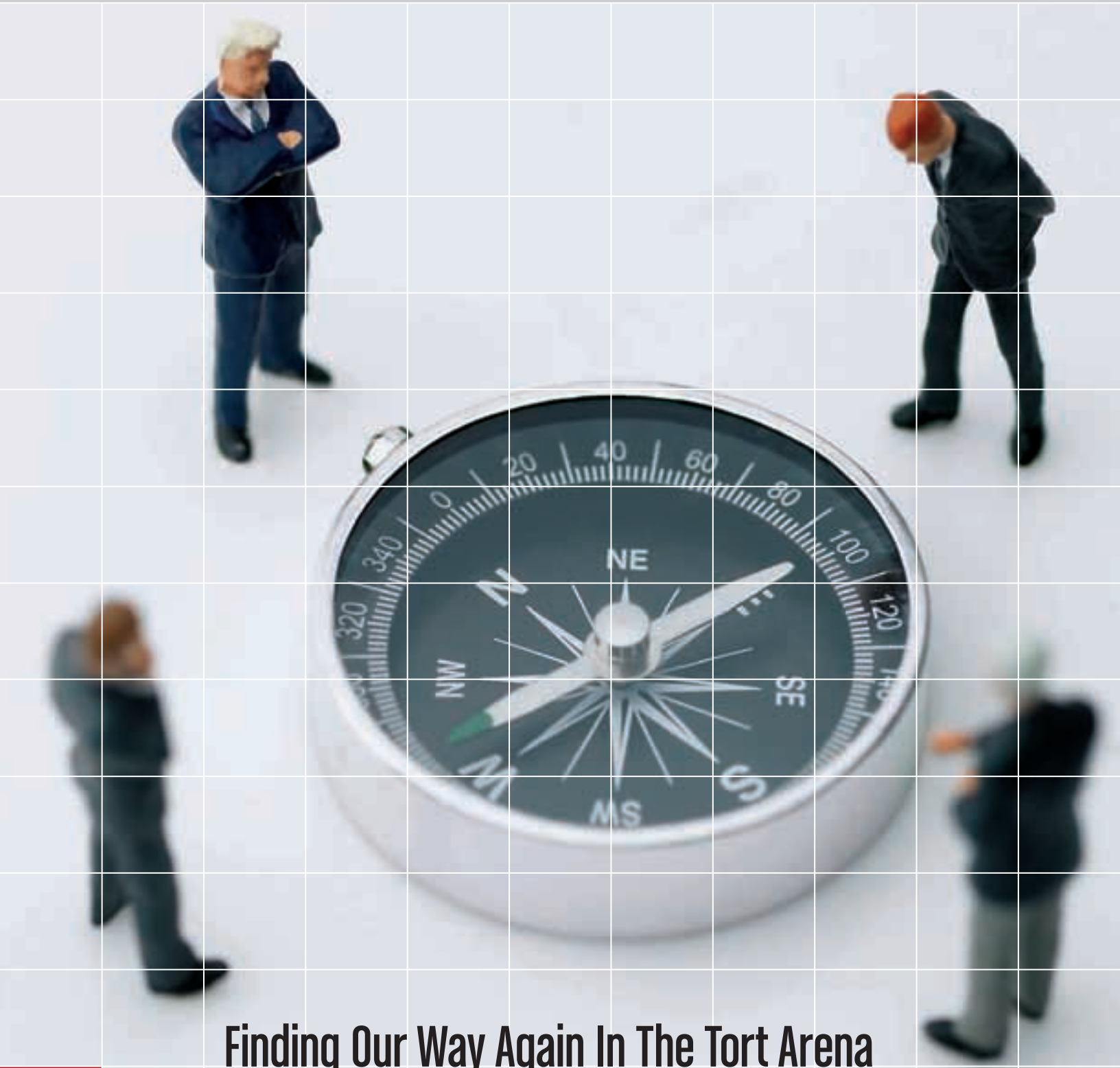
JONES DAY

PRACTICE PERSPECTIVES: PRODUCT LIABILITY & TORT LITIGATION



Finding Our Way Again In The Tort Arena

letter from the practice chair

This issue of *Practice Perspectives* reflects the continuation of our desire to present discussions of cutting-edge litigation topics that we hope will be of interest to our friends and clients. In this issue, we have made a specific effort to include articles that reflect the global nature of today's product liability and tort practice. Jones Day's client base is global. Our clients operate in a global market, and in contrast to the situation just a few decades ago, large product liability projects today almost invariably include international dimensions. The Jones Day brand—One Firm Worldwide—is particularly meaningful to this practice. We seek to offer our clients the knowledge and experience of the highest-quality practitioners, lawyers who understand client service and business judgment while operating in a single partnership that guarantees uniform high quality in all of the world's major legal and product markets.

As the head of Jones Day's Product Liability & Tort Litigation Practice (one of the best jobs in the world, by the way, because of the quality of my colleagues and clients!), I get to use this introductory column as a bully pulpit. My friends and colleagues know that I often voice concerns about the litigation climate in the United States today. Margaret Thatcher, and scores of political thinkers before and after her, often articulated that one of the requirements of a stable nation is to have "the rule of law." Our tort system has, in my opinion, deteriorated significantly since I was admitted to practice 35 years ago. Congress, state legislatures, attorneys general, and too many judges who should be working on solutions are now part of the problem. The tort litigation system—including product liability law—is supposed to resolve the relevant disputes of the citizenry justly, predictably, and efficiently. The system should not exist primarily to enrich lawyers, redistribute wealth, or achieve by litigation what is not being done by legislation or proper regulation.

Our tort system has, in my opinion, deteriorated significantly since I was admitted to practice 35 years ago. Congress, state legislatures, attorneys general, and too many judges who should be working on solutions are now part of the problem.

And, if you think my comments are too harsh, I invite you to do one or more of the following:

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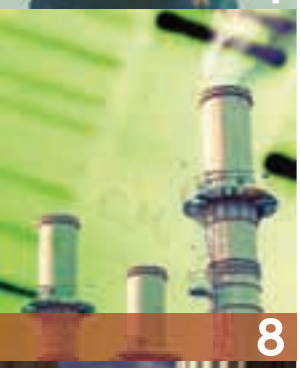

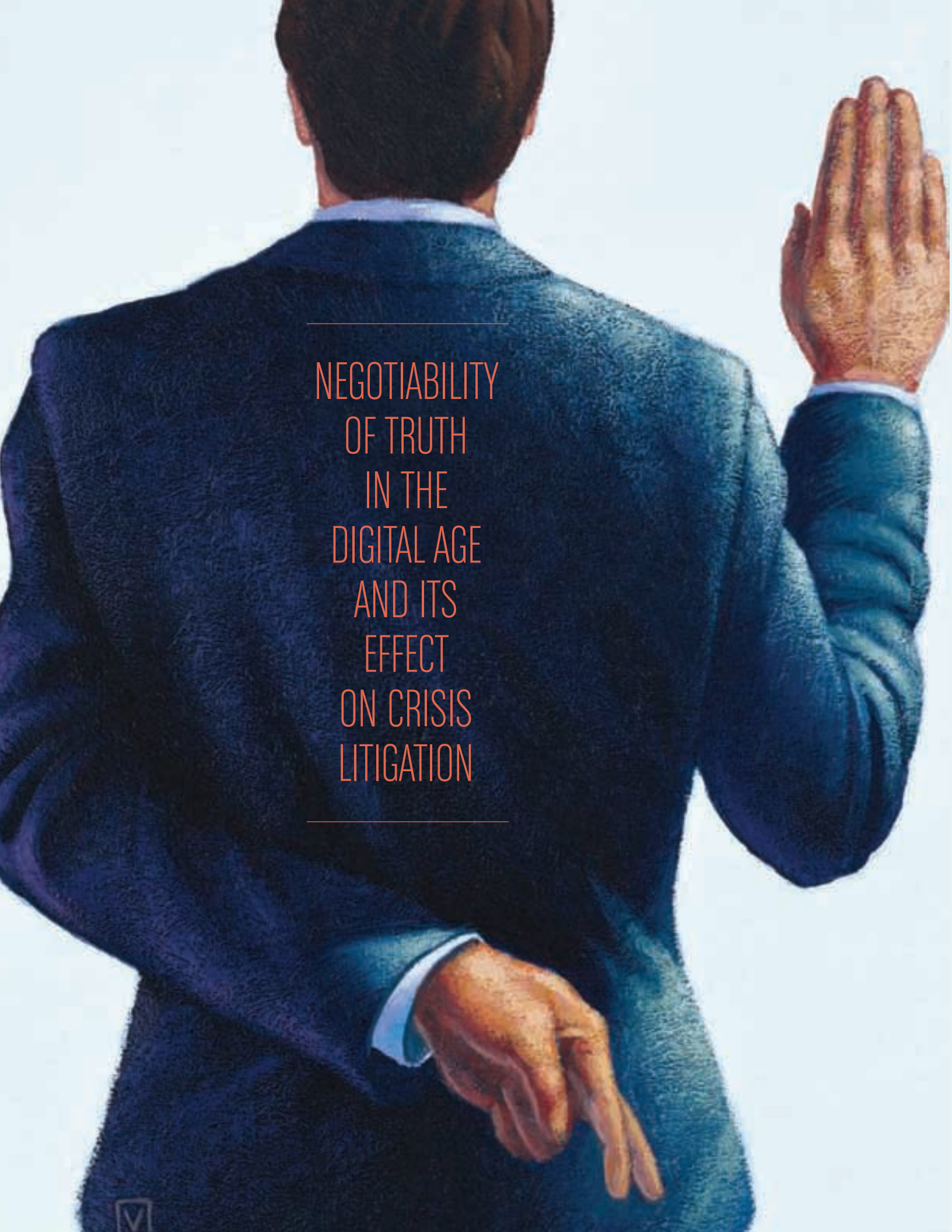

NEGOTIABILITY OF TRUTH IN THE DIGITAL AGE AND ITS EFFECT ON CRISIS LITIGATION

by Carol A. Hogan and Harlan A. Loeb

THE TEMPERAMENTAL RELATIONSHIP BETWEEN LEGAL ADVOCACY AND TRUTH DATES TO THE BIBLICAL DEBATE BETWEEN MAN AND GOD IN THE GARDEN OF EDEN. SPECIFICALLY, THE LORD CONFRONTS ADAM FOR VIOLATING THE FIRST-EVER LEGAL INJUNCTION, WHICH IS AGAINST EATING THE "FORBIDDEN FRUIT" FROM THE TREE OF LIFE OR, AS SOME COMMENTATORS TERM IT, THE TREE OF TRUTH. CAUGHT RED-HANDED AND KNOWING THAT THE DESTINY OF THE WORLD IS BEING WEIGHED IN THE BALANCE, ADAM BEGINS TO NEGOTIATE WITH GOD, INSISTING, "I DID NOTHING WRONG. YOU CREATED WOMAN, NOT ME, AND IT WAS SHE WHO PROCLAIMED THE INNOCENCE OF EATING FROM THE TREE." AND SO TRANSPIRES THE WORLD'S FIRST LEGAL CRISIS–AND ITS SUSCEPTIBILITY TO NEGOTIATION OF "THE ORIGINAL RECORD" (DOUBLE-ENTENDRE NOTED).

Today, the truth is perhaps nowhere more negotiable than in the crisis-litigation context. An entire body of trial advocacy relates to the belief that lawyers should choose a trial "theme" that emphasizes the "story" they want jurors to "buy." This same school of thought advises lawyers to downplay facts that do not support the trial theme. Jury research establishes that picking the right trial theme, one that appeals to the basic beliefs and core values of the vast majority of potential jurors, can prove critical in one's chances of winning or losing a lawsuit.

What jury consultants and experts do not concede readily is how crucial a strong trial theme really is, since truth in the litigation context always has been negotiable. Post-verdict interviews of jurors and studies by jury consultants and other research groups reveal that jurors—depending on gender, political views, income level, race, and other factors—will disregard facts and evidence, even if undisputed, that do not comport with their views of how the case should turn out. This concept is nothing new.

What has changed relates to the explosion of digital socialization and the plethora of digital and electronic outlets to express anyone's version of "the truth." This zeitgeist of digital socialization has dramatically influenced the negotiability of truth in all arenas, including litigation. Its true impact has not been fully appreciated because the number of digital outlets for the expression of opinions expands further every year. They range from social networks, such as YouTube, Facebook, Twitter, and MySpace, to blogs, message boards, and online forums.

Sobering statistics hold that newspaper readership is down 30 percent and broadcast-news viewership is down 67 percent.[1] Seventy-nine percent of all adults are online for an average of 33 hours per week.[2] Ninety-two percent of journalists say they conduct research online before writing their stories.[3]

Often, stories that appear in digital outlets create "truths" that bear little resemblance to the original content. These sites compare

functionally to the children's game known as "Telephone," in which participants sequentially whisper a phrase and then compare the first utterance to the last. Then they laugh at the vast distortion between what the first child heard and the last child said. However, in crisis litigation, unlike in the game, a risk develops if no attempt is made to reconcile any irregularities or inconsistencies between original source material and the "truths" that evolve during the (digital) dialogue.

This distortion grows more alarming as digital-content aggregators and blogs spawn unprecedented volumes of "conversational content" around a variety of legal issues. The Dow Chemical Company's litigation with Rohm and Haas last year provides a vivid example. Rohm and Haas sued Dow to enforce a definitive merger agreement with a material-adverse-change clause in place. The deal did not close in the wake of the credit crisis and economic recession. In pleadings, Dow stated that it had every intention of closing the merger but needed more time to structure viable credit terms, considering that the nation was mired in the worst recession in 80 years.

The Huffington Post, Seeking Alpha, the *New York Times* DealBook, and *The Wall Street Journal*'s blog substantially influenced public opinion in the *Dow* litigation. Selective use of online content created inferences and "versions of the truth" that proved highly potent in shaping the court of public opinion. The clips below from Seeking Alpha and from the web site The Truth About Dow demonstrate the manner in which online content creates "truth" in crisis litigation:

Seeking Alpha:[4]

> Less than a month ago Dow Chemical . . . was begging Rohm & Haas . . . to come to the bargaining table. Now, after a new agreement with their lenders and some chiding from the judge, they are essentially telling Rohm, "give us the deal we want or we'll see you in court."

The Truth About Dow:

> Terrible credit markets are Dow Chemical's story and the company is sticking to it.
>
> The Midland, Mich. chemical giant is locked in bitter litigation with the once-object of its affections, Rohm & Haas, over their $15.3 billion merger. Dow Chemical maintains that it is having trouble refinancing a $13 billion bridge loan for the merger and it will take until June 30 to determine whether the company can go ahead.
>
> If Dow Chemical is hoping to use the credit markets as a defense, however, it will have to bind and tie Wall Street banks that are now underwriting debt for companies with credit ratings high and low.

Both references above take stories written by Heidi Moore, a former *Wall Street Journal* reporter now with *The Washington Post*, and position them as the last word on the litigation, when she actually wrote numerous stories on the litigation. For the millions who rely on digital media for news and information about the *Dow* litigation, the "facts of the case" presented by these sources would differ greatly from the full coverage of the story by *The Wall Street Journal*, *The New York Times*, or even CNBC.

Because the Digital Age democratizes global communications and access to information, "citizen journalists" now participate actively in content formation in ways that shape the public narrative, on issues ranging from health-care reform to SEC lawsuits. In both, the underlying facts are negotiated and debated by empowered social media unbound by the rules governing lawyers and traditional journalists. Lawyers must be "tuned in" to this rapidly growing reality because litigation outcomes weigh in the balance. They must assume that a large percentage of potential jury pools gains some exposure to this tidal wave of opinion, unencumbered, in many cases, by any ties to facts or data.

And since almost 99 percent of commercial litigation settles with no imprimatur of "right or wrong" conferred by a judicial body, lawyers and clients also need to be aware that Twitter, Facebook, and "The Daily Show" are making and negotiating these pronouncements. Thus, this form of communication affects not only jury-verdict outcomes but the reputational risk posed to clients. As a result, stating "no comment" or "we do not comment on pending litigation" can prove to be a perilous course for clients in the throes of crisis litigation.

Fortune 500 corporations and their advisors, particularly their lawyers, need to know their way around this new mega-mall of digital media. The volume of information and the speed at which it is disseminated can seem overwhelming. Consider that the crash of the US Airways jet into the Hudson River in January 2009 was first reported by a rescue worker on one of the ferries who was Twittering from his iPhone. Below is a minute-by-minute recounting of the digital communications about the crash:

15:26 The incident occurs.
15:36 Ten minutes later a worker on the rescue ferry Twitters from his iPhone the first known photo of the incident. Thirty-four minutes later, MSNBC interviews him as a witness.
15:36 Airliners.net posts its first thread on the incident.
15:41 FlyerTalk.com posts its first thread on the incident.
15:46 Airline Pilot Central Forums posts its first thread on the incident.
15:49 The WSJ blog posts its first story: "US Airways Plane Crashes in New York's Hudson River."
15:52 A WSJ email alert is issued to subscribers.
16:00 The story appears on Google News.
16:03 The AP story begins to appear on blogs and web sites.
16:04 The first person to Tweet the story is interviewed on MSNBC as a witness.
16:12 US Airways issues its first statement.
16:15 Nine of the 10 most discussed topics on Twitter pertain to the incident.
16:30 @SouthwestAir (Southwest's Twitter profile) posts the following message: "Our friends @USAir and their Customers are in our thoughts this afternoon."
16:34 Someone Tweets that Wikipedia has an entry on the crash before any info is available on USAirways.com.
16:40 Twitterers are anticipating the US Airways press conference.
16:49 US Airways issues its second statement.
16:56 Someone creates a Twitter profile titled "@Hudsoncrash" to share news.
16:59 @SkyTalk (the Star-Telegram Twitter profile) Tweets the link to the flight log.
17:00 US Airways creates its first Twitter account (@USAirways).
17:20 People begin following the newly created US Airways Twitter account.[1]

[1] *Christi Day, Southwest Airlines, August 2009.*

Remarkably, the volume of calls into US Airways' call center was not particularly high because citizen journalists were providing the information families and customers were seeking. This phenomenon creates enormous challenges for companies in crisis because critical information, intelligence, and brand value are driven by direct touch points between the corporation and the customer. This example also illustrates how opinions can form and discourse can occur about an event—its causes and who is to blame—even before a corporation has learned that the incident took place and has decided what to say about it.

While harnessing this new tidal wave of communication can seem overwhelming, corporations and their advisors must recognize that these same digital forms of communication can serve as effective defensive weapons when crisis litigation erupts. Viacom's lawsuit against Google over copyright protections related to YouTube postings vividly illustrates this new social dynamic. Viacom claimed, among other things, that YouTube (owned by Google) knew about the infringing content and should have removed it. Google claimed it was clearly protected by the Digital Millennium Copyright Act safe-harbor provisions.

Both companies launched decidedly different digital campaigns to influence the public's perception of their respective positions in this high-profile lawsuit. Google benefited from citizen journalists championing the First Amendment values of free expression and access to information and content and in the end carried the court of public opinion and won on summary judgment.

The digital dialogue on the *Google* case boiled down a very complex case of first impression into a public debate that pits the value of free expression and content accessibility against the legal interests surrounding copyright protections. Consistent with campaign-based advocacy, both sides deliberately and diligently orchestrated the underlying dispute to facilitate a context for "choosing sides" or casting a vote. The result will weigh heavily on the intangible asset value of both corporations' brands.

As has become evident, counsel and client must advocate aggressively in the digital domain. This requires a level of "readiness" and active engagement that differs dramatically

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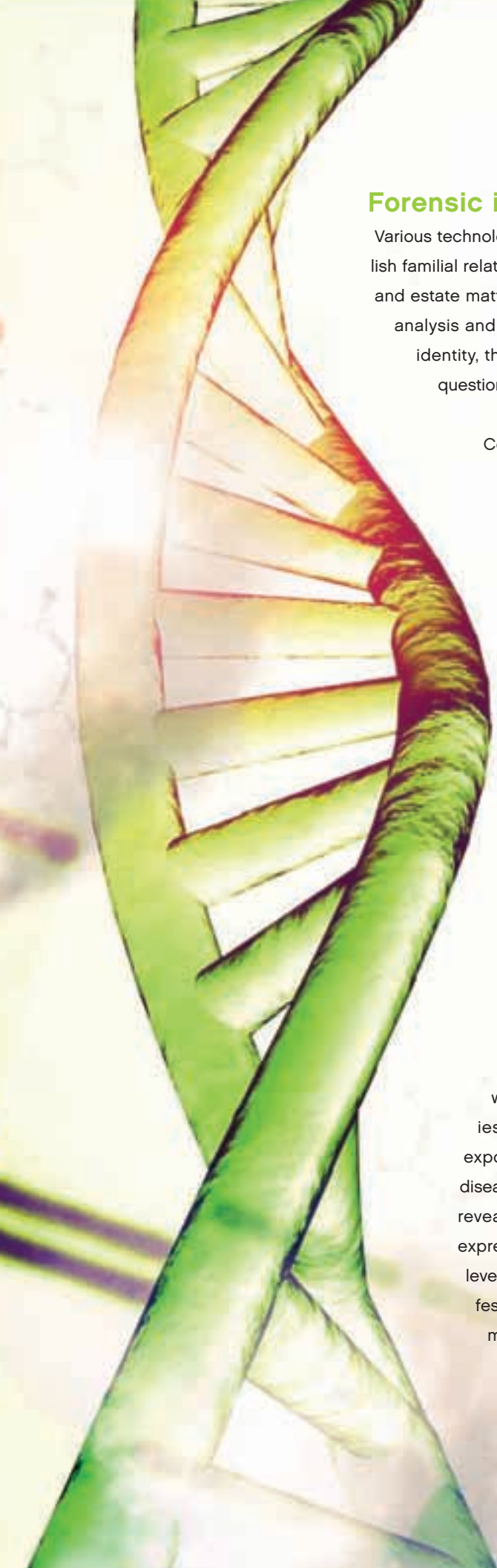
by Peter N. Larson and Ellinor R. Coder

GENES FOR JUSTICE?

USING GENE EXPRESSION ANALYSIS TO **IDENTIFY** THE MOLECULAR FOOTPRINTS OF ENVIRONMENTAL **HAZARDS**



Forensic identification techniques have a long history.

Various technologies have been used to identify criminal defendants or their victims, establish familial relationships for paternity and immigration matters, prove authorship in contract and estate matters, and so on. But although conventional technologies such as fingerprint analysis and blood typing have long been accepted as reliable means of establishing identity, their uses beyond that are limited, and their reliability has been called into question as more advanced technologies have become more widely accessible.[1]

Conventional forensic identification techniques met their match in 1984 when British geneticist Sir Alec Jeffreys unexpectedly discovered the 0.1 percent of human DNA[2] that makes individuals unique. His discovery paved the way for DNA profiling, which is the use of DNA to identify an individual by the unique features of his or her genetic material. DNA profiling caught on rapidly and is now the gold standard in many courtrooms for proving or disproving identity. However, the use of DNA technology is hardly limited to identifying people by the invisible "footprints" left behind in their blood, hair, and skin cells. As science and technology have advanced, scientists have harnessed DNA technology to learn more about disease and human development.

Most recently, DNA technology developed by scientists at the University of Illinois College of Medicine and marketed through the Cytokine Institute offers the possibility of identifying the unique molecular footprints that environmental hazards leave behind in our bodies. This technology, which studies changes in the expression of genes, works to identify the unique series of chain reactions set off within a person's DNA when he or she is exposed to a toxic substance.

This DNA technology attempts to fill the critical gap left by epidemiology, which focuses primarily on the risk factors for disease as reflected in studies of the human population at large. Epidemiology provides evidence that exposure to a particular hazard is generally associated with or causes certain diseases. But it can be argued that only a study of the individual could definitively reveal the complex pathways of a disease or injury within that individual. Gene expression analysis thus has the potential to enable us to see, at the molecular level, how an individual was injured by outside forces long before the injury manifests itself in cognizable disease symptoms. Having the ability to unlock these molecular "bread crumbs" may well enable practitioners to determine whether an exposure has occurred in the absence of measurable quantities of the substance within the body or before the manifestation of a disease.

THE PROOF IS IN THE PUDDING

DNA is essentially a blueprint that contains the instructions necessary for cells to build and sustain life. Gene expression, in contrast, is the process by which the information contained in the blueprint is translated into the machinery of life. For example, the expression of many genes results in the formation of proteins, which then perform various cell functions.

The technology of gene expression analysis attempts to identify the impact of toxic substances by studying how gene expression changes in response to a particular exposure. There are three possible reactions to an exposure at the DNA level: a gene is up-regulated, which is when the genetic material "turns on" and increases the expression of the gene (*i.e.*, more protein is produced); the genetic material is down-regulated, which is when the genetic material "turns off" and decreases the expression of the gene (*i.e.*, less protein is produced); or the gene is unaffected. Through the use of computers, this technology makes it possible to study the expression of tens of thousands of genes at the same time. This, it is said, results in a detailed view of how toxic substances affect the translation of our DNA into life functions. In building the detailed picture, a unique footprint emerges for each toxic substance.

For example, some scientists report that exposure to benzene alters the expression of genes that regulate protein metabolism, electron transport, and the antigen-processing functions of leukocytes, or white blood cells, which form part of the immune system and defend against disease.[3] Likewise, exposure to hexavalent chromium is said to affect the expression of genes related to cellular metabolism, immune response, intracellular signaling, and other functions of certain blood cells.[4] Results of this technology may allow scientists to identify the unique genetic footprints that exposure to benzene and hexavalent chromium leaves behind before the injurious effects of these substances become apparent as illness or disease.

GENE EXPRESSION ANALYSIS IN THE COURTROOM

The proponents of this technology hope that gene expression analysis will enable medical professionals and scientists to understand the roles that DNA plays in disease. A better understanding of this relationship could lead to better treatments. And, although it is in its infancy, gene expression analysis could affect many aspects of product liability, insurance, workers' compensation, and personal-injury litigation. For example, a plaintiff or prospective plaintiff alleging toxic exposure might be tested to determine whether his or her cells contain the unique genetic footprint for the alleged substance. Defense independent medical examiners might use the technology to negate disability. For plaintiffs and defendants alike, gene expression analysis (much like DNA fingerprinting before it) potentially offers the opportunity to present persuasive evidence of exposure—or the absence thereof—by an impartial, scientific means. The technology could also play a gatekeeping role in class certification by limiting class membership to those individuals who bear the unique signature of a particular toxin. In so doing, gene expression analysis could reduce the number of frivolous cases and prevent unnecessary damage awards.

AN END TO MEDICAL MONITORING?

In medical monitoring cases, plaintiffs who present no physical injury or symptom of disease, but who have an increased risk of future disease due to exposure to a hazardous substance, may be entitled to recover for medical screening tests to detect the early onset of a targeted disease. Gene expression analysis may prove useful in developing the sort of evidence needed to move away from an award of damages based on uncertain, pre-injury claims for future medical monitoring.

By way of example, in *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993), four landowners who lived next to a landfill alleged that Firestone's practice of disposing its industrial waste there, including the known carcinogen benzene, subjected them to prolonged exposure to carcinogens. *Potter*, 863 P.2d at 975, 801–02. None of the plaintiffs had developed cancer; instead, they alleged that they were at risk for developing cancer in the future. *Id.* at 975. The California Supreme Court awarded medical monitoring damages, finding that plaintiffs in a negligence action need only prove that the need for future monitoring is a reasonably certain consequence of their toxic exposure and that the recommended monitoring is reasonable. *Id.* at 825. However, the California court noted that the medical monitoring would be "unnecessary if the particular plaintiff had not been wrongfully exposed to pollutants." *Id.* at 822.

Enter gene expression analysis. This technology could potentially be used by defendants in such cases to show that the

plaintiffs did not bear the hallmark footprint of exposure to benzene and that medical monitoring was therefore definitively unnecessary. *See*, *e.g.*, *Sheridan, et al. v. NGK Metals Corp., et al.*, 2010 WL 2246392 (3d Cir. June 7, 2010) (affirming dismissal of medical monitoring classes in beryllium cases absent genetic markers). On the other hand, once an injury is known—*i.e.*, once the footprint is found—a plaintiff may be more likely to be awarded damages for testing to monitor the status of the exposure and its potential to develop into disease or injury. Although this would, of course, provide plaintiffs another means of stating a claim, it could also have the collateral benefit to all parties of mitigating the potential effects of the resulting disease as soon as they become apparent. Bottom line: If successfully utilized, gene expression analysis could be a valuable aid in more accurately determining the need for medical monitoring and setting damage awards.

WORKPLACE MONITORING

Gene expression analysis could also be used in the workplace to monitor workers for occupational exposure to process chemicals or their byproducts. For example, steel mills and textile manufacturers that use hexavalent chromium could utilize the technology as part of a workplace-monitoring program to track potential exposures beyond what are considered to be safe levels. Such a program might establish baseline exposure by testing new employees for the unique footprint; it would then retest the workers over time, administering the final test at the conclusion of their employment. This technology has the potential to be a valuable aid in monitoring worker safety and could provide early notice of exposure, enabling manufacturers to institute measures to mitigate damages once exposure becomes apparent. It could also be used to substantiate or refute later allegations of workplace injury when presented in either individual or collective actions.

But the use of this technology for workplace monitoring may raise countervailing privacy and genetic-discrimination concerns.[5] Employees may object to the collection of blood samples and may view gene expression analysis as an invasion of the right to privacy. In addition, Title II of the Genetic Information Nondiscrimination Act ("GINA") of 2008, which took effect on November 21, 2009, prohibits employers from discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment on the basis of the employee's genetic information. *See* 42 U.S.C. § 2000ff-1(a). GINA defines "genetic information" as information gained from an individual's genetic tests. *Id.* § 2000ff(4)(A). "Genetic test," in turn, is defined as "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes." *Id.* § 2000ff(7)(A). The "analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes" is expressly excluded from the definition of "genetic test." *Id.* § 2000ff(7)(B). Similarly, "genetic monitoring" is defined as "the periodic examination of employees to evaluate acquired modifications to their genetic material . . . that may have developed in the course of employment due to exposure to toxic substances in the workplace." *Id.* § 2000ff(5).

Whether gene expression analysis is covered by GINA, however, has yet to be decided. Proponents of the technology in the workplace will attempt to characterize it as simply a test of how an individual's DNA is translated—rather than a test of the composition of or changes to the DNA itself, which is regulated by GINA. Opponents, on the other hand, might argue that any procedure that looks for changes in genetic expression—up-regulation or down-regulation—is exactly the type of test contemplated by Congress.

Yet even if the use of gene expression analysis is considered "genetic monitoring" or a "genetic test" under GINA, under limited circumstances an employer may be permitted by GINA to collect genetic information within the context of a workplace-monitoring program. *Id.* § 2000ff-1(b)(5) (allowing genetic monitoring of the biological effects of toxic substances in the workplace). The employer must provide written notice of the monitoring to the employee; the employee must provide authorization for the monitoring or, alternatively, the monitoring must be required by federal or state law; the monitoring must be in compliance with federal or state regulations on genetic monitoring; the employee must be informed of the monitoring results; and the results must be presented to the employer in aggregate terms that do not disclose the identity of specific employees. *Id.* § 2000ff-1(b)(5)(A)–(E). Results reflecting specific employee identities may be provided to a licensed health-care professional or board-certified genetic counselor only. *Id.* § 2000ff-1(b)(5)(E).

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THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008 ("CPSIA") UPENDED THE ONCE LARGELY SETTLED AND SLEEPY AREAS OF LAW OVERSEEN BY THE CONSUMER PRODUCT SAFETY COMMISSION, RELEASED A CASCADE OF REGULATORY AND COMPLIANCE ACTIVITY, AND GENERATED WAVES OF UNCERTAINTY AND APPREHENSION.

by Peter J. Biersteker, C. Kevin Marshall, and Danielle M. Hohos

A virtually unnoticed and uncodified provision of the CPSIA requires the Commission to establish and maintain a publicly available, searchable, and internet-accessible database on the safety of all consumer products as well as all products or substances the Commission regulates under other laws.[1] The proposed new database, SaferProducts.gov, would supplement rather than supplant the Commission's two existing publicly available, searchable databases: the National Electronic Injury Surveillance System ("NEISS") database, which tracks emergency-room visits associated with consumer products, and the Commission's database of recalls and other notices.

The Commission has proposed an implementing regulation for SaferProducts.gov. It passed by a bare 3-2 party-line vote; more than 20 different amendments were considered, with most of them rejected. All five commissioners issued written statements explaining their votes. While some commissioners praised the proposed regulation as the epitome of "open government" and as necessary to eliminate "blind spots," others denounced it as "not ready for prime time" and as establishing a system of "garbage in/garbage out."[2]

The Commission published the proposed rule on May 24, 2010, with a deadline for comments of July 23, 2010.[3] The database is scheduled to go live no later than March 11, 2011.

Having an additional central, publicly available repository may further facilitate investigations, reveal issues and trends, and educate purchasers. But the reality may not live up to that billing. SaferProducts.gov, as proposed, threatens to confuse and mislead consumers while drawing a bull's-eye around manufacturers. Manufacturers, trade associations, and other stakeholders should follow developments related to the proposed rule as they prepare appropriately for implementation.

WHAT CONGRESS REQUIRED AND THE COMMISSION HAS PROPOSED

Although there are numerous issues, three aspects of the proposed SaferProducts.gov database are especially controversial from both a legal and a policy perspective.

SaferProducts.gov DATABASE MAKE CONSUMERS SAFER—BE THE BANE OF CONSUMER PRODUCT MANUFACTURERS?

Who May Report. Congress in Section 6A specified that the database include "reports of harm" from five individuals or groups: consumers, governmental agencies, healthcare professionals, child service providers, and public safety entities. In the teeth of this finite enumeration, the Commission's proposed regulation expands the scope of submitters in two ways.

First, the proposal defines "consumer" as "including, but not limited to, users of consumer products, family members, relatives, parents, guardians, friends, and observers of the consumer products being used."[4]

Second, the proposed rule adds to Congress's five categories of submitters a sixth: "others." This category includes—but is not limited to—"attorneys, professional engineers, investigators, nongovernmental organizations, consumer advocates, consumer advocacy organizations, and trade associations."[5]

Each of these two expansions raises a legal question: Is the definition of "consumer" so broad as to make the other statutorily specified categories largely superfluous (contrary to ordinary rules of statutory interpretation) and also impermissibly broader than the ordinary understanding of "consumer"? The Consumer Product Safety Act, for example, in defining "consumer product," seems to use "consumer" to refer to someone who buys or uses a product for personal purposes in or around a residence or school or in recreation.[6]

Even more questionable, nowhere does the proposed regulation identify the Commission's authority for adding the category of "others," which is at odds with Congress's seemingly exhaustive list of submitters. Commissioners Nancy Nord and Thomas Moore both solicited comments on this question, and Commissioner Anne Northup denounced the addition as having "zero basis" in the statute.

These expansions also raise practical problems. Both authorize persons to submit a report even though they lack either firsthand knowledge of an incident or a professional or legal duty to respond to an incident. "Consumers" (as defined by the Commission) and "others" are more likely to submit inaccurate reports. The breadth of the proposed definition of "harm" exacerbates this problem, by including not just injuries, illnesses, and death, but also any "risk" of these results.

However, it is malice rather than ignorance that poses the greatest risk to manufacturers; anonymous submitters can include competitors, advocacy groups, and even attorneys who may have sued on behalf of consumers. The database accordingly may become salted with both inaccurate and duplicate reports that will linger unless and until the falsely accused manufacturer can persuade the Commission to investigate and then remove or otherwise correct the error. Apart from the increased burden on businesses, the ability of even a diligent manufacturer or retailer to police effectively the accuracy of the database is far from certain, as discussed herein.

What Information Must Be Included in a Report? Congress required, "at a minimum," that a "report of harm" include six pieces of information: (1) a description of the product; (2) identification of the product's manufacturer (or private labeler); (3) a description of the harm; (4) the submitter's contact information; (5) the submitter's verification that the information "is true and accurate to the best of the person's knowledge"; and (6) a consent to posting the submitted information to the database.

Whereas Section 6A's list of who may submit reports appears fixed, its list of required items in a report is explicitly not. The Commission's proposed rule nevertheless adds nothing to Congress's "minimum." Although submitters *may* submit more than the minimum information, the Commission neither required any additional information for a report to be published nor identified any further particular optional information that might be helpful. For example, it would be helpful to include in reports the date and location of the incident, as well as the date and location of the manufacture of the product involved. Indeed, this kind of information is among the required fields for the database of the National Highway Traffic Safety Administration, which was established under an enabling statute upon which Section 6A is partially based.

The Commission also marginalized some of the statutory minimum requirements. For example, the requisite "verification" would be satisfied under the proposed regulation by a submitter's simply checking a box saying that the information "is true and accurate to the best of the person's knowledge."[7]

Skimping on the content of the "reports of harm" diminishes the usefulness of the database and exacerbates concerns

that the database will contain duplicate and inaccurate information. Commissioners Moore, Nord, and Northup all worried that the skeletal information requirements for "reports of harm" could hinder efforts to weed out duplicate reports. It is unlikely that the means the Notice of Proposed Rulemaking identified will succeed in weeding out duplicate or inaccurate reports; such means include sorting data (but not by date or location of either the incident or the product's manufacture) and using challenge-response tests, analogous to those used by ticket-purchasing web sites, to ensure that computers are not submitting the reports.

The failure to require enough information to automatically screen the submitted data is especially problematic, given that the Commission lacks the resources to examine submissions individually. Historically, the Commission has relied on subject-matter experts manually analyzing trends to detect hazardous products, link incidents, and predict the probability of repeated occurrences. This is a difficult task, given that the Commission receives 18,000 reports of incidents concerning 15,000 categories of products each year even without the planned database. With the database, the number of incidents will only increase.

With respect to verification, the Commission in the proposed rule rejected recommendations that the verification page contain a federal criminal-penalty warning about supplying false information. It also rejected a proposal to note in the database whether the submitter responsible for a report of harm insisted on anonymity or consented to the release of his or her contact information to the manufacturer, as well as a proposal to identify which reports were under investigation for possible inaccuracy. Exasperated, Commissioner Northup characterized the proposed verification check box as "essentially useless."

The database will include the statutorily mandated disclaimer that the Commission does not guarantee the accuracy, completeness, or adequacy of the database's contents. But the database will still be an official record of the Commission;[8] the disclaimer will provide little guidance on what, if any, use to make of a particular report; and the disclaimer is a thin substitute for actually improving the quality of the database.

Opportunity for Corrections. Before a report of harm may be included in the database, Congress required that the identified manufacturer or private labeler (1) be provided the report of harm within five business days "to the extent practicable"; (2) have the opportunity to comment on the information in the report; (3) have the opportunity to request that its comment appear in the public database (a request the Commission must grant absent a finding of inaccuracy); and (4) have the opportunity to protect any confidential information in the report.

But Section 6A gives the manufacturer or private labeler *no* right to receive the submitter's contact information unless the submitter gives "express written consent." And the Commission ordinarily will publish the report of harm on the internet "not later than" *10 business days* after sending it to the manufacturer—regardless of whether the manufacturer has responded.

Following publication of a report or comment, the Commission has a duty to remove or correct information it concludes is materially inaccurate. Congress required the Commission to make the correction within seven business days of determining, after investigation, that a material inaccuracy exists, but neither the statute nor the proposed implementing regulation specifies how long the Commission may investigate.

POTENTIAL PROBLEMS

Consumers. These issues with the proposed database create several potential problems for consumers, particularly when they are seeking to use it for purchasing decisions. First, the Commission seemingly has sacrificed its goal of educating and guiding consumers on the altar of "open government." The likelihood of inaccurate information in a given report leaves consumers without credible guidance as to any report. Whether they respond by believing or disbelieving everything, the usefulness of the database is undermined.

Second, a mere collection of incidents about a product, even if each report of harm were accurate, may provide a false picture of its safety. The database as proposed takes no account of the number of each product in circulation. If a product has 10 reports of deaths in the database, it would help to know whether 10 or 10 million products have been sold. Niche products will deceptively appear to be relatively safer than mass-marketed products.

Third, the database may create privacy concerns for injured consumers. The proposed rule does have some safeguards, such as prohibiting nonconsensual disclosure of an injured consumer's name and protecting against posting of medical records and photographs with personally identifying information. But it is open to question how much these will matter if a third party submits a report and includes detailed information, including data about incidents involving minors. Under the proposed rule, an injured consumer objecting to a report would be in the same position as the manufacturer—lacking the submitter's contact information, yet hoping to persuade the Commission to investigate, agree with his or her objections, and eventually remove or otherwise correct the report.

Businesses. The database and implementing regulations pose even greater problems for manufacturers, private labelers, and retailers—reputational costs, response costs, and litigation costs.

First, perhaps the biggest issue for businesses is the possibility of misuse of the database for publicity purposes. Such misuse may be intentional, such as an effort by an advocacy group or competitor to "spam" the database to target a company or pressure the Commission. It also may be accidental, such as the prosaic risk that duplicate reports will exponentially magnify the apparent risk of a product, which in turn might draw the unwarranted attention of advocacy groups or the Commission. As Commissioner Robert Adler noted, the incident reports in the database can be mined and used as "an early warning system" by the Commission to identify harmful products.

The Commission has no deadline for completing an investigation of alleged inaccuracies in a report, which triggers the obligation to correct inaccuracies within seven days, so efforts at correction may languish. And it remains unclear how the Commission's duty under Section 6 of the Consumer Product Safety Act to correct publicly disclosed inaccurate or misleading information about a manufacturer's safety record "in a manner equivalent to that in which such disclosure was made"[9] will bear on errors in the database.

Second, and related, the database will cause businesses to expend money and resources to address reports of harm, investigating and then responding both to the Commission and, likely, to the public. That task is difficult and may even be impossible, given both the probable anonymity of the submitter and injured consumer and the paucity of information required, such as the Commission's failure to require the submitter to identify the date and location of the incident that is the subject of the "report of harm." Additionally, if the manufacturer would like its comments published simultaneously with the report of harm, it must provide them within 10 days of the Commission's transmission of the report. Otherwise, the report will be published without comment from the manufacturer until such time as the manufacturer submits comments. If comments are received more than one year after the transmission of the report, the Commission can choose not to publish them. Even where an investigation of the report is feasible, the Commission, in preparing the proposed regulation, estimated optimistically that a manufacturer would need four and a half hours to respond to each report it received.[10]

Third, one can expect attorneys to mine the searchable database (perhaps "finding" information they submitted as "others" or "friends and observers") to prepare lawsuits, exert pressure for settlements, and even generate evidence, particularly on entitlement to punitive damages. Although it is arguable whether the database will be admissible evidence under the public records and reports exception to the hearsay rule,[11] the information in the database will certainly be relied upon by attorneys and experts in the course of litigation.

Experience with the Commission's NEISS database suggests what may come. NEISS collects data about product-related incidents from hospitals and enters it into a searchable database, which the Commission staff analyzes for enforcement purposes. Plaintiffs have used its contents in court. For example, in 1993, an expert extrapolated from NEISS data to testify that there were 938 injuries associated with Q-tips swabs—more than 23 times the 40 reports that the manufacturer had received. The jury awarded $1.5 million in compensatory damages and $20 million in punitive damages.[12] The verdict was reversed on appeal on the ground that the manufacturer lacked constructive knowledge of information contained in the NEISS database.[13] As to the database created pursuant to Section 6A, however, any such defense will be a hard sell, given that the Commission will notify the manufacturer of each report and, as Commissioner Adler noted, "companies will no longer be able to claim they have never heard of a complaint regarding their products."

Notice through the database conceivably could also be used to assess civil penalties for late reporting under Section 15 of the Consumer Product Safety Act.[14] This too is an issue that the Commission did not address in the proposed rulemaking, but the Commission's recent rule elaborating the factors it will consider in assessing the civil penalties leaves room for it to pursue this course.[15]

WHAT CAN BUSINESSES DO?

A little effort now to stay informed and be prepared will serve businesses well as the Commission develops the database.

Although Congress has mandated the database, and pending bills to "fix" the CPSIA would not alter that mandate, the proposed rule is not yet final. Businesses whose products are subject to regulation by the Commission and trade associations should follow developments via the Commission's web site (which has a section devoted to the CPSIA, organized by topic) to enable themselves to prepare for the final rule.

The Commission has ample authority to improve the SaferProducts.gov database, but it is not clear how open the majority of the Commission will be to making changes in response to the comments it has received. Unless the Commission solicits further comment on the proposed rule, there is little that interested businesses can do externally but wait to see whether the final rule addresses any of the problems noted herein. Particularly worth watching are the final determinations of whether to include the "others" category of those who may submit reports and the expansive definition of "consumer." If not changed in the final rule, both provisions may be open for litigation, a rarity in this area of law. Also worth watching is whether the comments prompt the Commission to reconsider any of the amendments that the minority commissioners unsuccessfully submitted. Commissioner Northup summarized these on pages 4, 5, and 7 of her statement of April 22, 2010.

Internally, an ounce of prevention will save a pound of anguish later. To prepare for the launch of the database in 2011, businesses whose products (or substances) are subject to regulation by the Commission should register with the Commission to use the portal on the database, in order to receive reports from the Commission promptly. Correspondingly, they should develop processes for receiving and swiftly distributing, investigating, and responding to any report. The receipt of a skeletal report of harm—which starts the 10-day clock running—is not the time to determine on the fly who within the company needs to see the report and who should oversee, decide on, and submit any comment. Apart from commenting to the Commission on reports it receives, a business must respond appropriately to valid or perceived product-safety issues that may emerge from its internal investigations and reports, by notifying the Commission, where appropriate, and responding to consumer complaints about its products

The world has changed, and companies need to be ready for it. ■

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[1] *See* CPSIA § 212, new § 6A of the Consumer Product Safety Act, 15 U.S.C. §§ 2051 *et seq.*
[2] *See* http://www.cpsc.gov/pr/statements.html (web sites herein last visited Oct. 20, 2010).
[3] 75 Fed. Reg. 29156 (to be codified at 16 C.F.R. pt. 1102); *see* http://www.cpsc.gov/about/cpsia/sect212.html.
[4] 16 C.F.R. § 1102.10(a)(1) (proposed).
[5] *Id.* § 1102.10(a)(6) (proposed).
[6] 15 U.S.C. § 2052(a)(5).
[7] *See* § 1102.10(d)(5) (proposed); 75 Fed. Reg. at 29158. The submitter also must generically identify its type ("consumer," "other," etc.). *See* § 1102.10(d)(5) (proposed).
[8] 16 C.F.R. § 1102.10(i) (proposed).
[9] 15 U.S.C. § 2055(b)(7).
[10] 75 Fed. Reg. at 29175.
[11] Fed. R. Evid. 803(8).
[12] *Strothkamp v. Chesebrough-Pond's, Inc.*, No. 60645, 1993 WL 79239 (Mo. Ct. App., Mar. 23, 1993).
[13] *Id.*
[14] 15 U.S.C. § 2064.
[15] *See* 16 C.F.R. § 1119.

The globalization of the economy has had a marked effect on the legal issues faced by U.S. companies. These issues increasingly include an international component, and nowhere is that more commonly the case than in the area of product liability. Many products sold in the U.S. by U.S.-based companies are manufactured outside the U.S., and many more incorporate components that are made outside the U.S. As a result, when a U.S. company faces allegations that one of its products has a design defect or has been manufactured defectively, investigating the underlying facts necessarily entails an investigation into the company's operations outside the U.S. and, in some cases, the operations of its subsidiaries or suppliers in other countries.

Investigations into overseas operations present challenges different from those involved in domestic investigations. First, there are obvious cultural and linguistic barriers to completing

COORDINATING INVESTIGATIONS BETWEEN U.S. COMPANIES AND THEIR SUBSIDIARIES OR SUPPLIERS OVERSEAS

a thorough investigation. Second, because of the time and expense involved, investigations in other countries often are done on a compressed schedule, usually on a "one-shot" basis, with no opportunity for follow-up interviews. Finally, many people outside the U.S. view the American legal system with a particularly jaundiced eye. While they know little about U.S. litigation, they have heard enough to know they do not want to be involved. In some cases, this reluctance leads to recalcitrance.

All these factors compound the difficulty of conducting investigations into operations outside the U.S. This article describes ways in which these investigations can be facilitated and made as productive as possible.

PLAN AHEAD: OBTAIN CORPORATE AND DEPARTMENTAL ORGANIZATIONAL CHARTS

Before leaving to visit non-U.S. operations, those performing the investigation can take a number of steps that will make their later visit and interviews more productive. A critical first step is to obtain organizational charts for the operations involved. You will need to understand the reporting relationships between those operations and the U.S. company, which sometimes are complicated by tax and other considerations. On a more granular level, you will need to understand the roles, responsibilities, and reporting relationships of the relevant employees, especially the leadership and the departments that are directly involved in the situation under investigation. If possible, locate organizational charts with pictures of the employees or obtain company "face books" that you can use with the organizational charts. Learning to recognize important faces will help you during the investigation.

by John W. Edwards II and Gillian K. Garrett

PLAN AHEAD: REVIEW THE COMPANY'S RELEVANT PUBLIC STATEMENTS

It is important to review the U.S. company's public statements relevant to the investigation and to its overseas operations. One important focus of the investigation will be to assess the accuracy of these statements. The attorneys conducting the investigation also should establish a liaison with the company's public-relations department to ensure that its future statements are consistent with the results of the investigation and the overall strategy for handling the situation.

PLAN AHEAD: IDENTIFY KEY WITNESSES AND RECORDS CUSTODIANS; PRESERVE DOCUMENTS

The attorneys conducting the investigation will need to conduct initial interviews of more accessible personnel in the U.S. to prepare for the investigation of the overseas subsidiary or supplier. One focus of the initial interviews should be to identify key witnesses and records custodians outside the U.S. It is important to begin working with the company's IT specialists and records custodians as soon as possible to secure and copy the paper and electronic files of custodians and witnesses both within and outside the United States. If litigation has ensued or is likely to be filed, the company has a legal obligation to preserve relevant evidence.

In addition, as discussed herein, a thorough review of the relevant written evidence is necessary to prepare for the later interviews and investigations overseas. In many cases, it will be necessary to arrange for translation of some of the documents before the review can begin.

One note of caution: Before collecting documents and data, counsel should review both the company's internal policies and the laws of the relevant jurisdictions. Some countries have enacted privacy laws in which the boundaries between

INVESTIGATIONS INTO OVERSEAS OPERATIONS PRESENT CHALLENGES DIFFERENT FROM THOSE INVOLVED IN DOMESTIC INVESTIGATIONS.

"employer" and "employee" information differ from those in the U.S.

Once you have compiled the initial list of witnesses and evidence custodians, counsel should review that list with the company's human-resources department. You should request advance notice of adverse employment actions against persons on the list. It can be disheartening (to say the least) to arrive in another country only to find that a key witness was discharged a week earlier. Advance notice also would allow you and the company to consider consulting agreements with key witnesses who may exit the company.

PLAN AHEAD: PREPARE FOR WITNESS INTERVIEWS

You should prepare for your witness interviews by learning as much as possible about the target overseas subsidiary or supplier and the witnesses you wish to interview. First, you should review the documents you collected from key evidence custodians within the company. As you review the documents, organize them by topic and witness. Mark the documents for easy sorting and retrieval during the interviews process.

Second, you should review any audit reports, testing reports, or other material the company has concerning the performance of the overseas subsidiary or supplier. Ask the company's security department for any similar information it maintains that may be separate from the company's other files. Obtain as much background information as you can, whether from the company, third-party auditors, stakeholders, or the media. Key documents are useful during interviews to refresh witnesses' recollections, validate or contradict witnesses' comments, and encourage recalcitrant witnesses.

Third, you should review any applicable contractual provisions with overseas suppliers related to liability, indemnification, access to premises or employees, rights to discovery, and employee privacy. You also should consider consulting local counsel about local laws related to discovery, employee privacy, and any other relevant issues.

Fourth, prepare witness interview outlines. The outlines should encompass issues raised by any pleadings, investigative reports, or other documents you have reviewed, as well as issues raised by other witnesses. Highlight important documents you wish to discuss. Identify the witnesses with whom you wish to discuss each issue and in each important document.

PLAN AHEAD: SECURE NECESSARY VISAS

Once you have finished preparing for your interviews of non-U.S. witnesses, you should plan your trip abroad. Begin by obtaining the appropriate visas for all the countries you wish to visit. For example, if you seek to conduct interviews in Mainland China as well as in Hong Kong, you will need a "double-entry" Chinese visa. To build flexibility into your schedule, request more time in the host countries than you think you will need.

PLAN AHEAD: SCHEDULE WITNESS INTERVIEWS

You should schedule witness interviews before you go, to ensure maximum efficiency and witness availability. Consider whether you should request a tour of the plants or work areas in addition to witness interviews. Ask company executives in the U.S. to introduce you to the executives at the overseas subsidiary or supplier before contacting them to arrange interviews or workplace visits. If you wish to interview lower-level staff, consider asking these executives to inform their staff that you will be contacting them to arrange a meeting. Schedule interviews during working hours and try to accommodate witnesses' schedules as much as possible. Find appropriate conference space for the interviews, preferably a private location. If possible, schedule two-person lawyer teams to perform the interviews, to make the best use of the witnesses' time and to facilitate more complete note-taking at meetings. Plan to have extra time at the end of your scheduled interviews.

If you wish to interview witnesses formerly employed by the overseas subsidiary or supplier, consider whether a company executive should make preliminary initial contact. Then, contact the former employees directly. Schedule the interviews at the witnesses' convenience and at the locations of their choice.

Consider whether a company representative should be present for any interviews. If necessary, arrange for translators and/or security to be present or available. Evaluate whether any witnesses should be advised to retain separate counsel or informed that they may bring separate counsel to the

interviews. Also consider whether other third parties, including forensic accountants or other experts, should be present for any of the interviews. If you invite third parties to an interview, evaluate the effect on attorney-client privilege and work-product issues and how best to resolve such issues.

In general, schedule witness interviews so that you interview lower-level employees before higher-level employees. Otherwise, you will have to interview higher-level executives more than once, to address details that arise during meetings with lower-level employees. If questions or discrepancies you wish to address with a witness arise after you have completed that witness's interview, however, schedule a second-round interview if possible within the time constraints.

DURING THE INTERVIEW

At the commencement of the interview, explain to the witness the purpose of the meeting and why the interview is important. Introduce yourself as counsel for the company and introduce all other meeting attendees to the witness. Explain to the witness that you do not represent him or her personally and that, as counsel for the company, you are required to report the results of your investigation to management (or, if applicable, to a committee of the board). Ensure that the witness is comfortable and tell him or her that you will be taking regular breaks.

Confirm the witness's background and try to establish rapport. Then, address the topics and documents identified on your outline. Check off the topics as you address them. In addition to the witness's personal knowledge about the topics, discuss rumors and hearsay. Do not be wedded to your outline. Ask both broad and narrow questions. Investigate "good" and "bad" facts. However, do not say anything you would not want repeated to a jury.

Observe the witness's body language carefully. Take comprehensive notes on his or her demeanor and comments. Before you finish, review your notes and outline to ensure that you have no further questions.

As you begin to wrap up the interview, explain that the witness should keep the matters discussed during the interview confidential. Tell the witness that you may need to speak with him or her again and obtain contact information. Ask the witness if he or she expects the contact information to change within the next three to six months. Give the witness your contact information and encourage the witness to contact you if he or she later thinks of any additional relevant information. Of course, thank the witness for his or her time.

AFTER THE INTERVIEW: FOLLOW UP

During interviews, it is common for a witness to offer, or for an interviewer to request, further information or copies of additional documents. During interview blitzes, it can be easy to lose track of these follow-up action items. Make a list of them. Execute your action items and follow up with witnesses to ensure that they do the same.

AFTER THE INTERVIEW: PREPARE WITNESS INTERVIEW MEMORANDA

You should prepare your interview memoranda as soon as possible after each witness interview, especially if you are performing a series of interviews. Your memoranda should contain your thoughts and impressions about the witness's demeanor and comments and should so state explicitly. You also should mark the memoranda as attorney work product, protected by the attorney-client privilege. When your memoranda are complete, distribute them to your legal team and maintain them in a paper file. You likely will need them again. ■

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RECENT TRENDS IN INTERNATIONAL PRODUCT LIABILITY LITIGATION

THE UNITED STATES COURTS COLLECTIVELY ARE BECOMING THE "WORLD'S COURTHOUSE."

Attracted by the high quality and efficiency of U.S. courts, the increasing willingness of U.S. courts to exercise jurisdiction over international disputes, and the perception that larger damage awards and punitive damages may be available in U.S. courts, non-U.S. litigants are filing cases in U.S. courts with increasing frequency. U.S. companies named as defendants traditionally reacted to such lawsuits by filing motions to dismiss in favor of the non-U.S. courts based on the doctrine of *forum non conveniens*. However, changed conditions in many countries have now made such motions much more difficult or, worse, ill-advised.

Corporate litigants (particularly product manufacturers and distributors with operations in many different countries) and their lawyers need to recognize and understand the unique opportunities and challenges of international litigation in the 21st century. As such corporations navigate this changed litigation environment, they should be well versed in the many procedural challenges, and the strategies for overcoming those challenges, that could affect the ultimate outcome of the litigation. This article will focus on a few of the challenges that have gotten increasing attention by the courts in recent years: key considerations in deciding where to sue or be sued, challenges of cross-border discovery, and frequently overlooked tools for managing parallel proceedings in non-U.S. and U.S. courts.

WHERE TO SUE OR BE SUED

When a U.S.-based company finds itself defending against claims brought in the U.S. by residents of another country for events that allegedly occurred there, the company's first reaction may be (and historically often has been) to seek dismissal of the case in favor of the courts of that country, based on the doctrine of *forum non conveniens*. The reasons for that reaction may have included the perception that the non-U.S. legal system almost always was more attractive for a defendant than the U.S. system because the non-U.S. system often did not recognize legal theories such as collective actions or strict liability that are more common in the U.S.; did not permit large damage awards or punitive damages; did not allow wide-ranging discovery; or did not permit contingency-fee agreements with plaintiffs' counsel.

As recent experience has shown, however, litigating can be extremely difficult in a faraway court without a truly functioning judiciary; in the judicial system of an autocratic regime where transparency or independence are lacking due to rampant politicization or corruption; where the ability to conduct meaningful discovery into the non-U.S. plaintiffs' claims is limited; and/or where laws are enacted specifically to disadvantage nonresident companies. Thus, a U.S. company may prefer (as many now do, given their other options) to defend against non-U.S. claims brought in the United States, where the company will have greater assurance of having, at the very least, the benefit of due process, familiar rules and procedures, broader discovery rights, and an independent judiciary. Similar considerations must factor into a U.S.-based company's decision about where to bring suit as the plaintiff if it is presented with the option to sue a non-U.S.-based defendant in either a U.S. or non-U.S. jurisdiction.

A rigorous comparative analysis of these factors should be undertaken for each case because the legal, judicial, and political climate can and will vary dramatically from country to country, between regions or other subdivisions within a country, and even within the same country from year to year. Of course, such an analysis cannot be divorced from an independent and careful assessment of the many other factors on which any case turns—the nature of the case, the identities of the parties, the specific court and judge, the law that will apply, and so on. The key legal issues addressed in this article, including forum selection, discovery challenges, and parallel proceedings, should be assessed with these considerations in mind.

Forum Non Conveniens. Most practitioners likely are familiar with the *forum non conveniens* doctrine, addressed by the U.S. Supreme Court in the seminal case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Under this doctrine, a U.S. court may dismiss a case pending before it if the moving party can show that an adequate alternative forum exists and that the balance between the private interests of the parties and the public interests favors the alternative forum.[1] In considering the private interests of the litigants, the courts take into account such factors as the location of documentary and other evidence, the residency of the witnesses, and the need for translators. In assessing the public interests, the courts consider such factors as the burden on local court dockets and jurors, the familiarity of the court with applicable law, and the citizenship and residency of the parties.[2]

Yet even if the balance of interests favors an alternative forum, U.S. courts will not dismiss a case if the alternative forum is inadequate. To determine adequacy, courts will analyze such factors as whether the proposed alternative venue has a functioning and fair court system and whether the plaintiff would have a remedy under the foreign law.[3]

A U.S. court may stay, rather than dismiss, the case under the *forum non conveniens* doctrine. A stay allows the U.S. court to retain jurisdiction while sending the case to the alternative forum to be litigated. If the alternative forum proves to be inadequate, the U.S. court can resume trial of the case.[4]

Practitioners should be aware of recent case law holding that a district court can dispose of an action based on *forum non conveniens*, even before considering subject-matter or personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.[5] Thus, where counsel anticipates a lengthy, intensive, and expensive discovery battle on personal jurisdiction, for example, he or she should consider bringing an early motion to stay or dismiss based on *forum non conveniens*, even before obtaining a determination on personal jurisdiction.[6]

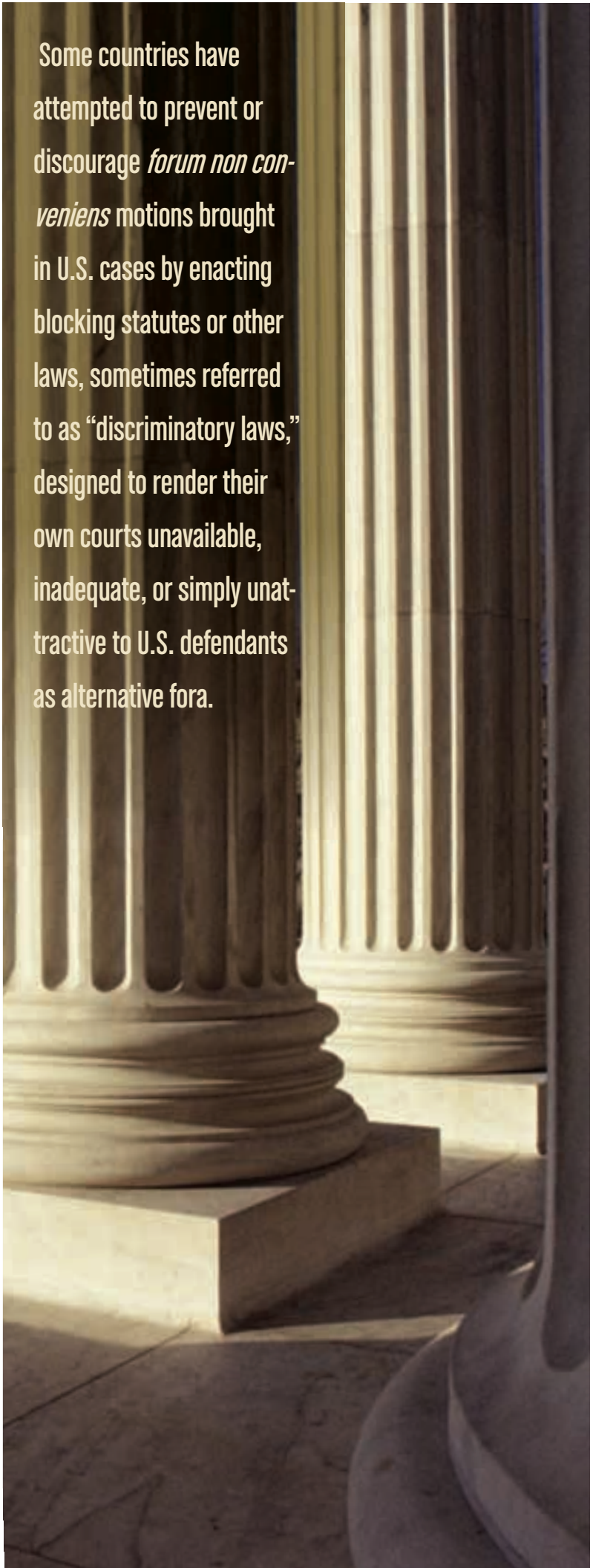
Blocking Statutes or "Discriminatory Laws" Can Prevent Parties From Seeking a Change of Forum. Some countries have attempted to prevent or discourage *forum non*

conveniens motions brought in U.S. cases by enacting blocking statutes or other laws, sometimes referred to as "discriminatory laws," designed to render their own courts unavailable, inadequate, or simply unattractive to U.S. defendants as alternative fora. Blocking statutes are designed to deprive the non-U.S. court of jurisdiction over a dispute once a case involving that dispute has been filed in a U.S. court, thus eliminating the non-U.S. court as an alternative available forum in the event that a later *forum non conveniens* motion is brought. For example, a blocking statute typically provides that, if a citizen of Country X files a lawsuit in any court outside Country X, then the courts of Country X shall lose, or shall be barred from exercising, jurisdiction over that dispute forever. Without an alternative forum to hear the dispute, so the theory goes, a U.S. court cannot dismiss the suit on *forum non conveniens* grounds.

Ecuador enacted a blocking statute in 1998, known as Law 55, which provides that if a suit involving an Ecuadorian plaintiff is filed outside Ecuadorian territory, the national competence and jurisdiction of Ecuadorian courts shall be extinguished. Several other Latin American countries have enacted similar statutes.[7] Even these blocking statutes, however, are not always successful.[8]

Other countries opt for "discriminatory laws" rather than blocking statutes to discourage U.S. *forum non conveniens* dismissals. For example, in 2001, Nicaragua enacted Special Law 364, which specifically applied to claims of sterility due to alleged exposure to the pesticide 1,2-dibromo-3-chloropropane, or "DBCP." By its terms, that law imposed a host of onerous conditions upon U.S. companies that sought to defend themselves in DBCP cases refiled in Nicaraguan courts after *forum non conveniens* dismissal of the cases in the United States. Among other things, Special Law 364 requires U.S.-based corporate defendants that had manufactured or allegedly used DBCP on banana plantations in Nicaragua to post a US$100,000 bond per plaintiff as a prerequisite to defending the case. (Claims by thousands of Nicaraguan DBCP plaintiffs are pending.)

In addition, Special Law 364 repeals applicable statutes of limitations and creates summary proceedings called "3-8-3." These proceedings require that the complaint be answered within three days, that all evidence be submitted within the next eight days, and that a verdict be rendered three days



later. Special Law 364 also creates an irrefutable presumption of causation if the plaintiff can produce two laboratory tests stating that he is sterile or has a substantially reduced sperm count, even in the face of birth certificates or other evidence of post-exposure children; it establishes a minimum damage award of US$100,000 per plaintiff and allows for only limited appeals.

Perhaps not surprisingly, the Nicaraguan plaintiffs in one of the first suits brought under Special Law 364 obtained a US$97 million judgment against the U.S.-company defendants and then sought to enforce that judgment in a Florida court. Evaluating the judgment obtained under Special Law 364, the district court declared that the judgment was unenforceable under the Uniform Foreign Money-Judgments Recognition Act because, among other things, the Nicaraguan court lacked jurisdiction over the U.S. defendants, and the irrefutable presumption of causation in Special Law 364 and the unfair targeting of U.S. companies violated due process and Florida public policy.[9]

Discriminatory laws such as Special Law 364 can create serious pitfalls for unsuspecting or uninformed U.S. defendants. For this reason, now more than ever, a U.S. corporate defendant that previously might have moved to stay or dismiss on *forum non conveniens* grounds should carefully examine the current legal, judicial, and political landscape in the country hosting the potential alternative forum before reactively pursuing any such motion. A U.S. company finding itself at the receiving end of a "discriminatory law" such as Nicaragua's Special Law 364, after having obtained a *forum non conveniens* dismissal in the U.S., may have a difficult time arguing later that the non-U.S. court did not constitute an adequate alternative forum after all, unless the company can point to circumstances that changed substantially between the time of the dismissal and the application of any such "discriminatory law" against the company; *e.g.*, the "discriminatory law" did not exist at the time of the *forum non conveniens* dismissal.

Foreign Law May Apply Even if the Case Remains Pending in a U.S. Court. Even parties that opt to have non-U.S. disputes heard in U.S. courts face unique challenges. For example, one potential difficulty with litigating an international dispute before a U.S. court is that the court may need to apply foreign law to one or more issues involved in the case—law with which the U.S. court may have little to no familiarity. So, how is a U.S. court to become educated on this foreign law?

Rule 44.1 of the Federal Rules of Civil Procedure suggests a mechanism for importing foreign law into a domestic case: "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Rule 44.1 allows the court to hear each party's foreign-law experts, or to appoint its own expert, to obtain a better understanding of the foreign law at issue.

The importance of finding knowledgeable and experienced experts to help educate the court on foreign-law issues cannot be overstated. This point is well illustrated by a recent case involving a bridge in Panama that had collapsed during construction.[10] The construction company's assignee filed a product liability suit in Florida against the manufacturer of the concrete blocks used in the bridge's construction. The block-manufacturer defendant argued that the litigation should be dismissed because applicable Panamanian law did not recognize strict liability at the time of the bridge collapse and did not allow a court to impose liability against the manufacturer of the component parts. Invoking Rule 44.1, the parties submitted to the court competing affidavits of foreign-law experts regarding the interpretation of Panamanian product liability law and its application to the issues in the case. Ultimately, the court agreed that Panamanian law should apply; sided with the block manufacturer's expert, whom the court found to have "superior experience in civil matters such as those at issue in this case"; and dismissed the action.[11]

A trial court's interpretation of foreign law is treated as a ruling on a question of law and is therefore subject to full review on appeal.[12] Upon review, the appellate court has full authority to interpret the applied foreign law after considering *any* information that might be relevant.[13] Thus, at both the trial- and appellate-court levels, a party would do well to devote the time and resources necessary to select highly qualified foreign-law experts if foreign law is potentially applicable in a case pending in a U.S. court.

STRATEGIES FOR OVERCOMING THE CHALLENGES OF CROSS-BORDER DISCOVERY

Another challenge faced by corporate defendants that find themselves defending against product liability or other personal-injury claims brought in the U.S. by plaintiffs resident in other countries is that formal discovery as to such plaintiffs may be much more limited, cumbersome, and costly. Although a plaintiff residing outside the United States who files a product liability or other personal-injury suit in the U.S. generally would be subject to a deposition, written discovery, and a physical examination, the court could place conditions upon even these basic discovery tools that would make them much more difficult, drawn out, and expensive for the defendant. For example, taking into account the economic differences of the parties and other logistical issues, some U.S. courts have required U.S.-based-company defendants to bear the cost of traveling to the home countries of non-U.S.-resident plaintiffs to take depositions and/or conduct physical or mental examinations of the plaintiffs there. These costs can include the travel expenses of deposition officers, court-certified interpreters, videographers, and/or experts.

The courts have recognized other limits to such discovery. The United States Supreme Court has held that, under the principles of international comity, U.S. courts must exercise "special vigilance" to ensure that non-U.S. litigants or witnesses are not subjected to unnecessary or unduly burdensome discovery that might disadvantage them relative to U.S. litigants or witnesses.[14] American courts are directed to give "most careful consideration" to their objections to discovery and to accord "due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."[15] Determining whether a particular discovery request is reasonable or abusive must be done by the trial court on a case-by-case basis, taking into account the facts of each case and the non-U.S. interests at stake.[16]

Discovery against non-U.S. litigants can also be obtained using the discovery procedures set forth in certain treaties, such as the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention"), to which the United States and more than 40 other countries are signatories. Another such treaty is the Inter-American Convention on Letters Rogatory, to which the United States, Spain, and many Latin American countries are parties.

Under the Hague Convention, a party in the U.S. can petition a U.S. court to send letters rogatory, along with translations of whatever documents or information are being requested, through official government channels to a "central authority" in another signatory country, using the procedures specified by that "central authority" to obtain the information sought from the party resident in that other country. But these discovery procedures can be time-consuming and cumbersome; obtaining a response to a discovery request processed through the Hague Convention can take many months. In addition, some signatories to the Hague Convention severely limit discovery rights. For example, in certain countries, depositions taken for use in foreign courts are viewed as violative of the countries' sovereignty and are prohibited; government authorities may detain and arrest persons taking depositions within such countries for use in the courts of other countries.

Notably, the Hague Convention's discovery procedures are permissive. American courts have discretion to determine whether principles of international comity require a party to conduct discovery in accordance with the Hague Convention or whether that party may resort to regular discovery methods instead.[17] The non-U.S. litigant bears the burden of persuading the court that the Hague Convention's discovery procedures must be used.[18]

The potential difficulties with discovery aimed at a non-U.S.-based party are compounded when a party to U.S. litigation seeks to take discovery of a nonparty residing outside the United States. In this instance, the Hague Convention can be particularly helpful because there may not be an alternative discovery method available to obtain testimony, information, or documents from a non-U.S. witness who is not otherwise subject to personal jurisdiction in the U.S. The Hague Convention's procedures are the same for both litigants and nonlitigants residing in a signatory country. Where the non-U.S. witness resides in a country that is not a signatory to the Hague Convention or any other such treaty, the lawyer's opportunity to conduct meaningful discovery to seek out the truth, such as to corroborate the claims of a plaintiff

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LITIGATION IN ENGLAND

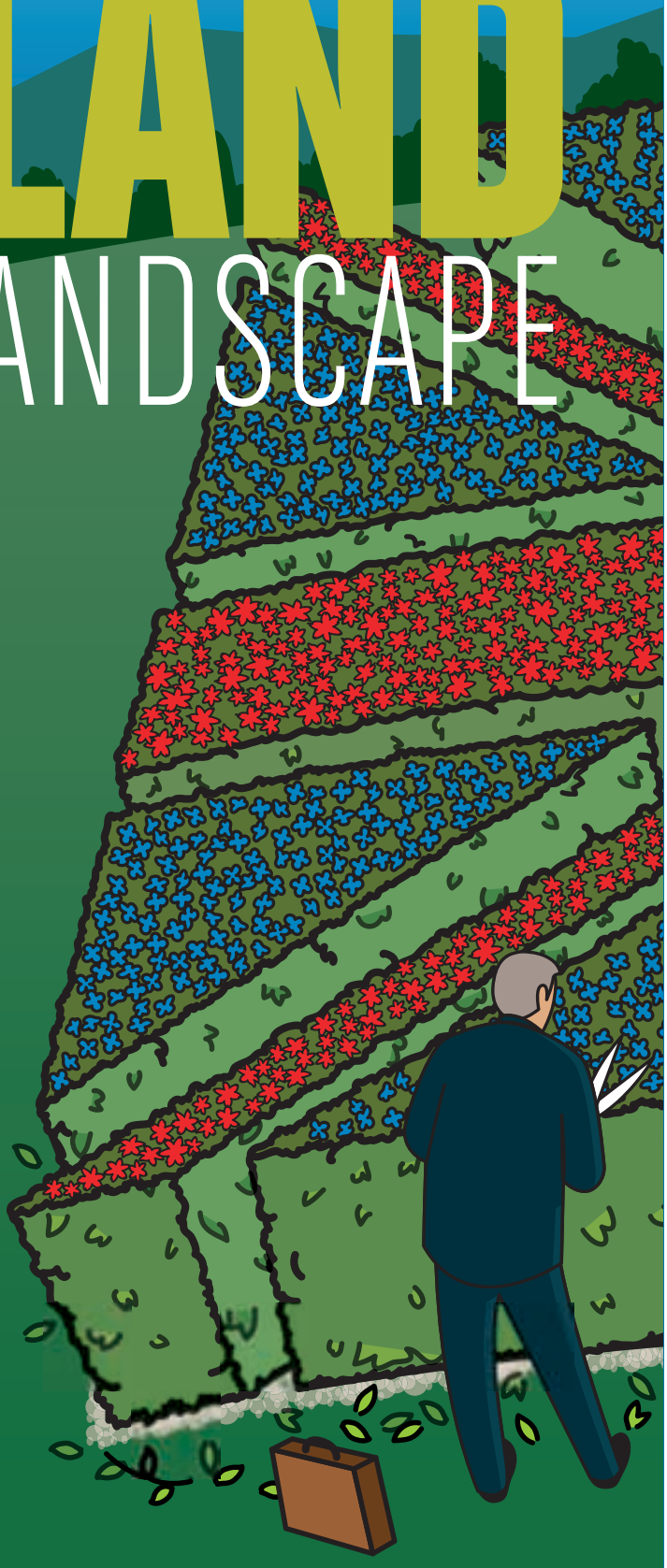
A CHANGING LANDSCAPE

by Ian F. Lupson

Manufacturers and distributors of goods in, and into, the United Kingdom and other EU member states will be familiar with the framework governing liability in the event that those goods cause damage or injury to consumers. The combination of the European Product Liability Directive (85/374/EEC) and the two General Product Safety Directives (92/59/EEC and 2001/95/EEC) imposes requirements as to product safety and information and provides a uniform framework that, when incorporated into the domestic laws of the various EU states, gives rights of compensation in the event of default.

Strict liability is imposed on the manufacturer/distributor of a defective product, and a product is "defective" if it does not provide the level of safety that the consumer might reasonably expect. The bar is therefore set low, so why does no U.S.-style "claim fest" arise when a widely used product is alleged to be defective? The traditional response to this question has been that it has not been feasible to organize a "mass tort" approach to litigation in the U.K.

Might that be about to change?



This article looks at changes in the litigation landscape in the U.K. and asks whether, against the background of sharp overall economic decline, U.S. companies need to be more wary of the risk of suit in the U.K. and to review and revise their already strained legal budgets to accommodate this new risk.

The usual starting point for any analysis of why the U.S. is generally a more litigious business environment than the U.K. is the recognition that the U.K. "cost-shifting" rules militate against speculative litigation. That is undoubtedly true; the prospect of having to pay typically 60 to 70 percent of the other side's costs in the event of loss will commonly deter a certain type of claimant. As will the fact that, even if a claimant has no intention of actually proceeding to trial, he can't just "have a go" and then walk away if it doesn't work. Walking away comes with a similar price tag.

This "adverse costs" rule, along with a number of other factors, might be about to change, and these changes will undoubtedly affect the U.K. litigation landscape.

CRITICAL MASS

First, in common with many EU jurisdictions, the U.K. is moving closer toward a system that a U.S. litigator would recognize as permitting class actions. Note that the expression is "moving closer toward" rather than "adopting"—at least at this point.

If a mass-produced product is defective, an individual consumer would typically suffer only very limited loss (and, one hopes, no injury). Leaving aside issues of product recall—EU developments in which area probably warrant a separate article—a manufacturer/distributor's concerns arise if a large number of affected purchasers suffer and then come together to present a united front against it. The reader may recognize this as one of the key benefits/disadvantages (depending upon one's perspective) of the U.S. class-action system: a concentration of firepower.

The U.K. does not presently permit class actions, in the sense that a lawyer cannot "scoop the pot" by seeking to have a court order that his firm should be counsel for all potentially aggrieved purchasers unless such individual purchasers positively opt out of proceedings. It is sometimes said that in the U.K., a lawyer cannot act for a client he does not know.

The U.K. does, however, have Group Litigation Orders, or "GLOs." GLOs were introduced in the U.K. in 2000, and they can be made in any claim where there are multiple parties to the same cause of action. Crucially, however, claimants wishing to be involved in the litigation must opt in by applying to the GLO Group Register. An aggrieved party must first commence his own action against the defendant, and the making of the GLO then serves to have these separate actions managed collectively. It is an efficiency measure that stops well short of U.S.-style class-action litigation.

That GLOs can work is shown by a case brought a little while ago against the Borough Council of Corby, a town in the English Midlands, by and on behalf of a number of children. These claimants had suffered limb deformity allegedly caused by their mothers' environmental exposure to toxins during the Council's irresponsible dismantling of the large steel-making facility that once dominated the town. *In re Corby Group Litigation* [2008] EWCA Civ 463. This case demonstrates the effectiveness of using GLOs to allow a number of individual and perhaps otherwise powerless litigants to band together for strength in numbers—and to prevail.

In the context of antitrust (or, as it is referred to in the U.K., "anti-cartel") litigation, the governing statute—the Enterprise Act 2002—likewise makes provision for certain "specified bodies" to bring proceedings for claims for damages before the Competition Appeal Tribunal on behalf of a group of two or more named individual consumers. Each consumer must, however, give his consent to the claims being brought by the specified body. Specified bodies tend to be consumer associations and the like.

However, recent decisions of the English courts have limited the level of recovery in successful actions against cartelists to the measure of what individual claimants have actually lost (*i.e.*, compensatory damages rather than damages related in any way to the profit generated by the cartel). This will likely stifle class-action-style development in this area for some time. The rewards to the participants are simply not great enough.

Next, the influential Civil Justice Council (the statutory body responsible for advising the U.K. government on the continuing reform of the civil justice system), in a report issued in July 2008 entitled "Improving Access to Justice through

ANOTHER DEFINING CHARACTERISTIC OF U.S. COMMERCIAL LITIGATION—AT LEAST AS SEEN FROM A NON-U.S. VANTAGE POINT—IS THE ABILITY OF THE SUCCESSFUL PLAINTIFF'S LAWYER TO SHARE IN THE SPOILS OF HIS CLIENT'S VICTORY: THE CONTINGENCY FEE. CONTINGENCY FEES ARE PRESENTLY UNLAWFUL IN THE U.K.

Collective Actions," has formally recommended new legislation to make collective actions generally available in England and Wales. One of the key assumptions listed in the report is that "[c]ollective action reform is consistent with the Government's policy statements supportive of collective private action and is in addition desirable in the light of European policy which is focused on improving collective redress for consumers."

The newly appointed coalition government in the U.K., however, is likely to have quite a lot on its mind in the coming years, and one wonders, therefore, whether this recommendation will formally be translated into a statute anytime soon. On the other hand, it is cunningly labeled as being part of "Access to Justice" (a concept difficult to argue against), and those who promote this form of private redress, which requires little support from the public purse (which in the U.K., as elsewhere, is likely to suffer huge cuts in the coming years), may see their ideas find favor. And the Cameron/Clegg administration has moved quickly to accept other recommendations for reform—on which, see below.

In all these ways (GLOs, anti-cartel suits, and the possibility of statutory revision), the stakes are raised by the looming prospect of very large-scale multiclaimant litigation not dissimilar to that experienced by U.S. corporations in their own backyard. However, in addition to these measures allowing the concentration of firepower into "big cases," another important

and potentially far-reaching change is already taking place in the U.K. relating to the way litigation can be funded.

FUNDING

Another defining characteristic of U.S. commercial litigation—at least as seen from a non-U.S. vantage point—is the ability of the successful plaintiff's lawyer to share in the spoils of his client's victory: the contingency fee. Contingency fees are presently unlawful in the U.K.

Instead, the U.K. has the similarly named (sometimes confusingly so) "conditional fee." Under this arrangement, a lawyer can agree to act on a no-win, no-fee basis (just as he can in the U.S.), but unlike in the U.S., the upside potential to the lawyer's income if he wins is measured not as a percentage of what's at stake, but as a percentage increase in that lawyer's ordinary fees. Since the maximum percentage uplift is 100 percent—and that will be allowed only in the most difficult cases—it is immediately apparent that the incentive to get involved in no-win, no-fee cases can be limited.

However, a recent and extensive investigation seems to hint that perhaps, in the right circumstances, the English courts' stance with regard to consolidated actions and fee issues might soften. The investigation, chaired by a senior U.K. judge, Lord Justice Jackson, was entitled "A Review of Civil Litigation Costs" and was released in January 2010.

The report was commissioned in light of the near-scandal caused by the level of costs run up in two recent English High Court cases—one involving the collapse of the Bank of Commerce and Credit International and the other, the near-demise of the English life insurer Equitable Life. The cost of litigating in the U.K. was thought to have become so high that non-U.K. litigants (who after all have a choice as to where their arguments should be heard) might go elsewhere. That would not be good for U.K. Plc, so up went the cry (figuratively) of "Something must be done!" Lord Justice Jackson's report is that "something."

We have already seen that there has been some suggestion that the U.K. might adopt U.S.-style "unless you opt out, you're in" class-action jurisprudence. But what makes that attractive to the legal fraternity, of course (or at least to part of it), is the ability to share in the spoils. Since sharing in the spoils doesn't actually involve the loser's paying *more*, it's perhaps not too surprising that Lord Justice Jackson's report mulls over the possibility that—again, only in certain circumstances—the English courts might have to get used to the idea that a plaintiff's lawyer will be paid out of (*i.e.*, share) his client's winnings: the contingency fee. The report suggests that, subject to a 25 percent limit, contingency fees may be made lawful in England and Wales.

To say that this would be quite a change is something of an understatement, but that the law in such areas is capable of swift development is shown by what has happened to the old-fashioned common-law concepts of maintenance and champerty (*i.e.*, the doctrine that held it to be against public policy for a disinterested third party—somebody not involved in the case—to take a financial stake in somebody else's litigation). Such contracts, while no longer illegal (*i.e.*, not carrying criminal sanction), had until very recently been considered unlawful (*i.e.*, incapable of enforcement).

That view has become deeply unfashionable, and again under the banner of "Access to Justice," the Civil Justice Council has pronounced itself in favor of outside funding—and an outside funder (unlike the lawyer it funds) *can*, even as things presently stand, take a percentage of the spoils.

In a very short period of time, a handful of such providers have sprung up to service the U.K. courts—in essence creating a U.K. market for such "investment." If the amounts at stake are large enough (experience has shown that mass-claimant/low-individual-claim-value cases are not ideal for funding) and if the view on the merits is sufficiently robust, there is currently no great shortage of funding to back English litigation, even to the tune of several million pounds (slightly more in dollars).

One such well-known fund recently announced that it had raised £60 million (US$90 million) to invest primarily in U.K.-based commercial litigation. The backing comes at a price, of course—typically 20 to 30 percent of any eventual recovery.

Readers whose eyes have not glazed over by this point may well be asking, "That's all very well, but what happens if the claimant loses? His backers may pay *his* fees, but what about the other side's fees payable under the 'English rule'?"

There is a market answer to that question too. It is called ATE—or "after the event" insurance, the "event" being the accrual of the cause of action. Simply put, a claimant approaches an insurer, seeking to insure against the cost of losing and having to pay the other side's costs. The insurer does its best to assess the risk of having to pay out, the likely maximum payment, and so on. If it likes the risk, it will provide a premium indication.

ATE is relatively highly rated (*i.e.*, expensive), but payment of the premium is often deferred; indeed, in the present climate, it can be made payable only on a successful outcome to the claim. This creates a situation where an impecunious claimant (with a good claim) may well be able to get financial backing to bring the claim, and an insurer's protection against the cost of it all going wrong, at a cost of precisely *nothing* to himself. This is what is meant by the premium's being payable only on a success. If the claimant wins, the insurer has nothing to pay out, and the costs the claimant recovers from the loser include the premium. If the claimant loses, the insurers have to indemnify him for his liability to pay the other side's costs, but they waive the premium.

Thus, an impecunious claimant with a good claim can insulate himself entirely from the risk of losing and stand to retain 70 percent or so of the proceeds if he wins. The lawyer gets to run a case that might otherwise not have happened, and because he takes it on a conditional-fee basis, as explained above, he typically receives cost rates from the funder in any event, with an uplift (paid for by the loser) if he wins.

ATE insurance has itself become problematic, however. In our "winning case" scenario, the plaintiff is obliged to pay the deferred premium but in the ordinary course can claim it back through English "cost-shifting" rules. The trouble is that, in part to make up for all those times when no premium ends up being charged at all, ATE premiums when they *are* charged (and then when recovery is sought) are often very large, increasing still further the cost burden borne by the unsuccessful litigant. Lord Justice Jackson has a view on this phenomenon. His Lordship has suggested that the ATE premium be irrecoverable—that is to say, it must be paid out of the claimant's recovery, not transferred to the defendant. The coalition government seems warm to this idea, which is likely therefore to become law.

SO WHAT IS THE PROGNOSIS?

Speculative claims are unlikely to see much increase, as funders/insurers are not fools, and they simply will not back that kind of case. Conversely, impecunious clients with good claims are likely to find them easier to pursue—hence the attraction in terms of those who advocate "Access to Justice."

And there's a whole new class of impecunious claimants—full-size corporations whose legal budgets have had to be slashed in response to the recession and which, if anecdotal evidence is to be believed, are already wising up to this new way of maintaining litigation that might otherwise have had to be abandoned for reasons of cost.

Indeed, with the weight of the Establishment being brought to bear on reducing the costs of litigation for the precise reason of preserving/increasing the workload of the English High Court, it is a fair bet to say that, particularly as the effects of the global financial crisis begin to crystallize, the number of new cases filed will increase. This is already the case in areas such as professional malfeasance.

There is also a concern among commentators that litigation—still primarily seen in the U.K. as a means of obtaining redress in the event of wrong—may morph into something of a new investment class, for backers of legal funding vehicles. It is countercyclical, and returns are not dependent upon the normal vicissitudes of economic life. Who knows, a creative investment banker may even develop a secondary market in litigation bond derivatives. ■

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residing outside the U.S., can be significantly impeded. Of course, the lawyer must proceed in accordance with the laws of the witness's country. If the witness is willing to sit for a deposition, in either the U.S. or his or her home country (assuming there is no law prohibiting it), then the problem is easily solved. When the witness is unwilling, however, the options are very few. Sometimes parties can use letters rogatory, wholly apart from any treaty rights, in the courts of the unwilling witness's home country to obtain some type of discovery, such as a deposition or "judicial confession" of the witness. These are simply requests to the non-U.S. government, asking it to appoint a deposition officer and to order the witness to appear and testify before such officer.[19] The party seeking the letters rogatory typically makes a motion to the local court, requesting their issuance. But the circumstances under which such discovery is permitted vary widely by country, are often very limited, and in some cases simply do not exist.

Parties seeking discovery of U.S.-based witnesses and documents for use in non-U.S. proceedings have it much easier. Congress enacted 28 U.S.C. § 1782 precisely to provide federal-court assistance to parties seeking to gather evidence to be used before non-U.S. courts and other tribunals.[20] Under Section 1782, upon request of a non-U.S. tribunal or of "any interested person" (which includes parties to a non-U.S. proceeding), a federal district court may order a person within the district to "give his or her testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." The court will consider several discretionary factors when ruling on a Section 1782 request: (1) whether the person from whom discovery is sought is a participant in the non-U.S. proceeding or a non-participant outside the non-U.S. tribunal's jurisdictional reach; (2) the nature of the non-U.S. tribunal, the character of the proceedings, and whether the non-U.S. court would be receptive to U.S. assistance; (3) whether the request is a concealed attempt to circumvent the policies of another country; and (4) whether unduly burdensome or intrusive requests should be rejected or narrowed.[21] Section 1782 can be an invaluable discovery tool for parties, including U.S. companies, that find themselves litigating in non-U.S. courts or before international tribunals and seek relevant evidence located in the United States for use in those non-U.S. proceedings.

MANAGING PARALLEL PROCEEDINGS IN NON-U.S. AND U.S. COURTS

The phrase "parallel proceedings" in international litigation typically refers to the pendency of similar claims between the same parties in the courts of different countries. The situation can arise, for example, in a dispute between a product manufacturer and its distributor, where the product manufacturer contends that it is owed money for a product shipment from the distributor, and the distributor claims that the products shipped were defective. Or the situation can arise in a dispute between a plaintiff claiming he was injured due to a defective product and a product manufacturer contending the claim is barred by a prior settlement and release. If the parties reside in different countries or the events underlying the claims arose in different countries, then one party arguably could file suit in one country while the other party seeks to file suit in a different country, each hoping to obtain a judgment in the courts of the country believed to be most favorable to the party or the claim. A party also might choose to commence parallel proceedings in the hope of being first to obtain a judgment that can then be used to bar the second claim under res judicata, to gain leverage or put pressure on the other party to settle the claim, or to obtain discovery in one forum that it is not entitled to obtain in the other. As the global economy expands, so does the opportunity for international disputes and hence the risk of parallel litigation.

The doctrines of international comity, international abstention, and anti-suit injunction are valuable tools that can be used to help U.S. companies effectively fend off unwanted parallel proceedings, often involving a U.S. court and one or more non-U.S. courts. The doctrines of international comity and international abstention can be used to halt U.S. proceedings in favor of parallel non-U.S. litigation. One court recently waded through the somewhat esoteric distinction between these related doctrines:

> The doctrine of international comity can be applied retrospectively or prospectively. When applied retrospectively, [U.S.] courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings. . . . When applied prospectively, [U.S.] courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum.[22]

In other words, once the court of one country has rendered a final decision in a dispute between the parties, the doctrine of international comity can be invoked to bar any subsequent litigation of the same or similar claims between the parties in the courts of another country (assuming the decision accords with fairness and due process and does not violate the public policy of the second country). This retrospective application of the doctrine is based upon the notion that the judicial decisions of one country should be accorded due respect by the courts of another country, out of recognition for the need to maintain good international relations and ensure reciprocity for the decisions of courts in both countries. American courts have held that there is a strong presumption in favor of recognizing the executive, legislative, and judicial acts of other nations.[23]

Parties seeking to invoke the doctrine often enlist the assistance of the State Department or non-U.S. ministries to provide an amicus brief or letter of support for due recognition of a particular legislative enactment or court decision, citing the potential negative implications of any failure to recognize the enactment or decision. Although such support can be persuasive, it is not binding on a U.S. court.[24]

Parties also may seek to stay or dismiss a U.S. action in favor of parallel proceedings pending in a non-U.S. court by invoking the doctrine of "international abstention." International abstention involves a prospective application of the doctrine of international comity. "Applied prospectively, federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum."[25] Other courts have specified the factors to be considered in determining whether to dismiss or stay a U.S. action under the doctrine of international abstention as follows: the similarity of the parties and issues involved in the non-U.S. action, the promotion of judicial efficiency, the adequacy of relief available in the alternative forum, the issues of fairness to and the convenience of non-U.S. witnesses, the possibility of prejudice to any of the parties, and the temporal sequence of the filing of the actions.[26]

The factors to be considered for dismissal or stay of a U.S. proceeding do not differ markedly between the doctrine of international abstention and the doctrine of *forum non conveniens*.[27] However, the doctrine of *forum non conveniens* can be invoked even if there is no parallel non-U.S. proceeding, whereas international abstention presupposes a parallel non-U.S. proceeding. If there is no parallel non-U.S. proceeding, a party can rely only on the doctrine of *forum non conveniens*; if there is a parallel non-U.S. proceeding, a party can rely on both doctrines.[28]

A party seeking to achieve the converse of international abstention, *i.e.*, to halt parallel proceedings in non-U.S. courts in favor of an ongoing U.S. court action, should consider seeking an anti-suit injunction from the U.S. court. An anti-suit injunction is a U.S. court order that enjoins a person subject to the court's jurisdiction from pursuing litigation in a non-U.S. court.[29] Notably, this injunction is aimed at the party over whom the U.S. court has jurisdiction, not at the non-U.S. court. Any failure to comply could be punishable as a contempt of court.

Before a U.S. court will consider issuing an anti-suit injunction, the party seeking the injunction must establish three threshold requirements: (1) the U.S. court must have personal jurisdiction over the party to be enjoined; (2) the parties must be the same in both cases; and (3) the resolution of the case before the enjoining court must be dispositive of the action to be enjoined.[30]

Once the threshold requirements have been met, U.S. courts will consider various factors to determine whether an anti-suit

injunction should issue. However, the weight, if any, that a court will accord these factors will depend upon the circuit in which the court sits.

The Courts of Appeal for the Third, Sixth, and D.C. Circuits follow a strict standard based on principles of comity, under which the courts generally resist "meddling" in the proceedings of another court.[31] Under this standard, a court will refrain from issuing an anti-suit injunction unless one of two factors can be shown: the non-U.S. action threatens the jurisdiction of the enjoining court (such as when a proceeding is *in rem*, since res judicata alone will not protect the first court's jurisdiction), or a party is attempting to evade an important public policy of the forum. Duplication of issues or even a party's intent to vex, annoy, or harass the other party does not justify interfering in an action in a non-U.S. court. Rather, courts observing the strict comity-based standard will allow parallel litigation to proceed in both fora until judgment is obtained in one court, which then may be pled as res judicata in the other court.

Although the Court of Appeal for the First Circuit generally tends toward the strict standard, it looks to the "totality of the circumstances," applying a rebuttable presumption against an anti-suit injunction, which "may be counterbalanced by other facts and factors particular to a specific case."[32]

The Courts of Appeal for the Fifth, Seventh, and Ninth Circuits follow a more liberal standard under which the court may consider the vexatiousness, oppressiveness, or inconvenience of the non-U.S. litigation.[33] These courts hold that an anti-suit injunction is appropriate where the non-U.S. litigation would frustrate a policy of the forum issuing the injunction, threaten the issuing court's jurisdiction, or be vexatious or oppressive. It is also appropriate when adjudication in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.

The Court of Appeal for the Second Circuit takes a middle-ground approach, placing greater weight on comity than the liberal standard, while considering a variety of equitable factors in determining whether to issue an anti-suit injunction. These factors include whether the non-U.S. litigation would frustrate a public policy in the enjoining forum, be vexatious, threaten the issuing court's jurisdiction, result in prejudice to other equitable considerations, or result in delay, inconvenience, expense, inconsistency, or a race to judgment.[34]

Comity and anti-suit injunctions can help ensure that once a corporation obtains a favorable judgment in one forum, it does not have to relitigate the issue in other venues. Anti-suit injunctions also can help consolidate all litigation into a preferred forum when related claims are being pursued in two fora. While circuits apply the anti-suit-injunction factors in different ways, anti-suit injunctions can enhance a company's ability to manage parallel proceedings effectively in both U.S. and non-U.S. courts.

CONCLUSION

International product liability litigation will continue to evolve in the 21st-century global economy. When U.S. companies with a worldwide presence face international litigation, they should choose their venues carefully and ensure that they are using all available tools to obtain and defend against cross-border discovery. They also should have at the ready several tools, often overlooked, to fend off unwanted parallel litigation in both the U.S. and non-U.S. tribunals. As the global economy continues to expand and U.S. product manufacturers and sellers find themselves embroiled in international litigation, whether in U.S. courts, the courts of other nations, or both, these companies will need to stay abreast of the ever-changing tools available to handle that litigation effectively and economically. By doing so, companies can go back to exploring successful business opportunities in the global market, while minimizing the risks attendant to today's—and tomorrow's—international litigation. ■

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[1] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002); *see also Gulf Oil*, 330 U.S. at 508–09.

[2] *See*, *e.g.*, *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1355–58 (S.D. Texas 1995).

[3] *See*, *e.g.*, *Delgado*, 890 F. Supp. at 1355–58.

[4] *See Ministry of Health v. Shiley Inc.*, 858 F. Supp. 1426, 1442 (C.D. Cal. 1994) (holding that the court would stay the case on *forum non conveniens* grounds in favor of trial in Canada, subject to certain conditions, while retaining jurisdiction to make further orders as might be appropriate); *see also Delgado*, 890 F. Supp. at 1375 (holding that if the Guatemalan court dismissed the action for lack of subject-matter jurisdiction, the plaintiff could return to the U.S. court and resume the case as if it had never been dismissed for *forum non conveniens*).

[5] *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007).

[6] *Cf. Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083 (9th Cir. 2009) (holding that *Sinochem* does not restrict the ability of federal appellate courts to review whether the district court had subject-matter jurisdiction prior to ruling on the *forum non conveniens* motion).

[7] *See* Decree Number 34-97 (1997) (Guatemala); Law in Defense of the Procedural Rights of Nationals and Residents (Honduras); and Article 40 of the Statute of Private International Law (Venezuela).

[8] *See Aguinda*, 303 F.3d at 480 (2d Cir. 2002) (case dismissed on *forum non conveniens* grounds despite Ecuador's blocking statute, which was found to be unconstitutional and not retroactive by Ecuador's own Constitutional Court).

[9] *See Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1351–52 (S.D. Fla. 2009).

[10] *Pycsa Panama, S.A. v. Tensar Earth Tech., Inc.*, 625 F. Supp. 2d 1198 (S.D. Fla. 2008).

[11] *See id.* at 1227, fn. 18.

[12] Fed. R. Civ. Proc. Rule 44.1.

[13] *See U.S. ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997) (holding that "[i]nterpretations of foreign law are subject to plenary review and may be resolved by reference to any relevant information").

[14] *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987).

[15] *Id.* at 546.

[16] *Id.* at 545 (recognizing that some types of discovery requests are "much more intrusive than others").

[17] *Société Nationale*, 482 U.S. at 536. *See also* Fed. R. Civ. Proc. Rule 28.

[18] *See*, *e.g.*, *American Home Assur. Co. v. Société Commerciale Toutelectric*, 104 Cal. App. 4th 406, 428 (2002).

[19] *See* Fed. R. Civ. Proc. Rule 28(b)(3); 28 U.S.C. § 1781.

[20] *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

[21] *See Intel Corp.*, 542 U.S. at 264–65.

[22] *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

[23] *See*, *e.g.*, *In re Board of Directors of Telecom Argentina, S.A.*, 528 F.3d 162 (2d Cir. 2008) (op. by Sotomayor, J.) (affirming recognition of an Argentine bankruptcy court's decision and holding that comity did not require the debtors to receive the same distribution in non-U.S. proceedings as in U.S. proceedings).

[24] *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001) (holding that while a court can consider the views of another government, "it is quite a different matter to suggest that courts—state or federal—will tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party").

[25] *Ungaro-Benages*, 379 F.3d at 1238.

[26] *See*, *e.g.*, *Evergreen Marine Corp. v. Welgrow Int'l, Inc.*, 954 F. Supp. 101, 103 (S.D.N.Y. 1997); *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1289 (E.D. Mo. 1997); *National Union Fire Ins. Co. of Pittsburgh v. Kozeny*, 115 F. Supp. 2d 1243, 1246 (D. Colo. 2000).

[27] *Ungaro-Benages*, 379 F.3d at 1238.

[28] *See* John Fellas, "Strategy in International Litigation," in *International Litigation 2010*, at 213 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-826, 2010).

[29] *See Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004).

[30] *See In re Complaint of Rationis Enters., Inc. of Panama v. AEP/Borden Indus.*, 261 F.3d 264 (2d Cir. 2001); *China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35–36 (2d Cir. 1987).

[31] *See*, *e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–27 (D.C. Cir. 1984); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. America*, 651 F.2d 877 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

[32] *See Quaak*, 361 F.3d at 19.

[33] *See*, *e.g.*, *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626–27 (5th Cir. 1996); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

[34] *See Ibeto Petrochem. Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64–65 (2d Cir. 2007).

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The next time you get a class-action settlement notice in the mail (most likely from a state court in a state where you have never been), telling you that it is exercising jurisdiction over you and your putative cause of action, look at what the case is about and what the claimed injury is that you are alleged to have suffered; *e.g.*, your gas tank doesn't hold exactly the amount of fuel stated in the owner's manual, your lawn mower's horsepower is a bit less than the label says, or your burger weighs less after cooking. Then, compare that alleged injury and what you are being offered as a remedy with what the fee request is from the class counsel.

Find out how much your state received in the tobacco settlement. Then, look into where the money went (or is going)—how much was paid to the state's outside counsel, in gross and on an hourly basis—and see if the counsel were hired on the basis of merit, competitive bidding, and cost-effective fees, or whether they were simply political cronies of the decision maker in state government who controlled the case.

Read the landmark studies authored by the RAND Corporation's Institute for Civil Justice ("ICJ") about the societal cost of asbestos litigation and the 100 or so public companies that have gone into bankruptcy as a result of those tens of thousands of cases, and focus on how little of the money spent has gone to those who have been genuinely injured. And consider that the more that's spent to settle or resolve the cases, the more the number of cases and claims grows—while Congress dithers, even after the Supreme Court repeatedly implored it to take legislative action.

After you digest the dimensions of that debacle, read Judge Janis Graham Jack's 2005 opinion in the silica cases, where she finally stated brilliantly what everyone already knew—that a lot of the cases were based on seemingly fraudulent or baseless diagnoses by forensic medical "experts" who have been enriched over the years by being part of the mass-tort machine in the asbestos cases.

This list could be longer, but the point is, I suggest, rather obvious. We have lost our way in the tort arena. Too many people who are in a position to attack these problems and be part of the solution either are apathetic or are being well rewarded by the game. The drag on the economy and the consequences to U.S. businesses in terms of global competitiveness and job creation are huge. What is perhaps even more disturbing for the long-term stability of the nation is that these abuses in tort litigation cause people to lose respect for the judicial system and the rule of law. When too great a percentage of the population sees the legal process as a crooked game or a wealth-transfer vehicle, rather than a vehicle for the dissemination of honest justice, we all lose; an important thread of the fabric that should hold us together as a stable nation is being unwound.

Two recent groups of events have fueled my concern—and excuse me in advance for any biases or criticisms that may be implied here.

First, the emerging acceptance of the practice of third parties' investing in and financing tort litigation is horrific. The common law, with centuries of experience, gave us the bans on champerty (the sharing in the proceeds of a lawsuit by an outside party who has promoted the litigation), barratry (the bringing of repeated legal actions solely to harass), and maintenance. It was widely recognized that it is not desirable to have strangers stirring up litigation or investing in it. Tort litigation was to be an honest process to provide remedies to those who were injured. It was never meant to be an investment scheme to benefit strangers to the controversy.

The approval of contingency-fee arrangements had some surface appeal in providing counsel to those who otherwise could not afford to pursue proper remedies for their legal injuries. However, whatever validity there may be in that "counsel for the poor" rationale disappears when one digs a bit deeper. Consider, for example, the use of contingency fees by public bodies, as was the case in the states' cases against the tobacco companies, or the recent public nuisance cases where law firms initiated the ideas for the suits and bankrolled the cases, as happened in the Rhode Island public nuisance case against the former makers of lead pigment. The big tort cases start to be by and for the very large contingent-fee firms. But, perhaps as our British friends occasionally tell us and as some considerable amount of evidence shows, such fee arrangements threaten to debase the

integrity of the system. Witness the guilty pleas that came out of the Milberg Weiss and William Lerach securities class-action cases and the Dickie Scruggs debacle in Mississippi.

The next step down the road to litigation as a "lottery" for the good of the lawyers was the acceptance, with Supreme Court approval, of lawyer advertising. After centuries of knowing that ambulance chasing was bad policy, lawyers were effectively given the green light to cleverly solicit clients, as is now being done globally via the internet. People who may have been injured by a product are invited to sign up with a lawyer with no risk and no fee unless there's a recovery.

Having watched this litigation monster grow beyond what was ever contemplated 30 or so years ago, we currently see scores of entities soliciting on the internet and occasionally via direct emails, presenting litigation leads to "injured" potential plaintiffs and offering to finance tort litigation. This practice, if accepted, will serve only to introduce greater risks of fraud and evidence tampering into the system.

Courts and bar associations will soon be called upon to review the propriety of third-party litigation financing. We can only hope that the myriad dangers these practices pose to the integrity of the system will be recognized and that these arrangements will be prohibited.

The second recent series of events that has heightened my concern about the health of our litigation system deals with the President's actions and comments relating to the oil spill in the Gulf of Mexico.

It was personally disappointing to me that the initial responses of many in government and in the media were focused not on what resources we as a nation could marshal to stop the oil flow, but on who would pay and on how claims would be handled.

As the internet exploded with ads from law firms seeking to sign up clients to pursue claims, it was announced that the President had prevailed on BP to set up a $20 billion fund against which claims would be made by those injured by the oil spill and that Ken Feinberg (one of my colleagues on the RAND ICJ board) would administer the process, just as he had done for the September 11, 2001, World Trade Center victims' fund.

Although I truly admire Ken Feinberg and his fairness, integrity, and competence and I also respect the President's jawboning intensity, the whole approach struck me as an insult to, or lack of confidence in, our court system. I would have hoped that the President's approach would have been that we should trust our court system, our tort laws, and the rule of law (not to mention due process) to resolve all claims and the responsibility for them fairly and properly, without the need for bludgeoning and the creation of a separate dispute resolution procedure by the executive branch.

The implication here is that for big things, we cannot or should not rely on our tort litigation system, the judiciary, the rules of civil procedure, the common law, and our statutes and processes to get it done fairly. This attitude, intended or not, reflects that, at the highest levels and even at the small claimants' level, people are not trusting our decaying tort litigation system. We have to find a way to correct that.

We hope you enjoy this issue of *Practice Perspectives*. Your comments and suggestions are always welcome. ■

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However, there are open questions about whether and how that information may be made available to employers, as well as what action employers may take upon receiving the information. If an employer is restricted from obtaining individually identifiable information, then a monitoring program may be of little use. An employer seeking to identify affected employees in order to take action to mitigate their injuries would be hampered in its efforts. And while the fact of an exposure presumably could be used to alter workplace conditions as a whole, it is of lesser use to the exposed individual. Whether, and to what extent, this information could be used to substantiate or refute later allegations of workplace injury remains unsettled. However, one could argue that GINA does not seem to prohibit an employer from keeping individual test results for later use in litigation, as long as the employer does not apprise itself of an individual's test results prior to the pending or threatened litigation.

CAUSATION AND INJURY REMAIN ELUSIVE

Gene expression analysis has two important limitations. First, as the technology now stands, it does not definitively prove *causation*. It is simply a test for *exposure*. A worker who alleges that his leukemia was caused by occupational exposure to benzene, and who exhibits the identified footprint for benzene exposure, cannot use the gene expression analysis test to definitively prove that his leukemia was caused by benzene as opposed to some other factor. The technology may provide some evidence of causation, but it would not exclude other possible causes, such as genetic predisposition or exposure to radiation. Moreover, it would not exclude other possible sources of benzene exposure—a different employer or household or other environmental exposure. On the other hand, gene expression analysis may definitively disprove causation if the person is found *not* to exhibit the unique footprint of exposure. Thus, proof of exposure is only one link in the causal chain. The existence of the unique footprint for a particular toxin must be linked to the disease or condition itself.

Second, gene expression analysis does not prove injury. Although it provides a vehicle to identify change within the body, such change is not necessarily harmful. Many parallels can be drawn to toxic trespass litigation, in which plaintiffs allege injury from the mere presence of chemicals in their bodies. In toxic trespass actions, courts have taken a variety of approaches in deciding whether a change that does not cause harm—or causes no more harm than that to which the general population is exposed—is compensable as a legal wrong. In the absence of the manifestation of an apparent injury to the exposed individual, defendants will have a strong defense that compensation is improper.

CONCLUSION

Gene expression analysis offers the promise of impartial, scientific evidence of exposure, even in the absence of measurable quantities of the substance in the body or the manifestation of apparent disease. However, gene expression analysis is not without limitations. The technology is relatively new, and its potential applications and benefits are still being explored. Employers seeking to implement workplace-testing or -monitoring programs will need to confront barriers raised by privacy and GINA's limitations on the use of genetic information. Parties seeking to use the technology in litigation will bear the burden of establishing its relevance and reliability, and they will still be required to prove or refute causation and injury. ■

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[1] *See, e.g., United States v. Llera Plaza*, 188 F. Supp. 2d 549 (E.D. Pa. 2002) (Pollak, J.) (vacating earlier ruling preventing expert fingerprint analysts from offering opinions on whether latent prints matched a particular person because of the subjective nature of rendering such opinions); Michael J. Saks, "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science," 49 *Hastings L.J.* 1069, 1100–06 (1998).
[2] Deoxyribonucleic acid, one of two types of molecules that encode genetic information.
[3] Bruce Gillis et al., "Identification of Human Cell Responses to Benzene and Benzene Metabolites," 90 *Genomics* 324, 327 (2007).
[4] Igor M. Gavin et al., "Identification of Human Cell Responses to Hexavalent Chromium," 48 *Environmental & Molecular Mutagenesis* 650, 654 (2007).
[5] *See* Jeremy Smerd, "DNA Technology May Curb Bogus Disability Claims," *Workforce Management* (Sept. 18, 2007).

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from the status quo of litigation communications. Rather than engaging reactively, counsel and client must identify ways to participate affirmatively in shaping the public narrative in a case or controversy. Unlike print media, new media create a permanent and easily retrievable impression, and companies must be prepared to shape their reputations accordingly.

As this constitutes an unprecedented challenge for many lawyers and their clients, some basic tools can help guide them through the traps of "litigation by digital advocacy." This digital due-diligence checklist for clients includes the following basic requirements:

- Establish digital protocols for engagement immediately after a complaint is filed or reported.
- Determine accountability for ensuring rapid participation and identifying escalation scenarios.
- Secure all search terms relevant to the litigation and issues on popular search engines such as Google.
- Include digital or social media components in the litigation communications plan.
- Encourage clients to create online engagement protocols that help set the framework or guidelines for when to engage or respond online.
- Recognize that clients must have pre-established relationships with key online influencers (*e.g.*, bloggers and community moderators responsible for fostering these relationships who serve as points of contact).

Lawyers today must recognize and adapt to the digital reality that now defines crisis litigation and the truths that shape settlements and jury verdicts. Counsel must equip themselves with the resources necessary to contend with these powerful media. ■

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[1] *Available at* http://en-us.nielsen.com/content/nielsen/en__us.html (web sites herein last visited Oct. 20, 2010).
[2] *Id.*
[3] *Id.*
[4] Seeking Alpha describes itself on its web site as "[t]he premier website for actionable stock market opinion and analysis, and vibrant, intelligent finance discussion." It publishes approximately 250 articles daily and boasts, "Seeking Alpha differs from other finance sites because it focuses on *opinion and analysis rather than news*, and is primarily written by *investors* who describe their personal approach to stock picking and portfolio management, *rather than by journalists*" (emphasis in original). *Available at* http://seekingalpha.com/page/about__us.

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