UTCLE The University of Texas School of Law

2014
THE CAR CRASH SEMINAR

July 31-August 1, 2014
AT&T Conference Center ▪ Austin, Texas

Recognizing and Preserving Auto Product Liability Cases

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RECOGNIZING AND PRESERVING AUTO PRODUCT LIABILITY CASES

Automobile litigation is the cornerstone of most personal injury practices. Automobile cases can range in complexity from a simple rear-end collision to a multiparty products liability case involving design defect and crashworthiness issues. Many of the same considerations apply to most automobile cases although the particular facts or the recovery potential of any individual case may dictate what approach is most appropriate for that case. This paper will address some of the issues most likely to be encountered in an automobile defect claim.

I. RECOGNITION OF THE CASE

The first step in handling an auto defect or crashworthiness case is recognizing that you have one. The initial inquiry is whether something about the product caused or contributed to the injury. It is also important to recognize when a crashworthiness case is not feasible. By their very nature, design defect cases in general, and crashworthiness cases in particular, are very time consuming and expensive. Therefore, they are usually economically feasible to pursue only in instances of catastrophic injury or death. Conversely, a prudent attorney should always look closely at the circumstances surrounding any serious injury case in an effort to determine whether or not some aspect of the product increased the severity of the plaintiff's injuries or caused additional injuries that would not have occurred otherwise.

Another important element to consider is whether or not an alternate design exists that would have prevented or reduced the risk of injury. Texas law requires that a claimant who alleges a design defect must prove by a preponderance of the evidence that there was a safer alternative design. TEX. CIV. PRAC. & REM. CODE § 82.005(a)(1).

Finally, carefully consider any comparative fault issues. Even in jurisdictions in which the plaintiff's negligence is not a defense to a strict liability action, jurors tend to be much more skeptical, on both liability and damage issues, in cases involving a plaintiff driver rather than a passenger.

II. INVESTIGATION

Any successful automobile litigation case begins with a careful investigation. A thorough investigation, conducted early in the case, saves time and money later by facilitating early case evaluation and identifying potential problems.

A. Obtain Information from Initial Investigation

After the initial client interview, you need to immediately obtain the accident report prepared by the investigating officer. The report may contain measurements, diagrams, and a description of what happened. It will usually contain the officer's opinion on causation, and it may identify witnesses. The officer's field notes may contain information not included in the report, and it is often beneficial to talk to the officer in addition to reviewing the accident report. Many investigating officers also take photographs of the vehicles and scene.

At trial the portions of the report containing the officer's observations at the scene should be admissible as business records or public records. TEX. R. EVID. 803(6)&(8). Opinions, conclusions, or hearsay statements, however, are not admissible unless their admissibility is established under an appropriate rule of evidence. *Logan v. Grady*, 482 S.W.2d 313,317 (Tex. Civ. App.—Fort Worth 1972, no writ) (holding that an unofficial accident report written by a bystander who allegedly witnessed the accident was inadmissible hearsay); *see, e.g., Texas Dept. of Public Safety v. Nesmith*, 559 S.W.2d 443, 447 (Tex. Civ. App.—Corpus Christi 1977, no writ). *But see Hawkins v. Gorea Motor Express, Inc.*, 360 F.2d 933, 934 (2nd Cir. 1966) (not error to admit state trooper's report based upon information derived from trooper's own observation and from conversations with the drivers); *see also In re Leifheit*, 53 B.R. 271, 273 (Bankr. S.D. Ohio 1985) (noting that in *Hawkins*, the testimony of the reporting officer before the court was necessary to lay the predicate for the report).

B. Document the Scene

The scene of the wreck should be documented as carefully as is possible and feasible given the circumstances of the case. It should be well photographed from all directions, being careful to document any physical evidence at the scene such as skid marks, debris, scrapes, or gouge marks. Photographs of the scene should also include any traffic signs or other traffic control devices and any trees, signs, fences, or other objects which may have obstructed the drivers' views or otherwise played a role in the wreck.

Another source of photographs and other information is newspaper or television reporters who may have been at the scene. Also, it is often appropriate to obtain aerial photographs of the scene, and if the case justifies the expense, hiring a survey company to survey the scene is helpful. Finally, after you have obtained all of the available information gathered at the time of the accident, you will want your investigator/expert to thoroughly document the scene with photographs and measurements.

As part of your investigation, you need to find out whether or not the scene has been changed since the wreck. For example, if the roadway has been resurfaced, the coefficient of friction and other important factors may have changed. Information concerning resurfacing can be obtained from the Texas Department of Highways and Transportation.

C. Document the Vehicles

The nature and extent of damage to the vehicles is always important in automobile product liability cases. Each vehicle should be carefully photographed, and repair estimates or damage appraisals should be obtained. In a potential design defect or crashworthiness case, obtaining possession of the vehicle is perhaps the single most important step in your investigation. To a large degree, your product liability case begins and ends with the vehicle in which your client was injured. Without the vehicle, your chances of successfully pursuing a design defect or crashworthiness claim drop drastically.

Possession of the vehicle must be secured as quickly as possible. If your client no longer possesses the vehicle, you need to determine who does. If the vehicle has been declared a total loss, it is likely to have been sent to a salvage yard where it could be disassembled, destroyed, or

auctioned. If you are unable to find out from the insurance company, the wrecker company, or your client where the vehicle is located, an inquiry to the Department of Highways and Transportation may help because salvage yards must surrender vehicle titles to the department. In addition, an inquiry to the Department of Motor Vehicles will reveal the chain of ownership of the vehicle if that is important in your case. Once the vehicle is acquired, it needs to be stored in a safe place where it will be protected from spoliation.

D. Document Witnesses

It is always important to interview witnesses and get their authorization to obtain any statements they have given. The accident report or officer's field notes may contain the names and addresses of people at the scene. You also may wish to interview EMS personnel and wrecker drivers. Additional witnesses may be identified from news reports. Witness interviews or statements let you understand early in the case what the evidence is going to be. This information will be invaluable if an accident reconstruction is necessary.

E. Additional Sources of Information in Products Liability Cases

There is an enormous wealth of information sources which can be consulted before filing suit and initiating discovery. The more you know before filing suit, the better you will be able to prepare your case and control the flow of the litigation. Some examples of available information sources are:

(1) American National Standards Institute (ANSI)
25 W. 43rd St., Floor 4
New York, NY 10036
(212) 642-4900 (Telephone)
www.ansi.org

ANSI is a repository for all American National Standards.

(2) Center for Auto Safety (CAS)
1825 Connecticut Ave., NW, Suite 330
Washington, D. C. 20009
(202) 328-7700 (Telephone)
www.autosafety.org

CAS is a consumer oriented group advocating highway safety. CAS tracks government activities and, when possible, actively participates in the federal rule making process.

(3) Highway Safety Research Center (HSRC)
University of North Carolina
730 Martin Luther King, Jr. Blvd., Suite 300, CB #3430
Chapel Hill, NC 27599
(919) 962-2202 (Telephone)
www.hsrc.unc.edu

The HSRC studies highway design and driver performance. It also tests vehicles.

(4) Insurance Institute for Highway Safety
1005 North Glebb Road, Ste. 800
Arlington, VA 22201
(703) 247-1500 (Telephone)
www.iihs.org

The IIHS studies motor vehicle wrecks and evaluates ways to reduce injuries and damage resulting therefrom.

(5) National Technical Information Service (NTIS)
5285 Port Royal Rd.
Springfield, VA 22161
(703) 605-6000 (Telephone)
www.ntis.gov

The NTIS is a U.S. Department of Commerce clearinghouse for government funded research and engineering studies.

(6) National Institute of Standards and Technology
100 Bureau Drive, Stop 1070
Gaithersburg, MD 20899
(301) 975-6478 (Telephone)
www.nist.gov

As part of the Department of Commerce, the Institute promulgates standards for manufacturers of products and provides industry with information for product development.

(7) National Highway Traffic Safety Administration (NHTSA)
400 7th St., S.W.
Washington, D. C. 20590
(888) 327-4236 (Telephone)
www.nhtsa.dot.gov

This governmental agency is involved in the enforcement of motor vehicle safety standards. NHTSA also investigates and recalls motor vehicles and their component parts and reviews pedestrian and driver safety standards.

(8) Society of Automotive Engineers (SAE) – Automotive Headquarters
755 W. Big Beaver, Suite 1600
Troy, MI 48084
(248) 273-2455 (Telephone)
www.sae.org/automotive/

SAE is an industry organization which compiles and publishes technical reports in all areas of vehicle design. SAE establishes voluntary standards for vehicle design and construction.

(9) Transportation Research Board (TRB)
Keck Center of the National Academics
500 Fifth Street NW
Washington, D. C. 20001
(202) 334-2934 (Telephone)
www.trb.org

TRB is part of the National Research Council which is jointly administered by the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The TRB compiles and provides information concerning transportation related technology.

(10) U.S. Department of Transportation (DOT)
400 7th St., S.W.
Washington, D.C. 20590
(202) 366-4000 (Telephone)
www.dot.gov

The DOT is a federal agency charged with administration of transportation programs and development of federal policies and programs related to transportation.

(11) U.S. Patent and Trademark Office
Public Search Facility, Madison East, 1st Floor
600 Dulany St.
Arlington, VA 22314
(800) 786-9199 (Telephone)
www.uspto.gov

This federal agency is charged with regulating patents. It is a source of information on product design and alternative designs.

(12) University of Michigan Transportation Research Institute (UMTRI)
2109 Baxter Road
Ann Arbor, Michigan 48109
(734) 764-6504 (Telephone)
www.umtri.umich.edu

The Institute studies highway design, vehicles, and their component parts.

III. RECONSTRUCTION

Careful investigation will pay off when you begin to reconstruct the wreck. Accident reconstruction is crucial to the successful development of any design defect or crashworthiness case, as well as many vehicular negligence cases. The plaintiff will have the burden of proving how the wreck happened and in some instances how the injuries occurred.

You must understand and be able to demonstrate how the wreck happened. Your reconstruction expert can use the physical evidence, photographs, and witness statements to

determine what happened, including important issues of speed, point of impact, and angle of impact. In many instances, a reconstruction expert can take this evidence and prepare a computer reenactment of the initial crash. These animations are invaluable when trying to explain a complex accident scenario to a jury.

Reconstruction is required in a design defect or crashworthiness case to determine what happened to the occupants during the crash. To prove your crashworthiness case, you will need to pinpoint the injury causing event. If the design defect in question did not cause your client's injury, you have no case. Therefore, it is wise to involve a biomechanica1 engineer in the early stages of case development. This early involvement may save you money by avoiding preparation and trial of a case that cannot be won.

More importantly, when there is a case, you will have begun preparing at the very earliest stage for what is likely to be one of the most hotly contested issues at trial. Biomechanical analysis of the occupant kinematics is likely to be the manufacturer's first point of defense. Your expert will need to be prepared to illustrate to the jury how the injury occurred. Frequently, crash test film and computer reenactments can be used to demonstrate occupant movement in the crash and the mechanism of injury. This proof is vital to the success of your case. Your biomechanical engineer may need to review certain documents to analyze the mechanics of the injury(ies). Some of these records may include EMS/ambulance reports, hospital reports, death certificate, autopsy records, county coroner's report, and funeral home records. Often, these sources have taken photographs, particularly in death cases, and these evidentiary materials should also be requested. Height and weight of the injured/deceased are frequently important considerations. If the height and weight are not included in EMS, autopsy, or hospital records, you will need to obtain prior medical records that contain this information.

A. Admissibility of Reconstruction Evidence

Not all accident reconstructions are performed by engineering experts. In some instances, current or former police officers have provided the accident reconstruction; however, the investigating officer on your wreck is not necessarily qualified to render an opinion regarding how the accident occurred. *See, e.g., Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 892 (Tex. App.—Texarkana 2004, pet. denied) (officer not qualified to give opinion that defendant's lane change was cause of accident); *Lopez v. S. Pac. Transp. Co.*, 847 S.W.2d 330, 334 (Tex. App.—El Paso 1993, no writ) (officer not qualified to testify regarding cause of accident where there was no showing of specialized knowledge of accident reconstruction); *Hooper v. Torres*, 790 S.W.2d 757, 760 (Tex. App.—El Paso 1990, writ denied) (officer not qualified to testify as to cause of accident because he was not an accident reconstructionist).

If qualified, the investigating officer does make an excellent reconstruction witness in many vehicular negligence cases. In this regard, the Department of Public Safety offers an accident reconstruction school which has been attended by many DPS troopers and officers of local police departments. This training in addition to actual experience in the field can establish the investigating officer as qualified to give reconstruction testimony. Courts have held that police officers are qualified to testify regarding accident reconstruction if they are trained in the science and possess the high degree of knowledge sufficient to qualify as an expert. *See Gainsco County Mut. Ins. Co. v. Martinez,* 27 S.W.3d 97, 104–05 (Tex. App.—San Antonio 2000, pet.

dism'd by agr.); *Chavers v. State*, 991 S.W.2d 457, 460–61 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

Once a witness is qualified to give opinion testimony based upon the witness' specialized "knowledge, skill, experience, training, or education, the witness may express opinions even with respect to an ultimate issue to be decided by the trier of fact." TEX. R. EVID. 704. *See Louder v. De Leon*; 754 S.W.2d 148, 148–49 (Tex. 1988) (permitting a state trooper to give opinion that driver's failure to yield right-of-way was proximate cause of accident). *See also Trailways, Inc. v. Clark*, 794 S.W.2d 479, 483 (Tex. App.—Corpus Christi 1990, writ denied) (officer allowed to testify regarding speed of bus and its contribution to cause of accident); *Rainbo Baking Co. v. Stafford*, 764 S.W.2d 379, 383 (Tex. App.—Beaumont 1989), *writ* denied, 787 S.W.2d 41 (Tex. 1990) (officer permitted to testify regarding cause of accident).

Unlike the common vehicular negligence case, however, engineering expertise is frequently needed in automobile product liability or crashworthiness cases. Many times these engineering experts will have to perform tests or otherwise create evidence. In order for this evidence to be admissible, the tests must be conducted under conditions substantially similar to those existing at the time of the accident. *Univ. of Tex. at Austin v. Hinton*, 822 S.W.2d 197, 202–03 (Tex. App.—Austin 1991, no writ). The conditions do not have to be absolutely identical. Instead, the trial court is given broad discretion to determine whether the evidence would aid rather than confuse the jury. *See Sosa v. Koshy*, 961 S.W.2d 420, 430 (Tex. App.—Houston [1st Dist.] 1997) (stating that differences between the tests, experiments, or recreations go to the weight of the evidence, not the admissibility); *Garza v. Cole*, 753 S.W.2d 245, 247 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Hinton*, 822 S.W.2d at 203 (Tex. App.—Austin 1991, no writ); *but see Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 202 (Tex. App.—Texarkana 2000, pet. denied) (stating that mere conclusory statements by a state trooper or other officer will not suffice to meet the burden of substantial similarity which experiments demand).

IV. DESIGN DEFECT AND CRASHWORTHINESS

Most automobile product liability litigation is based upon design defect or crashworthiness theories although manufacturing defect cases are occasionally encountered in which the vehicle does not conform to the design standards established by the manufacturer. *See Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 93 (Tex. 1974) (improperly placed gasket); *Cosper v. Gen. Motors Corp.*, 472 S.W.2d 552, 554 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.) (holes in the exhaust system).

The bulk of automobile product liability cases involve a design defect, in which the vehicle has been manufactured in accordance with the manufacturer's specifications, but its design renders the vehicle unreasonably dangerous. *See, e.g., Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 113 (Tex. 1984); *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979); *Gen. Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977*); Guentzel v. Toyota Motor Corp*; 768 S.W.2d 890, 892 (Tex. App.—San Antonio 1989, writ denied). In addition, design defect allegations are frequently used in conjunction with a marketing defect theory, in which the manufacturer is alleged to have failed to adequately warn of dangers or has failed to provide adequate instructions for safe use. *See Ford Motor Co. v. Durrill*, 714 S.W.2d 329, 337 (Tex.

App.—Corpus Christi 1986, writ dism'd per stipulation); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582, 592 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

In general, a defect is any condition which renders a product unreasonably dangerous. An unreasonably dangerous product is, by definition, defective. *See, e.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1087 n.20 (5th Cir. 1973*), cert. denied*, 419 U.S. 869 (1974); *Rudisaile v. Hawk Aviation, Inc.*, 592 P.2d 175, 177 (N.M. 1979); *Seattle-First Nat'l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975). *See also* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 32 (1973) (clarifying that unreasonably dangerous was meant only as a definition of defect; it was not intended to set forth two requirements, only one).

Different courts have applied different tests for determining whether or not a particular design is unreasonably dangerous. Some courts impose the consumer expectation test found in RESTATEMENT [SECOND] OF TORTS § 402A, comment (i), requiring the plaintiff to prove that the product is dangerous to an extent beyond that contemplated by the ordinary consumer. Other courts, including Texas, have adopted a risk versus utility test for determining whether a product is unreasonably dangerous. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256 (Tex. 1999); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 432 (Tex. 1997); *Acord v. Gen. Motors Corp*., 669 S.W.2d 111, 116 (Tex. 1984); *Turner v. Gen. Motors Corp*., 584 S.W.2d 844, 850 (Tex. 1979).

A. Crashworthiness

Crashworthiness issues arise when the defect, usually a design defect, causes or enhances the injury, but did not cause the original accident.

> "While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts. No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and resulting injury, usually caused by the so-called 'second collision' of the passenger with the interior part of the automobile, all are foreseeable."

Larsen v. Gen. Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968). Today most jurisdictions apply strict tort liability to crashworthiness cases. The Texas Supreme Court adopted the crashworthiness doctrine in 1979. *See Turner v. Gen. Motors Corp*., 584 S.W.2d 844, 848 (Tex. 1979). Crashworthiness has been a recognized cause of action in Texas since that time. *See Duncan v. Cessna Aircraft Co.*,665 S.W.2d 414, 418 (Tex. 1984); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 745 (Tex. 1980); *Glyn-Jones v. Bridgestone/Firestone, Inc.*, 857 S.W.2d 640, 643 (Tex. App.—Dallas 1993), *aff'd on other grounds*, 878 S.W.2d 132 (Tex. 1994).

There are two possible types of crashworthiness injuries. The second impact in a crashworthiness case may result in an entirely new injury, or the severity of the injury may be increased because of the additional impact. Different jurisdictions have reached differing results when addressing the level of proof necessary to establish causation of the second impact injuries. *Compare Huddell v. Levin*, 537 F.2d 726, 735 (3rd Cir. 1976) *with Mitchell v. Volkswagenwerk*

A. G., 669 F.2d 1199, 1206 (8th Cir. 1982). There is no Texas state appellate court case which directly addresses this issue. The Fifth Circuit, however, concluded that a plaintiff is not required to "segregate causation in crashworthiness cases, where 'the collision, the defect, and the injury are interdependent and . . . viewed as a combined event.'" *Shipp v. Gen. Motors Corp*., 750 F.2d 418, 424–26 (5th Cir. 1985). Under *Shipp*, the plaintiff incurs no additional burden in a crashworthiness case. The appropriate inquiry in a crashworthiness case is whether or not the defect was a producing cause of the injury, as opposed to the occurrence. *See Duncan v. Cessna Aircraft Co*., 665 S.W.2d 414, 428 (Tex. 1984); TEX. CIV. PRAC. & REM. CODE § 33.011(4).

B. Safer Alternative Design

In addition to establishing that the product was unreasonably dangerous, claimants claiming a design defect also must prove by a preponderance of the evidence that a safer alternative design exists and that the alleged defect was a producing cause of the injury. TEX. CIV. PRAC. & REM. CODE § 82.005 (Vernon Supp. 1993). The statute defines safer alternative design as:

> "a product design other than the one actually used that in reasonable probability: (1) would have prevented or significantly reduced the risk of the c1aimant's personal injury, property damage, or death without substantially impairing the product's utility; and (2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge."

TEX. CIV. PRAC. & REM. CODE § 82.005(b).

C. Compliance with Government's Standards

If a manufacturer establishes that the vehicle's design complied with federally mandated safety standards or regulations or that the vehicle received pre-market approval by the federal government, a rebuttable presumption arises that the manufactured is not liable. TEX. CIV. PRAC. & REM. CODE § 82.008(a) and (c). This presumption can be rebutted by the claimant by establishing that: (1) the standards or approval "were inadequate to protect the public from unreasonable risks of injury or damage;" *id* at (b)(1) and (c)(1); or (2) the manufacturer withheld or misrepresented information relevant to the government's decision making process. *Id*. at (6)(2) and (c)(2).

V. JURISDICTIONAL ISSUES

A. Jurisdiction

One of the very first litigation issues likely to be faced is whether or not the court has personal jurisdiction over a defendant. This issue has become increasingly complicated with the significant increase of foreign-made products now on the American market. The primary jurisdictional issues will arise with respect to the manufacturer.

Establishing personal jurisdiction over a non-resident defendant is a two-step process. First, there must be a statutory basis to assert jurisdiction over the defendant. Second, exercise of his jurisdiction must comport with the requirements of due process required by the 14th Amendment to the Constitution of the United States of America. The long arm statutes of most states provide for jurisdiction over a manufacturer doing business in the state. The Texas long arm statutes grant Texas courts personal jurisdiction over nonresidents doing business or operating a motor vehicle in Texas to the maximum extent permitted by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. TEX. CIV. PRAC. & REM CODE ANN. §§17.041–17.064 (2007); s*ee also CSR Ltd. v. Link*, 925 S.W.2d 591, 594–95 (Tex. 1996); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990); *Stauffacher v. Lone Star Mud, Inc.*, 54 S.W.3d 810, 815 (Tex. App.—Texarkana 2001, no pet.); *Schaeffer v. Moody,* 705 S.W.2d 318, 321–22 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

Due process requires that for a state's long arm statute to apply to a particular defendant that defendant must have sufficient contacts with the state that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). If a manufacturer purposefully places its product into the stream of commerce such that it can be expected to be purchased or used by consumers in the forum state, personal jurisdiction over the manufacturer is proper. *See World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297–98 (1980). The manufacturer's contacts with the forum state may be direct or indirect, through a distributor. *See id*. at 297.

The Texas Supreme Court has established a "jurisdictional formula" to ensure that due process requirements have been met when jurisdiction is exercised over a non-resident defendant by Texas courts. *In Interest of S.A.V.*, 837 S.W.2d 80, 85 (Tex. 1992). First, a Texas court must determine that there is a "substantial connection" between the nonresident and Texas as a result of the nonresident's action or conduct purposefully directed towards Texas so as to give rise to "minimum contacts" between the nonresident and Texas. *Guardian Royal Exchange Assurance v. English China Clays*, 815 S.W.2d 223, 230 (Tex. 1991). Second, the exercise of personal jurisdiction over the nonresident must "comport with fair play and substantial justice." *Id.* at 231 (citing to *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–15 (1987)). This second "fair play and substantial justice" consideration involves evaluating the following factors: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the "interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and (5) the "shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 228 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

The "minimum contacts" analysis identified in the first prong of the Texas "jurisdictional formula" can be used to establish general or specific jurisdiction over a defendant. General jurisdiction applies when a dispute does not arise out of a defendant's specific contacts with Texas, but rather is a function of the defendant's continuing, systematic and substantial contacts with the state. *Guardian Royal Exchange*, 815 S.W.2d at 228.

Specific jurisdiction, on the other hand, does arise out of a defendant's specific contacts with Texas and is established where the dispute arises out of an activity conducted by the defendant within Texas. *Commonwealth Gen. Corp. v. York*, 177 S.W.3d 923, 925 (Tex. 2005).

In establishing the basis for specific jurisdiction, the plaintiff must establish a sufficient nexus between the plaintiff's claim of liability against the defendant and the defendant's forum contacts. *See id.* In other words, to obtain specific jurisdiction, the plaintiff's claims must arise from the defendant's contacts with Texas rather than the defendant's contacts with the plaintiff. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 796–97 (Tex. 2002).

B. Jurisdiction of Foreign Corporations

This same procedural analysis applies when determining the propriety of exercising personal jurisdiction over foreign corporations. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 359 (Tex. 1990). Service on foreign corporations, however, may prove more problematic. In most instances, the plaintiff must comply with the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Although an argument can be made that service can be accomplished by mail under the provisions of FED. R. CIV. P. 4 (i) or similar state procedural rules, *see Ackerman v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986) (noting that the prudent litigator should probably rely upon the more traditional procedures for service under the Hague Convention). *See generally* Robert W. Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555 (1985).

C. Impact of Non-Manufacturing Seller Immunity on the Jurisdictional Inquiry

A recent change in the substantive law on products liability in Texas has impacted the role of jurisdiction over the retailer in terms of defeating removal on diversity grounds. Sellers that did not manufacture the defective product are not liable for harm caused to a claimant in the absence of one of several statutory exceptions. *See generally* TEX. CIV. PRAC. & REM CODE ANN. § 82.003 (2007).

For purposes of ascertaining whether diversity jurisdiction exists, federal courts are to look at the allegations in the plaintiff's pleadings in a 12(b)(6)-type analysis to determine whether the plaintiff has stated a claim against the in-state defendant—the non-manufacturing retailer—upon which relief can conceivably be granted. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). Thus, a products liability case involving an in-state non-manufacturing retailer should generally not be removable if the plaintiff's pleadings allege that the retailer falls within one of the statutory exceptions to immunity established under § 82.003. *See, e.g., Del Bosque v. Merck & Co.*, 2006 WL 3487400, at *2 (S.D. Tex. Dec. 1, 2006) (remanding products liability case to state court because, by alleging that the in-state sales representative "knew or should have known" about the risks posed by Vioxx, the plaintiff had properly pled that the in-state non-manufacturing retailer fell within one of the statutory exceptions to non-manufacturing seller immunity and was therefore subject to suit under state law); *Reynolds v. Ford Motor Company*, 2004 WL 2870079, at *4 (N.D. Tex Dec. 13, 2004) (deciding to remand products liability case where, although it was disputed by defendant, plaintiff had properly pled that non-manufacturing retailer "knew" of defect and was therefore liable to plaintiff under one of the statutory exceptions to non-manufacturing seller immunity).

Federal courts will pierce the pleadings, however, when the defendant argues that the plaintiff has omitted or otherwise misstated "discrete facts" that would preclude recovery against an in-state defendant. *See, e.g., Lott v Dutchmen Mfg.*, 422 F. Supp.2d 750, 754–55 (E.D. Tex.

2006) (denying remand where plaintiff had omitted facts that would have made it impossible to recover against the in-state dealer); *Rubin v. Daimler Chrysler Corp.* 2005 WL 1214605, at *6–7 (S.D. Tex. May 20, 2005) (upholding removal where plaintiff pled that in-state dealer "should have known" about defect instead of "actual knowledge").

VI. DISCOVERY

Discovery disputes constitute the single largest area of controversy in the preparation of design defect and crashworthiness cases. Because of the nature of these claims, most of the relevant materials and information are within the exclusive possession of the product manufacturer. The crashworthiness plaintiff is faced with the predicament of having to ask the party that is being sued to produce potentially damaging information. The manufacturer has an obvious economic motive to resist these requests.

A. Obtaining Discovery From Foreign Defendants

Discovery from foreign manufacturers is particularly troublesome. Many manufacturers argue that discovery must be conducted under the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters rather than under the applicable rules of civil procedure. This argument that the Hague Convention provides the exclusive or preferred means for conducting foreign discovery has been rejected by the United States Supreme Court. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 543–44 (1987) (declining to hold that the Hague Convention procedures should be the exclusive means for obtaining evidence located abroad). *See also In re Anschuetz & Co.*, 754 F.2d 602, 605 (5th Cir. 1985).

It is within the trial court's discretion to determine the most efficient and practical means of conducting discovery from a foreign defendant within that court's jurisdiction. Moreover, an American subsidiary may be required to produce responsive information held by its foreign parent. *See, e.g., General Envtl. Science Corp. v. Horsfall*, 136 F.R.D. 130, 134–35 (N.D. Ohio 1991); *A.F.L. Falck, S.p.A. v. E.A. Karay Co.*, 131 F.R.D. 46, 49 (S.D.N.Y. 1990); *Afros S.P.A. v. Kruss-Maffei Corp.*, 113 F.R.D. 127, 132 (D. Del. 1986); *Cooper Indus., Inc. v. British Aerospace*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984); *Am. Honda Motor Co., Inc. v. Votour*, 435 So.2d 368, 369 (Fla. Dist. Ct. App. 1983).

B. Protective Orders

Defendants frequently seek a protective order prohibiting dissemination of any information produced in discovery. Most protective orders are designed to limit or prevent information sharing between plaintiffs. Some courts that have addressed the issue, however, have favored the efficiency and economy of shared discovery. *See, e.g., Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980; *Garcia v. Peeples*, 734 S.W.2d 343, 347-48 (Tex. 1987).

In *Garcia v. Peeples*, the court discussed the benefits of shared discovery:

> Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare these responses.
>
> In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues. (internal citations omitted).

Id. at 347. The court held that a protective order prohibiting sharing of information between similarly situated litigants was inappropriate. This ruling was extended even to trade secrets:

> There is no indication from GMC's affidavits in support of the motion, nor is there any reason to believe, that GMC will be harmed by the release of this information [trade secrets] to other litigants.

Id. at 348.

C. Specific Discovery Topics

1. *Advertising/Public Relations*

A defendant's advertising and other marketing or public relations efforts are relevant to consumer expectation issues, determination of the product's foreseeable use, and punitive damage issues. *See, e.g., Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335 (Tex. 1998); *Leichtamer v. Am. Motors Corp*., 424 N.E.2d 568, 578 (Ohio 1981).

2. *Communications with Governmental Agencies*

Culligan v. Yamaha Motor Corp., U.S.A., 110 F.R.D. 122, 126-27 (S.D.N.Y. 1986) (asserting that confidential filings with Consumer Products Safety Commission are discoverable); *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 683 (N.D. Ind. 1985).

3. *Defendant's Documents in Possession of Plaintiff*

Occasionally a defendant will request that plaintiff's counsel disclose any documents relating to defendant which are already in plaintiff's possession. These materials, which are the by-product of counsel's review and selection of various materials, are privileged as opinion work product. Identification of these materials or disclosure of their substance would reveal counsel's thought processes, mental impressions, and strategy. *See, e.g., In re Allen*, 106 F.3d 582, 601 (4th Cir.1997) (quoting *Upjohn v. Co. v. United States*, 449 U.S. 383, 390–91 (1981)) ("The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."); *Shelton v. Am. Motors Corp*., 805 F.2d

1323, 1329 (8th Cir. 1986); *Sporck v. Pell*, 759 F.2d 312, 315–16 (3d Cir. 1985); *James Julian v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982). Moreover, the request seeks information that is already in the defendant's possession or control since the requested information is information created by defendant or on its behalf

4. ***Design Information (Including Design Modifications and Alternative Designs)***

Design documents are relevant to determining whether or not a defect exists. In addition, design modifications or alternative designs are relevant to issues concerning the existence and feasibility of safer design alternatives and defendant's knowledge of alternative designs. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256–57 (Tex. 1999); *Jampole v. Touchy*, 673 S.W.2d 569, 574 (Tex. 1984). *See also Bowman v. General Motors Corp*., 64 F.R.D. 62, 68 (B.D. Pa. 1974); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980

5. ***Identification of Hazard***

A manufacturer's knowledge of scientific studies or its communications with other entities concerning a particular hazard or corrective measures is discoverable. *See Allen v. Humphreys*, 559 S.W.2d 798, 804 (Tex. 1977). *See also George v. Celotex Corp*., 914 F.2d 26, 28–29 (2d Cir. 1990) (explaining that information available within industry is relevant to duty to warn).

6. ***Organizational Structure***

Halliburton Subsea v. Oceanografia, 2006 WL 1470366, at *2 (S.D. Tex. May 26, 2006); *Marathon Oil Co. v. Texas City Terminal Ry. Co.*, 164 F.Supp.2d 914, 918 (S.D. Tex. 2001) (declaring that plaintiffs were absolutely entitled to conduct discovery regarding defendant's corporate structure to determine whether defendant was proper party to litigation); *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 92 F.RD. 67, 70 (S.D.N.Y. 1981).

7. ***Other Models***

Design documents and testing is discoverable for models other than the model made the basis of the suit if the other models have similarity to the model in question. *See, e.g., Culligan v. Yamaha Motor Corp.*, U.S.A., 110 F.RD. 122, 126 (S.D.N.Y. 1986); *Clark v. General Motors Corp.*, 20 F.R Serv.2d 679, 686 (D. Mass. 1975); *Bowman v. General Motors Corp.*, 64 F.R.D. 62, 71 (E.D. Pa. 1974); *Jampole v. Touchy*, 673 S.W.2d 569, 575, 578 (Tex. 1984); *Traxler v. Ford Motor Co.*, 576 N.W.2d 398, 410–11 (Mich. App. 1998).

8. ***Other Similar Occurrences***

Other similar incidents, occurring both before or after the occurrence in question, are discoverable. *See, e.g., Mitchell v. Freuhauf Corp*., 568 F.2d 1139, 1147 (5th Cir. 1978); *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 142–43 (Tex. 2004); *McInnes v. Yamaha Motor Corp., U.S.A.*, 659 S.W.2d 704, 710 (Tex. App.—Corpus Christi 1983), *aff'd*, 673 S.W.2d 185 (Tex. 1984), *cert. denied* 469 U.S. 1107 (1985). *See also Smith v. Bic Corp.*, 869 F.2d 194, 201

(3d Cir. 1989) (noting other occurrences not protected as trade secrets); *Chicago Cutlery Co. v. Second Judicial Dist. Ct.*, 568 P.2d 464, 466 (Colo. 1977).

9. *Prior Depositions in Other Cases*

Malibu Consulting Corp. v. Funair Corp., 2007 WL 173668, at *3–4 (W.D. Tex. Jan. 18, 2007); *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 92 F.R.D. 67, 69–70 (S.D.N.Y. 1981).

10. *Standards*

Applicable standards and a manufacturer's efforts to comply with those standards are discoverable. *See Jampole v. Touchy*, 673 S.W.2d 569, 578 (Tex. 1984); *Ribley v. Harsco Corp.*, 377 N.Y.S.2d 375, 376–77 (Sup. Ct. 1975), *aff'd*, 394 N.Y.S.2d 740 (App. Div. 1977); *Earl v. Gulf & W. Mfg. Co.*, 366 N.W.2d 160, 164 (Wis. App. 1985).

11. *Testing*

Both preproduction and postproduction testing are discoverable. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456, 460–61 (5th Cir. 1985); *Culligan v. Yamaha Motor Corp.*, U.S.A., 110 F.RD. 122, 124 (S.D.N.Y. 1986); *Bowman v. Gen. Motors Corp.*, 64 F.RD. 62, 68 (E.D. Pa. 1974); *Allen v. Humphreys*, 559 S.W.2d 798, 802–03 (Tex. 1977); *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 561–62 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (Tex. 1998).

12. *Warnings*

See Hill & Griffith Co. v. Bryant, 139 S.W.3d 688, 695 (Tex. App.—Tyler 2004) (holding that labeling memo that described thought processes of manufacturer in placing warning labels on its products was discoverable). *See also Clark v. General Motors Corp.*, 20 F.R Serv.2d 679, 683 (D. Mass. 1975).

13. *Warranties*

Abrams v. Vaughan & Bushnell Mfg. Co., 325 N.Y.S.2d 976, 979 (App. Div. 1971); *Indep. Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 803 (Tex. App.—Fort Worth 1987, writ dism'd).

VII. CONCLUSION

Success in handling automotive product liability or crashworthiness cases depends first upon being able to recognize instances in which the vehicle or some component caused or enhanced the plaintiff's injuries and second upon thorough documentation and preservation of the evidence. Early investigation and evaluation is critical to a successful auto product liability practice.