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In “The Role of the United States in the Harmonization Process: A Proposed Scorecard” (34 PSLR 422, 4/24/06), attorney Daniel P. Malone observed that while the WP.29 and 1998 Global Agreement create a common process and forum for those involved in automotive industry regulation to discuss and harmonize vehicle safety regulations, “the need for considerable clarification remains.” In this article, Malone teams with attorneys Susan T. Dwyer and Colin P. Smith to explore unaddressed issues related to this country’s ability to contribute meaningfully to the harmonization process, and the potential impact participation may have on regulatory and litigation matters. The article presents a challenge to all interested parties to reflect on the scope of the harmonization process and to join in shaping its role within the U.S. legal system.

World Consensus on Vehicle Safety Standards: Speed Bumps on the Road to Common Ground

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The prevailing business model in today’s automotive world mandates that companies develop new markets and commit to continuous improvement in quality, delivery, and price. As competition has intensified, the pursuit of these objectives has driven vehicle manufacturers and suppliers to establish an integrated global presence. Worldwide communications, networks, and essential computer applications have led to a globalized industry and “companies without borders.”

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The legal framework governing this overall process has been slower to develop however. For example, countries have traditionally established distinct automotive performance, safety, and emissions standards, resulting in piecemeal and disparate certification and product differences based on the country of sale that lead to inefficiency, increased costs, and delayed development cycles. But a global legal platform for harmonizing safety standards now exists and offers an unprecedented opportunity to improve industry efficiency and safety. Of particular note, it has proven workable.¹

Given the global nature of today's automotive industry, it makes good sense to foster communication on prevailing safety standards, to share best practices, and wherever feasible, to create common ground. Indeed, whether one believes that our world is "flat,"² "tilted,"³ or otherwise, this harmonization process can and should serve the automotive industry and its customers well. Nonetheless, potential speed bumps lie ahead on the road to common ground, particularly for the United States.

A Brief History of Harmonization

Vehicles must meet all applicable regulations and safety standards in the country in which they are to be sold, including obtaining certification (or "type approval") of the vehicle and/or its components. When each country has unique regulations and approval procedures, expensive design modifications, additional tests, and time consuming and unnecessary duplication of efforts are often required. This balkanized process clearly does not advance safety, and it wreaks havoc on efficiency. For those reasons, an interest has existed for some time in harmonizing technical requirements for vehicles by establishing international regulations. Harmonization reduces international trade barriers, promotes global trade of vehicles and their components, and potentially facilitates safety enhancements.

The harmonization effort has been spearheaded by the World Forum for Harmonization of Vehicle Regulations (WP.29) under the United Nations Economic Commission for Europe (UNECE).⁴ This movement had its genesis in Europe, pursuant to what is commonly referred to as the 1958 Agreement.⁵ Originally, the 1958 Agreement provided that only UNECE member coun-

tries could participate. In 1995, however, the Agreement was revised to introduce self-certification and to open the process to all members of the United Nations and Regional Economic Integration Organizations that participate in UNECE activities.⁶ Currently, 46 Contracting Parties (participating nations) are signatories to the 1958 Agreement. The World Forum has produced 123 harmonized standards, known as UNECE Regulations.⁷ The United States remains the most notable non-signatory to the 1958 Agreement.

As the automotive industry globalized, the interest in and momentum for harmonization increased substantially. In 1998, the United States, Japan, and the European Community entered into a separate Global Agreement (i.e., 1998 Agreement) for the harmonization of vehicle regulations.⁸ That agreement aims to involve all countries in the creation of safety standards known as Global Technical Regulations (GTRs). Unlike the 1958 Agreement, the 1998 agreement merely facilitates participation of all countries in fashioning GTRs, promoting trade, and enhancing safety. Pursuant to this agreement, candidate GTRs are proposed, referred to the appropriate standing committees (known as Working Parties) for review and refinement, and then, once finalized, voted on by all participating nations.⁹ The 1998 Agreement then gives signatories discretion to choose which GTRs to adopt into their respective legal system and which to disregard altogether.

Twenty-eight nations have now signed the 1998 Agreement.¹⁰ On November 12, 2004, WP.29 established its first GTR dealing with door locks and door retention components¹¹ and a second GTR involving motorcycle emission test cycles has since been established.¹² Moreover, at its recent November meeting, the

ciency, and increasing anti-theft performance, see <http://www.unece.org/trans/main/welcw/p29.htm>.

⁶ See footnote 4, supra.

⁷ Id. See also TRANS/WP.29/343; AC.1 adopted two new UNECE Regulations during its June 2006 session. They relate to adaptive front lighting systems and wheels for passenger cars. For useful background on this issue, see footnote 5, McDonald, "Shifting out of Neutral" at 761-763, see also, Daniel P. Malone, "The Role of the United States in the Harmonization Process: A Proposed Scorecard," *BNA Product Safety & Liability Rptr.*, Vol. 34, No. 16, April 24, 2006 at 422-428 at 425, (hereinafter, see footnote 7, Malone, BNA I at ___).

⁸ The United States has its own Federal Motor Vehicle Safety Standards (FMVSS) and does not recognize UNECE approvals. Indeed, the United States and Canada follow a system of self-certification and, for years, found it difficult to implement the mutual recognition of approvals as required under the 1958 Agreement. Even in light of the 1995 amendment, however, which in the interest of expanding harmonization beyond UNECE members eliminated the mutual recognition of approvals requirement, the United States has chosen not to sign the 1958 Agreement. WP.29 also provides, under the 1997 Agreement, uniform conditions for periodic technical inspections, see ECE/RCTE/CONF/4 at <http://www.unece.org/trans/main/wp29/wp29wgs/wp29gen/wp291997.html>.

⁹ For a Notice of 2006-2007 activities under the 1998 Agreement, see 71 Fed. Reg. 59582 - 59587 (Oct. 10, 2006). See also 65 Fed. Reg. 51236 (Aug. 23, 2000).

¹⁰ Id. Malaysia, India, and Lithuania are the latest signatories. They have signed the 1998 Agreement since last April. See footnote 7, Malone, BNA I at 424.

¹¹ Id.

¹² Id. GTR No. 2 (WMTC) regarding emission test cycle for motorcycles was established in the Global Registry on 22 June 2005. It is not yet finalized, however, and the Working Party on

¹ Kevin M. McDonald and Daniel P. Malone, "World Safety Standards are Coming," *Automotive News*, December 26, 2005, p. 14.

² Thomas L. Friedman, *The World is Flat* (Farrar, Straus and Giroux 2005).

³ Clyde Prestowitz, *Three Billion New Capitalists* (Basic Books 2005); see also, William J. Holstein, *Armchair M.B.A.*, *New York Times*, Sunday Aug. 1, 2005.

⁴ See World Forum for Harmonization of Vehicle Regulations (WP.29) under the United Nations Economic Comm'n for Europe (UNECE), "WP.29 How it works—How to join it"; <http://www.unece.org/trans/main/wp29/wp29wgs/wp29gen/wp29pub.html>. (hereinafter UNECE WP.29 at ___).

⁵ Id. See also Kevin McDonald, "Shifting Out of Neutral: A New Approach to Global Road Safety," *Vanderbilt Journal of Transactional Law*, May 2005 at 760-769 (hereinafter see footnote 5, McDonald "Shifting Out of Neutral" at ___). WP.29 aims to initiate and pursue actions aimed at the worldwide harmonization or development of technical regulations for vehicles. These regulations are aimed at strengthening economic relations worldwide and, simultaneously, at improving vehicle safety, protecting the environment, promoting energy effi-

Executive Committee to the 1998 Agreement adopted, on November 14-15, 2006, three more GTRs regarding motorcycle brake systems, a worldwide harmonized heavy-duty certification procedure, and worldwide harmonized heavy-duty on-board diagnostic systems. When doing so, the Executive Committee added parallel amendments to align existing UNECE Regulations Nos. 49 and 78 under the 1958 Agreement to the three GTRs. Pursuant to the 1998 Agreement, WP.29 also maintains a list of all national or regional regulations that are candidates for harmonization and possible adoption as GTRs. This list is known as the Compendium of Candidate Global Technical Regulations.¹³ WP.29 is working on other proposed GTRs. In addition, all 123 UNECE regulations established pursuant to the 1958 Agreement are candidates for harmonization and adoption as GTRs.¹⁴ Clearly, the 1998 Agreement is gaining momentum.

The Potential for U.S. Contributions to Harmonization

The 1998 Agreement and WP.29 provide a workable process for promoting interaction, information sharing, and collaboration among participating nations. This trend has considerable potential for generating positive results as participants share best practices and increase efficiencies in overall certification efforts of vehicles and components. The 1998 Agreement also provides for active participation by Non-Governmental Organizations (NGOs).¹⁵ Practically speaking, NGO participation is essential because harmonization aims to create one standard that allows a product to be distributed more broadly—be it between two nations or, optimally, the entire world.¹⁶ Because getting our world to agree on anything is a formidable challenge, the process for creating GTRs must be as transparent, inclusive, and participatory as possible to maximize worthwhile outcomes. Of course the 1998 Agreement was not written on a blank slate—the question must be asked: in our nation, how likely is it that these objectives will be realized?

Pollution and Energy (GRPE) is continuing to elaborate on limit values for gaseous pollutants emitted by motorcycles. Because GTRs are performance oriented, they need to include limit values.

¹³ In sessions on Nov. 15-16, the Executive Committee to the 1998 Agreement also agreed on, among other things, the need to develop a GTR on Electronic Stability Control (ESC) systems for motor vehicles. For the Compendium of Pending Candidate GTRs, see <http://www.unece.org/trans/main/wp29/WPwgs/>. See also, footnote 9, *supra*.

¹⁴ See W.P.29-139-Ole.pdf (Status Report—12 June 2006). A final report of WP.29's November 2006 meeting will be available on its Web site, albeit after the publication date of this article.

¹⁵ Non-Governmental Organizations may participate in a consultative capacity in WP.29 and in its subsidiary bodies. See <http://www.un.org/esa/coordination/ngol>.

¹⁶ The 1998 Agreement establishes a process whereby all Contracting Parties, or as few as two participating countries, can jointly develop GTRs.

NHTSA's Historical Role in Automotive Regulation & Safety¹⁷

Any realistic assessment of U.S. potential to contribute meaningfully to harmonization should begin with a review of our nation's past efforts at establishing automotive safety standards. In the mid-1960's, the United States had the safest highways of any country in the world.¹⁸ The National Traffic and Motor Vehicle Safety Act of 1966 helped to create our nation's first federal agency responsible for overseeing automobile safety, the National Highway Traffic Safety Administration,¹⁹ charged with establishing "appropriate federal motor vehicle safety standards that were to meet the need for motor vehicle safety."²⁰ Since then, however, while automobiles have become far better in protecting their occupants, the United States has dropped to sixteenth place in terms of deaths per thousand vehicles.²¹

When Congress created NHTSA, it envisioned the agency as a proactive agent for improving automobile design and safety. At first, NHTSA had the full backing of Congress²²—but the honeymoon did not last long. NHTSA's rulemaking authority was subjected to challenges by the automotive industry, consumer protection groups, and others, which often spilled into courtrooms.²³ According to one authority, those challenges had a detrimental impact on NHTSA's rulemaking, resulting in the establishment of specificity requirements on testing that were difficult, if not impossible, to meet as well as significant delays in implementation dates,

¹⁷ The historic references in this section are based upon two extensive and excellent works regarding NHTSA's early days, see *The Struggle for Auto Safety*, Jerry L. Mashaw and David L. Harfst (Harvard University Press) (1990) (hereinafter see footnote 17, Mashaw & Harfst at ___); and highway safety both at home and abroad, see Leonard Evans, *Traffic Safety*, (2004) (hereinafter see footnote 17 Evans at ___).

¹⁸ Id. Evans at xiii; See Kevin M. McDonald, Book Review, *The Best (Or Worst) Kept Secret of Failed Public Policy: Road Safety*, Vol. 45 *Santa Clara L. Rev.* 1047-1053 (2005) (hereinafter McDonald Book Review at ___).

¹⁹ CH.38, 80 stat. 718 (1966). Initially, Congress conferred the duties of issuing automotive safety standards on the Secretary of Commerce, see 15 U.S.C. § 1392(a), 1391(10) (repealed). Subsequently, Congress transferred all powers under the Vehicle Safety Act of 1966 to the Secretary of Transportation which, in turn, first delegated powers to the Federal Highway Administration and then to what became NHTSA pursuant to the Highway Safety Act of 1970. See Kevin M. McDonald, *Shifting Out of Park: Moving Auto Safety From Recalls to Reason* (Lawyers & Judges Publishing Co., 2006).

²⁰ See Jorge L. Contreras, Book Review, *The Struggle for Auto Safety* by Jerry L. Mashaw and David L. Harfst, *Harvard Journal of Law & Tech'y*, Vol. 4, Spring Issue (1991) at 307. See also, Peter C. Carstensen, Book Review of *The Struggle for Auto Safety*, *Business History Review*, Vol. 66, No.1 at 191-193 (Spring 1992).

²¹ See footnote 17, Evans at xiii. When measured by number of traffic deaths per thousand vehicles, the United States finds itself behind Australia, Austria, Canada, Denmark, Finland, Germany, Great Britain, Iceland, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden and Switzerland. In terms of deaths per one hundred million miles, the United States had fallen from first place to tenth place. See also, Kevin M. McDonald, Book Review, *Traffic Safety*, Leonard Evans, 2005.

²² See footnote 17, Mashaw & Harfst at 52-62.

²³ Id.

among other things.²⁴ The challenges have not abated.²⁵ Collectively, those challenges helped create a largely adversarial, as opposed to collaborative, model for the formulation of automotive safety standards in the United States.

As a result, NHTSA has, to a large extent, resorted to a different approach to safety management: consumer notifications and recalls. In the landmark case of *United States v. General Motors*,²⁶ the court held that so long as equipment malfunction had occurred in a significant number of vehicles, a recall was warranted. That decision, and many others like it, altered the model initially envisioned by Congress.²⁷ Empirical data, however, suggests that recalls may not have the potential to improve safety that a more collaborative public/private model could offer. But how can such a model be implemented?²⁸

Back to Basics?

International harmonization may provide an opportunity for stakeholders in the U.S. automotive industry—be they regulators, manufacturers, industry associations, consumer protection groups, insurers, or others—to re-create a model closer to the one Congress apparently intended to create in establishing NHTSA.

²⁴ See, e.g., *Chrysler Corp. v. Dept. of Transportation*, 472 F.2d 659 (6th Cir. 1972) (significant delay in implementation, created “we/they” mindset between industry and government engineers, and increased burden of standard setting); *PACCAR v. NHTSA*, 573 F.2d 632 (9th Cir. 1978), cert. denied, 439 U.S. 862 (1978) (courts approve only highly specific rules—NHTSA needs significant data to support—without rules auto manufacturers do not introduce new safety equipment—NHTSA has no data to create new rules). For a comprehensive review of the formative “early days” between NHTSA and the industry, see footnote 17, supra, Mashaw & Harfst). See also Jorge Contreras, Book Review, *Harvard Journal of Law & Tech’y*, Vol. IV 1991.

²⁵ For example, on March 31, 2006, a federal district court struck down a final rule that amended the Confidential Business Information rule (Rule 512) to deal with expanded reporting mandated by the TREAD Act. The court concluded that NHTSA has the authority to promulgate a rule making categorical confidentiality determinations. But the court then determined that NHTSA’s final rule was not a “logical outgrowth” of its NPRM, *Public Citizen v. Mineta, et al.*, 427 F. Supp. 2d 7 (D.D.C. 2006); amended July 30, 2006, 444 F. Supp. 2d 12 (D.D.C. 2006). NHTSA had issued that particular NPRM in April 2002. NHTSA issued a new “512” NPRM on October 31, 2006, 71 Fed. Reg. 63738-63749.

²⁶ 518 F.2d 420 (D.C. Cir. 1975); See footnote 17, Mashaw & Harfst at 24; see also *U.S. v. General Motors*, 561 F.2d 923 (D.C. Cir. 1977).

²⁷ As Mashaw & Harfst opined: “This shift from rules to recalls indicated a reorientation of [U.S.] auto safety regulation, from science and planning to crime and punishment.” See footnote 17, Mashaw & Harfst at 111.

²⁸ Cf. Kevin M. McDonald, *Shifting Out of Park: Moving From Recalls to Reason* (Lawyers & Judges Publishing Co., 2006); (In 2004, more than 42,000 died in U.S. traffic crashes. In the same year, more than 30,000,000 vehicle recall notices were issued (i.e., 1.7 for every new vehicle sold). But less than 75% were brought in by owners for repair) at 1; see also Kevin M. McDonald, “Is it time to end vehicle safety recalls?” *Detroit News*, Aug. 16, 2006. “The shift signaled the ‘abandonment of [NHTSA’s] safety mission’ Recalls . . . won out over technology forcing rules because they were politically popular, easy for consumers to understand and formulated along lines familiar with product liability law.” See Jorge L. Contreras, Book Review, *The Struggle for Auto Safety* at 309.

Otherwise, taking a similarly uncoordinated, and at times adversarial, approach to this international collaborative effort could well mire it in legal technicalities, lengthy delays, political divisiveness, and endless red tape, and effectively neutralize chances for this nation to contribute to, or benefit meaningfully from, this promising trend. That would be unfortunate.

Decisionmakers must appreciate the essential role collaboration plays in the harmonization process, understanding that success will be dependent on levels of participation. At the same time, they must appreciate how industry participation could be chilled by a U.S. legal system that features unparalleled open discovery in litigation and staggering potential product liability exposure. As referenced above, safety standard rulemaking in this country has not always been a model of efficiency. Herein lies an apprehension. Stated simply, how will participation by NGOs in this open international process affect these parties in other aspects of our legal system? Absent change, how likely is it that the United States will realize its enormous potential to contribute meaningfully to these international efforts?²⁹

Potential Impact On the U.S. Legal System

Just as existing impediments could hamper meaningful U.S. participation in global efforts to harmonize, participation in activities pursuant to the 1998 Agreement may also impact our nation’s legal system. Some of these impacts could be detrimental, unintended, and decidedly unanticipated.

Potential Impact on NHTSA

As previously indicated, once a nation participating in the 1998 Agreement votes in favor of a particular GTR, it must initiate appropriate efforts to incorporate the GTR into its respective legal system. To preserve the essence of harmonization, a GTR necessarily needs to be adopted without modification. Otherwise, the purpose of the trend is undermined. Pursuant to WP.29 adopting its first GTR, NHTSA promptly initiated efforts to incorporate the standard into this nation’s laws by publishing a Notice of Proposed Rulemaking (NPRM) to amend FMVSS 208. Its NPRM, however, contained three differences from the GTR: a requirement for post-production testing, limits on design options, and extended application to vans carrying 12–15 passengers.³⁰

Herein lies the first potential speed bump in the process. The Vehicle Safety Act of 1966 charges NHTSA

²⁹ Going forward the answer to this question will also depend largely on how well NHTSA does in adhering to its stated objectives of safety enhancement, transparency, keeping the process participatory, bridge building and being open to growth (e.g., more focus on crash avoidance), see footnote 7, Malone, BNA I. See, e.g., Laura Meckler, “New Car-Safety Focus: Crash Prevention,” *New York Times*, Sept. 14, 2006, at D1 (innovations include electronic stability control, lane-departure warning systems, adaptive cruise control, automatic steering, and vehicle-to-vehicle communication).

³⁰ See footnote 17, supra. NHTSA indicated an intent to publish this Final Rule by July 2006, see footnote 7, Malone BNA I at 427. As of the publication date of this article, the Final Rule has yet to be published. See also, 71 Fed. Reg. 59584, Oct. 10, 2006 (If public comments to NPRM results in NHTSA adopting a final rule that differs significantly from the GTR,

with, among other things, establishing appropriate Federal Motor Vehicle Safety Standards. Does rubber stamping a GTR formulated at the international level necessarily discharge that duty? Minor deviations from a GTR (e.g., one that does not affect performance) may be in order.³¹ Moreover, absent collaborative effort during the process, any notice to incorporate a GTR into our laws may well face the same time consuming challenges that have, on occasion, hamstrung and frustrated automotive safety standard rulemaking efforts in this country. Indeed, at a time when efficiency calls for innovation and streamlined processes, the GTR process could have the opposite effect. Participation by all interested parties at the formative stages is key. For this reason, NGOs are, and should be, invited to take part in the activities of the World Forum and of its subsidiary Working Parties and be involved in the early stages of the development of a new GTR. Doing so reduces confusion and delays in the adoption of a GTR into a nation's legislation, thus streamlining efforts to harmonize vehicle regulations.

A second speed bump involves potential jurisdictional issues. Motor vehicle safety concerns involve much more than performance standards. In addition to overall economic issues having to do with vehicle production and cost, numerous issues exist—such as geography, climate, highway design, and driving culture—that can and do affect highway safety. To maximize the many potential benefits of participating in harmonization efforts, this nation, (i.e., NHTSA or its designee) should strive to create a model, to the extent applicable laws permit, that promotes meaningful input and collaboration,³² and promotes, facilitates, and maximizes participation in harmonization efforts by each of the various groups in the U.S. automotive industry.

Efforts to date to adopt the first GTR into our legal system highlight a third potential obstacle in the road to harmonization. Motor vehicles and accompanying safety concerns are not identical among countries. Countries who vote at WP.29 in favor of a GTR may find slight modifications are both necessary and appropriate at the adoption stage.³³ All nations share a common interest in improving highway safety. But will modifications made to a GTR at the adoption stage effectively undermine the process?

the "U.S. will consider submitting a proposal to make conforming amendments to the GTR.")

³¹ *Id.*

³² Dr. David Cole of the renowned Center for Automotive Research, <http://www.cargroup.org/> frequently references the term "co-opetition" (i.e., a melding of competition and cooperation) as an emerging and constructive mindset within the private sector (e.g., Global Engine Alliance, AUTOSAR). Recognizing that differences will always exist among segments of the automotive industry and that various segments are not competing per se, that mindset would nevertheless help to advance this international, public/private effort to find common ground.

³³ See, e.g., footnote 28, *supra* and accompanying text.

How best can the global automotive world capture advancements in technology in the time it takes to harmonize and then incorporate those improvements into participants' respective regulatory systems?

The potential scope of the harmonization process itself has the potential to create another bump in the road. The stated purposes of the 1998 Agreement are to promote and facilitate international trade by increasing efficiencies in the certification process, as well as to enhance safety. If harmonizing safety standards is beneficial, should such efforts stop there? Would it also be beneficial to harmonize and adopt standard definitions for key, safety-related terms, such as defect?³⁴ Similarly, if safety standards and common terminology are harmonized, should the international community create a common complaint procedure, too? For example, should WP.29 establish a global defect investigative body (e.g., a World Office of Defect Investigation)? Should vehicles that are purportedly the "same" be recalled in France or Japan but not in Canada or Korea? In that regard, how would such an investigative body work? Would an individual have the capability of initiating a global defect investigation by filing an administrative complaint?³⁵ In effect, would the NHTSA Office of Defects Investigation (and all like organizations) be superseded or perhaps be incorporated into a harmonized Global ODI? At this juncture, such developments are clearly unlikely, unwarranted, and unwise. Indeed, the 1998 Agreement currently addresses only technical provisions and performance requirements. But even at this early stage of its involvement, it is prudent for the United States to consider where this trend could lead.

While the scope of harmonization efforts may expand to cover much more than safety standards, the entire scheme steers clear of a major issue. Herein lies a fifth speed bump. If harmonization aims to enhance safety, how can it avoid addressing other factors that affect ve-

³⁴ See text accompanying footnote 28, *supra*. The Vehicle Safety Act defined the critical term "defect" rather circularly, to include "any defect in performance, construction components, or materials in motor vehicles or motor vehicle equipment." A defect is "safety-related" if it presents an "unreasonable risk of accidents." More specifically, a vehicle or vehicle component contains a "safety-related defect" if it is subject to a significant number of failures in normal operation, including failures that occur either during specified use or as a result of owner abuse (including inadequate maintenance) that is reasonably foreseeable, but excluding failures attributable to normal deterioration of a component as a result of age and wear. See 49 U.S.C. § 30102(a)(2), (a)(8) (2000); see e.g., *U.S. v. General Motors*, 518 F.2d 420, 441 (D.C. Cir. 1975); see also Kevin M. McDonald "Shifting Out of Neutral" at 778. Cf. At the 120th session of WP.29, Japan, through document TRANS/WP.29/2000/39, presented a proposal concerning the necessity of establishing common definitions to facilitate the formulation of future GTRs, 71 Fed. Reg. 59587 (Oct. 10, 2006). See S.R. I, TRANS/WP.29/1045.

³⁵ See, e.g., *Frankovich v. Italy*, [1992] I.R.L.R.84.

hicular safety such as driver behavior and highway design? An estimated 95 percent of motor vehicle accidents involve some measurable driver misconduct or distraction.³⁶ When drivers fail to give their full attention to what they are doing, the potential risk to the vehicle's occupants, occupants of other vehicles, and pedestrians, rises—sometimes significantly.³⁷

As interested parties who regulate the automotive world meet regularly to discuss, among other things, how best to enhance highway safety, should driver behavior ultimately be included within their scope?³⁸

Collaborative international efforts can be very time consuming. Meet speed bump number six. As evidenced by the first GTR, WP.29 works on a proposed GTR for years before submitting it to a vote. Given the industry emphasis on speed, innovation, and advanced technology, it is quite likely that, no matter the regulation, new and better technology will emerge during WP.29's deliberative process for any proposed GTR. Even if this deliberative, collaborative process works smoothly, therefore, how best can the global automotive world capture advancements in technology in the time it takes to harmonize and then incorporate those improvements into participants' respective regulatory systems?

For some countries, having separate safety standards works well, a situation which could present another impediment to the world community in achieving harmonization. The certification process can serve as a revenue generator. Vehicles built to meet or exceed unique safety standards may differ. Moreover, the process itself can create disincentives that discourage smaller players from entering a market. How can these practical disincentives of participating in harmonization be overcome? Should they be?

Another reason to slow down is the speed bump of process integrity. In order to sustain this trend, those involved must maintain an unwavering "reason to believe" in the system itself.

Clearly, the harmonization process must remain free of corruption and undue influence. WP.29 has worked very hard to maintain transparency in everything it does. Practically speaking, those involved must have considerable knowledge of the automotive industry the

³⁶ See Kevin M. McDonald, *Shifting Out of Park: Moving From Recalls to Reason* (Lawyers & Judges Publishing Co., 2006, Chapter 2: Who's to Blame?).

³⁷ Id. Such misconduct can include alcohol or drug use, fatigue, excess speeding, or aggressive driving. Driver distractions can include cell phone use, preoccupation with the radio or other system, interaction with passengers (particularly small children) as well as reading, tending to personal hygiene, and in effect, trying to do two things at the same time.

³⁸ While driver behavior has nothing to do with safety standards that govern vehicles and components, it has everything to do with enhancing highway safety. Shouldn't it, therefore, be included in or at least coordinated with the efforts of this international forum? Edward Wenk Jr., a science advisor to Presidents Kennedy, Johnson and Nixon says defining safety is difficult to do because engineers cannot determine what is enough. "It is not just a matter of science and mathematics," says Wenk. "Safety is a social judgment." See John Schwartz, "Too Bad Hippocrates Wasn't an Engineer," *New York Times*, Sunday, June 11, 2006, WK pg. 3. Herein lies the reason why, jurisdiction notwithstanding, efforts aimed at, among other things, enhancing safety should be coordinated, even integrated (e.g., WP.29—GTRs and World Health Organization—efforts aimed at improving Driver Behavior).

process seeks to improve. Otherwise, increasing efficiencies and improving safety will not be achieved.

Potential Impact on Automotive Product Liability Litigation

As the United States becomes more proactive in the harmonization movement, numerous potential obstacles arise regarding the way harmonization of safety standards could impact safety-related litigation, including apparently unintended consequences for the conduct of product liability practice in this nation. If the consequences come to pass, they could materially impact the way the American automotive industry views the harmonization trend, which, in our nation, is still in its infancy.

Many of the potential regulatory developments highlighted above could find their way into a particular product liability action. For example, a practical, regulatory consideration concerns the availability of all documentation that WP.29 compiles as part of its ongoing work.³⁹ Given its complete transparency, WP.29 will become an increasingly fertile source of information regarding proposed safety standards and various views regarding them. In an increasingly flattening world, where information flows at the speed of light, how could such information be used in American litigation? In the likely event such information is used, is that an intended or unintended off-shoot of harmonization? Moreover, will it result eventually in WP.29 participants having more safety-related information available to them or less?⁴⁰

The global harmonization process will spark debate both within and among participating countries, and these debates will take place in public, before the watchful eyes of the world's litigators. For practitioners in the United States, the ramifications could be profound. Both the higher-level legal principles and the nuts and bolts of day-to-day practice are directly implicated. Although the complete impact of the harmonization process is too conjectural to capture in this article, there are several discrete categories that the process will almost certainly affect.

As the harmonization process advances in the automotive field, it could well have considerable impact on product liability litigation in regard to design and expert issues.

At present, it appears that very few lawyers actively engaged in automotive product liability and safety litigation have even a vague awareness of GTRs and the global harmonization process or its potential implications. There has been little attention paid to harmoniza-

³⁹ See <http://www.unece.org/trans/main/welcwp29.htm>.

⁴⁰ See footnote 17, Mashaw & Harfst at 111. See also Kevin M. McDonald, "Shifting out of Park." ("Other countries with more science-based safety policies have more than halved their traffic deaths. What distinguishes the U.S. from other countries is the uniquely powerful role litigation plays in all aspects of American life.") "Shifting Out of Park," at xi.

tion by this community and the courts before which it practices. Moreover, where the process might be recognized, its significance would likely be dismissed.

The fact of the matter is that global harmonization has, to date, had limited impact in non-automotive litigation fields in which the process is more advanced. For example, in the aviation field, the limitations of the Warsaw Convention appear to reduce any significant impact of the harmonization process. Similarly, the uniform adoption of global standards by pharmaceutical manufacturers has limited disparities that might bring such issues to the fore in that area.

Design and Expert Issues. Despite its lack of impact in other areas, as the harmonization process advances in the automotive field, it could well have considerable impact on product liability litigation in regard to design and expert issues. Whether or not a particular GTR is merely a candidate or is passed and established by WP.29, and whether or not that GTR is fully embraced and adopted by NHTSA in the United States, these issues will have currency in American product liability litigation. First, each candidate or fully adopted GTR will at least arguably establish a standard for safe design and performance in the area it addresses. Second, the entire process will generate a variety of documents, data, and opinions that may directly or indirectly constitute or influence evidence in product liability lawsuits.

GTRs, like other voluntary or mandatory design and performance standards (such as SAE, ASTM standards, or Federal Motor Vehicle Safety Standards) will be admissible in most American jurisdictions as probative evidence on issues such as defect,⁴¹ standard of care,⁴² and/or state of the art.⁴³ Depending on the circumstances, evidence of a GTR may be offered by a plaintiff who contends that the defendant's product falls below its requirements, or by a defendant contending the product meets or exceeds it. Surrounding the offer and objections to such evidence will be predictable arguments on both sides, such as:

- The GTR is a "gold standard" evidencing worldwide consensus as to appropriate performance.
- The GTR evidences the state of the art.
- The GTR establishes only a minimum standard, but does not necessarily equate with or establish the requisite safety or non-defective character required by applicable state law.
- The GTR process is controlled or unduly influenced by the manufacturing community of which the defendant is a member, resulting in a standard that compromises safety for economic gain.
- The GTR is a compromise of safety, watered down by the economic needs of participating second and third world countries.

⁴¹ E.g., *Lorenz v. Celotex Corp.*, 896 F.2d 148, 150 (5th Cir. 1990); *Kidron Inc. v. Carmona*, 665 So.2d 289 (Fla. App. 1995); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y. 2d 102, 450 N.E. 2d 204 (1983).

⁴² E.g., *McCulloch v. H.B. Fuller Co.*, 981 F.2d 656, 658 (2d Cir. 1992); *Beatty v. Trailmaster Products Inc.*, 330 Md. 726, 743-44, 625 A.2d 1005, 1014 (1993).

⁴³ E.g., Ark. Code Ann. § 16-116-106; Ind. Code § 34-20-5-1 (West Supp. 2001).

Wide ranging organizations with varying agendas may introduce into the process information or data that reflects their particular biases or interests, as opposed to objective data or scientific study.

Perhaps even more important, the entire GTR creation process will be played out in a very public forum in which each and all inputs and building blocks will be available to serve as evidence in litigation. Particularly in this era of the Internet and electronic information, each submission, contribution, and draft will be available for review and download, including the positions expressed by varying nations, manufacturers and other NGOs, accompanying expert opinion, data analysis, and testing. The spectre of such an evidentiary tidal wave highlights the potential dangers of NGO participation in the GTR process. These wide ranging organizations with varying agendas, which may be accountable only to themselves or to unknown or ill-defined constituencies, may introduce into the process information or data that reflects their particular biases or interests as opposed to objective data or scientific study.

While all of this information would traditionally have been inadmissible hearsay or otherwise excluded on foundation grounds, the heavy reliance on expert testimony in American product liability litigation suggests it may take on a significant role in automotive safety litigation. Since both the Federal Rules of Evidence and many state court rules permit reliance by expert witnesses on otherwise inadmissible materials,⁴⁴ these sources will be commonly used and debated by such witnesses. Moreover, the rules generally provide judges with discretion to permit the hearsay bases of expert opinion to be disclosed to triers of fact.⁴⁵ As most practitioners know, this "back door" is wide open⁴⁶ in most courts and these GTR source materials will predictably become evidentiary.

Discoverability and Admissibility. Ultimately, the likelihood remains that the GTR that emerges from the harmonization process will be addressed in the courtroom and played out for the jury, particularly to the extent an FMVSS⁴⁷ "differs" from the GTR. Just how these standards will be used, or barred from use, in the pre-trial and trial phases of U.S. litigation is the second predictable area of impact that the efforts to establish GTRs will have in U.S. product liability litigation. In almost every product liability case, expert witness testimony and reports, and the admissibility of both, is critical. The global harmonization process may well have considerable effect on this aspect of litigation.

First is the issue of discovery. Presently, the only way for a plaintiff to find out what expert opinions existed

⁴⁴ Fed. R. Evid. 703. See, e.g., *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.W. 2d 1322 (1981).

⁴⁵ Id.

⁴⁶ Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 *Vand. L. Rev.* 577 (1986).

⁴⁷ Federal Motor Vehicle Safety Standard, see footnote 8, supra.

and, more importantly, were known to a manufacturer at the relevant time, is through the arduous discovery process—depositions of company employees, and document requests for internal memoranda. Global harmonization will not make that process go away—but it may provide counsel with a roadmap for navigating the process more deftly. With the body of global debate, negotiation, and deliberation in hand and readily available with the click of a mouse, counsel can seek out documents that may speak directly to proposals, standards, faults, flaws, alternative designs, and the like, contained in the publicly-available harmonization databases. This is particularly true in light of new duties to locate, preserve, and possibly produce electronically stored information, embedded data, and metadata within information systems.⁴⁸

Second, and perhaps more significantly, is the new battle over admissibility of evidence that the harmonization process will spark. It is in this area that harmonization will cause new law to be made, and therefore, it is in this area that practitioners must be vigilant of global developments.

Of specific concern will be the effect on standards for admissibility of expert testimony, such as those embodied in the *Daubert* test.⁴⁹ While the jurisprudence surrounding *Daubert* is extensive, it can be summarized as imposing a standard requiring that experts be qualified, and that their testimony be relevant, reliable, and helpful to the trier of fact.⁵⁰ In addition, when an expert, such as those likely to testify in a vehicle design trial, has expertise that is “technical, scientific, or more generally experience-based,” the court must “fulfill the gatekeeping function of making certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”⁵¹

As of yet, no U.S. court has determined whether participants in the harmonization debate are qualified to be experts, or whether reports and other documents produced by the harmonization process and adopted by the World Forum are relevant and reliable, and will assist the trier of fact. At some point, after the harmonization process has produced a body of material concerning some particular design feature, a court in this nation will be asked to act as “gatekeeper” and either admit or exclude proffered evidence that originated as part of the harmonization process. That determination may be greatly influenced by the process itself.

Contributors to the harmonization process may gain de facto “expert” status via active participation as NGOs in discussions regarding a particular GTR. And, once considered “expert” by the world community, it

may be very difficult for parties in litigation to disqualify these individuals from offering opinion testimony at trial. Some courts, especially those with large backlogs of expert-intensive lawsuits, may welcome a means to avoid the rigors of the gatekeeping function and may give the global “expert” designation great weight in the process. Litigants would then find themselves asking courts to overturn or ignore the purported conclusion of the global community that particular contributors to the GTR process are in fact experts.

As with all emerging areas of law, the first decisions relating to the interplay of this harmonization process and U.S. litigation are likely to set critically important precedents. Practitioners on the front lines of these cases will need to know all they can about the harmonization process and its participants if they are to be able to influence those decisions in their clients’ favor.

Preemption. One final possible impact warrants at least mention. As previously noted, the 1998 Agreement permits each contracting party to incorporate a GTR into its law or, subject to an explanation, to reject it altogether. It is at least conceivable that a GTR will be established by WP.29 that sets a higher, more stringent standard than the prevailing U.S. standard (e.g., emissions). Assume, too, that the U.S. chooses not to incorporate the GTR. What is the “argument” for preventing reference to the rejected GTR or other attempts to introduce it through a “back door” in other legal proceedings?

Preemption is the concept that a state law (including its common law) cannot impose a higher safety standard for an article in interstate commerce than the standard established by federal law.⁵² For preemption to apply, however, the federal law in question must be “express” in its intention to override state laws—preemption must be the “clear and manifest purpose of Congress.”⁵³ Clearly, one question for litigators in product liability cases involving motor vehicles will be whether parties’ use of GTRs established in the global harmonization process and then rejected by the United States will be deemed preempted by federal law.

Conclusion

The harmonization process has already proven worthwhile and workable.⁵⁴ In a politically splintered world, the fact that more than 20 nations have collaborated, engaged in dialogue, sought and received input, and, in a transparent forum, discovered common ground and established a GTR is encouraging. This is a potentially beneficial and important development,⁵⁵

⁴⁸ See, e.g., *Zubulake v. UBS Warburg, L.L.C.*, 229 F.R.D. 422 (S.D.N.Y. 2004). New Federal E-Discovery changes to the Federal Rules of Civil Procedure will take effect on December 1, 2006, see Thomas Y. Allman, “The Impact of the Proposed Federal E-Discovery Rules,” *Richmond Journal of Law & Tech’y*, Vol. XII, Issue 4 at 13 (2006). In regard to anticipated “WP.29 discovery,” privilege issues should be rare. Confidentiality concerns and resultant issues like those involving 49 C.F.R. § 512, however, may become more commonplace.

⁴⁹ See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

⁵⁰ *Id.* See also Fed. R. Evid. 702. WP.29 documentation can be downloaded free from its homepage.

⁵¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

⁵² See, e.g., *Reigel v. Medtronic Inc.*, 451 F.3d 104, 108 (2d Cir. 2006) (device’s satisfaction of FDA regulations and approval by FDA preempted plaintiff’s claims, which would have imposed a higher standard under state common law of negligence).

⁵³ *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996).

⁵⁴ See footnote 7, Malone, BNA I at 428.

⁵⁵ In effect, NHTSA has created a scorecard for itself in regard to participation in the harmonization process. The success of this trend in our nation will depend largely on what “marks” NHTSA receives on its scorecard. Perhaps those in our private sector who intend to (and should) participate in this process should have a scorecard, too. What should those criteria be? Some that come to mind are understanding the harmonization process, sharing good faith suggestions on im-

and we commend NHTSA for helping to build an international bridge as the automotive industry globalizes. Efforts aimed at increasing efficiencies and enhancing safety on a cross-jurisdictional basis are essential. But “speed bumps” undoubtedly lie ahead. These obstacles, while they need to be observed and negotiated, are hardly insurmountable. Ignoring them, however, could result in an unnecessarily bumpy journey.

Globalization and fierce competition have laid a foundation for accelerating a potentially unprecedented collaborative effort. But the harmonization movement needs considerably more understanding and discussion in the United States to evaluate its interplay with and impacts on the nation’s litigation and regulatory systems. To remain positive, there should be substantially

proving it, and, perhaps above all committing to the concept of “co-opetition” (i.e., creating a new public/private collaborative model), see footnote 32, *supra*. After all, the underlying concept of this trend is harmonization.

increased efforts to raise awareness of the harmonization process, followed by substantial consideration and dialogue about this development. Otherwise, a trend that has great promise may not receive the support, input, and understanding it needs and deserves.

This article promotes on-going discussion and attempts to shed some light on a number of potential concerns. It is by no means exhaustive. Instead, it challenges all interested parties to reflect on the scope of this overall process. Indeed, we hope that it serves as a catalyst, causing others to think about this increasingly important trend and to join in helping to shape the role harmonization plays in our legal system by sharing other, constructive insights. This powerful play continues, and you may “contribute a verse.”⁵⁶

⁵⁶ Walt Whitman, “O Me! O Life!” *Leaves of Grass*, 1900. (“That the powerful play goes on, and you will contribute a verse.”).