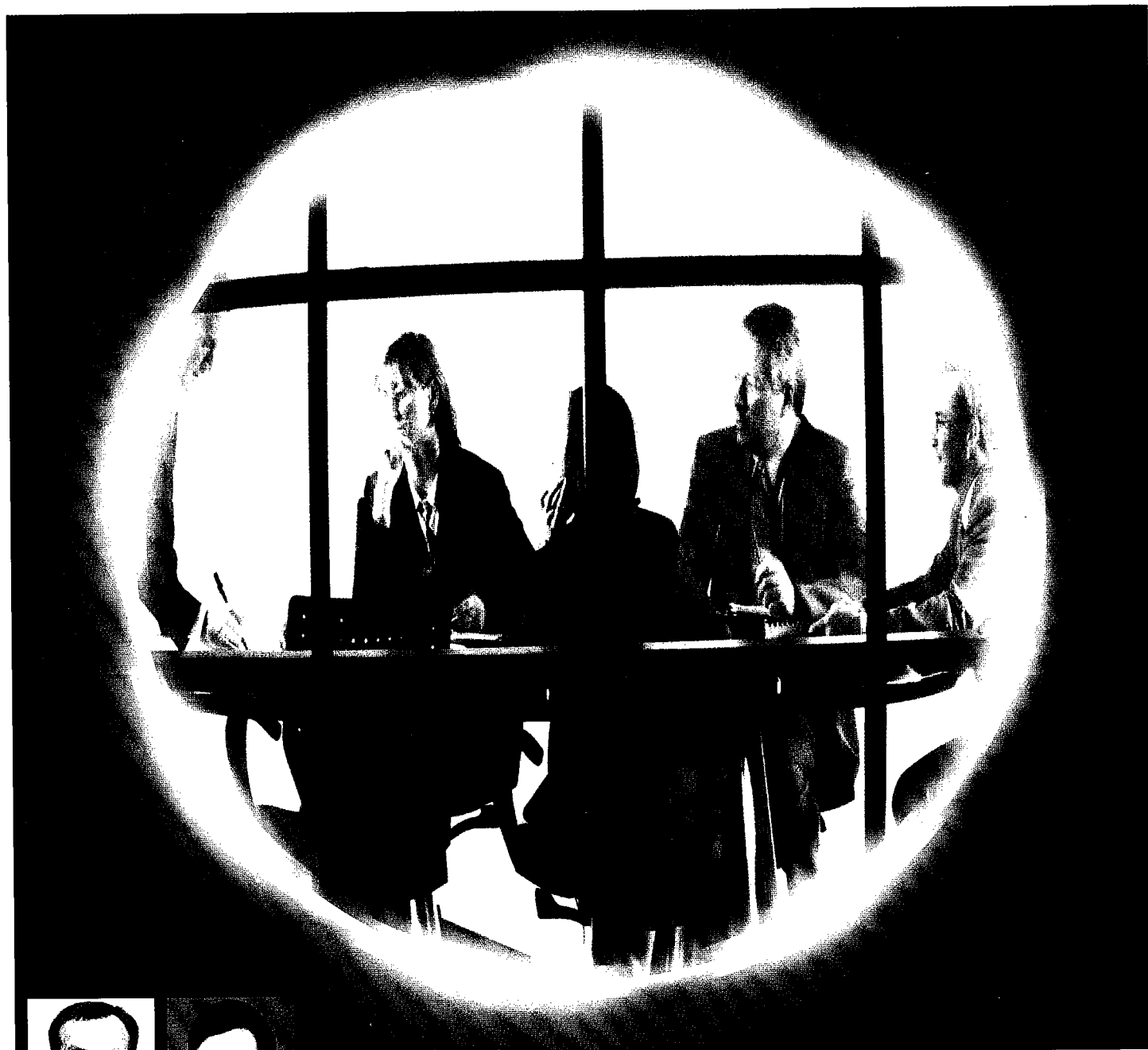


Attorney-Client Privilege and Work-Product Protection in Internal Corporate Investigations



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Every company eventually deals with potential liability that may result from employee misconduct. The scenarios are end-

less—an accusation of sexual harassment, a failed drug test after a work-related injury, an accountant's discovery of missing funds during an audit—and no business is immune. A company must be prepared for the inevitable through both a well-structured compliance program and, most importantly, a thorough internal investigation process.

Corporate officers and directors have a fiduciary duty to know what is going on in their company and to make informed, ethical decisions based on that knowledge. When potential wrongdoing has occurred, a well-run internal investigation provides management with the information it needs to run a disciplined business, pursue possible claims it may have against employees or other third parties, and assess possible company exposure that wrongdoing may have created. Internal investigations can also help maintain a company's reputation, both internal and external. Furthermore, proper investigation and follow-through can protect a business from claims that its negligence, for instance in hiring, supervising, or retaining employees, make it vicariously or directly liable for the harmful actions it is investigating.

Nevertheless, internal investigations are a delicate matter. Obviously, it is never desirable or comfortable to investigate your own employees. Further, issues can arise that force attorneys to assess both their loyalties and their professional responsibilities.

Internal investigations stretch our simplistic conceptions of the corporate construct to their breaking point and have important ramifications for the sacrosanct legal doctrines of attorney-client privilege and attorney work product.

Attorney-Client Privilege and Work Product 101

The attorney-client privilege arises in the context of evidence law; it protects a client and his or her attorney from compelled dis-

closure of communications between them. In short, "a client has a privilege to refuse to disclose, and to prevent others from disclosing, confidential communications between [it] and [its] lawyer or [the lawyer's] representative." 81 AM. JUR. 2d *Witnesses* §332 (2004). The privilege is generally the client's, not the attorney's. *Id.* at §331. While the contours of the privilege vary from state to state, there are fundamental aspects common to all jurisdictions. According to the Restatement (Third) of the Law Governing Lawyers, only information that may be characterized as (1) a communication, (2) between privileged persons, (3) in confidence, and (4) for the purpose of obtaining or providing legal representation, qualifies for the attorney-client privilege.

In some ways, this privilege is broad. "Communications" include both written and spoken information, and the persons who can invoke the privilege may include agents of both the client and the lawyer if they are facilitating the communication. Could a paralegal, claims coordinator, or investigator working at the direction of an attorney invoke the privilege? Most likely. Could a secretary invoke the privilege? Maybe. Could a receptionist invoke the privilege? Probably not. On the other hand, both the "confidentiality" and "purpose" requirements narrow the privilege significantly. Courts demand that the attorney and client take steps to achieve and maintain privacy; public or semi-public discussions are often left unprotected. Furthermore, only communications seeking legal advice are covered. Discussions with one's attorney for purely business purposes are not covered. In corporate law, the line between business and legal advice can be blurry, and corporate counsel should tread carefully.

Moreover, it is important to remember that attorney-client privilege covers the communications themselves and not the information underlying those communications—that is, the facts. While neither the attorney nor client need answer the question, "what did you discuss with your lawyer concerning your activities on May 27th," the client, at least, must answer direct questions such as, "what were you doing on May 27th?" Further, documents do not become privileged by virtue of entering an attorney's file cabinet or by simply labeling them

"privileged." The purpose of the privilege is not to conceal facts about an event, but, quite the opposite, to allow free and open dialogue about those legally significant facts with one's lawyer in the hope that the confidential nature of the relationship facilitates a frank and accurate assessment of an event's legal ramifications. In other words, the privilege does not allow the concealment of information necessary to the opposition's case; rather, it protects the legal advice rendered based on that information. As usual, exceptions apply; for example, the privilege cannot be used to facilitate future criminal schemes.

The work-product doctrine is embodied, among other places, in Federal Rule of Civil Procedure 26(b)(3), which states that ordinarily "documents and tangible things" created in preparation of litigation or for trial by an opposing party (a client) or his or her attorney are not discoverable. A very narrow exception is carved out for extreme circumstances if the opposition has a "substantial need" for the information and it cannot be obtained without "undue hardship"—perhaps a key witness died or absconded and opposing counsel conducted an interview while he or she was still available. Yet, even in the rare situations in which courts are compelled to enforce the exception, courts will take careful measures to avoid disclosing the "mental impressions, conclusions, opinions, or legal theories" of an attorney.

Essentially, the work-product doctrine protects the fruit of an attorney's labor as embodied in written documents. As with the attorney-client privilege, the "factual" information embedded in the work product is not strictly protected. Nevertheless, work-product protection is functionally broader than the attorney-client privilege because of the inherent difficulty of untangling an attorney's mental processes from his or her notes, interviews and outlines of key facts. On the other hand, documents created in the normal course of business do not become work product simply because they are used in preparation for litigation or become a key part of a corporation's defense. The application of the work-product doctrine becomes challenging when the day-to-day operations of a business involves the investigation of claims (*i.e.*, insurance adjusters).

Attorney-Client Privilege in Corporate Internal Investigations

A problem immediately arises when applying these concepts to an internal corporate investigation: Who is the client? While the client is obviously the corporation, as discussed above, what this conclusion means or how it relates to the attorney-client privilege is not so obvious. After all, a corporation is a mere legal construct that acts through people. Accordingly, it must communicate with an attorney through people. So, if the privilege applies to corporations at all—and rest assured, it does—the real question is its scope. To whom does the privilege apply?

Option 1: The privilege covers everyone.

An early attempt to answer this question at the federal level was in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950). The *United Shoe* court concluded that any “information furnished by an officer or employee in confidence and without the presence of third parties” is covered by the corporate privilege. This broad and unimaginative view is no longer viable. See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 601–02 (8th Cir. 1977).

Option 2: The privilege covers the “control group.” The control-group theory, as expounded in *Philadelphia v. Westinghouse Electrical Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), is the minority view. It holds that only those involved in decision making and/or in exercising control over a corporation merit the privilege. That court reasoned that “[i]n all other cases the employee would be merely giving the information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.” *Id.* at 485. This test maintains that management is the corporate “person,” and consequentially, by analogy, the control group is the brain of the corporate person. Those persons who can cause the client/corporation to act should be treated as the client; those who cannot, should not.

The control-group test also has the practical merit of providing a level of predictability and consistency: management has the privilege, but everyone else does not. Because of its merits, the control-group test still prevails in some state court systems,

and it is a useful rule of thumb even where it does not prove the rule.

Option 3: Privilege depends on a communication’s “subject matter.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981), is the definitive federal case dealing with attorney-client privilege and the work-product doctrine in the corporate context.

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In *Upjohn*, the Supreme Court explained that “[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” *Id.* at 389 (citing *Trammel v. United States*, 445 U.S. 40, 51 (1980)). For this reason, it is vital that the privilege should protect “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound informed advice.” *Id.* at 390.

The court understood that even low level employees can create legal entanglements for the corporation: “[i]n the corporate context, it will frequently be employees beyond the control group... who will possess the information needed by the corporation’s lawyers.” *Id.* at 391. The control-group test does not provide protection for such employees, and potentially discourages candor in their disclosures. Moreover, especially in large corporations, it is not always easy to discern who is in “control” and who is a mere facilitator. For this reason, the court concluded that “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Id.* at 393.

So how did the Supreme Court supply the certainty so vital to the privilege? It rejected the control-group test, decided

Upjohn on the facts, and called for development of the rule on a case-by-case basis. The concurring opinion, acknowledging the irony of the holding, attempted to provide what the majority did not by summarizing the facts and holding of the case and citing a number of lower court cases that contain tests more or less consistent with the majority’s opinion. Most notably among these subject-matter privilege tests are *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), and *Diversified Industries Inc. v. Meredith*, 572 F.2d at 609. The slightly more restrictive *Diversified* test states that the attorney-client privilege applies when

- (1) the communication was made for the purpose of securing legal advice;
- (2) the employee making the communication did so at the direction of his corporate superior;
- (3) the superior made the request so that the corporation could secure legal advice;
- (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note, moreover, that the corporation has the burden of showing that the communication in issue meets all of the above requirements.

Diversified Indus., 572 F.2d at 609.

In short, in the corporate context, the privilege covers those in the “control group” and the communications relating to the subject of the investigation:

As a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee’s conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be undertaken

with regard to that conduct.... Other communications between employees and corporate counsel may indeed be privileged.

Upjohn Co., 449 U.S. at 403 (Burger, C.J., concurring).

Upjohn in Practice

Putting these insights into practice, the methodology used by Upjohn's attorneys provides a useful guide for structuring information gathering in an internal corporate investigation. In *Upjohn*, an independent auditor discovered illegal payments by an Upjohn subsidiary to a foreign government and informed Upjohn's general counsel. The general counsel consulted with outside counsel and Upjohn's chair. They jointly decided to conduct an internal investigation and sent a letter concerning "questionable payments" to all Upjohn's foreign general and area managers. The letter noted the possible illegal activities and the company's absolute opposition to them, emphasized management's need for any information pertaining to such activities, and requested full disclosure. The letter indicated that the investigation was authorized at the highest levels and insisted on the fullest possible confidentiality—no discussion with anyone unless they have relevant information, and then, only to the extent necessary. Finally, the letter instructed that responses be sent directly to the general counsel.

The clear message of *Upjohn* is that the information gleaned from an investigation tailored as narrowly and discretely as possible to facilitate full and adequate legal representation should be respected in federal court as confidential and attorney-client privileged. In-house counsel should strive to model an internal investigation after *Upjohn* by (1) self-policing, both through contacting outside counsel and following a thorough compliance program; (2) taking immediate action when a potential situation arises by consulting with as few people as appropriate and necessary to take action through a pre-organized investigation method; (3) discretely contacting the parties with potential information and notifying them of the nature of the investigation, without unnecessarily revealing details, its importance, its authorization,

its scope, and its confidentiality; (4) directing employees to return all information either to internal or external investigators without further discussion with other

employees; and (5) crafting a proportionate, fair and transparent response.

In addition, in-house counsel should seriously consider how to best inform cor-

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porate employees involved in investigations about the scope of the corporation's privilege, the possibility of waiver, and the consequences that such a waiver might have for an employee.

Waiver

In the broadest sense, the attorney-client privilege is waived whenever there is "any voluntary disclosure inconsistent with the confidential nature of the [...] privilege." 81 AM. JUR. 2d *Witnesses* at §336. More specifically, in the corporate context, waiver occurs if a client, its counsel, or one of its authorized agents:

- voluntarily waives the privilege;
- voluntarily discloses the privileged communication during a non-privileged communication;
- disclaims its protection and either a person relies on the disclaimer or a judge deems the disclaimer irrevocable for legitimate reasons;
- fails to object properly when a third party attempts to obtain information regarding a privileged communication in a legal proceeding (*see* FED. R. EVID. 103(a)(1); *but also see* FED. R. EVID. 103(a)(1)).

Restatement (Third) of the Law Governing Lawyers §§78-79 (2000).

An agent must be authorized by the corporation to waive the corporation's privilege, not just to act in a capacity related to the communication. *See* Alexander C. Black, *What persons or entities may assert or waive corporation's attorney client privilege—modern cases*, 28 A.L.R. 5th 1 §17 (1995). Counsel should also be aware that the privilege may be waived for a certain communication, and possibly the subject matter surrounding it, if it becomes at issue in an action either because it was used to assist a witness' testimony, or because the client "asserts as to a material issue in a proceeding that [he] acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct; or [that] a lawyer's assistance was ineffective, negligent, or otherwise wrongful." *Id.* at §80.

New Federal Rule of Evidence 502 attempts to bring a degree of clarity to the innumerable murky scenarios that may arise. First, subsection (a) of the new rule states

that "waiver extends to an undisclosed communication or information in a Federal or State proceeding" only if (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together. FED. R. EVID. 502(a). This section concerns

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the limited, "strategic" disclosures that a client might wish to make for some litigation purpose. The rule makes clear that, in that case, the client waives his or her privilege concerning the entire "subject matter" of the disclosure to prevent the potential gaming of the system by using the privilege to create a distorted evidentiary picture.

In recognition of the tremendous time and expense associated with the liberal discovery regime in modern American litigation, the rule makers decided that the strict penalties and harsh consequences of good faith, accidental disclosures were simply too high and added unnecessary stress and expense to an already daunting process. Thus, a truly inadvertent disclosure will not constitute a waiver if and when "the holder of the privilege or protection took reasonable steps to prevent disclosure," and "the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." FED. R. EVID. 502(b). The Judicial Conference notes to the rule provide some guidance on what constitutes reasonable efforts in protecting and rectifying an error, pointing to cases that provide useful tests, and noting other "relevant considerations," such as, "the number of documents to be reviewed and the time constraints for production... [the use of] advanced analytical software applications and linguistic tools... [and] [e]fficient sys-

tems of records management implemented before litigation." FED. R. EVID. 502 committee notes to (b). (*See Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985)). The rule also refers to the clawback mechanism already in place in the Federal Rules of Civil Procedure, although this reference provides little practical guidance.

Rule 502 is not without its limitations. The rule only applies to disclosures "in a federal proceeding or to a federal officer or agency" and not to pure state actions. FED. R. EVID. 502(a). Furthermore, Federal Rule of Evidence 502 does not determine the scope of the attorney-client privilege or the work-product doctrines, which are its exclusive focus. *See id.* at (g). While Federal Rule of Evidence 502 does not preempt all aspects of state waiver law, subsection (c) does deal with disclosures made in state courts that an opposing party tries to use in a subsequent federal action. In summary, "[t]he Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product." FED. R. EVID. 502 committee notes to (c). This means that if the privilege was waived in state court under circumstances that would not have constituted a waiver in federal court, the federal court will protect the information. If a disclosure did not constitute a waiver in state court, but would have in federal court, the federal court will protect the privilege and not enforce a waiver. On the other hand, if a state court order expressly held that there was no waiver, the federal court will follow the order as a matter of "comity, courtesy, and... federalism." *Id.*

Finally, Federal Rule of Evidence 502 (d) and (e) makes clear that federal court orders protecting confidentiality are enforceable in other state and federal proceedings. Furthermore, the rule allows the parties to enter into agreements that delineate and limit waiver and "clawbacks" and makes such agreements enforceable on their terms against third parties when incorporated into a court order.

Practice Pointers

Develop a Plan: In-house counsel wish-
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ing to avoid unintentional disclosures and waivers need to develop a policy governing internal investigations that conforms to the requirements of *Upjohn* and ensure that this policy is effectively communicated to all persons involved in conducting such investigations.

Work the Plan: Investigations should target those persons indispensable to the fact-finding process, and discussions of those findings should be limited to the core group essential to rendering legal advice based on the results of the investigation. Coordinat-

ing the efforts through outside counsel also helps establish that a situation is unique, rather than the normal operating procedure of the company.

Protect the Plan: Counsel should generally instruct employees to refrain altogether from any communication without counsel, and, as a prophylactic measure, from discussing an investigation or the underlying facts with other employees, other than at the request of counsel and/or in the presence of counsel. The process needs to identify who has information and who can waive the corporation's privilege

as quickly as possible. Counsel should also be aware of the perils surrounding attempts to limit disclosures in different contexts, foreseeing the very real possibility that this might well mean waiving privilege to a much broader swath of information. Ever-advancing technology makes waiver as easy as the click of a forward button. Thus, counsel needs to approach dissemination of information in a disciplined fashion to maximize efficiency while still taking reasonable steps to safeguard inadvertent disclosures. ■

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others use it in conjunction with that other design defect stalwart, the consumer-expectation test. *E.g.*, *Mikolajczyk v. Ford Motor Co.*, No. 104983, 2008 Ill. LEXIS 1424, at *58 (Oct. 17, 2008) (employing both tests); Indiana Products Liability Act, §34-20-4-1 (2008) (employing only the consumer expectation test). Should the different frameworks reasoning—regulatory as opposed to civil tort—bar evidence of regulatory bans in the face of the consumer-expectation test? The answer may be an easy yes, depending on the jurisdiction.

The consumer-expectation test is increasingly subsumed within the risk-utility test. For example, the Restatement (Third) of Torts, Products Liability (1998) has done away with the consumer expectation test as a free-standing method of demonstrating design defect, instead relegating it to a factor—and a minor one at that—within the risk-utility test. *Rest. 3d* §2 cmt. f. Illinois has recently adopted a similar approach: “[w]hen both tests are employed, consumer expectation is to be treated as one factor in the multifactor risk-utility analysis.” *Mikolajczyk*, 2008 Ill. LEXIS 1424, at *80. Thus, even where

it exists, the consumer expectation test may actually just loop back into the risk-utility test.

Conclusion

The next time your client is faced with accusations that its product is defective, and the plaintiff's putative proof is a ban, consider launching an evidentiary counterattack. At minimum, you stand a good chance of precluding a ban from evidence early in the case. And at maximum, if the ban is all the evidence a plaintiff possesses, you may prevail on everything. ■

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