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**Recognizing and Preserving
Auto Product Liability Cases**

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RECOGNIZING AND PRESERVING AUTO PRODUCT LIABILITY CASES

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

I. RECOGNITION OF THE CASE

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

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

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

II. INVESTIGATION

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

A. Obtain Information from Initial Investigation

After the initial client interview, you need to immediately obtain the crash report prepared by the investigating officer. The crash report can be ordered from the Texas Department of Transportation. The report may contain measurements, diagrams, and a description of what happened. It will usually contain the officer's opinion on causation.

The complete file may contain information not included in the report. The file may include 911 tapes, the officer's notes, additional measurements, witness statements, and photographs. You can request the complete file from the investigating agency. Call the agency to see what is in the

file, and then request the file through an Open Records Act request. It is often beneficial to talk to the officer in addition to reviewing the accident report.

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

B. Document the Scene

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

Another source of photographs and other information is newspaper or television reporters who may have been at the scene. You can get aerial and street view images of the scene using Google Earth, or obtain aerial photographs of the scene. Many accident reconstruction experts now have the capability to do 3-dimensional surveys of the scene, or you can hire a survey company to survey the scene. Finally, after you have obtained all of the available information gathered at the time of the accident, you will want your investigator/expert to thoroughly document the scene with photographs and measurements.

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

C. Document the Vehicles

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

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