MOOOVE OUT OF THE WAY!
From @HillaryClinton

@Landingearless
Take it from me not “Dumb Donald” – you better delete that data from the black box!
#ExtremelyCarelessIsn’tNegligent

From @RealDonaldTrump

“Crooked Hillary” would hang you out to dry @Wheelehouse – I’ll “wall you off” from a thorough NTSB Investigation!
#NotSafeButGreat!
NTSB INVESTIGATIONS

The relationship between NTSB investigations and litigation
Anatomy of an Investigation

• The NTSB is responsible for all aviation accident and incident investigations involving a civil or public aircraft. 49 C.F.R. § 831.2(a)(1)

• Overarching purpose: Safety
  • An NTSB investigation is a “fact-finding proceeding with no formal issues and no adverse parties” that is not conducted “for the purpose of determining the rights or liabilities of any person.” Chiron Corp. And PerSeptive Biosystems, Inc. v. National Transportation Safety Board, 198 F.3d 935, 938 (D.C.Cir. 1999)

• Achieving the purpose: Party participant system.
  • The party system “ensures the board has access to technical expertise in the fact finding phase of the investigation, that all viewpoints are heard, and that the investigation itself is transparent.” Robert J. Sumwalt III, Board Member, Nat’l Transp. Safety Bd., Presentation to National Business Aviation Association’s Emergency Response Planning Workshop (Oct. 20, 2014)

• The Certification of Party Representative form, and the regulations underpinning it, drive the scope and nature of participation, and how a company prepares for and engages in litigation.
CERTIFICATION OF PARTY REPRESENTATIVE

I acknowledge that I am participating in the above-referenced accident or incident investigation, on behalf of my employer who has been named a party to the National Transportation Safety Board (NTSB) safety investigation, for the purpose of providing technical assistance to the NTSB's evidence documentation and fact-finding activities. I understand that as a party participant, I and my organization shall be responsive to the direction of NTSB personnel and may lose party status for conduct that is prejudicial to the investigation or inconsistent with NTSB policies or instructions. No information pertaining to the accident, or in any manner relevant to the investigation, may be withheld from the NTSB by any party or party participant.

I further acknowledge that I have familiarized myself with the attached copies of the NTSB Accident/Incident Investigation Procedures (49 C.F.R. Part 831) and "Information and Guidance for Parties to NTSB Accident and Incident Investigations," and will comply, and, if the party coordinator for my party, take all reasonable steps to ensure that the employees and participants of my organization comply, with these requirements. This includes, but is not limited to, the provisions of 49 C.F.R. §§ 831.11 and 831.13, which, respectively, specify certain criteria for participation in NTSB investigations and limitations on the dissemination of investigation information.

No party coordinator or representative may occupy a legal position or be a person who also represents claimants or insurers. I certify that my participation is not on behalf of either claimants or insurers, and that, although factual information obtained as a result of participating in the NTSB investigation may ultimately be used in litigation (at the appropriate time, and in a manner that is not inconsistent with the provisions of 49 C.F.R. §§ 831.13 and 49 U.S.C. § 1154), my participation is to assist the NTSB safety investigation and not for the purposes of preparing for litigation. I also certify that, after the NTSB Investigator-in-Charge (IC) releases the parties and party participants from the restrictions on dissemination of investigative information specified in 49 C.F.R. § 831.13, neither I nor my party’s organization will in any way assert in civil litigation arising out of the accident any claim of privilege for information or records received as a result of my participation in the NTSB investigation.

________________________________________
Signature

________________________________________
Date

________________________________________
Name & Title

________________________________________
Party Organization/Employer

1 Note: an alternate printed form may also be referred to as "Statement of Party Representation to NTSB Investigation."
Balancing Legal Counsel’s Involvement

• 49 C.F.R. 831.11 and Certification statement disclaim legal involvement:
  • “No party coordinator or representative may occupy a legal position or be a person who also represents claimants or insurers.” 49 C.F.R. 831.11(a)(3) and Certification
  • “…[M]y participation is to assist the NTSB safety investigation and not for the purposes of preparing for litigation.” Certification of Party Representative

• Key strategies for balancing NTSB participation and legal advice related to incident/preparation for litigation:
  • Company participants must always follow prudent writing guidelines
  • Company participants must not speculate or draw conclusions
  • Emphasize verbal communications with in-house counsel
  • Be mindful of your “normal course of business” investigative process
Communications and Disclosures During Ongoing Investigation

• 49 C.F.R. § 831.13 limits dissemination of information: “Release of information during the field investigation…shall be limited to factual developments, and shall be made only through” the NTSB

• Company should therefore not publicly comment during an ongoing NTSB investigation in which it participates

• Communications within company under 49 C.F.R. § 831.13:
  • Party representative may relay information within organization “necessary for purposes of prevention or remedial action.”
  • Requires prior consultation and approval of the investigator-in-charge before initial release by the Safety Board
Admissibility of NTSB Reports and Findings in Litigation

• **Key distinction:** Final Accident Report vs. factual accident reports (group chairperson or “investigator reports”)

• **Final Accident Report rule:** Under 49 C.F.R. § 835.2 “no part of a Board accident report may be admitted as evidence or used in any suit or action for damages…” 49 C.F.R. § 835.2; see also, Chiron Corp. and PerSeptive Biosystems, Inc. v. National Transportation Safety Board, 198 F.3d 935 (D.C. Cir. 1999)

• **Factual accident report rule:** “The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports…group chairman factual reports are factual accident reports.” 49 C.F.R. § 835.2; and Chiron Corp.
  
  • Exception: Opinions or conclusions contained in such a report inadmissible. See, 49 C.F.R. § 835.3(e) and In re Air Crash at Charlotte, 982 F.Supp. 1071, 1075 (D. S.C. 1996)
  
  • Exception to exception: Whether all opinion/conclusions are barred ("Frank Rule" Fidelity & Casualty Co. v. Frank), or only those related to the probable cause ("American Airlines Rule" under Kline v. Martin). NTSB endorses latter position

• Not all reports are barred but some parts of admissible reports are excluded
Waiver and Preservation of Privileges – Competing Views

• Party representative certification waives litigation privileges over information and records received during investigation participation

• NTSB’s position on certification’s waiver:
  • It requires “parties to waive any objection to civil discovery about their investigatory role in the event litigation commences.” *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 996 (5th Cir. 1999)
  • A “discovery waiver” by which parties “give up discovery privileges potentially assertable in a tort liability case.” *Id.*

• “Documents and information received” limitation: Some cases hold that similar NTSB language is not so broad as to waive *any and all* attorney-client privileges. *In re Air Crash at Charlotte* (D. Sc.1995) and *In re Air Crash Disaster at Sioux City* (N.D. Ill. 1990)
Conclusion

• Interest of safety is primary, litigation is secondary

• Remain mindful of party participant waivers and conditions against legal involvement while managing the scope of your involvement

• Prudent writing, controlled roster of participating employees, and controlled flow of information, will place the company in strongest position for litigation
NOW TRENDING ON TWITTER....
From @Landingearless

Re cow pasture accident, tires were manufactured by @WheelHouse as id’d by neon-green WH logo printed on tire’s side wall.

#where-rubber-does-not-meet-road
#greenwithenvy-not

From @WheelHouse

How were we supposed to know that new green paint had a corrosive effect on tires!?

#WheelofMisfortune
#not-much-pun 😞
Post-Sale Duty to Warn*(& Other Post-Sale Duties)
**Point-of-Sale Duty to Warn:**

- A duty to provide consumers with warnings of those dangers that the manufacturer knows or should know at time of sale.

**Post-Sale Duty to Warn:**

- A duty to provide consumers with warnings of dangers a manufacturer discovers or should have discovered after sale.

Paint Co. → Tire Co. → LG Cos. → Operators → Pакс
Post-Sale Duty to Warn: Four Factors

1. Seller knows product poses substantial risk of harm

2. Users can be identified and unaware of risk

3. Warning can be effectively communicated & acted upon

4. Risk of harm is sufficiently great to justify the burden
   (Restatement Torts, 3rd § 10)

Paint Co. → Tire Co. → LG Cos. → Operators → Paxs
What Law Applies?

- Consider law of each state where product is
- Majority of states impose continuing duty to warn
- Therefore, best to take maximum precaution
Duty to Recall

Liability for failure to recall if:

• Required by statute or governmental regulation; or
• In absence of recall requirement, the seller undertakes to recall the product and does so negligently (Rstmt Torts, 3rd § 11)
• Compliance with regulations does not prevent a negligence finding where reasonable person would take precautions
• Common law duty to recall/retrofit is very limited
Post-Sale Action Plan – 1

• Program should be in place before problem occurs and implemented quickly post-problem

• Consider timely and appropriate action
  • Warn, Retrofit, Recall

• Provide clear/concise instructions to employees, field reps, engineers re communications
Post-Sale Action Plan – 2

• Consider channels through which employee communications should flow

• Designate point of contact/spokesperson for various departments as appropriate

• Caution against written communications/emails (internal or external) without prior approval by point of contact designee
Post-Sale Action Plan – 3

• Caution against discussing in public, answering questions
• Develop uniform responses (“under investigation”)
• Make sure everyone on same page
• Update staff – meetings with counsel present
Remember:

• Never put image/marketing concerns above safety
• Establishing and following an effective post-sale program will be considered in determining negligence
• Balancing costs of recall/warning against costs of lawsuits can result in punitive damages
NOW TRENDING ON TWITTER....
From @DeweyCheetumAndHowe

My injured clients will win big from this landing gear disaster
#gearingup
#productdefendantsmustpay
#neverpiloterror 💰💰💰
Product Liability
What Is Product Liability?

• Strict liability arising from a product defect that causes harm

• Condition of the product is on trial
  • Unlike negligence, which looks at the conduct of the defendant

• Anyone in the chain of distribution can be strictly liable
Was The Product Defective?

• A defect is an unreasonably dangerous condition that causes harm

• Types of defects:
  • Design defect
  • Manufacturing defect
  • Failure to warn
  • Documentation
The Lawsuit: Causes Of Action

• Strict Liability
• Negligence
• Breach of Warranty (Express/Implied)
• Misrepresentation (Negligent/Intentional)
Potential Defenses

- No defect
- Alleged defect did not cause injury
- Product was modified by unauthorized party
- Product was misused in an unforeseeable way
- Comparative negligence of plaintiff
- Sophisticated user
- Statutes of limitation/repose (GARA)
- Government Contractor Defense
Damages

• Compensatory $$$
  • Economic or “special” damages: loss of earnings, medical expenses, property damage
  • Non-economic or “general” damages: pain and suffering, emotional distress

• Punitive 777
NOW TRENDING ON TWITTER....
From @DeweyCheetumAndHowe

Oh and @Landingearless and @WheelHouse, you’re both responsible!

#i-win-either-way
JOINT AND SEVERAL LIABILITY

• Plaintiffs can recover ALL awarded damages from any liable defendant (joint liability)

• Paying defendants have a right of contribution from non-paying defendants (several liability)
NOW TRENDING ON TWITTER....
From @Landingearless

Hey @WheelHouse, we had our attorneys review the contract.

This one’s on you!
#notmyproblem

From @WheelHouse

Not so fast @Landingearless
The indemnification clause is clearly limited
#PLANEinterpretation
Indemnity Agreements
• Contractual Indemnification is a way to shift liability- one party agrees to pay for potential losses or damages caused by the other party.

• An **indemnitor** is the party who is obligated to pay another. An **indemnitee** is the party who is entitled to receive the payment from the indemnitor.
Language is critical - When negotiating a contract, consider:

- Who is indemnifying whom?
- What risks does the indemnity provision cover (i.e. personal injury, wrongful death, property damage, intellectual property)
- Are attorneys' fees and costs of defense covered?
  - In many states the right to indemnity includes the reasonable costs of defense incurred in good faith, but there are states where attorney’s fees or other costs of defense are not permitted unless expressly stated
- Is there a monetary cap?
- What law applies?
- Is there a way to mitigate exposure? E.g. exclude consequential damages
- Do indemnity rights survive the expiration of the contract?
  - E.g. “Upon the termination of this Agreement at any time, all rights and obligations of the respective parties hereunder shall cease, provided however that notwithstanding any contrary provision hereof, all of the rights and obligations of the respective parties under the Indemnity and Insurance Section hereof, shall survive expiration or termination (for any reason) of the Agreement and remain in full force and effect.”
• Indemnitee must notify Indemnitor of claims
• Indemnitee must cooperate with Indemnitor in the defense of the claim
• Right of Indemnitor to control defense of claims (including selecting counsel) or settlement of claim
  ➢ Protect your company by including clause providing that Indemnitor may not settle without the prior written consent of Indemnitee and Indemnitee has a right to participate with own counsel under certain conditions
“To the fullest extent permitted by law, WheelHouse shall defend, indemnify, release and hold harmless LandingGear and any of its agents, employees, subcontractors or customers, from and against any and all loss, damage, injury, liability, demands, claims, judgment, award or expenses, fines, and penalties, including without limitation, reasonable attorneys’ fees and costs, for injury to or death of any person (including an employee of WheelHouse or Landing Gear), **caused in any manner by the possession, use or operation of the [Tires]**”

• If LandingGear is found negligent, is WheelHouse obligated to indemnify?
  - Agreements to indemnify v. one’s own negligence are unenforceable in some jurisdictions
  - Contract will not typically be construed to indemnify the indemnitee v. losses resulting from its own negligence unless such an intention is expressed in unequivocal terms- e.g. “...any and all losses ... occasioned directly or indirectly by the act of negligence of the indemnitor or otherwise ...”
“WheelHouse shall defend, indemnify, release and hold harmless LandingGear and any of its members, officers, directors, shareholders, agents, employees, subcontractors or customers, from and against any and all loss, damage, injury, liability, demands, claims, judgment, award or expenses, fines, and penalties, including without limitation, reasonable attorneys’ fees, for injury to or death of any person (including an employee of WheelHouse or LandingGear), arising in any from the possession, use or operation of the [Tires], whether or not caused by the negligence of LandingGear, except for claims arising from the gross negligence or willful misconduct of LandingGear.”
“WheelHouse agrees to indemnify and hold harmless LandingGear for all claims arising out of WheelHouse’s negligence or any defect in the tires sold to LandingGear under this contract”
INDEMNITY AGREEMENTS NOT ALLOWED BY STATUTE IN SOME STATES BECAUSE AGAINST PUBLIC POLICY:

- Indemnification for unlawful acts, fraud, intentional criminal or tortious conduct
- Indemnification agreements related to the construction, repair, maintenance or service of buildings, highways and railroads
- Indemnification for punitive damages
- Agreements to indemnify architects, engineers, or surveyors for losses resulting from their sole negligence
DUTY TO DEFEND

“Without limiting WheelHouse’s duty to hold harmless and indemnify hereunder, WheelHouse agrees to secure and carry as a minimum the following insurance with respect to all work to be performed under the Order for the duration of the Order: (i) Workers’ Compensation Insurance…(ii) Commercial General Liability Insurance …[etc.]

All such insurance shall be issued by companies authorized to do business under the laws of the State or jurisdiction in which all or part of the Services are to be performed, and must have an AM Best financial rating of A- or better or an equivalent rating as produced by another rating agency acceptable to LandingGear.

The insurance coverages described above shall be in form satisfactory to LandingGear, and shall contain a provision prohibiting cancellation or material change except upon at least ten (10) days prior notice to LandingGear. All such insurance policies will be primary in the event of a loss arising out of the WheelHouse’s performance under the contract and shall provide that where there is more than one insured the policy will operate, except for the limits of liability, as if there were a separate policy covering each insured and shall operate without right of contribution from any other insurance carrier by LandingGear. Certificates evidencing such insurance and endorsements naming LandingGear as an additional insured shall be filed with LandingGear within thirty (30) days after any renewals or changes to such policies are issued. To the extent permitted by law, WheelHouse and its insurer(s) agree that subrogation rights against LandingGear are hereby waived; such waiver shall be reflected on the insurance certificate. WheelHouse shall, if requested by LandingGear, advise LandingGear of the amount of available policy limits and the amounts of any self-insured retention.

The certificate of insurance shall identify the contract number or work to be performed and shall acknowledge that such coverage applies to liabilities incurred by WheelHouse, its employees, invitees or agents and that such insurance shall not be invalidated by any act or neglect of WheelHouse whether or not such act or neglect is a breach or violation of any warranty, declarations or conditions of the policies. WheelHouse shall require it's subcontractors to maintain insurance in the amounts and types required by this provision"
• Duty to defend is separate from and independent of duty to indemnify

• Broader than duty to indemnify and typically is to be determined from the allegations of the complaint, notwithstanding their merit

• Is the insurer’s obligation to the third party/indemnitee/additional insured limited to the insured’s obligation to indemnify?
  
  ➢ E.g. “...the scope of the coverage provided to LandingGear shall be limited to coincide with WheelHouse’s obligation to, defend, indemnify, and hold LandingGear harmless pursuant to the “Indemnity” section of this Agreement and shall be subject to all standard coverage limitations, exclusions, definitions, conditions, endorsements and other requirements, limitations and obligations set forth in WheelHouse’s insurance policies”

• Request copies of insurance certificates on annual basis to confirm that you are named as an additional insured
REMEMBER

• Beware boilerplate and pay close attention to fine print
• Contracts should be written/reviewed by counsel, including during renewals, as conditions may have changed
• Negotiate indemnity clauses- identify and attempt to minimize risk and liability and, where possible, avoid assuming liability for acts or omissions of others
• Do you have insurance to cover the contractual assumed liabilities?
• Notify your Underwriters before agreeing to procure insurance for another party or agreeing to an indemnity clause assuming liability for the negligence of others
• Indemnity agreement/additional insured provisions may ultimately have a negative effect on your loss history and result in increase of insurance premium
• Once you have notice of a pending action or claim, you should immediately notify contractual indemnitor/s- comply with notice provisions, if any
• Indemnitees may not be entitled to recover attorneys fees and defense costs incurred in enforcing the indemnity (e.g. New York). Avoid litigation if possible
NOW TRENDING ON TWITTER....
From @Landinggearless

The landing gear worked perfectly and everybody lived – we better not get sued!
#keep-away-the-vultures

From @WheelHouse

This sounds like another faulty landing gear – hope Landinggearless is paid up on their insurance premiums!
#PureSpeculation
Prudent Writing

How to Communicate Safely – Your Words Matter!
Think Defensively at Every Stage

• Conception of idea
• Design and Engineering
• Quality assurance and regulatory affairs
• Sales and marketing
• Service
THE “DO LIST” – THINGS TO REMEMBER WHEN WRITING

• Consider how your words would look if they were published on the cover of a newspaper
• How would your words look to a jury
• Think carefully before you write – you are creating a permanent record
• Practice “Economy of Words” – write only what is necessary to communicate your point
• Keep “cc list” to a minimum
• Stick to the facts
• Treat email as a formal communication
• Respond to all queries
The “Don’t List” – Common Pitfalls In Writing

• Do not include information of a personal nature in any writing
• Absent a litigation hold, do not keep drafts
• Don’t use sarcasm
• Don’t be emotional or apologetic
• Don’t express a possibility as a probability
• Don’t reach conclusions without supporting facts – don’t speculate
• In responding to a query, it is ok to not know an answer
• Don’t write to “show off” or otherwise try and impress your superiors
• Don’t write to protect yourself or to shift responsibility
• Don’t label all writings as “privileged” or “confidential”
Common False Assumptions About Emails

• Emails are not casual conversation
• Deleted emails are not gone forever
• Emails are not private
• Copying an attorney does not necessarily create privilege
From: Nicholas.Knowitall@landinggearlessco.com
Sent: September 19, 2016
To: James Sully
CC: Accident Investigation (ALL); Engineering (ALL); Marketing (ALL)
Subject: Incident in Cow Pie

Hey Jimbo-

Just got word from my buddy at WheelHouseCo. that a lawsuit was filed in that cow field crash. I heard there were no real injuries – sounds like a bunch of whiners are just trying to cash in!

Thankfully, we were not named. Word on the street is WheelHouseCo. is having some kind of an issue with the paint they put on their tires – personally, I wouldn’t put one of their tires on a Big Wheel but hey their price is right and it helps our bottom line. Anyway, I hope this really was a tire paint issue - the last thing we need is for everyone to find out our landing gear doesn’t always fully extend.

Peace-

Nick
ANY QUESTIONS?