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SUBROGATION WHITEPAPER

Toyota Recalls

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INTRODUCTION

Toyota's unprecedented recall of some 8.1 million vehicles will impact consumers, businesses, and their insurers all over the country and internationally. Since 1999, an estimated 2,000 complaints of sudden unintended acceleration in Toyota and Lexus vehicles have been reported to the National Highway Traffic Safety Administration [NHTSA].

Damage to person and property as a result of these apparent defects will result in numerous insurance claims throughout the fifty states. The breadth of this recall presents significant subrogation and recovery opportunities. At the same time, the potential complexity and fragmentation of these claims raise obstacles to their efficient and effective pursuit and prosecution.

Affected insurers must act quickly and expediently to review their past and pending claims involving Toyota vehicles. Given the expanse of the recall and the efforts directed by Toyota to rectify these manufacturing and design defects, it is possible, but unlikely given Toyota's penchant for vigorously contesting claims, that the automaker also will seek a forum for cost effective and expedient resolution of claims related to the defective vehicles.

The availability of multi-district litigation proceedings and mutual cooperation agreements may provide both the insurance industry and the automaker with a viable alternative to multiple forum litigation.

Either approach allows for the appointment of review masters and forensic experts to address liability and damages issues, towards the goal of implementing a mass tort settlement agreement.

This Subrogation Whitepaper is intended to provide the insurance industry with an outline of the legal considerations inherent in pursuing claims against Toyota relating to the recall. It addresses many of the potential causes of action, as well as possible pitfalls, such as potential defenses based on the statute of limitations or the economic loss doctrine. This Whitepaper is intended as a general guide, and should not be substituted for professional legal advice and careful evaluation of the specific facts of every case.

BACKGROUND

Per governmental reports, evidence had been developing for years that Toyota cars may suddenly accelerate. Toyota had originally blamed the problem on floor mats pinning the gas pedal. However, Toyota has known about the gas-pedal problem for more than a year and, until the recent recalls, did not undertake any mass remediation efforts.

MODELS AFFECTED

Following is a list of recalled models as of February 17, 2010:

- 2005-2010 Avalon
- 2010 Prius
- 2007-2010 Camry
- 2009-2010 RAV4
- 2009-2010 Corolla
- 2008-2010 Sequoia
- 2008-2010 Highlander
- 2005-2010 Tacoma
- 2009-2010 Matrix
- 2007-2010 Tundra
- 2004-2009 Prius

- 2009-2010 VENZA[1]
- 2009-2010 Pontiac Vibe[2]

TIMELINE OF THE RECALL

The current recall finds its genesis in Toyota's 2002 redesigned Camry sedan. Instead of physically connecting to the engine with a mechanical cable, the new pedal used electronic sensors to send signals to a computer controlling the engine. The main advantage is fuel efficiency. Eventually, the same technology migrated to other Toyota models including the Lexus ES sedan.

By 2004, the NHTSA received complaints that Camry and Lexus ES models sometimes accelerated suddenly without the driver hitting the gas. The NHTSA investigated 37 complaints. Initially, the NHTSA had decided to limit the probe to incidents involving brief bursts of acceleration, excluding so-called "long duration" incidents in which cars allegedly continued racing down the road after the driver applied the brakes. Investigators believed that it would be more effective to isolate any possible defect by focusing on shorter incidents. Longer incidents were excluded because they showed more signs of driver error such as mistaking the accelerator for the brake. Of the 37 incidents, 27 were categorized as long-duration and not investigated. On July 22, 2004, the probe was closed because NHTSA found no pattern of safety problems.

A lawsuit was filed in Michigan related to one fatal crash. In that accident, a 2005 Camry allegedly accelerated out of control, and sped up to 80 miles an hour before crashing and killing its driver.

In 2005 and 2006, the NHTSA received hundreds of reports of unintended acceleration involving Toyotas. Toyota refused to acknowledge the problem. Instead, it filed responses arguing that no systemic defect or trend could be found in the complaints.

On November 15, 2005, Toyota, asked NHTSA to drop its probe into sudden acceleration, arguing that no defect existed.

In March 2007, the agency opened a new probe, focusing on whether the gas pedal in the Lexus ES350 sedan could get caught beneath the floor mats. 59 of 600 respondents had experienced unintended acceleration, although some attributed it to causes other than the floor mats.

On June, 11, 2007, Toyota again responded that no defect existed.

In August 2007, the NHTSA requested Toyota to issue a Lexus and Camry recall to remove the floor mats blamed for the acceleration problems. Although NHTSA believed that the problems were related to the gas pedal itself, Toyota maintained that the cause was simply the floor mats. Toyota ended up recalling 55,000 Camry and ES350 models from 2007 and 2008.

On April 19, 2008, Guadalupe Alberto was driving a 2005 Camry when her car suddenly accelerated to 80 miles per hour. According to the lawsuit, the car went out of control before colliding with a tree and killing Ms. Alberto. Floor mats couldn't have caused the Camry to accelerate because Ms. Alberto had removed her mats several days before the accident. The suit is pending.

In late 2008, NHTSA investigated an accident in Minnesota in which a Lexus ES accelerated for two miles on a highway before the driver could regain control. Toyota stated that the driver's side floor mat was the cause.

At the close of 2008, Toyota also experienced a similar problem in Europe. Toyota did not share information related to these issues, even with its U.S. division. At this time, the European issue hasn't been linked to accidents and, according to Toyota, isn't related to sudden acceleration because it happens near idle speeds.

In August 2009, another fatal accident in the U.S. put Toyota in the spotlight. Mark Saylor, a California Highway Patrol officer, was driving a Lexus ES350 near San Diego when it accelerated to more than 100 mph. The tragic

[1] Source: http://www.toyota.com/recall/

[2] It should also be noted that Pontiac's Vibe is substantially similar to the Toyota Matrix and has been recalled as well.

crash, in which the driver and all passengers were killed, caught national attention because one of the occupants had called 911 during the incident.

On September 25, 2009, NHTSA informed Toyota that it needed to conduct further investigation into whether the pedals were defective.

On October 5, 2009, Toyota recalled 3.8 million vehicles to fix the floor-mat issue.

On November 3, 2009, Toyota issued a statement that NHTSA had concluded that "no defect exists" in the recalled vehicles. The next day, NHTSA called Toyota's statement "inaccurate and misleading."

On December 15, 2009, NHTSA officials met with Toyota executives. NHTSA believed that Toyota was taking too long to respond to its safety concerns. Toyota's view was that users needed to install the mats properly.

On January 23, 2010, Toyota recalled 2.3 million additional vehicles.

On January 26, 2010, Toyota stopped selling the affected models.

On February 8, 2010, Toyota received a grand jury subpoena from the Southern District of New York. Just over a week later, Toyota received a subpoena from the Securities and Exchange Commission.

On February 24-25, 2010, Congress held hearings and an inquiry into the recalls. Transportation Secretary Raymond LaHood and Toyota President Akio Toyoda both testified during these hearings. Toyota's North American COO, Yoshimi Inaba testified that Toyota did not properly share information related to the recall. James E. Lentz III, the President of Toyota Motor Sales U.S.A., told the House Energy and Commerce Committee that the prescribed repairs might "not totally" solve the problem and that Toyota was still examining the sudden acceleration problem, including the possibility that the electronics system might be at fault.[3]

CURRENT RECALL LAWSUITS

Since Toyota announced a recall of 8 million vehicles because of a defective gas pedal on January 21, at least 30 lawsuits seeking class-action status have been filed against the world's largest automaker. Mostly based on economic loss, these class action lawsuits allege that the recall has impaired the resale value of Toyota models.

Cases related to injuries and deaths are the most obvious cases that will be brought against Toyota. Already at least 19 crash deaths may be linked to accelerator problems in Toyota vehicles. There also have been an unknown number of injuries that could yet result in lawsuits. A $200 million suit was filed in Texas relating to a deadly 2009 crash involving a Toyota Corolla.

Auto insurers also are likely to pursue cases against Toyota for losses that may prove to have been caused by faulty vehicles.[4]

CAUSES OF ACTION

Plaintiffs in the Toyota recall cases likely will allege causes of action that include negligence, strict product liability, breach of implied warranty of merchantability, and violation of state consumer protection statutes. A summary of these causes of action is presented below.

[3] Source: Kate Linebaugh, Dionne Searcey and Norihiko Shirouzu, *Secretive Culture Led Toyota Astray*, Wall Street Journal, Feb. 8, 2010; Peter J. Henning, *Toyota's Latest Headache: Federal Subpoenas,* New York Times' Dealbook, February 23, 2010; Michael Maynard, *An Apology from Toyota's Leader,* New York Times, February 25, 2010.

[4] Source: CNNMoney.com, *Suing Toyota? Get in line*, Feb. 9, 2010; Amanda Bronstad, *'Legal Armada' sets sail against Toyota*, Feb. 3, 2010, National Law Journal.

NEGLIGENCE

In negligence cases, the defendant's conduct is a primary focus of the inquiry to determine whether a defendant is liable for a product defect. In order to prevail in any negligence action, the plaintiff must allege and prove: (1) the defendant owed a legal duty, (2) the defendant breached the duty, and (3) the breach proximately caused plaintiff's injury. Negligence claims for product defects can include failure to properly design a product, failure to properly manufacture a product, or failure to warn of a product's dangerous condition. Negligence claims based on Toyota's failure to come forward with the recall information at an earlier time will necessarily look at when Toyota learned that there was a problem and why it delayed in announcing the recall.

DUTY

The existence of a legal duty is a threshold question for the court. The law imposes upon manufacturers a duty to exercise reasonable care so their products in the marketplace will not harm persons or property.

BREACH

Any claim of negligence will require establishing a breach of the standard of care by the defendant. If a duty is breached resulting in injury to the plaintiff, the person or legal entity that breached the duty is a proper party in a products liability action based on negligence. Breach is most often a question of fact, which is left to the jury to determine. Because a negligence claim will most likely be based on negligent design, the relevant inquiry will be whether Toyota exercised due care at the time it designed the cars at issue.

CAUSATION

For a plaintiff to prevail on a negligence claim, it must prove that the breach of duty was a proximate cause of the damages. Causation requires a natural, direct and continuous sequence between the negligent act and the injury so that "but for" the act, the injury would not have occurred. In other words, the injury was not caused by an unexpected, freakish and improbable chain of events. Due to the fact-intensive nature of this proximate cause analysis, it is generally left to the fact-finder to decide whether the breach caused the damages.

STRICT PRODUCT LIABILITY

In strict product liability cases, the focus of the inquiry is on the product and whether it is defective rather than on whether the defendant acted with reasonable care. In order to prevail in any products liability action based on strict liability, the plaintiff must generally allege and prove: (1) the manufacturer or other seller sold an unreasonably dangerous and defective product; (2) the defect caused the plaintiff's injury; and (3) the plaintiff or a third party did not introduce the defect.

Many states have eliminated the privity requirement from a plaintiff in a product liability case. This means that a purchaser of a used Toyota falling within the recall should have the same rights as a person who purchased the same model new.

DEFECT IN THE PRODUCT

Types of Defects

An essential element of any product liability action is the existence of a defect in the product that existed at the time the product was manufactured or in the possession of the seller. A defect in a product may arise from a flaw in the manufacturing process, a flaw in the design of the product, or a failure to give an adequate warning of dangers associated with use of the product.

Manufacturing Defects

A manufacturing defect may occur when a mistake is made in the manufacturing process that results in a departure from the normal process thereby producing a flaw in an otherwise correctly designed product.

Design Defects

Design defects generally occur in the planning stages of a particular product. The manufacturer conceives an idea for a product and undertakes the planning, research, and testing to determine how the product may be manufactured. It is during this process that a flaw develops. While manufacturers are not required to make

accident proof products, a product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer.

Failure to Warn

An otherwise safe product may be considered defective solely by virtue of an inadequate warning or no warning at all. Where the seller has reason to anticipate that danger may result from a particular use, it may be required to give adequate warning of the danger. A product sold without such a warning is in defective condition. A failure to warn theory is a difficult fit for this auto defect because the defect impairs the use of the product during normal usage.

Standards to Determine Whether Defect Exists

There are two basic standards to determine whether a product is defective in strict liability cases: the consumer expectation standard and the risk utility standard. The application of these standards varies widely from state-to-state and even court-to-court within a single state.

Consumer Expectation Standard

For a plaintiff to establish that a product is defective under the "consumer expectation standard," it must prove that the ordinary consumer's expectations were frustrated by the product's failure to perform under the circumstances in which it failed. This standard is not derived from negligence principles. Instead, the focus is solely on the product that caused the injury.

Reasonably Prudent Manufacturer Standard: Risk-Utility Analysis

Some courts have rejected the consumer expectation test in design defect cases in favor of a test that would weigh the utility of the design versus the magnitude of the risk. These courts suggest that the appropriate standard to determine whether a product is defective is the reasonable manufacturer standard. This standard is more commonly referred to as the risk-utility test.

The specific factors that enter into the balancing process are: (1) the usefulness and desirability of the product; (2) the availability of other and safer products to meet the same need; (3) the likelihood of injury and its probable seriousness; (4) the obviousness of the danger; (5) common knowledge and normal public expectation of the danger (particularly for established products); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. A finder of fact will be required to balance the factors to determine whether a product is defective.

PROXIMATE CAUSE BETWEEN DEFECT AND DAMAGE

The plaintiff must also establish that the product defect caused the damage. Even though strict liability is a separate and distinct legal theory from negligence, the courts apply the same principles of causation in both types of cases.

ELIMINATING OTHER CAUSES

For a plaintiff to prevail in any suit involving strict liability, plaintiff must have used the product for the purpose intended and the product must not have been substantially changed from the condition in which it was sold. In auto accidents, this may require the elimination of driver error, maintenance and poor road conditions.

IMPLIED WARRANTIES

In products liability cases based on breach of warranty, the focus of the litigation is whether a warranty was made, the type of warranty that was made, and whether the seller breached the warranty. These issues are usually determined by examination of the sales agreement between the seller and buyer of the product.

In order to prevail in any action based on breach of warranty under the Uniform Commercial Code (UCC), the plaintiff must allege and prove: a sale of the goods, identification of the type of warranty, breach of the warranty, notice to the seller of the breach, and that the breach was the cause of the Plaintiff's injuries.

Because the warranty arises from the contract for sale, courts generally require that the plaintiff establish privity with the manufacturer or supplier as an additional element of a cause of action based on implied warranty. As an

additional fundamental requirement, a plaintiff must usually establish that it gave the seller notice of the breach of warranty.

Implied warranties can be waived under the UCC by conspicuously noting that the specific warranty has been waived. The validity of that waiver varies from state to state.

IMPLIED WARRANTY OF MERCHANTABILITY

The implied warranty of merchantability is contained in UCC 2-314(1), which provides, in part, that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Courts will generally require privity between the buyer and seller before allowing a plaintiff to enforce this warranty. In most cases, this warranty will be enforceable by the purchaser against the seller.

The requirement of merchantability is meant to be a flexible concept which depends upon the description of the goods and the circumstances of the sale. *See* UCC 2-314(2)(factors). The determination of merchantability will likely be a question of fact reserved for the jury.

Court Required Factors

As a practical matter, courts may, in addition to the UCC provisions, require that other elements be established in order to recover in a products liability action based on breach of an implied warranty. *See e.g., Amoroso v. Samuel Friedland Family Enterprises*, 604 So. 2d 827, (Fla. 4th DCA 1992). These elements are:

1. Plaintiff was a foreseeable user of the product;
2. The product was being used in the intended manner at the time of the injury;
3. The product was defective when transferred from the warrantor; and
4. The defect caused the injury.

These elements are substantially similar to the requirements for a strict liability action, which are discussed in the preceding section.

Defect In Product

A product is defective if it is not reasonably fit for the uses intended, or reasonably foreseeable, by defendant. In order to establish that an product is not fit for the ordinary purpose for which such goods are intended, the plaintiff does not have to establish or show any exact deficiency which rendered the article defective and caused it to fail.

This warranty does not impose on the merchant a duty to furnish the very best product of its kind or a product equal in quality to any other similar or competing product. The implied warranty of merchantability only requires the merchant to furnish goods that are fit for the ordinary purpose for which such goods are furnished.

EXPRESS WARRANTIES

Toyota generally offers a 3-year or 36,000 mile limited warranty on its vehicles. Under state discovery rules, a plaintiff may be able to bring an action for cars where the warranty period has expired, if the defect can be shown to have existed at the time the car was sold. The statute of limitations begins to run from when the defect was discovered. In some states, this means that a defect which existed during the warranty period can be the basis for liability, even if the defect does not appear until after the warranty period has expired.

A breach of warranty may also constitute a violation of the Magnuson-Moss Warranty Act (15 U.S.C. § 2301 *et seq.*) or a state warranty act. A violation of these statutes may allow for the recovery of attorney's fees and costs.

DISCOVERY RULE

The general rule is that a breach-of-warranty action must be commenced within the specified statute of limitations after "tender of delivery" of the product. *See Selzer v. Brunsell Bros., Ltd,* 652 N.W.2d 806, 812(Wis. App. 2002). However, if the warranty extends to future performance, the action accrues when the buyer discovered or should have discovered the breach. *See e.g.,* Wis. Stat. § 402.725(2); *see also Selzer,* 257 Wis.2d at 812. The courts have applied a stringent standard in determining whether a warranty explicitly extends to future

performance. The requirement of a specific reference to a future time is satisfied when a warranty guarantees a product for a particular number of years, or for a less precise, but still determinable period of time. Implied warranties cannot, by their very nature, explicitly extend to future performance, and the statute of limitations will generally start to run against claims based on implied warranty from the time when delivery of the goods is tendered. (Michigan is an exception to this general rule because it applies to discovery rule to all claims of implied warranties. MCL 600.5833.)

There is a split in authority on whether an auto warranty extends to future performance. *Compare,* MISSOURI *Ouellette Mach. Sys. v. Clinton Lindberg Cadillac Co.*, 60 S.W.3d 618, 621 (Mo. Ct. App. 2001)(finding warranty of future performance) *with* KANSAS *Voth v. Chrysler Motor Corp.,* 545 P.2d 371 (Kan. 1976)(finding that an auto warranty does not extend to future performance).

While implied warranties are breached upon delivery of the auto, the statue of limitations for breach of warranty extending to future performance begins to run when the breach is discovered or should have been discovered. In the case of the Toyota recalls, the discovery rule may mean that the statute of limitations for breach of express warranty on the relevant vehicles began to run once a reasonable person would have discovered the breach of warranty. There is a strong argument that the defects in Toyota vehicles were not discoverable until the end of 2009, when the sudden acceleration problems came to light. If this is the case, the statute of limitations for breach of warranty of future performance on Toyota vehicles began to run at that time. However, the application of the discovery rule varies from state to state, and is heavily dependent of the facts of the case. A definitive determination of whether the discovery rule applies to a specific case cannot be made without a full investigation of the underlying facts.

Some states also have enacted statutes of repose for product based claims. Under these statutes, if a product does not fail for a specified period, an action arising from a subsequent failure is barred. Consult our 50 State Survey on Limitations of Time for Commencement of Actions for a list of these jurisdictions.

VIOLATION OF STATE CONSUMER PROTECTION STATUTES

All states and the District of Columbia have enacted some form of consumer protection statutes. The ultimate purpose of these laws is to protect consumers from purchasing goods diminished in value by unfair trade practices and to protect the unwary consumer. Many of the statutes provide injured parties with a private cause of action under these acts. Consult our 50 State Survey on Consumer Protection Statutes.

To establish that Toyota violated a specific State Consumer Protection Statute, it will be necessary to prove three elements: (1) a deceptive act or unfair practice (as defined under each statute), (2) causation, and (3) actual damages (if they are greater than an applicable liquidated damages provision).

DECEPTIVE ACT OR UNFAIR PRACTICE

A “deceptive act” generally occurs if there is a representation, omission, or practice that is likely to mislead a consumer acting reasonably in the circumstances, to the consumer's detriment. The standard requires a showing of probable, not possible, deception that is likely to cause injury to a reasonably relying consumer. Generally, an act doesn’t need to be illegal to be deceptive.

An “unfair practice,” is generally one that offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

TRADE OR COMMERCE

An act will be deemed to affect trade or commerce if it relates to advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, tangible or intangible, or any other article, commodity, or thing of value, wherever situated.

In some cases, the statute will govern conduct of any trade or commerce, even between purely commercial interests. However, other statutes may limit causes of action to the actual seller, limiting rights against a product manufacturer. Finally, some courts may not provide a subrogating insurer with a right to pursue these claims because the insurer is not a consumer.

DAMAGES, ATTORNEY FEES, AND COSTS

A number of states allow for the recovery of actual damages, plus attorney's fees and costs. *See e.g.,* GEORGIA, IDAHO, KENTUCKY, among others. Some states provide for exemplary damages based on a knowing violation, while others require a knowing violation to recover attorney's fees and costs. *Compare* MASSACHUSETTS and MINNESOTA.

ADDITIONAL EVIDENTIARY ISSUES

This section discusses several additional substantive legal issues, including the extent to which a plaintiff can use the recall as evidence in its case, the imperatives of loss site investigations (spoilation, or the failure to preserve pertinent physical evidence, which may make it more difficult to prove that Toyota's culpable conduct was the cause of the accident at issue) and the use of circumstantial evidence to overcome the absence of direct physical evidence of a defect.

EVIDENCE OF THE RECALL

Recall evidence can be a powerful tool for a plaintiff to meet its burden in a product liability case. Recall evidence is admissible only if the plaintiff builds a sufficient foundation to demonstrate that the defects giving rise to the recall are substantially similar to the factors which brought about the loss. Once that burden is met, a plaintiff may be able to introduce the recall to support several elements of proof in a product liability case.

STANDARD FOR ADMISSIBILITY

Recall evidence has no different evidentiary requirements than those normally required for the admission of evidence of other similar occurrences. *See Weir v. Crown Equipment Corp.,* 217 F.3d 453 (7h Cir. 2000)(evidence of other accidents admissible if proponent establishes other accidents occurred under substantially similar conditions); *Four Corners Helicopters, Inc. v. Turbomeca*, 979 F.2d 1434 (10th Cir. 1992)(other accidents or other occurrence evidence in a product liability claim routinely permitted to demonstrate the existence of a defect). Fundamentally, the recall must address the component of the product that is alleged to be unreasonably dangerous. In addition, the failure mode must be substantially similar to the failure mode of the recall.

WHAT A RECALL CAN BE USED TO PROVE

A recall may not be dispositive of liability in and of itself. A recall that identifies all named vehicles, without exception, contain a specific defect can be used as an admission that the vehicle at issue contains a defect. *See e.g., Millette v. Radosta,* 404 N.E.2d 823 (Ill.App. 1980). In the case where a recall states that a vehicle *may* contain a defect, once the defect is proven, plaintiff may introduce the recall as evidence that the defect was present at the time the vehicle left the possession of the manufacturer. *See e.g., Carey v. General Motors Corp.,* 387 N.E.2d 583 (Mass. 1979); *Fields v. Volkswagen of America, Inc.,* 555 P.2d 48 (Okl. 1976).

Recall evidence cannot be used to prove that the defect caused the accident. A plaintiff must prove that the defect caused its injuries through expert testimony or circumstantial evidence.

SPOLIATION

In design defect cases, no longer being in possession of the car, though potentially problematic, may not necessarily bar recovery claims for past accidents. Under federal law, dismissal for spoliation is appropriate when there is proof of bad faith. *Bradley v. Cooper Tire & Rubber Co.,* 2005 WL 5989799, *2 (S.D. Miss. Oct. 25, 2005) *citing Vick v. Texas Employment Comm'n,* 514 F.2d 734, 737 (5th Cir. 1975). State evidentiary standards generally provide for a three factor test: (1) the degree of culpability of the party who destroyed the evidence, (2) the degree of prejudice suffered by the opposing party, and (3) whether a sanction lesser than dismissal is appropriate for the infraction. *See Schmid v. Milwaukee Electric Tool Corp.,* 13 F.3d 76 (3rd Cir. 1994); *Restaurant Management Co. v. Kidde-Fenwal, Inc.,* 986 P.2d 504 (N.M. App. 1999). Under this standard, there are several other sanctions that can be imposed, including the exclusion of expert testimony or certain direct evidence. Appropriate sanctions are within the discretion of the court, and are made on a case-by-case basis.

In *Schmid,* the Third Circuit overturned dismissal based on spoliation of the evidence. 13 F.3d at 81. The court found that because plaintiff's theory was a defect in design, the defendant's need for immediate access to the particular product was much less than if the plaintiff had alleged that there was a manufacturing error. *Id.* at 79. Whether the particular design was unreasonably dangerous or whether there is a feasible safer design "are matters that can be determined as well or better by inspecting and testing multiple [products] of the same design than by inspecting the particular [product] involved in the accident." *Id.* at 79-80.

PROVING A PRODUCT DEFECT FROM CIRCUMSTANTIAL EVIDENCE

In general, a plaintiff in a products liability suit must prove three things: (1) that the product had a defect rendering it unreasonably dangerous, (2) that the defect was present at the time the product left the manufacturer, and (3) that the defect caused the plaintiff's injuries. *See e.g., Taylor v. Cooper Tire & Rubber Co.,* 130 F.3d 1395, 1399 (10th Cir. 1997) (Utah law); *Henry v. Bridgestone/Firestone Inc.,* 63 Fed. Appx. 953 (7th Cir. 2003)(memorandum order)(Oklahoma law).

State law guides the substantive portion of a products liability case. Many states allow a plaintiff to prove a product defect by circumstantial evidence. 130 F.3d at 1398 (*identifying as examples:* Kansas, Colorado, Ohio, New Mexico and Wyoming)(citations omitted).

For example, under Utah law, a product failure standing alone is not a sufficient basis to conclude that there was a defect at the time that the product was manufactured. *Taylor,* 130 F.3d at 1398 *citing Hooper v. General Motors Corp.,* 260 P.2d 549 (Utah 1953). However, a failure, when added to other evidence, including expert testimony, the age of the vehicle, the fact that there had been no prior damage, and the description of the accident by the plaintiff, may allow the plaintiff to recover. *Id.* Circumstantial evidence may also come from similar occurrences under similar circumstances and from the elimination of alternative causes. *Wise v. Ford Motor Co.,* 943 P.2d 1310, 1313-14 (Mont. 1997). Expert testimony is not a requirement for proving a product defect. *Grover Hill Grain Co. v. Baughman-Oster, Inc.,* 728 F.2d 784, 794 (6th Cir. 1984)(Ohio law).

The circumstantial evidence must support the plaintiff's theory to the exclusion of other potential causes. "The circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion, or where the circumstances give equal support to inconsistent conclusions, or are equally consistent with contradictory hypotheses." *Henry v. Bridgestone/Firestone Inc.,* 63 Fed.Appx. 953, (7th Cir. 2003) *citing Downs v. Longfellow Corp.,* 351 P.2d 999 (Ok. 1960)(internal citations omitted). Proof of causation must be based on "probabilities not possibilities." *Id. citing Dutsch v. Sea Ray Boats, Inc.,* 845 P.2d 187 (1992). Plaintiffs generally have a difficult time excluding other causes of the accident.

"Generally speaking, when a vehicle suddenly goes out of control while being operated, driver error is a likely cause, absent a reliable explanation to the alternative." *Yielding v. Chrysler Motor Co.,* 783 S.W.2d 353, 355 (Ark. 1990). Driver error can be ruled out by direct evidence or "when the circumstances are such that common experience teaches that the accident would not have occurred in the absence of a defect." *Id. citing Harrell Motors, Inc. v. Flanery,* 612 S.W.2d 727 (Ark. 1981)(finding driver error ruled out where the car lurched while idling in the parked position).

In order to prove that the defect existed at the time of manufacture, the plaintiff must establish that the car was properly maintained and was not modified in a way that could introduce the same problem. *Grover Hill Grain Co. v. Baughman-Oster, Inc.,* 728 F.2d 784 (6th Cir. 1984). This is especially important for vehicle cases because there are many potential pitfalls with the maintenance of the particular car, such as tires, oil changes, repairs, brakes, etc., which could cause or contribute to faulty operation. *See e.g., Henry v. Bridgestone/Firestone Inc.,* 63 Fed.Appx. 953, (7th Cir. 2003)(finding that tire age is more often the cause of a blowout than a defect). The plaintiff must prove, by a preponderance of the evidence, that maintenance or modification did not play a role in the crash.

Finally, road conditions commonly contribute to causing accidents. Weather reports, road condition complaints and the incident report will be critical in excluding the possibility that road conditions contributed to the accident.

Two tire cases provide a comparison of the evidence required to substantiate a cause of action. In each of the cases, the tire experiencing the blowout was lost. In *Henry v. Bridgestone/Firestone Inc.,* 63 Fed.Appx. 953 (7th Cir. 2003), the plaintiff was injured when a truck veered toward her after one of its tires had a blowout. The plaintiff

took evasive action and was injured. She sued the tire manufacturer claiming that a defect in the other driver's tire caused him to lose control, leading to her damages. The Court held that she failed to state a cause of action because she could not prove causation. Her statement that a product defect in the tire of the other car caused the accident was not based on personal knowledge. Her expert's affidavit, which opined that there *could have been* a defect in the tire at issue and that if there was a defect it *could cause* a driver to lose control, was insufficient because it did not state that the accident *was probably caused* by a defect in the tire. *Id.* at 958. In addition, because the age of the tires was unknown, the plaintiffs could not exclude the age of the tires as the cause of the blowout.

By comparison, in *Bradley v. Cooper Tire & Rubber Co.,* the Court found that there was sufficient circumstantial evidence to support a products liability case. 2005 WL 5989799 (S.D. Miss. Oct. 25, 2005). In this case, the tires also were lost, but there was other circumstantial evidence including the police report, photos of the tire and two small tire fragments. This evidence was sufficient to support expert testimony opining that a defect in the tire caused the accident.

ADDITIONAL LEGAL ISSUES

STATUTES OF LIMITATIONS/REPOSE

A statute of limitations limits the amount of time a plaintiff has to bring a case. The time allowed to bring a claim will vary state by state. It may even vary within the state based on the theory of recovery that is being proposed. For example, in Illinois, property damage claims have a 5-year statute of limitations (735 ILCS 5/13-202), but breach of contract claims have a 10 year statute (735 ILCS 5/13-206), unless they relate to claims arising for the sale of a product, which have a 4 year statute (810 ILCS 5/2-725). Consult our 50 State Survey on Limitations of Time for Commencement of Actions.

State courts have taken a variety of positions when determining when the statute of limitations begins to run in products liability cases. Some states still apply the statute of limitations in its traditional way. In these states, the statute of limitations begins to run when the defendant committed the wrongful act or when the plaintiff was injured regardless of when the plaintiff became aware of the wrongful act or the injury. *See, e.g., Atwood v. Sturm, Ruger & Co.,* 823 P.2d 1064 (Utah 1992) (accrual on date of the injury); *Erickson v. Scotsman, Inc.,* 456 N.W.2d 535 (N.D.1990) (accrual of statute of limitations at the time of the injury);

In other states, a plaintiff's lack of knowledge of a product's defect causing personal injury affects the statute of limitations if a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of his or her claim. *See, e.g., Owens-Illinois, Inc. v. Edwards,* 573 So.2d 704 (Miss.1990) (en banc) (involving latent diseases). In these cases, the cause of action begins to accrue when the injured person knew, or by the exercise of reasonable diligence should have discovered, the defect or the cause of the injury. *E.g., Burgess v. Eli Lilly & Co.,* 609 N.E.2d 140 (1993).

Similarly, if there is fraudulent concealment of the defect in the product, then the statute of limitations does not begin to run until the fraudulent concealment should have been discovered. *See Palmer v. Borg-Warner Corp.,* 838 P.2d 1243, 1251 (Alaska 1992).

A statute of repose, by contrast, provides the window by which an action can be filed. If the statute of repose is six years, the lawsuit must be filed within six years of the purchase of the product. This means that a defect that manifests itself after five years and eleven months is actionable, but a defect which does not manifest until six years and one day is not actionable. The statute of repose varies from state to state, and some states do not have any statute of repose for product liability claims.

INSURER'S RIGHT TO CONTRIBUTION/INDEMNIFICATION

An insurer may be entitled to contribution or indemnity from Toyota for payments for liability claims asserted by injured parties against its insured. The legal theories of loss sharing (contribution) or loss shifting (indemnity) have much in common. Both seek to place to burden on the party responsible for the loss. Contribution is appropriate where two parties share responsibility for a loss. It is an equitable doctrine that allows one of the parties, who has paid more than its fair share of the loss, to receive pro-rata compensation from the other party. Indemnification,

on the other hand, allows a party who is completely without fault to shift the entire burden of the loss to another party who is fully responsible for the loss.

CONTRIBUTION

Contribution is an action by one tortfeasor who has paid more than its fair share of the loss. This party is able, in some states, to look to other responsible parties to share the burden of the loss with it. About half of the states allow an insurer to pursue contribution. *See e.g.,* NEW MEXICO N.M.S.A. § 41-3-2; NEVADA N.R.S. § 17.225; WASHINGTON R.C.W. 4.22.040(1-2). Each state, however, imposes specific rules and limitations on how much may be recovered and from whom it can be recovered.

In some states, such as Texas and New York, contribution claims between settling tortfeasors are barred. *See e.g.,* NEW YORK *Maryland Cas. Co. v. State,* 66 A.D.2d 953 (N.Y. App. Div. 1978); TEXAS *Crum & Forster, Inc. v. Monsanto Co.,* 887 S.W.2d 103 (Tex. App. 1994). Therefore, a determination of whether a specific contribution claim will be allowed is dependant on the intended forum of any given action. Consult our 50 State Survey on Effects of Settlement on Contribution Rights Against Non-Settling Joint Tortfeasors.

COMMON LAW INDEMNITY

An insurer may have a common law right to indemnification. The basic elements of a claim for indemnity are: (1) the indemnity plaintiff has discharged a legal obligation that it owed to a third party, (2) the indemnity defendant also is liable to the third party, and (3) as between the indemnity plaintiff and the indemnity defendant, the obligation ought to have been discharged by the latter. *See e.g., Fulton Insurance Company v. White Motor Corporation,* 493 P.2d 138 (Ore. 1972)(requiring indemnification in products case, where the insured driver was not at fault); *Houdaille Industries, Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979)("the party seeking indemnification must be without fault, and its liability must be vicarious and solely for the wrong of another").

The statute of limitations may, depending the state where the action accrued, begin to run on an indemnity claim once the party has discharged its liability for the underlying claim, either contractually or pursuant to judgment. *See e.g., Mettinger v. Globe Slicing Mach. Co.,* 709 A.2d 779 (N.J. 1998).

STATUTORY INDEMNITY

Some states have codified the traditional common law right to indemnity. In these states, a consumer protection statute or products liability statute may create a right of indemnification from the manufacturer or seller of the product. Texas, for example, has abolished most kinds of common law indemnity. Instead, the state has codified many common law indemnity rights. *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.002 and Tex. Bus. & Comm. Code Ann. § 17.555.

CONTRACTUAL INDEMNITY

In addition to implied indemnity rights, an insurer seeking to recover payments may pursue an action for indemnification against the manufacturer under the sales contract, or if the sales contract does not address indemnification, under the UCC. *See* UCC 2-607; UCC 2-714. A contractual indemnity theory is based on breach of warranty. The UCC allows a purchaser who is damaged by non-conforming goods from a third party to pursue the seller for those damages. Indemnification is a contractual/warranty remedy, and therefore should not be affected by a state statute that prohibits contribution between settling tortfeasors.

ECONOMIC LOSS DOCTRINE

The economic loss doctrine operates to bar tort litigation in cases that are considered contract disputes. Because every purchase of a car is governed by a sales contract and some form of warranty, it may be argued that the economic loss doctrine limits the potential avenues for recovery to contractual remedies. As is discussed below, several exceptions to the economic loss doctrine are likely to apply to vehicular accidents arising from sudden acceleration of Toyota vehicles. The application of the economic loss doctrine varies from state to state. Consult our 50 State Survey on the Economic Loss Doctrine.

THE ECONOMIC LOSS DOCTRINE: BACKGROUND AND EXCEPTIONS

California is considered the birthplace of the economic loss rule. In *Seeley v. White Motor Co.,* 403 P.2d 145 (Cal. 1965), the California Supreme Court distinguished between tort recovery for physical injury and warranty recovery for economic loss. The court held that a buyer should not bear the risk that a product will cause physical injury, but the buyer should bear the risk that the "product will not match his economic expectations." *Id*. at 151. The case involved a consumer transaction, the purchase of a defective truck. The court rejected the notion that the law of warranty should be "limited to parties in a somewhat equal bargaining position." *Id.* at 151.

In general, a party suffering only economic loss from a breach of express or implied contractual duties may not assert a tort claim for such breach absent an independent duty under tort law. However, courts have applied many exceptions to this doctrine, including when the product damages "other property" or when the failure of the product is "sudden and calamitous.", In most cases, damages associated with sudden acceleration of an auto will fall into one or both of these two exceptions. However, in the case of an auto accident which results in no injuries to persons or property, except for the car itself, the economic loss doctrine may limit damages to contractual remedies, such as breach of warranty or product liability.

MULTI-DISTRICT LITIGATION

If, as we expect, Toyota recall claims are brought in many jurisdictions, the most efficient way to proceed may be to utilize MDL proceedings. To the extent that federal jurisdiction applies, this permits the transfer of all related cases to one centralized court for pre-trial consolidation and coordination. To be eligible for MDL, the group of lawsuits must involve one or more common questions of fact. The information is presented to the Judicial Panel on Multidistrict Litigation, consisting of seven appellate and district court judges from different circuits and districts, who then would decide by majority vote whether to create an MDL and where to venue it. This would serve to promote the convenience of parties and witnesses and efficient conduct of such actions. The district court presiding over the MDL has jurisdiction over all transferred cases. It then can dispose of claims through settlement, dismissal or summary judgment. It can also control the pace and scope of discovery and the scope of expert testimony.

The Panel also looks at the current status of the pertinent litigation. Where was the first case filed? Where are most lawsuits pending? Do any courts already have specialized knowledge or experience? How advanced are the competing lawsuits? What is the condition of each court's docket and available courtroom technology?

SUMMARY

The discussions and concepts addressed within this article provide an outline of pending and prospective litigation associated with the Toyota Recalls. Specific decisions as to whether this is a factual and legal basis for pursuing a subrogation claim will require a detailed review of each claim on the basis of its own facts and circumstances.

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