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In This Issue

Does At-Home Online Schooling Actually Mean Less Privacy for Students?

By Mitchell W. Taraschi and Perri J. Koll


With the spread of COVID-19 and closures of schools, teachers are providing online education for students. With increased online learning comes increased privacy concerns and a responsibility for educators to familiarize themselves and comply with the Children's Online Privacy Protection Act (COPPA).

History of COPPA

COPPA was adopted in 2000 by the Federal Trade Commission (FTC) and revised in 2013. https://www.ftc.gov/news-eents/press-releases/2019/07/ftc-seeks-comments-childrens-online-privacy-protection-act-rule. It requires online services that collect personal information from children under the age of 13 to provide notice to parents and obtain verifiable parental consent before collecting, using, or disclosing that personal information. *Id.* The 2013 revision addressed changes in the way children use and access the internet, including increased use of mobile devices and social networking. *Id.* It also created an expanded definition of children's personal information, including persistent identifiers such as cookies, geolocation information, photos, videos, and audio recordings. *Id.*

Obtaining Verifiable Parental Consent

COPPA applies to operators of commercial websites and online services, including mobile apps. It requires an operator to obtain verifiable parental consent before collecting any personal information from a child. https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#schools, Section H, Verifiable Consent. Operators can use a number of methods to obtain verifiable consent, as long as the method is reasonably calculated to ensure that the person providing consent is the child's parent. *Id.* Examples of such methods include: providing a consent form to be signed by the parent, requiring the parent to use an online payment method that provides notification of transactions, providing a toll-free call in number or video conference, or checking a parent's government issued identification. *Id.* If the child's personal information is going to be used for internal purposes only and will not be disclosed to third parties, operators can use a direct notice sent to the parent's online contact address to request that the parent indicate consent in a return message. *Id.*

So What Do Schools Have to Do with It?

Educational institutions can consent to a website or app's collection, use or disclosure of personal information from students in lieu of parental consent. https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#schools. Section M, COPPA and Schools, 1. The school's ability to consent in lieu of parents is limited to the educational context where an operator collects personal information from students for the use and benefit of the school and for no other commercial purpose. *Id.* Under these circumstances, the operator is not required to obtain consent directly from parents and can presume that the school's authorization is based upon the school having obtained the parents' consent. *Id.* Operators must provide the school with notices required under COPPA. *Id.* Per the FTC, "as a best practice, schools should consider making such notices available to parents, and consider the feasibility of allowing parents to review the personal information collected." *Id.* If an operator intends to use children's personal information for commercial purposes, and not just in the educational context as described above, then parental consent is needed. *Id.* at 2.

To obtain consent from schools, an operator still must use a method which is reasonably calculated to ensure that a school is actually providing consent, and not a child posing as a teacher. *Id.* The FTC recommends decisions regarding use of a particular site or service be made on a school wide or even district wide level. *Id.* at 3. Further, schools should consider providing parents with a notice of the websites and online services whose collection it has consented to on behalf of parents. *Id.* at 4. Yet, the FTC states that such a notice is "best practice," and does not state one is required. *Id.*

What Schools Should Look for Before Utilizing Online Education Services

Per the FTC guidelines, schools should understand how an operator will collect, use, and disclose students' personal information. *Id.* at 5. Schools should ask what type of personal information will be collected from students, and how it will be used and shared. *Id.* Specifically, it should be understood if the information will be used for commercial purposes not related to the services required by the school. *Id.* Schools should be leery of operators who use the collected information for advertising purposes, as schools cannot consent to those sites on behalf of the parent. *Id.* Schools also cannot consent on behalf of parents unless the operator enables the school to review and have deleted the personal information collected from their students. *Id.* Schools should look out for what measures the operator takes to protect the private information of their students and what their retention and deletion policies are. *Id.*

Zoom Privacy Issues

Video conferencing service Zoom Video Communications, Inc. has seen an influx in use during the COVID-19 pandemic, including from educators. A class action lawsuit was recently filed against Zoom in the U.S. District Court for the Northern District of California, alleging the company has failed to protect its users' personal information. https://www.law360.com/articles/1258716/zoom-hit-with-proposed-class-action-over-privacy-concerns. The lawsuit alleges Zoom disclosed personal information to third parties like Facebook. *Id.* While the lawsuit doesn't allege specific COPPA violations, educators should be on the lookout for allegations such as these and monitor their use of online websites, programs, and apps. In the past, other online resources that may be utilized by teachers, such YouTube, have been hit with COPPA allegations, and Google/YouTube settled with the FTC for $170 million in September of 2019. www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations.

Potential Future Clarification

Compliance with COPPA may seem daunting to educators, especially in the current climate. Future clarification on complying with COPPA in the educational setting may be on the horizon. On July 25, 2019, the FTC posted that it was seeking public comments on potential changes to COPPA. https://www.ftc.gov/news-eents/press-releases/2019/07/ftc-seeks-comments-childrens-online-privacy-protection-act-rule. The FTC typically puts these rules out for comment every 10 years, making the timing of this rulemaking unusual. *Id.* FTC's Request for Comments states that it is being issued early because of "the continued rapid changes in technology." *Id.* The FTC sought comment on a wide range of issues, including whether COPPA should include an exception for use of education technology in schools. *Id.* The comment period was open until December 11, 2019. *Id.* However, the last set of amendments to COPPA were initiated in 2010 and not finalized until 2013, so we may not see any clarity any time soon.

Navigating COPPA in Online Education

Until educators can get further clarification from the FTC, there are protective measures that can be put in place to protect their students' personal information. Decisions should be made on a district wide level for continuity in programming among grades and classes. This will allow websites and online programming to be appropriately vetted and approved. Communication with operators is key to fully understand how they are collecting information about students, whether that information is being distributed to third parties, and what exactly schools are consenting to on behalf of their students. It may be best to stick to sites that are specifically designed for online education. The FTC approved a kidSAFE Seal Program as a safe harbor under COPPA which directs the Commission to review and approve self-regulatory program guidelines for operators. Parents and educators can look for the kidSAFE Seal on websites to assist them in whether a particular operator is COPPA compliant.

Further, specific parental permission should be obtained whenever possible. This is a continuing process and as new technology is introduced, parents should be kept up to date. Parents should be provided with memorandums outlining the school's online learning policies, including what services the school intends to utilize, what types of information they may collect, and how that information will be used.

Districts should consider memorandums or trainings for their teachers on this issue. Teachers should be familiar with their school's policies and ensure the parents of their students are kept informed. The FTC Frequently Asked Questions website on COPPA is a resource that educators can consult for further clarification.

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Considerations of Using the Statute of Repose Defense in Latent Disease Cases

By Denis F. Alia

Defending product liability cases requires the identification of specific legal issues at stake for your client. When a complaint is filed and discovery is underway, we develop a picture of what the case is about, the extent of allegations, and what legal defenses we plan on advancing to obtain the best outcome. We envision the final result, whether it is an outright dismissal or summary judgment, and calibrate the best approach to achieve that objective. While it may be easier to focus on more straight forward legal defenses, such as lack of product identification, lack of causation, or de-minimis exposure to a client's products, other defenses should not be overlooked.

For instance, when utilized under the right circumstances, the Statute of Repose ("SOR") defense is highly effective and a mechanism which could completely bar plaintiff's claims. A closer look at the interpretation of the SOR in various jurisdictions is helpful to bring some perspective to this legal defense. Equally important, recognizing some of the nuances in its application will help us understand why the defense could be a "hit or miss." In March 2019, in *Stearns v. Metro Life Ins. Co.*, 481 Mass. 529, 117 N.E. 3d 694 (2019), the Supreme Judicial Court of Massachusetts held that the Massachusetts SOR "completely eliminates all tort claims arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property after the established time period has run, even if the cause of action arises from a disease with an extended latency period and even if a defendant had knowing control of the instrumentality of injury at the time of exposure." *Id.* at 702. Under Mass. Gen. Laws Ch. 260, §2B, the SOR provides a six (6) year window from the opening or substantial completion of the improvement in which a plaintiff can bring suit against the product manufacturer. Under *Stearns*, upon the expiration of the six (6) year repose period, the SOR imposes a bar to plaintiff's claims, even in latent disease cases, when the plaintiff did not know of his injury until after the repose period had expired. The SOR is a swift mechanism in Massachusetts, which could give your client an excellent opportunity to dispose of a case, or at the very least, secure some bargaining power in settlement negotiations.

The opposite is true in Indiana. In 2016, in *Myers v. Crouse-Hinds Div. of Cooper Industries, Inc.*, 53 N.E.3d 1160 (Ind. 2016), the Indiana Supreme Court essentially eliminated the safe haven provisions set forth in the Indiana Product Liability Act ("IPLA"), as codified at §34-20-3-1, which barred actions against product manufacturers brought more than ten (10) years after the delivery of the product to the initial user or consumer. The *Myers* court addressed whether "disparate treatment constituted a constitutionally prohibited disparate privilege" by comparing the effect of the IPLA on two classes of plaintiffs: (1) those who were exposed to asbestos by Defendants who mined and sold raw asbestos products and (2) those who were exposed to asbestos by Defendants who incorporated asbestos into their products. The *Myers* court held that Section 2 of the IPLA is unconstitutional as it creates a preference and establishes inequality because all plaintiffs were suffering from a latent disease yet only those with claims against Defendants who mined and sold raw asbestos could proceed with their claims. Such a distinction violated case precedent and the Equal Privileges and Immunities Clause of Article I, Section 23 of the Indiana Constitution. The *Myers* decision eliminated

an important layer of defense for product manufacturers who can no longer argue plaintiffs' actions are barred since their product was installed more than ten (10) years prior to commencement of the litigation. The Indiana Contractor Statute of Repose, IC 32-30-1.5 remains untouched by *Myers* and can be utilized by defendants, however, the rationale of *Myers* may be extended to combat such assertions by defendants. With the SOR argument essentially eliminated, Defendants are now left with fewer arguments in their arsenal, including the lack of product identification as the main defense along with related causation issues.

In other jurisdictions, the decision to utilize the SOR requires a different type of analysis, one that is not based on whether the statute is constitutional, but rather factual details. The decedent in *Kinseth v. Weil-McLain*, 913 N.W.2d 55 (Iowa 2018), worked for the family's plumbing business and alleged exposure to Defendant's product when *installing*, *repairing* and *ripping out* boilers. The court held that any liability for *repair* or *removal* work on boilers was extinguished based on the Iowa SOR which bars causes of action "arising out of the unsafe or defective conditions of an improvement to real property" after fifteen (15) years. 2 Iowa Code §614.1(11) (2007). However, the Iowa SOR provided an exception, which allowed the jury to consider the decedent's exposure from *installing* the Defendant's boilers. As a result, the analysis of whether or not the SOR can be successfully utilized may depend on the extent of plaintiff's work on your client's product. In jurisdictions like Iowa, the SOR will not bar plaintiff's claims if the alleged exposure took place during the initial installation of the product. If the exposure took place at a later time during subsequent repair or removal work, the SOR is an available defense.

Some jurisdictions distinguish between *products* and *construction* SOR. As discussed above, although Indiana invalidated its products SOR, its contractor counterpart remains intact. In New Hampshire, the SOR is broken up into construction (§508:4-b) and products (§507-D:2). The twelve-year products SOR was held unconstitutional by *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512 (1983), while the New Hampshire Supreme Court has consistently held that the application of the eight-year construction SOR is constitutional, and provides a complete bar to plaintiffs' suits when applicable. For instance, in *Phaneuf Funeral Home v. Little Giant Pump Co.*, 163 N.H. 727 (2012), a funeral home brought an action arising out of a fire allegedly caused by a water fountain. The suit was filed against four defendants: (1) the manufacturer of the water fountain; (2) the manufacturer of a pump incorporated in the water fountain; (4) the manufacturer of the fountain's power cord; and (4) a contractor who customized the water fountain, converting it from a generic product to a specialized improvement by adding a back plate and making it a permanent fixture. The Court held that the construction SOR did not apply to the first three defendants because they manufactured products which were not intended to be permanent improvements to real property and were not specific to a particular building. However, the statute barred plaintiff's claim against the last defendant, the contractor, because they customized the water fountain from a generic product to a specialized permanent improvement to real property.

The SOR is constantly in flux, as the plaintiffs' bar regularly seeks to modify or eliminate the protections provided to companies that design, engineer and construct improvements to real property, particularly in cases involving latent diseases. In some jurisdictions, the courts have expressly recognized a defendant's involvement in the design process of improvements to real property, and the subsequent applicability of the SOR to latent disease cases. In other jurisdictions, the fate of the SOR depends on the trial court's interpretation of the law, which routinely departs from the plain language of the statute. While still other jurisdictions have limited the scope of the SOR by adding clearly defined exceptions to its application, and in other jurisdictions, the statute has been held unconstitutional. The lesson derived is that when available the SOR is an effective defense, which could result in either an outright dismissal for your client, or a favorable settlement resolution.

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Recent Seventh Circuit Analysis of *Daubert*, Federal Rule of Evidence 702, and the "Consumer Expectations" vs. "Risk-Utility" Tests

By John M. Socolow

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)("*Daubert*") and its progeny (in particular, *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999)) have had an enormous impact on litigation in the United States federal courts. Since *Daubert*, there have been countless "*Daubert* motions" filed, where one party challenges the admissibility of another party's expert's testimony (most often in the form of either a motion for summary judgment or in a motion *in limine*), thus triggering the trial judge's "gatekeeper" function.

This article discusses a *Daubert* motion recently filed by the defendant in the United States District Court for the Southern District of Illinois (the "District Court"). The court granted summary judgment in favor of the movant. The plaintiff appealed to the United States Court of Appeals for the Seventh Circuit, in Chicago (the "Seventh Circuit"), which affirmed the summary judgment decision. *See Clark v. River Metals Recycling, LLC and Sierra International Machinery, LL*C, 2018 WL 3108891 (S.D. Ill. June 25, 2018), *aff'd*, 929 F.3d 434 (7th Cir. 2019).

Before discussing the specifics of the *Clark* opinions, we first briefly review the history of the admissibility of expert testimony in the federal courts.

From Frye *to* Daubert*, and Beyond*

Prior to 1993, when the United States Supreme Court issued its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("*Daubert*"), admissibility of expert testimony in federal courts was governed by the "Frye test," enunciated by the Court of Appeals for the District of Columbia, in Frye *v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under the Frye test, in order to be admissible, expert opinion "must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs." 293 F. at 1014 (emphasis added).

Daubert and subsequent amendments to the Federal Rules of Evidence radically changed the analysis that federal courts must undertake in determining the admissibility of expert testimony. The Frye test no longer applies in federal courts (or in many state courts). Now, instead of general acceptance, in order to be admissible expert testimony must be: (i) relevant and reliable; and (ii) in compliance with Rule 702 of the Federal Rules of Evidence ("FRE").

In *Daubert*, the United States Supreme Court noted that:

> [T]he trial judge *must* determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review.

Daubert, 509 U.S. at 592–93 (emphasis added). The Court summarized its holding by stating that: "General acceptance" is not a necessary precondition to the admissibility of "scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.

In a subsequent opinion, the United States Supreme Court emphasized that the FRE "leave in place the 'gatekeeper' role of the trial judge in screening" expert evidence. *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997).

Completing the trilogy, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999), the Supreme Court stated that Daubert applies to *all* expert testimony, not just scientific testimony. The Court concluded that "*Daubert's* general holding—setting forth the trial judge's general gatekeeping obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge." *Kumho Tire*, 526 U.S. at 141.

The current version of FRE 702 is an outgrowth of *Daubert*, and provides as follows:

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

a. the testimony is based on sufficient facts or data;

the testimony is the product of reliable principles and methods; and

b. the expert has reliably applied the principles and methods to the facts of the case.

FRE 702.

The Clark *Case*

In *Clark*, both the District Court and the Seventh Circuit provided short and concise, but still comprehensive, discussions of both the *Daubert* standard and FRE 702, and the consumer expectations vs. risk-utility tests that courts applying Illinois law must undertake in product liability cases involving allegations of design defect.

Factual Background

The product at issue in *Clark* was an RB6000 car-crushing machine (the "Crusher"), which was designed and manufactured in Italy, then imported into the United States by the defendant, Sierra International Machinery, LLC ("Sierra"), which reassembled the Crusher and mounted it on a trailer. A photograph of the Crusher appears below.

The plaintiff was very familiar with the Crusher, having worked with it almost every day for about 18 months before his accident. At the beginning of each day, he would perform a variety of daily maintenance tasks, including checking the oil, antifreeze, and hydraulic fluids. To access the platform area where he performed those tasks, he would climb up on the right side of the Crusher. During his deposition, the plaintiff testified that after performing those tasks, he would always step from the platform on to the stabilizer, and then jump to the ground. On the day of the accident, as he was preparing to jump, the plaintiff slipped and fell to the ground, seriously injuring his arm. His counsel made a seven-figure settlement demand.

The plaintiff's method for ascending to, and descending from, the platform directly contradicted the methods recommended by Sierra. In training its customers, Sierra recommended that workers use either a ladder or a working platform such as a manlift or forklift. Here, the plaintiff's employer was not the original purchaser of the Crusher, so he never received training from Sierra. In addition, he never saw the Crusher's operator's manual until the day of his deposition. That manual clearly stated that workers must not jump off of the Crusher.

The plaintiff filed suit, alleging that the Crusher was defective because its front platform was not equipped with a ladder and guardrails. No failure to warn claim was made. The plaintiff retained an engineering expert to try to support his opinions regarding product defect.

Summary Judgment Granted by the District Court

After extensive discovery, Sierra filed a motion for summary judgment, arguing that: (i) under Illinois law, in order to prove that the Crusher was defective, the plaintiff was required to use the risk utility test, not the consumer expectations test, because the Crusher is a highly special-

ized product with which most, if not all, jurors would be unfamiliar; and (ii) Clark failed to present admissible expert testimony (*i.e.*, testimony that satisfied *Daubert's* requirements of relevance and reliability) to meet his burden of proof under the risk utility test.

Despite having retained an expert, plaintiff's counsel still argued that he should be able to rely on the consumer expectations test, because ladders and guardrails are common knowledge, and that expert testimony was therefore not even required.

The District Court sided with Sierra, finding that an ordinary consumer will never have purchased, let alone heard of, the Crusher, so there is no "ordinary common knowledge" as to the characteristics of the Crusher.

Having concluded that the risk utility test applies—thus requiring plaintiff to provide expert testimony that any danger of the design of the Crusher outweighs its utility—the District Court then analyzed the testimony of plaintiff's expert. Sierra did not challenge the expert's qualifications as an engineer. Instead, Sierra challenged his methodology, and the relevance and reliability of his opinions. Sierra pointed to multiple examples of how the expert's opinions were conclusory, with no reliable supporting analysis or methodology. In granting Sierra's motion, the District Court was highly critical of plaintiff's expert, and it wholeheartedly agreed with Sierra's arguments, stating as follows:

> The Court is puzzled why it should admit expert testimony regarding safety mechanisms that would allegedly help with routine maintenance when that expert does not even know where that maintenance is supposed to be performed. That alone disqualifies Dr. Blundell. But there are more reasons as well. Notably, Dr. Blundell offered no calculations to support his theory, he does not provide even a rough sketch of an alternative design, and his opinion is nothing more than a "bare conclusion" that adds "nothing of value to the judicial process." McMahon v. Bunn- O-Matic Corp., 150 F.3d 651, 658 (7th Cir. 1998) (quoting Mid–State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)). He even cited to American National Standards Institute standard A1264 1-2007 in support of his theory, but after further review, he admitted at his deposition that "I believe to make this vehicle safe [a fixed ladder] has to be there but, I mean, there's nothing in this standard that says you have to have a fixed ladder." (Blundell Dep. at 102:16–19.) Accordingly, "[n]o engineer would put such an unsupported assertion in a scholarly article … [and] we doubt that [the expert] would accept it from a student in a term paper. Why, then, should courts pay it any heed?" Id. As Daubert and the Seventh Circuit make clear, "[n]aked opinions cannot stave off summary judgment." Id. The Court will strike Dr. Blundell's testimony.

2018 WL 3108891 at *6. The plaintiff filed a motion for reconsideration, which the District Court denied. The plaintiff then appealed to the Seventh Circuit.

Seventh Circuit Affirms the District Court

On appeal, the plaintiff raised many of the same arguments he presented in opposition to Sierra's motion for summary judgment. In particular, he argued that: (i) the District Court should not have excluded the expert; (ii) regardless of its treatment of the expert, the District Court should have found that the consumer expectations test did not apply, and that expert testimony was not even necessary; and (iii) the District Court erred in not holding a *Daubert* hearing before excluding the expert's testimony. Sierra opposed all of those arguments.

The Seventh Circuit held oral argument in April 2019. During oral argument, plaintiff's counsel argued aggressively that because, in his view, the front platform area of the Crusher is a simple part of the machine, he should have been permitted to try to prove his claim based on the expectations of an ordinary consumer.

The Seventh Circuit, perhaps playing devil's advocate, then asked us why the consumer expectations test should not apply, because plaintiff's claim raises a relatively simple issue, namely, whether a ladder should have been attached to the Crusher's platform. We argued that the focus should not be on the platform and a ladder as standalone components, but rather on the Crusher, as a whole. We reminded the Seventh Circuit that the Crusher is a highly specialized product that is used in an industrial setting, and that attaching a ladder to the front platform is not necessarily a simple task because of width restrictions that could prevent the Crusher from being towed on roadways, and because of the limited space available to attach a ladder in light of the fact that a tractor must back up under the front platform to connect to the trailer, and be able to make turns without having the ladder interfere with the wheels. We also reiterated to the Seventh Circuit that when Sierra sells the Crusher to its initial customer, it provides: (i) training, including the need for the customer to use a ladder, platform, or some other equipment to enable persons to access elevated areas to perform routine maintenance; and (ii) an operator's manual, which states that only properly trained personnel can operate and maintain the Crusher, and which prohibits jumping off of the Crusher.

The Seventh Circuit found that: (i) the District Court accurately applied the requirements of FRE 702 and *Daubert* in analyzing the admissibility of the plaintiff's expert's testimony, and (ii) the District Court did not abuse its discretion in excluding that testimony, stating as follows:

> The district court's decision to exclude the testimony represented a reasonable assessment of the proposed evidence. It found Dr. Blundell's methodology to be unclear and conclusory, and we have no trouble following its thinking. We see no deficiency in the district court's decision about the necessity of a hearing, and so it committed no error when it resolved this issue without one.

929 F.3d at 438. In addressing the risk utility vs. consumer expectations question, the Seventh Circuit noted that:

> [T]here might be some products that are so simple that no expert is needed to tell people how to use them…But we agree with the district court that the case before us is not one that can be resolved exclusively on the basis of common experience. Clark needed expert testimony for this critical element of his case (*i.e.*, what design(s) would have been acceptable), and with Dr. Blundell's analysis excluded, he had none.

Id. at 440 (citations omitted).

Conclusion

The *Clark* case is instructive since it demonstrates that an arguably "simple" product can also be highly specialized, in which case relevant and reliable expert testimony, compliant with *Daubert*, must be submitted in order to prove that it is defectively designed.

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Cruising into the Future or a Crash Waiting to Happen?

Biometrics and the Connected Car

By Madison C. Shepley

As biometric applications become increasingly incorporated into the automotive industry, practitioners across the country must be proactive in combatting privacy liability risks. State biometric privacy laws cannot be overlooked. At the outset, businesses and legal advisors may wish to start asking questions and developing polices and plans regarding use and storage of biometric data in order to keep their eye on the road ahead for potential biometric data privacy liability.

"Eyes on the road!" No, that's not your Dad in the passenger seat scolding you for messing with the radio, or your significant other telling you to stop looking at your phone while driving. That message is coming from *your dashboard*. Driver focus monitoring systems, such as that found in a newly designed 2020 Outback SUV, now employ dashboard cameras to watch and monitor the driver's eyes and face, and can determine whether the driver is looking away from the front of the vehicle for an extended period of time.[1] Driver awareness monitoring systems are increasing in presence in both luxury and mainstream vehicles and are just one example of how *biometric technology* is being adopted in the automotive industry.[2]

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[1] Goode Intelligence, Biometrics for the Connected Car- Identifying who you are and how you are (1st ed. 2017), https://www.goodeintelligence.com/wp-content/uploads/2017/11/Goode-Intelligence-White-Paper-Biometrics-for-the-Connected-Car-Identifying-who-you-are-and-how-you-are.pdf [hereinafter Goode White Paper]; Tom Krisher, Distracted driver tech: Cars order you to keep your eyes on the road, app., (May 31, 2019, 5:00 A.M.), https://www.app.com/story/money/business/consumer/2019/05/31/distracted-driver-tech-cars-order-you-keep-your-eyes-road/1276277001/.

[2] John R. Quain, Eyes on the Road! (Your Car Is Watching), N.Y. Times (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/business/autonomous-cars-technology-privacy.html; Frost & Sullivan, Adoption of Biometrics in the Automotive Industry, Frost Perspectives, Measurement & Instrumentation (July

Biometrics involves the measurement and analysis of biometric identifiers and biometric information—unique physical and behavioral characteristics and traits such as DNA, fingerprints, hand prints, vein, eyeball/retina/iris, and voice patterns, as well as facial geometry measurements. For the automotive industry, biometric technology in the vehicles and personal transportation presents an opportunity for increased security and safety for both driver and passengers. It is anticipated that biometrics in automotive vehicles will continue to evolve across three main sectors: Advanced Driver Assistance Systems (ADAS), Health Wellness and Wellbeing (HWW) systems and vehicle security.[3] The rapid embrace of biometrics has led to innovative leaps in sensors, computer processing, artificial intelligence, and user interfaces that enable new ways for drivers and passengers to interact with and personalize their vehicles. Specifically, we are seeing automotive biometrics focus on a variety of components including fingerprint access ignition switches, driver authentication through facial recognition software, software that assesses a driver's state of awareness, personalized vehicle settings such as seat mirror position, and monitoring of driver health.

But with these significant technological advances come concerns for individual data privacy and compliance with state biometric data privacy laws. As business, employment, and consumer use of biometric data has become more extensive, so has the legislative and judicial response to the use of biometrics and related privacy law issues.[4] While there has not been a uniform proliferation of biometric data privacy laws, on either the state or federal level, automotive manufacturers currently face a patchwork of state biometric privacy laws.

Biometric Information Data Privacy Laws

Currently, there are only three states—Illinois, Texas and Washington—that have laws specifically addressing protection of consumers' biometric information.[5] The most restrictive of the biometric data privacy statutes is the Illinois Biometric Information Privacy Act ("BIPA").[6] BIPA states that, "No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information," without first obtaining informed consent of the subject.[7] Texas also requires notice and consent prior to the capture of biometric identifiers.[8] In contrast, in Washington, written consent is not required for the collection of biometric data.[9] Retention requirements are also distinct in Washington and Texas. Where BIPA requires the development of a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information, for the other states, biometric data must be destroyed either "within a reasonable time, but no later than the first anniversary of the date the purpose for collecting the identifier expires," (Texas), or retained "no longer than is reasonably necessary to provide the services that the biometric identifier was collected for or to protect against or prevent fraud or criminal activity" (Washington).[10]

Illinois BIPA includes a private right of action, unlike state statutes in Texas and Washington. In addition, the Illinois Supreme Court recently held individuals have standing to bring a BIPA claim to recover liquidated damages and attorneys' fees for a purely statutory violation of the law's requirements, even if the individuals do not suffer any actual harm.[11]

11, 2017), https://ww2.frost.com/frost-perspectives/adoption-of-biometrics-in-the-automotive-industry/.

3 Trevor Lloyd-Jones, Automotive Industry and Insurance Coming Together for Biometric Technologies, LexisNexis Insurance Insights Blog, https://blogs.lexisnexis.com/insurance-insights/2017/11/automotive-industry-and-insurance-coming-together-for-biometric-technologies/.

4 Alan S. Wernick, Biometric Information- Permanent Personally Identifiable Information Risk, American Bar Association (Feb. 14, 2019), https://www.americanbar.org/groups/business_law/publications/committee_newsletters/bcl/2019/201902/fa_8/.

5 Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et seq.; Capture or Use of Biometric Identifier, Tex. Bus. & Com. Code Ann. §503.00; Wash. Rev. Code Ann. § 19.375, et seq.

6 Texas and Washington lack a number of the stringent components of the BIPA. For instance, both Texas and Washington do not create a private right of action for individuals and require that litigation under the statutes be brought by their respective state attorney general. Additionally, neither Texas nor Washington incorporate as broad of a definition for biometric identifiers. See, Tex. Bus. & Com. Code Ann. § 503.001(a); Wash. Rev. Code Ann. § 19.375, et seq.

7 740 ILCS 14/15.

8 See Tex. Bus. & Com. Code Ann. §§ 503.001.

9 740 ILCS 14/15.

10 Tex. Bus. & Com. Code Ann. §§ 503.001(b), (c)(3); Wash. Rev. Code Ann. § 19.375.020(4)(b).

11 Rosenbach v. Six Flags Entm't Corp., 2019 IL 123186, 129 N.E.3d 1197.

Biometric Information and Automotive Systems

Part of the stringency of BIPA also comes from its definitions.[12] Under BIPA, a "biometric identifier" is defined as: "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color."[13]

Based on these definitions and current understandings of certain automotive biometric technologies and systems, including driver line of sight recognition and facial recognition software, a plaintiff's class action lawyer may argue that such falls under the definition of biometric identifier as a scan of face, retina or iris scan, or face geometry under 740 ILCS 14/10. Cognizant of these definitions and accompanying privacy issues, certain auto manufacturers are stating that they do not record or store driver monitoring information.[14] However, even though descriptions of planned driver monitoring systems may indicate that the vehicle or its manufacturer will not store the recordings of driver observation, these driver monitoring systems may lead to BIPA claims based on the use of line of sight recognition and facial recognition software technologies.

BIPA further defines that "Biometric information" includes: "any information, *regardless of how it is captured,* ***converted****, stored, or shared,* based on an individual's biometric identifier used to identify an individual." The critical issue with this definition is the word, "converted." BIPA does not define further what it means for biometric information to be converted.[15] This lack of definition may pose potential issues for even those manufacturers engaging with biometric technology utilizing binary encryption mechanisms. Similarly, the broad application of "convert" also raises concerns for use of any biometric technology utilizing fingerprint or hand scanning identification. Part of the utility of these technologies is how they ensure verification and identification of a user or driver. Fingerprint recognition systems can be used for driver verification security—but those inherently rely on a previously given fingerprint to match. "Storage" for purposes of the statute crucially relies on how any biometric information is stored for use of particular features, including an initial facial or retina scan, or fingerprint.

As these examples demonstrate, many of the automotive biometric technologies currently being incorporated into the next generation of automobiles to enhance safety, convenience, and customization of the driving experience—have the potential to fall under the purview of BIPA, and effectively thwart well-intended efforts of auto manufacturer efforts to enhance safety and convenience features in vehicles.

Ultimately, given the highly technical and continually evolving nature of biometric technology and arguable vagueness of biometric privacy statutes, potential liability issues remain unclear. Auto industry professionals are finding themselves left with more questions than definitive answers, such as:

- How is the biometric automotive system incorporated into the vehicle? Is it in anyway reactive with the driver or passenger?
- How are facial recognition and line of sight detection features employed?
- Is there a system memory function? If so, how and where is this utilized?
- How are fingerprint and hand scan features employed?
- How is that information retained for use in driver verification?
- What is the level, if any, of access to biometric data by the manufacturer and/or software developer?
- And finally, how do we comply with biometric information privacy statutes?

In short, if a biometric automotive system in any way collects, captures, or obtains its consumer's biometric information, then auto manufacturers and their legal advisors may need to consider the system's permissibility under BIPA. These professionals may also wish to consider whether the argument that a particular system does not collect biometric information is a viable defense. Additional technical issues, such as interactivity, may also come into play. For instance, the level of access that a software developer or auto manufacturer has or does not have to any biometric automotive system and any collected data may prove a crucial defense. Another step in mitigating liability concerns may be ensuring a biometric automotive system is compliant with the state statute. Under BIPA, systems

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12 Unlike BIPA, which also extends protection to biometric information that results from the conversion of biometric identifiers, the Texas statute, Capture or Use of Biometric Identifier, Tex. Bus. & Com. Code Ann. §503.00, does not include a similar definition of or clause for biometric information.

13 740 ILCS 14/10.

14 Quain, supra note 2.

15 740 ILCS 14/10.

can be made compliant by drafting an informed consent plan for consumers and development of a written system policy regarding data protection, storage, and retention. But even compliance may pose certain challenges in the automotive context.

Compliance

Under ILCS 740 14/15, compliance with BIPA involves a threefold plan that requires 1) development a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information; 2) informing and automotive manufacturers consumers in writing that a biometric identifier or biometric information is being collected or stored, including the purpose and length of time during which it will be stored, and obtaining a written release executed by the consumer; and 3) storing, transmitting, and protecting from disclosure all biometric information within the industry standard of case and in the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.[16]

Specifically, obtaining consumer consent involves providing information in writing that details that a biometric identifier or biometric information is being collected or stored, and the purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used. Obtaining consent typically also requires receipt of a written release executed by the consumer or consumer's legal representative.

The second and third parts of compliance involve the development of a public written policy, and in executing said policy, adhering to a reasonable standard of care with protections at or above those used for confidential information. The retention policy must establish a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. 740 ILCS 14 /15. For the purposes of compliance, this too should be completed prior to release and use of the system.

BIPA makes plain that *written consent* and notice are required prior to capture of any biometric information or identifiers. But, assuming that biometric automotive system must be brought into compliance, what does this mean for auto manufacturers? When the journey starts? At the first purchase of the vehicle? What implications does this have for other users who drive the vehicle, such as a spouse or colleague? How is consent obtained for these persons? What we do know right now is that if a biometric automotive system is subject to BIPA, the prudent policy would be to develop a notice plan, a written retention plan, and plan for obtaining the written consent of each auto consumer whose biometric information is collected through use of the biometric system.

As prudent practical pointers for avoiding potential liability under biometric data privacy statutes, the following is a non-exhaustive list:

- Develop and follow a written consent plan.
- Obtain consent for each activation/use of the biometric system.
- Include a complete notice and consent plan that is published both publicly and in each vehicle operator's manual.
- Inform and disclosure if and how biometric information is retained and that such retention meets statutory obligations.
- Secure and encrypt any biometric, personal, or private information.
- Ensure that data storage be within the reasonable standard of care in the private entity's industry and with protections at or above those used for confidential information.
- Allow for the system to be disabled by the consumer.

Conclusion: Keep Your Eyes on the Road Ahead

The automotive industry has a long road ahead with the increased adoption of biometrics and biometric automotive systems. As states attempt to keep up with the rapid advancements of technology— data privacy compliance concerns should be at the forefront of every auto professional's mind. Due to the patchwork of state biometric data privacy regulations, automobile manufacturers may wish to take careful consideration of each state's, particularly Illinois', collection, disclosure, and retention requirements when incorporating new biometric automotive systems into their next-generation vehicles. Illinois and BIPA may now be the most extreme examples of what requirements

[16] 740 ILCS 14/15(a)-(b),(e).

manufacturers may potentially face, but there may be more to come on the journey ahead.

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