



30

# United States Automotive Products Liability Law

## **A Corporate Approach to Preventive Management, Risk Reduction, and Case Coordination for Chinese Automakers**

SECOND EDITION  
October 2009

**Derek H. Swanson**  
McGuireWoods LLP  
Richmond, VA

**Dr. Lin Wei**  
Zhonglun W&D Law Firm  
Shanghai, China

[www.mcguirewoods.com](http://www.mcguirewoods.com)

**McGUIREWOODS**

McGuireWoods news is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

Copyright © 2011 by McGuireWoods LLP. All rights reserved.

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
<b>I. OVERVIEW OF UNITED STATES AUTOMOTIVE PRODUCTS LIABILITY LAW.....</b>	<b>3</b>
<b>A. Theories of Automotive Products Liability .....</b>	<b>3</b>
1. Negligence .....	4
2. Warranty.....	5
3. Strict Liability in Tort.....	7
<b>B. Categories of Defect .....</b>	<b>8</b>
1. Manufacturing Defects .....	8
2. Design Defects.....	8
3. Defects Arising from Marketing—Failure to Instruct or Warn.....	9
4. Crashworthiness .....	9
<b>C. Typical Defenses .....</b>	<b>10</b>
1. Intervening, Contributory, and Comparative Negligence.....	10
2. Assumption of Risk.....	11
3. Misuse or Alteration of Product.....	11
4. Lack of Contractual Privity .....	11
5. Disclaimers of Warranties and Contractual Limitation of Remedies.....	12
6. State of the Art—Development Risk .....	12
<b>D. Relationship of the Parties to One Another .....</b>	<b>13</b>
1. Parties .....	13
2. Rights of Those in the Chain of Distribution.....	14
3. Difference between Rights of Merchants and Rights of Consumers .....	15
<b>II. PRACTICAL ASPECTS OF MANAGING AND LITIGATING AN AUTOMOTIVE PRODUCTS LIABILITY CLAIM IN THE UNITED STATES.....</b>	<b>16</b>
<b>A. Peculiarities of the Legal System in the United States .....</b>	<b>16</b>
1. Contingent Fee System.....	16
2. Distinction between Federal and State Courts .....	16
3. Jury Trials in Civil Case.....	19

	4.	Losing Party Pays Only Limited Costs .....	19
B.		Jurisdiction Over Foreign Automobile Manufacturers.....	20
C.		Service of Process .....	21
	1.	Statutory Agents .....	21
	2.	Effect of the Hague Convention .....	22
D.		Default Judgment.....	22
E.		Pretrial Discovery .....	23
	1.	General .....	23
	2.	Interrogatories .....	23
	3.	Requests for Production of Documents .....	24
	4.	Requests for Admissions .....	25
	5.	Depositions.....	25
	6.	Subpoena Duces Tecum.....	27
	7.	Protected Information .....	28
	8.	Sanctions for Failure to Make Discovery .....	29
	9.	Effect of the Hague Evidence Convention.....	30
	10.	Expert Witnesses.....	30
F.		Jury and Non-Jury Trials .....	31
G.		Damages .....	32
H.		Settlement.....	35
I.		Judgments and Their Enforcement.....	35
J.		The Appellate Process.....	36
K.		Lawyers in the United States.....	37
	1.	Plaintiffs’ Bar .....	37
	2.	Defense Bar .....	38
L.		Federal Motor Vehicle Safety Standards/NHTSA Regulation.....	39
M.		Lemon Laws .....	39
III.		MINIMIZING RISK OF LIABILITY .....	40
A.		Jurisdiction over Foreign Corporations.....	40
B.		Reducing Exposure to Liability.....	41
	1.	Reviewing Product Literature, Warnings, Instructions, and Advertising before Publication.....	41
	2.	Document Retention Policies.....	42

C.	Responding to Litigation .....	43
1.	Investigation of Claims .....	44
2.	Retention and Education of Trial Counsel.....	44
3.	Supervision of Trial Counsel .....	45
4.	Case Control .....	45
5.	Interrogatories .....	45
6.	Document Production .....	46
7.	Depositions .....	46
8.	Defense Expert Witnesses .....	46
9.	Adverse Expert Witnesses .....	46
10.	Trial .....	47
11.	Alternative Dispute Resolution .....	47
	CONCLUSION.....	47

## INTRODUCTION

Manufacturers selling vehicles in the United States are subject to being sued for injuries and damages caused by their products. This includes both domestic and foreign automobile manufacturers. In recent years, automotive products liability suits have become more frequent and more widespread. These suits have become increasingly more expensive to litigate and have resulted in very large judgments against manufacturers. Recently, there have been instances of automobile manufacturers having to defend hundreds of lawsuits complaining of essentially the same defect. In addition, through the operation of the “class action” device, thousands of automobile owners regularly bring claims against automobile manufacturers in a single lawsuit. Overall, when an automobile becomes subject to allegations of a pervasive defect, the problems for the manufacturer can be enormous and the costs can be great.

As in other industries, an automobile manufacturer’s exposure to products liability claims is affected by (1) the quality of its automobiles, (2) the care that is taken in their manufacture, (3) the way in which their automobiles are marketed, and (4) the way in which the manufacturer responds to claims for injuries arising from their use. Whether an automobile manufacturer’s products liability problems remain a matter of isolated and infrequent claims or become so serious that they threaten the continued existence of the company can be drastically affected by the way in which the manufacturer manages its exposure and handles initial isolated claims. It is therefore critical for manufacturers planning to sell vehicles in the United States to develop a comprehensive litigation and risk management strategy.

Automobile manufacturers’ problems with products liability litigation have become more serious in the United States for several reasons. The substantive law has become more favorable to plaintiffs and less favorable to manufacturers. One reason for this is that new theories of liability have been adopted that allow a plaintiff to prevail more easily. A second reason is that changes in procedural law have encouraged automotive products liability lawsuits. In addition, jurisdictional limitations have been relaxed, so that a plaintiff can sue an out-of-state or foreign automobile manufacturer in a local court.

Moreover, parties’ rights to discover information from opponents are extensive. An automobile manufacturer’s documents regarding a product’s design and manufacture can be examined by plaintiff’s counsel and can be, and often are, used effectively against them. Federal courts, as well as some state courts, now permit plaintiffs to request production of electronic documents in the discovery process, raising several new and challenging technical and legal issues.

In addition, the publicity given automotive products liability lawsuits encourages injured persons to seek legal advice about possible claims. Because of these

changes, plaintiffs' attorneys can earn substantially more money prosecuting automotive products liability cases than in the past.

The following developments have resulted in the nationwide organization of plaintiffs' attorneys for the prosecution of such claims:

- (1) Information about automobiles that may be the source of potential profits to plaintiffs' attorneys, including automobile manufacturers' documents, are widely circulated to plaintiffs' attorneys in every jurisdiction as is information about the results of automotive product liability lawsuits.
- (2) A plaintiffs' attorney can often obtain materials that supply him with a ready-made case against a particular automobile model from other lawyers who have handled similar cases or from organizations that collect such information.
- (3) Some plaintiffs' attorneys have learned to specialize in certain types of automotive products liability litigation, prosecuting cases in multiple jurisdictions by associating with local attorneys and repeatedly using groups of professional testifying experts that have testified in dozens of similar cases. For example, plaintiffs' attorneys have developed specialties in cases that involve roof deformation, door latch failure, post-collision fires, electrical fires, occupant restraint failure, handling and stability, window glazing, brake failure, and seatback collapse.
- (4) Particular automobiles have sometime received so much attention from plaintiffs' attorneys that a single automobile has become the basis for organizational activity. Attorneys have been known to advertise for clients injured by certain automobiles. Publications have appeared that are solely devoted to the prosecution of claims and suits involving a single automobile model or automobile manufacturer. In fact, providing materials and sources of proof about certain automobiles has itself become a business for profit.

An automobile manufacturer confronted with the aforementioned litigation environment must organize its efforts to deal with automotive products liability lawsuits. Some manufacturers have been forced to devote significant portions of their managerial and engineering staff to help defend against them. For example, special computerized indices containing millions of documents make it easier to monitor the progress of hundreds of lawsuits. In fact, manufacturers sometimes spend more money defending a case than is otherwise required to achieve settlement because of the positive effect that a favorable judgment can have on other lawsuits and claims.

The need for organization of an automobile manufacturer's efforts to minimize the risks and expenses arising from automotive products liability claims, however, is not restricted to such extreme situations. Care in design and

manufacture, as well as quality control, are always important. A manufacturer must also consider the effect on its overall exposure arising from products liability when decisions are made with respect to:

- (1) the documentation that the manufacturer retains about its product;
- (2) the way in which the product is marketed; and
- (3) the manufacturer's response to claims from consumers and insurance companies relating to alleged product defects.

This paper is designed to assist emerging automobile manufacturers in China to understand the legal issues they will confront when they begin selling their vehicles in the United States. This paper also outlines some of the features of the substantive law governing automotive products liability lawsuits in the United States. In addition, it identifies recent developments in the law that will affect automotive products liability lawsuits and discusses certain procedural aspects of United States automotive products liability litigation that have a practical effect on the way in which a manufacturer defends lawsuits brought against it. Finally, it sets out some of the important considerations affecting a manufacturer's establishment of a program to reduce its exposure to both risks and expenses arising from automotive products liability claims.

## I. OVERVIEW OF UNITED STATES AUTOMOTIVE PRODUCTS LIABILITY LAW

### A. Theories of Automotive Products Liability

The discussion below applies to cases involving injury or death to the person or physical damage to property other than the automobile itself.

Two features of the legal system in the United States make it difficult to set forth the law of automotive products liability with absolute certainty. First, most of the rules of private law are made by the individual states, not by the federal government. There is no general, federal compulsion to uniformity. Second, the common-law courts in the United States are empowered to make—and to change, rules of law. As a result, the United States is composed of fifty jurisdictions whose law is sometimes similar and sometimes very different. In any jurisdiction, an attorney's opinion about a rule of law can only be a prediction of what a court will do because of the authority that the court may consider controlling or persuasive.

A plaintiff who claims to have been injured by an automobile can generally bring suit under three possible theories of liability: (1) negligence, (2) breach of an express or implied warranty, and (3) strict liability. Regardless of the theory a plaintiff chooses to pursue, the burden is generally on him to prove: (1) a defect,

(2) an injury, and (3) a causal relationship between the defect and the injury. In negligence and in warranty, a plaintiff must prove additional elements. Negligence and strict liability are theories arising from the law of torts, while breach of warranty is a theory associated with the law of contracts. This explains why application of these three theories often differs.

Although strict liability ordinarily presents the fewest obstacles to recovery, plaintiffs often maintain suits under all available theories. Despite the danger of confusing the jury, most jurisdictions permit the submission of a case under multiple theories.

### **1. Negligence**

Negligence is the failure of a manufacturer to exercise due care under the circumstances. Negligence is the failure to do something that a manufacturer exercising reasonable care would have done in the same or similar circumstances.

In deciding whether an act was reasonable, courts will consider various factors that ought to have entered into the manufacturer's decision. Important factors include custom in the industry, standards imposed by federal regulations, the experience of potential consumers, the foreseeability and likelihood of an injury, the seriousness and frequency of the injuries threatened by the product, and the expense and feasibility of eliminating or warning against the anticipated injury. Taking all of these factors into account, the manufacturer's conduct is judged on the basis of whether the risks imposed on consumers were excessive when compared to the benefits arising from the manufacturer's conduct.

The plaintiff has the burden of proving negligence. Ordinarily, the negligence is actually that of one or more of the manufacturer's employees. The manufacturer is responsible for its employees' conduct, which is imputed to the manufacturer under the principle of "*respondent superior*."

It should be noted that in addition to making mistakes in assembly, an automobile manufacturer can be negligent in several ways: (1) failing to properly label the automobile, (2) failing to properly warn of dangers associated with the automobile's use, (3) failing to give proper instructions, (4) failing to design adequately, (5) failing to inspect adequately, and (6) failing to test adequately. Lawsuits alleging negligent design are among the most common, but negligence in any of these areas can support an allegation of defect in the product. Either the product has a defect in manufacture or design that ought to have been eliminated by the exercise of due care or the product carries hidden dangers which ought to have been discovered or warned of in the exercise of due care.

## 2. *Warranty*

### a. Express Warranties

All American states, with the exception of Louisiana, have adopted the Uniform Commercial Code. Section 2-313 of the Code, which governs express warranties, provides:

- (1) Express warranties by the seller are created as follows:
  - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
  - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or models.

When an injury occurs because an automobile does not meet the standards established by the warranty, the manufacturer is subject to liability. It is not necessary for the plaintiff to prove that the manufacturer was negligent.

Any affirmation of fact or description in advertising can be found to be an express warranty if it can be said to have helped induce the sale. Advertising that a product is “trouble free” or “safe and modern” can bind a manufacturer to the standards for its product approaching perfection. A representation that a product will not fail for a stated period may be treated very differently from a representation that if the product fails during that period, it will be repaired or replaced.

### b. Implied Warranties

Even in the absence of an express warranty, the law may imply certain warranties. Section 2-314 of the Uniform Commercial Code provides:

- (1) Unless excluded or modified (§2-316), 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. . . .

- (2) Goods to be merchantable must be at least such (a) pass without objection in the grade under the contract description; and (b) in the case of fungible goods, are of fair or average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit among all units involved; (e) are adequately contained, packaged or labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label, if any.
- (3) Unless excluded or modified (§2-316) other implied warranties may arise from the course of dealing or usage of trade.

Section 2-315 of the Uniform Commercial Code creates an implied warranty of fitness for a particular purpose under certain conditions:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.

There are several significant differences between the implied warranty of fitness and the implied warranty of merchantability. The implied warranty of merchantability, unless excluded, arises out of the sale itself. But the implied warranty of fitness for a particular purpose does not arise in every sale. The buyer must show that the seller knew, or had reason to know of any particular purpose for which the goods were to be used, and must also show that he relied upon the seller's skill or judgment in selecting goods that were suitable for this particular purpose.

Although plaintiffs often prefer to allege all three categories of warranty, the one upon which recovery is most often based is the implied warranty of merchantability. The basis of such a claim is the existence of a defect that renders the product unfit for its usual purpose.

Defenses of lack of privity of contract and failure of the plaintiff to give notice of defect within a reasonable period are available in some jurisdictions. The clear trend, however, is toward their abolition in personal injury and wrongful death actions. Because of the contractual basis of warranty actions, disclaimers of warranty and contractual limitations of remedies remain a possibility; however, the opportunities to make use of disclaimers and limitations on liability in

consumer personal injury and wrongful death situations are limited by statute and case law in many jurisdictions.

### **3. *Strict Liability in Tort***

The elements of an action in strict liability in tort are set out in Section 402A of the Restatement (Second) of Torts.

Section 402A. Special Liability of a Seller of Product for Physical Harm to User or Consumer.

- A. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (i) the seller is engaged in the business of selling such a product, and (ii) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- B. The rule stated in Subsection A applies although (i) the seller has exercised all possible care in the preparation and sale of his product, and (ii) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

The Restatement is not itself authority for the imposition of strict liability, but the language of Section 402A has been adopted by the courts in many states. A few state courts have adopted The Restatement (Third) of Torts, which broadens the scope of an automobile manufacturer's responsibilities.

Most states have some form of strict liability. The action in strict liability in tort does not depend upon the fault or lack of care of the automobile manufacturer. The action is based solely on the presence of a defect that renders the product unreasonably dangerous and that causes an injury.

One justification often given for the imposition of strict liability is that it shifts the burden of injuries caused by the defective automobile onto the manufacturer who can spread the costs among all users of the automobile. This justification could theoretically apply as well to injuries caused by non-defective automobile, but no court in the United States has gone so far as to impose liability without finding that the automobile was defective. However, there is an obvious tendency in many jurisdictions to construe "defect" liberally. Moreover, the trier of fact always knows that an accident has happened when deciding whether the product that caused the accident was defective.

## **B. Categories of Defect**

The concept of a defect is the foundation of modern automotive products liability law. In each case, for a plaintiff to recover from a manufacturer, he must prove that the automobile at issue was defective and that the defect existed at the time the automobile left the hands of the manufacturer.

### **1. Manufacturing Defects**

A manufacturing defect exists when an automobile fails to conform to its design or specification. In warranty or strict liability cases it does not matter why the product fails to conform to its design. It is not a defense that a manufacturer employed all possible care in its manufacture or quality control procedures, nor that a certain proportion of products always and unavoidably fail to meet specifications. In negligence, a plaintiff must prove not only that a product is defective, but also that the defect came about through a failure to exercise reasonable care.

Although manufacturing defect cases might seem to involve a mechanical comparison of the design specifications to the finished product, liability is not limited to cases where a part was omitted, where a foreign object was built into the product, or where some other identifiable failure to conform to specifications is apparent. The rules of evidence governing expert testimony have become more liberal. The result has been cases in which a manufacturing defect is postulated by an expert witness solely on the basis that a product failed at the time or in the manner that it did. In fact, several jurisdictions permit cases to be decided by a jury without expert testimony at all, and without evidence of any particular defect, when a new product unexplainedly fails in service.

### **2. Design Defects**

Allegations of defective design can also be made under any theory of liability. In negligence, the plaintiff must prove the breach of a design standard. In warranty, the question is whether the design renders the automobile unfit for its ordinary purposes. In strict liability, the issue is framed in terms of a defect that renders an automobile unreasonably dangerous. The strict liability standard is often left to the jury solely on the instruction that a defect exists if the automobile is more dangerous than an ordinary consumer would have expected.

Because the term “design defect” is used both in negligence and strict liability actions and because expert testimony about the existence of a defect is usually employed under both theories, the evidentiary distinctions between negligence and strict liability have been blurred. The adequacy of a design is usually to be judged in light of the circumstances and feasibility at the time of the design. Although evidence is often admitted for a number of purposes, many cases hold that even in strict liability, design is not to be judged by hindsight.

Often, courts will use the “state of the art” at the time of manufacture as a standard to ascertain whether an automobile was defectively designed. This is often a disputed point and is typically established through expert testimony through comparison with other vehicles and sometimes with relevant patents.

### **3. Defects Arising from Marketing—Failure to Instruct or Warn**

An automobile may be defective because of inadequate instructions or warnings. Instructions inform the user how to make safe and efficient use of an automobile. Warnings must catch the user’s attention and impress upon him the nature and extent of the risk involved in the use of the automobile. Instructions and warnings are both necessary.

A manufacturer has a duty to warn of an automobile’s dangerous propensities if: (i) the automobile is dangerous, (ii) the manufacturer knew or should have known of the danger, and (iii) the danger is neither obvious nor known to the user. Generally, there is no duty to warn of an obvious danger. A few courts have held, however, that a manufacturer must even warn of an obvious danger. The duty to warn extends to all persons whom the manufacturer should expect to use the automobile and to those endangered by a reasonably foreseeable use of the automobile.

A warning must notify the user of possible consequences of the use or foreseeable misuse of an automobile. Generally, the adequacy of a warning is a factual question to be determined by the jury. This fact often precludes pre-trial summary adjudication of failure to warn cases, even when there is a warning addressing the danger at issue in the case. In deciding whether a warning is adequate, the jury will consider in addition to what the warning says, such factors as the location of the warning, its size and color, and the education and experience of the user. Parties often retain warnings experts to provide scientific testimony on these factors.

In most jurisdictions, an automobile manufacturer has a continuing duty to warn consumers of an automobile’s dangerous propensities, even after that product has entered the marketplace. In addition, failure to warn is specifically recognized as a source of defect under Section 402A of the Restatement (Second) of Torts. In other words, the automobile is defective because it is without adequate warning. The standard for judging the adequacy of the warning is essentially a negligence standard. In some jurisdictions, however, a failure to warn can be actionable even if the failure to warn was reasonable. Such jurisdictions ask only whether the product is unreasonably dangerous in the absence of a warning.

### **4. Crashworthiness**

Most jurisdictions recognize some form of the “crashworthiness” doctrine. In a crashworthiness case, a plaintiff can bring a claim against an automobile

manufacturer alleging the vehicle was defective and unreasonable dangerous, even if the alleged defect did not cause the accident itself, but enhanced or intensified the plaintiff's injuries over and above the injuries that would have resulted in a non-defective vehicle.

### **C. Typical Defenses**

There are a number of defenses based upon a consumer's own conduct or the conduct of others which have traditionally been available to automobile manufacturers in defending automotive products liability lawsuits. Most of these defenses originally appeared in negligence cases and are of limited value in warranty or strict liability actions.

#### **1. *Intervening, Contributory, and Comparative Negligence***

Even where an automobile is defective, the manufacturer will not be liable unless the defect "proximately" caused the injury. If a plaintiff's own negligence is the sole "proximate" cause of his injury, there is no liability. Under the traditional contributory negligence concept, a consumer's negligent acts which contributed, however slightly, to his injury also prohibited the consumer from recovering any damages from the manufacturer. As discussed below, contributory negligence still exists in a few states. In most instances, however, a consumer's slight negligence will not prevent him from recovering against the manufacturer if he sues on a warranty or strict liability theory.

The common law contributory negligence rule has been viewed as excessively harsh by many courts and legal commentators, because it bars recovery even in cases in which a plaintiff is slightly negligent and a defendant is negligent to a greater degree. The defense is now only recognized as a complete defense in only four jurisdictions—Virginia, North Carolina, Alabama, and the District of Columbia.

The majority of jurisdictions have responded to this criticism by adopting a comparative negligence rule by statute or by judicial decision. In these jurisdictions, the jury is asked to apportion fault between the plaintiff and the defendant. Some states provide that a plaintiff who is less than 50% responsible for his own injuries may still recover, but the verdict is reduced to reflect the degree of his fault. This is called a modified comparative fault rule. Other jurisdictions apply a pure comparative negligence rule permitting some recovery regardless of the percentage of fault attributable to the plaintiff, with a reduction in the award to reflect the plaintiff's contributory fault.

The comparative negligence rule generally weakens the defense of contributory negligence when a plaintiff sues on a negligence theory. However, the rule has been interpreted in some jurisdictions as applicable to strict liability cases. In these jurisdictions, the defense of a strict liability case is substantially enhanced by fault on the part of the consumer.

## **2. Assumption of Risk**

Whereas contributory negligence is generally not a defense to an automotive products liability action brought under warranty or strict liability theories, the plaintiff's assumption of the risk of injury will often bar his recovery. A consumer assumes the risk of injury when he discovers a defect and is aware of the danger, yet proceeds to make use of the automobile despite the known risk. It is difficult, however, for a manufacturer to prevail with an assumption of risk defense. The manufacturer must show that the consumer knew of the risk, that he appreciated the danger, and that he voluntarily and unreasonably acted in the face of the risk. The doctrine of assumption of the risk is most valuable where the plaintiff is an experienced user of the product.

## **3. Misuse or Alteration of Product**

Another defense available in a products liability action is that of misuse of the product. The defense of misuse is often available as a complete defense in negligence and warranty actions. In automotive products liability cases, misuse is defined as the consumer's use of the automobile for some purpose or in a manner that was neither intended nor reasonably foreseeable by the manufacturer. It is important to note, however, that abnormal or unintended uses may not allow the manufacturer to avoid liability if they are reasonably foreseeable. Furthermore, many courts construe the concept of reasonable foreseeability so broadly that the mere occurrence of the misuse makes it foreseeable.

Alteration of the product can also provide an important defense in products liability actions, particularly in strict liability actions. Section 402A requires a plaintiff to prove that the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." It is generally held, however, that evidence of product alteration is only relevant where the alteration is shown to be causally related to the injury. And, the fact that a manufacturer ought to have foreseen an alteration may leave it liable.

## **4. Lack of Contractual Privity**

A manufacturer's duty to act with reasonable care is no longer regarded as a duty extending only to those who purchased the vehicle. As a result, lack of contractual privity is not a defense to an action in negligence. It has never been a defense to an action in strict liability in tort. In many states, anyone reasonably expected to use or be affected by a product can sue in warranty as well. In some jurisdictions, however, the group of people who are entitled to sue a seller on its warranty may be more limited. In those jurisdictions, lack of privity is still sometimes a defense in a warranty action.

## **5. *Disclaimers of Warranties and Contractual Limitation of Remedies***

A warranty is based, at least in theory, upon a contractual agreement. A seller can therefore attempt to disclaim or limit warranties of good quality by the contract of sale. A defense based on a disclaimer of all warranties can be substantially complicated by the fact that the injured person may not have been a party to the contract of sale and may not have known about the disclaimer. Contractual limitations on remedies for breach of warranty are made prima facie unconscionable and hence usually unenforceable by, Section 2-719(3) of the Uniform Commercial Code. Such disclaimers may be of substantial value when the damages claimed are for destruction of property.

It is difficult to persuade a court to give effect to disclaimers that purport to exclude liability for negligence or to eliminate strict liability in tort. While such disclaimers can be useful in commercial situations, they may be valueless if made in connection with the sale of an ordinary consumer product to a consumer.

## **6. *State of the Art—Development Risk***

The term “state of the art” is used in American jurisprudence in at least two different senses. Some courts use the term to refer to industry custom. Others use the term to refer to practical technological feasibility (i.e., what is realistically capable of achievement at the time of manufacture). The Model Uniform Product Liability Act (UPLA) abandons the term “state of the art” in favor of “practical technological feasibility,” which it defines as “the technical, mechanical, and scientific knowledge relating to product safety that was reasonably feasible for use, in light of economic practicality, at the time of manufacture.”

In automotive product liability cases based upon negligence, evidence of both industry custom and technological feasibility is admissible by either party to prove due care or lack of due care. But even careful adherence to universal industry custom is almost never conclusive evidence of due care. An entire industry may have unreasonably lagged behind in the adoption of new and available technology. On the other hand, proof that a product could not have been made safer, under the practical technological feasibility existing at the time of manufacture, is conclusive evidence of due care.

In actions based upon breach of warranty, or strict liability in tort, the focus is said to be on the product, rather than on the manufacturer’s conduct. Therefore, many courts have held that industry custom is irrelevant in these cases. Under these theories of liability, practical technological feasibility is also irrelevant on the issue of defective construction.

Since liability for defective design or for inadequate warnings or instructions is essentially based on negligence principles, most courts allow the defendant to introduce evidence as to the practical technological state of the art to prove that the design, warnings, or instructions used did not render the product *unreasonably* dangerous at the time of manufacture. Some courts place the burden on the plaintiff to prove that a safer design was technologically feasible; other states have statutes providing that compliance with the technological state of the art raises a rebuttable presumption that the product was not defective; while still others provide that once the plaintiff has established a prima facie case, the burden shifts to the defendant to establish that the design or warning was not unreasonably dangerous. The “state of the art defense” is not, however, an absolute one. It is merely one factor for the jury to consider in determining whether the product was unreasonably dangerous. At least one court has stated that the jury may use hindsight in making this determination.

Under the UPLA, industry customs are admissible in both design and warning cases for whatever consideration the trier of fact chooses to give them. But the UPLA requires the trier of fact to find for the defendant “if the [defendant] proves, by a preponderance of the evidence, that it was not within practical technological feasibility for it to make the product safer with respect to design and warnings or instructions at the time of manufacture so as to have prevented the [plaintiff’s] harm. . . .” This defense, however, does not affect the defendant’s post-manufacture duty to warn of newly discovered dangers, nor does it relieve him from liability for breach of express warranty or for defective manufacture of the product.

In cases alleging inadequate warnings, the plaintiff may produce an “expert” to testify that the manufacturer could have and should have known about the danger in question. In design cases, an “expert” may testify that an alternative design is safer and was feasible at the time of manufacture. The jurors, though they are not trained in science, must decide the issue of practical technological feasibility based on conflicting testimony of plaintiff’s and defendant’s experts. The result is often to hold the manufacturer liable for failure to adopt a design or include a warning which was not practically and technologically feasible at the time of manufacture.

## **D. Relationship of the Parties to One Another**

### **1. Parties**

With the abolition of defenses based upon privity, plaintiffs are now able to bring suit against all persons in the chain of distribution of a product. Warranty and strict liability actions can be brought against any seller of the product. Negligence actions may be brought against anyone who negligently created a defect or who negligently failed to discover one. Products liability actions are often brought against the retailer, distributor, and manufacturer of the product at

issue. Where a particular component of a product is alleged to be defective, the component manufacturer and distributor may also be included as defendants.

The presence of multiple parties adds to the length, complexity, and cost of discovery and trials. It may also complicate defense tactics and strategy, particularly if defendants take adversary positions toward each other. In products liability cases involving automobiles, the plaintiff often files suit against the manufacturer, as well as the local dealer who sold the vehicle to the plaintiff, in order to prevent the defendant from taking advantage of a federal law that would otherwise permit the manufacturer to remove the case to the federal court in that jurisdiction.

## ***2. Rights of Those in the Chain of Distribution***

Ordinarily, liability in warranty can be passed up the chain of distribution to the manufacturer of the product or component at issue. So, if a retailer is sued by a consumer for product defect, he may sue any seller above him in the chain of sale. A defendant added in a lawsuit by an existing defendant is called a third party defendant.

The same effect can be achieved in negligence cases in an action for indemnity brought by a seller against the manufacturer. Indemnity is usually available on behalf of a passive tort-feasor, who negligently failed to discover a defect against the active tort-feasor whose negligence created it. The seller of a defective product can also claim indemnity in strict liability against another company further up the chain of distribution that manufactured or sold the defective product. Indemnity rights may also be established by contract.

Disputes often arise between a manufacturer, who claims that he was supplied a defective component, and the component's supplier, who claims that the defect in the ultimate product was caused by the manufacturer's inappropriate use of his non-defective component. The knowledge of the supplier of the component's use, the warnings and other information supplied by it, and the relative expertise of the two parties can become quite important. A similar situation may arise with respect to the duty to warn. The ultimate responsibility for inadequate warnings is usually imposed on the manufacturer, but courts have sometimes imposed it on others.

Even where full indemnity is unavailable, a seller against whom recovery is obtained may be able to recover a portion of the sum he is forced to pay. The action to obtain partial payment is one for contribution between joint tort-feasors. The availability of contribution is governed by statute or common law decisions in the various United States jurisdictions, although a uniform act has been passed by a number of states.

Claims for indemnity or contribution can usually be decided in the initial action brought by a products liability plaintiff. When several members of the chain of

distribution have been sued by a plaintiff, claims for indemnity or contribution can be asserted by way of a cross-claim between defendants. If the manufacturer or other party primarily liable has not been sued by the plaintiff, defendants in most jurisdictions can bring that party into the action through a “third-party complaint.”

The Uniform Commercial Code provides another device affecting the apportionment. Section 2-607 provides in pertinent part:

(5) Where the buyer is sued for breach of warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of notice does come in and defend he is so bound.

This “vouching in” provision allows a seller against whom a judgment is recovered to recover in turn against his seller in a later action without having to relitigate the question of whether the product was defective. Manufacturers frequently accede to the request to be “vouched in” and assume the cost of defense because they possess superior technical knowledge and can more easily defend their product.

### ***3. Difference between Rights of Merchants and Rights of Consumers***

Strict liability in tort and implied warranty theories are available to those who sell products in the regular course of business as well as to consumers. However, merchants in the chain of distribution are given wide latitude in allocating risks between themselves by contract. Implied warranties may be disclaimed or limited, and indemnity agreements or agreements to hold harmless may be entered into. If properly drafted, these agreements can dictate whether a claim is brought in negligence, strict liability, or in warranty.

Sellers are on a different footing with respect to consumers. The Uniform Commercial Code makes presumptively invalid a disclaimer of consequential damages for personal injury caused by a consumer product. Several states do not permit implied warranties to be disclaimed on consumer goods. Even where such a warranty disclaimer is theoretically allowed, disclaimers are viewed with disfavor and are strictly scrutinized. Finally, the federal government, through the Magnuson-Moss Warranty Act, 15 U.S.C. 2301-2312, forbids the disclaimer of implied warranties on consumer goods whenever a written warranty is given. Many manufacturers find it commercially necessary to afford some written warranty and therefore are forced to give an implied warranty as well.

The Magnuson-Moss Act establishes a number of specific requirements for warranties. Failure to observe the requirements of the Act can lead to suits brought by the government or by private parties.

## II. PRACTICAL ASPECTS OF MANAGING AND LITIGATING AN AUTOMOTIVE PRODUCTS LIABILITY CLAIM IN THE UNITED STATES

### A. Peculiarities of the Legal System in the United States

#### 1. *Contingent Fee System*

Personal injury actions in the United States are usually taken by plaintiffs' lawyers on a contingent fee basis. This means that the plaintiff's lawyer's fee is a percentage of the total recovery. One-third of the recovery is the usual fee, but some lawyers can command fifty percent in unusual cases. If the plaintiff recovers nothing, his lawyer collects no fee.

The contingent fee system allows an injured party without money to bring suit. Money to cover expenses in the lawsuit is usually advanced by the plaintiff's lawyer. If the plaintiff wins, expenses in the action are deducted from his share of the award. The plaintiff must in theory remain ultimately liable for these expenses. In practice, however, when a plaintiff without money loses his lawsuit, the lawyer rarely recovers the expense money he had advanced.

The contingent fee system gives plaintiffs' lawyers a stake in the outcome of the case that may cause conflicts between their financial interests and their duties as officers of the court. In addition, conflicts of interest can arise between a plaintiff's lawyer and his client when they are presented with a choice between a small but certain settlement and a possibly large but uncertain award of damages.

#### 2. *Distinction between Federal and State Courts*

Every state has its own court system created by its constitution or statutes. Most of the judicial business of the country is carried on in state courts.

Federal courts comprise the judicial branch of the federal government. A federal court sits in every state. They are empowered by the United States Constitution to hear certain types of disputes. The original jurisdiction of the federal courts includes cases in which there exists "diversity of citizenship." Suits between American citizens from different states, and suits between an American citizen and an alien have the required diversity of citizenship. Corporations are treated as citizens of the state or country in which they are incorporated and of the state or country in which they have their principal place of business. The diversity jurisdiction of the federal courts is subject to an additional statutory requirement

that the “amount in controversy” exceeds \$75,000. This is typically not an issue in automobile products liability cases, where plaintiffs regularly demand millions of dollars in damages.

This original jurisdiction of federal courts in diversity cases is not exclusive. In most products liability actions against foreign manufacturers, the plaintiff can bring suit in either state or federal court. If the plaintiff chooses to sue in state court, the manufacturer may be entitled to demand that the action be removed to federal court.

This right of removal was initially given to out-of-state and foreign defendants to insure that they would not be subject to the possible favoritism of a state court toward citizens of its own state. However, federal judges are usually appointed from among lawyers practicing locally, and federal juries are always drawn from the state or district of the state in which the federal court sits.

The outcome of a lawsuit may nevertheless be affected by whether it is tried in state or federal court. Federal courts are often better adapted through experience and traditions of formality to the resolution of controversies involving large sums. Formality and the requirement that litigants meet the stringent deadlines imposed by federal procedures often hinders plaintiffs—who have the burden of making out their cases. However, whether removal is advantageous to a defendant in a particular products liability case depends on the nature of the case, the parties, the judge, the jury pool, and various other local circumstances.

To prevent removal, the plaintiff has only to join a citizen of his own state as an additional defendant. As previously noted, in automotive products liability cases, a plaintiff typically joins the local automobile dealer from whom he brought the allegedly defective vehicle. This joinder will destroy the complete diversity of citizenship necessary for federal jurisdiction, since the diversity requirement is satisfied only when no defendant is a citizen of the same state as any plaintiff. Even if the plaintiff fails to make out his case against the dealer, the dealer’s dismissal, unless issued consent by the plaintiff, does not make the case removable. Although some cases suggest the contrary, most courts hold that a third party defendant may not remove a case to federal court.

Both state and federal courts follow the principle of “*stare decisis*.” Each court is obliged to conform its own decisions to holdings on the same issue by courts of a higher level of authority. Thus, each federal trial court must conform to the decisions of the Federal Court of Appeals of its circuit, and all federal courts must conform to the decisions of the Supreme Court of the United States. State courts are bound only by the rulings of their own state’s higher courts. They are not bound by the United States Supreme Court except on questions of federal law. Decisions of other courts will often be persuasive to a judge even though he is not obliged to follow them.

Rules of procedure and of evidence are nearly uniform throughout the federal courts, although some federal courts have introduced minor modifications through local rules of court. The substantive law can vary drastically from one state to the next, however, as can rules of civil procedure and rules of evidence in state courts. Because of these differences in procedural and substantive law, an attorney will rarely try a case outside of his home state without the assistance of a lawyer from the forum state. Many states require at least one attorney for each party to be a member of the bar of that state. In a diversity case, a federal court will follow federal procedure, including federal rules of evidence, but will follow the substantive law of the state in which the court is sitting. State substantive law includes choice-of-law rules used to determine whether a case is governed by the law of the state in which the state or federal court is sitting or the law of some other jurisdiction. But choice-of-law rules vary from state to state. The choice of forum does not always determine what substantive law applies, but it can have this effect.

A recurrent problem in automotive products liability suits is the determination of the state or country whose law governs the duties and liabilities of the parties. Before about 1960, the usual rule required the court to apply the law of the “place of the wrong” in a tort action, at least to determine the duties owed by the alleged wrongdoer and the standards to be applied to his conduct. Therefore, the governing law was often the law of the place of manufacture. However, when a defective sub-assembly manufactured in one state or country was shipped into another jurisdiction for incorporation into a finished product, the law of the place of final assembly might govern because that is where the “last event necessary to make an actor liable for an alleged tort” occurred.

Even under traditional conflict-of-laws rules a manufacturer’s products are not always judged by the law of its own place of business. The shift of emphasis of the substantive law of product liability away from assessing a manufacturer’s conduct toward putting the product itself on trial naturally made it more likely that a court would apply the law of the place of the accident, or the law of the place the consumer purchased the product. Under the traditional approach, the law of the place of purchase usually governed actions brought on a claim of breach of warranty. If the plaintiff employed alternative theories of recovery, the court could apply the law of several different jurisdictions to different aspects of the case.

Many jurisdictions have rejected the traditional rules and have applied a “center of gravity” or “significant relationship” test. This test applies the law of the place having the most significant relationship to the lawsuit. To determine where this is, courts consider: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties and (4) the place where the relationship, if any, between the parties is centered. Courts have also given weight to a jurisdiction’s “interest” in the lawsuit: for instance, which state

will have to provide support and medical care to an injured plaintiff who fails to recover damages.

These conflicts-of-laws situations can become quite complicated. But it is fair to say that a manufacturer of products that are used in the United States cannot rely on any substantive aspect of the law of the jurisdiction in which it is located as a reliable guide to the outcome of products liability litigation.

### ***3. Jury Trials in Civil Case***

The right to a jury trial in civil cases is guaranteed by the Seventh Amendment of the United States Constitution. While this amendment applies only to proceedings in federal courts, nearly every state constitution also grants the right to trial by jury in civil cases. These constitutional provisions explain the unusual American practice of using juries in civil suits.

In almost all civil actions for substantial damages in America, any party may demand trial by jury. This right may be waived, intentionally or inadvertently, and the case tried to the judge alone.

A jury generally consists of between 5 and 12 people. In many state courts, the verdict need not be unanimous.

The jury sits as the trier of fact, while the judge presides over procedure in the courtroom and makes decisions regarding the admissibility of evidence and the proper application of the law. Relying on evidence presented in court, rather than on personal knowledge of the case, the jury resolves all questions of fact; and, in most cases, after being instructed by the judge as to the applicable law, the jury applies the law to the facts and reaches a general verdict. Jury deliberations are secret, and the final judgment is reported without giving reasons for it. Moreover, decisions on individual questions of fact are usually not stated, although some jurisdictions permit the attorneys to interview the jury after the verdict is rendered. Damages are also usually assessed by the jury as a lump sum, without explanation of the method by which the jury reached that amount.

### ***4. Losing Party Pays Only Limited Costs***

Certain costs of litigation are normally assessed against the losing party. The costs often include court fees, costs of transcribing depositions, and statutory witness fees. Attorney's fees are not taxable as costs, except in rare circumstances, nor are the fees of expert witnesses. A defendant must therefore bear most of the expenses of litigation even if it prevails. In a small minority of jurisdictions, there are statutes enabling defendants to recover attorneys' fees and costs in certain types of cases at the discretion of the trial court, but this is rare.

## B. Jurisdiction Over Foreign Automobile Manufacturers

The plaintiff has the burden of establishing that the court in which the lawsuit is filed has jurisdiction over the “person” of each defendant. In determining “*in personam* jurisdiction,” the court must determine: (1) whether the defendant is amenable to service of process under the state jurisdictional statute, and (2) if so, whether assertion of jurisdiction over the defendant comports with constitutional due process (procedural justice) requirements.

Courts have abandoned the requirement that a defendant be physically present in a state to be subject to jurisdiction. Constitutional due process is satisfied if the non-resident corporation has “minimum contacts” with the forum state so that bringing suit against it there will not offend “traditional notions of fair play and substantial justice.”

Nearly all states have taken advantage of this expansion of permissible jurisdiction by enacting “long-arm” statutes. These statutes grant courts jurisdiction over defendants who perform a single act in that state that causes injury or who cause injury in the state by an act committed outside the state. Where the act causing the injury is committed outside the state, additional contacts with the state are required, but they need not be very extensive.

Nevertheless, there are limitations on jurisdiction over foreign corporations. If the defendant foreign manufacturer has no significant contacts with the state where its product allegedly caused an injury, and if the plaintiff cannot prove that the defendant should have expected its product to be sold or used in that state, then that state cannot assert jurisdiction. Moreover, there is no concept of “minimum contacts” with the United States as a whole. A foreign manufacturer may be subject to the jurisdiction of the state and federal courts in one state and yet not be within the jurisdiction of the court of another state.

In products liability situations, long-arm statutes are usually applicable only if the action is brought in the state where the accident occurred. If the plaintiff brings his action in another state, either for reasons of convenience or in order to try to affect the outcome, he may have to satisfy the older tests requiring that the defendant be “present” or “doing business” in that state. Many foreign manufacturers whose products reach the United States are not subject to jurisdiction on these grounds.

It should be noted that the presence of a wholly-owned subsidiary corporation in a state will not necessarily be considered a “contact” with the state by the foreign parent corporation. The acts of the subsidiary are not considered the acts of the parent unless the separate corporate identities of the two organizations are disregarded.

Moreover, a parent corporation will not be held liable for the torts of its subsidiary unless, through abuse of the corporate relationship, the subsidiary has become a “mere instrumentality” of its parent.

To prove that a subsidiary is a “mere instrumentality,” the plaintiff must show that the parent corporation exercised close control over the subsidiary. Among the factors deemed relevant in the determination of whether the requisite degree of control is maintained by the corporation are: (1) the presence in both corporations of the same officers or directors, (2) common shareholders, (3) financial support of the subsidiary’s operations by the parent, (4) underwriting the incorporation and purchase of all of the capital stock of the subsidiary by the parent corporation, (5) the organization of the subsidiary with a grossly inadequate capital structure, (6) a joint accounting and payroll system, (7) in the financial statements of the parent, the identification of the subsidiary as a division of the parent corporation or the listing of subsidiary obligations as those of the parent, (8) the use of property of the subsidiary as property of the parent corporation, (9) the control of the subsidiary in the interest of the parent, and (10) the failure to observe the formal requirements attributable to the operation of a subsidiary.

In applying the instrumentality rule, courts may also consider any fraud or wrong perpetrated by the parent through its subsidiary and the threat of unjust loss or injury to the claimant because of the subsidiary’s insolvency.

## **C. Service of Process**

### **1. Statutory Agents**

Due process requires that the plaintiff make reasonable efforts to notify the defendant that a lawsuit has been filed against it. Statutes often provide formal requirements affecting the method of notification.

Corporations registered to do business in a state must appoint registered agents to receive service of process for them. State “long-arm” statutes provide for “substituted service of process” in cases where the plaintiff contends that the court has jurisdiction over the defendant even though the defendant has no agent in the state to be served with process. To effect substituted service, the claimant’s attorney causes the suit papers to be served on a designated state official. The official has the duty to mail the papers to the defendant’s last known address. The defendant must respond by filing with the court and serving on the plaintiff’s attorney appropriate papers within a specified period, ranging from 20 to 35 days. It is often not clear whether this period begins when the state official is served or when the company receives the paper. Modern statutes sometimes allow additional time for responding to pleadings served in this manner.

## **2. Effect of the Hague Convention**

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters went into effect for the United States on February 10, 1969. The Convention went into force between the United States and China in 1991.

The Convention's primary mode of service entails the transmission of the documents by the appropriate authority in the requesting state to the designated "Central Authority" in the addressed state, which then uses the methods provided by internal law for service or any requested method not "incompatible" with its internal law.

The Hague Convention applies "in all cases, in civil or commercial matters," where the address of the person to be served is known. Although it has been contended that service in a federal case in the United States, whether or not permissible under the Convention, would only have to fulfill the requirements of Rule 4(i) of the Federal Rules of Civil Procedure, it seems clear that the Convention intended contracting states to follow its provisions in order to effect valid service. Of course, to be valid in the United States service would still have to conform to the relevant state or federal rules and any Constitutional prerequisites.

The Hague Convention neither limits nor extends jurisdiction. A plaintiff can comply with its terms and obtain jurisdiction provided the requirements of jurisdiction are met. However, the Convention will usually cause more time to elapse between the filing of the lawsuit and the date on which the defendant must file its response. Sometimes procedural advantages can be gained by forcing a plaintiff who has served process in a manner not allowed by the Convention's provisions to effect service again.

### **D. Default Judgment**

Failure to respond to the plaintiff's initial pleading within the allotted time may result in a judgment by default. If this occurs, the court may take the allegations relating to liability as true or allow only the plaintiff to put on evidence regarding that subject. The plaintiff still must prove his damages and the defendant is permitted to dispute them. However, once a default has been entered, many states do not require that the defendant be given notice of when the hearing on damages will be held.

If a foreign manufacturer is named as a defendant in a lawsuit in America and is not familiar with American procedure, the time for responding may expire before the manufacturer's response to the plaintiff's complaint reaches the United States. Courts, and even opposing counsel, are usually willing to extend the deadline in these situations. Similarly, in extenuating circumstances, a default judgment may be set aside even though damages have been assessed. However,

any indication that the foreign manufacturer has not taken the matter seriously or has unduly delayed in referring the matter to counsel in the United States will drastically reduce the likelihood of securing an extension of time or of avoiding a judgment by default.

Theoretically, it is possible for a defendant who feels that a state or federal court lacks jurisdiction over him to ignore a lawsuit and to allow a default judgment to be entered, and later contest the judgment when the plaintiff attempts to enforce it. However, if the defendant is wrong, and the court where the enforcement action is brought decides that the original court did in fact have jurisdiction, the defendant has lost his chance to challenge either liability or damages. It is much safer to raise a jurisdictional defense in the court where the action is first brought.

## **E. Pretrial Discovery**

### **1. General**

“Discovery” is the term used to describe the pre-trial procedures that permit a party to obtain the information necessary to prepare and present his case. In the United States, extremely broad discovery is permitted in order to avoid being surprised at trial and to allow the case to be decided upon the most complete evidence available.

The current rules provide few clear limitations on the scope of discovery. Courts have the power to limit discovery by making “protective orders” to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. A protective order may provide that the requested information not be discovered at all or that, if discovered, it be revealed to no one other than the parties, their counsel and the judge. Disputes between the parties regarding the proper scope of pre-trial discovery sometimes require months of motions practice and court hearings.

Because the burden is on the party seeking the protective order to show why it is appropriate, discovery is often conducted with virtually no limitations. The common methods of discovery from an opposing party include written interrogatories, requests for the production of documents, and requests for admissions. Oral depositions can be used to obtain information from both parties and non-parties, and the subpoena *duces tecum* provides a method for obtaining documents from a non-party.

### **2. Interrogatories**

An interrogatory is a written question directed by one party to another. Answers to interrogatories must be in writing, under oath, and served on the inquiring party or filed within a given period—typically thirty days after receipt of the

interrogatories. Answering interrogatories can be tedious, time-consuming, and expensive.

Litigants sometimes abuse the right to serve interrogatories. The evolution of “form” interrogatories has exacerbated this problem. Judges are sometimes unwilling to spend the time necessary to make a detailed examination of interrogatories and their answers to determine their reasonableness and sufficiency. A few courts have responded to abuses in the use of interrogatories by decreeing an arbitrary limit on the number of interrogatories that a party may propound.

It is extremely important that answers be consistent. Proof that a manufacturer has given inconsistent answers to the same interrogatory in different lawsuits can result in loss of an otherwise defensible case and may be evidence that supports an award of punitive damages. This often requires careful discovery issues. Automobile manufacturers in the United States sometimes employ lawyers who specialize in discovery issues pertaining to different types of cases.

### ***3. Requests for Production of Documents***

Each party to a lawsuit is entitled to request that other parties produce documents described in the request that are in the possession or control of the responding party. Once a court has jurisdiction over a party, it can order production of documents in the possession or control of that party even if they are outside the jurisdiction of the court, in another state, or in a foreign country. Usually, any document arguably relevant to the case is subject to production. The request need not be specific—single requests requiring the production of hundreds of thousands of pages have been determined by courts not to be too broad.

A plaintiff’s lawyer prosecuting a significant products liability claim may, as a matter of course, ask for all documents:

- (1) related to the design of the product;
- (2) related to specifications, and change in the specifications for the product;
- (3) related to quality control procedures used in the product’s manufacture;
- (4) related to the source of the components of the product, or at least of those components involved in the accident;
- (5) related to marketing, promotion, and advertising of the product; and
- (6) related to the organization of the manufacturer, and detailing who was responsible for decisions about the product.

A request like this will often be enforced by a court as a matter of course, with little concern for the number of documents that might have to be produced or the lack of any obvious relevance to the lawsuit of most of the documents.

If the case promises sufficient rewards, and the plaintiff's lawyers are sufficiently diligent, the only real limitation on what must be produced may be the simple fact that the defendant manufacturer never created or no longer has documents of the kind requested. As a result, the policies of a manufacturer with respect to the creation and retention of documents can be critical.

Business reasons may demand the creation of certain kinds of documents. Documents cannot legally be destroyed once they are subject to a request for production, and they cannot safely be destroyed once it is apparent that they may be relevant to some pending or likely claim or lawsuit. If the fact of such destruction is discovered, the jury may be instructed that it can presume that the destroyed documents would have been detrimental to the case of the party destroying them.

Effective December 1, 2006, the Federal Rules of Civil Procedure were significantly amended to codify a party's right to seek electronically stored information ("ESI") in discovery. Because of its intangible form, volume, transience and persistence, a plaintiff's request for ESI can create a host of discovery challenges. Furthermore, electronic information is usually accompanied by metadata, the preservation of which creates special challenges to prevent spoliation. At present, more than half of the individual state jurisdiction have also adopted—or are in the process of adopting—similar electronic discovery rules.

#### **4. *Requests for Admissions***

Another pre-trial discovery device is the "request for admissions." Such a request forces a party to admit or deny a number of written factual statements relevant to the lawsuit. This device can be used to establish the genuineness of documents, to narrow the issues of the lawsuit, and to shorten the trial by eliminating uncontroverted facts that would otherwise have to be proved. Unreasonable refusal to admit a fact that the other party then proves at trial can result in the imposition of costs and attorney's fees incurred in proving it.

#### **5. *Depositions***

The term "deposition," in its most common legal sense, refers to the oral testimony of a witness, called the "deponent," taken before trial and recorded stenographically. The deponent is required to answer oral questions posed by the counsel of parties to the suit.

The party requesting the deposition must give reasonable notice to all other parties of the name of the deponent and the time and place of the deposition.

All parties have the right to be represented by counsel at the deposition, and to ask questions of the deponent. The questions are answered under oath before a licensed court reporter who records the questions, the answers, and all remarks of the deponent, the parties, and their attorneys.

The deponent may be represented by counsel. Any lawyer present may make objections as he would at trial. If the objection is to the admissibility of the evidence, the deponent can answer, and the validity of the objection can be determined later, before the answer is admitted into evidence at trial. If the objection is instead that the question seeks information not discoverable, the deponent's attorney, or his employer's attorney, may also instruct the deponent not to answer the question. If the examining party deems the question sufficiently important, he will then bring the matter promptly before a judge of an appropriate court who will rule on the objection. Sometimes counsel can telephone the judge and obtain an immediate ruling during the course of the deposition.

Depositions differ from interrogatories in that the witness has little time to reflect upon the best response to the questions. He must promptly answer each question to the best of his knowledge. If he consults with his lawyer before answering, this fact can be reflected in the record.

Only parties to the lawsuit can ordinarily be made to answer written interrogatories, but anyone within the jurisdiction of the court can be required to give an oral deposition if he may have knowledge of any facts relevant to the lawsuit and if he has no compelling reason, such as ill health, to be excused.

The Rules of Federal Procedure provide a procedure for compelling the deposition of a witness in another state by referring the matter to a federal court in that state. State courts in some states will compel local deponents to give depositions for use in actions pending in other states. But the uniform ability to take depositions anywhere in the United States can be a significant factor in deciding whether a state or federal forum is preferred.

In response to a properly filed notice stating that a party desires to take the deposition of a corporation on specified matters, the corporation must designate one or more representatives to answer on its behalf oral questions relevant to such matters. A party may also depose any other agent or employee of the corporation, although that agent might lack the authority to speak for the corporation on particular matters.

Assuming that a court has jurisdiction over an alien corporate defendant, any party may take the deposition of that corporation's directors, officers or "managing agents" at their place of residence, even if they reside outside the United States. To obligate the director, officer, or managing agent to appear for the deposition, the requesting party has only to mail a copy of the deposition notice to the corporation's attorney in the case. The term managing agent

generally includes those who supervise other employees and who have responsibility for making decisions of some importance within the corporation. The examining party has the burden of proving that a noticed deponent is a managing agent of the corporation, and some courts have determined that any doubts should be resolved in the corporation's favor. As discussed below, the refusal of directors, officers, or managing agents to appear for noticed depositions can result in sanctions being imposed against the corporate defendant.

The scope of depositions is as wide as the scope of any other method of discovery. Generally, a witness must answer any question which appears reasonably calculated to lead to the discovery of evidence that would be admissible at trial. Even its assets and net worth can be inquired about in a case in which punitive damages are claimed.

Depositions are useful for several reasons. A party can obtain information about his opponent's case so that its strengths and weaknesses may be assessed. He can obtain information and evidence necessary for the preparation of his own case. He can uncover clues that may lead to the discovery of other helpful evidence. Depositions are sometimes taken to preserve the testimony of a witness who will not be able to appear at trial. Depositions also fix a witness' version of the relevant facts. Any answer given in the deposition that conflicts with the witness' testimony at trial may be read to the judge and jury to impeach the witness' credibility.

Certain depositions may be used at trial not only for impeachment, but for any purposes. Under the Federal Rules of Civil Procedure and under many state rules, any portion of the deposition of a party or an officer, director, or representative designated by a corporation to give a deposition for it, may be read as evidence at trial by opposing counsel. Under certain conditions, deposition of non-party witnesses may also be used for any purpose at trial.

If a party chooses to read only portions of a deposition transcript at trial, the opposing party may read or compel the reading of other portions that may be required in fairness to complete the context of the witness' statements.

## **6. *Subpoena Duces Tecum***

Documents can be obtained from non-parties by serving on the non-party a "subpoena *duces tecum*" issued by the court. Courts usually issue subpoenas as a matter of course. If the subpoena is challenged, it may be quashed or limited by the court. Nevertheless, a litigant willing to pay the costs associated with a third party's production of documents may be able to obtain substantial numbers of documents specified only by category.

## **7. Protected Information**

Even the broadest discovery rules recognize that some information is “privileged” or protected from disclosure. Two important protections are the attorney-client privilege and the “work product” doctrine.

The attorney-client privilege protects confidential communication between an attorney and his client. This privilege encourages the full disclosure of facts necessary for effective representation of the client. A client’s natural reluctance to discuss the weaknesses of his position would be greatly increased if he had to fear that what he told his lawyer could later be used against him.

Communication between a corporation’s management or employees and counsel are protected by the attorney-client privilege. Courts recognize that communication between counsel and a corporation often must involve several individuals within the corporation. Communication conveying advice of counsel from one corporate officer to another are privileged. So is communication between members of a corporation’s management made for the purpose of eventually obtaining advice from counsel or of setting out factual information given to counsel for his consideration. However, the attorney-client privilege is waived if information is communicated unnecessarily to others in such a way as to indicate that the client did not really intend to keep the information confidential. Information distributed to anyone other than corporate employees and counsel is not privileged. Nor is information that is disseminated within the corporation with little apparent regard for confidentiality. As such, the distribution of information that might qualify for the attorney-client privilege, ought to be restricted.

Only communication made in the course of obtaining legal advice is protected. Information otherwise discoverable cannot be protected from discovery by transmitting it to a lawyer. Communication made in the course of obtaining business advice is not privileged. Communication between a corporation and retained counsel may be presumed to be legal in nature. However, communication with counsel who are employees of the corporation is less likely to be held privileged, especially if the information is widely distributed to management.

Any waiver of the attorney-client privilege extends to all privileged interactions on the same subject matter. A party cannot produce a privileged document favorable to his position and withhold other less favorable documents on the same subject. Production in discovery of a privileged document can destroy the privilege as to the subject matter of that document.

It should be noted that the attorney-client privilege does not protect communication made in furtherance of the commission of a crime, fraud, or tort. However, it is not clear whether abrogation of the privilege depends upon the client’s knowing that he was engaged in wrongful conduct.

A second important basis for withholding requested documents is the “work product” doctrine. Based on Federal Rule of Civil Procedure 26(b)(3) and on *Hickman v. Taylor*, 329 US. 495 (1947), this doctrine protects material prepared in anticipation of litigation or preparation for trial by or for a party or that party’s representatives—including his attorney, consultant, surety, indemnitor, insurer, or agent.

Like the attorney-client privilege, the work product doctrine does not protect underlying factual information available from some source other than the privileged document. Moreover, work product may be discovered upon a showing that the party seeking discovery has substantial need of the materials for the preparation of his case, and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. The “mental impressions, conclusions, opinions, and legal theories” of counsel (or other representatives of a party) must, however, remain protected.

While the work product privilege can protect materials prepared for a party by non-lawyers, the rule is usually perceived as primarily protecting lawyers’ work product. Material prepared by non-lawyers is much easier to protect if it is requested by a lawyer or prepared according to a lawyer’s instructions. Assigning an employee to counsel as a legal assistant or investigator and having him report to the lawyer instead of to his own management can help protect material prepared by that non-lawyer employee. A document prepared at the request of a lawyer and according to his instructions ought to show these grounds for protection on its face.

The work product privilege can be waived by using or distributing the material in a manner inconsistent with confidentiality. However, waiver of the work product privilege with respect to one document does not affect a waiver of the privilege for all documents on the same subject, as happens with the attorney-client privilege.

There is no absolute privilege prohibiting discovery of trade secrets, financial data, and similar confidential information. But, Rule 26(c) of the Federal Rules of Civil Procedure specifically allows the court to order that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. A court may order disclosure but impose safeguards against the information becoming public or being used except in connection with the litigation.

### **8. Sanctions for Failure to Make Discovery**

When a party objects to a request for discovery, the party seeking discovery may ask the court to order compliance with the request. The parties present their arguments to the judge, who has broad discretion in deciding whether or not to sustain the objection.

Failure to respond to a request for discovery within the period prescribed by law (usually twenty to thirty days), or failure to obey a court order overruling an objection to a discovery request and allowing discovery, can result in the imposition of sanctions. The court can order that the offending party pay the attorney fees and other expenses incurred by the requesting party in obtaining compliance with its request. It can also order that the requesting party's contentions to which the request was relevant be deemed proved for purposes of the trial. In addition, the court can refuse to allow the offending party to offer certain proof, to raise certain defenses or to present certain claims at trial. Finally, in extreme cases, the court can dismiss the suit or render judgment by default against the offending party. Parties and attorneys engaging in false, incomplete, or deliberately misleading answers to requests for discovery also risk severe sanctions, including criminal penalties.

Non-parties are also subject to sanctions by the court. A witness who lies at his deposition commits perjury, and an individual who ignores or refuses to comply with a subpoena *duces tecum* may be fined or imprisoned for contempt of court.

### **9. Effect of the Hague Evidence Convention**

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters has been in force in the United States since October 7, 1972. Under the convention, three procedures are now generally available to American litigators to obtain evidence abroad: (1) letters of request (international "letters rogatory"), (2) taking of evidence by diplomatic or consular official, and (3) taking of evidence by official commissioners.

In China, a request to take voluntary depositions must be modeled on the Hague Model Letter of Request and submitted to the Central Authority. Depositions may also be taken of willing witnesses before U.S. Consular Officers only with the prior permission of the Central Authority, provided no compulsion is used.

### **10. Expert Witnesses**

As a general rule, lay witnesses may not testify about opinions or conclusions, but must confine their testimony to concrete facts within their own observation or knowledge. To the extent that a matter is not within the ordinary training or experience of laymen, however, a witness may be qualified as an expert who may testify about his opinions and conclusions based on his own professional or scientific knowledge. In products liability cases, the question of whether the product was defective is often quite technical. The ability to give opinions in court can make experts the most important witnesses. An expert may be called to testify to technical facts, and only an expert can state an opinion that, based on those facts, the product in question was or was not defective.

In many cases, the plaintiff cannot prove that a product was defective without expert testimony. However, as discussed above, the unexplained failure of a

relatively new product may result in a presumption that a defect existed. Such a presumption may make it unnecessary for the plaintiff to present expert testimony. Plaintiffs complaining of failure to warn may also be able to proceed without expert testimony. In many of these cases, however, the defendant may find expert testimony helpful.

Theoretically, the sole function of an expert witness is to educate the finder of fact about pertinent matters beyond the competence of laymen. The trial judge determines whether a matter is suitable for expert testimony and whether a witness qualifies as an expert on that matter. In recent years, reliance upon expert testimony at trial has increased in American practice. Fewer credentials are required of an expert than was previously the case, and experts are allowed to go further toward giving an opinion on the ultimate issues of the case than once was allowed. Expert witnesses are selected and paid by the party who offers their testimony. If an expert is retained by a claimant's lawyer to examine a product and finds nothing wrong with the product, the lawyer may dismiss that expert and seek another. The existence of the unfavorable opinion of the first expert is protected by the work product doctrine.

Because neither party is under any compulsion to use an expert not entirely favorable to his case, experts often act as advocates. A number of professional expert witnesses make a business out of testifying in particular kinds of cases. Some of these witnesses testify exclusively or almost exclusively for plaintiffs or for defendants. There are even experts who testify only for plaintiffs against a particular product. Through contacts among the plaintiffs' bar, and through advertising in bar publications, these experts make themselves available, often nationally, to any plaintiff with a claim involving a particular product or kind of product.

## **F. Jury and Non-Jury Trials**

Either party may insist on a jury in a products liability action. A trial proceeds more slowly before a jury than before a judge alone. Jury trials are therefore more expensive. Some products liability trials have taken months. Cases involving punitive damages can be especially protracted, since evidence may be admitted that is not relevant to the particular accident in issue but that may tend to show that the defendant acted recklessly or disregarded the safety of consumers.

Jurors are selected at random from the community. Most have no college degree and very few are professionals. Lawyers and medical doctors are usually exempt from jury duty. Other potential jurors can be excused from service if they are urgently needed in their jobs. Anyone qualifies for jury duty so long as he is mentally competent and has not been convicted of a serious crime. As a result of these factors, juries tend to consist of housewives, retired people, laborers, and the unemployed. The longer the trial is expected to last, the smaller the

chances of finding well educated people who have the time to serve on the jury. Jurors for a particular case are chosen from a panel of potential jurors who have been requested to attend court.

Lawyers for the parties have an opportunity to conduct a “voir dire” of the potential jurors to discover any biases they may have. Some states allow extensive “voir dire,” permitting the lawyers to discuss almost any subject. In these states, voir dire in a major case can take many days. The lawyers attempt to become sufficiently familiar with the jurors’ backgrounds and ways of thinking to decide which ones would be most favorable to their case. They try to give the jurors a favorable impression of them and their clients, and by asking the jurors about hypothetical situations similar to the situation that will later be shown by the evidence, attempt to give the jurors a preconception of what the case is about. In other states, voir dire is conducted almost entirely by the judge, who simply asks the jurors if they have any interest in the case, if they are related to any of the parties or their lawyers, and if they will be able to consider the evidence impartially.

Potential jurors who reveal themselves to be incompetent or biased may be challenged for cause. The court rules on whether a challenged juror will be allowed to sit. Each party’s lawyer may also peremptorily strike from the jury box a set number of potential jurors to reduce the final jury to the required number. Lawyers use the information obtained in voir dire and their general knowledge of the community from which the jurors are drawn in deciding which jurors to strike. Parties sometimes hire psychologists to help them pick the jurors most favorable to them. Some psychologists have become jury experts, making a profession of assisting litigants in jury selection.

The severity of plaintiff’s injuries is not the only factor affecting the damages awarded. The amount of jury verdicts varies tremendously depending on the plaintiff, the location of the lawsuit, the court, and the attorneys involved. Cases involving the same or very similar products and injuries have resulted in verdicts ranging from zero to several million dollars.

Verdicts tend to be higher in some areas of the country than in others. California, New York, Florida, and Texas are states in which high verdicts may be expected. Generally, verdicts are higher in urban industrial areas than elsewhere. Bench awards are not necessarily lower than jury verdicts.

## **G. Damages**

Damages are of two types, compensatory and punitive. Compensatory damages are awarded both for pecuniary losses and for non-pecuniary injuries suffered by the plaintiff. The plaintiff has the burden of proving each item and element of damage claimed. However, where damages are claimed for non-pecuniary injuries, it is sufficient for the plaintiff to prove the injury. The jury is asked to

determine the amount of money that compensates for that injury. It has wide discretion in setting the amount, and it is rarely given any guidance on this subject by the court. Only if the amount is grossly disproportionate to the amounts given in the past for similar injuries in that jurisdiction is there any chance that the verdict will be set aside because the amount awarded was wrong. In awarding such damages, the jury may consider:

- (1) the injuries themselves, whether permanent or not;
- (2) the effect of the injuries on the plaintiff's health;
- (3) any inconvenience or discomfort caused by the injuries;
- (4) any disfigurement or deformity caused by the injuries and any associated humiliation or embarrassment;
- (5) the physical pain and mental anguish suffered by the plaintiff; and
- (6) any monetary losses suffered by the plaintiff, including:
  - (a) the cost of medical care and the expenses associated with hospitalization;
  - (b) loss of wages or income; and
  - (c) loss of earning capacity.

In almost all instances these amounts can be recovered even though they have been paid or otherwise covered by the plaintiff's employer or his insurer. The amount of pecuniary losses proved often appears to have an effect on the jury's decision with respect to non-pecuniary injuries, but it is certainly not the only factor affecting that decision.

Damages are awarded both for the past effects of an injury and for any effects that may reasonably be expected in the future. Once a judgment is paid or a case settled, the plaintiff is regarded as completely compensated, and he may not bring another action if the injuries prove to have more severe effects than were expected.

In wrongful death actions, the elements of damages are set by statute. Therefore, they vary from state to state.

Punitive damages are intended to punish the defendant and to deter him from engaging in similar conduct in the future. They are awarded because of the defendant's reprehensible conduct. While the criteria for awarding punitive damages vary from state to state, the plaintiff must prove more than simple negligence. Conduct that is malicious, willful, wanton, reckless or outrageous, or shows a conscious disregard for the rights of others may result in the imposition of punitive damages.

In products liability cases, plaintiffs seeking punitive damages often attempt to prove a reckless disregard for consumer safety. Knowing violations of safety standards, inadequate testing and manufacturing procedures, failure to warn of known dangers, fraudulent advertising, and failure to take actions to correct or warn consumers of a danger discovered after the product has been marketed, may be evidence of such a disregard for safety.

The number of claims for punitive damages has grown substantially since the 1960's and the award of punitive damages has also become more common. The mere assertion of a claim for punitive damages can result in a relaxation of the rules of relevancy. The admission of otherwise irrelevant documents can make the defense more difficult by obscuring the basic question of whether a defect existed in the particular product involved. The value of coordination in dealing with multiple claims for punitive damages is apparent, for such risks often involve attempts to prove the same misconduct, and present the same issues involving admissibility of documents.

In some jurisdictions, the defendant's misconduct in discovery is admissible to prove the defendant's state of mind. A claim that a defendant sought to conceal evidence can be offered to prove that the defendant continues to attempt to mislead the public about a dangerous product. Hence, discovery responses in punitive damages cases must be prepared with particular care.

In response to increases in the frequency and size of punitive damages verdicts, the Supreme Court of the United States has made several decisions which limit awards of punitive damages through the United States Constitution. One limitation is one the permissible ratio between punitive damages and compensatory damages. Although the Court has not clearly defined a ratio that will be unconstitutional per se, the Court has indicated that a 4:1 ratio between punitive and compensatory damages is broad enough to lead to a finding of constitutional impropriety, and that any ratio of 10:1 or higher is almost certainly unconstitutional.

In addition, in *BMW of North America, Inc. v. Gore* (1996), the Court ruled that punitive damages must be reasonable, as determined based on the degree of reprehensibility of the conduct, the ratio of punitive damages to compensatory damages, and any criminal or civil penalties applicable to the conduct. In *State Farm Auto. Ins. v. Campbell* (2003), the Court held that punitive damages may only be based on the acts of the defendants which harmed the plaintiffs. Most recently, in *Philip Morris USA v. Williams* (2007), the Court ruled that punitive damage awards cannot be imposed for the direct harm that the misconduct caused others, but may consider harm to others as a function of determining how reprehensible it was.

## **H. Settlement**

Very few of the thousands of civil cases filed every year in the United States result in the entry of a final judgment in favor of either side. The vast majority, probably 90%-95%, are settled before trial. In products liability cases, as in other civil suits, the defendant frequently finds it advisable to pay some amount in settlement in order to avoid legal fees, expenses incurred in litigating, and the risk of an adverse judgment larger than the proposed settlement. The defendant may also want to avoid the prolonged disruption of normal business activities which a large suit may cause, the bad publicity resulting from a products liability suit, and the legal precedent the result in one case could establish.

Plaintiffs must also consider the uncertainties of litigation. Although their expenses are lower because of the contingent fee system, the plaintiff may not be capable of financing a lengthy trial. Another factor encouraging out-of-court settlement may be the court itself. Because court dockets are usually overcrowded, judges will frequently urge the parties to reach a settlement. Settlement negotiations may begin before a lawsuit is filed. It is advisable to assess the value of a case for settlement as early as possible to save in preparation costs. Often, however, informed assessment and settlement of a case is only possible after extensive discovery and technical investigations have been conducted.

The fact of a settlement offer or settlement negotiations is not admissible into evidence at trial to prove liability. However, settlement negotiations must be conducted carefully because admissions may be made that the opposing party may be able to put into evidence for some other purpose.

In cases involving large settlement awards, benefits to both parties can often accrue from settling on a basis other than a one-time payment. The plaintiff might not need a large sum of money immediately, or might not be sufficiently sophisticated to invest it. A plaintiff with an uncertain life expectancy may want the assurance that he will have a regular flow of income for life. By taking the risks of investment or the risk that the plaintiff may live longer than expected, the defendant may be able to save considerable sums. Because payments received in compensation for personal injuries are tax-free no matter when paid, there may be tax advantages to the plaintiff. Some states have adopted statutes permitting a court to order judgments to be paid through periodic payments.

## **I. Judgments and Their Enforcement**

The judge may order a new trial if he believes the trial and its result to have been unfair to any party because of judicial error, misconduct by counsel or jurors, excessiveness of the verdict, or other reasons.

Since the ruling on a motion for a new trial is within the discretion of the trial court, that ruling is not usually subject to reversal in an appellate court.

The enforcement of judgments in the United States depends on the power of the sheriffs or marshals to execute the judgment, pursuant to a writ issued by the clerk of court, by selling the goods of the debtor at auction to obtain money to pay the judgment. Obligations owed to the judgment debtor by a third party are subject to garnishment to satisfy the judgment. Judgments are most easily enforced in the state in which they were obtained. But every state is required by the United States Constitution to give full faith and credit to the judgments of other state and federal courts. In practice, a judgment debtor with assets anywhere in the United States is unlikely to be able to avoid the enforcement of a judgment if the amount involved is large enough to make the effort to collect it worthwhile.

## **J. The Appellate Process**

In almost all American jurisdictions, appellate courts may not review findings of fact. The function of the appellate court is to consider asserted errors of law.

Grounds for appeal include claims that the court improperly admitted evidence or improperly withheld admissible evidence from the jury, improperly allowed the jury to decide a case in which the facts were so clear that the judge ought to have decided the case as a matter of law, or improperly instructed the jury about the law applicable to the facts of the case.

State judicial systems provide for the appeal of legal issues from the trial court to an intermediate court appeals and then to the state supreme court. In some states, however, the state supreme court is the only court of appeals. Some state appellate courts are required by law to hear all appeals, while others take only those appeals that appear on petition to be meritorious or to involve points of law that need to be clarified by an appellate court. Generally, there is no practical avenue of appeal from a state supreme court in a products liability action. While any party aggrieved by a final judgment of a state supreme court can take an appeal to the United States Supreme Court, the chances of having the appeal accepted and given a hearing are very small.

Appeals from United States District Courts are taken to the United States Court of Appeals for the circuit that includes the state in which the District Court sits. Appeals from the Courts of Appeals can be taken to the United States Supreme Court. However, as a practical matter, appeals on questions of substantive law from Courts of Appeals are no more likely to be heard by the United States Supreme Court than are appeals from state supreme courts. Products liability is largely a creature of state law, and the United States Supreme Court, like the federal Courts of Appeal, can only attempt to ascertain what that law is, not make or change it. If the question is one of federal procedure, the situation is somewhat different, but the likelihood of the United States Supreme Court's hearing the appeal is still small. Far more appeals are taken to the United States Supreme Court than it can possibly hear, and on procedural matters it usually

hears only very important questions, or questions on which the Courts of Appeals of the several circuits have reached different answers.

In order to take an appeal, the appellant in both state and federal courts ordinarily must file a notice of appeal. To obtain a stay of the execution of the judgment, a losing defendant is often required to post a bond to guarantee the payment of the judgment if the appeal is not successful. If the judgment is large, the cost of posting such a bond may be a significant barrier to taking an appeal or a significant factor in deciding to attempt to settle the case for less than the judgment in consideration of abandoning the appeal.

The appellate court receives the record of the trial and other proceedings from the court below, and considers briefs filed by all parties. Because the appeal concerns questions of law, no new evidence can be introduced. The process of assembling the record, writing briefs, writing replies to the opposing party's briefs, waiting for oral argument of the case to be scheduled, and waiting for the court to prepare and render its opinion may easily take more than a year. If a second appeal to a higher court is possible, the process must be repeated.

The appellate court can affirm the judgment below or reverse it. In some cases, it may reverse the trial court's decision and render final judgment for the appellant. More often, however, it will point out the legal errors and order a new trial in the original trial court. At the new trial, a new jury will be empanelled—the former jury is not recalled. The second trial can also result in an appeal, so the whole process may be repeated.

The delays, uncertainties, and expense of appeals act as a strong inducement to each side to settle the case. These factors may also deter the party losing at trial from pursuing an appeal even if he feels certain that the trial court committed reversible error.

Among other factors discouraging defendants from appealing adverse judgments is the possibility of generating additional publicity concerning an allegedly defective automobile. However, the increasing use of collateral estoppel may make it necessary for losing defendants to seek appellate review more often.

## **K. Lawyers in the United States**

In the United States, there is no formal division of lawyers into solicitors and barristers, but lawyers tend either to specialize in litigation or to avoid it. Lawyers who litigate personal injury actions, including products liability cases, tend primarily to represent either plaintiffs or defendants.

### **1. *Plaintiffs' Bar***

Attorneys who frequently represent plaintiffs in personal injury cases often belong to the American Association for Justice ("AAJ"). The group informs its

members of the latest developments in the law, as well as of successful strategies and trial techniques. Its publications are a principal means of communication among plaintiffs' lawyers about products liability cases.

It is almost impossible for a manufacturer to keep information about suits involving its product from being disseminated. Judgments are always public information, and while agreements to keep settlements secret can be entered into, they are difficult to enforce. The AAJ and other organizations also educate their members, conducting seminars whose subjects include the substantive law of products liability and trial tactics in products liability cases.

Groups of plaintiffs' lawyers specialize in personal injury suits involving a particular product. Members of the group share their pleadings, discovery documents, discovery depositions, experts, and information about their strategies. Some of these groups of lawyers develop packages of pleadings, documents, and depositions concerning a particular product which they sell to other lawyers.

## **2. *Defense Bar***

The defendants' bar in the United States consists mostly of those lawyers whose principal area of practice is the representation of defendants. Litigation involving automobile accidents has always provided a significant portion of this business, but other kinds of litigation, including products liability, have become more important. The result has been some specialization among defendants' lawyers.

However, the organization necessary to offset the advantages gained by plaintiffs' lawyers through organization and communication must be implemented through the risk reduction and litigation management programs of the manufacturer and its coordinating counsel. Public methods of communication, for instance, through the Defense Research Institute ("DRI"), the defense bar's equivalent of the AAJ, cannot be used for information important for the defense of particular products.

Defendants' lawyers ordinarily charge fees based on hourly rates. Throughout the United States there are defense lawyers familiar with the techniques of using expert witnesses and who are able to learn adequately the technical aspects of the arguments that must be made in defense of a product. These attorneys help select and manage local attorneys, educating them about the product, conducting expert discovery, monitoring the progress of the defense, making sure that the defense strategy in each case is consistent with the manufacturer's overall strategy, and, depending on the importance of the case, they also monitor, assist, or supervise at trial.

## **L. Federal Motor Vehicle Safety Standards/NHTSA Regulation**

The National Highway Traffic Safety Administration (“NHTSA”) has a legislative mandate under Title 49 of the United States Code, Chapter 301, Motor Vehicle Safety, to issue Federal Motor Vehicle Safety Standards (“FMVSS”) and regulations to which manufacturers of motor vehicle and equipment items must conform and certify compliance. These Federal safety standards are regulations written in terms of minimum safety performance requirements for motor vehicles or items of motor vehicle equipment. These requirements are specified in such a manner “that the public is protected against unreasonable risk of crashes occurring as a result of the design, construction, or performance of motor vehicles and is also protected against unreasonable risk of death or injury in the event crashes do occur.” See 49 CFR 571. Manufacturers are required to self-certify that their vehicles comply with all applicable safety regulations.

NHTSA frequently requires automobile manufacturers to recall vehicles through its Office of Defect Investigation (“ODI”). NHTSA is authorized to order manufacturers to recall and repair vehicles or items of motor vehicle equipment when ODI investigations indicate that they contain serious safety defects in their design, construction, or performance. ODI also monitors the adequacy of manufacturers’ recall campaigns. Before initiating an investigation, ODI carefully reviews the body of consumer complaints and other available data to determine whether a defect trend may exist.

## **M. Lemon Laws**

“Lemon laws” are state laws that provide a remedy for purchasers of cars that repeatedly fail to meet standards of quality and performance. These cars are called “lemons.” The federal lemon law (the Magnuson-Moss Warranty Act) protects citizens of all states. Different states’ lemon laws vary and may not necessarily cover used or leased cars. The rights afforded to consumers by lemon laws may exceed the warranties expressed in purchase contracts.

In addition to injury related products liability lawsuits, automobile manufacturers must also contend with hundreds of lemon law claims in each of the states in which they sell automobiles. Significantly, the lemon laws of several states require the automobile manufacturer to pay prevailing plaintiffs’ attorneys fees, providing an incentive for the plaintiffs’ bar to take on large numbers of these cases, even where the potential recovery in each case would be small.

### III. MINIMIZING RISK OF LIABILITY

#### A. Jurisdiction over Foreign Corporations

Foreign manufacturers should always consider contesting jurisdiction when sued in American courts. The available jurisdictional defenses, however, cannot be relied upon to shield such manufacturers from the risks arising from American products liability law once the American market has been entered in a systematic fashion.

Foreign corporations involved in products liability suits in the United States may be able to avoid the jurisdiction of American courts on any of several grounds. As mentioned above, American procedure requires trial courts to have jurisdiction over the “person” of each defendant. This jurisdiction, called “*in personam*” jurisdiction, can be challenged on the basis of (1) noncompliance with a jurisdictional statute or (2) nonconformity with constitutional due process standards.

Most state long-arm statutes allow the assertion of jurisdiction by the courts of the state in which the injury occurred, even if the injury was caused by a tortious act elsewhere. The United States Supreme Court has held that “due process” demands more than an isolated occurrence in the forum state or the mere foreseeability of an accident there. By the standard established by the Supreme Court, a defendant’s conduct and connection with the forum state be such that he should “reasonably anticipate being hauled into court there.” The Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Thus, manufacturers and distributors sometimes may be able to conduct their activities such as solicitation of business and advertising in a way that will prevent the assertion of *in personam* jurisdiction by courts in a remote state.

When a suit is brought in a state other than the one in which the injury occurred, the state and constitutional standards are somewhat stricter, and the propriety of asserting jurisdiction depends on whether the corporation has carried on continuous and systematic, although unrelated, activities in the state.

An alien corporation may face greater difficulty than an American business in opposing *in personam* jurisdiction. If courts outside the United States would normally be the only ones with jurisdiction, and if the plaintiff for some reason would have difficulty gaining access to those courts, the plaintiff could argue that a United States court sitting where the injury took place or where he is domiciled should grant jurisdiction “by necessity.” “[W]hen [the plaintiff’s] right is totally foreclosed by the ‘minimum contacts’ test, and by conditions existing in the

alien's domicile, the plaintiff should be permitted a forum 'by necessity' in the state of his residence."

The defendant may have to prove that a foreign court is open to the plaintiff's claim. In addition, even if a foreign court is available, the plaintiff may argue that it would be grossly unfair or inconvenient for him to be forced to pursue his claim abroad. Although the United States Supreme Court has recently stressed necessary contact between the forum and the defendant, it also said that "the burden of the defendant . . . will . . . be considered in light of . . . the plaintiff's interest in obtaining convenient and effective relief." Such considerations put a greater burden on the foreign defendant.

Another way that the jurisdiction of American courts can be avoided is by contesting the validity of service of process. A defendant can contend that there was a failure to comply with a relevant statute or with the Federal Rules of Civil Procedure. Rule 4(i) of the Federal Rules, however, is very permissive with respect to the service of process abroad, and violations of foreign laws governing service may be a significant factor only if enforcement is later sought in the courts of the foreign country concerned.

In addition to the federal or state regulations, the due process clause of the Federal Constitution requires that the defendant be given notice "reasonably calculated to impart knowledge of an action." This requirement can be interpreted to mean that the documents must be translated into the language of the defendant. However, a foreign manufacturer accustomed to receiving communication in English may find it difficult to contend that it is unfair to be served in signatory countries of the Hague Convention on Service of Documents can object that the exclusive procedures of that Convention were not followed, especially if any objection to certain methods of transmission such as to service by mail directly on the defendant has been made by the government of the foreign manufacturer.

These jurisdictional defenses may be successfully asserted on a case-by-case basis. Nevertheless, once a foreign manufacturer begins to operate systematically in the American market, it must expect to subject itself to American jurisdiction. The attendant risks must then be recognized and minimized through a well-planned risk reduction program. That program should include efforts to reduce exposure to liability and to prepare for litigation which would otherwise threaten the profitability of American sales and operations.

## **B. Reducing Exposure to Liability**

### **1. *Reviewing Product Literature, Warnings, Instructions, and Advertising before Publication***

Under American products liability law, legal liability to a plaintiff may be predicated upon what is or is not said about a product by its manufacturer. All

advertising materials have the potential for creating unintended warranties. Advertising that a product is the safest on the market is an express warranty, which a jury may find it to be breached if a competing product has a safety device or features not found on the advertised product. Warnings and instructions—although seemingly clear to the manufacturer’s engineering or sales department—may be legally insufficient. There are numerous cases which hold that a warning that a product is “dangerous” if misused is insufficient without an explanation of the cause and degree of danger.

To be legally adequate in all states, a warning must identify the danger, describe the degree of danger, and explain the likely result of a consumer’s failure to heed the warning or instruction. Knowledge of dangers unknown at the time of manufacture requires that all product literature be brought up to date. Such knowledge may come from the manufacturer’s experience or research or the experience and/or research of others.

To minimize product liability exposure, manufacturers must review all of their literature on a periodic basis making changes where necessary. The help of counsel who are familiar with the product, the dangers associated with the product, and products liability law in the United States is essential if such a review is to be successful and cost effective.

## **2. Document Retention Policies**

The potentially large judgments that can be rendered against manufacturers warrant a considerable outlay of time and expense in discovery efforts by plaintiffs’ counsel. Since major products liability actions first appeared in the 1960’s, American lawyers have become increasingly adept in finding proof of product defects in manufacturers’ files.

A manufacturer cannot alter his document retention program simply to avoid discovery in threatened or pending litigation. Retention of certain records is required by various regulatory and taxing authorities at home and abroad. Yet, anyone who sells in the American market should consider the nature of the records that are kept on a product. He should know what records are maintained, why they are maintained, and the information they reflect. Product records should be kept in accordance with a document retention system that ensures that necessary records are retained and unnecessary ones are discarded after a reasonable period of time.

Frequently, the failure to maintain documents normally kept by others in the industry is seen by U.S. courts and juries as evidence of willful destruction of documents in an attempt to avoid liability. A company-wide document retention program, properly administered, can often be used to explain why a manufacturer has certain documents in its files and why certain others have been destroyed.

### C. Responding to Litigation

The proper management of lawsuits alleging personal injury or significant property damage caused by a manufacturer's products requires special coordination. The results of one suit may affect other actions involving the same product. For example, the factual positions taken by a manufacturer in the defense of one suit may provide the basis for allegations in another action that the product is defectively manufactured or designed.

The necessity for special coordination is most apparent when a single manufacturer is required simultaneously to defend a large number of products liability actions involving one product. Coordination of pleadings, discovery, and document production by lawyers who understand the company, the product and products liability law is a crucial factor in the resolution of products liability problems that can financially cripple even large manufacturers. Similar coordination is necessary in the defense of smaller numbers of products actions because of several developments in American law.

The liberalization of tort law in the favor of plaintiffs has made the defense of all products liability cases more difficult. Increasingly large damage awards and the growing technical sophistication of plaintiffs' counsel have rendered the defense of products cases more complex and more expensive. Manufacturers are now often called upon to justify design criteria, manufacturing procedures, quality control systems, and other aspects of production. If a manufacturer or his insurer is required to expend large sums to develop the defenses, the resulting evidence should be designed for use in more than one lawsuit.

An additional consideration is the rising cost of adequate insurance coverage for products liability. High premiums have forced many manufacturers to become self-insured or to purchase policies with primary defense effort from the insurance carrier to the manufacturer. Without the benefit of the insurance carrier's network of the claims adjusters, the average manufacturer is unable to investigate and evaluate claims alleging injuries from its products. Even where insurance coverage is available, the adjusting network frequently lacks the technical expertise to conduct a sufficiently thorough investigation to allow proper evaluation and settlement of defenses.

Another important factor is the growing willingness of lawyers to exchange information about a particular product. Documents or testimony produced by a manufacturer in one action may be readily obtained by other lawyers and used in other actions against the manufacturer in different parts of the country. Plaintiffs' groups, such as the Association of Trial Lawyers of America, provide an information exchange service on products. If there are enough cases, plaintiffs' attorneys hold seminars on specific product defects. Often expert witnesses who are successful in testifying against a particular product attain

national recognition and must be dealt with repeatedly in cases involving the product.

The final factor that demands a coordinated approach to products liability litigation is the power of state and federal courts to impose significant sanctions against a party who deliberately or inadvertently withholds documents during discovery proceedings. The possibility of judicially imposed sanctions makes coordinated discovery a necessity for the manufacturer defending more than one products liability claim. Coordination of discovery activities can help avoid an embarrassing situation in which trial counsel for a manufacturer in one state produces a document which trial counsel for the manufacturer in another state has denied existed. In more than one such situation, default has been entered against the offending manufacturer, even where the case was otherwise defensible.

A systematic approach to products liability defense is a modern necessity. The effort must include the participation of the manufacturer, its insurer, and its coordinating counsel. Coordinating counsel, with the advice and assistance of the other parties, must ensure that the following functions are performed.

### ***1. Investigation of Claims***

Prompt and thorough investigation of claims alleging injury or substantial property damage from a product is essential. Early processing of claims can often result in a settlement which is advantageous to the manufacturer. If settlement is impossible, an early investigation will uncover facts that will facilitate the defense of a resulting lawsuit.

### ***2. Retention and Education of Trial Counsel***

If a claim cannot be settled, the claimant usually files suit against the manufacturer. After a suit is filed the manufacturer must act quickly. Responsive pleadings ordinarily must be filed within thirty days or less from the date plaintiff serves the complaint. It is most important to begin preparing the defense as early as possible.

To be most effective, coordinating counsel must have an understanding of the following matters:

- (1) the history of the product and its use;
- (2) all literature about the product;
- (3) an understanding of the design and construction of the product with respect to those areas at issue in the litigation;
- (4) information with respect to available defenses, defense witnesses, and independent expert witnesses;

- (5) information with respect to insurance coverage;
- (6) discovery previously directed to the manufacturer and the responses given by the manufacturer;
- (7) the information needed from the plaintiff about how the accident occurred;
- (8) the corporate structure of the manufacturer and its position in the industry; and
- (9) the litigation and settlement policy of the manufacturer.

With the assistance of the client, coordinating counsel must obtain local counsel and see that a proper theory of defense is adopted.

### ***3. Supervision of Trial Counsel***

By law and judicial rule in most jurisdictions, a local trial lawyer must appear in every case. Because of local variations in practice and procedure, it is usually necessary for a local counsel to participate in the trial of a case to a significant degree. This is also desirable because of the possibility of local prejudice against outside counsel. Competent products liability trial lawyers are usually very busy. Their workloads are unpredictable because of the uncertainties of trial schedules. Accordingly, it is necessary to supervise the activities of trial counsel to ensure that all everything necessary has been done prior to trial.

### ***4. Case Control***

It is important for the manufacturer to maintain accurate statistical information about pending and settled products litigation.

Discovery directed to the manufacturer often inquires about the details of prior cases. In addition to asking about the factual situations involved, a plaintiff may request that the defendant set out for each case the court and docket number, the names of counsel, and the identity of expert witnesses who testified or gave depositions. Also, insurance carriers and governmental agencies often require information about the number of cases, settlement amounts, etc. Case control systems can provide this information quickly, without repetitive file searches. Case control systems also permit orderly scheduling of depositions and trials, so as to avoid conflicts in the schedules of counsel and expert witnesses.

### ***5. Interrogatories***

Without a coordinated effort, any manufacturer runs the risk of providing interrogatory answers in one action that may be incomplete or inconsistent with answers filed in another action. To avoid such problems and to assure that

complete and timely answers are given in each action, a systematic approach to answering interrogatories is mandatory.

## **6. Document Production**

Plaintiffs are relying with increasing frequency on requests for production of documents to obtain evidence to support theories of liability. They can require a manufacturer to produce design specifications, test results, inter-office memoranda, and other documents relating to the manufacturer's operations and its products.

Consistent responses to requests for production of documents are essential. Serious discovery problems are often associated with failures to produce documents and inconsistent document productions.

## **7. Depositions**

The depositions of any employee or expert witness retained by the manufacturer frequently can be used as substantive evidence (and certainly as material with which to impeach the witness) by any party whether or not that party took the deposition or even was involved in the action in which it was taken. When there are multiple actions involving the same product, the depositions of certain employees and expert witnesses will be taken repeatedly. For this reason, the proper preparation of witness for the first and each subsequent deposition is essential. Witnesses who have not been thoroughly prepared for a deposition often give answers which are seemingly inconsistent with documents or with answers given in prior depositions. Such inconsistencies can destroy the witness' credibility.

## **8. Defense Expert Witnesses**

The relative safety of a product or the absence of a defect is most often established by the manufacturer through the testimony of his expert witnesses. In each action, it must be determined whether an employee of the defendant, an outside expert, or both will be used.

The work done by expert witnesses coordinated by trial counsel is often the critical factor in the success or failure of a manufacturer's defense in a given trial. Plaintiffs' attorneys collect information on defendants' experts and this information is exchanged. For this reason, proper preparation of defense expert witnesses is therefore critical.

## **9. Adverse Expert Witnesses**

Experts who are not employed in the industry frequently work primarily or exclusively for plaintiffs. Such experts often appear repeatedly in actions involving certain products. Files must be maintained on the testimony of these

adverse witnesses. Coordinating counsel must understand the theories adopted by each expert to support his testimony about defects.

A file on an expert should contain all deposition testimony given by him, reported trial testimony, testimony before governmental agencies, copies of all published articles, and copies of all reports produced or filed in the course of litigation with respect to similar products. Once an opposing expert witness has been designated in a particular action, a copy of his file must be available to counsel so that he can prepare to take the expert's deposition and cross examine him at trial. Analysis of this file by the defendant's experts should aid counsel in his preparation.

### **10. Trial**

The trial of each action against the manufacturer's product must be conducted in such a way that a technically proficient defense is offered in that action. It is equally important that the trial be conducted in a way that produces the maximum benefit in other actions against the same product.

### **11. Alternative Dispute Resolution**

Alternative dispute resolution (ADR) involves dispute resolution processes and techniques that fall outside of the government judicial process. ADR has gained widespread acceptance among both the general public and the legal profession in recent years, most likely the result courts' increasing caseloads, the perception that ADR is less expensive than litigation, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. ADR has become an important fixture in the litigation process. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried.

## **CONCLUSION**

The United States automobile market is among the most lucrative in the world and presents Chinese automobile manufacturers with considerable growth and profit opportunities. However, automobile manufacturers now face a litigation environment in the United States that is more aggressive and complex than ever before. It is therefore crucial for automobile manufacturers to develop a comprehensive litigation and risk management strategy. This requires early investment in education for key management and engineering personnel and the development of strategic relationships with experienced legal counsel. This can help the manufacturer to become resistant to litigation and can create an advantage in an increasingly more competitive market.