DISCOVERING POTENTIAL THIRD PARTIES IN MOTOR VEHICLE ACCIDENT CLAIMS:

WHO SHOULD WE CONSIDER?

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In today's litigious world, claims related to motor vehicle accidents are exceptionally common. With the number of these cases on the rise, defence counsel has had to become more creative in defending them. One way to effectively defend these claims is to consider whether the accident may have been caused by someone else who may be required to assume your defence or indemnify you. Specifically, we recommend always considering whether the accident could have been caused by a mechanical failure in the defendant vehicle.

Mechanical failures can happen for a variety of reasons. With today's large-scale foreign manufacturing industry, vehicle parts are manufactured by the millions. As a result, mistakes can, and do, happen along the production line. The most common reason for a mechanical failure is that foreign manufacturers have used cheap, substandard materials that easily break. In other cases, the design of the part is just not sufficient for the task it was made to complete.

In the automobile industry, these types of failures are typically captured by product recalls. As a result, any time there is a possibility that a product failure caused the accident, we recommend that you consider bringing a third party claim against the manufacturer of the vehicle, and the manufacturer of the specific part.

However, it is equally possible that the vehicle may have recently been subject to maintenance, repairs, or inspections. Further, if the vehicle was sold used, it may have a safety standard certificate. In these scenarios, consideration should be given to bringing a third party claim against the garage, mechanic, or dealer that certified the vehicle as safe to drive.
In this paper, we will first set out when to bring a third party claim against the manufacturer. We will then set out when to bring a third party claim against the garage, mechanic or dealer.

Third Party Claims against Manufacturers

Recently, a number of large-scale, highly publicized recalls have plagued automobile manufacturers in North America and abroad. In 2010, Toyota recalled an estimated 2.3 million vehicles for issues relating to the acceleration pedal as well as an additional 5.2 million vehicles for an improper floor mat, which caused the pedals to become pinned to the floor. Furthermore, there were allegations that the issues surrounding Toyota vehicles were responsible for anywhere from 20 to 40 deaths.[1] In 2014, General Motors issued an infamous recall of an estimated 28 million vehicles worldwide in response to a faulty ignition switch that impacted the ability to deploy airbags in an accident. In General Motors case, there were allegations that the faulty ignition played a role in upwards of 150 deaths and 850 injuries.[2]

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[1] *James R. Healy*, Toyota deaths reported to safety database rise to 37, online: USA Today <http://usatoday30.usatoday.com/money/autos/2010-02-17-toyota17_ST_N.htm>.
[2] *Ben Klayman*, Deaths linked to GM ignition-switch defect rise to 23, online: Reuters

A review of Transport Canada's recall notice database revealed that from 2014 to present, there have been 1,537 recalls issued by manufacturers impacting various types of motor vehicles and for problems related to various structural and safety concerns.[3] While vehicle recalls to the extent as those seen impacting Toyota and General Motors are rare, recalls are a more common event than one would think.

Occasionally, vehicles subject to a recall are involved in accidents that may result in injuries or fatalities. Furthermore, an allegation may be advanced that the accident was caused by a part subject to a recall. If you are presented with a case where the accident may have been caused by a recalled part that malfunctioned, you should consider bringing a third party action against the manufacturer. The following section of the paper will address how to frame the claim against the manufacturer in breach of contract, breach of warranty, and negligence.

Framing the Claim

First, most third party actions against the manufacturer of a vehicle can be grounded in a claim for breach of contract. It can be alleged that the defendant is either as party to, or was the intended third party beneficiary of the contract, or contracts agreed to during the original production and sale of the vehicle.

Second, defendants may also allege a claim for breach of the express or implied warranty that was agreed upon their purchase of the vehicle. Common implied warranties include that a product is of "merchantable quality", and that the product is fit for the purpose for which the product was purchased.

Third, defendants may also allege that the manufacturer was negligent in the creation, design, marketing or general manufacturing process of the part. Manufacturers can be held to be liable in negligence for failing to ensure the product performed to a certain standard, or for failing to warn consumers of potential defects (i.e. failing to recall the product in a timely manner).

Breach of Contract

Historically, claims against the manufacturer or distributor of a defective product were barred because the end consumer did not have a contract with the liable party; there was no privity of contract. However, the Court's ruling in the well-known case of *Donoghue v. Stevenson*[4] prevented both manufacturers and distributors from advancing a privity of contract argument in the context of product liability and negligent manufacture claims.

The ruling in *Donoghue* is notable in the context of motor vehicle accidents mainly due to the complexity of relationships that exist between distributors (both parts and finished product), suppliers, and manufacturers of products in the automobile industry. *Donoghue* changed the legal landscape by allowing a defendant to effectively cut through the multiple "layers" of contracts in

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< http://www.reuters.com/article/2014/09/29/us-gm-recall-compensation-idUSKCN0HO1F220140929>. GM has provided compensation to victims for 74 fatalities and approximately 126 injuries, see *Chris Bruce*, GM ignition switch death toll continues to rise, online: Autoblog <http://www.autoblog.com/2015/03/24/gm-ignition-switch-death-toll-74/>.

[3] *Government of Canada*, Road Safety Recalls Database, online: Transport Canada < http://wwwapps.tc.gc.ca/Saf-Sec-Sur/7/VRDB-BDRV/search-recherche/menu.aspx?lang=eng>.

[4] [1932] A.C. 562 [*Donoghue*].

the automobile industry. In other words, this decision allows Canadian parties to seek redress directly against the manufacturer, even if they never entered into a contract directly with them.

Pre-*Donoghue*, manufacturers would rely on the concept of "privity" by refusing to indemnify parties that were not contemplated by the original contract with the manufacturer. As consumers would only enter into a contract with the retailer (in our case, the dealership), the manufacturers would escape liability as they had no contractual relationship with the consumer; their relationship was only with the retailer. However, post-*Donoghue*, manufacturers could no longer rely on the concept of privity as a defence to a contract-based product liability claim.

While *Donoghue* provided claimants the common law ability to seek compensation for damages from the manufacturers of products, the introduction of the *Sale of Goods Act* ("*SGA*")[5] gave "teeth" to claimants' arguments by providing legislative terms that apply to all contracts for the sale of goods. In other words, the *SGA* permits defendants to bring third party claims directly against the manufacturer. Please note that the sale of services is covered below, in the section dealing with the potential liability of garages, mechanics and used car dealers.

Breach of Implied and Express Warranties: The Sale of Goods Act

Beyond the principles articulated in the common law, the *SGA* prescribes the obligations of a manufacturer of a product. Section 15 of this *Act* states that:

> Subject to this *Act* and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:
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> 1. Where the buyer, expressly or by implication, makes it known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to fitness for any particular purpose.
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> 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed
>
> 3. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

It is notable that this section applies to <u>every</u> contract for the sale of goods that fulfils the conditions as set out in subsection (1). This is the case unless the section is inconsistent with an express warranty or condition found in the contract, or the parties have explicitly excluded this section's application in the terms of the contract. However, it is rare that consumer contracts

[5] R.S.O. 1990, c. S. 1.

will explicitly exclude the relevant provisions of the *SGA*. As a result, the implied conditions and warranties pursuant to the *SGA* are applicable to the vast majority of consumer purchases.

Furthermore, there is an implied condition in all contracts for sale that the goods purchased will be of merchantable quality. There is also an inference (albeit rebuttable) that the buyer will rely upon the manufacturer's skill and judgment to provide goods reasonably fit for the communicated purpose. Where automobile manufacturers are competing for a share of the consumer market, they will often advertise the high performance or the safety of a vehicle as reasons why a specific car should be purchased over another. If these marketing ploys fail to prove accurate, defendants can bring claims against the manufacturer for the product not meeting the communicated purpose, and possibly for negligent misrepresentation.

In investigating the appropriateness of a third party claim against an auto manufacturer, it is important that defence counsel investigate any claims with respect to the safety or performance of the vehicle made by the manufacturer. Furthermore, consideration must be given as to whether or not the representation was a factor in the defendant's decision to purchase the vehicle. Depending on the specific fact scenario, the *SGA* may provide an avenue for recovery on these claims.

An example of where this strategy was successful appears in the case of *Fuller v. Ford Motor Co. of Canada Ltd.*[6] In *Fuller*, the plaintiff was driving a half-ton panel truck along an asphalt road at a speed approximately 20 to 25 miles per hour, when he began to enter a curve in the road. While making the turn, the car began to slide due to icy road conditions. When the plaintiff engaged the brakes to slow his speed, they did not operate as expected, and the plaintiff's vehicle ended up in the ditch, and suffered significant damage.

Immediately after the accident, the plaintiff got out of the vehicle and found that a portion of the rear axle had become dislodged from the car prior to the car entering the ditch. Ford Motor Company Limited manufactured the vehicle. As a result, the plaintiff sued Ford Motor Company Limited in contract for a breach of both the express and implied warranties of the product. The plaintiff also claimed that Ford Motor Company Limited failed to meet their obligations pursuant to section 15 of the *SGA*.

In *Fuller*, the court determined that the accident did not dislodge the axle. Although the precise cause of the defect could not be determined, the court was able to rule that the issue with the axle was a latent defect.[7] On this basis, the court held that the defendant manufacturer had failed to satisfy both the express and implied warranties of the product, and thus had breached the contract the plaintiff entered into with them when the vehicle was purchased.

The Negligence of Manufacturers

While breach of contract may be the obvious first step, manufacturers can be liable if the product was created in a negligent manner. Specifically, a manufacturer may be found negligent if they made some error during either the design or manufacturing process. Manufacturers may be found negligent if they failed to carry out effective testing of the product, or if they failed to properly warn consumers of potential dangers in using the product. Notably, in the context of automobiles, a manufacturer may also be found negligent if they failed to recall a product or

[6] (1978) 22 O.R. (2d) 764 (Ont. County Ct.).
[7] *Ibid*.

issue an appropriate warning if an issue with the product arises after it has entered the marketplace.

If the claim is framed in negligence, the first issue to be determined is *whether the manufacturer owes a duty to the consumer*. Once a duty of care to the consumer is established, the second issue to be determined is *what standard of care ought to be imposed on the manufacturer*.

It was determined in *Donoghue* (and affirmed in numerous decisions succeeding *Donoghue*) that a manufacturer of a product owes a duty to the consumer.[8] With respect to the standard of care owed by a manufacturer, it is clear that the standard demanded of a manufacturer and designer of a product is the normal negligence standard. The normal negligence standard is that of reasonable care in the specific factual circumstances.[9] Therefore, in order to succeed on the basis of negligent manufacturing, the claimant must demonstrate that the manufacturer failed to exercise "reasonable care" in the course of the manufacturing process.

Jurisdictional Challenges

The fact that there are no native Canadian auto manufacturers had previously created a barrier to an effective third party claim. Further, there is no similar legislation to the *SGA* in the United States. Knowing this, automobile manufacturers have tried to raise a jurisdictional defence to claims, which have resulted in significant procedural issues and have increased the associated costs.

However, the decision of *Hutton v. General Motors of Canada, Ltd*.[10] removed this barrier. The court in *Hutton* held that despite the fact that the parent company of the defendant was the true manufacturer of the vehicle, and that the defendant was more properly characterized as a distributor, the defendant was held liable for the negligent design and manufacture of the vehicle by the US parent company.

Therefore, any attempt by an automobile manufacturer to try a jurisdictional defence for this reason can likely be deflated by referencing the decision in *Hutton*. However, for the purposes of ensuring complete discovery of all relevant evidence, it is likely best practice to sue both the parent auto manufacturer and the relevant Canadian subsidiary.

Third Party Claims against Garages, Mechanics and Dealers

When attempting to seek indemnity or contribution from a garage, mechanic, or used car dealer for shoddy repairs or improper inspection, a defendant may take several different avenues to secure a successful recovery. Specifically, a defendant can claim that the garage, mechanic or dealer negligently repaired, inspected, or certified the vehicle.

Negligence

A mechanic is expected to conduct all inspections and repairs with the reasonable care that would be expected of a person with his training and expertise. When an individual or business falls below this standard of care, a court will likely deem them to have performed their duties

[8] *Donoghue, supra* note 4.
[9] *Phillips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637 at p. 653 (Ont. C.A.).
[10] [2011] 4 WWR 284, 33 Alta LR (5th) 340 (Alta. Q.B.).

negligently, and consequently find them liable for the damages that flow from the negligent inspection or repair.

However, not every instance of a mechanical failure will necessarily indicate that liability will be found against the mechanic, or even against the automobile body shop; the mechanic's work still needs to fall below the standard of care. In other words, finding that a mechanical failure may have contributed to an accident does not necessarily mean that the mechanic who conducted repairs or issued a safety certificate did so negligently.

For instance, in *Gervais v Johnson,* the defendant rear-ended the vehicle being driven by the plaintiff.[11] While the main action was settled, the defendant subsequently brought a third-party action against Midway Alignment Ltd. in both contract and tort for the improper issuance of a safety certificate.

In *Gervais*, the defendant purchased a 15-year-old vehicle, and Midway had issued a safety certificate, which certified the vehicle would be safe to drive for 36 days. The accident occurred six weeks after the safety certificate was issued, or just over a week past the expiration of the safety certificate. When the inspection was completed, the brakes were found to have pitting, which is indicative of the early stages of a failure. Another major issue at trial focused on the condition of the brake lines upon certification.

Although the evidence in *Gervais* supported a finding of brake failure, the defendant was found to have been negligent by following too closely to the vehicle in front of him, as well as negligent in not having his vehicle maintained or inspected after the 36 days in order to ensure the certificate remained valid. Further, as the rear brakes were found to have pinholes throughout them, which is a condition that was held to have occurred slowly over time, the court held that defendant ought to have been alive to this issue through the proper use and maintenance of his vehicle. The court further held that the third party claim against Midway Alignment Ltd. failed in that while Midway Alignment Ltd. may have committed a misrepresentation, it was innocent and not negligent.

Negligent Misrepresentation

Defendant motorists may also have a cause of action against mechanics or garages for improper inspections, even where they did not retain the party to conduct the inspection. The action would be brought on the basis of a negligent misrepresentation, also known as the *Hedley Byrne* principle, which stems from the decision in *Hedley Byrne & Co. v. Heller & Partners Ltd.* [12] The *Hedley Byrne* principle states:

> If a person seeks information or advice from another in circumstances in which a reasonable person would know that he or she was being trusted or that his or her skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying the answer as to show that he or she does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making a reply.

[11] *Gervais v Johnson* (1990) 19 ACWS (3d) 373 ["*Gervais*"].
[12] *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.) ["*Hedley Byrne*"].

A duty to exercise proper care may arise out of some "special relationship". Special relationships can include the following: a solicitor to client, a banker to customer, contracting party to contracting party or out of a particular relationship created ad hoc. This principle has been confirmed by the Supreme Court in *Queen v. Cognos Inc.*[13]

> In *Queen*, the court held that there are four prerequisites in order for such a duty to be found:
> (1) a duty of care on the person giving advice or information arising from a special relationship between that person and the recipient;
> (2) a false statement negligently made;
> (3) reasonable reliance on the statement by its recipient; and,
> (4) a loss resulting from that reliance.

Garages, mechanics and dealers face this issue most frequently when they issue safety certificates.[14] When safety certificates are issued, and it is later found that there were repair issues that were not properly identified and disclosed, a cause of action exists for negligent misrepresentation. In *Ali v 301077 Ontario Ltd.*,[15] the plaintiff purchased a vehicle from a private vendor who advertised the vehicle as "certified". The vendor provided the plaintiff with a safety standard certificate issued pursuant to the *Highway Traffic Act*.

In *Ali*, the plaintiff began noticing problems with the vehicle after purchasing it and brought it to a garage. The plaintiff also had the vehicle inspected by the Ministry of Transportation. When the Ministry inspected the vehicle, various deficiencies were noted, and the vehicle was impounded. As a result, the plaintiff brought an action against the business that issued the safety certificate.

The court in *Ali* held that there was no cause of action stemming solely from a breach of the statutory duty as that is conducted for the public good (i.e. to ensure that all vehicles on the road have been safety checked). The effect of the breach, however, resulted in a safety certificate being issued containing misrepresentations with respect to the vehicle's mechanical condition. This provided the plaintiff with an avenue to bring a claim as the statements were held to be negligent misrepresentations, enabling the owner of the vehicle to successfully seek damages against the defendant.

Breach of Warranty

Another avenue for recovery is via the *Consumer Protection Act* ("*CPA*"). The *CPA* applies to both goods and services and can, therefore, be applied in a variety of contexts. For our purposes, this legislation can be relied on to third party mechanics and garages for repairs that did not meet the standard of care, or against used car dealers that sell vehicles with faulty parts.

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[13] *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 ["*Queen*"].
[14] Please note that while the *Hedley Byrne* principle and the requirements in Queen apply to representations made by garages, mechanics and dealers, it applies equally to the earlier situation where the manufacturer of a vehicle made negligent misrepresentations as to the quality or fitness of their vehicles for marketing purposes.
[15] *Ali v 301077 Ontario Ltd*., (1984) 24 ACWS (2d) 192 ["*Ali*"].

Section 9 of the *CPA* states:

> **Quality of services**
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> 9.(1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.[16]
>
> **Quality of goods**
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> (2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.[17]

Part VI of the *CPA* relates to Repairs to Motor Vehicles and Other Goods. Section 63 of the *CPA* states:

> **Warranty for vehicles**
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> **63.** (1) On the repair of a vehicle, every repairer shall be deemed to warrant all new or reconditioned parts installed and the labour required to install them for a minimum of 90 days or 5,000 kilometres, whichever comes first, or for such greater minimum as may be prescribed.[18]
>
> **Loss of warranty**
>
> (5) A consumer who subjects any vehicle part to misuse or abuse is not entitled to the benefit of the warranty on that part.

There are certain limitations to bringing a claim against a vendor of a used vehicle. The *CPA* only applies to the sale of vehicles through a business to a person purchasing the service for themselves or for their family. Therefore a private sale (from individual to individual) will not warrant statutory protection.[19] The *CPA* is also deemed not to apply where the purchaser is using the vehicle for business purposes.[20] In any event, while the *SGA* is frequently pled, the *CPA* is underutilized in pleadings. This legislation is meant to be interpreted in conjunction with the *SGA* and is particularly relevant in the context of bringing an action against a mechanic or automobile body shop.

Determining Liability: Destructive Testing and Spoliation

Once you have identified the appropriate parties, defendants who are considering bringing third party claims against manufacturers or automobile body shops must turn their mind to the possibility of obtaining an expert report to establish liability. This is an important step in the litigation process and parties should be cautious to proceed in a manner that protects the integrity of the findings of an expert report.

Fully considering of the implications of expert testing is particularly important in situations where the expert testing is necessarily destructive, as is the case with many vehicle parts. If the expert's testing process is conducted in a way that destroys the part, and potentially prejudices the other parties to an action, the court has the discretion to impose various sanctions such as striking the pleadings, or excluding the expert's findings and report.

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[16] 2002, c. 30, Sched. A.
[17] *Ibid*.
[18] *Supra*, note 16.
[19] *National Onsite Service Ltd v Trans Canada Truck Repairs (2001) Ltd*., 2014 SKPC 53 at para 23.
[20] *Bowen v Parkrow Auto Sales Ltd*., [2012] OJ No 1403 at para 31.

In *Dyk v Protec Automotive Repairs Ltd.*, the plaintiffs obtained an expert report indicating that the condition of the brakes had contributed to the subject motor vehicle accident.[21] The testing of the brake pads was necessarily destructive. The vehicle itself had also been destroyed and was therefore no longer available for any testing by the defendants or third party. In this case, the court held that spoliation would only be accepted as a basis for excluding evidence if it can be shown that relevant evidence in pending legal proceedings was intentionally destroyed for the purpose of either committing fraud or suppressing the truth. While in this case the plaintiff did intentionally destroy the evidence, it was in order to conduct expert testing and was not done for any fraudulent reason.

Notably, Justice Hoy of the Ontario Superior Court of Justice took a strong stance in a similar set of circumstances. In *Cheung (Litigation Guardian of) v Toyota Canada Inc.* the driver, Wai Cheung was killed after his van rolled over on Highway 401.[22] Several members of his family were injured in this accident and were the plaintiffs in this action. As a result of this accident, the plaintiffs sued not only Toyota Canada Inc. but also the maintenance garage where the vehicle was maintained and the dealership where they purchased the vehicle. This decision was a result of a motion brought by three co-defendants in this matter against the estate of Cheung to strike Cheung's crossclaim.

The central issue in this matter was whether the accident was caused by Chueng's driving, or whether the axle of the van broke and caused the rollover. An expert report was prepared on behalf of the estate. This report determined that recent repairs to the brakes were faulty and caused the axle failure. The expert concluded that nuts on a bearing retainer plate were insufficiently tightened, which led to a misalignment that resulted in friction causing wear on the axle that ultimately broke.

Unfortunately, there were two spoliation events that occurred as a result of these tests, and the report was obtained prior to the defendant, Toyota being put on notice of the claim. As a result, the estate was ordered to provide all of the photographs, data, findings and opinions arising out of the investigation, examination or testing of the van. It was also required to deliver specified component parts in the possession of the expert. Best efforts were made to comply with the order but it turned out that the estate's expert did not preserve many of the parts following testing. Furthermore, the estate's expert misplaced the tires prior to their inspection. The photographs that were provided to the parties indicated that the nuts had been moved before the expert had examined the parts.

The court in *Cheung* did not find that the moving defendants had suffered the requisite degree of prejudice to warrant striking the crossclaim under Rule 60.12 of the *Rules of Civil Procedure*. This rule also permits the court to make any order as is just where a party fails to comply with an interlocutory order. In the circumstances of this case, the court determined that the estate could not rely on any expert report or evidence that was dependent on the missing tires.

These cases demonstrate that the courts have various remedies when responding to an allegation of spoliation. As a result, we recommend that if an insurance adjuster is in the process of obtaining an expert report, it should notify any adverse parties of this intention, especially where destructive testing is contemplated. This allows all parties the opportunity to participate in the testing and/or indicate what parts they would like preserved. To avoid confusion, parties

[21] [1997] BJC No. 1895.
[22] [2003] OJ No 411.

retaining an expert should be sure to clearly communicate what parts must be preserved and what may be destroyed prior to handing over the evidence to them. These cautionary steps early on in the process will ensure the preservation of one's pleadings as well as any opinions that are obtained as a result of retaining an expert.

Conclusion

Overall, our experiences suggest that whenever we are asked to defend a claim that arises out of a motor vehicle accident, consideration must always be given to whether there are any potentially liable third parties. We also recommend that these considerations are made as early as possible in the initial stages of file management, so that proper notice and investigation can take place well before limitation periods expire.

For instance, when you first see the claim, you should ask your engineer if any part of the vehicle failed prior to, or during the collision. Second, if a part failed, find out whether the part was subject to a manufacturer's recall notice. Third, ask the insured if the vehicle was recently repaired, inspected or certified. Asking these questions early on can assist us as your legal counsel in identifying possible third parties that may indemnify you for the claim.