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PRODUCT LIABILITY
& COMPLEX LITIGATION UPDATE

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A PUBLICATION OF THE PRODUCT LIABILITY GROUP

Table of Contents

Introduction

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Practice Group Leader
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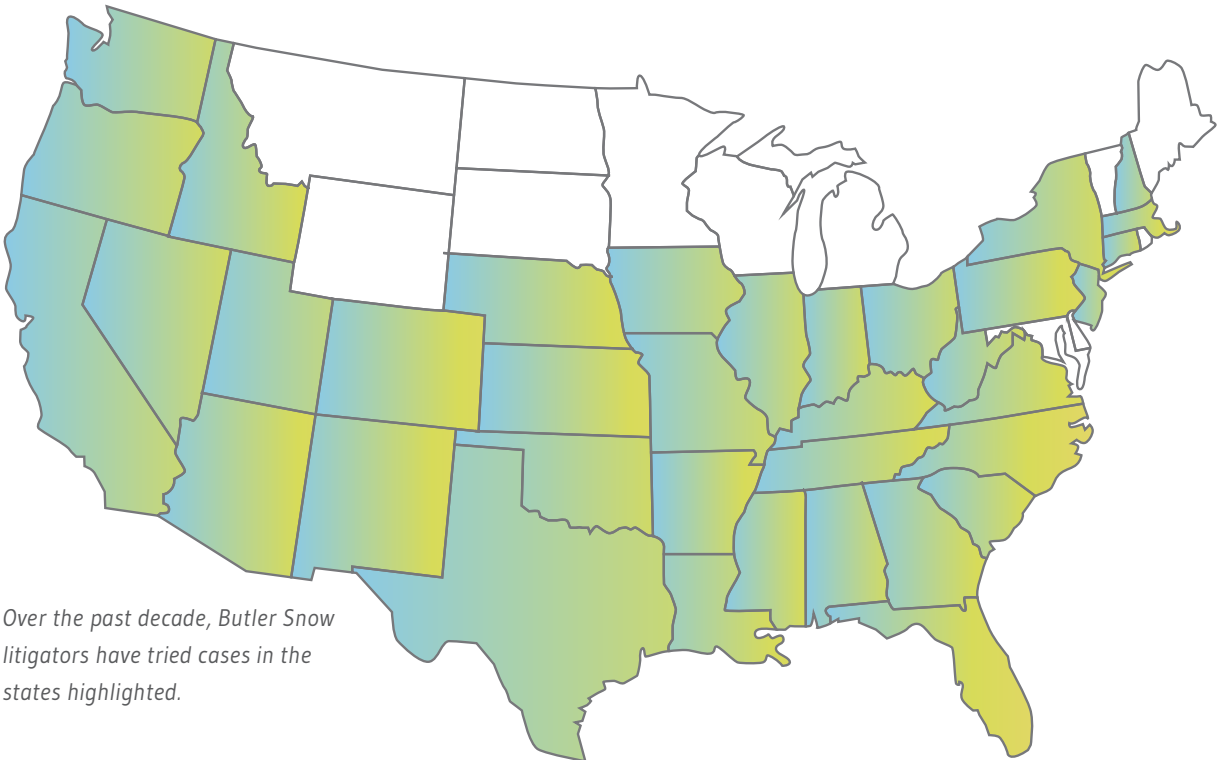
We are pleased to provide you with this edition of the firm's Product Liability & Complex Litigation Update. This edition contains several articles by our attorneys that we hope you find interesting and informative from maintaining the confidentiality of internal investigations to issues on the horizon with the continued development of autonomous vehicles. We also anticipate providing you with a second update later this year with additional articles of interest.

It is our goal to remain on the cutting edge of the law with regard to matters that impact our clients' business interests and in conjunction with your needs for consultation and/or defense representation. In that regard, our line-up of highly skilled product liability, complex litigation, and toxic tort specialists continues to grow by way of new attorneys and in new states. In 2016, we expanded our footprint to include new attorneys in Texas and Virginia to complement the teams we have in place in Alabama, Louisiana, Mississippi, and Tennessee. As always, our attorneys remain active in several defense organizations and hold a number of leadership positions in the same. Those organizations include the Product Liability Advisory Council, the International Association of Defense Counsel, the Defense Research Institute, The Federation of Defense and Corporate Counsel, the American Board of Trial Advocates, and the American College of Trial Lawyers.

Butler Snow litigators offer something that many others don't – trial experience. In the past two years, Butler Snow attorneys have tried more than 40 cases across 13 states. Our attorneys have the experience and knowledge to provide you with quality legal counsel. Hopefully, we're able to impart some of that knowledge on you in this edition of Product Liability & Complex Litigation Update.

Butler Snow is a full-service law firm with more than 330 attorneys who practice from 22 locations across the United States and offices in London and Singapore. Butler Snow attorneys serve clients on the local, regional, national and international levels and do so with a client-first mentality. The firm has been recognized as one of America's Top 100 Law Firms by the BTI Power Rankings and ranked as a Top 10 Firm for Client Relations to the Pharmaceutical Industry. Butler Snow has also been consistently recognized for understanding client's business, anticipating client's needs, legal skills and quality.

U.S. Litigation Map



Over the past decade, Butler Snow litigators have tried cases in the states highlighted.

Autonomous Vehicle Revolution

Arthur D. Spratlin, Jr.
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The race is on for the commercialization of Autonomous (driverless) Vehicles (AVs) – Google and Nissan hope to get there by 2020. Ford and Volvo hope to have a fully autonomous vehicle on the road by 2021. You have probably noticed the almost daily news stories and television segments about AV technology. The reality is that the technology is here (subject only to being fine-tuned), but the regulatory scheme is causing some delays. In other words, our existing automobile laws are becoming more outdated day-by-day as AV technology continues to advance. Many argue that current state laws related to the testing and rollout of AVs are doing nothing but stifling the technology.

While the "non-traditional" auto manufacturers (Google, Apple, Uber, Tesla) raced to a quick lead in the public's eye on AV technology, the major auto manufacturers quickly ramped up their AV development to keep the pace. Now, GM, Ford, Toyota, Nissan, Volvo, BMW, Mercedes, etc., are all in the race to see who can bring AVs to the commercial market first. Traditional auto parts suppliers like Continental, known for its tire division, are also pioneering innovations in the autonomous vehicle race. Continental opened a Silicon Valley business unit called Continental Intelligent Transportation Systems in 2014.

The race has resulted in a series of mergers, acquisitions and partnerships between the auto manufacturers and a variety of start-ups, software companies and product suppliers. For example, GM recently invested $500 million in ride-share company Lyft, and then invested $1 billion to purchase Cruise Automation, a self-driving vehicle startup. Google recently announced the construction of a 53,000 square-foot facility in Michigan to test its AV technology, and Toyota recently announced a $1 billion investment in its AV program. Uber, which has aggressively hired some of the best and brightest minds in the engineering field to focus on AV technology, is already operating autonomous cars in Pittsburgh, and just acquired self-driving truck startup, Otto, in a deal reportedly valued at about $680 million. As a group, several of the companies recently banded together to form the Self-Driving Coalition for Safer Streets, a lobbying group, to ensure that AVs hit the market sooner than later. The Coalition is promoting one clear set of federal laws, which they intend to help develop, as the best way to evolve the technology.

With the support of the federal government, the manufacturers and the states have the support to move the AV technology, testing and development along at a brisk pace. President Obama carved out $4 billion in the 2017 budget for AV development, and the National Highway Traffic Safety Administration (NHTSA) is bullishly advocating for AVs. In order to get around the patchwork of various state laws that are already developing, the Department of Transportation (DOT) and NHTSA have been working on proposed operational guidelines for AV testing and regulation, and a "model" policy for the states to help end the mish-mash of local regulations that threaten to stymie the development of AVs.

The new 116-page Policy, entitled "Federal Automated Vehicle Policy – Accelerating the Next Revolution in Roadway Safety" was just released on September 20, 2016, and is intended to serve as a guideline to establish a foundation and a framework upon which future DOT/NHTSA action will occur. The Policy identifies which aspects of AV regulation will be uniform and which will be left to the states' discretion. The guidelines, which use the term HAVs (Highly Automated Vehicles), are focused on safety, acknowledging there were over 35,000 deaths on U.S. highways in 2015, 94% of which were caused by human error or bad decision making. This initial regulatory framework serves as a "best practices" to guide manufacturers in the safe design, testing and deployment of HAVs. In keeping with the Agency's "ambitious approach to accelerate the HAV revolution," and its desire "to be more nimble and flexible," the Policy is expected to be updated annually, if not sooner.

On the state level, in an effort to make Virginia a leader in researching and developing AV technology and to streamline the use of Virginia's roadways and state-of-the-art test facilities for AV testing and certification, the state announced on June 2, 2015 the creation of the Virginia Automated Corridors partnership. This initiative was created to help build a new economy, and to provide the opportunity for AV manufacturers and suppliers to experience ideal, real-world environments that they need to test complex driving scenarios. The program integrates numerous resources, such as 70 miles of interstate highway, dedicated high-occupancy toll lanes, high definition mapping capabilities, enhanced pavement markings and connected vehicle capability via dedicated short range communications.

Similarly, Arizona Gov. Doug Ducey signed an executive order on Aug. 25, 2015 to encourage AV development and testing. Michigan lawmakers recently passed new legislation to allow for the expanded manufacture and road testing of AVs, in an effort to protect Michigan's dominance in the automotive research and development arena, before other states (and countries) beat them to the task. California and Nevada, among others, have already passed legislation to promote and encourage AV development and to allow AV testing on public roads. In fact, about nine states have passed AV legislation, while 16 other states introduced AV legislation in 2015. Much of the debate among state legislatures involves whether to require a human driver behind the wheel who can take over or whether the definition of "driver" can actually include the AV's computer system, which acts to control the vehicle.

WHY ALL THE FUSS?

Safety. There are about 36,000 deaths in the U.S. each year due to automobile accidents. And, more than 90 percent of those accidents are caused by human error. Estimates show that AV technology could reduce traffic deaths by 80 percent. So the obvious problem is the human driver. Humans get tired, sleepy, and distracted, they text, they look at Facebook ... and they drink. In fact, one theory is that our children and grandchildren will look back one day with horror and disbelief as they consider the number of deaths and accidents during the first 100 years of the automobile when we actually drove them ourselves! On the other hand, the recent, highly publicized, Tesla accident in Florida, believed to be the first fatality involving a vehicle in autonomous mode, has been a wake-up call to the industry. But, statistically, Tesla points out that its Autopilot mode, when used in conjunction with driver oversight, reduces driver fatigue and is still safer than purely manual driving. Tesla also notes that its system is still in the beta testing phase and provides warnings that the drivers remain engaged and ready to take the wheel.

Other benefits expected to come about as a result of AVs include reduced traffic congestion, offsite parking, fewer cars on the road and less individual car ownership, as society moves to a ride-sharing mentality. Who wants the cost, maintenance and insurance expenses and other hassles of car ownership, when the vehicle sits in the garage depreciating 90 percent of the time? Studies show that the members of our younger generation do not want to be bothered by driving anyway ... they much prefer the freedom to text and use social media! And, AVs will give new freedom to the elderly and people with disabilities.

HOW WILL IT WORK?

The AVs are loaded with radar, lidar, cameras, sensors, software, maps and computers with 360-degree awareness that can see around corners, over hills and otherwise anticipate things that humans cannot, and they can react faster. And, they will be connected to each other by Vehicle-to-Vehicle (V2V) technology, and to the world around them by Vehicle-to-Infrastructure (V2I) technology, via dedicated short-range communication (DSRC) links to a wireless spectrum band similar to Wi-Fi. The merger of these technologies will allow the AV to become part of an integrated transportation ecosystem.

One of the biggest debates among the manufacturers is the issue of how much autonomy the car needs to have and whether to pursue "Semi-Autonomy" (human driver required to take over in emergency, i.e., GM) or "Full Autonomy" (no steering wheel, no brake pedals, i.e., Google). Google argues that Semi-Autonomy is actually more dangerous, because the whole point is to get the humans from behind the wheel, because humans cannot be relied upon to act quickly enough in emergency situations.

LIABILITY?

The proliferation of AVs could indeed bring about a new paradigm in the way we have traditionally viewed auto liability cases and insurance coverage. If the shift to AVs will result in fewer accidents caused by human drivers (i.e., a shift in responsibility from the driver to the car itself), then we are likely to see a shift from traditional auto insurance (purchased by the driver) to product liability coverage (purchased by the manufacturer). Simply put, if the human driver is no longer "driving" the vehicle (since it may not have a steering wheel), then how is the human liable under a typical negligence analysis? While the insurance industry is trying to get a handle on all this, looking for some concrete information as to their potential risk exposures, some believe that the price of personal auto insurance will decline as human driver liability declines, while auto manufacturers and suppliers will need more product liability coverage to deal with an increase in defective technology claims. In fact, in an effort to speed the process, and to settle any questions as to liability, several of the major auto manufacturers have stated publicly that they will be responsible for any accidents occurring while the vehicle is operating in autonomous mode. If the AV technology can truly account for most of the 94% of accidents currently caused by human error, then it sounds like a pretty safe bet.

OTHER PROBLEMS?

In addition to safety, there are a plethora of other thorny practical, legal and regulatory issues to navigate before we see the mass commercialization of AVs, such as licensing, registration, certification, insurance, infrastructure, cyber-security, privacy and ethical dilemmas – such as where the AV must decide between two bad outcomes in an unavoidable accident scenario. But, at the current pace of AV technology, expect to see these issues resolved sooner than later.

WHAT ELSE IS OUT THERE?

Just when you thought the concept of a self-driving car was difficult to digest, you are already way behind! AVs are just a piece of the new transportation ecosystem. As mentioned above, Uber recently got into the trucking business when it purchased the self-driving truck start-up, Otto, with its sights set on "Uberizing" the long-haul freight business, with a new division called Uber Freight. Uber Freight plans to connect shippers to trucks, as Uber connects riders to cars, and to increase efficiencies by cutting out the middleman/broker. On October 27, 2016, Uber also released a white paper revealing its ambitious vision for on-demand aviation via small electric-powered aircraft known as VTOL's (vertical take-off and landing), via a new division called Uber Elevate. Yes, flying cars. Uber Elevate does not intend to build the VTOL hardware themselves, but plans to collaborate with vehicle designers, entrepreneurs, regulators, government agencies, and others to bring on-demand urban air transportation to life.

In the larger scheme of things, we are steadily working our way towards Smart Cities. The ever-connected and app friendly Smart Cities will be engineered to alleviate everyday annoyances by utilizing technology systems that react to the data collected. For instance, think smart power grids to immediately address power outages; smart garbage cans to compact trash and notify the sanitation department when they need to be emptied; on-demand mobility, with new car-sharing availability; smart parking meters, that alert drivers to open spots; and smart policing, with artificial intelligence programs to predict where future crimes will occur 8-10 hours in advance so police can concentrate patrols where needed.

And, looking way on out there, Charles Bombardier has a design on paper for a supersonic plane called the Antipode, which can travel from New York to London in 11 minutes. The supersonic business aircraft can supposedly reach a speed of Mach 24 – up to 16,000 miles per hour – which is 12 times faster than the Concorde! Oh yes, the transportation revolution is here! Fasten your seatbelt.

Strategic Tactics for Defending Recall-related Products Liability Litigation

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The use of recalls by manufacturers of all varieties of products, from food to automobiles to pharmaceuticals, to make sure that their products are safe in order to succeed in the marketplace, maintain credibility with their customers and comply with governmental regulations is nothing new. Nor is the inevitable fallout of resulting personal injury litigation which follows such recalls. Recalls often generate a great amount of media attention. However, with the advent of social media, the 24-hour news cycle, and the overwhelming swell in plaintiffs' attorney television advertising, litigation claims, and often Congressional, governmental agency, Attorneys General, shareholder and other stakeholder investigations and lawsuits are more prevalent and rapid than ever. There is a vast network of plaintiffs' lawyers who regularly monitor governmental websites for recall announcements. Recall-related litigation can have mammoth, far-reaching, and even "bet the company" effects on manufacturers.

The legal implications of recalls are immense and diverse: from regulatory compliance to securities litigation to criminal investigations. This article aims to focus on a few brief helpful guidelines with regard to personal injury recall-related litigation: how to prepare to refute meritless claims while resolving claims with value in a manner which is cost-effective and timely, while protecting the manufacturer's interests, image, integrity, and stakeholder and related interests. Having a well-planned litigation strategy in place to prepare and defend against such litigation, while coordinating and protecting the manufacturer's other connected interests is crucial in surviving and navigating the often rocky terrain of recall-related litigation.

PRE-LITIGATION PLANNING

Even before the first lawsuit is filed, manufacturers and their counsel should begin planning for the inexorable personal injury litigation once a decision to recall a product has been made. Depending on the product involved, and whether the recall is voluntary or involuntary, consumer notification of recalls is typically spearheaded and closely monitored by the applicable governing agency (FDA, NHTSA, CPSC, etc.), and can involve press releases, direct consumer notifications, Internet notices, or point-of-sale notifications. Litigation counsel should be involved when possible in negotiations with compliance personnel and agencies to balance the necessity of providing adequate notice with the effects the notice could have on subsequent products liability litigation. Manufacturers can be certain that – if evidence of the recall is admitted at trial – the notice(s) will be a key, if not the key, piece of evidence shown to the jury.

Litigation counsel should be involved with all of the recall key players – communications, logistics, compliance, marketing, engineering, distribution – in coordinating the recall strategies, as emails, documents, and even witnesses from all aspects of those branches will undoubtedly be involved in subsequent litigation. Having a voice at the table from a litigation perspective can help shape and in some instances improve the manufacturer's defense later down the road. More importantly, involving litigation counsel in communications with recall coordination efforts may protect those communications as privileged in subsequent discovery efforts.[1]

While the law of spoliation and the duty to preserve evidence varies by jurisdiction and can be complex, once the recall efforts begin, an early, comprehensive and well-distributed litigation hold notice and evidence and document preservation system should be put in place as soon as possible. There is no general duty to preserve evidence before litigation is filed, threatened, or reasonably foreseeable, unless the duty is voluntarily assumed or imposed by a statute, regulation, contract, or another special circumstance.[2] Thus, the "trigger" to preserve information will depend on the facts specific to each recall. Custodians and information technology personnel should be made aware of the gravity of this duty, as spoliation of evidence can be incredibly harmful in subsequent litigation, resulting in an adverse inference, or severe sanctions.[3] Moreover, they should be advised that their communications moving forward should be treated as evidence that could be put on a big screen in front of a jury or the headline of a news story someday. There are unfortunately too many anecdotes about "smoking gun" emails, some of which include cringe-worthy jokes or inappropriate comments made – particularly when consumer safety is involved – which severely harmed the defense of an otherwise defensible case.

Retention of the products themselves can be particularly crucial in recall situations where products such as food or pharmaceutical products are recalled for potential manufacturing defect concerns. In those situations, manufacturers often routinely destroy such recalled products. However, careful consideration of whether to retain, and potentially test, samples of recalled products, should be made. This can be a double-edged sword. Manufacturers and their litigation counsel must balance concerns of possible claims of spoliation in future discovery battles with the possibility of retaining and testing samples which may not be representative or could be compromised while stored during protracted litigation. Moreover, depending on the facts of the case, the most advantageous defense strategy may be to focus on the claimant's actual product as opposed to retained recalled products.

There should also be coordination with litigation counsel regarding any possible revisions to manufacturing-related policies and procedures post-recall. Manufacturers will have to balance wanting to remedy the reason for the recall, governmental agency intervention and compliance, and the potential that such changes could potentially be admitted in subsequent product liability litigation and could be viewed disfavorably by jurors.

CONCERNS FOR EARLY LITIGATION STAGES

Once litigation begins post-recall, there are several early steps manufacturers and their counsel can take to gain an advantageous defensive posture in the litigation. The breadth and type of recall, and number of cases being filed, whether the litigation is in multidistrict ("MDL"), mass tort, consolidated or multiple individual proceedings will affect the strategic decisions made. Often times plaintiffs' attorneys will attempt to avoid MDL or mass tort actions, in which case quick and careful consideration should be made whether to transfer such cases to the consolidated proceedings. In recalls involving large numbers of claims, defense counsel and manufacturers should coordinate an early and efficient mechanism for tracking service of complaints, so as to avoid any cases "slipping through the cracks", which could result in losing the ability to transfer or remove a case, or in default judgment being entered against the manufacturer.

In individual recall-related cases, removing a case from state court to federal court should be an early consideration. It depends on the facts of the case and the venue, but generally defendants in products liability recall cases prefer to be in federal court, and plaintiffs prefer to be in state court. In federal court, defendants have the advantages of the Federal Rules of Procedure and Evidence, scheduling orders, wider jury pools, and federal procedural law, amongst others. Plaintiffs' attorneys often try to circumvent removal by filing complaints in state court which name retailers, prescribers, unrelated distributors or manufacturing facilities, employees, officers, directors, or other third parties as co-defendants in order to destroy diversity. In such instances, an early evaluation of the involvement, if any, of these co-defendants in the recall and the case is crucial to determine whether they have been fraudulently joined. If so, a manufacturer can nonetheless remove the case and assert fraudulent joinder of the co-defendants. The doctrine of fraudulent joinder is an exception to the requirement that removal requires complete diversity. In a suit with named defendants who are not diverse, the diverse defendant may remove if it can establish that the non-diverse defendants were "fraudulently" named or joined to defeat diversity.[4] Joinder is fraudulent if there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.[5] If the court determines that the joinder was fraudulent, it can disregard, for jurisdictional purposes, the citizenship of certain non-diverse defendants, assume jurisdiction over a case, dismiss the non-diverse defendants, and thereby retain jurisdiction.[6] A denial of a motion to remand by a federal court in such situation is a "one-two punch", since it could also result in dismissal of third-parties affiliated with a manufacturer, including its officers, directors, and employees. This is of particular concern in an era of increased governmental scrutiny and focus on individuals within and in charge of product manufacturing companies.

Another crucial early litigation strategy is the evaluation and filing of a motion to dismiss some or all of plaintiff's claims. Given the widespread media coverage of most recalls, often plaintiffs' attorneys are quick to file large numbers of meritless cases using boilerplate complaints when their clients may not have suffered injuries, or in some instances may not have even purchased or used the recalled product, or if they did, their products were not defective. Using the standards in *Iqbal and Twombly*[7] or their state progeny to weed out these baseless claims early on, forcing plaintiffs to "put up or shut up" with regard to the basic facts of their cases can save manufacturers resources, time, and effort in defending against a case without merit.

DISCOVERY

Discovery in recall-related litigation, particularly in cases involving enormous numbers of claims, can be arduous and cost manufacturers millions in man-hours and dollars. In defending these cases, manufacturers and their counsel should try to "tame the beast" before it gets out of control. Prior to the onset of discovery, it is critical to seek a discovery and electronically stored information ("ESI") plan with opposing counsel (or via motion practice if an agreement cannot be reached) which limits the scope and amount of discovery as much as reasonable, but possible. This can avoid lengthy and costly discovery battles later on, and often keeps manufacturers in the good graces of the court, as courts often spurn such fights between parties. During the course of discovery, although discovery rules are broad, companies should try to limit the discovery of recall-related evidence when possible. Defendants can object and seek to limit discovery based on requests which are overly broad, vague (i.e., "all documents in any way related to the recall"), or not reasonably calculated to lead the discovery of admissible evidence (i.e., seeks information regarding another recalled product or component part), or that it should be limited because of undue burden or cost (i.e., the product has a very long history or was widely, if not globally, distributed). The relatively recent proportionality requirements of Rule 26 of the Federal Rules, which permit limitations on discovery proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit, are an excellent resource for seeking to limit the discovery of recall-related evidence.

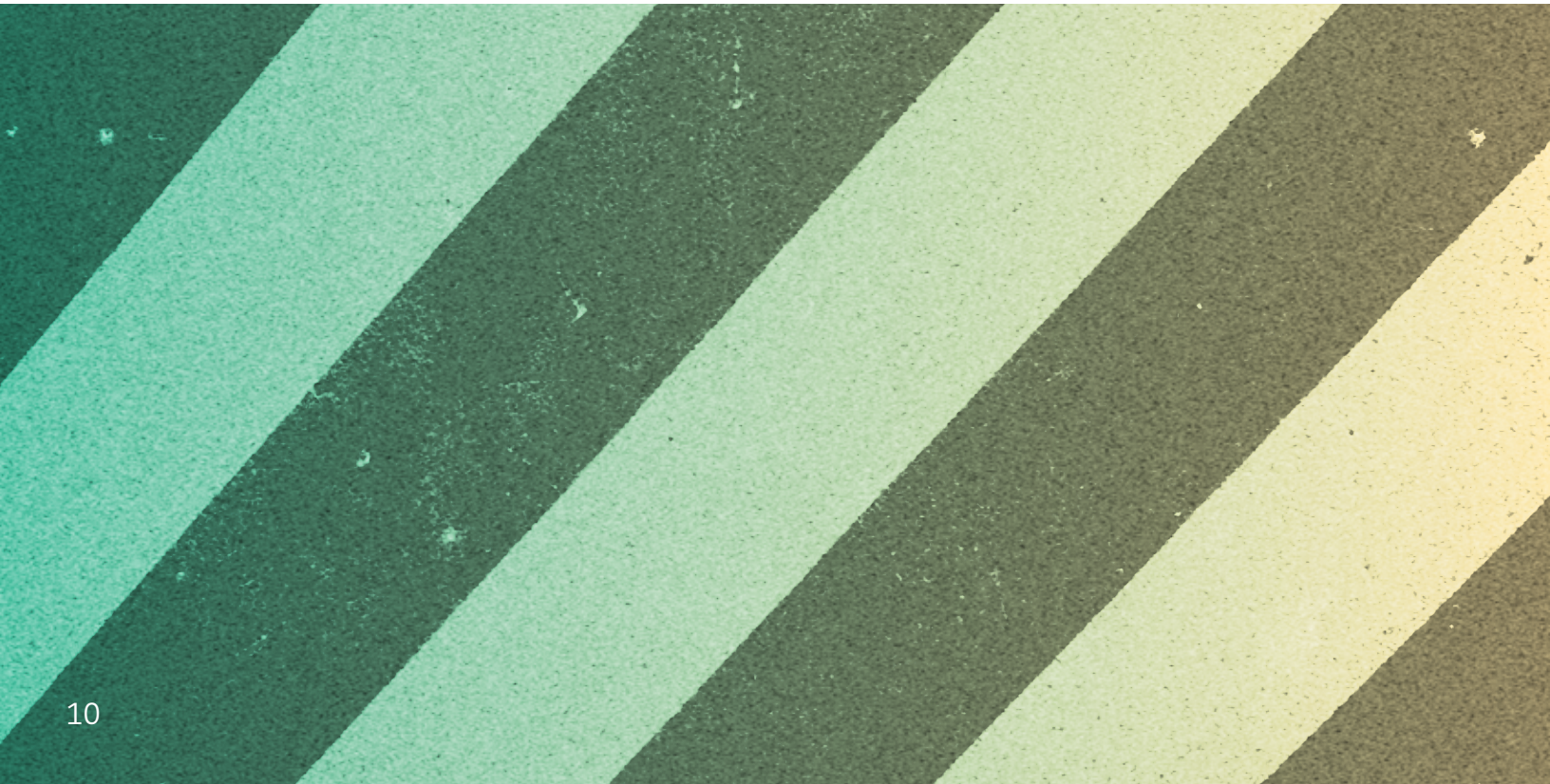
PREPARING FOR TRIAL

When preparing for trial, exclusion of recall-related evidence is key. Companies may successfully move to exclude recall evidence based on relevancy grounds, or in the basis that its probative value is substantially outweighed by the probability that its admission will create a danger of unfair prejudice or confusing or misleading the jury, or require an undue consumption of time.[8] Courts may also exclude recall-related evidence as inadmissible hearsay.[9]

Perhaps one of the strongest arguments companies have for exclusion of recall-related evidence is that it is a subsequent remedial measure. Courts routinely exclude evidence of product recalls under Rule 407.[10] However, this exclusion is somewhat narrow. Post-accident studies, tests, and reports may fall outside of the exclusionary power of Rule 407, even if these documents later lead to a recall campaign.[11] Moreover, courts may find that actions must be voluntary actions taken by the party in order to be excludable, and thus involuntary recall-related evidence will not be excluded.[12] Certain state rules of evidence or common law may also have idiosyncratic applications of the subsequent remedial measures rule with regard to recall-related evidence.

Companies may also want to consider using recall-related evidence at trial to show their efforts to improve the product and to protect the public, where a plaintiff is seeking punitive damages.[13] Where pre-recall complaints come into evidence, excluding recall evidence means that the manufacturer could lose the benefit of showing measures it took to make the product safer. Where the plaintiff ignored recall notices or refused remedial offers, recall evidence could assist with a contributory negligence defense.

With regard to jury voir dire, if recall-related evidence has been excluded prior to trial, a defendant should tread carefully to avoid questions relating to the recall, instead asking potential jurors such questions as: if they have read anything about or used the product; their thoughts on the product; whether they or anyone they know had a bad experience with it; if they have ever stopped using a product or decided not to use a product because they were worried about the safety of it and if so, what was the product what was the nature of their worry. Defendant should focus questions on any negative impressions, feelings or opinions about companies in terms of the testing of their products, the warnings that are issued on their products, the marketing of their products or the conduct of the sales representatives and marketing and advertising for their products that would make it difficult for them to be fair in a case involving a manufacturer. In the event the recall-related evidence is not excluded, manufacturers would want to delve into which potential jurors know about the recall, what they know about it, and of course whether they or someone they know purchased or used the recalled product (or any recalled product).



In the event recall-related evidence is admitted at trial, consider requesting a jury instruction explaining that evidence of a recall campaign may only be considered after the plaintiff, independent of the recall, establishes by a preponderance of the evidence that a defect existed in the product.[14]

In conclusion, although litigation stemming from product recalls can be massive, expensive, and have worrisome and far-reaching effects for companies, utilizing efficient, effective, and smart recall-related litigation strategies can ease the burden on manufacturers and get their focus back to what they do best – making safe, useful products for their customers to use and enjoy.

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1 *In Re GM Ignition Switch Litig.*, 2015 US Dist. LEXIS 5199 (The notes and memoranda relating to the witness interviews conducted by the vehicle manufacturer's lawyers were protected from disclosure by the attorney-client privilege because the materials reflected confidential communications between the manufacturer's outside counsel and its current or former employees, agents and counsel, and the provision of legal advice was a primary purpose of the communications; the materials at issue were also protected from disclosure by the attorney work product doctrine under Fed. R. Civ. P. 26(b)(3) because the materials were prepared in light of a pending government investigation and anticipation of civil litigation, and plaintiffs could obtain the information by other means; the manufacturer had not waived either form of protection.)

2 *Victor Stanley*, 269 F.R.D. at 521 ("Absent some countervailing factor, there is no general duty to preserve. . . ." evidence); *see also Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003); *Gilleski v. Community Med.* Ctr., 765 A.2d 1103 (N.J. App. 2001); *Kelly v. Sears Roebuck & Co.*, 720 N.E.2d 683 (Ill. App. Ct. 1999); *Distefano v. Law Offices of Barbara H. Katsos, PC*, No. CV 11-2893, 2013 U.S. Dist. LEXIS 47036, *16-18 (E.D.N.Y. Mar. 29, 2013) (concluding that the duty to preserve was triggered when client discharged counsel and noting that the Second Circuit has held that in certain circumstances, "a regulation can create the requisite obligation to retain records," even where litigation involving the records is not reasonably foreseeable) (internal citations omitted); *Martin v. Keeley & Sons, Inc.*, 979 N.E.2d 22 (Ill. 2012) (noting that a voluntary undertaking requires a showing of affirmative conduct by the party evincing its intent to voluntarily assume a duty to preserve evidence, and that a mere opportunity to exercise control over evidence is insufficient to establish a special relationship that would establish a duty to preserve it); *but see Powers v. S. Family Mkts. of Eastman, LLC*, No.A12A2382, 2013 Ga. App. LEXIS 212 (Ga. Ct. App. Mar. 18, 2013) (holding that merely contemplating potential liability and completing an accident report after an investigation do not demonstrate contemplated or pending litigation).

3 *See* Fed. R. Civ. P. 37 or its state analogues

4 *In re Briscoe*, 448 F.3d 201, 215-16 (3d Cir. 2006); *Hogan v. Raymond Corp.*, 777 F. Supp. 2d 906, 913 (W.D. Pa. 2011).

5 *In re Briscoe*, 448 F.3d at 217.

6 *Id.*

7 In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555 (citation omitted). In *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009), the Court held that Rule 8 demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and therefore a complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 678. The complaint is legally insufficient if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*

8 Fed. R. Evid. 401-403; *Tompkins v. Medtronic, Inc.*, No. 92-16687, 1994 U.S. App. LEXIS 2843, *13 (9th Cir. 1994); *Jordan v. General Motors Corp.*, 624 F. Supp. 72, 77 (E.D. La. 1985) (in part because the defect involved in the recall campaign was distinctly different from the defect alleged in instant matter, introduction of recall campaign evidence was irrelevant); *In re Fosamax Prods. Liab. Litig.*, No. 06-md-1789, 2013 U.S. Dist. LEXIS 6631, at *8-9 (S.D.N.Y. Jan. 23, 2013) ("Court agrees that any conduct undertaken by Merck after Plaintiff's injury is irrelevant."); *Long v. TRW Vehicle Safety Sys.*, 2011 U.S. Dist. LEXIS 119111, 10-11 (D. Ariz. Oct. 14, 2011) (excluding evidence of recall of seatbelt where there was only a slight connection between the recalled product and the product at issue because "the Court sees a risk of unfair prejudice that substantially outweighs the marginal probative value of the recall evidence.")

9 *See* Fed. R. Evid. 801-807; *Accord Higgins v. GMC*, 465 S.W.898, 900 (Ark. 1971) (recall letter may constitute admission by party opponent).

10 *See, e.g., Velazquez v. Abbott Laboratories*, --- F. Supp. 2d ----, 2012 WL 5330931, *9 (D. Puerto Rico Oct. 30, 2012) (recall notices ... are considered to be subsequent remedial measures under Rule 407); *Giglio v. Saab-Scania of Amer., Inc.*, 1992 WL 329557, at *4 (E.D. La. 1992); *Chase v. GMC*, 856 F.2d 17, 21 (4th Cir. 1988); *Cothren v. Baxter Health Care Corp.*, 798 F. Supp. 2d 779 (S.D. Miss. 2011); *Hughes v. Stryker Corp.*, 423 Fed. Appx. 878 (11th Cir. 2011).

11 *See Benetiz-Allende v. Alcan Aluminio do Brasil*, 857 F.2d 26, 33 (1st Cir. 1988); *Rocky Mountain Helicopters, Inc.*, 805 F.2d at 918.

12 *See HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2002).

13 *Holmes v. Wegman Oil Co.*, 492 N.W. 2d 107, 112-113 (S.D. 1992); *Denton v. DaimlerChrysler Corp.*, 2008 WL 5111222, at *2 (N.D. Ga. 2008).

14 *Manieri v. Volkswagenwek*, 376 A.2d 1317 (N.J. Super. 1977); *Allstate Ins. Co. v. Jaguar Cars*, 915 F.2d 641, 649 (fn 16) (11th Cir. 1990).

Cyber Security Meets Product Liability

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More and more products are becoming part of the "Internet of Things" ("IoT") – products that connect, store or transmit information via the Internet. Experts estimate that by 2020 there will be 50 billion IoT devices. Cars. TVs. Cameras. Home alarms. Baby monitors. Medical devices. Like all technologies, there are benefits and risks. It has become more and more apparent that all IoT products can suffer a cyber-attack. Remember that hackers have a variety of motives. Damage to reputation. Competitive advantage, particularly with nation states. Embezzlement. Theft of trade secrets and IP.

But does poor cyber security mean product liability? If so, how should IoT manufacturers prepare to defend a product liability lawsuit?

IS THERE A PRODUCT DEFECT? Is an IoT product defective because it is hacked? This will certainly become a battle of the experts. For courts applying a risk-utility test, how will the courts measure a high cost of securing an IoT product from a cyber-attack? Does the state of the art require every IoT product to use the same security measures as, say, our power grid or military defense systems? Technology changes so quickly that an IoT product may be reasonably secure at the time of manufacture, but not at the time a consumer is using the product. For courts applying a reasonable alternative design theory, can a plaintiff show a reasonable alternative design that could have reduced or avoided a cyber-attack?

IS THERE AN INJURY? Is a cyber-attack itself an injury (assuming there is no personal injury)? If so, does the economic loss rule preclude liability?

IS THERE INSURANCE COVERAGE? If a manufacturer does not have a cyber policy, this seems more and more unlikely given the courts' current view of CGL insurance coverage in traditional data breach litigation. Especially if the product is used as a component in a larger product and the larger product is hacked. In 2014, the Insurance Services Office introduced a new set of exclusions that excluded coverage for cyber-attack related liabilities in traditional CGL policies.

There is also the risk of spoliation claims.

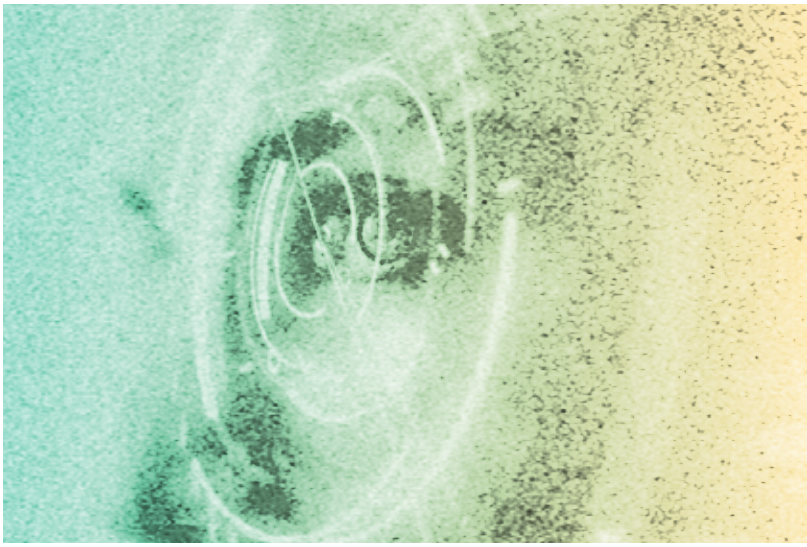
Product manufacturers should not wait for the courts to answer these questions. As the Federal Trade Commission ("FTC") recommends with all IoT devices, manufacturers should build reasonable security into IoT products at the outset, rather than as an afterthought in the design process. What constitutes reasonable security, of course, is an ever changing standard and varies depending on the sensitivity of data collected. While many future security needs cannot be predicted with certainty, here are some of the best practices suggested by the FTC.

1. **Start with a security risk assessment.** Identify the threats and vulnerabilities. Hire someone outside of your company to perform this assessment. As the saying goes, your internal IT employees "don't know what they don't know." Get a fresh set of eyes.

2. Minimize the data you collect and store. If your company does not need to store data for business purposes, don't! The more data you store, the larger target you are to hackers..

3. Test your security before launching products.

4. Monitor your products throughout the life cycle, update software, and patch known vulnerabilities if feasible.

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Are Confidential Pre-Suit Investigations Actually Confidential? Understanding the Unsettled Privilege of Self-critical Analysis

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In the realm of product design and manufacture, the idea of a product is conceptualized, developed, and ultimately transformed into a final, tangible product for user consumption. But what if a company wants to re-conceptualize and re-develop its product into a newer, better final product – Product 2.0? While improvement should be celebrated, companies are often severely scrutinized for improvement efforts in the legal realm, particularly when Product 2.0 is created because Product 1.0 may have caused an injury. In most states, although evidentiary rules protect improvement efforts from disclosure at trial, the confidentiality that companies expect to attach to improvement efforts for discovery purposes oftentimes does not. But shouldn't companies be afforded that protection? Enter: the self-critical analysis privilege.

The self-critical analysis privilege ("SCAP") "is a qualified privilege designed to protect an entity's internal reviews and investigations from disclosure based on the policy of encouraging companies to assess their compliance with regulations and laws and make any necessary changes without fear of reprisal in any future litigation."[1] From a public policy perspective, the SCAP makes sense because it promotes company proactivity in curing problems with products that companies would otherwise be hesitant to discover before an injury occurs.[2]

Notwithstanding its benefits, the SCAP is neither widely accepted nor uniformly applied.[3] As one court explained, "courts have been somewhat hesitant to embrace the [SCAP] and have often qualified their uses of the privilege [because] its application will lead to the exclusion of extremely relevant and persuasive evidence."[4] This is apparent despite the relatively high threshold for qualifying for the privilege, which generally requires consideration of the following factors:

1. the information must result from a critical self-analysis undertaken by the party seeking protection;
2. the public must have a strong interest in preserving the free flow of the type of information sought;
3. the information must be of the type whose flow would be curtailed if discovery were allowed; and
4. no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential.[5]

For products liability, application of the SCAP is primarily state-law dependent because products liability itself is state-law dependent.[6] Indeed, state courts rejecting application of the privilege often do so because of no state statute or court rule establishing the privilege.[7] But even if the privilege is recognized in a jurisdiction, it, like most privileges, is qualified to the extent it can be overcome if the party seeking the information demonstrates that the need and relevance of the information outweighs the public policy concerns of maintaining the privilege.[8]

So how does a company protect what should be confidential pre-suit investigations or product improvements? First, determine whether the company's jurisdiction either has or likely would accept the SCAP. Second, apply the following measures when ready to engage in self-critical analysis measures:[9]

- Prepare a thorough engagement letter clearly identifying the purpose of seeking legal advice related to possible litigation (it is best to conduct litigation-driven investigations through outside counsel).
- Clearly identify the internal investigating team, including only those necessary for a comprehensive investigation (smaller is better).
- All communications and responsibilities should come directly from counsel, including requests for information gathered for or by third parties for the investigation.
- Clearly label all attorney-client communications and confidential exchanges as such.
- Minimize written communications and email, and provide strict instructions for any distribution of same.
- Minimize drafts and clearly label drafts as such.[10]

If litigation occurs in a jurisdiction that has either outright rejected the SCAP or will likely reject it, companies can take some refuge in the attorney-client privilege and work product privileges, so long as the above-parameters are utilized and maintained. Certain concepts should be kept in mind, too. First and foremost, the attorney-client privilege will not protect business advice or underlying facts because an attorney was involved in the communication.[11] Put into context, if the advice is of both a legal and business nature, only the legal advice – and documents reflecting same – will receive protection under the privilege.[12] As to work product, the majority of jurisdictions – including the Fifth Circuit – apply the privilege where litigation is not imminent so long as the "'primary motivating purpose behind the creation of the document is to aid in possible future litigation.'"[13]

In sum, it remains difficult for companies to engage in self-critical analysis efforts without assuming the risk of those efforts becoming discoverable. Although the rules of evidence protect these efforts from disclosure at trial, they do not protect them from disclosure during discovery. Any protection, then, requires strict compliance with privilege rules. For jurisdictions that accept the SCAP, this privilege provides the most protection for companies engaging in self-critical analysis efforts as it provides more leeway than the attorney-client and work product privileges. Unfortunately, however, its acceptance is limited. The attorney-client and work-product privileges can, nevertheless, provide protections so long as the appropriate parameters are put in place and are maintained.

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1 McOmber, Elisabeth M., *Self-Critical Analysis Privilege: Does It Protect Manufacturers Seeking to Review and Improve Internal Practices and Procedures?*, Am. Bar Assoc. (July 23, 2014), http://apps.americanbar.org/litigation/committees/products/articles/summer2014-0714-self-critical-analysis-privilege.html.

2 *Ludwig v. Pilkington N. Am.*, Inc., No. 03 C 1086, 2004 WL 1898238, at *1 (N.D. Ill. Aug. 13, 2004).

3 *See* Pepke, Amy M., *In-House Counsel and the Internal Investigation: What have you got to lose?*, 1 Pro Te: Solutio 9 (July 2008), http://www.butlersnow.com/wp-content/uploads/2014/08/ProTeVol1No3.pdf.

4 *Ludwig*, supra n.2. Some courts have limited the privilege to materials prepared for mandatory government reports, while others have applied varying balancing tests to assess whether the privilege is overcome. *See, e.g., Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1100 (D.N.J. 1996).

5 *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992) (internal quotation marks omitted).

6 McOmber, *supra* n.1.

7 *Id.* (citing *Harris v. One Hope United, Inc.*, 2 N.E.3d 1132 (Ill. App. Ct. 2013); *Uniformed Fire Officers Ass'n v. City of New York*, 955 N.Y.S.2d 5 (App. Div. 2012); *In re Fisher & Paykel Appliances, Inc.*, 420 S.W.3d 842 (Tex. App. 2014).

8 *Id.*

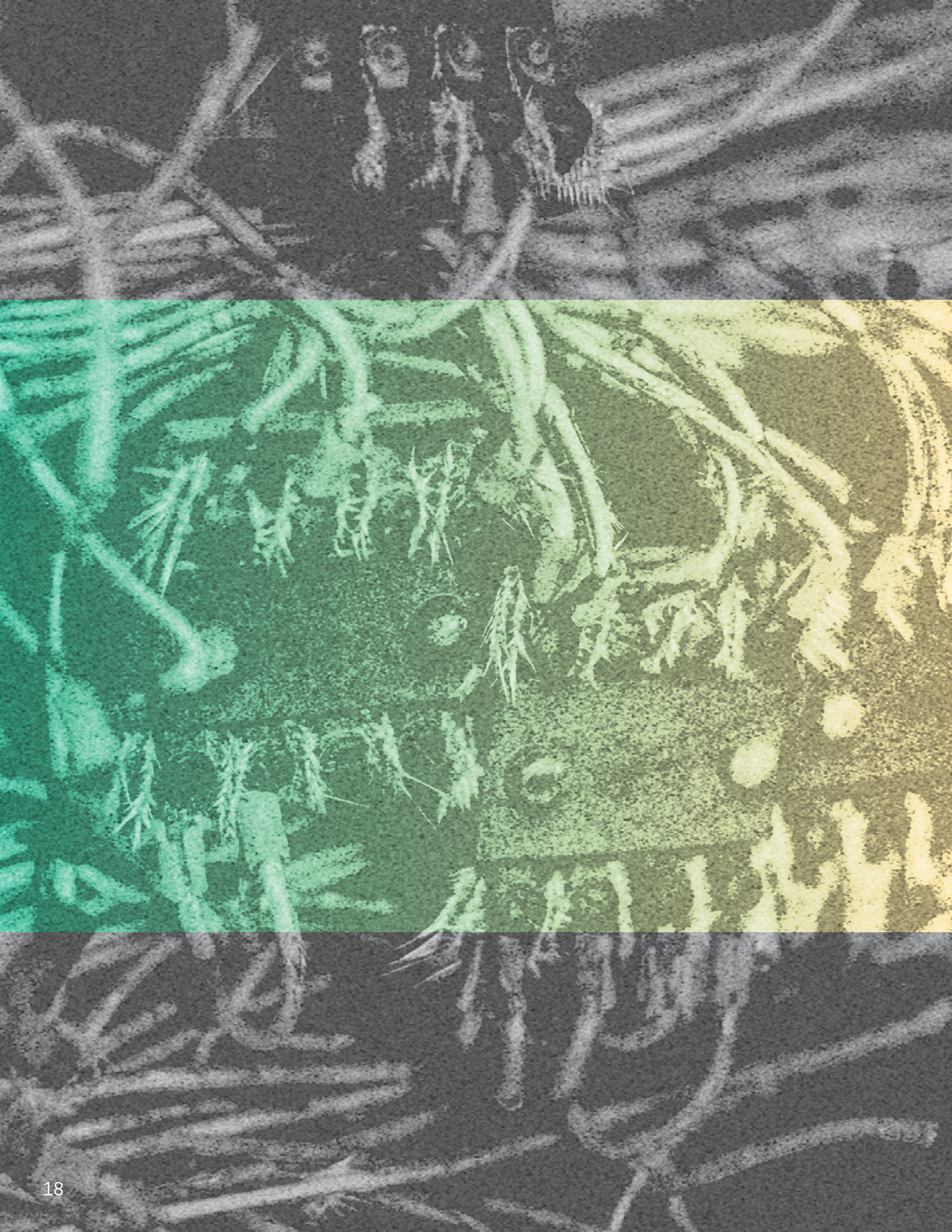
9 Mississippi state courts to date have not adopted the SCAP, and the Fifth Circuit "has neither adopted nor rejected" the SCAP. *See Roman Catholic Diocese v. Morrison*, 905 So. 2d 1213, 1245 (Miss. 2005); *Greene v. FMC Techs., Inc.*, Civ. A. No. 4:13-CV-02375, 2014 U.S. Dist. LEXIS 108943, at *1-2 (S.D. Tex. Aug. 6, 2014) (citing *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000)).

10 Pepke, *supra* n.3, at 10-11.

11 *Id.* at 6.

12 *Id.* at 6 (citing *Upjohn Co. v. U.S.*, 449 U.S. 383, 390 (1981)).

13 *Id.* at 9 (quoting *U.S. v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982)).



Alabama Supreme Court Articulates Strict Interpretation of Alternative Design Requirement

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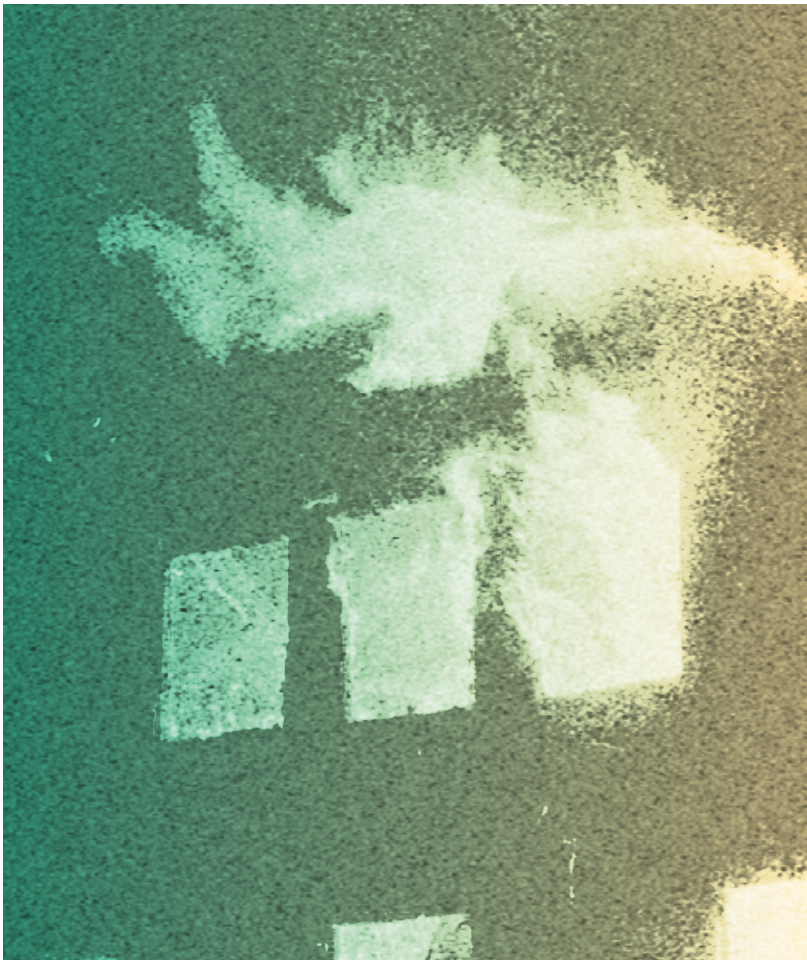
In cases alleging design defect under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD")—Alabama's common law concept of strict liability, a plaintiff has the burden of proving the existence of a safer, practical alternative design by demonstrating that (1) the injuries inflicted would have been less severe or eliminated by the use of the alternative design, and (2) the utility of the alternative design outweigh the utility of the design actually used. In *Hosford v. BRK Brands, Inc.*, 2016 Ala. LEXIS 91 (Ala. Aug. 19, 2016), the Alabama Supreme Court further defined the proof needed to establish the existence of an alternative design, handing manufacturers a powerful argument when defending AEMLD claims.

Hosford arose out of the death of plaintiff's 4-year old daughter due to a slow, smoldering mobile home fire. The home was equipped with two BRK-manufactured smoke alarms, but only one activated during the fire. Both smoke alarms relied on "ionization technology," which is less sensitive to smoke from smoldering fires than smoke from flaming fires. By contrast, "photoelectric technology"-equipped smoke alarms are generally more sensitive to smoke from smoldering fires. Plaintiff alleged that had the alarm not been defectively designed, her daughter would have been alerted to the fire and escaped. In support of her AEMLD claim, plaintiff proposed as an alternative design a "dual-sensor" smoke alarm incorporating both ionization and photoelectric technology. In fact, BRK manufactured a dual-sensor alarm that included both sensor types and redundant circuitry, but at a significantly higher cost. After a jury verdict in favor of BRK, plaintiffs appealed. The central issue on appeal was whether plaintiffs had presented substantial evidence of a safer, practical alternative design under the AEMLD.

Affirming the trial court, the Alabama Supreme Court held that, as a matter of law, plaintiff's proposed alternative design—the dual-sensor smoke alarm, was not a safer alternative design to the ionization alarm; "rather, it is a design for a different product altogether." The Court explained that a plaintiff could not point to other, different products to demonstrate an alternative design, instead suggesting that a plaintiff must show how the product at issue could have been modified or improved. Citing the trade-offs consumers make in purchasing safety devices, the Court observed that manufacturers are "not obligated to market only one version of a product, that being the very safest design possible. If that were so, auto[] manufacturers could not offer consumers sports cars, convertibles, [or] jeeps ..."

Finally, at the end of the opinion, the Court explained that plaintiff's AEMLD claim could not "prevail in the absence of evidence establishing the existence of a safer, practical alternate design for the allegedly defective product – not a design for a different, albeit similar product, even it if it serves the same purpose...."



Texas Supreme Court Overturns Longstanding Precedent: Seat-Belt Evidence is Now Admissible

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BACKGROUND ON NABORS DECISION

In *Nabors Well Services Ltd. v. Romero*, the Texas Supreme Court overruled 40 years of case law regarding the inadmissibility of the use or non-use of seat belts.[1] The Court held that evidence of the failure to use seat belts is admissible for proving comparative negligence/proportionate fault on the part of a plaintiff if the nonuse caused or contributed in any way to the plaintiff's damages. This decision not only establishes that seatbelt evidence will be relevant in virtually any case involving automobiles, it strengthens the argument for admissibility of other types of comparative fault evidence in which a party's behavior contributes to the party's own injuries.

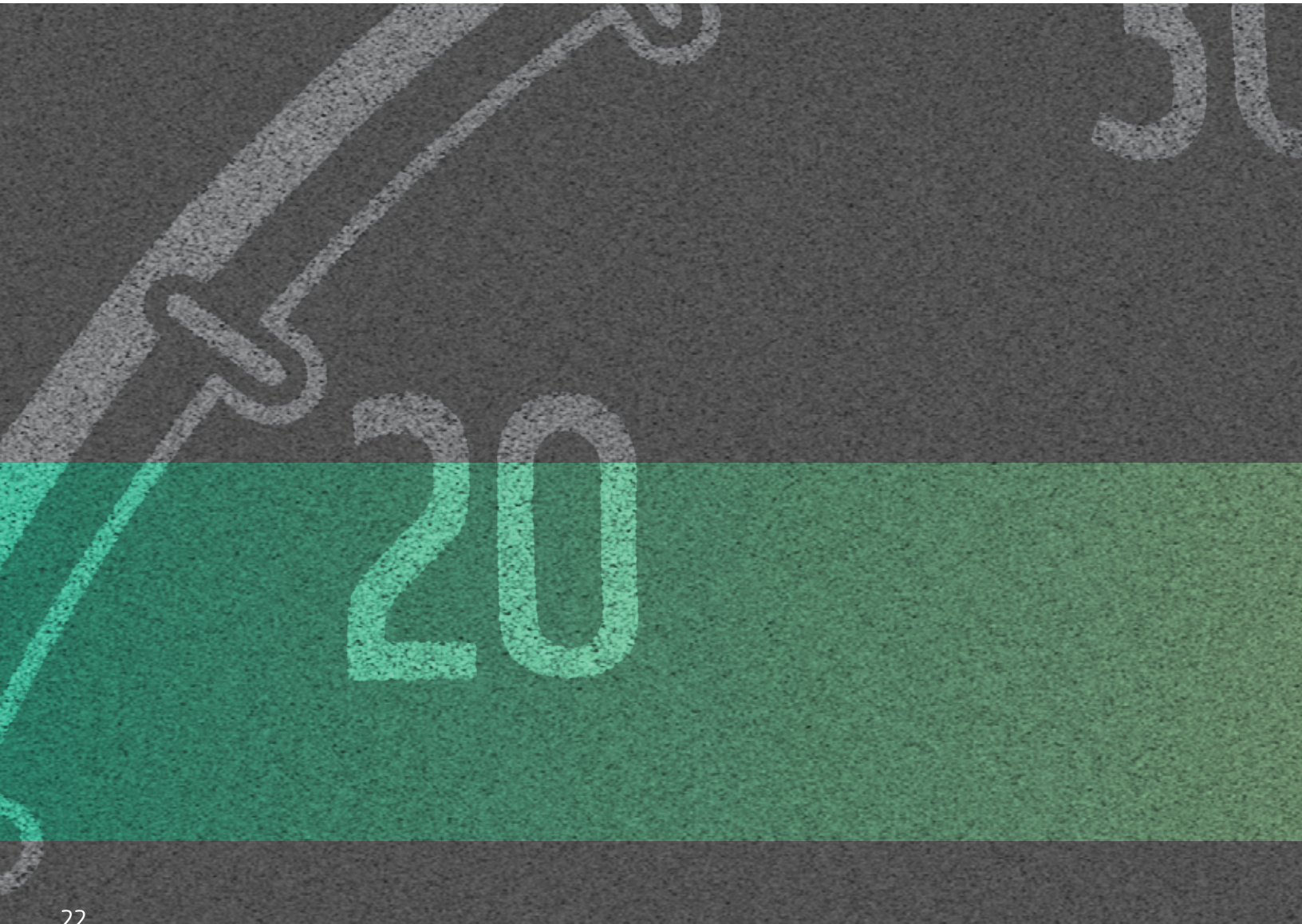
Texas has a proportionate responsibility system whereby a damaged party's recovery is reduced by its own degree of fault and is totally barred if the party is more than 50% at fault for its own injury.[2] In automotive cases plaintiff's injuries are frequently caused or enhanced by their failure to wear seatbelts. Prior to *Nabors*, a party's failure to wear a seatbelt was inadmissible except in product liability cases involving the seatbelt itself. After *Nabors*, evidence that an injured party was or was not wearing a seat belt at the time of a car accident may be introduced in order to determine whether the party was to any degree at fault for his or her own injury. In reaching its decision the Court recognized the distinction between occurrence-causing and injury-causing negligence, and found that the language enacted by the Legislature in the Texas Proportionate Responsibility statute specifically allows apportionment for causing or contributing to injury.[3] Further, in overturning the precedent from 1974, the Court justified that at the time of that decision, seat belts were not as common and their use was not required by law. Additionally, since the time of the 1974 decision, the Texas Legislature has overhauled the state's negligence statute and allows for apportionment of plaintiff's fault.

PROCEDURE FOR SEAT BELT EVIDENCE MOVING FORWARD

The Texas Supreme Court's decision in *Nabors* is fairly instructive in addressing how seat-belt evidence will be handled moving forward; specifically, it recognized that existing rules of evidence include everything needed to handle this type of evidence.[4]

Relevance: First, the Court pointed out that, as with any evidence, seat-belt evidence is admissible only if it is relevant, a determination which is within the trial court's province. The burden is on the defendant to put forth evidence that "nonuse caused or contributed to cause the plaintiff's injuries." The Court instructed that the trial court should first consider this evidence, for the purpose of making its relevance determination, outside the presence of the jury. The Court stated that "Expert testimony will often be required to establish relevance" but declined to say it will be required in all cases. And even relevant seat-belt evidence is subject to objection and exclusion under Rule 403 if its probative value is substantially outweighed by unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

Jury Charge: Similarly, the Court noted that this holding should not cause any confusion about constructing the jury charge. A single apportionment question should be submitted, allowing the jury to consider both a plaintiff's (and other persons') pre-occurrence, injury-causing conduct alongside his and other persons' occurrence-causing conduct. The jury is asked to apportion responsibility between all whose actions or products combined to cause the entirety of the plaintiff's injuries. Under Texas Civil Practice and Remedies Code Section 33.003(a), the fact-finder may consider relevant evidence



of plaintiff's failure to use a seat belt as a "negligent act or omission" or as a "violat[ion of] an applicable legal standard." The submission of seat-belt non-use by a child would be slightly different, as the law places responsibility on the driver for properly restraining children in the vehicle. Under the current law, children under age 15 do not violate seat-belt laws by failing to restrain themselves. However, minors are still held to the degree of care that would be exercised by an "ordinarily prudent child of [the same] age, intelligence, experience and capacity … under the same or similar circumstances." The jury may further apportion third-party responsibility to the person upon whom the law places the burden to properly restrain the child. Accordingly, this holding also extends to the admissibility of pre-occurrence, injury-causing conduct by third parties, even when that third party did not play a part in actually causing the occurrence.

POSSIBLE APPLICATION

Finally, it should be noted that this holding is not limited to just seat-belt evidence. The Court held that "relevant evidence of a plaintiff's pre-occurrence, injury-causing conduct generally" will now be admissible. Thus, the *Nabors* holding opens up the possibility of consideration of "pre-occurrence, injury-causing conduct" in a variety of settings outside of auto collision cases.

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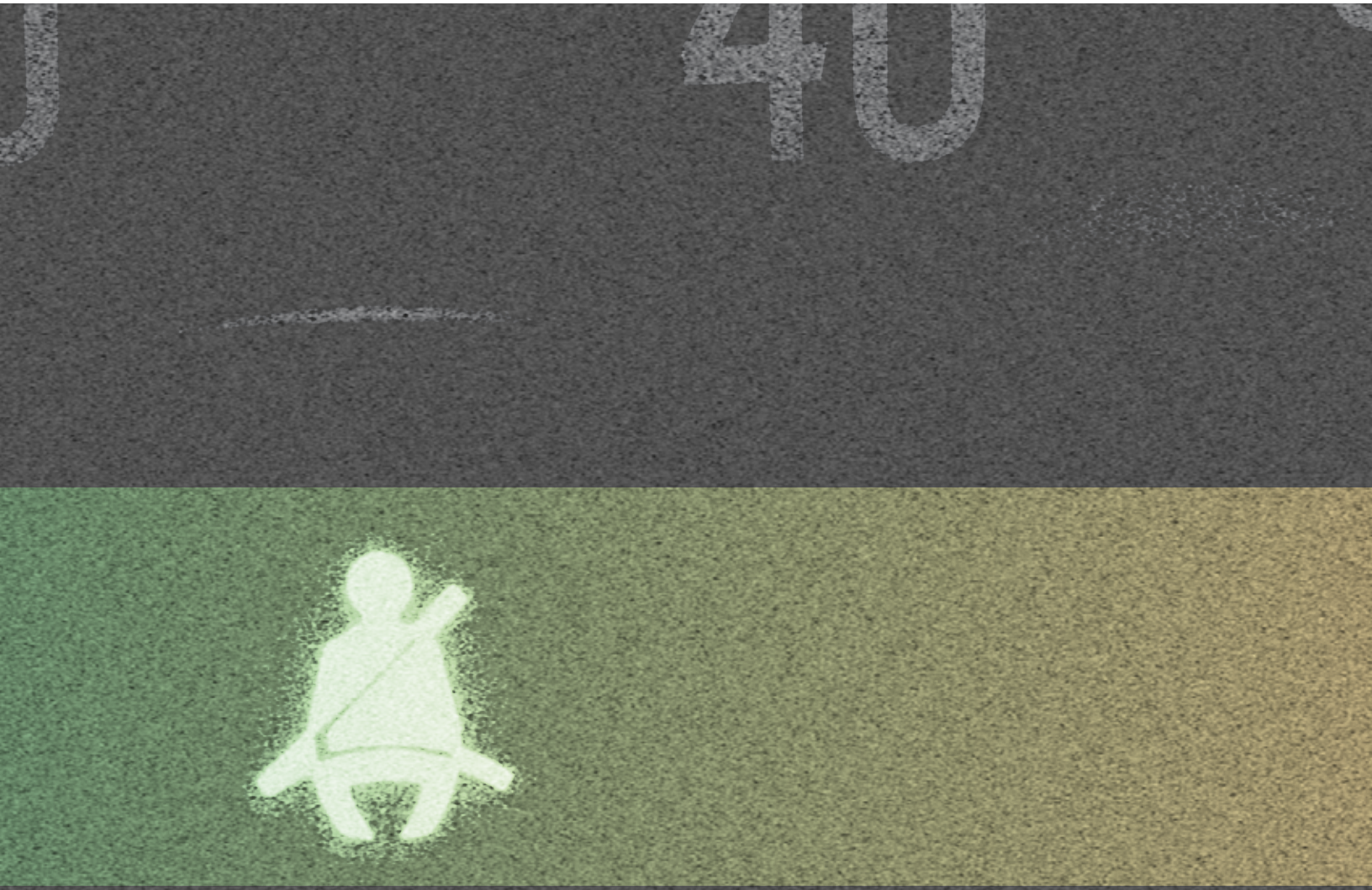
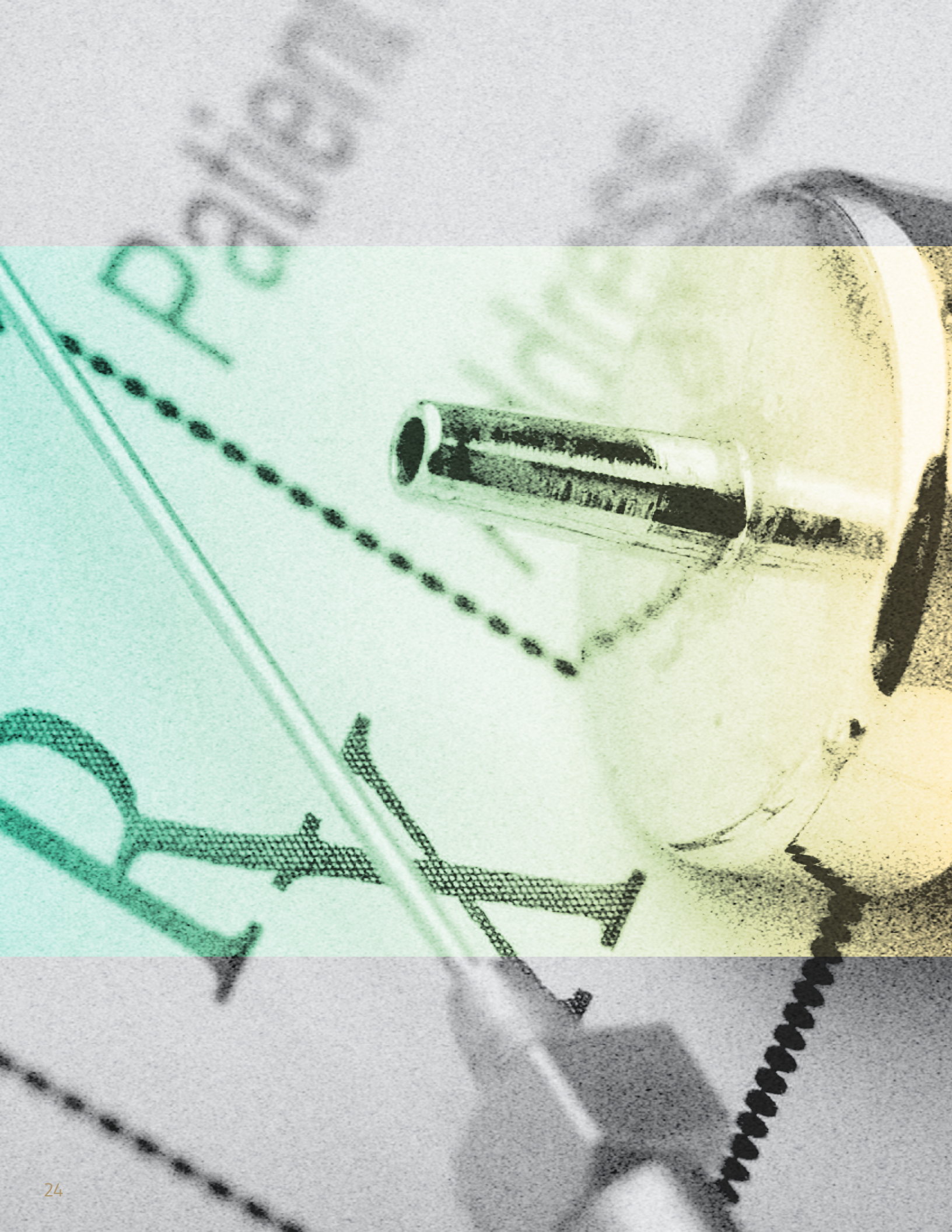
1 *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 555 (Tex.2015).

2 TEX. CIV. PRAC. & REM. CODE § 33.001

3 TEX. CIV. PRAC. & REM. CODE § 33.003(a) (allowing the fact finder to assign percentage of responsibility to any person "causing or contributing to cause in any way … the personal injury, property damage, death, or any other harm for which recovery of damages is sought.").

4 *Nabors*, 456 S.W.3d at 563.





Louisiana Addresses Ex Parte Contact With Treaters

Lea Ann Smith
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The question of whether plaintiffs' counsel should be permitted to have unfettered *ex parte* communication with treating and prescribing physicians has been heavily litigated. Unlimited contact between plaintiffs' counsel and physicians is an area of concern particularly in toxic tort and pharmaceutical cases. These physicians are critical fact witnesses and allowing *ex parte* communication beyond their care and treatment of the plaintiff creates an imbalance and an opportunity for "woodshedding" by plaintiffs' counsel. "Woodshedding" is the process by which plaintiffs seek to coach or prejudice the physician during these communications. Plaintiffs use this contact as a chance to preview their liability themes and in some cases provide the physicians with defendants' internal documents without context. Plaintiffs are afforded a distinct advantage over defendants when they are permitted unrestricted *ex parte* access to these physicians prior to their depositions.

Recently, courts have recognized this disadvantage and placed restrictions on such *ex parte* communications with prescribing or treating physicians. *See, In re Ortho Evra Products Liability Litig.*, MDL Docket No. 1742, No. 1:06-4000, 2010 WL 320064 (N.D. Ohio Jan., 20, 2010); *In re Chantix Products Liability Litig.*, (No. 2:09-CV-2030-IPJ, 2011 WL 9995561 (N.D.Ala. June 30, 2011); *In re Pelvic Mesh/Gynecare Litigation*, Docket No. ATL-L-6341-10, (N.J. Super. Ct. Law Div. Dec. 3, 2013); and *In re Actos Products Liability* Cases, No. BC411678 (Cal. Super. Ct. Mar. 20, 2015). Unfortunately, this trend did not continue in a recent decision from the Eastern District of Louisiana involving claims relating to plaintiffs' use of the medication Xarelto.

Defendants in the I*n re: Xarelto Products Liability Litigation*, 2016 WL 915288 (E.D. La. March 9, 2016) case filed what was referred to by the Court and the parties as the "Woodshed Motion." In the motion, Defendants sought an order limiting plaintiffs' counsel's *ex parte* communications with plaintiffs' treaters to the "diagnosis and treatment of the plaintiff and the plaintiff's medical condition." The approach advanced by the Defendants would not result in a complete ban on all communications with the physician, therefore, there would be no interference with the patient-physician relationship. The prohibition would be limited to communication regarding plaintiffs' liability theories including providing information about Defendants' conduct and warnings. Further, the defense proposal not only banned defense counsel from similar contact but also prohibited defense counsel from any *ex parte* communication with physicians regarding the diagnosis and treatment of the plaintiff. To be protected from the prejudice of woodshedding by Plaintiffs' counsel, the Defendants were willing to forego contact with the physician they would normally be permitted to have.

The Court declined to impose restrictions on the substantive content of Plaintiffs' *ex parte* contacts. First, the Court found imposing such restrictions would be both unenforceable and unreasonable. The Defendants' position was reframed in the Court's order as an effort to "sanitize" all advocacy surrounding liability from the plaintiffs' counsel's discussions with the physicians. The Court noted it lacked "the ability to surgically remove delicate insinuations from the individual sentences of Plaintiffs' counsel." Further, implementation of Defendants' proposal to "cleanse advocacy" from the Plaintiffs' contacts was not enforceable.

The Court's position is perplexing as the "cleansing" discussed was not the relief sought. Defendants requested an order prohibiting the parties from communicating with the physicians regarding their liability theories. Defendants did not request a ban on plaintiffs' efforts to be an advocate. Rather, they sought to prevent plaintiffs from providing the physicians with documents and information outside the purview of the doctors' role in the case, which is to testify as fact witnesses regarding the care and the treatment of their patients.

The Court also rejected a proposed compromise from the Defendants that allowed both parties to engage in the same *ex parte* contact concerning liability. The Court found this proposal placed an undue burden on the physician-patient relationship stating it would be "even more difficult for Defendants to surgically separate discussion on liability from a physician's understanding of his treatment of individual patients." The compromise proposal was viewed by the Defendants arguing that if Plaintiffs are allowed to woodshed, they should be allowed to do the same. The Court dismissed this proposal by stating "two wrongs don't make a right."

The Court's prescription to cure the uneven playing field created by *ex parte* communications was "a strong dose of cross-examination" at the physician's deposition. It was suggested a strong cross-examination would mitigate any abuse or imbalance of allowing the *ex parte* contact. This is unlikely as the plaintiffs through these ex parte communications are afforded the benefit of conducting their discovery deposition informally and privately during their discussions with the physician. Ultimately, the Court provided some relief to defendants by requiring disclosure by plaintiffs of meetings with the physician and the identity of documents shown to or provided to the physician in connection with the meeting at least 48 hours prior to the physician's deposition. In short, Defendants would be alerted as to the documents the physician reviewed and have two days to prepare to cross-examine the witness while plaintiffs have an unlimited *ex parte* access. The proposals presented by the Defendants struck a balance between allowing plaintiff's counsel access to physicians and preventing woodshedding. These proposals if accepted would have allowed the doctors to testify in an unbiased way without either party having an unfair advantage. Hopefully, the trend seen in other cases of allowing restrictions on communication with treating and prescribing physicians will continue and this case will not be followed in other courts.

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