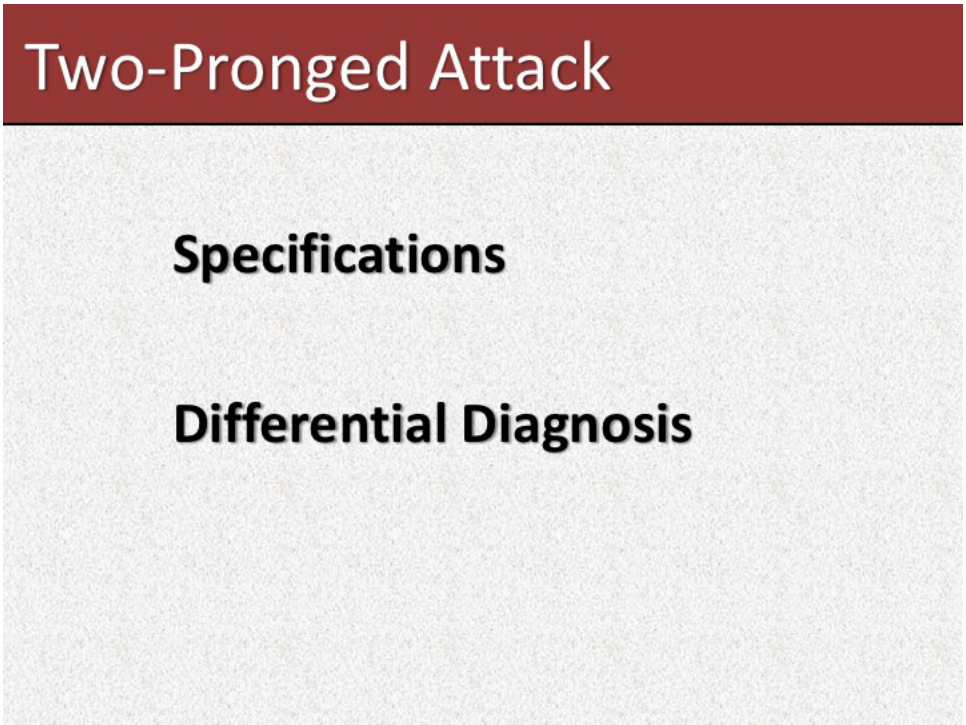
Experts

Closing


Prepare them for the tag lines…
This shouldn't happen…
The rung of a ladder doesn't fall off……
Something had to go wrong…
Something just doesn't catch fire…
This shouldn't have failed like this…
A bicycle wheel just doesn't fall off…


Something just doesn't catch fire…
✓ The UTV was abused
✓ The UTV saw excessive use
✓ The UTV was improperly maintained & Repaired
✓ The UTV was never cleaned properly after excessive use
✓ The UTV was used by an unskilled person who should have never had access to it


A bicycle wheel just doesn't fall off.....
✓ The front-fork and wheel attachment were not routinely maintained or cleaned
✓ The entire bike showed signs of poor upkeep
✓ The Quick-Release wasn't properly tightened
✓ The secondary-retention safety devices were filed off to gain a competitive advantage


Two-Pronged Attack
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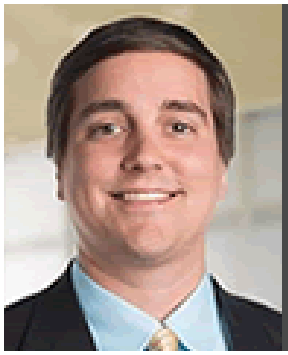

RAYMOND C. LEWIS

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Raymond C. Lewis knows that an attorney with courtroom experience is a valuable asset to a client and has developed the skills necessary to get through the unexpected hurdles of a courtroom.

His practice centers primarily in the areas of complex commercial and business litigation, insurance defense, and appellate work. He has successfully litigated complex commercial disputes for local and national clients involving multi-million dollar claims for breach of contract, product liability, oil and gas disputes, and transportation casualty. In his appellate practice, Ray has handled numerous appeals before the Louisiana Supreme Court, Circuit Courts of Appeals, and the U.S. Fifth Circuit, many resulting in published decisions favorable to his clients.

Ray has appeared multiple times as a “Ones to Watch” in the legal industry by New Orleans CityBusiness. He has also been voted to the Louisiana Super Lawyers “Rising Star” List, 2014-2017. He has written and lectured on trial and appellate practice and environmental law topics.

Ray was born in Louisiana, but grew up in Dallas, Texas. He returned to Louisiana to attend the Paul M. Hebert Law Center at Louisiana State University, where he was a member of the Louisiana Law Review. After leaving law school, he served as law clerk to the Judges of the 23rd Judicial District Court.

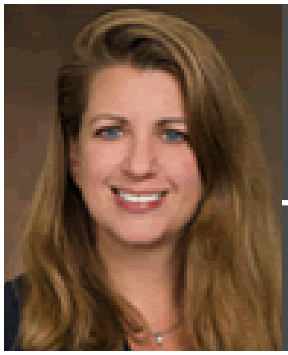
While at LSU, he met his wife Jenny, a native of New Orleans, and followed her back to New Orleans. They have two young daughters keeping them very busy but very happy.

Practices
- Appellate Litigation
- Commercial Litigation
- Commercial Transportation
- Insurance Coverage
- Manufacturer’s Liability and Products Liability

Industries
- Transportation
- Insurance
- Manufacturing

Accolades
- New Orleans CityBusiness Ones to Watch: Law, 2015, 2017
- Super Lawyers “Louisiana Rising Stars” List, 2014-2018

Education
- J.D., B.C.L., Louisiana State University, 2007
- B.A., Baylor University, 2004



NEW TOBACCO: LESSONS FROM THE OPIOID LITIGATION FOR ALL PRODUCT MANUFACTURERS

Jessie Zeigler
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Plaintiffs' Increasingly Creative Attempts to Expand Corporate Liability Under the Doctrine of Public Nuisance

Jessie Zeigler and Micael Kapellas

William Prosser posited in his Handbook of the Law of Torts, that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." Id. § 86, at 571 (4th ed. 1971).[1] This nebulousness has led courts to recognize that, allowed to proceed unabated, nuisance law has the potential to "become a monster that would devour in one gulp the entire law of tort . . . ." Tioga Public School District #15 of Williamson County v. United States Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993).

At the turn of the last century, perhaps not surprisingly, plaintiffs increasingly began venturing into this impenetrable jungle to exploit the ambiguity of public nuisance, and the tort awoke from "a centuries-long slumber." Donald G. Gifford, Public Nuisance As A Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 743 (2003). Most notably, plaintiffs began applying the doctrine, with varying levels of success, to claims against tobacco manufacturers,[2] handgun manufacturers,[3] paint manufacturers who included lead pigment in their products,[4] and companies that used methyl tertiary butyl ether (MTBE) in gasoline.[5] In recent years, the tort of public nuisance has been used in increasingly novel ways, and with similarly varying levels of success, including in claims related

1 Prosser further explained that few terms have "afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a 'nuisance,' and there is nothing more to be said." Id.

2 See, e.g., Moore ex rel. Mississippi v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. Jackson County May 23, 1994); McGraw v. Am. Tobacco Co., No. CIV. A. 94-C-1707, 1995 WL 569618 (W. Va. Cir. Ct. June 6, 1995). By mid-1997, "forty of the fifty state attorneys general had filed suit against tobacco companies," suits which were eventually settled between the state attorneys general and tobacco companies for $206 billion. See Maria Gabriela Bianchini, The Tobacco Agreement That Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation, 87 Cal. L. Rev. 703, 712 (1999).

3 See, e.g., People ex rel. Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003) (affirming dismissal of common-law public nuisance claims against handgun manufacturers, wholesalers and retailers and reasoning that "giving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities."; City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) (reversing appellate court decision dismissing city's claims for, inter alia, public nuisance against gun manufacturers); City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1228 (Ind. 2003) (allowing the city to proceed on public nuisance claims against gun manufacturers and other defendants); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004) (refusing to create "an entirely new species of public nuisance liability" in affirming the trial court's dismissal of public nuisance claims against gun manufacturers). The Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C.A. § 7901, et seq., significantly limited the right to bring public nuisance and other claims related to firearms by "prohibit(ing) causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." But see Chiapperini v. Gander Mountain Co., 13 N.Y.S.3d 777, 789 (N.Y. Sup. Ct. 2014) (allowing claims for public nuisance and negligent entrustment to go forth against gun sellers).

4 Plaintiffs continue to enjoy success in some instances with their claims that lead paint producers are liable under public nuisances theories. See, e.g., People v. Conagra Grocery Prod. Co., 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017), reh'g denied (Dec. 6, 2017), review denied (Feb. 14, 2018) (upholding a finding that lead paint qualified as a public nuisance, while modifying the trial-court's award).

5 See, e.g., In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., 415 F. Supp. 2d 261 (S.D.N.Y. 2005) (allowing claim for public nuisance under Indiana law to proceed against petroleum companies who allegedly contaminated groundwater with the MTBE additive).

to gang activity[6] and priest sexual abuse.[7]

While an exact or comprehensive definition of nuisance has proved elusive, most states utilize the Restatement (Second) of Torts definition of public nuisance, which defines it as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1). The Restatement further explains:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Id.

As one commentator has explained, the traditional doctrine of public nuisance, which requires that a party prove an injury that is "different-in-kind" and not just "different-in-degree" from the general public who may be affected by the nuisance, "presents a paradox: the broader the injury to the community and the more the plaintiffs injury resembles an injury also suffered by other members of the public, the less likely that the plaintiff can bring a public nuisance lawsuit." Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755, 761 (2001).

Attorneys representing manufacturer defendants need to be aware of their clients' potential exposure to nuisance claims. It is not difficult to envision that the doctrine might be utilized by creative plaintiffs' attorneys to assert claims against manufacturers and other entities operating in heretofore unimagined realms. Two industries that have faced increased potential liability in recent years based on claims that their actions have created public nuisances are prescription drug manufacturers, particularly those who manufacture and distribute opioids, and fossil-fuel companies, who plaintiffs allege have engaged in actions that have contributed to climate change.

In December 2017, the Judicial Panel on Multidistrict Litigation transferred 62 opioid-related civil actions to the United States District Court for the Northern District of Ohio. See In re Nat'l Prescription Opiate Litig., No. MDL 2804, 2018 WL 2012878 (U.S. Jud. Pan. Mult. Lit. Apr. 23, 2018). Since then, 487 additional actions were transferred to the Northern District of Ohio. Id.[8] The more than 500 actions consolidated in the multidistrict litigation have been brought by cities, counties and Native American tribes, and do not account for the dozens of additional cases being brought by in state courts around the country by various municipal and other entities.

Public nuisance actions based on the alleged effects of climate change preceded by years the claims related to opioids made against prescription drug manufacturers. See Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011). In American Electric Power Company, the Supreme Court left it to the Second Circuit to determine whether state-law nuisance claims were pre-empted by the Clean Air Act, id. at 430, a question left open when the plaintiffs subsequently withdrew their complaints. See "20110902 Letter withdrawing by plaintiffs in AEP v Connecticut (American Electric Power)," link available at http://climatelawyers.com/post/2011/09/21/Connecticut-v-AEP-The-End-Is-Very-Near.aspx.

More recently, several coastal cities and states have

6 See People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1120, 929 P.2d 596, 615 (1997) (finding valid claims that gang members violated the public nuisance statute in part because the "hooligan-like atmosphere that prevails night and day in [their neighborhood]—the drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fistfights and gunfire—easily meet the statutory standard" of being "'indecent or offensive to the senses' of reasonable area residents.")

7 See, e.g., Doe 30 v. Diocese of New Ulm, 2014 WL 10936509, at *11, 13 (Minn. Dist. Ct.) (trial court order declaring that alleged victim of priest sexual abuse had no standing to maintain a private action for the alleged public nuisance because he, at most, sustained damages different in degree from the general public. The court determined that he lacked standing because he and did not sustain "special or peculiar damage" that was not common to the general public, which is a prerequisite to seeking a private remedy to a public nuisance under Minnesota law and elsewhere.)

8 United States District Judge Dan Aaron Polster, who is presiding over the multidistrict litigation, appears eager for a quick resolution to the MDL cases. At the January 9, 2018, first meeting of counsel he told the parties that he did not "think anyone in the country is interested in a whole lot of finger-pointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unravelling complicated conspiracy theories. So my objective is to do something meaningful to abate this crisis and to do it in 2018." (Doc. 58, No. MDL 2804, "Transcript of Proceedings Before the Honorable Dan A. Polster United States District Judge and Before the Honorable David A. Ruiz United States Magistrate Judge," at 4:17-25.) (Transcript also available at https://assets.documentcloud.org/documents/4345753/MDL-1-9-18.pdf).

also applied the theory of public nuisance in lawsuits filed against entities such as BP, ExxonMobil, Chevron, ConocoPhillips and Shell, alleging that the companies knew of the harms that global warming posed. In a nod to the earlier public nuisance lawsuits against tobacco companies, some of the lawsuits even allege that the fossil fuel companies "borrowed the Big Tobacco playbook in order to promote their products" by "engag[ing] in advertising and public relations campaigns intended to promote their fossil fuel products by downplaying the harms and risks of global warming." See State v. BP P.L.C. et al., Case No. RG17875889 (Superior Court of the State of California, County of Alameda, Sept. 19, 2017) (Complaint at ¶ 63). The City of Oakland brought the lawsuit in Alameda County against the fossil fuel companies listed above, as well as other unknown entities. The lawsuit alleges that Oakland will be required to expend billions of dollars to confront the climate change injuries it will suffer, and requested an abatement fund be established to provide for infrastructure so that the city can adapt to global warming impacts such as sea level rise. The same day that the City of Oakland filed its complaint, San Francisco's city attorney filed a similar complaint against the same entities. See State v. BP P.L.C. et al., Case No. CGC-17-561370 (Superior Court of the State of California, County of San Francisco, Sept. 19, 2017). On July 17, 2017, California's San Mateo and Marin counties, as well as the City of Imperial Beach, filed similar lawsuits alleging public nuisance and other claims against the same fossil fuel companies and others that are named in the Oakland and San Francisco complaints.

Whether the entities that have brought suit against prescription drug manufacturers and fossil fuel companies succeed in their claims based on public nuisance remains to be seen. It is possible that the players in either or both industries follow the template laid out in the early tobacco cases, in which the manufacturers entered into master settlement agreements which netted states significant payouts. It is also possible that Congress intervenes in one or both industries to curtail the potential liability of the prescription drug manufacturers and fossil fuel companies with something similar to the Protection of Lawful Commerce in Arms Act, which severely curtailed the right to bring lawsuits against firearms manufacturers, distributors, and dealers when the firearms or ammunition functioned as they were designed and intended but were used unlawfully.

Whether either of the above described scenarios— or, perhaps some other outcome— ultimately ends up playing out, what seems inevitable is that companies and industries will continue to see increasingly novel uses of the public nuisance doctrine and need to prepare accordingly.

BASS BERRY + SIMS PLC

Fight Song: Lessons from the Opioid Litigation for All Products Manufacturers

The New (Ab)Normal

- States have enacted state products liability acts
- Plaintiffs' attorneys are now getting creative in response:
  - New twists on common-law actions
  - Manipulation of narrow statutorily based actions
- There is often no case law on point, so we are in an untested, wild frontier in the products cases

State Product Liability Acts

- Tennessee Example:
  - Compliance with state or federal laws raises a rebuttable presumption the product is not dangerous
  - No duty to warn of obvious dangers or hazards

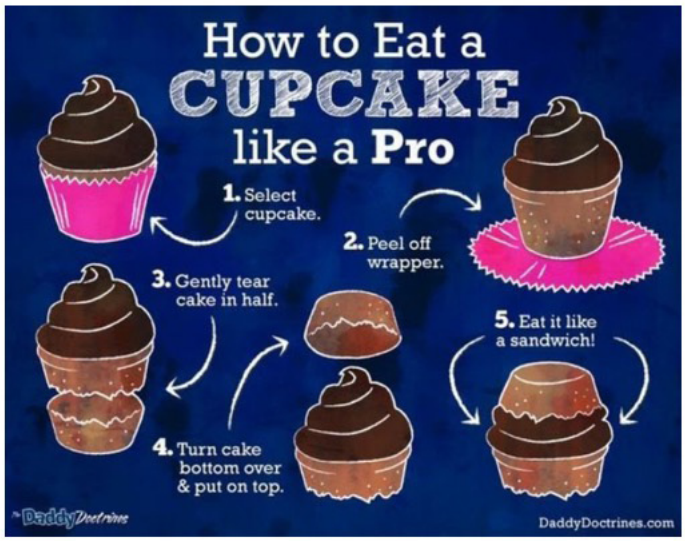
  - Manufacturer not liable for alterations

In response, plaintiffs' attorneys are getting creative…

Common-Law Claims

- Plaintiffs' attorneys are manipulating older actions in new ways:
  - Nuisance
  - Fraud and Fraudulent Misrepresentation
  - Unjust Enrichment

These claims may not really make sense.



Nuisance

- **Tobacco**
  - *e.g., State of Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997), *subsequent mandamus proceeding sub nom. In re Fraser,* 75 F. Supp. 2d 572 (E.D. Tex. 1999)
- **Handguns**
  - *e.g., People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003)
- **Lead Paint**
  - *e.g., People v. Conagra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018)

Unjust Enrichment

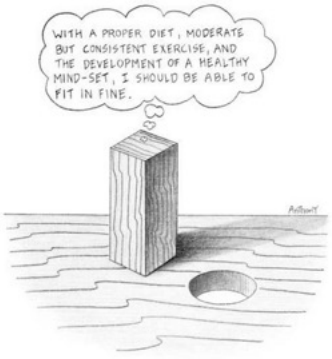
- **Tires**
  - *e.g., In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 155 F. Supp. 2d 1069, 1104 (S.D. Ind.), on reconsideration in part, No. MDL NO. 1373, 2001 WL 34691976 (S.D. Ind. Nov. 14, 2001), and on reconsideration in part sub nom. in re Bridgestone/Firestone Inc. Tires Prod. Liab. Litig., 205 F.R.D. 503 (S.D. Ind. 2001), rev'd in part sub nom. In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002)*
- **Pet Food**
  - *e.g., Adkins v. Nestle Purina PetCare Co., 973 F. Supp. 2d 905 (N.D. Ill. 2013)*
- **Hair Relaxer**
  - *e.g., In re Amla Litig., No. 16-CV-6593, 2018 WL 3629226 (S.D.N.Y. July 31, 2018)*

Trespass

- **Pokémon Go**
  - *Pokémon Go Nuisance Litigation*, case number 3:16-cv-04300, (N.D. Cal.)
- **Oil**
  - *State v. N. Atl. Ref. Ltd.*, 160 N.H. 275, 999 A.2d 396 (2010)
- **Drywall**
  - *Employers Mut. Cas. Co. v. Holman Bldg. Co.*, 84 So. 3d 856, 857 (Ala. 2011)

Statutory Claims

- **Pre-existing statutory rights of action**
  - **Drug Dealer Liability Act**
    - State Opioids Cases
  - **RICO**
  - **Consumer Protection Act**



Consumer Protection Act

- **Asthma medication (No PLA preemption)**
  - *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 323, 858 P.2d 1054, 1067 (1993)
    - PLA preempted common law claims, but no pre-emption under Washington law, because CPA was specifically exempted from the Products Liability Act
- **Fuel (specifics of CPA claim)**
  - *e.g., In re Duramax Diesel Litig., No. 17-CV-11661, 2018 WL 3647047, at *5 (E.D. Mich. Aug. 1, 2018)*
    - Claims brought under the a variety of states' case law with allegations that engines were not both high performance and low emission.
    - Argued Mississippi and Idaho Consumer Protection Act claims were barred because plaintiffs did not satisfy the attorney general's approval or settlement processes required by the state for such claims.

New Theories of Damages

- **Costs of prosecution**
- **Costs of rehab programs**
- **Unemployment insurance costs**
- **Costs of climate change**

Competing Cases

- Federal cases
- State cases

"We have too many cooks in the kitchen."

Fight Creativity With Tried and True Defenses

Combat New Theories: Determine Why They Were Not Used Before

- Preemption/Conflict Between Laws
  - FDCA
  - Products Liability Statutes
  - FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act)
  - National Childhood Injury Vaccine Act
- Statutory Language
- Remedy-specific limitations
  - Unjust enrichment is an equitable remedy, so there should be no other remedy at law.

Combat New Damages Categories: Discover Why This Has Not Been Done Before

- Causation
- Standing
- Look to other industries, such as the gun litigation for nuisance claims

Combat New Parties: Why Haven't They Brought Claims Before? And Did They Even Bring These?

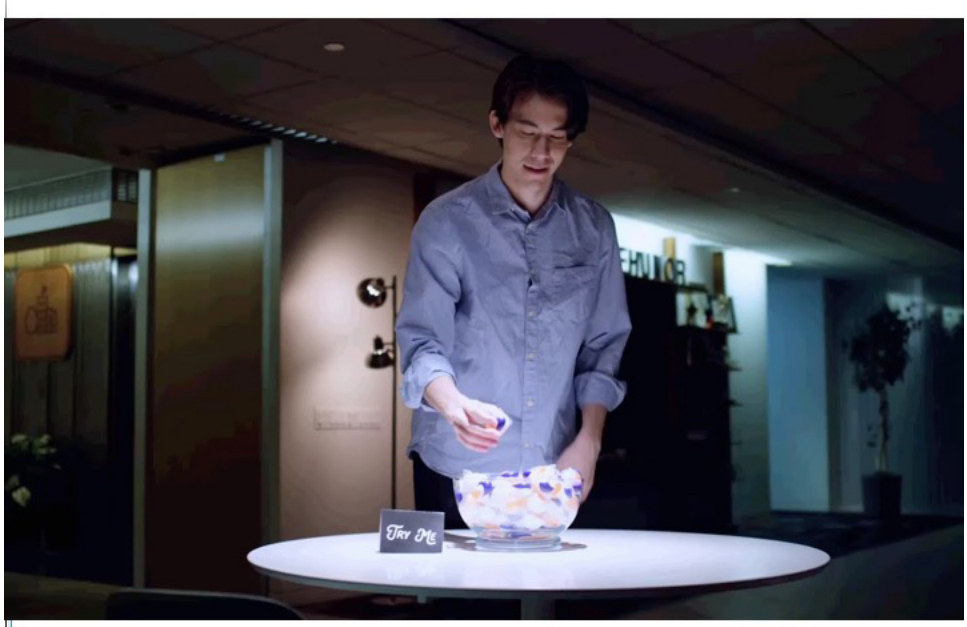
- Standing
- Real Party in Interest
- Authority to Sue on Behalf of a Government or Governmental Entity

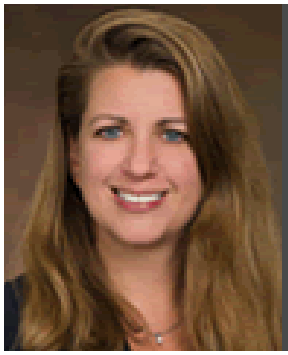
Combat Multiple Jurisdictions: How Can They Litigate In Separate Places?

- Authority To Sue
- First Filed Doctrine
- Preemption

Go Back to the Basics.

Warnings!





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Whether representing a Fortune 500 company or one of the largest municipalities in Tennessee, Jessie Zeigler has returned successful results for 100 percent of the cases she has handled for clients in a wide range of litigation matters. Her counsel has saved clients millions in losses across various industries – including automotive, food and beverage, healthcare, consumer products, pulp and paper, general manufacturing, chemical, pharmaceutical/life sciences, and medical device – as they have faced claims related to crisis management, environmental, natural gas hedging, health & safety, products liability, healthcare liability, or contracts. Jessie represents clients in claims related to deceptive business practices under the Tennessee Consumer Protection Act (TCPA) and the False Claims Act (FCA). She also has more than 23 years of experience in representing clients in environmental, health and safety matters.

Jessie is chair of the firm's Products Liability & Torts Practice Group.

Related Services

- Products Liability & Torts
- Litigation & Dispute Resolution
- Environmental
- Healthcare Disputes
- International
- Utilities – Telecom, Energy & Water
- Life Sciences

Accolades

- Chambers USA — Environment, Recognized Practitioner (2016-2018)
- Best Lawyers in America® — Environmental Law; Litigation: Environmental; Natural Resources Law (2007-2018)
- Nashville Business Journal — "Women of Influence, Trailblazer Category" (2015)
- Nashville Bar Association — President's Award (2014)
- Mid-South Super Lawyers (2009-2017)
- Top 50 Women Mid-South Super Lawyers (2011-2012, 2016)
- Phi Beta Kappa

Publications

- Jessie Zeigler and Chad Jarboe Examine Witness Preparation in Trials for ABA Publication - December 4, 2017
- Jessie Zeigler Outlines Key Steps for Managing Plant Disasters - October 18, 2017
- Jessie Zeigler Co-Authors Article on Component Supplier Liability in Medical Device Cases - September 26, 2014
- Products and Mass Torts: 2014 Industry Group Developments- February 13, 2014
- Jessie Zeigler Co-Authors Article for Defense Counsel Journal - July 31, 2013
- Law360 Publishes Article on Gas Utility Decision in Favor of Firm's Client - July 23, 2013

Education

- Vanderbilt Law School - J.D., 1993 - Order of the Coif
- Syracuse University - B.A., B.S., 1990 - summa cum laude

ADVANTAGES AND POTENTIAL PITFALLS OF GOOD CONDUCT EVIDENCE

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Telling the Corporate Story: Advantages and Potential Pitfalls of Good Conduct Evidence
Steve Schleicher

Effect of Anti-Corporate Bias

There is a natural bias in favor of an individual over a corporation. This may be due to a tendency to cheer for the underdog, a belief that a corporate defendant is in a financial position to pay for damages or perhaps a belief that corporations place profits over public safety concerns. It may also stem from identifying with the familiar. In a product liability case for example, the jury will see the plaintiff as a real person with whom they can relate on some level based on shared life experiences. They will learn about the plaintiff's interests, goals, family and career – and how their life story has been altered due to the alleged negligence of your client. By contrast, the jury will hear evidence that the product in question is manufactured by large international corporation run by a CEO and Board of Directors; that the manufacturing process takes place overseas and the company makes substantial profits. This sets a "David vs. Goliath" scenario where the plaintiff is favored and the corporation is presumed liable.

This predisposition matters. People tend to resolve factual questions in favor of the party they already favor. While bias can be conscious and overt, it is often a function of the subconscious and can vary in degree. Anti-corporate bias is not only limited to jurors, but can also affect the decision making of judges. It is important, therefore, to find ways to place your client's narrative before the fact finder.

Telling the Corporate Story

Corporations have stories to tell. They make innovative and sophisticated products available to average consumers, some of which are life-saving. They provide employment. They are comprised of unique people from diverse backgrounds. Some have amazing backstories, compelling missions and support positive things in their communities.

Telling the corporate story means messaging against anti-corporate bias wherever possible. It means finding ways to present information that humanizes the corporate client for the purpose of dulling the negative effect of anti-corporate bias so that the fact finder can be directed to legitimate considerations of liability and damages.

Messaging against corporate bias should occur at all stages of litigation.

Discovery. An advocate should consider finding opportunities to develop these themes in the discovery phase and using them wherever possible and appropriate. For example, a plaintiff may testify in a deposition that a product provided a significant benefit to them for a number of years. A medical expert may testify that the corporate defendant's

products are superior to its competitors. A 30(b)(6) witness may discuss the corporation's mission statement and prevailing company culture.

Motions. Motion practice is another opportunity to message against corporate bias. Written memoranda can contain positive information about the corporation, its products and its contribution to society. For example, a motion to dismiss based on a statutory liability shield such as federal preemption can relate the reason for the rule to the mission of the corporation: "Congress enacted the rigorous premarket approval process allow Corporate Client to bring innovative, life-saving products to people who need them."

Trial. The trial presents many opportunities to message against anti-corporate bias, beginning with jury selection. The legitimate purpose of voir dire is to allow lawyers to discover a basis for a challenge for cause and to gain information helpful in intelligently exercising peremptory challenges. Defense counsel should focus their efforts on asking questions designed to identify jurors whose anti-corporate bias is so strong they simply cannot fairly act as a fact finder in a products liability case. Remaining will be those for whom bias is still present, but not to a degree such that they may be eliminated from the panel. While voir dire is by rule a process of obtaining information from prospective jurors, in practice parties advocate before the trial presentations begin. Defense counsel should carefully take the opportunity to educate the jury about the corporate client, its employees and its mission. For example: Have you heard about Corporate Client? Corporate Client has facilities in this State and employs more than 20,000 people. Do you have any friends or family members that work there? Corporate Client sponsors several charitable and community events here locally. Have you ever attended or participated in these events? Corporate client manufactures a particular medication. Do you, a family member or close friend depend on this medication? Attorneys should be careful to stay within this "fast pitch and catch" method to avoid drawing objection or having their voir dire cut short by the court.

Opening statements are another opportunity to message against anti-corporate bias. Just as plaintiff's counsel will provide background information to the jury to introduce their client and establish a human connection, defense counsel should take the opportunity to describe the corporate client in human terms: "Corporate Client was founded by an eccentric inventor who came up with a product that helps people. He wanted to make certain that everyone who needed one could have access to it so he started his own business." "Corporate Client manufactures its product just miles away from this courthouse. It employs thousands of people in the state and has been a trusted household name in the industry for decades."

Witness examinations also present opportunities to present "good corporate citizen" and other favorable evidence, just as such themes were developed in discovery. While some leeway is given to briefly present such evidence during introductory and background questioning, care must be taken to confine more substantial corporate story testimony to facts that are "of consequence in determining the action." Fed. R. Evid. 401. For example, in a strict products liability action, a plaintiff must prove that the product was inherently defective and that the defect existed when it left the defendant's control. Restatement (Second) of Torts §402A. Evidence that the corporate defendant's quality control personnel are among the best trained and highest paid in the industry is good corporate conduct evidence that would be relevant to the product defect element. Such evidence should be admissible as a "routine business practice." Fed. R. Evid. 406.

Good corporate conduct has been used in the context of punitive damages claims. For example, an automobile manufacturer in a strict products liability action was alleged to have manufactured minivans with a defective rear door hatch that caused enhanced injuries when passengers were ejected in a crash. Norwest Bank New Mexico N.A. v. Chrysler Corp, 981 P.2d 1215 (N.M. 1999). In this case, the driver and front-seat passenger were wearing seat belts at the time of the crash but the rear-seat passengers were not. While the trial court excluded evidence relating to the passengers' nonuse of seat belts in the crash, the court allowed the manufacturer to present evidence of its "general corporate policy to encourage seat belt use" to mitigate any punitive damages.

Closing arguments are the advocate's final opportunity to use whatever facts were established in the record to emphasize good corporate conduct and message against anti-corporation bias. "Corporate Client was established to provide the highest quality products to those who so desperately need them. It has grown into the successful company it is today by earning the loyalty and trust of its customers decade after decade. Quality and care is in its culture and mission statement. Their employees are people who live and work in this community. Corporate Client is not liable for plaintiff's injuries because its product was not defective."

The Potential Pitfalls

Pandering, Avoiding and Overkill. While it is important to present these themes, caution and discretion should be exercised. Jurors will find pandering to be distasteful and insulting to their intelligence. Even worse, a fact-finder may suspect that the defense is focusing on the corporate story to avoid discussing the real contested issues in the case and assume those facts are unfavorable. Repetitive corporate story evidence that is not directly related to a contested issue runs the risk of overkill. Trials are long and jurors do not appreciate a perceived waste of their time. Defendants, who do not get to begin their case-in-chief until the plaintiff has rested, must be particularly sensitive to this because juror stamina wanes over the course of a trial. Telling the corporate story is a means by which to attempt to make the fact finder listen to the facts and consider your defense. Such evidence is not a defense in and of itself and is no substitute for facts relevant to liability and damages.

Opening the Door. Defense counsel should exercise caution in selecting what evidence is presented to avoid opening the door to bad conduct evidence. Corporations, like people, are complicated. There may be bad conduct evidence that the advocate simply does not want to risk placing before the jury. In that case, counsel may opt to take the "get in, get out" approach. However, this risk must be assessed in light of the Rules of Evidence, which do not allow the wholesale introduction of past bad conduct evidence to rebut evidence that portrays the corporate defendant in a favorable manner. For example, in a complex hip implant case, defense lawyers and witnesses referred to Johnson & Johnson as "wonderful people doing wonderful things." In Re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prod. Liab. Litg., 888 F.3d 753 (5th Cir. 2018). The plaintiff's lawyer countered by seeking to introduce evidence that Johnson & Johnson had entered into a deferred prosecution agreement for violations of the Foreign Corrupt Practices Act because some non-party Johnson & Johnson affiliates were found to have paid bribes to Saddam Hussein's Iraqi government. The trial court allowed the introduction of this evidence, countering vague and very generally favorable references to Johnson and Johnson with evidence of international wrongdoing in the form of paying bribes to a dictatorial regime. The jury awarded plaintiffs more than half a billion dollars, including $360 million in exemplary damages. The Fifth Circuit Court of Appeals reversed and ordered a new trial. Citing Fed. R. Evid. 404(b)(1), the court held that "the Rules of Evidence do not simply evaporate when one party opens the door on an issue. And a party cannot introduce evidence of prior bad "acts . . . to show that on a particular occasion the person acted in accordance with the character." The court found the bad conduct evidence was not admissible, and that plaintiff's lawyer had "tainted the verdict by inviting the jury to infer guilt based on no more than prior bad acts" and that this alone was grounds for a new trial.

The introduction of good conduct evidence does not automatically allow every bad act in which the corporate client has engaged before the fact finder. But assume that specific bad conduct evidence relevant to rebut good conduct evidence offered as to a particular claim or defense will be allowed if the door is opened.

Conclusion

Telling the corporate story is one way to counter the effect of anti-corporation bias and open the fact-finder to consider both sides. If done carefully, it can be an effective advocacy tool for your client.

Telling the Corporate Story: Advantages and Potential Pitfalls of Good Conduct Evidence

Steve Schleicher
Maslon LLP

MASLON

Telling the Corporate Story

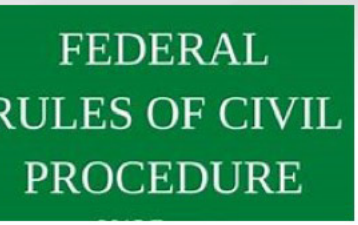
- Anti-Corporate Bias
- Messaging Against Bias
  - Pre-Trial Proceedings
  - Trial
- Potential Pitfalls
  - Jury Skepticism
  - Opening the Door

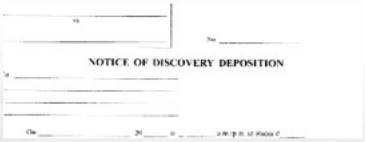

Corporation
Recall
Defective
Pollution
Dangerous
Rich
Greedy
Profits
Bailouts
Corrupt


Corporation
People
Cure
Jobs
Community
Employment
Sponsorship
Relief
Innovation
Product
Leadership
Solution

Opportunities for Messaging

- **Pre-Trial Proceedings**
  - Discovery
  - Motions Practice





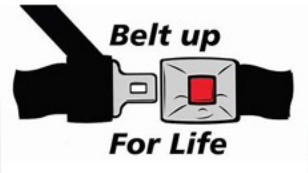
Opportunities for Messaging

- **Trial**
  - Jury Selection
  - Opening Statement
  - Witness Examination
  - Closing Argument

Relevant Purpose

- Company permitted to introduce evidence of general corporate policy to encourage seat belt use to mitigate punitive damages.

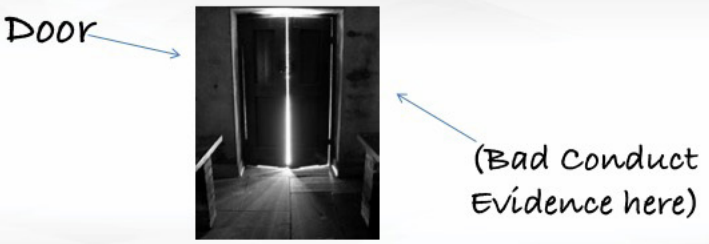
Norwest Bank New Mexico, N.A. v. Chrysler Corp., 981 P.2d 1215, 1225 (N.M. 1999)



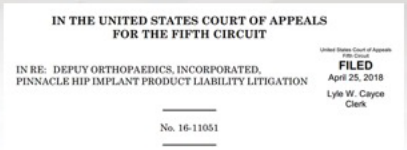
Pitfalls

- **Avoid**
  - Pandering
  - Overkill
  - Wasting Time

Good Conduct Evidence:
Does it Open the Door?



Opening the Door?



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

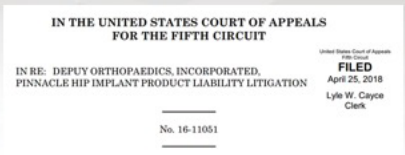
IN RE: DEPUY ORTHOPAEDICS, INCORPORATED,
PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

FILED
April 25, 2018
Lyle W. Cayce
Clerk

No. 16-11051

- Jury verdict against corporate defendants.
- $502 million damages.
- $360 million in exemplary damages.

Opening the Door?



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FILED
April 25, 2018
Lyle W. Cayce
Clerk

No. 16-11051

- *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*
- Johnson and Johnson
- "Wonderful people doing wonderful things"
- Trial court: "opened the door" to prior bad acts:
  - Deferred Prosecution Agreement for violations of the Foreign Corrupt Practices Act.
  - Non-Party affiliates paid bribes to Saddam Hussein's Iraqi government.

Opening the Door?

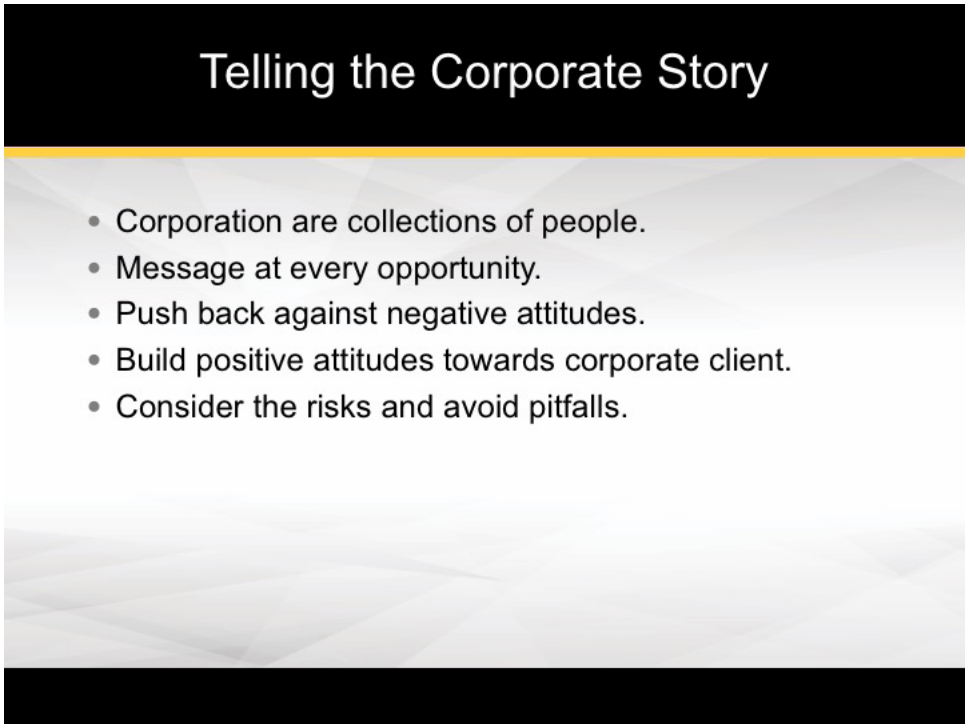
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
REVERSED

IN RE: DEPUY ORTHOPAEDICS, INCORPORATED,
PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

FILED
April 25, 2018
Lyle W. Cayce
Clerk

No. 16-11051

- Evidence "tainted the verdict by inviting the jury to infer guilt based on no more than prior bad acts."
- Basis for new trial.


Telling the Corporate Story
Corporation are collections of people.
Message at every opportunity.
Push back against negative attitudes.
Build positive attitudes towards corporate client.
Consider the risks and avoid pitfalls.

STEVEN L. SCHLEICHER

Partner

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Steve Schleicher, an experienced trial lawyer, concentrates his work on high stakes civil litigation and products liability cases, government and internal investigations, and white-collar criminal matters. He also serves as co-chair of Maslon's Government & Internal Investigations Group.

Steve has 22 years' experience as a trial lawyer, having spent his career as a prosecuting attorney before joining Maslon. A former federal prosecutor, he worked for 13 years in the U.S. Attorney's Office, serving as the Deputy Criminal Chief of the Special Prosecution Section (2014-2016) and as the St. Paul Branch Chief. Prior to joining the U.S. Attorney's Office, Steve worked at the Minnesota Attorney General's Office and Winona County Attorney's Office. Steve also has experience in military courts, having served as a JAG Corps Officer in the United States Army Reserve.

Throughout his career, Steve has prosecuted many criminal cases, including murder and other violent crime; complex narcotics conspiracies; racketeering; organized crime; fraud; and civil rights violations. He has also had numerous jury trials and has conducted hundreds of investigations. In 2016, he served as a prosecutor on the Jacob Wetterling case and was recognized as an "Attorney of the Year" by Minnesota Lawyer for his dedicated work.

Areas of Practice
- Litigation
- Government & Internal Investigations
- Tort & Product Liability

Selected Experience
- Represent leading medical device manufacturer in nationwide lawsuits involving both implanted and external medical devices in multiple state and federal courts across the country
- Served as co-liaison defense counsel for leading corn seed developer in Minnesota state court consolidated action involving over 65,000 individual U.S. corn growers and various entities that purchased, stored, transported, and exported corn grown in the U.S., along with a class of Minnesota corn growers alleging tort and consumer fraud claims against client

Recognition
- Presidents Award, Minnesota State Association of Narcotics Investigators, 2017
- Julius E. Gernes Prosecutor Award, Minnesota State Bar Association Public Law Section, 2017
- Attorney of the Year, Minnesota Lawyer, 2016
- Arson Prosecutor of the Year, 2004, International Association of Arson Investigators, Minnesota Chapter

Presentations
- "Incident Management: From Initial Complaint to Litigation," 7th Annual ACC Minnesota In-House Counsel Conference; June 14, 2018
- "Surviving the Waves: Implied, Express, and Subject Matter Waivers of Attorney-Client Privilege,"; May 17, 2017

Education
- William Mitchell College of Law J.D., cum laude, 1995
- University of Minnesota, Duluth B.A., magna cum laude, 1992 - Majors: Criminology and Political Science

PANEL: MDL – TO CENTRALIZE OR NOT CENTRALIZE, THAT IS THE QUESTION

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MDL: To Centralize or Not Centralize, That is the Question
Enjoliqué Aytch

It is becoming more and more common in mass torts, especially in products liability cases involving pharmaceuticals or medical devices, to be consolidated into a multidistrict litigation (MDL) proceeding. When multiple cases involving a single product are filed in various federal districts, an attorney (usually plaintiffs' counsel, but sometimes by defense counsel) initiates the process by filing a motion to transfer with the United States Judicial Panel on Multidistrict Litigation (JPML). In this pleading, a request is made to send all cases involving "common questions of fact" to a particular judicial district for the coordination of all "pretrial proceedings."

Since its inception, the JPML has considered motions for centralization in more than 2,750 dockets involving over 600,000 cases and millions of claims therein. The type of litigation considered for centralization have involved categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability cases; marketing and sales practices; patent validity and infringement; antitrust price fixing; data security breaches, securities fraud; and employment practices.

The authority to transfer cases to an MDL is found in 28 U.S.C. § 1407(a), which provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

This paper will serve as a primer for the MDL process and procedures, including the procedures after transfer, the various criteria the JPML considers when determining whether consolidation into an MDL is warranted, and the various considerations that counsel should analyze when faced with the decision to centralize federal cases into a single MDL.[1]

1 Some states, such as New Jersey, have a comparable state process of consolidating cases filed in state courts from around the county into a single action in front of one judge. This is usually, although not always, referred to as multicounty litigation, or an MCL. An examination of the MCL process and its own implications is outside the scope of this paper, although there are many similarities between the two.

The Judicial Panel on Multidistrict Litigation ("JPML")

The JPML determines whether civil actions pending in multiple federal districts should be transferred to a single court federal district court for coordinated pretrial proceedings. If the JPML determines centralization is warranted, it will also select the judge (the "transferee court") to provide over the proceedings. The JPML is made up of a panel of seven circuit and district court judges appointed by the Chief Justice of Supreme Court of the United States, and no two of them may be from the same circuit. 28 U.S.C. § 1407(d). The panel holds bi-monthly meetings around the country to decide multiple motions for centralization in a variety of cases. The next two hearing sessions will be held on September 27, 2018, in San Francisco, CA, and November 29, 2018, in New York, NY. A case will not be transferred and consolidated into an MDL without an oral argument. The concurrence of four members shall be necessary to any action by the panel. 28 U.S.C. § 1407(d).

The current JPML consists of:

- Sarah S. Vance, Chair, USDC Eastern District of Louisiana
- Majorie O. Rendell, USCA Third Circuit
- Charles R. Breyer, USDC Northern District of California
- Lewis A. Kaplan, USDC Southern District of New York
- Ellen Segal Huvelle, USDC District of District of Columbia
- R. David Proctor, USDC Northern District of Alabama
- Catherine D. Perry, USCD Eastern District of Missouri

How an MDL Begins

The creation of an MDL begins with a party filing a motion for transfer, which may also be known as a motion for centralization or a Notice of Related Actions. By way of example, such a motion may be titled: "Motion of Plaintiffs for Transfer of Actions to the Northern District of California Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings." See Sample of Motion for Transfer, Sample M-1.[2] Several attachments are filed with the Notice of Related Actions, including a schedule of actions, a proof of service indicating service of papers on the clerk of each district court that may be affected by the motion, and the complaint and docket sheet for each action should be filed as exhibits.

The last document to be filed is the Interested Party Petition, which contains the arguments for consolidation. The moving party bears the burden of proving that transfer is proper, and must convince the panel (or at least four of the seven panelists) that the three criteria are present and warrant transfer.

Overview of the Criteria for the Creation of an MDL

The following three criteria must be satisfied in order to transfer cases to a transferee court for consolidated pretrial proceedings:

1. The cases must share more than one question of common fact. The issues must be material, contested, and factual. Legal issues are not sufficient.
2. Transfer must advance just and efficient conduct of the actions.
3. Transfer must serve the convenience of the parties and witnesses.

Each of these criterion will be discussed in more detail below.

Hearing Before the JPML

Once all of the required documents have been filed, the panel enters an order setting oral argument to determine (1) whether the pending federal cases should be centralized into an MDL and (2) what federal district court and judge should be assigned the litigation.

2 Available at: http://www.jpml.uscourts.gov/sites/jpml/files/Checklist%20for%20New%20MDL%20Motion-3-2011.pdf.

The atmosphere of a JPML hearing is akin to a legal conference, with many more attorneys showing up to monitor the proceedings than actually participate in them. Counsel is given limited time to speak, and so should focus their comments on the matters that are generally accepted to be the most pertinent to the panel. These include:

(1) how many common questions of fact exist;

(2) how many cases have been filed;

(3) will the transfer prevent duplicative work and the possibility of inconsistent rulings;

(4) how far along is the litigation in any given district;

(5) will centralization increase or decrease the possibility of settlement; and

(6) what is the availability of judge in any proposed transferee court?

If there is a significant number of pending cases that will make transfer a given or if the defendant(s) agree to centralization, the argument quickly shifts to the selection of an appropriate transferee court. The inquiry of the panel as to the transferee court includes:

(1) whether the proposed district has adequate transportation and hotel facilities to handle counsel from across the county;

(2) the location of the defendant(s) in relation to the proposed venue;

(3) the location of witnesses and evidence in relation to the proposed venue;

(4) the presence or absence of other MDLs in the district; and,

(5) the interest of the proposed transferee judge in handling the MDL.

Many times, the panel will question various of the plaintiffs' counsel as to the interest of a particular judge in handling an MDL. Generally, the best practice for reaching out to potential judges is for plaintiffs' counsel, with participation of defense counsel, to contact a potential transferee judge's chambers or the circuit clerk's office of the proposed federal district and ask if there is interest in an MDL.

After the hearing, the panel will consider the evidence and enter an order to grant or deny transfer and designate a transferee judge if appropriate. Rulings on transfer are surprisingly swift, usually within two weeks of the hearing. The orders and transfer and consolidation are also relatively brief, usually only numbering 5 or 6 pages.[3] A concurrence of four judges on the panel is required to direct or deny a transfer. Any order to transfer will be filed in the office of the clerk of the transferee court.

The Transferee Court

Once the JPML's order is filed in the office of the circuit clerk of the transferee court, transfer becomes effective and the jurisdiction of the transferor court ceases and the jurisdiction of the transferee court is exclusive. The transferee court will usually schedule a status conference, with one of the most important issues initially addressed is the leadership of the plaintiffs' (and sometimes defendant's) case.

In many cases, the court will appoint interim lead or liaison counsel to be spokespersons for each side until permanent leadership is appointed. Ultimately, it is the judge who decides who directs the litigation for the plaintiffs. The court will appoint attorneys to serve as lead counsel and liaison counsel. The role of lead counsel is often divided between or among two or more attorneys who direct the litigation for plaintiffs. Liaison counsel is likely to be a local attorney who handles administrative matters and assists in the "coordination of communications between the court and other counsel." The next attorneys appointed by the court are members of the Plaintiffs' Steering Committee ("PSC") or executive committee. Committees are usually organized by tasks such as discovery, briefing and science/experts. For the plaintiffs' case, it is in these committees that the work of the MDL is done.

There are two basic models for leadership selection. In the "competition model," the court invites applications for leadership positions, which are evaluated and appointments made. In the "consensus model," the court directs the plaintiffs to

3 See e.g., MDL No. 2846 - IN RE: Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation, available at: http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2846-Transfer-Order-7-18.pdf.

file a proposed leadership slate, subject to objections and to court approval. Both methods involve usually lengthy applications. Generally speaking, most MDL leadership contests end in negotiated slates approved by the court.

After the court appoints the leadership, the appointed lawyers control the MDL and litigate the cases on behalf of all plaintiffs' counsel. The work will include discovery (the Plaintiff's Fact Sheet ["PFS,"] depositions, expert disclosure), motion practice (Daubert hearings), screening and selection of potential bellwether cases and, often, negotiation of a group settlement. The leadership fronts the cost of the litigation and, for their efforts, they are awarded "common benefit" fees and expenses at the conclusion of the litigation.

Remand

In the unusual case where the pretrial litigation does not result in the settlement of the MDL, the transferee court will file a "suggestion of remand"[4] with the panel recommending that the cases be remanded to their respective transferor districts. The complete record of the pretrial proceedings is sent to the transferor court in the form of a pretrial order. The order contains a summary of rulings, a chronology of proceedings, an outline of issues that remain undecided and an indication of the present state of the case. The remanded cases then proceed to trial in their respective districts. Generally the plaintiffs' leadership makes a "trial package" containing the common elements of the case such as depositions and key exhibits is available to counsel.

LAW AND ANALYSIS

First Criterion – More than One Question of Fact Between Cases

Some of the fact questions that the Panel will look at to determine whether the first criterion – the requirement that the cases share more than one question of common fact – is satisfied include, but are not limited to:

1. The product at issue in the litigation

2. The alleged risks and defect of the product at issue

3. The adequacy of the product's warning label with respect to those risks

4. The alleged injuries caused by the product

Additionally, the presence of some individualized fact issues (for example, with respect to causation), will not be sufficient to overcome transfer where common questions of fact predominate. This is especially true in medical device product liability actions. See, e.g., In re Mirena IUD Prods. Liab. Litig., 938 F. Supp. 2d 1355, 1357 (J.P.M.L. 2013); In re: Zimmer Durom Hip Cup Prods. Liab. Litig., 717 F. Supp. 2d 1376, 1377-78 (J.P.M.L. 2010) ("Though the actions certainly present some individual issues, this is usually true of device cases and other products liability cases. Section 1407 does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization.").

Some defendants may have an argument against centralization where the injury, adverse reaction, or alleged defect differs. For example, in In re Mirena IUD Prods. Liab. Litig., the Panel ordered that the actions pertaining to the Mirena IUD products be consolidated and transferred to an MDL, except as to a single case subject to the motion. The lone case which it denied transfer alleged that the product causes autoimmune disorders and that the product's label fails to provide adequate warnings with respect to such disorders. 938 F. Supp. 2d at 1357-58. Because the remaining 40 pending actions related to the risk of perforation or migration, the court ordered that the single case with allegations of a substantively different risk did not satisfy the criteria for more than one common factual issues.

Second Criterion – Advancement of the Just and Efficient Conduct of the Actions

For the second criteria—whether transfer will advance just and efficient conduct of the actions—the JMPL considers many factors in determining whether transfer will be just and efficient, such as the number of cases involved, the number of shared questions of fact and the nature of the questions. The potential to avoid duplicative discovery, conflicting rulings, unjust delay or needless complication will

4 See e.g., MDL No. 1964 - IN RE: NuvaRing Products Liability Litigation, available at: https://anewmerckreviewed.files.wordpress.com/2017/09/life-final-nuvaring-edmo-09-19-2017.pdf.

also be considered. An important factor that is also taken into account is the availability of the transferee judge to handle the cases.

A number of challenges to centralization focus on this criterion. One of the largest motivating forces supporting the creation of an MDL is to streamline the pretrial discovery process. To avoid centralization, a defendant could argue that informal coordination between the cases would be a practical, efficient, and convenient alternative to an MDL, especially when the number of cases involved is manageable, and there are a limited number of counsel and jurisdictions involved.

The JPML has repeatedly found that "informal cooperation among the involved attorneys is both practicable and preferable to centralization" and has denied plaintiffs' motion for centralization on that ground. See e.g., In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig., 38 F. Supp. 3d 1380, 1381 (J.P.M.L. 2014) (hereinafter "In re Mirena").[5] While noting that some characteristics of the litigation suggest it might be beneficial to centralize the actions, the Panel found:

> Several factors in this new wave of actions, however, weigh against centralization. First, the nine actions before the Panel are filed by a single plaintiffs' counsel, and name the same defendant, which has national counsel coordinating its response to this litigation. Defendant represents that it stands ready and willing to share any overlapping discovery upon entry of an appropriate protective order (which already has been entered in two actions). Given the few involved counsel and limited number of actions, informal cooperation among the involved attorneys is both practicable and preferable to centralization. See In re: Chilean Nitrate Products Liab. Litig., 787 F.Supp.2d 1347, 1347 (J.P.M.L.2011). The actions before the Panel are well-positioned for informal coordination, as they all are in their infancy with discovery having commenced in a handful of actions only in the last few months.

Id. at 1381. See also In re: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Prods. Liab. Litig., 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013) (denying the motion to transfer and centralization and stating: "[I]mportantly, Pfizer represents in its brief that it is 'ready and willing to work with Plaintiffs' counsel in the [non-south Carolina] actions to appropriately coordinate any common discovery or other pretrial matters across the cases.' Given that express representation, the limited number of involved actions [5 actions subject to the motion, but 23 related federal actions], and the overlap among counsel, we do not believe that creation of an MDL is necessary at this time.") (internal citation omitted).

As part of a coordinated discovery effort to escape centralization into an MDL, a defendant could try to negotiate an agreement with plaintiffs that all discovery disputes will be heard by a single district, such as the one where discovery is furthest along.

One of the main risks in taking the coordinated discovery approach is the possibility of being subject to the most permissive discovery order from one district that will apply across all other districts. Federal district judges are sometimes willing to allow coordinated discovery between various districts proceed together, and are less prone to second-guess another federal judge's ruling on a particular issue. However, federal judges will also usually stay in contact with each other in order to streamline the pretrial process and promote judicial economy, and divergent or inconsistent discovery rulings would hinder those goals.

The Panel also must also make the determination of whether centralization is proper by looking at the actual number of cases currently filed against the defendant. This effort should be undertaken without speculating that there is a possibility that additional actions would be filed in the future. See id. ("Although plaintiffs assert that the number of actions is likely to expand substantially, the mere possibility of additional actions does not convince us that centralization is warranted."); see also In re: Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig., 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (denying centralization, noting that "[w]hile proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions.").

5 See also In re Cymbalta (Duloxetine) Prods. Liab. Litig. (No. II), 138 F. Supp. 3d 1375, 1377 (J.P.M.L. 2015); In re OxyElite Pro & Jack3d Prods. Liab. Litig. (No. II), 65 F. Supp. 3d 1412, 1413-14 (J.P.M.L. 2014).

The Panel also distinguished its prior decision centralizing a number of Mirena actions alleging uterine perforation and migration injuries because the record before that Panel involved a far greater number of actions—"in addition to the eight actions on the motion, there were 40 related actions in 17 other districts filed by numerous different plaintiffs' counsel." Id. (citing In re: Mirena IUD Prods. Liab. Litig., 938 F. Supp. 2d 1355, 1356 (J.P.M.L. 2013)).

This is not to suggest that the JPML will not order centralization into an MDL of cases with a handful of pending actions. See In re MLR, LLC, Patent Litig., 269 F. Supp. 2d 1380 (J.P.M.L. 2003) (ordering consolidation of pretrial proceedings in multidistrict litigation involving same parties' disputes over validity and infringement of complex patents was warranted, even though only three actions were involved and there was not complete identity of issues); see also In re: Kaba Simplex Locks Marketing and Sales Practices Litig., 764 F. Supp. 2d 1339 (J.P.M.L. 2011) (finding consolidation was proper in a products liability action involving eight pending actions, where no parties actively opposed the creation of an MDL)

Another argument weighing against centralization is if the procedural posture of the actions vary significantly. For example, if general causation discovery was complete or soon to be completed in one or more of the actions, while other actions are still in their infancy, this would militate against centralization. See In re Cymbalta (Duloxetine) Prods. Liab. Litig. (No. II), 138 F. Supp. 3d 1375, 1376 (J.P.M.L. 2015). In In re Cymbalta (No. II), the Panel was faced with a renewed motion for transfer and centralization after it had denied the first one. In denying the motion for a second time, the Panel stated:

> In our Cymbalta I decision, we acknowledged that these actions "share factual issues concerning Cymbalta's development, marketing, labeling, and sale," id. at 1393, but concluded that centralization was not warranted for a number of reasons. First, the procedural posture of the actions "varie[d] significantly." Id. For example, whereas in the two earliest-filed of the cases, the discovery cutoff was quickly approaching, the more recently filed actions were "still in their infancy." Id. at 1394. Second, the record showed "that most, if not all common discovery ha[d] already taken place in th[e] earlier-filed actions." Id. Lilly already had produced nearly two million pages of documents, as well as corporate representatives for Rule 30(b)(6) depositions in the areas of drug safety, sales training, and labeling. Id. Third, only a limited number of plaintiffs' counsel were involved in the litigation. Id. Just two firms represented plaintiffs in all of the 25 constituent actions, and Lilly was represented by only one law firm. Id.
>
> …
>
> Common discovery has advanced even further since Cymbalta I. Indeed, in recent months, four Cymbalta cases have gone to trial—including two cases in the Central District of California that were on the Section 1407 motion in Cymbalta I. According to Lilly, it has produced nearly three million pages of documents; Lilly witnesses have sat for four 30(b)(6) depositions covering such topics as the company's regulatory affairs, sales training, clinical trial, and safety surveillance functions; and there have been seven fact depositions of current and former Lilly employees involved with the development, clinical trials, and post-marketing surveillance of Cymbalta withdrawal trials. Lilly represents that it has made this common discovery available to all plaintiffs in cases in which discovery has been served on Lilly and protective orders have been entered, and that it will make that discovery available to all plaintiffs in the same manner. Although moving plaintiffs complain that discovery has been conducted in an uncoordinated manner and that Lilly's production has been deficient in several respects, the current record even more firmly supports our conclusion in Cymbalta I that "the discovery that has occurred to date has been substantial."

In Cymbalta II, the plaintiffs argued that since the first decision, Eli Lilly had refused to cooperate in a number of ways which should now weigh in favor of centralization, such as rejecting proposed tolling agreements, refusing to consent to plaintiffs' plan on dismissing and refiling cases on the condition that Eli Lilly not raise potential statute of limitation defenses, and other procedural requests. The Panel discounted these arguments, stating: "But in our decisions in which we have denied centralization and found cooperation feasible, we have never suggested that such cooperation entails requiring

a party to acquiesce to a given motion, agree not to raise a possible claim or defense, or accede to its opponent's use of a particular procedural strategem." Id. at 1377 n.4.

Third Criterion – Transfer Must Serve the Convenience of the Parties and Witnesses

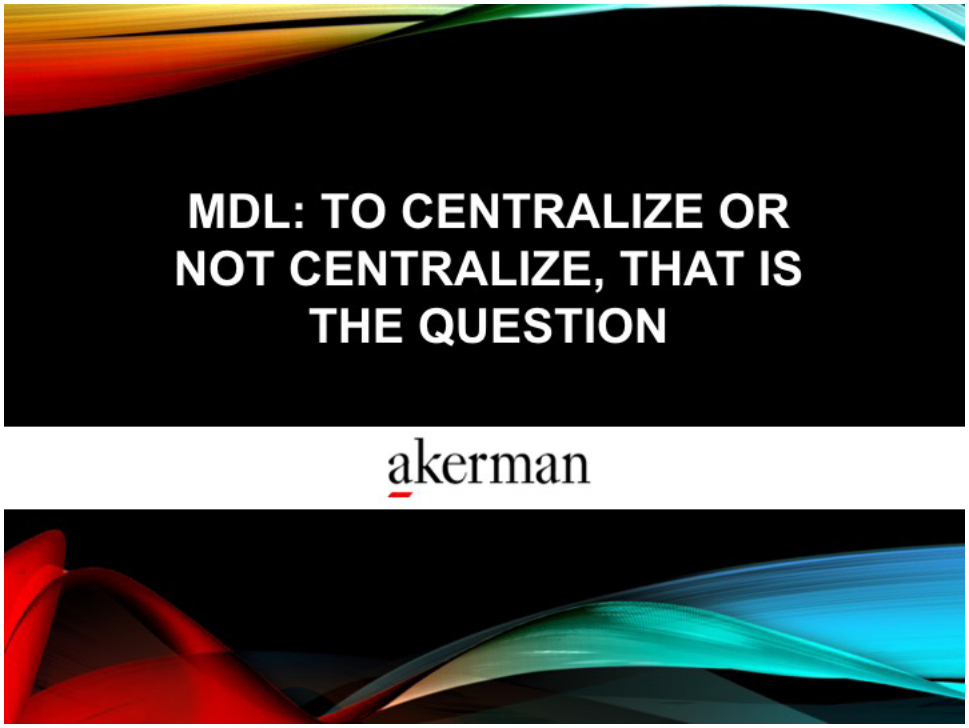
One of the purposes of transfer is to protect the parties from inconvenience, added expense and loss of forum choice. The geographical location of pending cases and the residences of parties and witnesses are considered to determine the most convenient district to handle the actions. The JPML must also rule out the possibility that any of the parties have ulterior motives, such as forum shopping, for transferring their action. Ultimately, the panel has the authority to transfer the litigation to any district it chooses but usually selects a district that is both convenient and has pending cases.

Other Considerations / Thoughts

Centralization streamlines the litigation. Rather than having upwards of 30 cases pending in different federal courts across the country, the litigation is coordinated in a single forum before a jurist the parties begin to become familiar with allowing some familiarity, and it prevents multiple scheduling orders requiring counsel to jump from federal district court to another. The litigation will also proceed in an orderly fashion in a manner that saves the parties attorneys' fees and costs.

Importantly, because of the fewer number of cases, there should be less disruption to the business. Because the MDL centralizes pre-trial and discovery workup, the business people are disturbed fewer times as there is not the same need to be deposed repeatedly and asked for the same discovery information.

However, the creation of an MDL attracts a significant number of additional cases being filed against it. This is sparked by coordinated advertising by the plaintiffs' counsel in an effort to increase the total number of cases and therefore the likely settlement value. Lawyers may run television, radio, print or Internet ads seeking potential plaintiffs to represent or refer to other firms for a fee. There is also the belief that once an MDL is created, it facilitates and motivates a defendant to negotiate for an enter into an early global settlement.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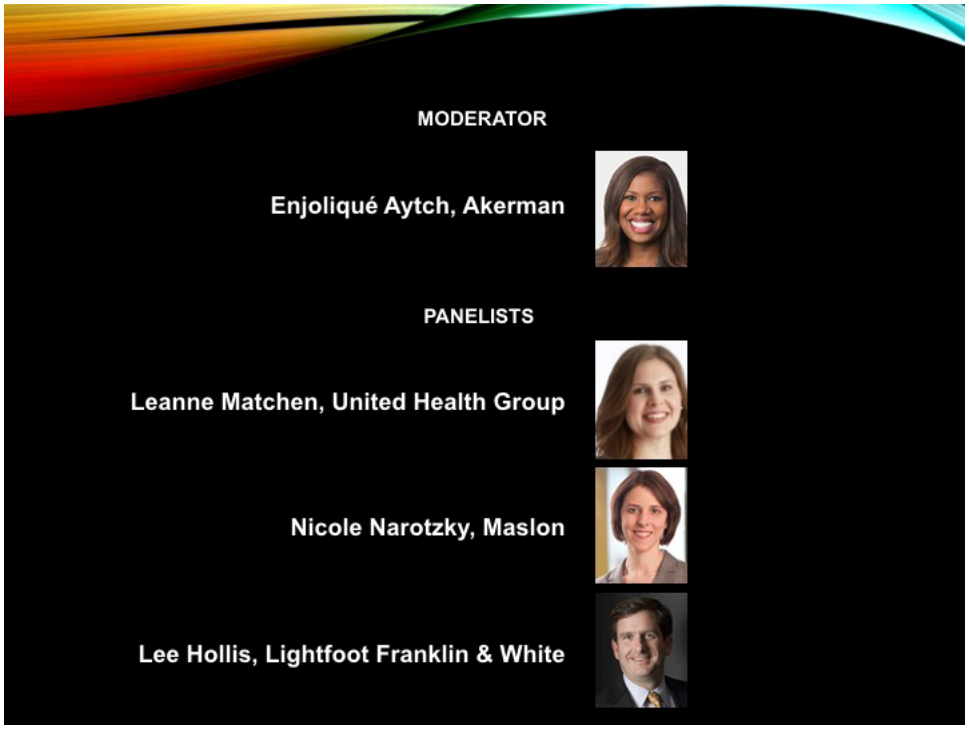
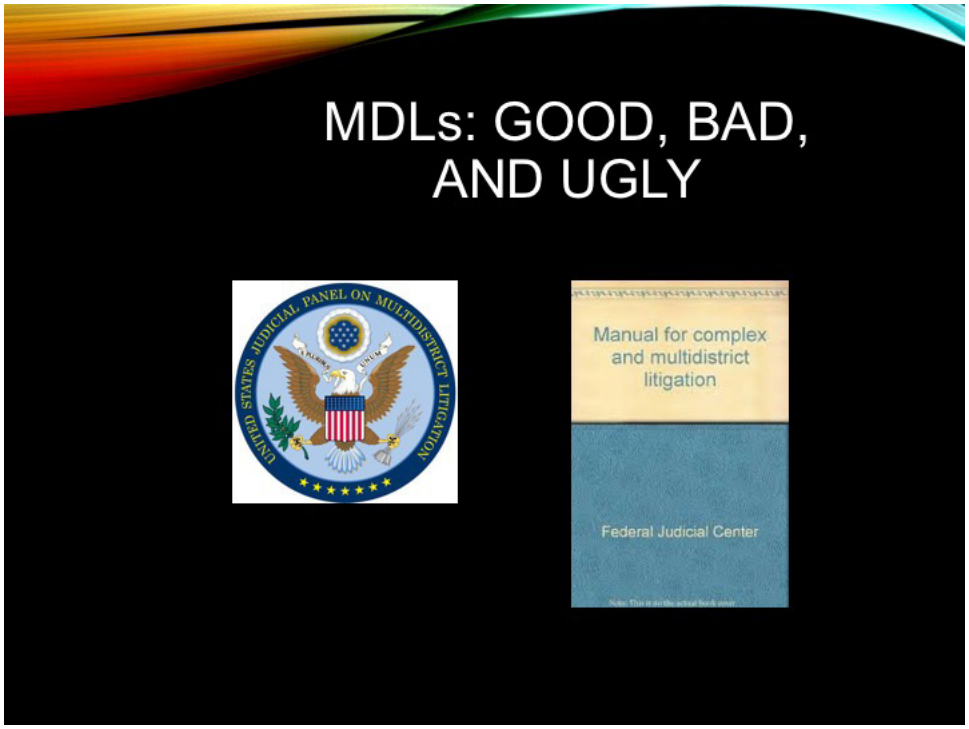

MODERATOR
Enjoliqué Aytch, Akerman
PANELISTS
Leanne Matchen, United Health Group
Nicole Narotzky, Maslon
Lee Hollis, Lightfoot Franklin & White


EXPERIENCE WITH MDLS
PHYSIOMESH
OPIOIDS
OPIOID EPIDEMIC
OPIOID CRISIS
Firestone
BARD
Blood Clot Filters
COOK
BARD
AMS


BELLWETHER TRIALS
bellwether trial
test trial in a mass tort case in which the verdict can influence the out-of-court settlements of hundreds or thousands of plaintiffs whose cases did not go to trial
Jury Awards $247 Million to Patients in Pinnacle Hip Trial
JURY AWARDS $11M TO PLAINTIFF IN WRIGHT CONSERVE HIP BELLWETHER TRIAL
JUDGE SELECTS FIRST COOK IVC FILTER BELLWETHER TRIALS FOR 2017
FIRST XARELTO BELLWETHER TRIAL ENDS IN FAVOR OF DRUGMAKER
$1 Billion Verdict in 3rd DePuy Pinnacle Hip Injury Bellwether Trial


RESOLVING LITIGATION IN A MDL
New Jersey Law Journal
Drugmakers Agree to $300M Settlement in MDL Over Hypertension Medication Benicar
STRYKER TO SETTLE
HIP MDL FOR
$1.4 BILLION
Mass Tort Lien Resolution and Multi-District Litigation
BREAKING NEWS:
TAKEDA SETTLES ACTOS LAWSUITS
FOR $2.37 BILLION


MDLs: GOOD, BAD, AND UGLY
UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
Manual for complex and multidistrict litigation
Federal Judicial Center

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Enjoliqué Aytch focuses her practice on product liability, mass tort litigation, and commercial litigation. She has extensive experience defending domestic and international medical device and pharmaceutical manufacturers in multi-plaintiff actions, as well as hospitals and physicians in medical malpractice actions in all stages of litigation, including trial. She has represented high profile clients in disputes capturing media attention, including Atrium Medical Corporation and Under Armour.

Enjoliqué serves as co-chair of Akerman's Black Women Lawyers Affinity Group, an internal network group whose objective is to provide support, development, and networking opportunities. She was re-selected into The National Black Lawyers Top 40 Under 40, highlighting the top 40 black attorneys under the age of 40 from each state or region who have demonstrated excellence in their legal practice. Enjoliqué was also designated as a fellow of The Leadership Council on Legal Diversity in 2017.

Areas of Expertise

- Product Liability and Mass Torts
- Litigation
- Health and Life Sciences

Notable Work

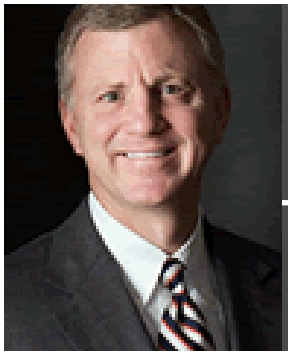
- Medical Product Liability Multidistrict Litigation: Represent a hernia mesh medical device manufacturer in a high-profile MDL centralized in the District of New Hampshire against claims of strict product liability, negligence, breach of warranty, and other causes of action.
- Trademark Infringement: Represented sportswear giant, Under Armour, in the defense of a declaration action seeking confirmation that the Plaintiff's trademarks do not infringe on Under Armour's trademarks, the cancellation of Under Armour registered trademarks, and in the prosecution of Under Armour's claims for trademark infringement, trademark dilution, unfair competition, and cybersquatting under the Lanham Act, 15 U.S.C. § 1051, et seq.

Honors and Distinctions

- Daily Business Review Professional Excellence Awards 2017, Recognized as a "Young Lawyer on the Rise"
- The National Black Lawyers Top 40 Under 40, 2015-2016
- Legacy Miami "Miami-Dade County's 40 Under 40 Black Leaders of Today and Tomorrow for 2014"
- Georgia Super Lawyers Magazine 2011, Rising Star
- 2010 Young Lawyers Division Leadership Academy of the State Bar of Georgia, Alumni
- "Career Spotlight: Enjolique Aytch, Akerman LLP Litigation Partner, Building on Diversity," South Florida Sun Sentinel, Jun. 1, 2017

Education

- J.D., University of Georgia School of Law, 2007, cum laude, Georgia Journal of International & Comparative Law, Editor-in-Chief
- B.A., American University, 2003, Dean's List Recipient



OPENING STATEMENTS IN PRODUCTS LIABILITY TRIALS: RECOGNIZING JURORS' BIAS

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Opening Statements in Products Liability Trials – Recognizing and Using Jurors' Cognitive Shortcuts to Persuade and Win
Harlan I. Prater, IV

Opening statement is a truly remarkable part of a trial. The jurors typically have been given a brief introduction of the case by the judge, and they have endured voir dire. They have at least some idea of what the case is about and what the parties' respective trial themes are. Opening statement often is presented as the first real "ceremonial" event in the trial. The struck jury has been sworn in and is in the box, only one lawyer stands up for each side, and he or she lays out his or her version of the dispute for the first time. It can be a very tense time, because opening statements can set the tone and rhythm of a trial. Unquestionably, it is an extraordinarily important part—if not the single most important part—of the trial.

Lawyers, psychologists and other commentators have been writing and talking about opening statements for decades. My partner, Warren Lightfoot, once recalled, "Back in 1964 when I started practicing, we did not think opening statements were very important. We regarded them as minor inconveniences to be tolerated and to be given little consideration. We thought we could prepare them at the last minute, hurry through them, and get on to the more important parts of the trial." Warren learned differently over the next forty-plus years.

Subsequent research has indicated that up to 85 percent of jurors make up their minds about who should win a trial based on opening statements. The thinking (supported by analysis) has been, "While other parts of the trial confirm it, opening statements give the jury a basic feeling for who is right and why, who has the better facts, what is the logical result." W. Lundquist, "Advocacy in Opening Statements," The Litigation Manual (1999). These commentators have stressed the rule of primacy—what is believed first tends to be the most difficult to dislodge—and they have observed that all of the trial, from the direct examinations, to the cross-examinations, to the closing arguments, flows from the opening statements. See A. Ordover, "Persuasion and the Opening Statement," The Litigation Manual (1999).

These arguments and analyses are logical and difficult to dispute. There was a time, though, that I did not buy them. I believed that jurors simply did not know enough about what was going on in the courtroom generally, much less with regard to the facts of the specific case they were hearing, to make a definite decision about who should win based solely on opening statements. Rather, I believed that the most important part of a trial was the defense lawyer's cross-examination of the plaintiff's first truly substantive witness whose testimony was disputed—be it a fact witness or an expert witness. It was during that witness's testimony, I thought, that the plaintiff was firing its best shot, and it was my opportunity to show the jury that the plaintiff's best

shot was off the mark. It was during that witness's testimony that I could attack the credibility of the plaintiff's entire case and bolster the credibility of our case.

With the benefit of hindsight and more experience and study, I now realize that I was wrong. Perhaps my affinity for that first cross-examination was clouded by how much I enjoy cross-examining a witness—particularly a paid expert. To me, there is no greater "rush" for a trial lawyer than taking on an adverse expert witness. At the end of the day, however, it is clear (to me, at least) that opening statements could well be the single most important part of a trial. Moreover, how jurors listen to opening statements has changed dramatically as the Internet, social media, and television programming have greatly influenced how they receive and process information.

Cognitive Shortcuts

Trial lawyers must recognize that jurors bring innate and understandable biases to their decision-making. For example, psychoanalytical studies have revealed:

- A doctor who has just diagnosed two cases of bacterial meningitis is likely to see it in the next patient, even though the patient only has the flu, which resembles bacterial meningitis.

- People play the lottery—and overestimate their likelihood of winning—because they hear about the big jackpots and winners rather than the millions of other players who lose every week.

- People judge themselves more likely to be murdered than getting stomach cancer, because homicides are so frequently reported in the news. In fact, it is five times more likely that you will die of stomach cancer (which is already fairly rare) than be murdered.

- People think that shark attacks are relatively frequent because of media reports. The true fact is that you are more likely to be killed by a part that has fallen off a plane, which in itself is unbelievably unlikely.

- When two of your friends have just had car accidents, you tend to believe that the roads are becoming less safe and feel that you are more likely to have an accident, too.

See J. Dean, " The Availability Bias: Why People Buy Lottery Tickets" (2016) (citations omitted). In other words, humans use cognitive "shortcuts" (also referred to as heuristics) to process unfamiliar information and make decisions. The key for the trial lawyer is to take advantage of these shortcuts in presenting his or her case, particularly in opening statement. Among the most commonly analyzed cognitive shortcuts are the following:

(1) Hindsight Bias.

(2) Confirmation Bias.

(3) Anchoring Bias.

(4) Availability Bias.

See R. Fuentes, A. Jehle, N. Jetmundsen, "How to Captivate Jurors Like a Hollywood Movie Director," For the Defense (July 2016).

Hindsight Bias

Researchers have proposed that there are three levels of hindsight bias, ranging from memory distortion ("I said it would happen"), to a sense of inevitability ("It had to happen"), to foreseeability ("I knew it would happen."). This bias causes us to selectively recall information that confirms what we know to be true, and then process new information to fit our view of the world. See N. Roese, K. Vohs, "Hindsight Bias," Perspectives on Psychological Science (Sept. 2012).

Confirmation Bias

Once we have formed a view, confirmation bias causes us to embrace information that supports that view and reject information that is contrary to that view. "Simply put, it is easier to convince someone about a viewpoint that he or she already believes than a new one." R. Fuentes, et al., at 20. It is a form of "wishful thinking" that may cause us to make the wrong decision, because we tend to stop gathering information that may call our decision into question.

Anchoring Bias

When we buy a used car, we may focus excessively on the amount of the monthly payment, the odometer reading, the condition of the tires, or the car's model year, rather than how well the engine was maintained. This is an example of anchoring bias, through which we tend to give too much value to specific information—the anchor—and then adjust other information to fit that value.

Availability Bias

The best definition of "availability bias" that I have seen comes from Rick Fuentes, a founding partner of R&D Strategic Solutions LLC, a jury consulting firm in Orange Beach, Alabama. Dr. Fuentes has said, "People are more heavily influenced by information that is more available to them, meaning that it can be easily brought to mind and accessed."

What does all this psycho-babble have to do with trying a products liability lawsuit?

We have long heard that an opening statement should tell a story. One commentator has gone so far as to suggest that an opening statement, at its essence, should succinctly complete the following single sentence: "When it comes down to it, this case is all about _____." See G.C. Ritter, Creating Winning Trial Strategies and Graphics (2015), at 308. This is exactly what jurors are looking for the lawyer to do throughout the trial, especially in opening statement. The key, though, is to structure your story in a way that exploits the cognitive biases that the jurors bring with them to the courtroom.

I am no psychologist, but I am convinced that the way in which we process information has changed more in the past decade than in the prior 100 years. The Internet, apps on smartphones (e.g., Instagram, Twitter), and the prevalence of investigative television dramas, such as CSI, have fundamentally changed how we receive and process information. This transformation is profound in how jurors observe what goes on in a courtroom:

- No longer do jurors view lawyers with respect, as the purveyors of truth and justice. Today's jurors feel empowered to protect their own feelings. They do not want to be told what to believe by some random lawyer they do know. On the contrary, jurors feel like they—alone—are qualified to solve cases.
- Impatience is at an all-time high. Dr. Fuentes has reported that "jurors are really bored." They have little patience for a lawyer who is disorganized, who rambles, who presents redundant evidence, and who wastes their time with long examinations and arguments. Jurors expect today's lawyers to get down to business—their time is valuable.
- Jurors want to be entertained. They want to be given an interesting narrative with appealing visuals, and they want lawyers to treat them as the smart people they are—not as students who need to be taught.

In light of how jurors view trials differently, I have come to the realization that I have to change how I try products liability cases—starting with opening statement. You have seen many lists of "Do's" and "Don'ts" when it comes to opening statement, and I do not have any new magical list that will be particularly innovative, much less a list that will guarantee a win. Nevertheless, some of my longstanding rules have been tweaked to (a) give jurors what they expect, and (b) maximize the advantages to be gained by recognizing the cognitive biases of today's jurors. For purposes of this discussion, rather than restate pointers made by many others that may only insult the reader, I will add four rules to which I am committed in trials to come.

Rule 1: Start Strong

The quality of the beginning shapes all of what follows. When a musician starts off strong, for example, something special happens. I think back to the "Star Spangled Banner" performance by Whitney Houston before the Super Bowl that was played in the earliest days of Operation Desert Storm. She walked to the podium full of energy and confidence, and her first words, "Oh, say can you see," were sung with power and unadorned conviction. Whitney Houston was where she was meant to be, doing what she was meant to do, and she lifted a nation with her clear, strong voice. Had she started meekly, what proved to be an unforgettable moment would have been quickly forgotten.

Opening statement is the trial lawyer's first opportunity to truly catch the jury's attention. Rather than spending the critical beginning of opening statement thanking the jurors for being there or talking about what a good corporate citizen your client is, get right to it—even before you introduce yourself and your team. For example, in an automotive products liability case in which the plaintiff alleges that a defect in his steering system prevented him from avoiding a collision with a tractor-trailer that had pulled in front of him, the defense lawyer could start his or her opening statement as follows, "George Smith unfortunately was hurt when he drove into the side of a tractor-trailer that was pulling onto Highway 69. A cell phone, opened to Facebook, was found in his lap . . . ."

This is an area, too, where recognition of the jurors' biases is critical. In a products liability case, the defense lawyer should recognize that most jurors believe that more warnings or safety features will prevent most accidents (i.e., hindsight bias). Accordingly, the defense lawyer should avoid making arguments that try to convince jurors of something that is contrary to their preconceptions (i.e., confirmation bias), such as "sometimes bad things happen to good people and there is no one to blame," or "large corporations put safety above everything else."

Rule 2: Tell a Story that is Accessible, Repeatable, and Appealing

Jurors come to a courtroom with preconceived notions of what is going to happen, but the experience is still very new to them. They are listening to things they may have never thought about being said by people they do not know. They are sitting in a jury box with strangers. Accordingly, they naturally will rely on their life experiences—their cognitive biases—to help them (1) receive and understand the new information to which they are being exposed, and (2) make a decision based on that information.

Jurors want to figure out for themselves what happened and why it happened. "Each juror strives to make sense of the conflicting information by formulating a story that explains the situation in familiar terms. . . . Jurors can often sum up their stories in as little as one sentence." R. Fuentes, et al., at 17. Dr. Fuentes has used as an example a trucking accident case, in which one juror described the case this way: "This young man's life would not have been taken away if the company had followed policies and procedures!" Id. It is up to the trial lawyer to succinctly structure the themes of his or her case in opening statement so that they are accessible and repeatable by a majority of the jurors. Id. at 22 ("Theme development is critical. Themes are the connective tissue for a story. The simplest definition of a theme is that it must be repeatable, readily comprehensible, and have broad appeal.")

This is an area where recognizing the role of jurors' biases, particularly the anchoring bias and the availability bias, can be very important for a defense lawyer. For example, assume that you have a products liability case in which the plaintiff's injury was caused by his own negligence or the negligence of a third party. Rather than waste the jury's time with a rendition of how safe your product is and how many standards it complies with, the defense lawyer can use his or her opening statement to tell a story that focuses on the roles of parties other than your client. Formulate the initial story of the case with a narrative that places the plaintiff or third parties in the best position to have prevented the accident. Who really had the knowledge and control to prevent the accident? You want to tell the jury about the actions of these other parties—first and foremost—in your opening statement in a way that the jurors can easily access and repeat during deliberations. This approach will give the jurors an anchor upon which they can rely, and it also will trigger their availability bias by offering a narrative that they can grasp and pitch to other jurors. As Dr. Fuentes has cautioned, "The more you are talking about your own client, the more you are asking the jury to poke holes in your story."

This is not to say that your opening statement should be a full attack on the plaintiff or third parties. Jurors do not want to be preached to about who was or was not responsible—they want to come to that conclusion on their own—and research has shown that rhetorical questions, rather than declarative statements attributing fault, are much more effective in leading jurors where you want them to end up. The best opening statement simply lays out the facts, in words that the jury can access and repeat,

from which the jury can come to the conclusion you want.

Rule 3: Use Visual Aids, But Do Not Let Visual Aids Rule You

I have often said that with the inexpensive technology available nowadays, the trial lawyer's ability to use visual aids is limited only by his or her imagination. It also is true that jurors tend to believe what they see, rather than what they hear.

Visual aids can be very effective in making an opening statement "pop" for a jury. They can help jurors understand what happened, they can be used to introduce key players and explain important documents, and they can make complicated concepts more accessible and repeatable, among other things—the list is endless. It is important, however, that the visual aids not overwhelm the simple story you are trying to tell (and sell). In fact, studies have shown that viewers will give no more than a few seconds' worth of time to a new slide. If you cannot make your point in a few seconds (even with a visual aid), the opportunity to make the point is lost. See C.G. Ritter, at 384.

I suggest two rules of thumb: (1) The slide should not contain too much information, and (2) the medium is not the message. While some visual aids may require direct attention by the presenter, I suggest trying to avoid allowing visual aids to become the focus of any opening statement. On the contrary, many of the most effective visual aids are "passive," in the sense that they are simply being displayed to the jury in the background as the lawyer is making his or her presentation.

Conclusion

Warren Lightfoot concluded, "We have learned that opening statements have a profound affect on jurors when they are in a very receptive frame of mind," and subsequent research has proved him right. Opening statements provide the single best opportunity to define the playing field and tap into jurors' cognitive biases—before they have started filtering the evidence to fit those biases. "You need to present your case with a compelling and moving story line that speaks to jurors, takes advantage of the cognitive shortcuts that they naturally use to make sense of the case, and that reinforces a thematic narrative that directs the jurors toward your client's positions and away from [your opponent's] viewpoint." R. Fuentes, et al., at 23.

OPENING STATEMENTS IN PRODUCTS LIABILITY TRIALS

Harlan I. Prater, IV

LIGHTFOOT

LIGHTFOOT FRANKLIN WHITE LLC
TRIAL & APPELLATE COUNSEL

- Hindsight Bias
- Confirmation Bias
- Anchoring Bias
- Availability Bias

Hindsight Bias

"Monday Morning Quarterback"

Confirmation Bias

"Beat My Head Against The Wall"

90% of people believe that if a company can profit by cutting corners, it will.

72%
corporations do not take responsibility for their action.

69%
big business puts profit over safety.

77%
products should be made as safe as possible without regard to cost.

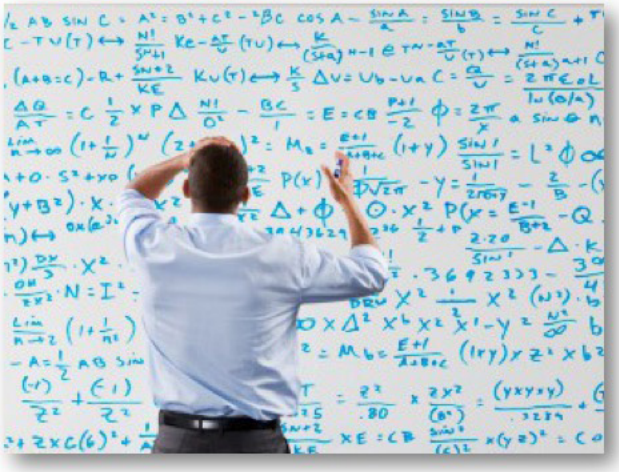
82%
government safety standards do not go far enough to make sure that products are safe.

Anchoring Bias

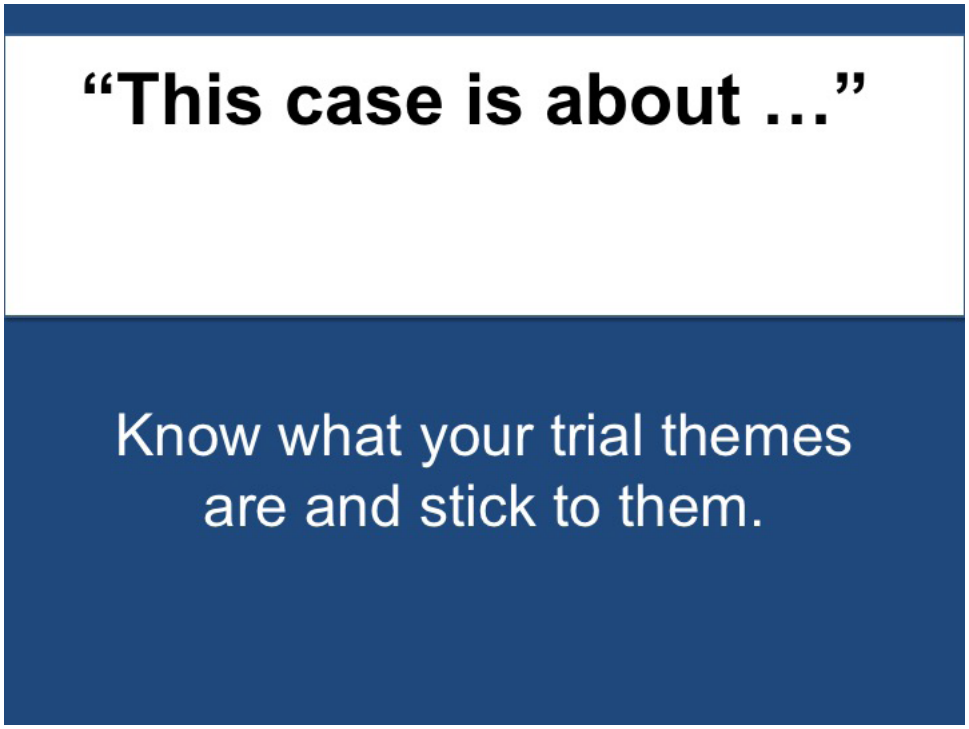
"Tunnel Vision"

Availability Bias

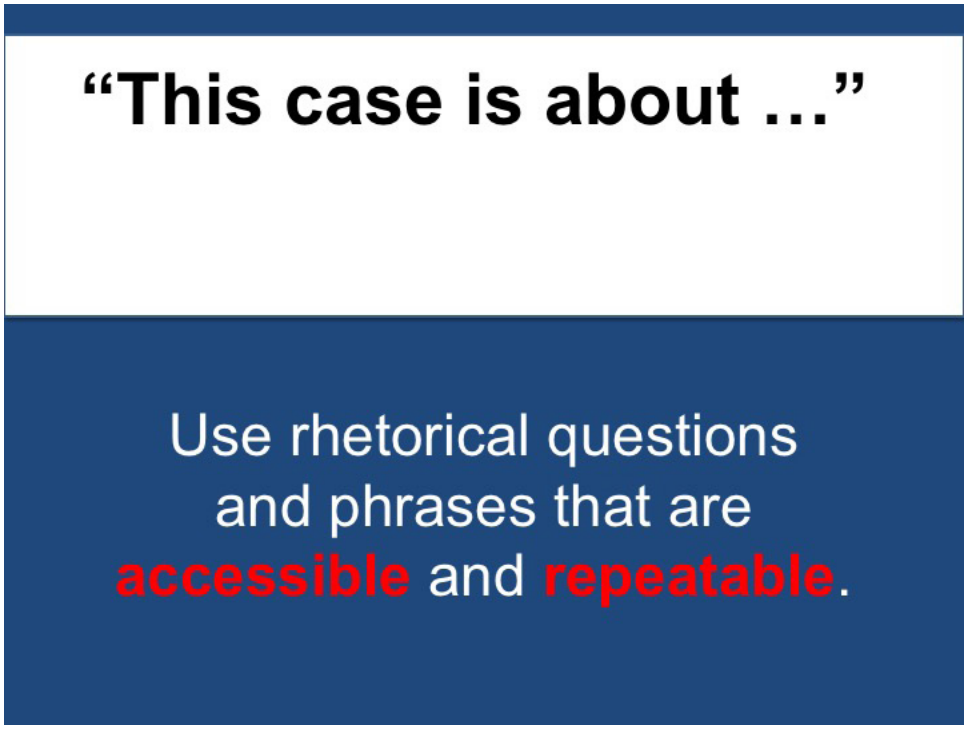
"We Believe What We Can Understand"




"This case is about …"


"This case is about …"
Know what your trial themes are and stick to them.


"This case is about …"
Package your trial themes in a simple story that makes sense.

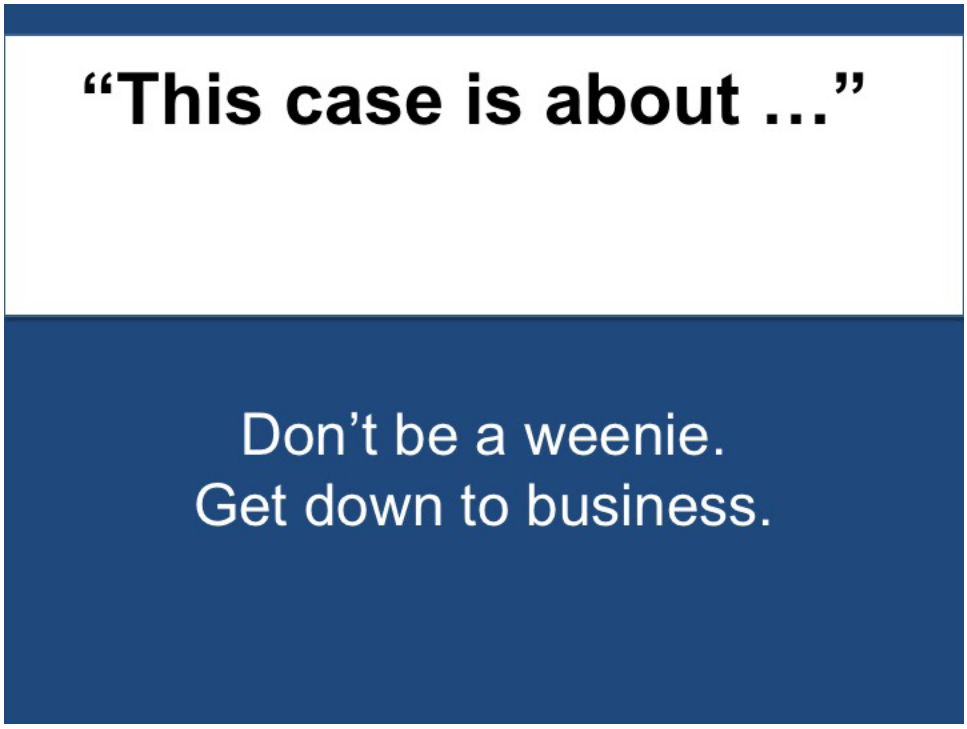

"This case is about …"
Use rhetorical questions and phrases that are accessible and repeatable.

"This case is about …"

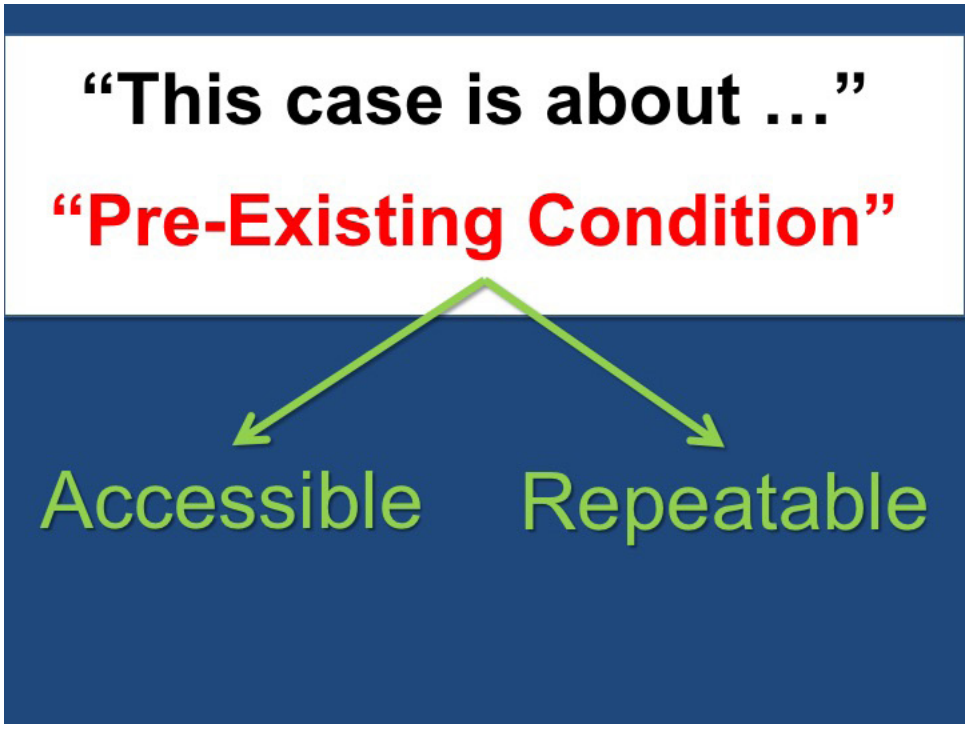
Give jurors an explanation for the cause of the plaintiff's harm that focuses on conduct **other than your own**.

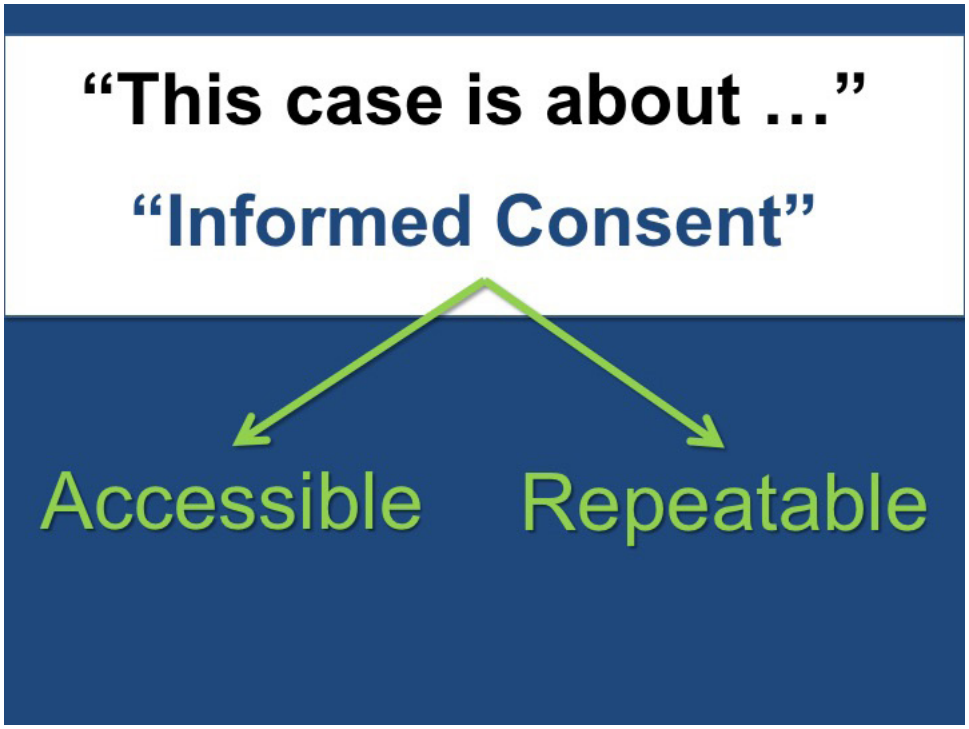
"When a corporate defendant is talking about itself, it is losing. All the jury is doing is thinking of ways to poke holes in your 'good company' story."

- Rick Fuentes


"This case is about …"
Don't be a weenie.
Get down to business.


"This case is about …"
"Pre-Existing Condition"
"Known Complication"
"Informed Consent"
"Perfect Track Record"

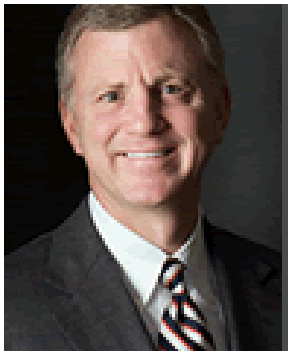

"This case is about …"
"Pre-Existing Condition"
Accessible
Repeatable


"This case is about …"
"Informed Consent"
Accessible
Repeatable


"This case is about …"
"Known Complications"


"This case is about …"
"Perfect Track Record"
50,000
procedures
2,000
surgeons


"This case is about …"
"Pre-Existing Condition"
"Known Complication"
"Informed Consent"
"Perfect Track Record"



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Harlan Prater defends clients in high-stakes civil trials — he is a tireless advocate, protecting their interests. For more than 30 years, clients have relied on Harlan for his experience and skill in product liability, pharmaceutical, medical device and business litigation. He also represents clients in environmental, consumer fraud, antitrust and patent cases.

Proven experience and record-setting wins: Harlan's career includes landmark cases, major victories and appearances before the Alabama Supreme Court. He served as trial counsel in the largest and longest-running trial in Alabama history — an environmental contamination case that involved thousands of plaintiffs and a trial lasting more than 19 months.

He has also obtained defense verdicts in numerous potentially multi-million dollar cases for clients throughout Alabama and the Southeast, including the first verdict in more than a decade in favor of a defendant product manufacturer in Lowndes County, Alabama. Harlan has served as national counsel for various product manufacturers, and is one of only 15 Alabama lawyers selected as members of the Product Liability Advisory Council (PLAC).

A leader in the legal profession and the community: From the courtroom to the community, Harlan is dedicated to giving back. He currently chairs the Alabama State Bar Committee on Disciplinary Rules and Enforcement, which makes recommendations to the Alabama Supreme Court, and he has served on the Birmingham Bar Association executive committee.

Practice Areas

- Pharmaceuticals & Medical Devices
- Product Liability
- Catastrophic Injury
- Environmental and Toxic Torts
- Commercial Litigation
- Banking and Financial Services

Awards and Accolades

- Chambers USA, "Leading Lawyer," Litigation: General Commercial
- Benchmark Litigation, "Litigation Star," Product Liability
- Best Lawyers in America, Litigation – Environmental, 2011-19; Personal Injury – Defendants, 2011-19; "2014 Lawyer of the Year" for Personal Injury Litigation – Defendants; "2018 Lawyer of the Year" for Litigation – Environmental
- Alabama Super Lawyers, Top 50

Education

- A.B., Duke University, 1983 magna cum laude
- J.D., Duke University School of Law, 1987 with honors

OCCAM'S RAZOR: SIMPLICITY AS AN EFFECTIVE TRIAL TOOL IN PRODUCTS LIABILITY CASES

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Occam's Razor: Simplicity as an Effective Trial Tool
Emily Harris

Simplicity is a mantra that is easy to say, but hard to do - especially when litigating complex legal disputes. Simplicity has great persuasive power. For that reason, as trial attorneys, we should all be looking to use simplicity as an effective trial tool, from the start of a case through verdict.

Occam's Razor

Occam's razor is a heuristic device – or put more simply, a tool to help someone make decisions as between multiple possible explanations. This reasoning device is widely attributed to a Franciscan friar, William of Ockham, who was born in the year 1287. He stated the principle that is now attributed to his name, this way: "plurality should not be posited without necessity." But, the principle existed long before William of Ockham and has had many iterations since his time. In perhaps the easiest layman's formulation it is said that: "when there are competing explanations, the simplest explanation is usually the correct one." Asking this question – what is the simplest explanation or simplest path – throughout litigation of a case can help frame a winning strategy.

Research on Simplicity in Decision-Making

The research on how people use simplicity in the course of making decisions is compelling. In one study, four experiments looked at the hypothesis that simpler explanations would be judged as both better and more likely to be true by study participants.[1] For instance, in one part of the study, participants were asked to choose between a one cause explanation and a two cause explanation for a set of symptoms. Nearly all of the participants, 96%, selected the one cause explanation. When asked to justify their choice, 17% said it was because of the simplicity. Notably, 39% of the participants justified their choice because it was more probable that there would only be a single cause, instead of two. The findings of this study concluded:

- People prefer simpler explanations.
- Simple explanations are deemed more probable than complex explanations.
- Even with probability evidence, simple explanations are still preferred.
- If probability evidence is ambiguous, simpler explanations are assigned a higher probability.
- Disproportionate evidence in favor of a complex explanation is required to overcome a simple explanation.

In sum, you need a lot more evidence to convince people to adopt a complex explanation over a simple

1 Lambrozo, T. Simplicity and Probability in Causal Explanation, Cognitive Psychology 55 (2007).

explanation.

Simplicity through the Life of a Case

Simplicity is one of the hardest goals to accomplish in litigation. It takes more work, requires more planning, analysis and thought to keep it simple. But, as evidenced by the research and basic understandings of human nature, there can be a big reward in chasing simplicity as a goal in litigating cases.

Simplicity should start at the beginning. Whether you are the plaintiff or defendant, deciding the framing of the case at the beginning has long-term effects on simplicity throughout. In some ways, the beginning should start at the end. Namely, early thought into what the case would look like at trial, developing trial themes, and envisioning opening and closing statements is a critical exercise in determining what is essential to the case. Just because a cause of action can be plead, does not mean that it should be plead. Some claims will necessarily require expensive or complicated expert testimony. Other claims may get to the same end-result, but with a simpler burden of proof. The same is true for affirmative defenses. Asserting an affirmative defense is likely to lead to discovery on that request. Thus, the advice of Abraham Lincoln on this topic is sound: "In law, it is good policy to never plead what you need not, lest you obligate yourself to prove what you cannot."

Simplicity extends itself to the pleadings and motions in a case as well. Here, plain language is your friend. If the judge can't understand what your argument is, you are unlikely to be able to persuade him or her. Plain language does not mean dull. Rather, plain language gets your point across quickly, clearly and, even sometimes, with passion. It takes hard work and time to draft briefs that make the point, avoid verbosity and structure sentences for clarity and impact. But, the results will pay off. Study after study has shown that judges not only prefer plain language to legalese, but find plain language briefing more persuasive.

Another way to bring simplicity is to insert visuals in your briefing. Photographs, maps, and diagrams can often quickly illuminate a complex factual issue that would otherwise require pages to describe.

You should also consider simplicity in developing your trial themes, particularly where the opposing side's story is complex. Keying off the research on how people process explanations, developing a straight-forward theory of the case, supported by science and the facts is critical to success. To this end, it may be necessary to cull out any non-critical evidence that can lead to multiple inferences or that raises ambiguity as to the probability of what occurred. A simple explanation of the events is more likely to be persuasive to a jury than a complex explanation.

Complex issues and science are sometimes unavoidable, particularly in products liability case involving competing expert opinions. That does not mean, however, that efforts cannot be made to make the complex issues more accessible to the trier of fact. Visual aids for expert testimony are key. Physical demonstratives of the actual product at issue can greatly assist the trier of fact, as will photographs, diagrams and charts. Work to develop simple graphics that tell a story and summarize expert opinions will be rewarded. Simplicity can also be accomplished by cutting out unnecessary science. On close review, you may find that certain expert opinions or explanations of processes are not needed to defend against a claim. Streamlining expert testimony by removing unnecessary explanations and technical jargon will increase the likelihood that the trier of fact will conclude the expert's opinion is the correct one.

OCCAM'S RAZOR:

SIMPLICITY AS AN EFFECTIVE TRIAL TOOL

Emily Harris
CORR CRONIN | LLP

OCCAM'S RAZOR

When there are competing explanations, the simplest explanation is usually the correct one.

SIMPLICITY HAS A LONG HISTORY

"**We may assume the superiority, all things being equal, of the demonstration which derives from fewer postulates or hypothesis.**" Artistole (384 BC-322 BC)

"**We consider it a good principle to explain the phenomena by the simplest hypothesis possible.**" Ptolemy (90 AD-168 AD)

"**We are to admit no more causes of natural things than such as are both true and sufficient to explain their appearances.**" Issac Newton (1642-1726)

"**Everything should be made as simple as possible, but not simpler.**" Albert Einstein (1879-1955)

"**You know you've achieved perfection in design, not when you have nothing more to add, but when you have nothing more to take away.**" Antoine de Saint-Exupery (1900-1944)

THE SIGNIFICANCE OF SIMPLICITY

- People prefer simpler explanations.
- Simple explanations are deemed more probable than complex explanations.
- Even with probability evidence, simple explanations are still preferred.
- If probability evidence is ambiguous, simpler explanations are assigned a higher probability.
- Disproportionate evidence in favor of a complex explanation is required to overcome a simple explanation.

- Lambrozo, T., Simplicity and Probability in Causal Explanation, Cognitive Psychology 55 (2007)

SIMPLE IS HARD TO DO

SIMPLICITY STARTS AT BEGINNING

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROLFE GODFREY and KIRSTINE GODFREY, husband and wife and their marital community composed thereof;

Plaintiffs,

vs.

STE. MICHELLE WINE ESTATES LTD. dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.

Defendants.

NO.

FIRST AMENDED COMPLAINT FOR PERSONAL INJURIES; PRODUCT DEFECT CLAIMS

I. INTRODUCTION

1.1 This is a products liability action brought by Plaintiffs to recover both general and special damages caused by a defective and dangerous wine bottle - manufactured, distributed and sold by Defendants (hereafter referred to collectively as Defendant) - which shattered and broke severely injuring Plaintiff Rolfe Godfrey's right hand while he was working as a server at a restaurant on or about February 13, 2010.

II. PARTIES

2.1 Plaintiffs are Rolfe Godfrey and Kirstine Godfrey. All actions alleged

FIRST AMENDED COMPLAINT FOR PERSONAL INJURIES; PRODUCT DEFECT CLAIMS - Page 1

Plain Language

In the
Supreme Court of the United States

SIGRAM SCHINDLER BETEILIGUNGSGESELLSCHAFT MBH,
Petitioner,

v.

MICHELLE K. LEE, Deputy Under Secretary of Commerce for Intellectual Property and Acting Director, Patent and Trademark Office,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Howard N. Shipley
Counsel of Record
George E. Quillin
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Counsel for Petitioner

October 6, 2014

i

QUESTION PRESENTED

"Does the US Constitution, in legal decisions based on 35 USC §§ 101/102/103/112,

- require instantly avoiding the inevitable legal errors in construing incomplete and vague classical claim constructions – especially for "emerging technology claim(ed invention)s, ET CIs" – by construing for them the complete/concise refined claim constructions of the Supreme Court's *KSR/Bilski/Mayo/Myriad/Biosig/Alice* line of unanimous precedents framework,

or does the US Constitution for such decisions

- entitle any public institution to refrain, for ET CIs, for a time it feels feasible, from proceeding as these Supreme Court precedents require – or meeting its requirements just by some lip-service – and in the meantime to construe incomplete classical claim constructions, notwithstanding their implied legal errors?"

Plain Language

(ORDER LIST: 575 U.S.)

MONDAY, MARCH 23, 2015

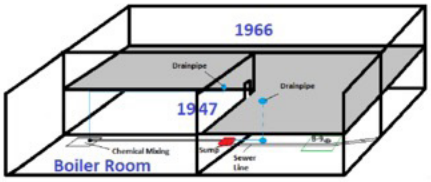
ATTORNEY DISCIPLINE

D-2827 IN THE MATTER OF HOWARD NEIL SHIPLEY

A response having been filed, the Order to Show Cause, dated December 8, 2014, is discharged. All Members of the Bar are reminded, however, that they are responsible-as Officers of the Court-for compliance with the requirement of Supreme Court Rule 14.3 that petitions for certiorari be stated "in plain terms," and may not delegate that responsibility to the client.

Use Visuals in Briefing

was located under an undamaged and undisturbed concrete slab. *Id.* The excavation exposed the top and invert of the 1947 sewer line to a depth of approximately 4-5 feet below grade and extended to points four feet to the east and west of sample point B-9. *Id.*, ¶ VII.F.13. The cross section diagram below identifies in green the approximate location of the excavation at B-9. *Id.*, Ex. I.



The excavation further exposed two joints—an angled 22.5 degree joint located to the east of B-9 and a straight line joint located to the west of B-9—and confirmed lead seals. *Id.*, ¶ VII.F.14. The straight-line joint was askew between the bell end and insert and the seal appeared compromised. *Id.*, VII.F.16.

Simplicity as a Trial Theme

COMPETING THEORIES

Defendants

- ✓Plaintiff screwed the corkscrew in at an angle
- ✓The tip of the corkscrew scored the glass
- ✓The bottle broke

COMPETING THEORIES

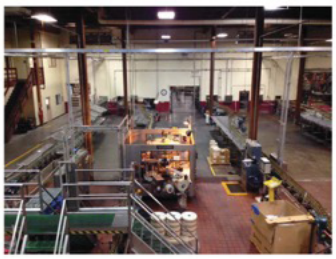
Plaintiff: The Perfect Storm Scenario

The bottle deviated from other Saint-Gobain manufactured bottles:

- Out of round
- Rocker bottom

**Or, it had a seed, split finish, choked neck, crooked neck

COMPETING THEORIES



Plaintiff: The Perfect Storm Scenario

The bottle was damaged at Ste. Michelle:

- rinser,
- filler,
- corker,
- conveyor belts
- capsule applicator
- capsule spinner machine
- divider inserter
- workers banging bottles against each other or dropping them
- debris or concrete particles falling on top of the bottle

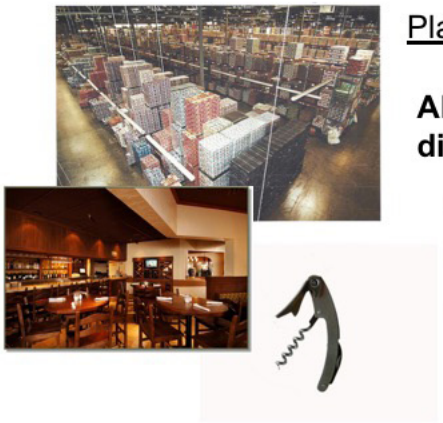
COMPETING THEORIES

Plaintiff: The Perfect Storm Scenario

The damage to the bottle was latent:

- Damage not visible to Plaintiff
- Bottle doesn't break at time it is damaged
- Bottle withstands 6 months of storage
- Top doesn't break when foil is removed

COMPETING THEORIES



Plaintiff: The Perfect Storm Scenario

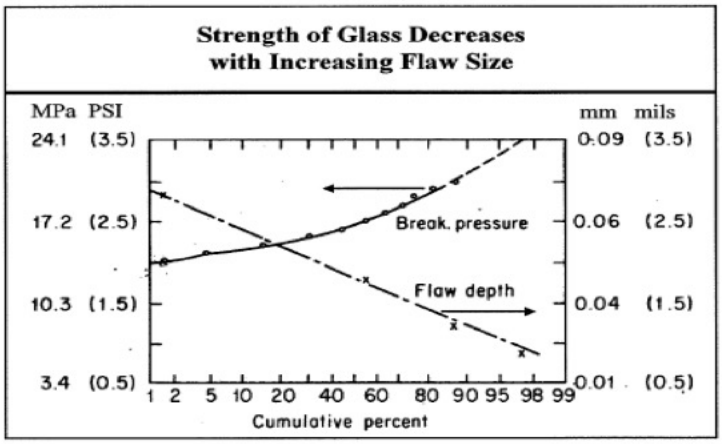
Alternative causes must be disproved

- Damage by distributor
- Damage by restaurant
- Damage by plaintiff

Simplicity as Tool with Experts

- Physical demonstratives
- Photographs
- Graphics
- Cut out extra, unnecessary science

Simplicity as Tool with Experts



Simplicity as Tool with Experts

Visual Aids are Key to Simplicity

Visual Aids are Key to Simplicity

Visual Aids are Key to Simplicity

Visual Aids are Key to Simplicity

Visual Aids are Key to Simplicity

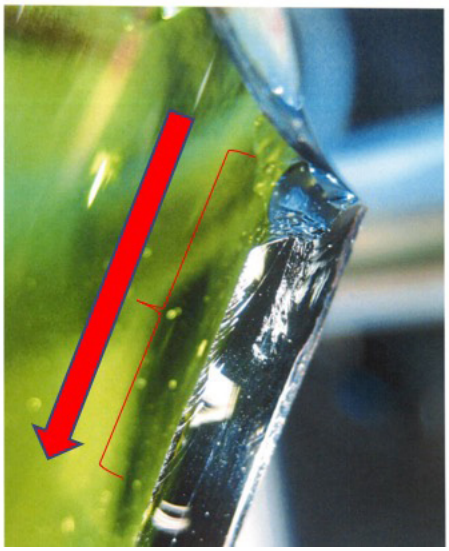
The crack was moving downward

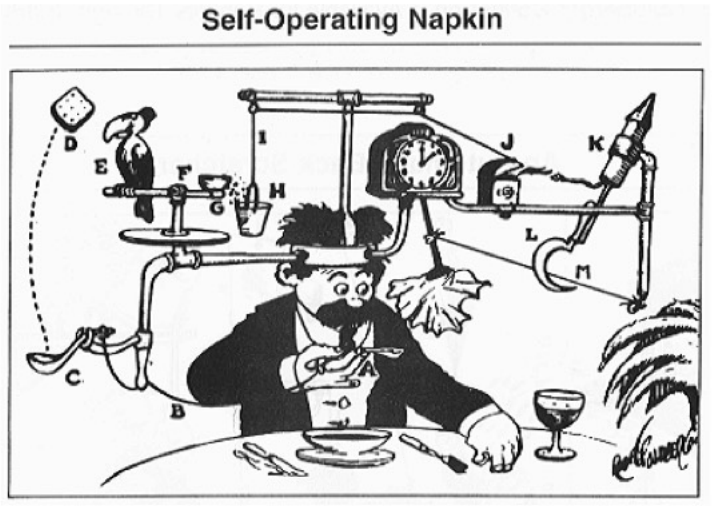
+

The crack was moving on the inside of bottle

=

The origin was on the inside surface of the missing top of the bottle





"Simplicity is the ultimate sophistication."

Leonardo da Vinci

EMILY BRUBAKER HARRIS

Managing Partner
CORR CRONIN (Seattle, WA)

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Emily is the firm's managing partner. Her practice focuses on complex civil litigation, class action defense, products liability, real estate litigation, and employment litigation, at both the trial and appellate level. Emily is also one of the lead attorneys pursuing wrongful death claims against landowners and government entities arising from the 2014 Oso Landslide. Emily excels in handling large and complex matters that require creative problem-solving, diligence, and fine attention to detail.

Prior to joining Corr Cronin in 2004, Emily was a litigation associate at O'Melveny & Myers LLP in Los Angeles, and she clerked for the Honorable Thomas G. Nelson on the United States Court of Appeals Ninth Circuit. Emily has been selected to the "Rising Star" list in Seattle's legal community. She is licensed to practice in Washington and California.

Featured Cases

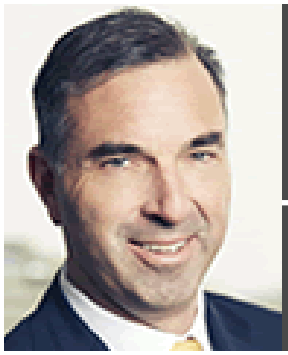
- Rails to Trails Class Actions – Defending King County in numerous cases challenging ownership of former railroad corridors valued at over $100 million. Defeated motion for preliminary injunction, secured dismissal of claims for quiet title and a declaratory judgment regarding ownership of the corridor and obtained judgments quieting title in King County.
- Oso Landslide – Pursuing wrongful death claims arising from the March 22, 2014 Oso, Washington Landslide. Obtained significant spoliation sanction order against State of $1.2 million. With co-counsel, obtained $60 million settlement from the State and Grandy Lake Forest Associates.
- Fiber Optic Right of Way Litigation – Defense of telecommunications company in multiple class actions in state and federal courts alleging claims of trespass arising from installation of fiber-optic cable on railroad rights-of-way.
- Class Action Jury Trial – Defense verdict in four-week jury trial defending a national transportation company against multi-million dollar claims that its independent contractor drivers were employees.
- Products Liability Trial – Successfully defended bottle manufacturer and winery against products liability claims seeking more than $900,000 in damages. After a four week bench trial, obtained a complete defense verdict.

Presentations and Publications

- Ethical Duties for Lawyers Working with Expert Witnesses, Landslides in Washington, Law Seminars Int'l, Seattle, Washington, March 2017
- Occam's Razor: Simplicity as an Effective Trial Tool, Network of Trial Law Firms, Napa, California, April 2015
- Class Action Jury Trials: Going the Distance, Network of Trial Law Firms, Naples Florida, May 2013

Education

- J.D., Loyola Law School of Los Angeles
- M.A., Annenberg School for Communications, U.S.C.
- B.A., Communications Studies, University of California, Santa Barbara



AVOIDING CYBERSECURITY RISKS POSED BY EMERGING TECHNOLOGY TRENDS

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Best Practices for Avoiding Cybersecurity Risks Posed by Emerging Technology Trends
Patrick G. Seyferth and William E. McDonald

The Internet of Things is here, and with it comes the "connected vehicle." Although vehicle connectivity brings substantial benefits, it also presents many new cybersecurity and data-protection challenges. They are an alluring target for hackers. With the evolution of connected features, connected cars have multiple avenues to negotiate with each other, the roads they traverse, and other sources, as well as less oversight from a human operator to correct errors. The constant machine-to-machine communications present an infinite number of fundamental security risks. To address these issues, automotive companies are implementing security-by-design in new ways to improve cybersecurity and bolster data protection in connected vehicles. Meanwhile, government agencies, like the Federal Trade Commission ("FTC") and the National Highway Safety Traffic Administration ("NHSTA"), are paying close attention to, and offering guidance about, cybersecurity on connected vehicles. Not only are government agencies paying attention, so too are plaintiffs' attorneys, filing claims regarding automotive cybersecurity. Accordingly, automotive companies are addressing cybersecurity every step of the way, and counsel for these companies must be ready to address this reality.

Connected Vehicles and Cybersecurity

Years ago, many of the perceived cybersecurity risks related to connected vehicles were largely hypothetical. Now, recent examples involving connected vehicles have demonstrated that the risks, while very remote, are real and should be taken seriously. With the increase in connected vehicles, automotive companies are addressing those risks throughout the production of the connected vehicles they send to market. For automotive companies, cybersecurity includes more than a possible data breach, it also addresses the possibility of remotely controlling a vehicle through a cybersecurity hack.

Due to the complexity of connected vehicles, and the growing number of unique features available in them, there is no "one-size-fits-all" approach to cybersecurity. And "complexity" is an understatement: the 2016 Ford GT, for example, has about 10 million lines of code, which is approximately 8 million more than the F22 Raptor fighter jet.[1] Such complexity is why automotive companies are paying such close attention to cybersecurity throughout all stages of design, development, and production.[2] This is what "cybersecurity by design" means today—considering cybersecurity throughout the design of a connected vehicle through a dynamic process.

1 https://www.digitaltrends.com/cars/the-ford-gt-uses-more-lines-of-code-than-a-boeing-787/; http://www.nocarnofun.com/new-2016-ford-gt-supercar-has-3-million-more-lines-of-code-than-a-passenger-jet-airplane/

2 http://www.ptc.com/-/media/Files/PDFs/IoT/J6340_HBR_Transforming_ITSecurity_eBk.ashx?la=en&hash=546B21A8D9DFB58151E92DE3BDB599E4C4CF1FE0

To apply a security-by-design approach, companies are using the following methods, among others, to increase connected vehicle cybersecurity:

- Fuzz Testing

  Fuzz testing is one way to defend connected vehicles from some potential cybersecurity threats. Fuzzers work by creating and feeding a wide range of unexpected or corrupted inputs looking for a combination that will exploit vulnerabilities in code (Security Testing the Internet of Things IoT: Dynamic Testing (Fuzzing) for IoT Security.[3] Testers can identify traffic patterns and differentiate between legitimate and malicious ones. Start with Security: A Guide for Business: Lessons Learned from FTC Cases.[4] Fuzzing can be a very useful technique because the random nature of fuzz testing allows testers to find bugs that might go undetected by human eyes.[5]

- Penetration Testing

  "Penetration Testing" is another way to protect connected vehicles against potential cybersecurity vulnerabilities. Penetration testing, whether manual or automated, employs the same techniques used by real-world hackers to assess cybersecurity.[6] Some experts argue that penetration testing performed manually better emulates the persistent, aggressive actions of true attackers, which may lead to better results than automated vulnerability scans.[7] Pre-release penetration testing mimics the actions of real-world hackers to assess security posture before a connected vehicle hits market, which may allow automotive companies to address cybersecurity issues before they are discovered illegitimately.

- Over-the-Air Updating

  Over-the-air updating is another option automotive companies are implementing to address potential cybersecurity threats. With over-the-air updates, automotive companies can update software in connected vehicles remotely, allowing them to address cybersecurity issues on the fly. Updating connected vehicle software remotely can increase vehicle cybersecurity, and reduce the ability of a hacker to manipulate outdated software (as was done in the Wanna Cry hack of 2017).[8] However, over-the-air updates are not feasible for all connected vehicles, internal components, or software within them. Further, because over-the-air updates create another potentially open surface, such updates may have other effects on connected vehicles' cybersecurity.

Cybersecurity and Data Protection on Connected Vehicles

Cybersecurity not only prevents remote control of the connected vehicle, it also protects the data stored on the vehicle. Considering the attention OnStar received in 2011 for one of its privacy policies related to data stored on connected vehicles, and many of the other recent data breaches in other industries, automotive companies should continue to consider data protection when evaluating connected vehicle cybersecurity.

Why would someone hack into a car? Hackers generally fall into two categories. The first is often referred to as "white hat" hacking. White hat hackers have been defined as "people who break into a computer system and inform the company that they have done so. They are either concerned employees or security professionals who are paid to find vulnerabilities."[9] Possible motivations for a vehicle-based hack by a white hat hacker may include:

- Informing the affected company and/or the public about a potential vulnerability
- Bragging rights
- "Bug bounties," which are financial rewards some companies offer to white hat hackers who find potential vulnerabilities

Conversely, "black hat" hacking is done for malicious or criminal purposes. Possible motivations for a black hat hacker may include:

- Vehicle theft

3 http://www.beyondsecurity.com/security_testing_iot_internet_of_things.html

4 http://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf

5 https://www.owasp.org/index.php/Fuzzing

6 http://www.business2community.com/brandviews/upwork/why-you-should-hack-your-own-network-01848015#QFjirc0E1yRSgVhE.97

7 http://msbusiness.com/2017/06/mike-skinner-5-cybersecurity-strategy-mistakes-cant-afford-make/

8 https://www.forbes.com/sites/peterlyon/2017/06/22/cyber-attack-at-honda-stops-production-after-wannacry-worm-strikes/#7591abbd5e2b

9 http://www.pcmag.com/encyclopedia/term/54434/white-hat-hacker

- Information theft
- Financial fraud (e.g., short selling before causing a recall)
- Unauthorized modifications
- "Hacktivism," which is hacking to achieve some political goal
- Targeted harm
- State-sponsored hacking

As with any "connected" industry, it is virtually impossible to eliminate the risk of unauthorized and unlawful access, or hacking, in a connected automotive world.

Governmental Attention Toward Connected Vehicles and Cybersecurity

In addition to automotive companies, governmental agencies are also increasing their focus on connected vehicles and cybersecurity. On June 28, 2017, the FTC and the NHTSA held a workshop examining consumer privacy and cybersecurity related to connected vehicles. The FTC, citing a long history of considering privacy in connected vehicles, and its role to prevent "unreasonable data security practices," asked Congress to consider legislation concerning privacy and cybersecurity on connected vehicles. During the workshop, speakers from the FTC, NHTSA, automotive companies, and numerous prominent cybersecurity companies discussed data collection, privacy, cybersecurity, and legal issues related to the connected vehicle.

The FTC is doing more than examining possible legislation regarding cybersecurity and connected vehicles: it is offering guidance to increase cybersecurity. In a recent publication, the FTC made many cybersecurity recommendations including:

- limiting data collection and data retention where possible. No one can steal from a company what it does not have;
- requiring multiple-factor authentication where appropriate;
- suspending or disabling accounts after repeated failed login attempts to reduce the risks associated with brute-force attacks;
- segmenting connections by using firewalls at various levels, using intrusion-detection and prevention tools throughout connected products, and continuing to monitor the activity on connected products to detect unusual behavior; and
- frequently running cybersecurity tests and updating software.[10]

The NHTSA has also spoken on the subject, and it is expected that the NHTSA and the FTC will continue to offer guidance to improve the cybersecurity on connected vehicles as these technologies continue to evolve.[11]

Legislation Involving Connected Vehicle Cybersecurity

The federal and state governments have also passed and proposed legislation to combat potential cybersecurity threats:

- SPY Car Act

  In March 2017, Senators Ed Markey and Richard Blumenthal reintroduced the Security and Privacy in Your Car (SPY Car) Act covering security concerns related to vehicles' critical software systems, noncritical systems and personal information.[12] The NHTSA and the FTC are responsible for maintaining automotive cybersecurity and privacy standards. The 2017 SPY Car Act states that if the vehicle does not have built-in security technology and any hacking is reported, then the OEM will have to pay a fine amount of $5,000 per car. The "Cyber dashboard" is a new inclusion in the SPY Car Act: the driver can view a scorecard via a user friendly standardized graphics interface. The scoreboard is an indication of how an OEM has secured the onboard electric systems. In addition to the scorecard, drivers will also have transparency on data collected and transmitted from the vehicle.

10 https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf

11 http://www.nhtsa.gov/About+NHTSA/Speeches,+Press+Events+&+Testimonies/NHTSA+and+Vehicle+Cybersecurity

12 https://store.frost.com/cybersecurity-in-the-automotive-industry.html

- Cybersecurity Information Sharing Act (CISA)

  This act was signed into law on December 18, 2015.[13] The goal was to "improve cybersecurity in the United States through enhanced sharing of information about cybersecurity threats." On February 16, 2016, the Department of Homeland Security published a report with information about the processes for information sharing under CISA and other steps companies should take to benefit from the law.

- Computer Fraud and Abuse Act (CFAA)

  This cybersecurity bill enacted in 1986 specifies that hacking a car without permission is a felony. It also allows a persons suffering a loss by reason of a violation of the Act to pursue a civil action against the violator.

- State Laws

  As of March 29, 2018, all fifty states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands have enacted legislation requiring private, governmental or educational entities to notify individuals of security breaches of information involving personally identifiable information.[14]

- "Internet of Things Cybersecurity Improvement Act" Introduced

  This "bill was drafted with input from technology experts at the Atlantic Counsel and Harvard University."[15] "The security standards prohibit the suppliers from including hard-coded (unchangeable) usernames and passwords in their devices, which is a primary vector for hackers and malware to break into the devices and hijack them." It "requires vendors to ensure that their devices are patchable and are free from already known vulnerabilities when sold." It was introduced in 2017 and has not yet been voted on.

Litigation Involving Connected Vehicle Cybersecurity

Where gaps in governmental guidance exist, automotive companies can review recent litigation involving cybersecurity. One class action recently filed is a representative example of a connected vehicle cybersecurity claim Plaintiffs may bring:

- Cahen, etal. v. Toyota Motor Corp., et al. - US District Court Northern District of California (2015)

  Plaintiffs alleged that the CAN buses in certain Toyota vehicles were susceptible to hacking. Plaintiffs claimed that low-level protocols were used that did not support any security features. Plaintiffs further claimed that hacking attacks could be used to invade a user's privacy or to modify the operation of the vehicle. The Plaintiffs alleged Toyota was aware that the CAN bus-equipped vehicles could be hacked, and that Toyota made misrepresentations about the safety of the CAN bus-equipped vehicles. The judge dismissed the Plaintiffs' claims in November 2015.

  In cases involving connected vehicle cybersecurity, Plaintiffs may allege claims of:

  - negligence
  - unjust enrichment
  - unfair and deceptive trade practices
  - breach of implied warranty of merchantability
  - breach of express warranties
  - breach of common law warranty
  - fraud by concealment
  - breach of contract
  - product liability
  - wiretap allegations (when the collection/ management of consumer data is involved)

Data Collection, Privacy Concerns, and Other Legal Implications to Consider

The collection and management of data/personal information implicates privacy policies. And privacy policies are playing a significant role in consumer purchasing-behavior. According to Forbes, 56% of consumers believe security and privacy would be key differentiators in their future purchasing decisions[16] (last visited June 28, 2017). These

13 https://www.congress.gov/bill/114th-congress/senate-bill/754

14 http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx

15 http://thehackernews.com/2017/08/iot-bill-security-standard.html

16 https://www.forbes.com/sites/ibm/2017/01/11/how-to-protect-data-privacy-of-connect-

figures could rise as the prominence of connected products continues to grow.

With increased collection of data by connected vehicles touching on many legal and privacy policies, many companies are examining their data retention and privacy policies in many respects.

Practical Takeaways for Counsel

Counsel working with automotive companies must be aware that the legal and practical risks associated with connected vehicles and cybersecurity are no longer just conceptual. Claims and lawsuits have been brought, and government agencies are examining the topic. Counsel should think about proactively addressing these topics with clients. One recommendation is to develop a cross-functional, inter-departmental group of employees that counsel can work with to proactively engage in cybersecurity planning. Another recommendation is to examine, and implement the FTC's cybersecurity recommendations where appropriate. Cybersecurity-by-design may require coordination among many stakeholders including those from legal, engineering, information security, technology, physical security, public relations, regulatory affairs, compliance and audit, and more.

Conclusion

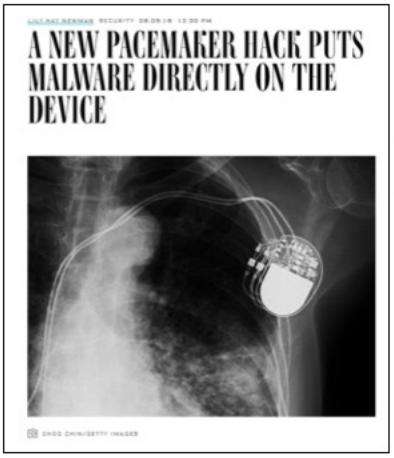
Although the connectivity of the automobile has already surpassed what many imagined possible, it will continue to evolve. With that evolution will come new challenges, which will entail continual attention to cybersecurity on connected vehicles. In this developing reality, it is our job to help our clients navigate current cybersecurity issues and anticipate future challenges.

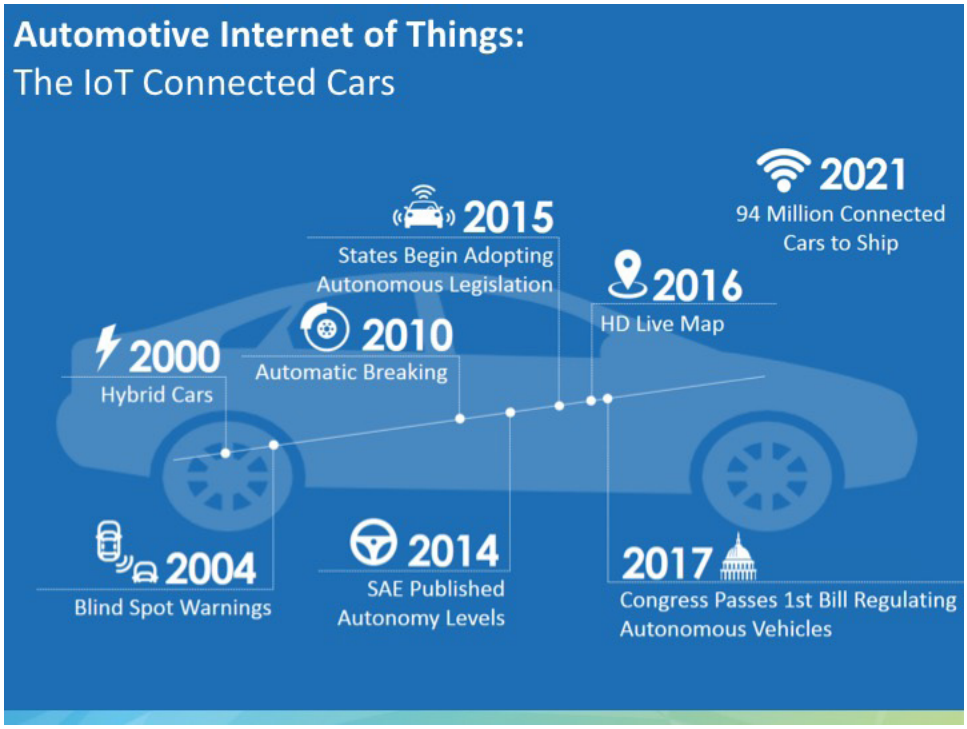
ed-cars-as-their-popularity-accelerates/#3be4d81d5e95

Connected Devices

Privacy & Cybersecurity in the News

Privacy & Cybersecurity in the News





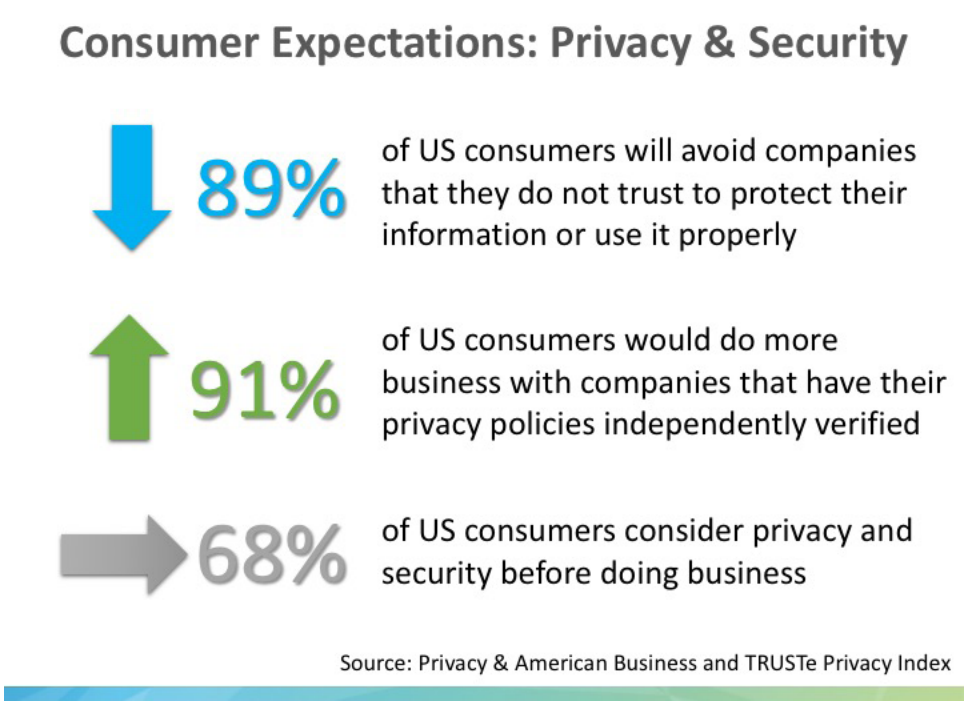
New Vehicle Technology

Data Collection

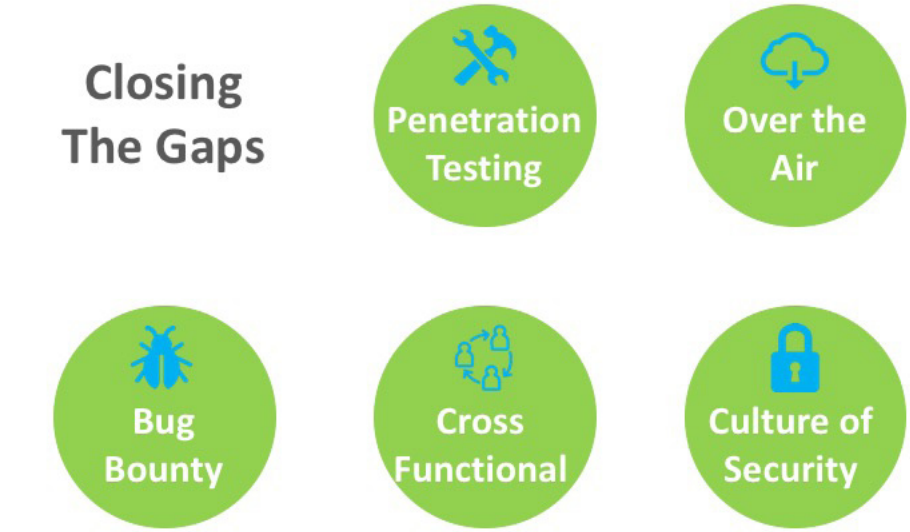
What?
- Geographic location
- System Settings
- Operational data

Why?
- Provide feature functionality
- Maintain and improve services
- Diagnose and assist with technical issues

Who?
- No one “owns” the data


Consumer Expectations: Privacy & Security
89%
of US consumers will avoid companies that they do not trust to protect their information or use it properly
91%
of US consumers would do more business with companies that have their privacy policies independently verified
68%
of US consumers consider privacy and security before doing business
Source: Privacy & American Business and TRUSTe Privacy Index


Privacy "Due Care": Security By Design
Designing and building privacy and security protections into products and everyday business practices.
Fostering a culture of privacy and security with executive-level commitment and employee training and awareness.


Closing The Gaps
Penetration Testing
Over the Air
Bug Bounty
Cross Functional
Culture of Security


Product Liability
Discovery / Data Management
Commercial
Intellectual Property
Class Actions
Insurance Coverage
Infrastructure
What you say and how you say it matters
Balancing Act
Potential Litigation Issues & Tradeoffs

Connected Devices: Product Liability Claims


THE EXPRESS TRIBUNE · TECHNOLOGY

Teenage girl killed after cellphone explodes during usage

By News Desk Published: March 19, 2018

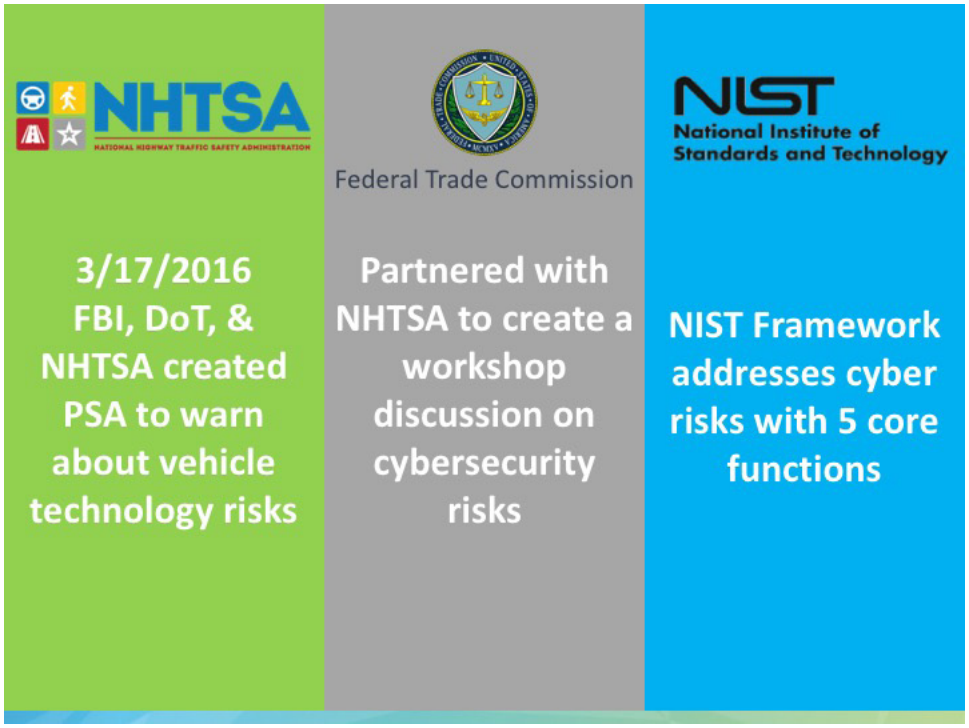
130 SHARE TWEET EMAIL

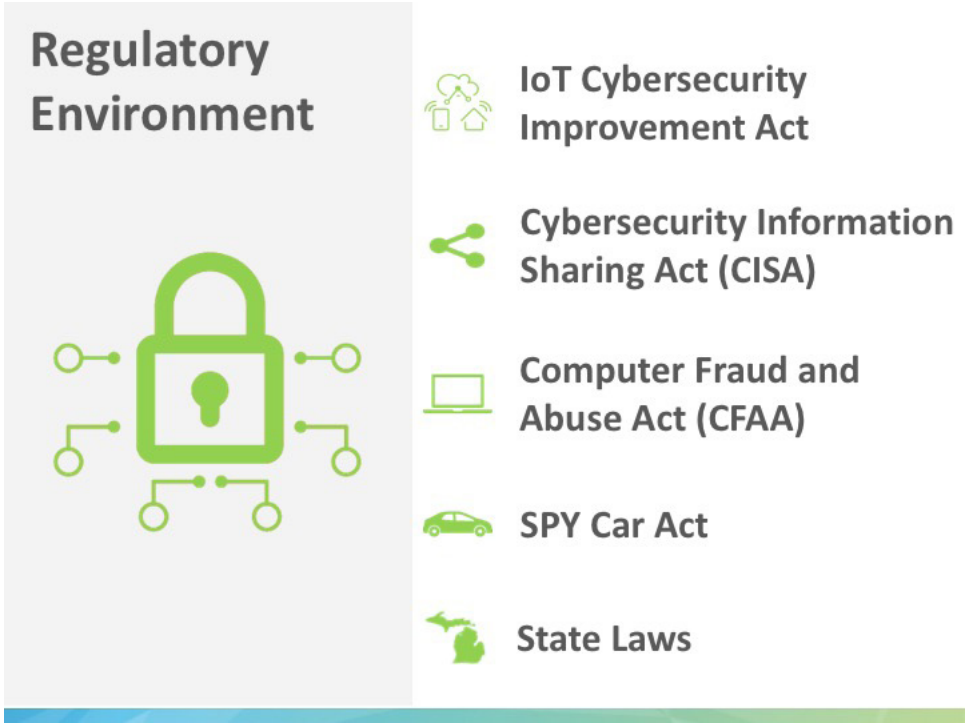

More Than Half a Million Hoverboards Are Being Recalled

by Michal Addady @michal_addady JULY 6, 2016, 11:36 AM EDT

Failure to Warn

- Provide adequate warning and information to consumers
- Terms and conditions should clearly explain the system, the information it may collect, and how it is used
- Include clear disclosures


NHTSA
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
3/17/2016 FBI, DoT, & NHTSA created PSA to warn about vehicle technology risks
Federal Trade Commission
Partnered with NHTSA to create a workshop discussion on cybersecurity risks
NIST
National Institute of Standards and Technology
NIST Framework addresses cyber risks with 5 core functions

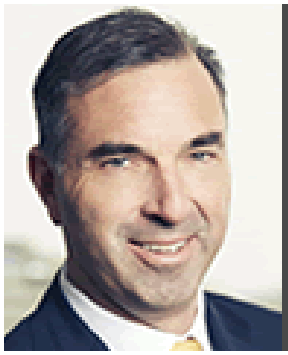

Regulatory Environment
IoT Cybersecurity Improvement Act
Cybersecurity Information Sharing Act (CISA)
Computer Fraud and Abuse Act (CFAA)
SPY Car Act
State Laws

Practical Takeaways

- Stay up-to-date on related events within the news
- The financial cost of a hacking incident can be enormous, even if it doesn't involve physical harm
- Think about how to get in front of these claims
- Create a plan on how a hack would be dealt with

Practical Takeaways

- Putting best practices in place and responding to these incidents may require coordination with many departments
- Be aware that multiple government agencies may investigate or bring an action after a hack, or if they believe consumers are not being adequately protected



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Patrick G. Seyferth is a founding Partner of Bush Seyferth & Paige PLLC "BSP," a law firm of business-minded trial attorneys with a proven track-record of defending Fortune 500 clients in complex and high-exposure cases throughout the United States. Patrick represents a wide range of clients in a variety of industries including: Fiat Chrysler Automobiles US LLC, FordDirect, PulteGroup, Mercedes-Benz USA, General Motors, Volkswagen Group of America, Textile Management Associates, and Hyundai Motor Company.

For the past 23 years, Patrick has successfully handled high-exposure product liability cases, commercial litigation, and class actions. Patrick has first-chaired catastrophic cases in 23 states and has tried cases to verdict in Michigan, Tennessee, Arizona, and New York. He frequently presents on topics including trial skills, social media, cybersecurity, autonomous vehicles, and other emerging technologies.

Representative Matters

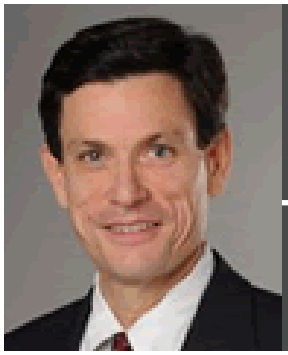
- Selected as an arbitrator in multi-million dollar commercial dispute concerning alleged violations of non-compete provision negotiated in connection with the sale of business.
- Defeated class certification, obtained a with-prejudice dismissal of the named plaintiffs' claims, and resulted in an award of over $670,000 in fees and costs.
- Defeated class certification in a putative class involving over 1 million vehicles, with potential damages exceeding $1 billion dollars. The Sixth Circuit upheld the denial of class certification on appeal.
- Managed, organized, and defended a major automotive manufacturer in more than a dozen high-profile arbitrations that were executed during a three-month period of time.
- Argued on behalf of an Amicus Curiae brief in the Michigan Supreme Court on behalf of a major automotive manufacturer on the issue of whether privity is required to maintain a claim for breach of implied warranty seeking economic damages under Michigan's Uniform Commercial Code.

Honors and Awards

- America's Top 100 Attorneys®, 2018
- Leading Lawyers, 2014-present
- Inclusion in The Best Lawyers in America, Commercial Litigation and Product Liability Litigation – Defendants, 2012-present
- Michigan Super Lawyers, Top 100, 2011-present
- Michigan Lawyers Weekly, Leader In The Law, 2011
- U.S.D.C. Eastern District of Michigan, Certificate of Appreciation, Merit Selection Panel, 2011
- U.S. News Best Lawyers ®, 2010-present
- DBusiness Top Lawyers, 2008-present
- Michigan Super Lawyers, 2006-present
- Martindale-Hubbell® AV Peer Review Rating

Education

- University of Michigan Law School, J.D., cum laude, 1992
- Michigan State University, B.S., 1987



PANEL: HOW EXPERTS ARE VIEWED - LAWYERS' VS JUDGES' AND JURORS' PERSPECTIVES

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How Experts Are Viewed - Lawyers' vs. Judges' and Jurors' Perspectives
C. Bradford Marsh and Yamisi James

Why Retain an Expert?

An expert witness may testify in a case if his or her scientific, technical, or specialized knowledge will help the trier of fact understand evidence or determine a fact in issue.[1] The expert must first be qualified as an expert witness by knowledge, skill, experience, training, or education.[2]

An expert may provide opinion testimony on facts or data that the expert was made aware of or personally observed.[3] If experts in the relevant field would reasonably rely on the kinds of facts and data to form an opinion on the subject, they need not be admissible for the opinion to be admitted into court.[4] Otherwise, those facts or data may only be disclosed by the proponent if the probative value in assisting the jury outweighs the prejudicial effect.[5] Unlike a lay witness, an expert witness is allowed a wide latitude to offer opinions, including opinions that are not based upon firsthand knowledge or observation.[6]

1 Federal Rule of Evidence 702

2 Federal Rule of Evidence 702

3 Federal Rule of Evidence 703

4 Federal Rule of Evidence 703

5 Federal Rule of Evidence 703

6 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 (1993).

The Lawyer's Perspective on Experts

We as lawyers often consider the following in choosing an expert:

Qualifications: Where did the expert receive their education?; What level of education did the expert reach?; How long has an expert been in the relevant field?; How much of an expert's work requires "hands-on" experience versus being academic?; Has the expert published relevant works?; How many times has one served as an expert witness?; How many times has one been disqualified as an expert witness?; How many times has an expert given a deposition versus testifying at trial?

Availability: How many other cases is the expert involved in?; Where is the expert located?; How reputable is an expert in the local community?; Can the expert be responsive in a case where questions or issues are likely to continuously arise?

Impression: How does the expert appear live?; How is the expert perceived by others?; How knowledgeable does the expert appear?; How confident does the expert seem?; How is the expert's public speaking ability?; Is the expert able to communicate difficult topics in an understandable fashion?; Would the expert's testimony in your case largely contradict testimony the expert has given in the past?; Are you aware of the expert's reputation with other lawyers?; Could the prior relationship with an expert be deemed problematic?; Is the expert

likeable?

Fit: How collaborative is the expert?; How would the jury perceive the expert?; Is the expert's geographical location potentially an issue?; How familiar is the expert with the technology you would like to use in your case?

The Judge's Perspective on Experts

The district court acts as a "gate keeper" in determining whether proffered expert testimony is reliable and relevant before accepting a witness as an expert.[7] The United States Supreme Court in Daubert v. Merrell Dow Pharms., Inc., stated that the following may be appropriate in assessing whether expert testimony is scientifically valid and applicable to the case: (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been published and subject to peer review; (3) assessment of the known or potential rate of error; and (4) general acceptance within the relevant scientific community.[8]

Blatant Avoidance of Evidence Can Be Problematic

In Martinez v. Garcia,[9] the Court addressed a motion to bar an opinion witness, Dr. Doblin, who was offered by two defendants. The witness, Dr. Doblin's, expert Rule 26 report included some of the following language:

> "…It is my opinion that Dr. Ghosh and Ms. Williams complied with the standard of care and acted in a professional manner in all of their encounters… There is nothing in the record whatsoever to suggest that Dr. Ghosh or Latonya Williams were deliberately indifferent to Mr. Martinez's medical needs or that Dr. Ghosh or Ms. Williams' care of the patient fell below the standard of care…"[10]

Given that the Court denied the defendants' motion for summary judgment months earlier and was familiar with the Plaintiff's evidence showing a dispute of facts, the court noted that it found the above excerpt from Dr. Doblin's Rule 26 report "extraordinarily troubling."[11] Totally accepting a scenario proffered by one attorney while ignoring all evidence that did not fit into that scenario led to the Court finding that was an "abuse of the system."[12] Expert witnesses, the court stated, should be considering and assessing all the evidence and not just the aspects that are consistent with their expressed opinion.[13] The court, therefore, found Dr. Doblin's opinion to be unreliable under the standards set forth in Daubert v. Merrell Dow Pharms, Inc. and Kumho Tire Co. v. Carmichael and barred his testimony.[14]

It is Not Necessarily Required for An Expert to Perform the Subject Testing Oneself

In Lohmann & Rauscher, Inc. v. YKK (U.S.A.), Inc.,[15] the plaintiff, who manufactured orthopedic supports and braces, initiated suit against the defendant. The plaintiff alleged that the straps sold by the defendant and subsequently incorporated into the plaintiff's orthopedic products, were defective.[16]

The defendant moved to exclude the testimony of the plaintiff's expert, Duvall.[17] Duvall was a polymer materials scientist and had a doctorate in metallurgical and materials engineering.[18] He was retained to assess the performance and alleged defects in the straps.[19]

The plaintiff moved to exclude Duvall on several grounds including (1) his failure to personally participate in the testing.[20] The court found this argument to disqualify Duvall to be unpersuasive.[21] The court referenced Federal Rule of Evidence 703 and its authorization of an expert to rely on facts not personally observed.[22] Mr. Duvall had provided oral instructions to an engineer at a laboratory to test the peel strength of the straps, but did not personally participate or observe the testing himself.[23] He testified that experts in his field typically relied on

7 Winters v. Fru-Con Inc., 498 F.3d 734 (7th Cir Ct. of Appeals).

8 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

9 2012 U.S. Dist.Lexis 158220

10 Martinez at *6.

11 Martinez at *6.

12 Martinez at *8.

13 Martinez at *8.

14 Martinez at *8-*9.

15 477 F. Supp. 2d 1147 (2007).

16 Lohmann at 1149.

17 Lohmann at 1159.

18 Lohmann at 1157.

19 Lohmann at 1157-1158.

20 Lohmann at 1159.

21 Lohmann at 1159.

22 Lohmann at 1159.

23 Lohmann at 1158.

test results like these, leading the court to conclude it was not unreliable.[24] Duvall had a longstanding relationship with the laboratory and his reliance on their test results, the court stated, should go to the weight of his evidence instead of the admissibility.[25]

Even in the "Simplest" Case, Some Level of Analysis and Not Just Deduction Should be Completed by the Expert

In Fedelich v. Am Airlines,[26] the plaintiff initiated suit after tripping and falling over the emergency stop box attached to an airport luggage carousel.[27] In support of the lawsuit, the plaintiff retained an expert, McCarthy, who averred that the emergency stop box protruded excessively, which amounted to a design defect that was unreasonably dangerous.[28]

The defendant moved to exclude McCarthy's testimony, which it claimed was unreliable and improper.[29] The defendant contended that the plaintiff's expert, McCarthy's, testimony was unreliable given he only used photographic evidence; did not request literature on the carousel's design; lacked knowledge of the facts as he did not speak to the plaintiff or review the plaintiff's deposition; did not physically inspect the carousel; and failed to conduct any research into a carousel's safety standards.[30] The defendant also believed McCarthy was unqualified to render an opinion given his lack of experience with sloped conveyor belts.[31] In addition to arguing that McCarthy was in fact qualified due to his master's degree in mechanical engineering, the plaintiff argued that he used supporting analysis in reaching his conclusion and that a lack of extensive research in the report was indicative of the case being simple enough to not require further analysis.[32] McCarthy utilized "Safe Design Methodology" where the following process is assessed: (1) identifying a severe hazard, (2) preventing access to a severe hazard when feasible, and (3) if it is not feasible to alter the design without defeating utility, then appropriately warn of the risk.[33] He testified that the plaintiff's one accident was enough to identify the box as a severe hazard.[34] The plaintiff claimed that given the simplicity of the case, a detailed analysis was not needed.[35]

While finding that McCarthy's experience as an engineer qualified him to testify as an expert witness, the court excluded McCarthy's testimony on the grounds it was unreliable.[36] The court found McCarthy's photographic inspection and unsupported assumptions were insufficient to demonstrate a reliable methodology.[37] The court stated that its objective is to "make certain that an expert…employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[38] The court therefore found it difficult to believe that McCarthy would only perform a photographic inspection and not research accident rates or safety standards if he was asked to perform an evaluation as part of his routine engineering work.[39] The court further found that an expert who could explain technical data about the carousel design and identify safe alternatives would be helpful, but "an expert who testifies about what he intuitively deducts is not helpful to a jury of this court."[40] While experts can often reach conclusions by observations alone, the method should still provide an objective standard against which the court can assess the accuracy, instead of being simply subjective and conclusory.[41] Unlike the defendant's expert, McCarthy failed to provide information and verifiable facts that supported his position, which would have assisted a jury in making a decision based on concrete facts.[42]

The Jury's Perspective On Experts

In summarizing what constitutes a "good expert," jurors have stated that having an expert who was active in their practice and not simply a

24 Lohmann at 1159-1160.

25 Lohmann at 1160.

26 724 F.Supp. 2d 274 (2010).

27 Fedelich, 724 F. Supp. 2d at 276.

28 Fedelich, 724 F. Supp. 2d at 277.

29 Fedelich, 724 F. Supp. 2d at 277.

30 Fedelich, 724 F. Supp. 2d at 278.

31 Fedelich, 724 F. Supp. 2d at 278.

32 Fedelich, 724 F. Supp. 2d at 278.

33 Fedelich, 724 F. Supp. 2d at 279.

34 Fedelich, 724 F. Supp. 2d at 279.

35 Fedelich, 724 F. Supp. 2d at 279.

36 Fedelich, 724 F. Supp. 2d at 282.

37 Fedelich, 724 F. Supp. 2d at 280.

38 Fedelich, 724 F. Supp. 2d at 280.

39 Fedelich, 724 F. Supp. 2d at 280.

40 Fedelich, 724 F. Supp. 2d at 280.

41 Fedelich, 724 F. Supp. 2d at 281.

42 Fedelich, 724 F. Supp. 2d at 280 -281.

professional expert who only testified in court was a factor they viewed positively.[43] Multiple jurors mentioned the importance of an expert witness being able to explain topics in lay terms.[44] They compared these experts to teachers, as they often thoroughly explained the subject matter and included demonstrative evidence.[45] Jurors also explained that an expert witness who is extremely knowledgeable in their respective field coupled with an air of confidence upon cross examination can be powerful.[46]

On the other hand, "bad experts" were characterized as boring or too one-sided.[47] Experts who became "flustered" on the stand or whose opinions were based upon incorrect facts were viewed unfavorably.[48] Notably, an attorney's failure to adequately connect the importance of the expert testimony to the case can limit the effectiveness of an expert.[49]

In assessing the credibility of expert witnesses, jurors focused upon impressive credentials, likeable personality, a concise presentation with diagrams or models, familiarity with the case, and lack of bias.[50] There have been publications that note that an expert testifying exclusively for one side, one company, or who derives a significant portion of their income from expert testimony can present a danger of bias.[51] In many instances the jurors were able to remember the name of the institution with which an expert was affiliated.[52] And while an expert's credentials were helpful in establishing credibility, jurors can become a bit skeptical of "form listing" of publications and committees, which can reflect a lack of true hands-on experience in the relevant field.[53]

When it comes to the actual presentation style, jurors tended to favor live testimony over deposition testimony.[54] How clear an expert is, is crucial to the jury-they often viewed it as part of an expert's overall credibility.[55] Less technical terms in addition to models or diagrams were often appreciated.[56] Jurors stated they preferred expert witnesses who answered questions directly instead of "beat[ing] around the bush."[57] An expert witness being evasive made them appear less believable.[58] Extremely long expert testimony was noted to seem to go "on and on."[59] Jurors largely appreciate consistency between an expert's deposition testimony and their testimony at trial.[60] If there were several discrepancies in an expert's testimony, they viewed that expert as less credible.[61]

43 Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message, Sanja Ivkovic p. 455

44 Id. at 455.

45 Id. at 455.

46 Id. at 455.

47 Id. at 457.

48 Id. at 457.

49 Id. at 457.

50 Id. at 458.

51 Honorable Mark I. Bernstein, "Jury Evaluation of Expert Testimony Under the Federal Rules" 7 Drexel L. Rev. 239, 267-268.

52 Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message, Sanja Ivkovic p. 458.

53 Id. at 462-463.

54 Id. at 469-470.

55 Id. at 470.

56 Id. at 470.

57 Id. at 471.

58 Id. at 471.

59 Id. at 471.

60 Id. at 473.

61 Id. at 473.

HOW EXPERTS ARE VIEWED:

LAWYERS' VS. JUDGES' AND JURORS' PERSPECTIVES

Moderator: Brad Marsh

swift/currie

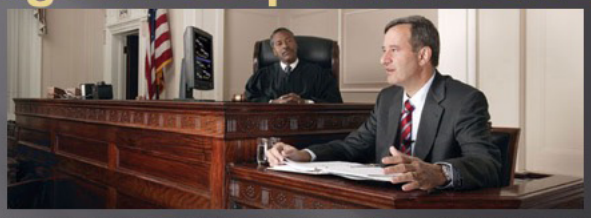
Why Should an Expert Be Retained?

- If one's specialized knowledge will help the jury understand evidence or determine a fact at issue. (Federal Rule of Evidence 702)
- If that expert has the requisite knowledge, education, experience, or training. (Federal Rule of Evidence 702)

A Lawyer's Considerations in Selecting an Expert

- Qualifications:
  - Schooling? Experience? Publications? Past Expert Testimony?
- Availability:
  - Too Busy? Closer Geographical Location?
- Impression:
  - Too Confident or Not Confident Enough? How will the expert present to the jury? Likeable? Contradictory Past Testimony? Hired Gun?
- Fit:
  - Technologically savvy? Open to suggestions?

Judge's Perspective On Experts



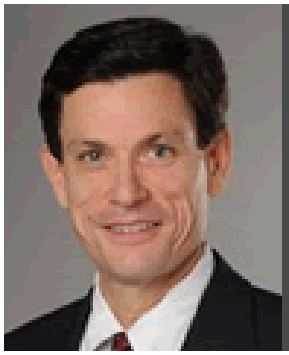
- Judge is the "gate keeper" in determining whether expert testimony is relevant and reliable
- Daubert standards
- Specific Considerations in Case Law
  - All Evidence Should Be Examined by Expert
  - The Subject Testing Need Not Be Done Firsthand
  - Simple Intuition Without Supporting Facts is Insufficient

Jury's Perspective On Experts

- Clear, concise, and understandable testimony presented in lay terms made a "good expert"
- Appearing too one-sided and being boring makes a "bad expert"
- Attorney should make sure to be able to explain the significance of their expert's testimony
- In assessing credibility, jurors looked at: credentials, likeability, lack of bias

A Jury's Perspective Cont'd

- Providing direct answers as opposed to evasive answers
- Demonstrative evidence like diagrams and charts often had a positive effect on a juror's opinion of expert credibility
- Consistency between an expert's deposition and trial testimony



C. BRADFORD MARSH

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As demonstrated by "representative work," Mr. Marsh is an accomplished trial lawyer who has successfully tried to verdict dozens of cases. A variety of cases have been handled in different venues including both state and federal courts. Much of his work has been in the areas of products liability and other complex, large exposure matters. Experience and success in court enable Mr. Marsh to be wise counsel who, if the situation warrants, can negotiate favorable resolutions short of trial. Mr. Marsh has also been able to validate his opinions and results on appeal.

Over the years, he has been a frequent lecturer to client, industry and legal groups, presenting in the areas of products liability and trial techniques. In 2001 and 2017, Mr. Marsh was appointed to the Review Panel of the State Disciplinary Board of the State Bar of Georgia. He served as chairman in 2004. In 2017 and 2012, Mr. Marsh was appointed to the Formal Advisory Opinion Board of the State Bar of Georgia and was elected chairman in 2014. He was reappointed to the State Bar Advisory Panel Opinion Board and Disciplinary Board Review Panel in 2017.

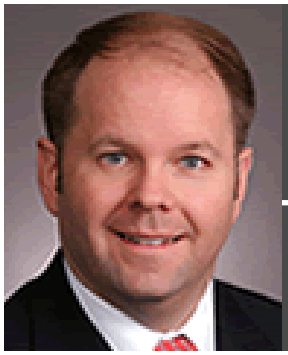
Mr. Marsh has been favored with an "AV" rating since early in his practice. He has been consistently named by his peers as a Georgia Super Lawyer in Georgia Super Lawyers magazine and Atlanta Magazine. He also served on the board of a community hospice, taught Sunday School and sings in the church choir. He is happily married and the father of two daughters.

Practice Areas
- Automobile Litigation
- Catastrophic Injury & Wrongful Death
- Commercial Litigation
- Employment Counseling & Litigation
- Environmental Law
- Medical Malpractice
- Premises Liability
- Products Liability
- Professional Liability

Awards and Recognitions
- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Georgia Super Lawyer, 2005 to present
- Best Lawyers "Lawyer of the Year," 2017
- Named as one of The Best Lawyers in America©, 2017 - 2018

Publications and Presentations
- "Emotional Distress as Bodily Injury Under a Comprehensive General Liability Insurance," Reference Handbook on Comprehensive General Liability Policy
- "The Insurance Law Annual Survey," Mercer Law Review

Education
- University of Georgia School of Law (J.D., 1984)
- University of Georgia (B.A., 1981) (Omicron Delta Kappa, Blue Key [President] and the Mortar Board Honor Society)



ROUNDTABLE: TALES FROM THE FRONTLINES

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Tales from the Trenches: Developments in Products Liability Law from Recent Trials
Jennifer Fitzgerald and Todd Ohlms

Nothing sharpens a client's business strategies with respect to mitigating product liability risk like a trial or new legislation. Based on recent trials and legislation, the following article focuses on areas of product liability law that are frequently at the center of those disputes.

WARNING: Duty and Failure to Warn

A client gets a letter in the mail stating that a customer, in installing the client's product, received a cut from handling a sharp edge of the product. Is the next obvious step to put a WARNING label onto the product? That depends.

Strict products liability is the rule governing consumer product injury lawsuits in most states. Under strict product liability, the defendant is held liable for product defects regardless of whether the company or business acted negligently. One of the primary issues in litigation is whether or not there was a duty to warn. Notably, whether the risk of the injury the plaintiff suffered was either obvious or unpredictable; the more obvious and predictable the risk, the lower the obligation on the defendant to warn.

As an initial premise, a manufacturer has no obligation to make its product "accident proof or foolproof." Weatherby v. Honda Motor Co., Ltd., 195 Ga.App. 169, 170, 393 S.E.2d 64, 65 (1990), cert. denied (June 21, 1990). "Since practically any product, regardless of its type or design, is capable of producing injury when put to particular uses, 'a manufacturer has no duty to design his product as to render it wholly incapable of producing injury.'" Id. (citing Hursh, American Law of Product Liability, Vol. 1, § 2:59, p. 240). Thus, a manufacturer of even obviously dangerous products will not incur liability so long as those products were properly made and free of hidden or non-obvious defects. Id. ("The manufacturer of a butcher knife, cleaver, or axe, properly made and free of latent defects and concealed dangers, may not be held liable merely because someone was injured while using the product.")

Furthermore, a product is "unreasonably dangerous" only where the perilous nature of the product and the danger of using it are not obvious, or when the plaintiff did not have knowledge of the particular threat of harm caused by the product. See, e.g. Arnold v. Ingersoll-Rand Co., 834 S.W.2d 192 (Mo. 1992) (holding that plaintiffs who sued the manufacturer of an air compressor did not meet their burden of proof on the element of causation in a strict liability failure to warn claim when the facts showed that plaintiffs knew there was a danger of explosion when gas fumes accumulated in the mechanic shop). A product is not "unreasonably dangerous" when the user is acutely aware of the

danger. Austin v. Kroger Texas, LP, 465 S.W.3d 193 (Tex. 2015) (Company has a duty to warn or make safe, "but not both."); Kerber v. American Machince & Foundry Co., 411 F.2d 419 (8th Cir. 1969) (holding that a plaintiff could not recover for injuries he suffered after sticking his hand into a bakery machine because the dangerousness of the machine was not concealed but instead was open, obvious, and apparent to all who used it, "particularly the plaintiff who had – by his own admission – actual knowledge of the danger and an awareness that he could be hurt" if he stuck his hand in the machine's uncovered opening.). Klugesherz v. American Honda Motor Co., 929 S.W.2d 811 (Mo. App. E.D. 1996) (upholding JNOV in favor of defendant as to plaintiff's failure to warn claim when the facts showed that the plaintiff was aware of the dangers posed by riding an ATV prior to being injured while doing so.). There is no duty to warn of an open and obvious danger of which the product user is actually aware or should be aware as a result of ordinary observation or as a matter of common sense." Feele v. W.W. Grainger, Inc., 302 A.D.2d 971, 972 (4th Dep't 2003; Lamb v. Kysor Indus. Corp., 759 N.Y.S.2d 266, 268 (4 Dep't 2003)("The open and obvious nature of that risk negates any duty to warn on the part of defendants.") Finally, if "'a manufacturer's warning would have been superfluous given an injured party's actual knowledge of the specific hazard that caused the injury,' the Court may, as a matter of law, grant summary judgment." Marshall v. Sheldahl, Inc., 150 F. Supp.2d 400, 405 (N.D.N.Y. 2001).

With this background, the issue of whether or not the client should place a warning on the product is not all that simple. First, was the potential for injury open and obvious? Are the customers of the product likely to be aware of the inherent risk? And, perhaps less obvious, but possibly more important, what impact does a warning label on this product mean for the entirety of the client's product line?

For argument's sake, imagine that the client manufactures countertop stoves. The burner grates on the stove weigh six pounds each. The company received multiple letters about injuries incurred when consumers cleaned their stove and dropped the weight on their foot. The company, out of an abundance of caution, put a temporary notice on the grates: "WARNING Grates Are Heavy And May Cause Injury." What are the implications for this action? The edge of the countertop stoves, when not installed, is metal. While not sharp like a knife, it has the possibility for giving a nasty cut if a hand is slid along that edge prior to installation. Once installed, there is no risk. People generally know not to slide their hands along metal edges. Further, most installers of countertop stoves are professional – particularly since they need to connect gas lines and the like. Presumably, their knowledge of the product is even greater than that of the average consumer. Nevertheless, an installer receives a cut while installing the stove. His first piece of evidence is the fact that the company attached a WARNING to the open and obvious danger of the weight of the burner grate, but failed to provide notice of this less obvious, but still inherent danger. The application of a potentially unnecessary WARNING can have reverberations into other situations and even be evaluated with respect to other products that the client makes. Slapping a WARNING label onto a product should not be undertaken lightly. In evaluating the use of the WARNING label, it is imperative to evaluate the impact such a label may have on other product lines.

Reasonably Anticipated Use – Are There Any Options to What Plaintiff Did?

In consideration of the "reasonably anticipated use" of a product, courts generally look to the method and manner of the product's end use. However, a recent trial demonstrates that courts occasionally will look to the reasonably anticipated method of installation.

Returning for a minute to the installation of the aforementioned countertop stove; assume for a minute that the stove has plastic strapping that loops through the burner openings such that there would be no reason to touch the metal edges of the stove to move and install it. Clearly the use of the straps is the intended method of installation. The stove can be lowered without pinching ones fingers between the stove and counter and without touching the metal edge. Imagine now that the knowledgeable, professional installer testifies that he knows the edge is sharp and takes care not to touch the edge in installation. However, when he and his assistant carried the stove into the house

from the truck, having first removed it from its box, he hoisted the stove onto his shoulder and he suffers a severe cut not on his hand but on his shoulder. Is this a reasonably anticipated use?

Courts generally use an objective, ordinary person standard to define the concept of "reasonably anticipated." For, example, in Louisiana, the standard for determining a reasonably anticipated use is an objective one (an ordinary person in the same or similar circumstances). Thus, this objective standard mandates that a court ask whether the person was engaged in a reasonably anticipated use of the product, not whether that person was a reasonably anticipated user. Peterson v. G.H. Bass and Co., Inc., 713 So.2d 806, 809, writ denied, 727 So.2d 441; Dunne v. Wal-Mart Stores, Inc., 679 So.2d at 1037, Kampen v. American Isuzu Motors, Inc., 119 F.3d 1193, 1198 (5th Cir.1997). A manufacturer is liable only for those uses it should reasonably expect of an ordinary consumer. Kennedy, A Primer on the Louisiana Products Liability Act, 49 La. Law Rev. at 586. Similarly, in Missouri, in DG&G v. Flexsol Packaging Corp. of Pompano Beach, 576 F.3d 820 (8th Cir. 2009), the Eighth Circuit held that the reasonably anticipated use did not extend to any and all potential uses by a consumer. Similarly, in Idaho, "a product is defective if the defendant has reason to anticipate that danger may result from a particular use of his product..." Puckettv. Oakfabco, Inc., 979 P.2d 1174, 1181 (Idaho 1999). See also, Rindlisbaker v. Wilson, 519 P.3d 421, 429 (Idaho 1974) (quoting RESTATEMENT (SECOND) OF TORTS § 398.

The defense in support of our stove manufacturer would require a presentation, and possibly a demonstration of other alternatives to what the stove installer did. First, our stove manufacturer sold the stove in a box. Moving the box into the house would have been safer. The box as a whole would be less awkward to move. Further, once removed from the box, carrying stove by the provided handles likewise would have been safer. Such a demonstration would provide the jury with a concrete example of what the plaintiff could have done differently and clearly show there were other, safer, options that would have been employed by the reasonable installer.

Implications of Taxes on Personal Injury Verdicts

Just this week Mr. Dewayne Johnson was in the news for convincing a jury that he got cancer from Monsanto's Roundup Weedkiller. The jury was so convinced, in fact, it awarded Mr. Johnson $289 million. But will he receive anything remotely close to that number? No.

First, and most obvious, Monsanto has pledged to appeal. With hundreds of other claims pending against Monsanto, it is expected to fight for its life. But what of Mr. Johnson. Even if Mr. Johnson receives his verdict, what will he really receive?

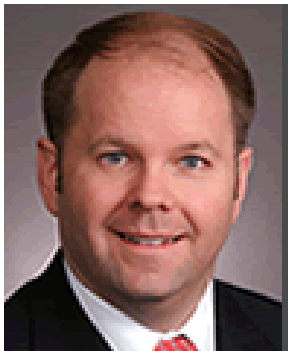
In 2017, the new tax bill passed by President Trump removed deductions for certain legal fees. As a result, Mr. Johnson is now liable for the taxes on the entire $289 million – even though his lawyers are entitled to a substantial portion of that award. Of course his attorneys, also receiving a substantial award, are also required to pay tax on their income they receive through their contingency fee on Mr. Johnson's successful result at trial and resulting award.

Mr. Johnson was awarded $39 million in compensatory damages and $250 million in punitive damages. Assuming that Mr. Johnson's law firm had the case on a contingency and required him to pay out of pocket costs, Mr. Johnson may only be entitled to about 50% of the award. This would be about $19.5 million on the compensatory award. Since it is compensatory, it would not be taxed. However, of the punitive award, assuming of the $250 million, $125 million goes to fees and costs, Mr. Johnson would be left with a total recovery of $125 million, before taxes, of the punitive award. However, when it comes time to pay taxes, Mr. Johnson will be paying on the entire $250 million. Since he clearly lands in the 37% bracket, Mr. Johnson will be taxed $92.5 million. This leaves Mr. Johnson not with the $289 million he was awarded but instead $19.5 million in compensatory plus $32.5 million ($125-92.5 million) in punitive or exemplary damages for a total of $52 million dollars.

The verdict is, of course, also subject to state taxes and, with Mr. Johnson living in California, where the cap on deductions is $10,000; Mr. Johnson could pay upwards of $25-$30 million dollars to the state

of California. While Mr. Johnson, or any of us, would gladly accept a payment of $18-$20 million dollars, it is clearly not the $289 million verdict Mr. Johnson was awarded.

The ramifications of this complicated math, and the impact the new tax laws have on verdicts and settlements are imperative to know regardless of which side of the case you are on. When it comes to resolution, the structure and the payment manner may have dramatic impacts on the plaintiff. Being able to fully present the ramifications of the tax issues is to a client or an opponent in mediation will permit the knowledgeable attorney to better drive to resolution.



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Todd Ohlms is a Partner in the Litigation Practice Group and is Co-Leader of the Commercial Litigation Team and the Private Equity and Venture Capital Industry Group, as well as a member of the Emerging Technologies Industry Team.

His practice involves advising and representing clients on their business-critical litigation matters. He has substantial experience in actions involving temporary restraining orders, preliminary injunctions and in the substantive areas of intellectual property, fiduciary litigation, securities and shareholder litigation, antitrust and trade regulation and complex/multi-jurisdictional disputes.

In addition, Todd has extensive experience in creating and implementing electronic discovery strategies and protocol for clients. Since 2006, he has actively participated in the Firm's development of its own in-house E-Discovery Lab, which clients use to dramatically reduce their costs associated with identifying, collecting, analyzing, and producing electronic discovery information in disputes.

He is often retained by private equity firms to counsel their portfolio companies on a wide range of matters and is frequently selected to serve as outside general counsel to their portfolio companies. Todd has frequently spoken regarding uses to help portfolio companies implement litigation avoidance strategies and address other legal challenges while simultaneously managing the cost of their legal services. He has also represented clients involved in disputes over family owned enterprises where sensitive and complex relationships often play as large a role in determining the result as the actual legal theories at issue.

Practice Areas
- Family Offices
- Private Equity and Venture Capital
- Banking & Finance Litigation
- Litigation
- General Commercial Litigation

Industries
- Private Equity and Venture Capital
- Emerging Technologies

Honors and Awards
- Chicago Daily Law Bulletin and Chicago Lawyer – 40 Under Forty Illinois Attorneys to Watch – 2002
- Leading Lawyers - Commercial Litigation
- Illinois Leading Lawyers - 2018 (cited in multiple years)

Education
- J.D., Washington University in St. Louis School of Law
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ROUNDTABLE: BEST PRACTICES FOR ACCIDENT INVESTIGATIONS

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Best Practices for Accident Investigations
Andrew H. Cox

Key evidence can be gained and preserved in the hours and days following a product-related accident. Unfortunately, the call to action never comes at a convenient time. Manufacturers should plan ahead and have an accident-investigation protocol in place in advance of any incident.

Form the team. The first step is to create the core team responsible for investigating or responding to accidents involving the company's products. Having too many cooks in the kitchen can ruin efficiency, result in inconsistent messaging, and create additional deponents in future litigation. Thus, the team should be kept small. Ideally, the company should designate one engineer with relevant product knowledge to undertake the boots-on-the-ground work, directed by a legal department designee. Some situations, such as a workplace accident at an important customer's plant, may require communication between the company and the customer due to the nature of the ongoing business relationship or due to the customer's desire to identify a root cause of the accident, comply with internal corrective-action obligations, or simply gain reassurance that the equipment is safe and will not result in future employee incidents. In such situations, it may be necessary to add an appropriate business manager to the team to serve as the single point of contact between the company and the customer. Train others in the organization to refer customer communications relating to the incident to this single point of contact. Because product-related accidents may be reported first to customer service representatives or employees in the sales or marketing team, also train these employees to refer all such reports to the legal department or other single designee who will triage the report and determine if further investigation is warranted.

Train the team. How to communicate is the most important subject on which to train the company's investigation team. In particular, employees in customer service or sales who are often the first to receive notice of a product-related incident must be trained to avoid expressing any conclusion or theory as to the cause of the incident, to never refer to other complaints or accident reports, to avoid any unnecessary commentary, and simply collect the necessary factual information to be passed along to the legal department or other designee. Because comments made by a company representative during an investigation can be used against the company at a later time, the engineer or other employee tasked with the investigation also should be trained to keep comments to a minimum and to stick to factual statements. The investigator should never jump to a conclusion, express a theory, express surprise, comment on what the product should or should not do, refer to prior accidents involving the same or other company products, or make any "I

told them so" comments. Email communications should be kept to a minimum, and only the lead investigator should create any original written material, preferably in a format that documents the factual information gathered based on the written investigation protocol and is addressed to legal counsel.

In addition to training team members on how to communicate during the investigation process, the team members likely to inspect the accident site should be prepared to handle the more routine, yet important aspects of the investigation, such as having the necessary gear on hand. For example, if your product is used at construction sites, an investigator will require a hard hat, steel-toe boots and possibly high-visibility gear. Other types of personal protective equipment may be required for fire scene investigations or chemical spills. If your customers are defense contractors, access to their facility to investigate a workplace incident will likely require proof of U.S. citizenship, which could dictate which employees are assigned to the investigation team. Certainly, the company should invest in a camera for use at site or product inspections so that the company investigator is not taking pictures on their personal smart phone. Squaring away these routine issues in advance will save headaches later.

Determine the goals for the investigation. In creating the investigation protocol, it is important to first determine the goals for the investigation. The goals for each manufacturer will depend on the product, industry and applicable regulations. Manufacturers of medical devices or consumer products may have reporting obligations, and thus one goal for the investigation will be to confirm whether a reportable event has taken place. Another goal may be to determine if component-part or other manufacturers should be put on notice of the event. Depending on the company's insurance thresholds, another goal may be to determine if the incident should be reported to the insurers. The goals may dictate that certain information be collected, which should be indicated in the investigation protocol.

Create a protocol suited for your product and typical accident scenario. The best protocol for each manufacturer will depend on the nature of the product and the common accident scenarios. Every protocol should begin by requiring the employee receiving the first report to identify the key factual information and report it to the person responsible for triaging the report. The remainder of the protocol must be custom designed. The following are several topics that a good protocol should cover.

Collect product-related records in advance. Upon receiving notice of an accident and the opportunity to investigate, collect the relevant product documentation. The extent of product documentation that you are able to identify in advance of a site visit will depend on your ability to identify in advance the model and serial number or date of manufacture of the product. As applicable, you need to obtain the specification sheet or other basic product material, the owner's manual, any parts illustration, a list of the on-product warnings for verification purposes, information required to interpret any date or other codes discovered during the site inspection, and relevant diagrams and schematics. In particular, for fires or other situations involve potential electrical issues, be sure to have readily available any relevant wiring diagrams. To avoid the risk of leaving hard copy documents behind at a site inspection or laboratory crowded with other investigators, consider instructing your investigator not to take paper copies of the relevant product material, but rather, to take the material on a secure laptop or tablet.

Collect publically available information in advance. It is easy to obtain aerial photographs of any traffic accident or other outdoor accident site in advance of the inspection. For workplace accidents, obtain all available information on the employer, duration of operation, locations and any moves. Depending on the nature of the product and industry, this may provide insight into whether the product was purchased new or in the aftermarket and possibly moved from location to location. Collect any media reports of the accident, and look for eye witnesses already interviewed by the press at the scene. The same witness may be available for you to speak with when you visit the scene. Once you know the injured party's identity, search court records and look for publically available web-based information and publically viewable social media relating to the injured party.

Visit the scene. At the scene, document all identifying information on the product. If the product is commonly modified, repaired incorrectly, used in conjunction with an incorrect component or hazard-causing material, train the investigator to look for and document these key issues while at the scene. The investigator needs to gain an understanding of the accident environment, weather conditions, time of day of the accident, lighting, noise levels, location of witnesses and objects involved in the accident, events and actions leading up to the injury-causing event, housekeeping issues, tools and personal protective equipment involved, and applicable workplace practices and routines. Beyond this, the key information to document will depend on the nature of the product. Train the investigator to take notes of factual observations, not conclusions, and to avoid any speculation.

Take photographs. Although there is a school of thought that the manufacturer's investigator should be highly selective with his photographs lest they create a record of relevant evidence on which to be deposed later, you will be thankful at trial when your investigator is able to point to the photograph he took of the key issue in the case. Your investigator should photograph the product, the scene, any components or products involved in the accident, and any objects involved in the events leading up to that accident. In addition to photographs, the investigator should be trained and equipped to take relevant measurements and create diagrams as necessary. If the investigator is likely to take videos, train him to mute the microphone so as not to record background conversations.

While at the scene, attempt to identify all surveillance videos. It is not uncommon for workplace accidents to be recorded by surveillance cameras. These videos are often recorded over within days of the accidents. Ask the employer about any surveillance video and make sure it is preserved. Although a poor substitute for the original video, while at the scene, take a cell phone video of the surveillance video while being played on a monitor to be sure to have at least a rudimentary copy of the video. For outdoor accidents, while at the scene, attempt to identify other sources of surveillance video. Even residential accidents are often recorded on smart phones. Be sure to identify all potential videos of the event.

Talk to witnesses. Your ability to speak with witnesses will vary widely depending on who the investigator is, whether parties are represented by counsel, and the stage of the investigation. Ideally, any accident investigation will involve interviews of the injured party, all people in the area of the accident, family members or co-workers familiar with the product and its maintenance or repair history, anyone who accompanied the injured party to the hospital, first responders, supervisors and security guards in workplace accidents, and anyone who trained the injured person on how to use the product. The list of potential types of witnesses is endless, but will depend on the type of product involved and the relevant industry. The best practice is to evaluate in advance the potential accident scenarios and the types of witnesses likely to be involved and include potential categories on the investigation protocol.

If your investigator will be conducting witness interviews, training is required. The unreliability of eye-witness testimony is now well documented. And it is simply human nature to make factual observations consistent with previously held beliefs. Thus, your investigator must know to ask open ended questions, push the witness to focus on facts observed, ask the witness to avoid opinions or theories or at least provide the factual basis for any such expressions, and to follow up on any hearsay statements. If possible, attempt to reconcile inconsistencies while at the scene while witness memories are fresh. Beyond learning the sequence of events leading up to the injury-causing event and the complete product history (purchase, repairs, modifications), in workplace accidents, the investigator should ask about how the product fits into the workflow, the operating conditions, the operator's duties, the employers' policies and procedures, and identify any unique terminology used in the workplace. If the product has been removed or the accident scene cleared, have witnesses create drawings. The investigator should document any statements attributed to the injured party or other potential claimant, as such could be admissible in future litigation.

Collect more publically available information. Accidents justifying the time and expense of an investigation typically involve first responders. Request police reports and photographs, and fire and ambulance reports, as well as any 911-call recordings. For vehicle accidents, obtain the drivers' history and the vehicles' title history from publically available sources. For workplace incidents, OSHA investigation reports and citations will eventually be completed and available. Many other industries – aviation, automotive, utilities – also involve reports generated by government investigators that will eventually become publically available.

Identify the players. A wide variety of parties can become involved in product-related accidents. Each driver and passenger may have their own insurance company, with its own investigator. Workplace accidents involve plant risk managers, workers' compensation insurers, and OSHA investigators. Government agencies and investigators get involved in aviation, environmental and some automotive accident investigations. A residential gas explosion investigation will involve a government investigator, the utility and the manufacturers of nearly every gas appliance identified in the rubble, along with their company engineer, outside investigator and counsel. As dictated by the product and industry, be sure to include on the protocol an instruction to collect all the relevant information about the particular players likely to be involved.

Preserve evidence. Evidence preservation is a two-way street. Unless you are blessed by the rare case where you can be certain that an accident will not result in a claim, once the product is identified, be sure to issue the appropriate preservation notice to all company personnel who may have relevant information relating to the subject product, its design, manufacturing, marketing, sale, repair history, subsequent design changes and other relevant topics. Once your own house is in order, request in writing that other parties involved preserve all relevant evidence, including the product and any related products, components or materials, and all records relating to the product. If relevant, make sure the employer preserves all personal-protective equipment involved in the workplace accident. Request information regarding where the product and related artifacts are being stored and make sure these third parties are aware of their evidence preservation obligation.

Request records. For workplace accidents, ask the employer early on for copies of the equipment manuals kept on file, purchase records, information on equipment maintenance or repairs, and any training materials relating to the product. Make sure the employer is preserving all company emails and text messages relating to the equipment and the accident and instructs its employees to preserve all personal-account emails and text messages relating to the event. Eventually, you will request the personnel files for the injured worker and relevant co-workers and any prior accident reports involving the same equipment. For vehicle accidents, you should seek the vehicle service and maintenance records. If the incident turns into a claim, request all available medical records.

Complete the protocol. The investigation report may be protected as work product. However, the written investigation protocol itself may be discoverable. If so, the company's investigator may be questioned on the protocol during a deposition. If the protocol was not followed, this could create the wrong impression. Thus, be sure to train the investigator to follow the protocol and gather all required information even if that means indicating "not applicable" or "not available" for certain items.

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Bill practices in the firm's Product Liability Litigation and Construction practice groups and focuses on the defense of product liability claims and claims against construction professionals.

In the product liability area, Bill regularly counsels clients on mass tort and class action litigation involving building and other consumer products as well as litigation involving allegations of exposure to chemicals or environmental contamination (including claims of exposure to benzene, carbon monoxide, chromium, mold, PCBs, sulfur dioxide, and vinyl chloride). He advises product manufacturers and specialty chemical companies on risk avoidance, litigation, and dispute resolution concerning serious injuries to persons and property.

His construction litigation practice includes the representation of owners, contractors, architects, engineers, construction managers, and other construction professionals in various contractual disputes as well as third party claims involving serious personal injury of property damage.

Bill regularly writes and presents on green chemistry regulations, the FTC Green Guides, USGBC's LEED program, and other regulations that affect the ability of chemical and consumer product manufacturers to commercialize their products, maintain compliance, and achieve competitive advantage.

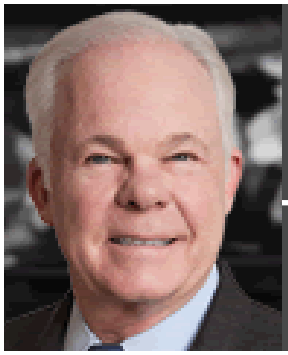
Bill has both trial and arbitration experience, and has argued before the U.S. Court of Appeals for the Sixth Circuit and the 8th Appellate District of Ohio. He has appeared in numerous jurisdictions throughout the United States.

Practice Areas
- Product Liability Litigation
- Construction

Publications
- "Be Careful What You Wish For: Revised TSCA Process Slower Than Industry Hoped," Thompson Hine Product Liability Litigation Update, February 2017
- "TSCA Overhaul Will Have Major Impact on Chemical Manufacture & Use," Thompson Hine Environmental Update, June 2016
- "California DTSC Finalizes Green Chemistry Playbook," Thompson Hine Green Products Update, April 2015
- "Suit Urges EPA to Regulate Nanosilver, Remove Products from Shelves," Thompson Hine Product Liability Update, January 2015
- "Goooaaal," The Whisper, DRI - The Voice of the Defense Bar, June 2010
- Ohio Construction Law Manual (Baldwin's Ohio Practice), Eds. Welin, et al., 2009; Chapter 5 Delay, Acceleration, Disruption and the Right to Finish Early; Chapter 10 Subcontracting

Distinctions
- Selected as an Ohio Super Lawyer Rising Star by Ohio Super Lawyers magazine, 2010 to 2015

Education
- Boston College Law School, J.D., 2003, cum laude
- University of Michigan, M.S., 2000
- College of Wooster, B.A., 1997, with honors; Phi Beta Kappa



ROUNDTABLE: PREVENTING PRODUCTS LIABILITY CLAIMS BEFORE THEY ARISE

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Managing Product Safety Issues

Tom Myrick

This paper presents an overview of product liability law in the United States; specifically, it addresses the various duties that a manufacturer or seller of products undertakes when those products are introduced into the stream of commerce including the related claims for relief and available defenses.[1]

Duties

A plaintiff must set forth the legal standard of care or duty which was violated and the facts constituting the violation. The plaintiff must also set forth and prove that the harm was caused by a violation of the standard of care or duty. The legal standard of care or duty for a given set of facts is a question of law beginning with which law applies: state law and, if so, which state; federal law; statute; or law established by the decisions of the appellate courts.

In general, the duties of a manufacturer of industrial products are to design and manufacture a safe product in compliance with its contractual obligations. When the product cannot be so designed, then any reasonably foreseeable danger must be physically guarded against to protect the user. The industrial manufacturer also has a duty to adequately warn against any reasonably foreseeable dangers which cannot be designed out or guarded against.

The duties of a manufacturer of consumer products are similar. A manufacturer should not place a product that is unreasonably dangerous to a consumer or user into the stream of commerce.[2] A manufacturer has a responsibility to act with due care and must eliminate foreseeable dangers.[3] A manufacturer's product must conform to all warranties (unless adequately disclaimed).[4] And a manufacturer has a duty to warn consumers with an adequate warning of a foreseeable danger in the use of a product.[5]

In light of these obligations, strict liability, negligence, failure to warn and breach of warranty are four typical products liability claims that can be asserted against the manufacturer or seller of a product.

1. Strict Liability.

Strict liability statutes, like the law of product negligence and failure to warn, were created to protect society's interest in freedom from harm.[6] Strict liability focuses on the nature of the product and the product's propensity to inflict harm.

Elements: To succeed on a Claim of strict

1 This memorandum is not meant to be an opinion about any particular set of facts or assurance of any particular outcome under a given set of facts. Indeed, many of the principles discussed below differ from state to state. In addition, the same set of facts can result in different outcomes depending on the forum, state law, the presiding judge or arbitrator, the characteristics of the jury, and other factors. This memorandum is similarly not meant to be a comprehensive legal analysis, but, rather, it addresses specific topics of interest.

2 63 Am. Jur. 2d Products Liability § 530 (2007).

3 63 Am. Jur. 2d Products Liability § 212 (2007).

4 63 Am. Jur. 2d Products Liability § 631 (2007); 63 Am. Jur. 2d Products Liability § 656.

5 63A Am. Jur. 2d Products Liability § 1075 (2007).

6 63 Am. Jur. 2d Products Liability § 521 (2007).

liability, a Plaintiff must typically prove: (1) plaintiff was injured by the product; (2) the injury occurred because the product was defective and unreasonably dangerous; and (3) the defect existed when it left the hands of the Defendant.[7]

Types of defects include: (1) defect in manufacture; (2) defect in design; or (3) failure to warn.[8]

Generally, the product's defective condition must be unreasonably dangerous. However, a minority of states hold that the principal basis for strict liability is proof of the defective condition of the product and that there is no need to prove the defective condition is unreasonably dangerous).[9]

States use different tests to determine whether a product is unreasonably dangerous. Examples include:

Risk-utility balancing test: A product is unreasonably dangerous if its risks outweigh its benefits. In balancing the risks and utility of a product, courts consider factors including cost of product, gravity of potential harm from product, cost and feasibility of eliminating or minimizing the risk, nature of the product, nature of the claimed defect and presence or absence of warnings and instructions.[10]

Consumer expectations test: A product is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the article with the ordinary knowledge common to the community as to the characteristics of the article. A Plaintiff must prove that the product is more dangerous than an ordinary consumer would expect when it is used in the intended or reasonably foreseeable manner.[11]

Exceptions to strict liability in some jurisdictions include that a product is not defective and unreasonably dangerous if it is inherently and obviously dangerous, or if its defect is one of which the user is or should be aware.[12]

Another exception includes that unavoidably unsafe products are exempt from strict liability.[13] Such products are incapable of being made safe for their ordinary and intended use. To obtain this exemption, the manufacturer must prove that the product is incapable of being made safe, that it was properly prepared and marketed, and that it was accompanied by a proper warning (e.g., administration of x-ray treatments by a hospital, prescription drugs, medical devices implanted in the human body, asbestos, blood products).[14]

Persons entitled to bring a strict liability claim include the purchaser or end user of the product. Generally, the user or consumer need not have purchased the product directly from the defendant to pursue a strict liability claim.[15] However, a user or consumer injured by a product can maintain a strict liability claim even if he or she is not the purchaser of the product.[16] Indeed, even bystanders who neither used nor purchased the product can maintain strict liability claims.[17]

2. Negligence.

Negligence focuses on the conduct of the Defendant, that is, did the Defendant negligently create the unsafe condition of a product.[18]

Elements: To succeed on a product negligence Claim, a Plaintiff generally must prove that: (1) the product was defective; (2) the defect caused the injury complained of; and (3) the Defendant failed to exercise due care.[19]

This duty is owed to all users facing a foreseeable risk of harm in the absence of due care, including bystanders.[20]

7 63 Am. Jur. 2d Products Liability § 558 (2007); Talkington v. Atria Reclamelucifers Fabrieken BV, 152 F.3d 254, 263 (4th Cir. 1998).

8 63 Am. Jur. 2d Products Liability § 562 (2007); see, e.g,, Beneway v. Superwinch, Inc., 216 F. Supp. 2d 24, 29 (N.D.N.Y. 2002); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1209 (N.D. Tex. 1985).

9 63 Am. Jur. 2d Products Liability §§ 561, 568, 570-71 (2007); see, e.g., Brown v. Link Belt Division of FMC Corp., 666 F.2d 110, 115 (5th Cir. 1982) (applying majority view); Cronin v. J. B. E. Olson Corp., 501 P.2d 1153, 1159-60 (Cal. 1972) (applying minority view).

10 63 Am. Jur. 2d Products Liability § 589 (2007); see, e.g., Lancenese v. Vanderlans and Sons, Inc., 2007 U.S. Dist. LEXIS 37102 at *5 (E.D. Pa. 2007).

11 63 Am. Jur. 2d Products Liability § 583 (2007); see, e.g., Talkington, 152 F.3d at 263.

12 63 Am. Jur. 2d Products Liability § 581; see, e.g., Berkner v. Bell Helmets, Inc., 822 F. Supp. 721, 723 (N.D. Ga. 1993); Wilson v. Bicycle South, 915 F.2d 1503, 1507 (11th Cir. 1990).

13 63 Am. Jur. 2d Products Liability §§ 591 - 593 (2007).

14 Id.; see, e.g., Caplaco One, Inc. v. Amerex Corp., 43 F. Supp. 1116, 1120 (E.D. Mo. 1977).

15 63 Am. Jr. 2d Products Liability § 601 (2007).

16 63 Am. Jur. 2d Products Liability §603 (2007).

17 63 Am. Jur. 2d Products Liability § 609 (2007).

18 63 Am. Jur. 2d Products Liability § 204 (2007).

19 Id.; see, e.g., Talkington, 152 F.3d at 263;Whitmire v. Terex Telect, Inc., 390 F. Supp. 2d 540, 556 (E.D. Tex. 2005).

20 63 Am. Jur. 2d Products Liability § 213 (2007).

3. Failure To Warn.

When a manufacturer has reason to anticipate danger from a use of its product, it has a duty to warn consumers and a duty to ensure that its warnings are adequate.[21] When there is a duty to warn, providing an inadequate warning is no better than providing no warning at all.[22]

Liability for failure to warn may arise under negligence, strict liability or breach of implied warranty theories.[23] Each theory applies the same general rule: the supplier of a product is liable to expected users for harm that results from foreseeable uses of the product if the supplier has reason to know that the product is dangerous and fails to exercise reasonable care to inform the user.[24]

> Negligence: manufacturer is negligent if it fails to warn of those dangers of which it knows or reasonably should know[25]
>
> Strict liability: product is unreasonably dangerous and carries an inadequate warning or there is a failure to warn which creates an unreasonably dangerous condition[26]
>
> Breach of implied warranty: contract theories – breach of representations made by defendant[27]

Whether a particular warning is adequate is a question for the trier of fact.

Courts balance the following factors in determining what precautions the manufacturer must take to satisfy its duty to give adequate warnings: (1) dangerous condition of product; (2) purpose for which product is used; (3) form of any warnings given; (4) reliability of any third party who is to act as a conduit of necessary information about the product; (5) magnitude of the risk involved; and (6) burdens imposed upon the supplier by requiring that it directly warn all users.[28]

A manufacturer is not required to affix permanent labels to each product to warn of all possible dangers; this would create a billboard effect which would effectively warn of nothing ("straw man").[29]

4. Breach of Warranty.

Warranties can arise by express promise or by implication.[30] Enforcing these warranties is one way in which society is protected from broken promises. Warranties are governed by the Uniform Commercial Code (the "UCC"), a statute each state has adopted and which divides warranties into two classes: express and implied.[31] When a product does not live up to the requirements of a sale contract, the UCC enables a purchaser to recover on the basis of implied warranties of fitness and merchantability, as well as on any express warranties created between the parties.[32] Under the UCC, the purchaser of defective goods may recover the benefit of the bargain (the difference between the value of the goods as delivered and the value of the goods had they complied with the warranties) as well as incidental and consequential damages.[33]

> Express warranties: are those for which the buyer bargained; they go to the essence of the bargain, being a part of its basis, and are contractual.[34]
>
> Implied warranties: arise by operation of law and not by agreement of the parties.[35] The purpose of an implied warranty is to protect the buyer from loss where the product fails to conform to the normal commercial standard or meet the buyer's known purpose.
>
> Economic loss doctrine: A Plaintiff whose only damages are injury to the product itself cannot recover in negligence or strict liability. Instead, the Plaintiff is limited to an action for breach of warranty.[36]

21 63A Am. Jur. 2d § 1108 (2007); Restatement 2d of Torts § 388; Garrison v. Rohm and Haas Co., 492 F.2d 346, 352 (6th Cir. 1974).

22 63A Am. Jur. 2d Products Liability § 1175 (2007).

23 63A Am. Jur. 2d Products Liability § 1110 (2007).

24 Id.; McNeal v. Hi-Lo Powered Scaffolding, Inc., 836 F.2d 637, 641 (D.C. 1988).

25 63A Am. Jur. 2d Products Liability § 1112 (2007); see, e.g., Wood v. Ford Motor Co., 691 P.2d 495, 497 (Ore. App. 1984).

26 63A Am. Jur. 2d Products Liability § 1114 (2007); see, e.g., Pinchinat v. Graco Children's Products, Inc., 390 F. Supp. 2d 1141, 1146 (M.D. Fla. 2005).

27 63A Am. Jur. 2d Products Liability § 1119 (2007).

28 63A Am. Jur. 2d Products Liability § 1177 (2007); Cover v. Cohen, 461 N.E.2d 864, 385-86 (N.Y. 1984).

29 Andre v. Union Tank Car Co., 516 A.2d 277, 286 (N.J. Super. 1987).

30 See U.C.C. §§ 2-313, 2-314, 2-315; 63 Am. Jur. 2d Products Liability § 659 (2007).

31 U.C.C. §§ 2-313, 2-314, 2-315.

32 Id.

33 U.C.C. §§ 2-714, 2-715; 63 Am. Jur. 2d Products Liability § 659 (2007).

34 U.C.C. § 2-313.

35 See U.C.C. §§ 2-314, 2-315.

36 Lord v. Customized Consulting Specialty, Inc., 643 S.E.2d 28, 30 (N.C. Ct. App. 2007).

> Economic loss is defined as damages for inadequate value, costs of repair or replacement of the defective product, or consequent loss of profits – without any claim of personal injury or damage to other property.[37]
>
> This doctrine was developed due to the distinction between the sometimes conflicting purposes of tort and contract law. Tort law is for use in cases in which a defective product caused, not the usual commercial loss, but a personal injury to a consumer or by-stander. Contract law is for use in cases involving purely commercial loss.[38]

5. Fraud.

A seller can be held liable for fraud by intentionally or recklessly misrepresenting a past or existing material fact upon which the purchaser reasonably relies as part of their decision to purchase the product. Offering opinions on the quality of the product or the results to be expected from the product are considered "puffing" and do not constitute fraud. Remedies available to purchasers who have been defrauded are similar to those available for breach of warranty with the addition of possibly voiding contractual protections put in place by the seller. Some states also have unfair and deceptive trade practice statutes (mini-Sherman Act statutes) for which fraud suffices as a predicate act and which provide for treble damages and statutory attorneys' fees.

Defenses

One of the best ways to manage exposure to legal risk from claims related to a seller's products should already be company policy—that is, to emphasize and document quality. Other ways include limiting express and implied warranties, providing exclusive remedies, disclaiming consequential damages, adequate warnings, safety instructions, assigning known risks in a written contract, and obtaining insurance.

1. Limiting Warranties

It is generally accepted that the seller of goods may exclude warranties. Under the UCC, the liability of a manufacturer or seller for personal injury, death or property damage caused by a defective product, which is predicated on breach of an express or implied warranty, may be limited in two different ways: (1) by disclaiming the warranty or a part of the warranty itself in the manner prescribed by UCC 2-316; or (2) by limiting the remedy available on breach, in the manner prescribed by UCC 2-718 and 2-719.[39]

UCC provisions on "unconscionability" limit the exclusion or modification of a warranty.[40]

> Implied warranty of merchantability: To exclude or modify the implied warranty of merchantability, the language must mention merchantability and, in the case of a writing, must be conspicuous. A blanket exclusion stating that "there are no warranties express or implied" does not exclude the warranty of merchantability because it does not mention the word "merchantability."[41]
>
> Implied warranty of fitness: To exclude or modify the implied warranty of fitness, the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond those on the face hereof." Blanket exclusions, stating that "there are no warranties express or implied," are generally sufficient as well[42]
>
> Express warranties: With regard to the exclusion or modification of an express warranty, words or conduct relevant to the creation of an express warranty and tending to negate or limit warranty are to be construed, wherever reasonable, as consistent with each other; negation or limitation is inoperative to the extent that such construction is unreasonable.[43]

A disclaimer of warranty may generally be determined to be unconscionable under UCC 2-302. A limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable.[44] A determination of whether a contract or clause is unconscionable is a question of law for the court, although its resolution depends on underlying questions of fact. In determining

37 Id.

38 Id. at 30-31 (quoting Spillman v. Am. Homes of Mocksville, Inc., 422 S.E.2d 740, 741-42 ((1992)); Reece v. Homette Corp., 429 S.E.2d 768, 770 (N.C. Ct. App. 1993).

39 63 Am. Jur. 2d Products Liability § 794 (2007).

40 U.C.C. §§ 2-302, 2-719(3); 63 Am. Jur. 2d Products Liability § 795 (2007).

41 U.C.C. § 2-316(2); 63 Am. Jur. 2d. Products Liability § 807 (2007).

42 U.C.C. § 2-316 Comment 4; 63 Am. Jur. 2d. Products Liability § 807 (2007).

43 U.C.C. § 2-316(1); 63 Am. Jur. 2d Products Liability § 806 (2007).

44 U.C.C. § 2-719(3).

whether a clause is unconscionable, courts consider substantive (embracing the contractual terms themselves to determine if they are commercially reasonable) and procedural elements (manner and process by which terms became part of contract).[45]

2. Adequate Warnings

An adequate warning is one that includes the directions, communications, and information essential to enable the user to use the product safely, so that, had the injured person complied with the warning, there would have been no injury. The warning must convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent user.[46]

Not only must the warning be on the product or in package inserts, it must be in a form designed to catch the attention of a reasonable user of the product.[47] In deciding whether the form of a warning was adequate, a jury can consider the position of the warning, its color, the size of print, and the symbols used to call the user's attention to the warning or cause the user to be more likely to read the label and warning than not.[48]

A warning that is illegible to the reasonably foreseeable and prudent user either because it is written in a language foreign to that person or damaged, is likely to be found not adequate.[49] However, the adequacy of any warning is judged as of when the product is sold. Nonetheless, it would be in a seller's best interest to provide in its safety manual an instruction that any warnings on the product sold be clearly visible to the user after installation for the life of the product. Also, a Claim could be made even though the warning is adequate at the time of sale, if the seller could reasonably foresee that the warning will deteriorate to the point of being illegible during the expected life of the product.

To help mitigate any Claim that the warnings were inadequate because of language, it would be in the seller's best interest to adopt the industry standard universal warning symbols and use them both on the product and in the safety manual, as appropriate.[50]

3. Safety Instructions

Because it is not feasible to place all warnings on some products, an alternative is to at least provide a warning and universal symbol on the product that clearly instructs the user to "Read Safety Manual Before Use."[51] The safety manual should include an instruction that the manual should be retained so that it will be easily accessible for all users. The safety manual should reiterate that all users should read the manual carefully before use of the product.

4. Assigning Risk

One of the concerns expressed by sellers is the situation in which it recommends an application of one of its products without knowing or appreciating the risks associated with the customer's product or facility. One method to manage such risks is to enter into a written agreement before beginning any assessment of the customer's needs and before selling any products to the customer. The contract should clearly set out the nature of any devices, tools or products the seller intends to bring into the customer's facility and should require the customer to disclose the nature of any products provided to the seller. The contract should require the customer to disclose all known risks and assume the consequences of all risks, known or unknown. The implied warranty of fitness for a particular purpose should also be disclaimed conspicuously and in writing.[52]

Magnuson-Moss Warranty Act

Additional consideration must be given to the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312, which impacts warranties on consumer products. As an initial matter, the Act distinguishes between "full" warranties and "limited" warranties.[53]

45 See, e.g., U.S. Achievement Academy, LLC v. Pitney Bowes, Inc., 458 F. Supp. 2d 389, 400 (E.D. Ky. 2006); Nat'l Coach Works of Virginia v. Detroit Diesel Corp., 128 F. Supp. 2d 821, 828 (D. Md. 2001).

46 63A Am. Jur. 2d Products Liability § 1179 (2007); Brown v. Sears, Roebuck & Co., 667 P.2d 750, 757 (Ariz. App. 1983).

47 63A Am. Jur. 2d Products Liability § 1180 (2007).

48 Id.

49 63A Am. Jur. 2d Products Liability § 1181 (2007); Stanley Indus., Inc. v. W.M. Barr & Co., 784 F. Supp. 1570, 1574 (S.D. Fla. 1992).

50 See Barnes v. The Kerr Corp., 418 F. 3d 583, 591 (6th Cir. 2005) (noting that inclusion of warnings in three forms of media weighed in favor of a finding that the warning was adequate).

51 63A Am. Jur. 2d Products Liability § 1136 (2007).

52 UCC §§2-315 and 2-316(2).

53 15 U.S.C. § 2303(a).

A full warranty is one that meets the federal minimum standards for warranties set forth under the Act at 15 U.S.C. § 2304.[54] Such warranties must be "conspicuously designated a 'full (statement of duration) warranty.'"[55] Any warranty that does not meet the federal minimum standards is a limited warranty, and must be "conspicuously designated a 'limited warranty.'"[56]

A "full" warranty requires the warrantor to meet specific substantive provisions. Where the consumer product suffers from a defect, malfunction, or failure to conform with a written warranty, the warrantor: (1) must remedy the product "within a reasonable time and without charge"[57]; (2) may not limit the duration of any implied warranty[58]; (3) may not exclude or limit consequential damages for breach of any warranty "unless such exclusion or limitation conspicuously appears on the face of the warranty"[59]; and (4) must allow a consumer the option of a refund or replacement without charge when the product "contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions."[60]

The Act also generally restricts the ability of suppliers of consumer products to disclaim certain warranties.[61] The Act defines a supplier as "any person engaged in the business of making a consumer product directly or indirectly available to consumers."[62] Specifically, a supplier may not "disclaim or modify . . . any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer Product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product."[63] The Act does allow implied warranties to be "limited in duration to the duration of a written warranty of reasonable duration."[64] However, this limitation must be "conscionable," "set forth in clear and unmistakable language," and "prominently displayed on the face of the warranty."[65] The Act likewise makes any violation of this provision "ineffective" under the Act and state law.[66]

Generally, the Act does not apply to products liability cases because claims for breach of warranty under the Act are claims for direct damages.[67] However, damages for personal injury are recoverable under the Act if the warrantor: 1) violates the prohibition on disclaimer of implied warranties; 2) limits the duration of the implied warranty in a full warranty; or 3) improperly excludes or limits consequential damages under a full warranty.[68]

54 15 U.S.C. § 2303(a)(1).

55 Id.

56 15 U.S.C. § 2303(a)(2).

57 15 U.S.C. § 2304(a)(1); see also 17 Am. Jur. 2d Consumer Product Warranty Acts § 22 (2007)..

58 15 U.S.C. § 2304(a)(2).

59 15 U.S.C. § 2304(a)(3).

60 15 U.S.C. § 2304(a)(4). The Federal Trade Commission may determine what constitutes a "reasonable number of attempts." Id.

61 See 15 U.S.C. § 2308; see also 63 Am. Jr. 2d Products Liability § 750 (2007)

62 15 U.S.C. § 2301(4).

63 15 U.S.C. § 2308(a).

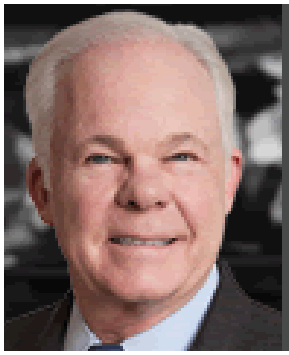
64 15 U.S.C. § 2308(b).

65 Id.

66 15 U.S.C. § 2308(c).

67 63 Am. Jur. 2d Products Liability § 624 (2007).

68 63 Am. Jur. 2d Products Liability § 750 (2007); see also Boelens v. Redman Homes, 748 F.2d 1058, 1068 (5th Cir. 1984).



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- Litigation
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- Securities Litigation
- Trade Secrets Litigation
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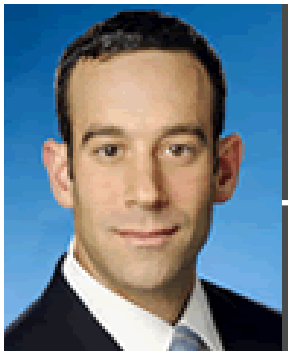

RESPONDING TO A RULE 45 SUBPOENA IN PRODUCTS LIABILITY CASES

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Stuck Between a Rock and a Hard Place: Best Practices for Rule 45 Non-Party Subpoenas in Products Liability Cases
Scott Etish

The decision to pursue ESI from a non-party via subpoena may result in a lengthy, expensive, and sometimes onerous process for both the non-party and the requesting party. The non-party may incur exorbitant costs associated with responding to the subpoena, the requesting party may wait months or even years to receive the ESI, and the issue may end up being submitted to the court via a protracted motion process. Even more, the requesting party may be liable for cost-shifting if it is not careful to avoid undue burden and expense upon the responding party.

Non-party subpoena practice is challenging for all types of organizations related to many types of cases. However, non-party subpoena practice in products liability cases has its own set of unique challenges, primarily because of the potential for a stream of litigation and subpoenas related to a specific product or product line. As such, it is essential for manufacturers and distributors to adopt a long-term approach in non-party subpoena practice in the products liability context.

This article provides advice for navigating the provisions of Fed. R. Civ. P. 45 in the context of products liability cases to most effectively and cost-efficiently pursue non-party ESI by subpoena. It also explains how a non-party can use the protections built into Rule 45 to effectively comply with, and object to non-party subpoenas, including utilizing data organization and structure to address situations where the products at issue will likely result in a stream of litigations and subpoenas. This article also provides practical considerations for practitioners on either side of a non-party subpoena to utilize in a manner that will help them shift some or all of their costs, including attorneys' fees, onto the other party.

Introduction to Rule 45

Federal Rule of Civil Procedure 45 governs non-party subpoena practice, as it (1) sets rules to the form, content and service of subpoenas; (2) requires places for compliance; (3) allows for cost-shifting and recovery of attorneys' fees; (4) sets duties in responding to a subpoena; and (4) allows for transfer of a subpoena-related motion.

The need for requesting parties to avoid undue burden or expense is of particular importance to both requesting and responding parties, and this issue is at the heart of the vast majority of disputes involving non-party subpoenas. Federal Rule of Civil Procedure 45(d)(1) states that "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction – which may

include lost earnings and reasonable attorneys' fees – on a party who fails to comply." Pursuant to Rule 45(d)(3), "[o]n timely motion, the court for the district where compliance is required must quash or modify a subpoena that . . . subjects a person to undue burden."

Additionally, Rule 26(b)(1)-(2) requires courts "in all discovery" to consider a number of factors potentially relevant to the question of undue burden, including: (1) whether the discovery is unreasonably cumulative or duplicative; (2) whether discovery sought is obtainable from some other source that is more convenient, less burdensome or less expensive; and (3) whether the burden or expense of the proposed discovery outweighs its likely benefit.

Effectively Seeking ESI from Third Parties to Avoid Undue Burden and Cost-Shifting

In light of Rule 45(d)(1)'s pronouncement that a party seeking ESI from a non-party must take "reasonable steps to avoid imposing undue burden or expense" on a non-party, the requesting party must be strategic in seeking ESI from non-parties. Failing to follow best practices could result in a court quashing or modifying a subpoena and/or cost-shifting back to the requesting party. Accordingly, it is critical for a requesting party to: (1) carefully assess non-party ESI needs before seeking ESI from a non-party; (2) communicate with non-parties throughout the process; and (3) carefully draft the subpoena to avoid undue burden.

Assessing Non-Party ESI Needs

The requesting party will need to determine the scope of ESI its adversary in the litigation has possession, custody or control of before dragging non-parties into a dispute. In particular, a requesting party should be careful about seeking ESI from a non-party when the adversary in the litigation will have the same information, especially where the requesting party has not yet exhausted the discovery process. Indeed, it will be difficult to convince a court that discovery is needed from a non-party when the adversary in the litigation is not objecting to the production of communications with the non-party. As such, non-party discovery can be particularly effective in situations where it is revealed during discovery that a non-party may have access to potentially relevant information that is not in the possession of the party in the litigation.

Like any complex litigation, products liability cases are likely to involve sophisticated ESI issues. In a products case, important ESI may be in the possession of non-parties, such as first responders, healthcare providers, insurers and/or a plaintiff's employer. In some cases, especially involving consumer products, the bulk of the records may be in the possession of non-parties. Accordingly, identification of custodians and data sources in a products liability case should include non-parties, who will be the recipient of a subpoena for records.

Communication

The key to successful non-party subpoena practice is transparency and communication with opposing counsel, the court and even the non-party whose ESI is being sought. If you anticipate the need to seek non-party discovery, then the parties should discuss this during the first Rule 26 meet and confer, address in the joint case management conference memorandum as well as at the actual Rule 16 conference before the court. In addition to interaction with opposing counsel and the court, practitioners would be well-served to go the extra mile in working with the non-party whose ESI is being sought. That is especially true of healthcare providers who may resist complying with a subpoena or whose testimony may later be essential to the defense of a claim.

A party serving a Rule 45 subpoena seeking ESI should: contact the non-party before serving the subpoena (if possible); serve a written litigation hold; and discuss issues with the non-party such as burden, format, cost, and duration of the hold to determine the most practical, cost-effective method for compliance. As part of this process, consider the following questions: (1) what is the nature of your relationship to the non-party; (2) what is the non-party's expected method for data collection and review; (3) can you agree on search terms; (4) what custodians' ESI will be searched; (5) what is the volume of potentially relevant ESI per search term and/or custodian; and (6) what is the expected burden. In products liability cases where non-parties may repeatedly be subpoenaed to produce

information regarding an incident or a product, the requesting party should also consider whether receipt of previous productions will be sufficient to satisfy the requesting party's discovery needs. Careful consideration of these questions will help ease the potential burden upon a non-party and allow a requesting party to demonstrate a good faith basis for their non-party subpoena.

Drafting Reasonable Discovery Requests: Avoiding Undue Burden or Expense

As discussed above, pursuant to Rule 45(d): a party "must take reasonable steps to avoid imposing undue burden or expense." Courts "must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply." Accordingly, practitioners should pay careful attention to Rule 45, and make sure to draft narrowly tailored, targeted requests in the first instance. In drafting the requests, the goal should be to demonstrate that the requests are not intended to burden or harass, but to minimize costs. In this connection, make sure to: (1) restrict requests to the relevant time period; (2) tailor requests to relevant subject matter; (3) identify relevant custodians, if possible; and (4) specify the form of production, as permitted by Rule 45(d)(2)(B).

Failing to follow these best practices could lead to a situation where the requesting party can be held responsible for attorney's fees associated with a third-party's response to a requesting party's motion to compel, including preparation for and participation in oral argument. See Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015) (holding that the subpoena was overbroad on its face and requesting party failed to comply with its Rule 45(d)(1) duty to avoid imposing undue burden). Practitioners should be flexible, if appropriate, in follow up communications with a non-party after the subpoena is served. Rigid adherence to the requests after a responding party has attempted to compromise and explain why certain requests cannot be met will not serve a requesting party well.

Responding and Objecting to the Subpoena Seeking ESI

There are few things more frustrating in litigation than receiving a non-party subpoena seeking extensive ESI, especially in cases where the non-party has little to no interest in the outcome of the litigation. In these situations, one of the very first discussions between outside counsel and the client in receipt of the subpoena will focus upon putting together a strategy seeking to quash the subpoena and/or shift costs back to the requesting party. As the responding party, your early focus should be on: (1) complying with deadlines and obligations; (2) issuing a legal hold and preserving ESI; (3) communicating with the subpoena sender; and (4) potentially engaging in motion practice including requests for cost-shifting.

Objections and Complying with Deadline to Respond

Pursuant to Rule 45(d)(2), objections to a non-party subpoena are due 14 days after service, unless the subpoena specifies a later (or earlier) time. There is no minimum time period under the rule but reasonableness governs. In comparing Rule 45(d)(2)(B) (14 days to object) with Rule 34(b)(2) (30 days to respond), the practitioner might be surprised to realize that non-parties have a significantly shorter window of time to file objections than parties do as part of discovery. A non-party receiving a Rule 45 subpoena should immediately implement a written litigation hold and seek an extension of the 14-day response deadline, including for objections.

In responding to a subpoena, make sure to stay away from boilerplate objections. See Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015) (boilerplate objections insufficient; each request must be separately responded to). Be prepared to show evidence of ESI "not reasonably accessible" because of undue burden or cost (affidavits from custodians, IT, or vendors; cost estimates). It is also prudent to request cost shifting early to lay groundwork for future application to the court. This is a great way to create a record of undue burden (cost) and good faith attempts to cooperate.

Communication

This article earlier discussed the importance of communication by the requesting party in non-party subpoena practice. Similarly, the responding party should work hard to establish a process with transparency and cooperation, and key steps should include discussions with the requesting party: (1) confirming the scope of the requests; (2) negotiating the terms of production (custodians, search terms); (3) educating the requesting party about the scope of relevant ESI that is reasonably accessible and the ideal form of production; and (4) raising specific objections to overly broad requests and propose how to narrowly tailor requests (limit custodians or search terms, specify different form of production, offer a sampling). In serial products liability cases, productions may have already been made in related cases, potentially in matters where the responding party is directly involved in the litigation. Accordingly, the responding party in a products liability matter should seek to determine whether the production of material already collected and produced in other matters will be sufficient. It is best to have these discussions early with the requesting party. Additionally, the responding party should be prepared to demonstrate evidence of why ESI is "not reasonably accessible" because of undue burden or costs, and these assertions should be bolstered by affidavits from IT personnel, custodians or vendors and cost estimates. It is imperative to establish a record of undue burden and good faith attempts to cooperate.

If the party serving the subpoena has not already done so, the nonparty should discuss the burden, format, cost, and duration of hold issues up front. The parties and nonparties should confer on any problems that arise before filing any motions with the court. Finally, the nonparty should make sure to obtain a written release from the litigation hold once the production is completed

Data Organization and Structure

While non-party subpoena practice in most civil litigations will more often follow a "one off" model, products liability cases more often than not result in a stream of litigations and/or subpoenas. Accordingly, it is imperative for organizations to adopt a long-term approach in potentially responding to the first non-party subpoena or party discovery requests in a litigation. While the natural reaction will often times be to simply respond to the pending request and move on to the next thing, establishing a systematic response – especially when future requests are anticipated – will be extremely helpful and cost-effective in dealing with future requests. For instance, organizations often have various different outside counsel working on similar products liability cases throughout the country. However, more often than not outside counsel are not able to easily access databases previously established by the organization and/or understand how the databases were set up.

With proper oversight, organizations can work with outside counsel to revisit access to databases, and thereby only provide outside counsel with access to information that is relevant to the matters being worked upon. Organizations may also be able to utilize unified document coding procedures where document reviews from one matter may carryover to other matters without the need for subsequent review. Of course, this has the potential to dramatically reduce legal spend.

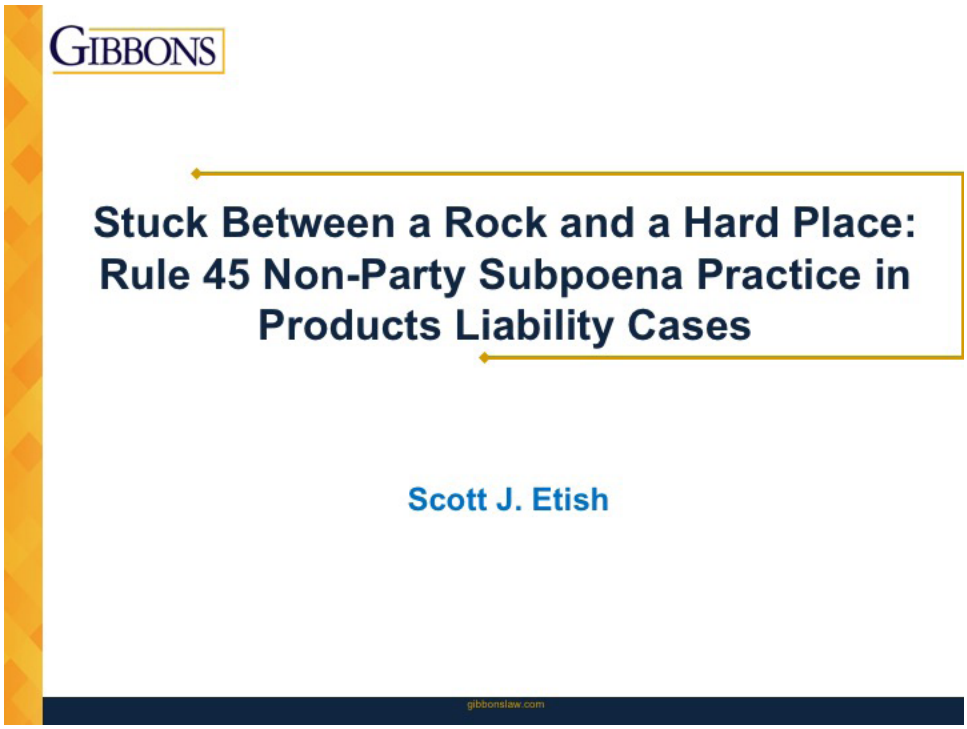
As noted above, products liability cases – and the potential for a stream of ongoing litigations and subpoenas related to products at issue – require a unique approach. In addressing these situations, it is imperative to think about ways to avoid repetition and duplication for each subsequent matter and consider how to do facilitate collaboration and consistency.

Cost-Shifting

As noted previously, requesting parties are required to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" pursuant to Rule 45. Costs are more easily recoverable by third parties under Rule 45 than by parties under Rule 34 and 26. A court will look to protect rights of non-parties, especially where their connection to the claims is attenuated. Of course, in the products liability context, non-parties subject to a subpoena will often include healthcare providers or public entities who can raise compelling arguments against shouldering the cost of third-party discovery.

Many courts follow the principles advocated in the Sedona Conference's 2008 Commentary on Non-Party Production & Rule 45 Subpoenas and consider: (1) the scope of the request; (2) the invasiveness of the request; (3) the need to separate privileged material; (4) the non-party's interest in the litigation; (5) whether the requesting party ultimately prevails; (6) the relative resources of the requesting party and non-party; (7) the reasonableness of the costs sought; and (8) the public importance of the litigation.

Case law on requests for cost-shifting is extremely fact sensitive, but it is fair for non-parties to expect some reimbursement for costs and reasonable attorneys' fees in cases where the non-party does not have an interest in the litigation. Best practices for a non-party faced with an improper Rule 45 subpoena should: (1) estimate the costs of compliance to the requesting party's subpoena as specifically as possible; (2) put the requesting party on notice from the outset as to the non-party's request for cost-shifting; (3) attempt to obtain an agreement for reimbursement of such costs; (4) seek protection from the court if the requesting party will not enter into an agreement; and (5) keep a detailed record of the expenses involved in compliance.



Program Agenda

I. Introduction to Rule 45

II. Effectively Seeking ESI from Third Parties in Products Liability Cases

III. Responding and Objecting to the Subpoena Seeking ESI

IV. The Courts and Cost-Shifting

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Part I

Introduction to Rule 45

- Background of Rule & recent amendments
- ESI-related provisions
- Comparisons to Rules 26 & 34

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Rule 45 At a Glance

- Governs third party subpoena practice
- Sets form, content, service of subpoen
- Requires certain places for compliance
- Protects the recipient of a subpoena
- Allows cost-shifting and recovery of attorneys' fees for undue burden

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Rule 45(d)(1): Protecting a Person Subject to a Subpoena

- *Avoiding Undue Burden or Expense; Sanctions*. A party or attorney responsible for issuing and serving a subpoena **must** take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required **must** enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

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Part II

Effectively Seeking ESI from Third Parties in Products Liability Cases to Avoid Undue Burden and Cost-Shifting

- Assessing third party ESI needs
- Communicating with third parties
- Drafting the subpoena

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Assessing third party ESI needs

- Does your adversary have possession, custody, or control of all relevant ESI?
- Identification of custodians and data sources in products liability cases should include non-parties, who will likely receive a subpoena for records
- Where is the relevant ESI stored?
- How much ESI do you need from nonparties?
- Practice pointer: raise potential third party discovery issues at the Rule 16 conference

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Communicating with third parties

- Communicate early and often
- Important ESI in products liability cases may be in the possession of non-parties such as first responders, healthcare providers, insurers and/or a plaintiff's employer
- Consider offering to manage the production and storage of third party ESI
- Consider offering to review the production subject to a clawback agreement
- Minimize a non-party's burdensome administrative tasks

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Drafting reasonable discovery requests: avoiding undue burden or expense

- Draft narrowly tailored, targeted requests in the first instance!
- Show that the requests are not intended to burden or harass, but to minimize costs
- Restrict requests to the relevant time period
- Tailor requests to relevant subject matter
- Name relevant custodians, if possible
- Always specify the form of production, as permitted by Rule 45(d)(2)(B)

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Drafting reasonable discovery requests: avoiding undue burden or expense

- Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015): despite lack of any factors justifying cost-shifting, court held that the subpoena was overbroad on its face, therefore the requesting party failed to comply with its Rule 45(d)(1) duty to avoid imposing undue burden.
  - Requesting party was responsible for attorney's fees associated with third-party's response to requesting party's motion to compel, including preparation for and participation in oral argument.

Summary of Best Practices: Seeking ESI From Non-Parties in Products Liability Cases

- Assess your third party ESI needs early and raise with the Court
- Engage in early, constant communications with the third party
- Offer to store, manage, and review ESI to ease administrative burdens
- Offer to assume all or part of the costs of production via a cost-sharing agreement
- Draft narrowly-tailored, targeted requests to avoid undue burden or expense
- Create a record of reasonableness!

Part III

- Responding and Objecting to the Subpoena Seeking ESI in Products Liability Cases
  - Complying with deadlines and obligations for form and manner of production
  - Issuing a hold and preserving ESI
  - Communicating with subpoena sender
  - Engaging in motion practice

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Rule 45(d)(2): Response and Objection Deadline

- Objections are due 14 days after service
  - unless the subpoena specifies a later (or earlier!) time; no minimum time period under rule but reasonableness governs
- Compare Rule 45(d)(2)(B) (14 days to object) with Rule 34(b)(2) (30 days to respond)
- Takeaway: nonparties have a significantly shorter window of time to file objections

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Communicating with sender of subpoena: early, constant communications

- Confirm the scope of the requests
- Begin to negotiate the terms of production (custodians, search terms)
- Educate the requesting party about the scope of relevant ESI that is reasonably accessible and the ideal form of production
- Raise specific objections to overly broad requests and propose how to narrowly tailor requests (limit custodians or search terms, specify different form of production, offer a sampling)
  - Am. Fed'n of Musicians of the United States & Canada v. Skodam Films, LLC, 313 F.R.D. 39 (N.D. Tex. 2015): boilerplate objections insufficient; each request must be separately responded to.

Data Organization & Structure:Best Practices for Organizing Responses in Products Liability Cases

- Critical in products liability cases to set out to organize databases early to facilitate sharing of information for different matters.
- Unify coding to allow for the use of information from different matters.
- Provide access to one unified database without different degrees of access.
- Ability to track productions.
- Move away from siloing!

Summary of Best Practices in Products Liability Cases: Responding and Objecting to Subpoena Seeking ESI

- Remember the 14-day objection period
- Issue a legal hold notice upon trigger event (and respond/object to party's hold notice)
- Maintain constant communications with party
- Create a record of undue burden/cost
- Negotiate parameters of production
- Request cost-shifting
- File a motion to quash or modify if necessary
- Consider cross-motion for sanctions if motion to compel is filed

Part IV

The Courts and Cost Shifting

- Legal tests for cost-shifting
- Federal standards
- Recovering attorneys' fees

Costs More Easily Recoverable

- General Principles:
  - Costs are more easily recoverable by third parties under Rule 45 than by parties under Rule 34 and 26
  - Rule 45(d)(1) *mandates* that the requestor be reasonable and the Court enforce this obligation
  - Court's look to protect rights of non-parties, especially where their connection to the claims is attenuated
  - In products liability cases, non-parties may be healthcare of public entities who can raise compelling arguments against shouldering the cost of third-party discovery

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Federal Standards for Cost-Shifting

- Many courts follow the principles advocated in the *Sedona Conference's 2008 Commentary on Non-Party Production & Rule 45 Subpoenas* and consider:
  - the scope of the request;
  - the invasiveness of the request;
  - the need to separate privileged material;
  - the non-party's interest in the litigation;
  - whether the requesting party ultimately prevails;
  - the relative resources of the requesting party and non-party;
  - the reasonableness of the costs sought; and
  - the public importance of the litigation.

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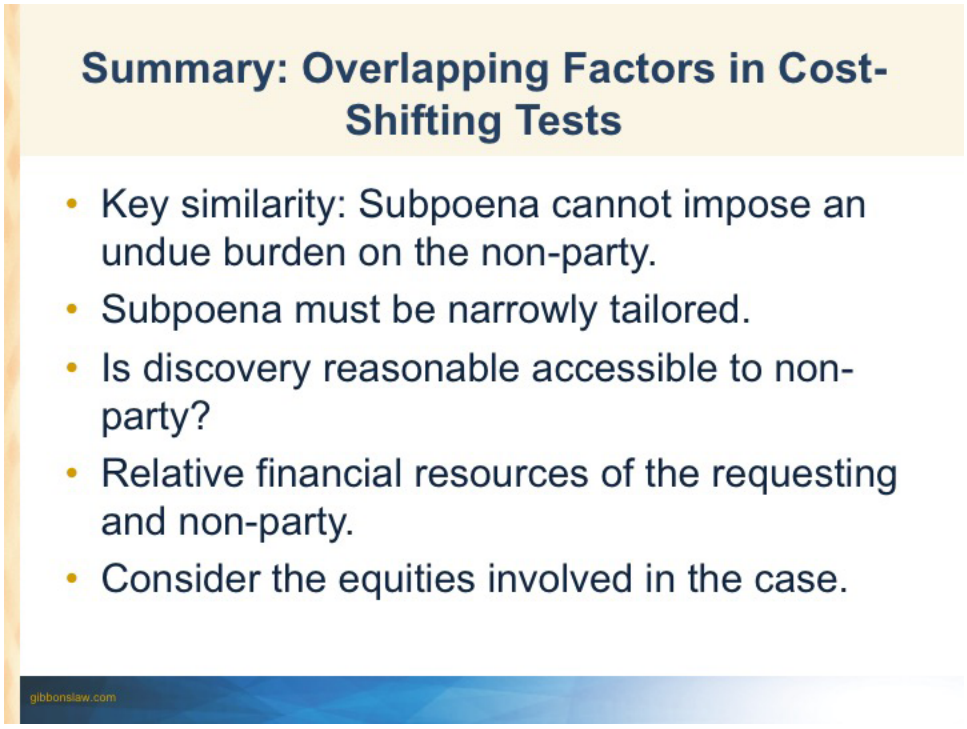
Summary: Overlapping Factors in Cost-Shifting Tests
• Key similarity: Subpoena cannot impose an undue burden on the non-party.
• Subpoena must be narrowly tailored.
• Is discovery reasonable accessible to non-party?
• Relative financial resources of the requesting and non-party.
• Consider the equities involved in the case.
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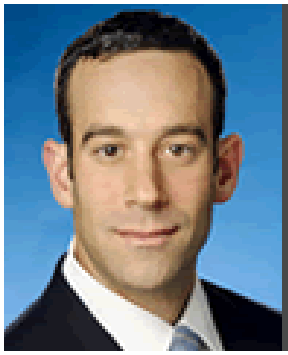

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Mr. Etish is a problem solver. He is a litigator who works with clients to understand their business objectives and navigate them through times of crisis. In many situations, this means seeking to resolve disputes cost effectively through negotiation without litigation. If negotiations are not realistic or are unsuccessful, Mr. Etish will not hesitate to take a more aggressive approach. Mr. Etish represents an extensive range of clients from diverse industries, including food manufacturing, transportation, pharmaceutical, and real estate. His diverse litigation practice is focused primarily on complex commercial disputes, involving business torts, partnership and shareholder agreements, real estate, construction, restrictive covenants, and trademark litigation.

Services
- Commercial & Criminal Litigation
- Electronic Discovery & Information Management Counseling

Experience
- Representing a commercial landowner with respect to environmental matters involving underground storage tanks.
- Representing an international consumer packaged food company with respect to claims involving breach of contract, misappropriation of trade secrets, and unjust enrichment involving the design of an automated storage and retrieval system (ASRS) to be installed at a 402,000-square-foot meat processing facility.
- Representing a title insurance company with respect to litigation involving the duty to defend and priority of coverage.
- Representing the owner in a construction litigation involving claims for breach of contract and breach of a performance bond.
- Representing health care provider in a suit involving numerous counts, including violations of the Sherman Antitrust Act and Racketeer Influenced and Corrupt Organizations Act (RICO), breach of contract, and tortious interference with contract.
- Represented a produce distributor in numerous commercial and product liability lawsuits associated with the 2006 E. coli O157:H7 outbreak in the Mid-Atlantic states.
- Represented a regional supermarket chain in real estate litigation matters and obtained expedited relief on claims related to a “going dark” provision and summary judgment defending claims related to an “area restriction” in commercial leases.
- Represented manufacturing companies in litigation involving restrictive covenants, non-competes, and trade secrets in situations involving executives commencing employment with a competitor.
- Represented a major pharmaceutical company in responding to a state attorney general’s subpoena with respect to marketing practices.

Honors and Awards
- Selected to the Pennsylvania Super Lawyers Rising Stars list, Business Litigation
- The Legal Intelligencer “Lawyers on the Fast Track,” 2014

Education
- Rutgers School of Law - Camden (J.D.) - Research Editor, Rutgers Law Journal
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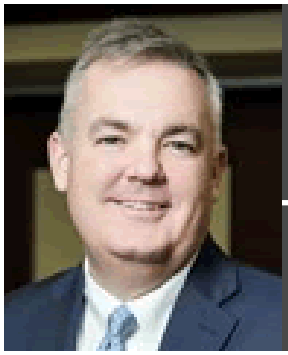

LEVERAGING EFFICIENCY TO PROMOTE MEANINGFUL JUDICIAL ECONOMY IN MASS TORTS

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Lobbying the Gatekeeper: Leveraging Efficiency To Promote Judicial Economy in Mass Torts
Martin Healy

Not long ago, I was reminded that the definition of insanity is doing the same thing over and over - yet expecting a different result. We all make mistakes, and at times, we all follow the herd even when we know it won't get us where we want to go. The same holds true for mass torts and complex litigations. How can it be that so many litigations follow the same procedural paths – particularly when dealing with discovery, when these paths have been proven time and again to be colossal failures in terms of fostering judicial economy or achieving cost-effective and fair results. Unfortunately, the primary reasons we continue down these ill-fated paths are comfort with the status quo and fear of change - particularly when there are no guarantees of success.

It is human nature to resist change or to take action that makes people uncomfortable – but we must embrace change if we wish to improve the process. With the ability to easily stockpile thousands of claimants with the click of a mouse and find some minimal level of scientific or medical support for most any theory of causation, it has become far too easy to generate mass tort litigations in the United States. But with ease of advertisement driven aggregation of claims comes the inability to properly investigate the merits of each such claim. Similarly, the ability to identify an article or professional espousing a particular opinion or science-based hypotheses does not equate to proper proof of causation. Accordingly, now more than ever, we must resurrect the ghosts of "Lone Pine" and promote the virtues of staged discovery to educate and encourage trial courts to accept their role as "gatekeepers," develop more efficient procedures to assess the viability of these claims and, ultimately separate the wheat from the chaff.

Lobbying the gatekeeper is a noble goal, but it requires more than complaints about the incredible costs of litigation or a passing reference to the success of Lore v. Lone Pine Corp. and its progeny. Rather, it requires a detailed analysis of the claims, the strengths and weaknesses of the plaintiff population and alleged scientific support, and a fair (reasonably unbiased) assessment of whether the use of such a discovery tool makes sense and, if so, when and where it would be most effective. Bottom line, you must be able to explain the value of the proposed discovery technique and demonstrate to the court precisely how its use will help the court and parties cut to the chase in a fair and effective manner.

Lone Pine Orders

So, you may be asking, what is a Lone Pine Order? A Lone Pine Order is a generic term used to describe pre-trial case management tools that highlight specific issues (basic proof requirements

needed to substantiate a claim – or obvious deficiencies that impact large numbers of claims) and then compels the production of certain evidence needed to support those issues in a timely manner to streamline the litigation and eliminate meritless claims. In Lore v. Lone Pine Corp., 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986), several hundred plaintiffs filed a toxic tort action against the operator of a landfill (Lone Pine Corp.), and more than 400 other entities that were alleged to have generated or hauled toxic chemicals to the landfill claiming they sustained personal injuries and/or property damage as a result of the exposure to toxic chemicals originating from that site. The court, after determining plaintiffs failed to plead a prima facie case to support their claims, ordered plaintiffs to provide certain basic proofs by a date certain or have their claims dismissed. Specifically, the court ordered as follows:

> (1) Plaintiffs would provide the following documentation with respect to each claim for personal injuries:
>
> (a) Facts of each individual plaintiff's exposure to alleged toxic substances at or from Lone Pine Landfill;
>
> (b) Reports of treating physicians and medical or other experts, supporting each individual plaintiff's claim of injury and causation by substances from Lone Pine Landfill.
>
> (2) Plaintiff would provide the following with respect to each individual plaintiff's claim for diminution of property value:
>
> (c) Each individual plaintiff's address, including tax block and lot number, for the property alleged to have declined in value;
>
> (d) Reports of real estate or other experts supporting each individual plaintiff's claim of diminution of value, including the timing and degree of such diminution and the causation of same. Id. at *1-2.

When plaintiffs failed to produce this evidence, even after receiving an extension of time to do so, the court dismissed the plaintiffs' complaint with prejudice. The court stated, "it is time that prior to the institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause…[the court] is not willing to continue the instant action with the hope that the defendants eventually will capitulate and give a sum of money to satisfy plaintiffs and their attorneys without having been put to the test of providing their cause of action." Id. at *4

These were strong words from the court in 1986 – and they warrant even greater attention in 2018. With the increasing number of mass tort claims being filed – many of which admittedly lack merit,[1] the overwhelming costs associated with these claims, and the incredible burden placed on our judiciary system to handle these claims, the court should be more than willing to work with the parties to find more efficient and cost effective methods for moving these cases through the litigation process.

The Available Tools - And Other Support

Most people agree the mass tort litigation process can, and should, be improved. We agree there is an inordinate amount of wasted time, discovery on issues that bear little relationship to the case, and unnecessary battles over issues of little significance to the final determination. Yet we frequently continue down the same path – despite the fact that the court rules, the judiciary and the legislature not only acknowledge that mass torts and complex litigations need to be handled differently, but they are actively seeking ways to improve the system. The primary battleground seems to center between those who believe the current rules/processes already provide us with everything we need to address the problems, and those who believe that we must amend the court rules or enact legislation to fix the problems. But no matter how you look at the issue, we have a problem that must be addressed – and we as lawyers must do what we can to eliminate or reduce these issues.

The Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure are supposed to govern the procedures in all civil actions pending before the United States District Courts. Fed. R. Civ. P. 1. But it is beyond dispute that these Rules do not

1 Some estimates suggest between 20% and 45% of individual cases associated with mass torts are ultimately dismissed for lack of sufficient evidence to substantiate their claims – and many of those fail for lack of evidence of exposure to the product, an alleged injury that does not match injury profile for the litigation, or other similar deficiencies that could be addressed at the outset of the litigation.

govern all civil actions – or perhaps better stated, do not specify the procedures used in a large number of mass torts and Multi-District Litigation ("MDL") actions. In terms of the overall number of federal court filings, MDL cases now account for nearly half of all civil cases pending in the district courts.

Fortunately, the Federal Rules acknowledge that certain matters, including mass torts and other complex litigation, often require the use of different or more targeted litigation management techniques. In fact, the Federal Rules provide a number of suggested procedural devices to help manage such litigations.[2] By way of example, Fed. R. Civ. P. 16 provides the Court with several options to help direct litigations in a more fair and efficient manner:

- Fed. R. Civ. P. 16(b)(3)(B)(ii) allows the Court to modify the extent of permissible discovery;
- Fed. R. Civ. P. 16(c)(2)(A) allows the Court to formulate and simplify the issues and otherwise eliminate frivolous claims or defenses;
- Fed. R. Civ. P. 16(c)(2)(C) allows the Court to obtain admissions and stipulations about facts and documents to avoid unnecessary proof;
- Fed. R. Civ. P. 16(c)(2)(E) allows the Court to determine the appropriateness and timing of summary adjudication;
- Fed. R. Civ. P. 16(c)(2)(F) allows the Court to control and schedule discovery;
- Fed. R. Civ. P. 16(c)(2)(L) allows the court to adopt special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems;
- Fed. R. Civ. P. 16(c)(2)(M) allows the Court to order a separate trial (hearing) of a claim, counterclaim, crossclaim third party claim or particular issue; and
- Fed. R. Civ. P. 16(c)(2)(P) allows the Court to take such other actions to facilitate the just, speedy and inexpensive disposition of the action.

In light of the autonomy provided by these rules, it is no wonder that most federal court decisions point to Fed. R. Civ. P. 16 as justification for entering a Lone Pine order. See Avila v. Willits Environmental Remediation Trust, 633 F. 3d 828, 833 (9th Cir. 2011); In re Fosamax Products Liability Litigation, 2012 WL 5877418 at *2 (S.D.N.Y Nov. 20, 2012); In re Digitek Products Liability Litigation, 264 F.R.D. 249, 256 (S.D. W. Va. March 5, 2012). Other courts, however, rely upon the reasonable investigation and due diligence mandates of Fed. R. Civ. P. 11 to support their decisions. See In re Orthopedic Bone Screw Products Liability Litigation, 1997 WL 303239, at *1-3, (E.D. Pa. Feb. 3, 1997); In re Orthopedic Bone Screw Products Liability Litigation, 1998 WL 411370, at *1 (E.D. Pa. Jan. 13, 1998); Acuna v. Brown & Root, Inc., 1998 WL 35283824, at *5-6 (W.D. Tex. Sept. 30, 1998, aff'd, 200 F.3d 335, 340 (5th Cir. 2000).[3]

Fed. R. Civ. P. 11(b) provides, in essence:

A party, by submitting a pleading or other paper to the court, certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are

2 The Federal Rules of Procedure, notably Rules 11, 16, 26, 37, 42 and 83, provide additional authority in support of, and to supplement, the court's inherent power to manage litigation. See Chambers v. Nasco, Inc., 501 U.S. 32, 42-51 (1991); Pedroza v. Cintas Corp., No. 6-013247-CV, 2003 WL 828237, at 1 (W.D. Mo. Jan. 2003).

3 Although not specifically addressed here, many states follow federal procedures or have enacted similar court rules that allow for the entry of Lone Pine orders. See, Lone Pine v. Lore, 1986 WL 637507 (N.J.Super. Nov. 18, 1986); In re. Mohawk Rubber Co., 982 S.W.2d 494, 498 (Tex. App. 1998); In re Love Canal Actions, 547 N.Y.S.2d 174, 176-78 (N.T. Sup. 1989); Schelske v. Creative Nail Design, Inc., 933 P.2d 799, 802-05 (Mont. Jan. 2, 1997); In re. Rezulin Products Liability Litigation, slip op. at 1, Index No. 752,000/00 (N.Y. Sup. Aug 2004); Cottle v. Superior Court, 5 Cal. Rptr 2d 882, 887 (Cal. App. 1992); Atwood v. Warner Electric Brake & Clutch Co., 605 N.E.2d 1032, 1036-38 (Ill. App. 1992); In re. Baycol Litig., November Term, 2001, No. 0001, Order (Ct. Com. Pl. Phila. Dec. 12, 2003); In re. Avandia Marketing, Sales Practices & products Liability Litigation, 2010 WL 4720335, at *1 (E.D. Pa. Nov. 15, 2010).

reasonably based on belief or a lack of information. Fed. R. Civ. P. 11(b).

Presuming plaintiff's counsel complies with the mandates of Fed. R. Civ. P 11(b), counsel should have most, if not all, of the basic information typically required under Lone Pine orders at their disposal before the filing of the initial complaint. Accordingly, compelling counsel to provide this support at the outset of the litigation not only makes sense in terms of fairness and notice, it promotes judicial efficiency because this additional information, or lack thereof, not only helps frame the key issues and corresponding discovery in the litigation, it also allows the court to assess and weed-out meritless cases. Moreover, the failure to perform the required due diligence prior to filing not only wastes everyone's time and resources and increases the number of meritless cases on the docket, it also exposes plaintiffs to the risk of sanctions. See In re Engle Litigation, 282 F. Supp.3d 1174 (M.D. Fla. 2017); In re Mentor Corp. Obtape Transobturator Sling Prods., 2016 U.S. LEXIS 121608 (M.D. Ga. Sept. 7, 2016); Carroll v. E One Inc., 893 F. 3d 139 (3rd Cir. 2018).

The Manual for Complex Litigation

Although not an authoritative legal source, the Manual for Complex Litigation is an excellent resource for identifying and discussing helpful techniques and procedures for managing large scale litigation in both the federal and state courts – and provides specialized guidance to address issues that arise in complex litigation such as strategies for handling class actions and methods for resolving issues associated with expert and/or scientific evidence. Interestingly, the Manual for Complex Litigation specifically sets the stage for its use in its Introduction:

> In offering an array of litigation management techniques and procedures, the Manual does not recommend that every complex litigation necessarily employ any such procedures or follow a standard pattern. Choices will depend on the needs of the litigation and many other considerations. What the Manual does urge is that choices be made, and that they be made starting early in the litigation." (emphasis added).

Its use, like the use of all procedural tools, is therefore tied to counsel's ability to make the case for change. It is not automatic – it is not even necessarily recommended, but it is very helpful in situations where the parties identify a particular issue or need, and then match (or create) a procedural tool designed to cure that problem in a more effective and efficient manner.

The Civil Rules Advisory Committee

Over last few years, there have been a number of proposals submitted to the Civil Rules Advisory Committee designed to address the mass tort problem. Although this committee is evaluating a number of possible changes to the federal rules, several have been specifically designed to address the increasing concern over the number of frivolous or meritless claims in mass tort actions and the lack of a uniform, effective method for screening them out in the early stages of a litigation. Some of the options proposed include:

- . . . a heightened pleading requirement (akin to Rule 9(b)) that compels plaintiffs to provide "meaningful evidence of a valid case" in any consolidated proceeding subject to a "Master Complaint."

- . . . an additional initial disclosure requirement (akin to Rule 26) that compels each plaintiff to file "significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendants conduct.

The committee acknowledges that the primary objective for these Rule change proposals is to address the significant inconsistency created by the ad hoc approach currently being used by MDL Judges (and others attempting to manage complex litigation) who are left "on their own" to create fair and appropriate procedures to manage complex litigation, without any real guidance or limitations provided by the Civil Rules. See Minutes, Civil Rules Advisory Committee, November 7, 2017, at pg. 20-21.

Oddly, although plaintiffs' counsel acknowledge that meritless claims are often included in mass tort litigations for a variety of reasons, they argue that this is widely known and that there is little

harm in allowing these matters to sit during the pendency of the case – especially if the litigation is ultimately resolved on a global scale - because it does not significantly alter the course of discovery. But it is "a mistake to underestimate the burden frivolous claims impose on defendants." Id. at p. 24. Weeding out frivolous cases is an important part of the system. Id. at 25. "It is the numbers that make these claims complex…Numbers raise the stakes and pressures." Id. "Some courts see MDL proceedings as a mechanism for settlement, not truth-seeking." Id. But "settlements require a realistic understanding of what the case is worth." Id. There is also an important regulatory aspect – "a publicly traded company has to disclose litigation risks . . . even though many of them are bogus, inflating the apparent exposure to risk of many losses." Id.

Counsel must identify these issues for the court, explain the problems created by allowing meritless cases to sit on a docket (especially when the number of meritless claims has been estimated as high as 40% of claimants in certain mass torts), and to lobby for the imposition of early disclosures, detailed fact sheets and/or other similar proof requirements to help eliminate such claims and narrow the scope of the litigation as a whole.

The Legislature

Even the legislative branch acknowledges we have serious problems managing mass tort litigations in a manner that weeds out meritless or frivolous claims, or otherwise helps the parties address the issues raised in the litigation in a fair, effective and cost-efficient manner. This concern provides the foundation for H.R. 985, which is a bill that passed the House Judiciary Committee earlier this year – but has been sitting idle for several months.

H.R. 985, entitled the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017," was created to:

(1) assure fair and prompt recoveries for class members and multidistrict litigation plaintiffs with legitimate claims;

(2) diminish abuses in class action and mass tort litigation that are undermining the integrity of the U.S. legal system; and

(3) restore the intent of the framers of the United States Constitution by ensuring federal court consideration of interstate controversies of national importance consistent with diversity jurisdiction principles.

Although this Act addresses a number of issues, and further advances many of the key principles of the Class Action Fairness Act of 2005, its relevance for our purposes are the provisions pertaining to "Allegations Verification" set forth in Sec. 105. Multidistrict Litigation Proceedings Procedures. Specifically, in an effort to curb abuses in mass tort litigation and reduce the number of frivolous claims in the MDL, the legislature has suggested amending Section 1407 to compel "plaintiffs asserting claims for personal injury in an MDL to provide evidence, including but not limited to medical records, to support the factual contentions in the complaint regarding the nature of the alleged injury, the exposure to the risk (product) that allegedly caused the injury, and the alleged cause of the injury," and to do so within the first 45 days of transfer or direct filing in the MDL jurisdiction. It is not a coincidence that these evidential factors mirror those of most Lone Pine Orders – and even though this Bill would be limited to MDL proceedings, the stated objectives for this Bill and the efficiencies to be gained by proceeding in this fashion in all mass tort and complex litigations have equal merit in all state court and federal proceedings.

Lone Pine - The Case for Judicial Efficiency

Armed with this background, counsel must now conduct a thorough assessment of each litigation to identify (1) the primary issues identified in the pleadings; (2) the proof requirements associated with those claims; (3) the factual and/or logic gaps (if any) identified in the pleadings, discovery responses and/or expert proffers; and (4) the scope of other applicable legal defenses or road blocks that may apply to the claims asserted – and then determine the best time and method for raising those issues with the court for early resolution. In certain situations – where the pleadings are obviously defective on their face - the problem can be addressed by filing motions to dismiss the complaint and/or deficient claims. But in other situations – where the claims may be properly plead, but where the likelihood of

plaintiffs meeting their proof requirements seems remote or specific issues or deficiencies have been identified that can be addressed on a global scale at any time during the pendency of the litigation - counsel should follow the lead of Lone Pine and its progeny to devise a more efficient and cost-effective path to address those concerns, narrow the scope of the litigation and seek the dismissal of meritless claims.

Although this approach is fairly straight-forward and beneficial to achieving fair and cost effective results, many lawyers still oppose the entry Lone Pine orders. Most of the opposition comes from plaintiff's counsel who would prefer to complete discovery before offering this type of support for their claims. But the opposition also frequently bleeds into the judiciary because these case-management techniques run counter to many of the normal customs and procedures employed by the court – and unfamiliarity, specifically when combined with vocal opposition, often forces people to run for the comforts of what they know best. Accordingly, the Lone Pine issues identified and the procedures proposed should be narrowly tailored to achieve a specific objective, supported by evidence and, most importantly, presented in a manner that aligns the defendant's interests with the fundamental interests of the court – fairness, efficiency (resources, timing and cost) and expediency. A defendant can raise all of the "need to separate the wheat from the chaff" arguments you can think of, but if you cannot establish that the proposed discovery "short-cut" will save time, money and judicial resources while also leading to a fair and legally supportable result, the likelihood of convincing the court to adopt the procedure will likely fail.

Let's start with the basics. Lone Pine orders have been widely accepted in toxic tort cases with multiple plaintiffs. See Arias v. DynCorp, 2008 WL 9887418, at *1-2 slip op. (D.D.C. Oct. 21, 2008), aff'd, 752 F. 3d 1011, 1014 (D.C. Cir. 2014); Eggar v. Burlington Northern Railroad Co., 1991 WL 315487, at *4 (D. Mont. Dec 18, 1991); Bell v. ExxonMobil Corp., 2005 WL 497295, at *1-3 (Tex. App. March 3, 2005); Trujillo v. Ametek, Inc. 2016 WL 3552029, at *1 (S.D. Cal. June 28, 2016). Abbatiello v. Monsanto Co., 569 F. Supp. 2d 351, 354 (S.D.N.Y 2008); In re 1994 Exxon Chemical Plant Fire, 2005 WL 6252312, at *1-2 (M.D. La. April 7, 2005); Steering Comm. V. Exxon Mobile Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006); Adjemian v. American Smelting & Refining Co., 2002 WL 358829, at *1-6 (Tex. App. March 7, 2002); In re Silica Products Liability Litigation, 398 F. Supp. 2d 563,576 (S.D. Tex. June 30, 2005); Burns v. Universal Crop Protection Alliance, 2007 WL 2811533, at *2-3 (E.D.ark. Seept. 25, 2007); Asarco LLC v. NL Industries, Inc. 2013 WL 943614, at *3 (E.D. Mo. March 11, 2103).

Similarly, Lone Pine orders have been deemed "routine" and accepted time and again in a number of different settings in mass tort cases more broadly. See In re Vioxx Products Liability Litigation, 2007 WL 9653192 (E.D. La. Nov. 9, 2007); In re Vioxx Products Liability Litigation, 557 F. Supp.. 2d 741, 743 (E.D. La. 2008); In re Baycol Products Liability Litigation, MDL No. 1431, 2004 WL 626866, at *1 (D. Minn. Mar. 18, 2004); In re Rezulin Products Liability Litigation, 441 F. Supp.2d 567, 570 (S.D.N.Y. 2006); In re Bextra and Celebrex Mktg Sales Practices and Product Liability Litigation, MDL No. 1699, slip op. (N.D. Cal. Aug. 8, 2008); In re Avandia Marketing, Sales Practices & Products Liability Litigation, 2010 WL 4720335, at *1 (E.D. Pa. Nov. 15, 2010), aff'd 2017 WL 1401285, at *3 (3rd Cir. April 19, 2017).

Regardless of the type of litigation or the underlying claims asserted, the resounding theme in each of these litigations was the need for the court to adopt a different discovery approach to wade through all of the claims, evaluate their viability, and then address common issues in a more efficient manner. By requiring plaintiffs to provide evidential support on certain key issues outside the "normal" course of discovery – or on an expedited basis, the court found success moving the litigation forward more quickly and eliminate meritless claims earlier in the process.

Also, although Lone Pine orders have been used in mass tort litigation to address a variety of issues over the years, they have been particularly helpful when used to address certain types of issues that arise more frequently. For instance, courts routinely enter Lone Pine orders:

- To address improper, incomplete or delayed discovery. Modern Holdings, LLC v. Corning Inc., 2015 WL 6482374 at *3-4 (E.D. Ky. Oct.

27, 2015); Bell v. ExxonMobil Corp., 2005 WL 497295, at *1-3 (Tex. App. March 3, 2005); Avila, 633 F. 3d at 834; Able Supply Co. v. Moye, 898 S.W.2d 766, 771 (Tex. May 11, 1995); Simeone, 872 N.E.2d at 352; Atwood v. Warner Electric Brake & Clutch Co., 605 N.E.2d 1032, 1035 (Ill. App. 2d 1992); In re. Avandia Marketing, Sales Practices & products Liability Litigation, 2010 WL 4720335, at *1 (E.D. Pa. Nov. 15, 2010); In re. Asbestos Products Liability Litigation, MDL 875, Administrative Order No. 12, slip op. at 6 (E.D. Pa. Sept. 3, 2009), aff'd, 718 F.3d 236, 244-45 (3rd Cir. May 31, 2013); Accord Modern Holdings, 2015 WL 6482374, at *3; In re Love Canal Actions, 547 N.Y.S.2d 174, 176-78 (N.Y. Sup. 1989).

- To assess class representative or bellwether cases. In re. Nexium Antitrust Litigation, 777 F.3d 9, 21, (1st Cir. 2015); In re Zimmer Nexgen Knee Implant Products Liability Litigation, 2016 WL 3281032, slip op. (N.D. Ill. June 10, 2016); Trujillo v. Ametek, Inc., 2016 WL 3552029, at *3 (S.D. Cal. June 28, 2016); Gbarabe v. Chevron Corp., 2017 WL 956628, at *6 (N.D. Cal. Mar 13, 2017); Madison v. Chalmette Refining, LLC, 637 F.3d 551, 556 (5th Cir. 2011); Abuan v. General Electric Co., 3 F.3d 329, 331 (9th Cir. 1993); Bell v. ExxonMobil Corp., 2005 WL 497295, at *1-3 (Tex. App. March 3, 2005); Eggar v. Burlington Northern Railway Co., 1991 WL 315487, at *5 (D. Mont. Dec 18, 1991);

- To identify meritless cases or non-qualifying injuries. In re 1994 Exxon Chemical Plant Fire, 2005 WL 6252312, at *1-2 (M.D. La. April 7, 2005); Steering Comm. V. Exxon Mobile Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006); In re Rezulin Products Liability Litigation, 2005 WL 1105067, at *1-2 (S.D.N.Y. May 9, 2005); Rezulin, 441 F. Supp. 2d at 570; In re Fosamax Product Liability Litigation, 2012 WL 5877418 at *2 (S.D.N.Y Nov. 20, 2012).

- To assess qualification for settlements/viability of opt-outs. In re Vioxx Products Liability Litigation, 2007 WL 9653192 (E.D. La. Nov. 9, 2007; In re Vioxx Products Liability Litigation, 557 F. Supp.. 2d 741, 743 (E.D. La. 2008); In re Pradaxa Products Liability Litigation, MDL No. 2385, slip op. at 2-5 (S.D. Ill, May 29, 2014), aff'd, 2015 WL 5307473, at *1 (S.D. Ill. Sept. 10, 2015); In re Oil spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, slip op. (E.D. La. July 17, 2014), enforced, 2016 WL 614690 (E.D. La. Dec. 16, 2016).

- To compel production of information in plaintiff's control. In re Baycol Products Liability Litigation, MDL No. 1431, 2004 WL 626866, at *1 (D. Minn. March 18, 2004); In re Vioxx Products Liability Litigation, 2007 WL 9653192 (E.D. La. Nov. 9, 2007; In re Vioxx Products Liability Litigation, 557 F. Supp. 2d 741, 743 (E.D. La. 2008); Avandia, 2010 WL 4720335, at *1-2; Acuna v. Brown & Root, Inc., 1998 WL 35283824, at *7 (W.D. Tex. Sept. 30, 1998, aff'd, 200 F.3d 335, 340 (5th Cir. 2000); Baker v. Chevron USA, Inc., 2007 WL 315346 at *1 (S.D. Ohio Jan. 30, 2007); In re Avandia Marketing, Sales Practices & Products Liability Litigation, 2010 WL 4720335, at *1 (E.D. Pa. Nov. 15, 2010).

This compilation is by no means exhaustive. Targeted and expedited discovery could be valuable in a number of other situations as well. Lone Pine orders could be designed to address a number of procedural bars to litigation – like statute of limitation issues. They could also be used to address pleading deficiencies identified at the motion to dismiss phase by compelling the production of sufficient evidence to justify the continuation of the case. Lone Pine orders would also be extremely valuable in identifying Daubert[4] problems earlier in the course of litigation. By compelling plaintiffs to provide the scientific basis for their claims at the outset, it allows defendants and the court to evaluate the relative strength of the theory or its general acceptance in the scientific community long before the parties are forced to expend millions of dollars litigating a claim that ultimately lacks the necessary medical or scientific support. Finally, Lone Pine orders can assist the parties with the application of court decisions impacting significant numbers of claimants such as decisions on Daubert motions or decisions on motions in limine that impact blocks of individual plaintiffs. None of these suggestions are perfect, but each warrants consideration as the number of mass tort claims continue to rise because

4 Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) (United States Supreme Court case determining the standard for admitting expert testimony in federal courts).

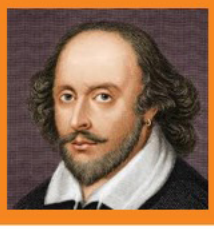
otherwise, the court and our clients could drown in the cost of frivolous litigation.

Conclusion

Given the current state of mass tort litigation and the ease with which plaintiffs' counsel can aggregate claims – good and bad – with the assistance of online media, we must all look for opportunities to improve the legal system. Through the use of Lone Pine orders, courts can help identify and eliminate meritless claims more quickly, and then focus more attention on the expedient resolution of those that have merit. It would be impossible to identify all of the ways courts can use Lone Pine orders to help ensure litigations proceed in a more efficient and cost effective manner, but if everyone makes a concerted effort to identify the problems presented by such litigations at the outset, and then look for creative ways to address those problems in a manner that fairly and efficiently addresses the issue and ultimately reduces the court's docket – you will have done your part.

A BOOST FROM THE "BARD"

"ONCE MORE UNTO THE BREACH, DEAR FRIENDS, ONCE MORE. . ."



William Shakespeare,
- - Henry V

A RALLYING CRY . . .

TO ADDRESS:

- DISCOVERY PROBLEMS IN MASS TORTS
- NEED FOR CHANGE
- *VALUE OF LONE PINE*
- MOMENTUM FOR CHANGE
- TACTICAL USE OF LONE PINE

THE PROBLEMS WITH MASS TORTS

- VAGUE PLEADINGS
- LACK OF EVIDENCE/SUPPORT
- BROAD ONE-SIDED DISCOVERY
- FRIVOLOUS CLAIMS
- INEFFICIENT / COSTLY

MADE WORSE BY TECHNOLOGY

- EASY CLAIM AGGREGATION
- LACK OF PERSONAL CONTACT
- LIMITED DUE DILIGENCE
- UNLIMITED ACCESS TO MEDICAL AND SCIENTIFIC LITERATURE OF QUESTIONABLE VALUE

THE MODERN REBUTTAL

SO WHAT DO WE DO ?

ASSESS THE CURRENT TOOLS

- Fed. R. Civ. P. - Rules 8, 9, 11, 12, 16, 26, 37, 42, and & 83
- The Manual for Complex Litigation
- Lone Pine Orders

DISCOVER LONE PINE

LONE PINE ORDERS

- Case Management Discovery Tool
- Highlight Critical Issues
- Compel Evidentiary Support
- Dismiss If Failure to Comply

STANDARD LONE PINE DEMANDS

- *Prima Facie* Showing Of:
  - Exposure to Product/Toxic Substance
  - Medical Support For Alleged Injury
  - Proof of Causation


LIKELIHOOD OF SUCCESS


IMPROVING YOUR CHANCES

SELL MOMENTUM FOR CHANGE

- ADVANCES IN TECHNOLOGY
- APPELLATE COURT ACCEPTANCE
- MANUAL FOR COMPLEX LITIGATION
- CIVIL RULES ADVISORY COMMITTEE
- LEGISLATIVE EFFORTS

DEVISE TACTICAL STRATEGY

- EVALUATE SCOPE OF CLAIMS/ISSUES RAISED
- ASSESS PROOF REQUIREMENTS
  - (Focus on those in Plaintiff's Control)
- IDENTIFY GAPS IN FACTS/LOGIC
- CONSIDER OTHER LEGAL DEFENSES
- SELECT PROPER SCOPE OF TIMING

DEMONSTRATE JUDICIAL EFFICIENCY

- TAILOR ORDER TO ACHIEVE OBJECTIVE
- SUPPORT WITH EVIDENCE
  (Factual Basis, Science/Data, Past Success)
- ALIGN INTERESTS WITH COURT'S
- EMPHASIZE FAIRNESS, EFFICIENCY, and EXPEDIENCY
- ESTABLISH VALUE!

PROMOTE LONE PINE SUCCESS

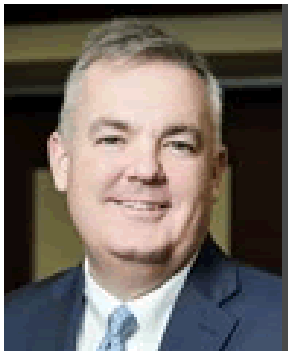
- RESOLVE DISCOVERY FAILURES
- CLASS REPS AND BELLWETHERS
- MERITLESS / FRIVOLOUS CLAIMS
- OPT-OUTS / NON-QUALIFYING INJURIES
- FOSTER SETTLEMENT PROCESS
- OBTAIN PLAINTIFF'S INFORMATION

TRY PUSHING THE ENVELOPE

- CURE PLEADING DEFICIENCIES
- EARLY CASE ASSESSMENT
- ADDRESS PROCEDURAL BARS
- IDENTIFY *DAUBERT* ISSUES
- APPLY *DAUBERT* AND *IN LIMINE* DECISIONS

DESPITE THE ODDS: NEVER GIVE UP !

Remember the Alamo!



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Principal

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Martin Healy is a litigator with 25 years of experience working with clients on complex litigation, including class actions and multi-district litigation, in state and federal courts across the country. Mr. Healy works with clients to understand their business needs so that he can develop strategic, cost effective legal solutions that help them achieve their goals. When a trial is necessary, however, Mr. Healy advocates for his clients in the courtroom where he has successfully tried numerous cases to verdict.

Mr. Healy works with clients to defend product liability, drug and medical device, consumer fraud and toxic tort claims. He has managed national litigation for clients in a wide range of industries including complex matters for global pharmaceutical, medical device, automotive and heavy equipment, and other product manufacturing and engineering companies around the world. Working strategically with his clients, Mr. Healy has successfully handled thousands of cases, filed in numerous jurisdictions, from initial pleadings through trial. He also successfully represents clients through all phases of class action litigation from initial counseling and crisis management, to the development of trial and motion strategies for defeating class certification, to the application of settlement strategies for obtaining the approval of class settlements.

Mr. Healy regularly partners with clients to provide counsel on matters of corporate compliance, litigation avoidance, cyber security and data privacy. His experience includes counseling clients on managing and avoiding risk, the assessment of litigation threats, regulatory compliance, data security and privacy, and document retention and management.

Prior to joining the firm, Mr. Healy was a partner in the Complex Litigation Department of an AmLaw 200 firm, and a trial attorney for general practice and insurance defense firms, where he handled a wide variety of cases and gained significant jury trial experience.

Practice

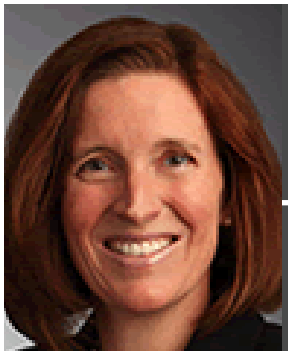
- Litigation
- Toxic and Environmental Tort
- Class Actions
- Product Liability
- Life Sciences Litigation
- Environmental Litigation
- Data Privacy and Cybersecurity
- Life Science

Honors and Awards

- “AV Preeminent” by Martindale Hubbell in the fields of Product Liability, Litigation and Torts

Education

- The John Marshall Law School, Chicago, IL, J.D. 1993
- Villanova University, Villanova, PA, B.A., 1987



PANEL: ETHICS AND SOCIAL MEDIA - IS IT TRULY OLD WINE, NEW BOTTLE?

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Ethical Considerations In The Age Of Social Media

Vaughn Crawford and Paloma Diaz

While popular social media sites change and evolve, usage in the United States in its various forms continues to steadily increase. In 2005, only 5% of American adults used at least one social media site.[1] Today, that percentage has risen to 69%.[2] The frequency with which users access social media platforms every day has risen dramatically as well.

While the prevalence of social media places new challenges on the legal profession, technological advancement is nothing new. Even though lawyers must now consider how social media shapes the duties of competency, evidence preservation, and confidentiality, the analysis should not change markedly simply because the communication occurred online. Ethics in the age of social media truly is old wine in a new bottle—the old wine representing the rules of professional responsibility and the new bottle representing social media.

At all times a lawyer is required to meet minimum standards of professional responsibility, but of course we strive to do better. This article discusses how social media influences that minimum standard and what that means for practicing attorneys.

Competency

In 1983, the American Bar Association adopted the model rule on competency.[3] To this day, the 35-year-old language remains the same.[4] In essence, the rule requires a lawyer to provide competent representation, which according to the comments includes an understanding of "the benefits and risks associated with relevant technology."[5]

Fortunately, the rule does not require an attorney to maintain a minimum amount of followers on Instagram or Twitter, but it does require an attorney to understand how social media can help or hinder their client. And in some cases, providing competent representation requires investigating social media. For example, the Ninth Circuit has held that a lawyer's failure to investigate a victim's social media amounted to ineffective assistance of counsel.[6] While ineffective assistance of counsel and malpractice standards certainly differ,[7] both require proof that but for the attorney's deficient performance or negligence, the result of the proceeding would

1 Social Media Fact Sheet, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/social-media/.

2 Id.

3 ABA Model Rules of Professional Conduct (pre-2002)—History, LEGAL INFO. INST., https://www.law.cornell.edu/ethics/aba/2001/history.htm#Rule_1.1 (last visited June 20, 2018).

4 Id.

5 MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2018).

6 Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013).

7 "To establish that counsel provided constitutionally ineffective assistance, a defendant must demonstrate both deficient performance and prejudice." James v. Ryan, 679 F.3d 780, 807 (9th Cir. 2012), cert. granted, judgment vacated, 568 U.S. 1224, 133 S. Ct. 1579, 185 L. Ed. 2d 572 (2013). "To prevail in a legal malpractice suit, a plaintiff must establish four elements: (1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts were the proximate cause of the plaintiff's damages; (4) that but for defendant's conduct the plaintiff would have been successful in the prosecution or defense of the action." Blue Water Corp. v. O'Toole, 336 N.W.2d 279, 281 (Minn. 1983) (the elements may vary depending on state).

have differed. Due to the willingness of social media users to post thought processes, beliefs, biases and impressions, social media sites may have just the "smoking gun" evidence that could change the outcome of a case.

Information contained on social media sites can be material and necessary for an effective defense.[8] Consider a plaintiff seeking damages for loss of enjoyment of life.[9] The defense discovers the plaintiff's social media and finds contradicting evidence—photographs of or comments about the plaintiff engaging in activities that directly refute such damages. Accordingly, the judge or jury finds that the plaintiff is not entitled to compensation for these damages because the photos or comments demonstrate the plaintiff's physical capabilities and enjoyment of life.[10] In this instance, the defense discovered a "smoking gun."

Some attorneys may struggle navigating the many social media sites that hold potentially important evidence. One way to address this problem is by instituting a reverse mentoring program.[11] Reverse mentoring programs allow young attorneys, who grew up using social media, to pass on their skills and knowledge to those who did not. Another option is to consider relying on support staff for this function. Bottom line, if attorneys never ask about or search for social media evidence, they are placing themselves in a vulnerable position with respect to fulfilling their duty of competency.

Providing competent representation also applies when selecting a jury. Can a lawyer review a prospective juror's social media presence? The short answer is "yes." However, there are important differences between how jurisdictions view the features of certain social media sites. Some social media sites, liked LinkedIn, send automatic alerts when a user's profile is viewed, and some jurisdictions view these automatic alerts as communications. To ensure there is no violation of Rule 3.5,[12] check your jurisdiction before browsing and carefully plan how you and your support staff or consultants will use social media as part of the jury selection process.[13]

Evidence Preservation

Rule 3.4 prohibits an attorney from unlawfully altering or destroying evidence, or assisting others in doing so. When it comes to evidence, don't lie, don't delete, and don't conspire to do either.

There are public and private aspects to social media and both are generally discoverable. Failure to preserve social media evidence has led to serious sanctions.[14] If litigation is anticipated, do not advise your client to "clean up" their past social media presence—once it is tweeted or posted, it cannot be taken back. Instead, warn that what is on social media can and will be used by the opposing party and prepare for it. While lawyers cannot control what a client has posted in the past, they certainly can and should inform the client of the perils associated with continuing to post going forward[15] and the dangers of deleting and not preserving what is already there.

How can a lawyer or client preserve social media evidence? Some social media sites offer users the ability to "Download Your Info."[16] Additionally, there are now several third party vendors available to ensure preservation.[17] Depending on the client, a third party vendor may be the safest option. For example, ArchiveSocial is a third party vendor that offers social media archiving for government, education, and law enforcement.[18]

Although there is a duty to preserve, this does not mean the opposing party will always have free reign

8 Romano v. Steelcase Inc., 30 Misc. 3d 426, 430, 907 N.Y.S.2d 650, 654 (Sup. Ct. 2010).

9 See id.

10 Stephanie R. Caudle, Could Social Media Impact Your Personal Injury Claim?, HUFFPOST (May 9, 2016), https://www.huffingtonpost.com/stephanie-r-caudle/could-social-media-impact_b_9858366.html (In a Canadian case, a judge ruled similarly against the claimant who claimed loss of enjoyment of life but was contradicted by Facebook posts).

11 Dan Negroni & Joann Grages, Burnett Reverse Mentorship Is the Key to Success for Millennials and Their Law Firms, AM. BAR ASS'N, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/mentoring/reverse-mentorship-the-key-success-millennials-and-their-law-firms.html (last visited June 21, 2018).

12 MODEL RULES OF PROF'L CONDUCT r. 3.5 (AM. BAR ASS'N 2018) (stating "A lawyer shall not . . . communicate ex parte" with a juror during the proceeding).

13 See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014) (determining that automatic alerts to prospective jurors is not a communication). New York opinions suggest that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account. See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); N.Y. Cty. Lawyers Ass'n, Formal Op. 743 (2011); SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION (2015). The Oregon State Bar Association expressed similar beliefs as the New York opinions. See Oregon State Bar Formal Ethics Op. No. 2013-189, "Accessing Information About Third Parties Through a Social Networking Website."

14 Allied Concrete Co. v. Lester, 736 S.E.2d 699, 703, 705 (2013) (holding the plaintiff and his counsel subject to sanctions for engaging in spoliation of social media evidence).

15 See 50 Cent Tells Bankruptcy Court Piles of Cash in Photos Were Fake, N.Y. TIMES (Mar. 10, 2016), https://www.nytimes.com/2016/03/11/nyregion/50-cent-bankruptcy-fake-cash-money-bills.html.

16 For example, under a Facebook user's "settings," there is an option to download a copy of the user's information, either to keep, or transfer to another service.

17 Examples include, CloudPreservation, X1 Social Discovery, and Smarsh

18 ARCHIVESOCIAL, https://archivesocial.com/ (last visited June 20, 2018).

over your client's social media presence. Of course, the opposing party will have access to anything publicly available. For non-public content, there are several methods of accessing social media evidence once the opposing party establishes relevance. Courts have allowed direct access, limited access, and in camera review.[19] Since no one practice is widely favored, attorneys have considerable latitude to argue for the access they want.

Confidentiality & Privilege

Rule 1.6 prohibits an attorney from revealing confidential information. When a lawyer is frustrated by a negative review on a social media site, for example, responding can be tempting, but is also problematic. The lawyer must be careful not to reveal any confidential information in doing so. Any disclosures made do not fall under the exemption to the confidentiality rule that allows an attorney to reveal information to defend against a formal charge.[20]

Additionally, if a client posts, even privately, about protected information, the client may waive attorney-client privilege. To prevent unintended waivers, the lawyer and client must discuss and limit the methods used for attorney-client communications, and the perils of not adhering to that agreement.

Old Wine, New Bottle

Don't let the new bottle fool you. The Rules of Professional Responsibility have not changed despite the proliferation of tweets, posts, pictures, and private messages amng social media's billions of users. The prevalence and variety of social media may be unique in terms of social media's impact on legal ethical obligations, but it's certainly not the first change in technology the legal profession has experienced. Putting the wine into a new bottle has not changed the essence of the wine. No matter the technology available to lawyers, the ethical rules and the standards required by those rules remains fundamentally the same.

19 See Largent v. Reed, No. 2009-1823, 2011 WL 5632688 (requiring plaintiff to turn over her Facebook login information to the defense counsel); Trail v. Lesko, No. GD-10-017249, 2012 WL 2864004 (stating that a party is not entitled to complete access of an opposing party's private posts); Offenback v. L.M. Bowman, Inc., No. 1:10-CV-1789, 2011 WL 2491371, at *1 (M.D. Pa. June 22, 2011) (the judge conducted an in camera review of the Plaintiff's Facebook account and ordered the production of only the relevant material).

20 Kali Hays, DC Atty Admonished For Response To Ex-Client's Complaint, L. 360 (July 6, 2016), https://www.law360.com/articles/814439/dc-atty-admonished-for-response-to-ex-client-s-complaint.

Snell & Wilmer

The wine remains the same, but the bottle *has* changed

The duties of **competency**, **confidentiality**, **and evidence preservation** in the age of social media

Snell & Wilmer L.L.P

Instantaneous Communication

Mark Twain:

"Before truth can get his boots on, a lie is halfway 'round the world."

With the speed of optic cables, that's actually around the earth 3 times in a second

The Duty of Competency

- Rule 1.1 – "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Requisite Knowledge and Skill ….

- Rule 1.1, Comment 8 – "[K]nowledge and skill **include the benefits and risks associated with relevant technology ….**"

"Quadfather"

Jesse's Details	
Status:	Single
Here for:	Networking, Dating, Serious Relationships, Friends
Orientation:	Straight

Hey Jesse. Happy late birthday. Hope it was radical. My brother called me from your house when he was all wasted, so I'm sure you crazy fools had fun.

Postings on S-M Making the Case

"We are all blessed to be alive for we were not wearing seatbelt except the driver and passenger."

Postings on S-M Making the Case

- "Y'all know I was texting and driving. I did this to myself."
  - Graves v. Toyota Motor Corp., 2012 WL 13019012 (S.D. MS 2012)

Social Media = "Relevant Technology"

- Attorney's failure to investigate social media held to be ineffective assistance of counsel.

  Cannedy v Adams 706 F. 3d 1148 (9th Cir. 2013)

Investigating the Venire

ABA Formal Opinion 466

- "There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn . . . In today's Internet-saturated world, the line is increasingly blurred."

Rules of Thumb

- A lawyer *may* view the public portion of a person's social media – party or potential juror.
- A lawyer may *not* personally, or through another, send an access request to a juror.
- Network-generated notice to a juror that a lawyer has reviewed the juror's information is *not* communication from the lawyer to the juror. (LinkedIn, *e.g.*)

- But, other ethics opinions (including 2 from NY) are to the contrary. There is no clear authority re whether such unintentional "communications" violate ER 3.5 or 4.2

Witnesses?

- In general, a lawyer may request permission to view the restricted portion of an *unrepresented* party's social media profile (*e.g.*, "friend" that person on Facebook).
- However, the lawyer cannot use deception.
  - *Disciplinary Counsel v. Brocker*, 145 Ohio St. 3d 270 (2016)

The Duty of Confidentiality

- Rule 1.6(a) – "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

What You Cannot Do ....

- "A lawyer may not disclose client confidential information solely to respond to a former client's criticisms of the lawyer posted on a website that includes client reviews of lawyers."
  - New York State Bar Association Committee on Professional Ethics, Opinion No. 1032 (Oct. 2014)

Confidentiality Breached

- Illinois: Lawyer responded to negative post on Avvo accusing lawyer of taking a fee, knowing she couldn't help:
  - "I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about."

    - DISCIPLINED FOR REVEALING CONFIDENTIAL INFORMATION AND PUTTING THE PROFESSION IN A BAD LIGHT.

"Proportionate and Restrained"

- An attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is "proportionate and restrained.''

  Los Angeles County Bar Association in Opinion 525

Friends and Family Discount ….

- After reaching a settlement, the plaintiffs' daughter posted on Facebook: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

  Gulliver Schools, Inc. v. Snay, 137 So. 3rd 1045 (2014)

Access to Evidence

Rule 3.4(a) – "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document **or other material** having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

Social Media = Material .....

- Social media posts can have evidentiary value and an attorney has a duty to investigate and advise his or her client to preserve relevant social media that may be evidence.

Deleting = Shredding

Plaintiff's counsel in wrongful death case directed his paralegal to tell the client to delete photos from his Facebook page. The client was the surviving husband of a young woman killed in a collision with one of the defendant's cement trucks. One of the deleted Facebook photos showed him holding a beer can and wearing a T-shirt "emblazoned" .....

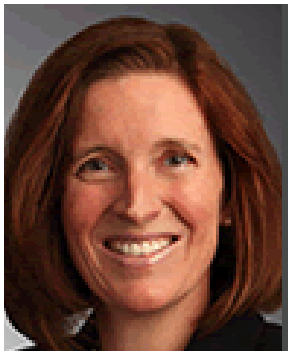
- After a $8.6 million verdict for the plaintiff husband, Allied Concrete sought a new trial based on spoliation of evidence. The court cut the verdict in half, and then assessed sanctions of $542,000 against the **plaintiff's lawyer personally** for his "deceptive and obstructionist conduct."

  Allied Concrete v. Lester, 736 S.E. 2d 699 (S. Ct. Va. 2013)

Trial Publicity

- ER 3.6 prohibits a lawyer who is participating in a case from making a public, extrajudicial statement that the lawyers knows or reasonably should know will be disseminated by means of public communication and have a substantial likelihood of materially prejudicing the proceeding.

- The Ninth Circuit's Model Jury Instruction (Civil Instruction 1 15, Criminal Instruction 1.8) includes: “Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other form of social media . . .”



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Liz McOmber's practice is concentrated in product liability defense litigation and complex commercial litigation. She defends high-stakes product defect claims against leading manufacturers of automobiles, commercial vehicles and component parts, watercraft and marine products, aircraft, pharmaceuticals, medical devices and asbestos containing products. Liz also represents automotive manufacturers in motor vehicle franchise disputes addressing issues regarding statutory notice and buyback provisions, dealer sales and transfers of ownership, dealer succession and dealer terminations. Liz's complex commercial litigation experience includes advising and defending insurance carriers on coverage issues and in claims for breach of contract and bad faith, defending companies in Limitation of Liability Act proceedings and defending construction defect cases.

Services

- Commercial Litigation
- Product Liability Litigation
- Construction
- Personal Injury
- Insurance
- Pharmaceuticals and Medical Devices
- Life Sciences and Medical Technology

Representative Presentations and Publications

- "Not Here, but There: The evolving landscape of personal jurisdiction," Author, Utah Business magazine (August 2017)
- "Can You Sue Me Here? – Personal Jurisdiction in Utah After Clearone, Inc. v. Revolabs," Co-presenter, The University of Utah S.J. Quinney of Law CLE (January 24, 2017)
- "Use of Post Market Data to Support Pre-Market Approvals," Co-presenter, Utah Life Science Summit 2016 (October 6, 2016)
- "Location, Location, Location: A Brief Overview of Personal Jurisdiction, Forum Selection Clauses and Why They Matter," Author, The Enterprise – Utah's Business Journal (August 1, 2016)
- "The Effect of the U.S. Supreme Court's Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas Decision on the Enforceability of Forum Selection Clauses," Author, Association of Corporate Counsel Mountain West Chapter FOCUS (Winter 2014)
- "Self-Critical Analysis Privilege: Does It Protect Manufacturers Seeking to Review and Improve Practices and Procedures?" Author, Product Liability, American Bar Association Section of Litigation (Summer 2014)

Professional Recognition and Awards

- 30 Women to Watch," Honoree, Utah Business (May 2018)

Education

- Brooklyn Law School (J.D., cum laude, 2002) - Dean's Merit Scholar; Notes and Comments Editor, Brooklyn Journal of International Law; Best Brief Award and Quarter-Finalist, Sixteenth Annual William McGee National Civil Rights Moot Court Competition, University of Minnesota Law School; Writer, Sixteenth Annual Jerome Prince Evidence Competition
- University of Utah (B.A., Anthropology, 1994) - Dean's List