

## PRODUCT LIABILITY

SEPTEMBER 2017 – SECOND EDITION

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*Smart technology is increasingly becoming an everyday part of our lives. Although this technology makes our lives easier and more efficient in many ways, it also creates an enormous amount of information that provides detail into how we manage our daily lives. This article will explore the ways in which lawyers should counsel their clients about connected devices and the “internet of things,” thinking outside the box during discovery, and using the information generated by connected devices in litigation.*

## How the Internet of Things is Changing Litigation



### ABOUT THE AUTHOR

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### ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The internet of things refers generally to the interconnection of computing devices contained within everyday objects. This interconnection enables them to send and receive data. As one author put it, “[t]he Internet of Things revolves around increased machine-to-machine communication; it’s built on cloud computing and networks of data-gathering sensors; it’s mobile, virtual, and instantaneous connection; and they say it’s going to make everything in our lives from streetlights to seaports ‘smart.’” Daniel Burrus, *The Internet of Things is Far Bigger Than Anyone Realizes*, available at <https://www.wired.com/insights/2014/11/the-internet-of-things-bigger/>. The internet of things is how our running applications tell our social media accounts how much we ran this morning, how we are able to close our garage doors with just a touch on our smart phones, and how street lights and traffic signals are automated.

All of this technology makes our lives easier. It also creates an enormous amount of information that provides detail into how we manage our daily lives. There are a variety of predictions regarding the growth of the internet of things, with some forecasting anywhere from 20 billion to as many as 50 billion connected “things” by 2020. Amy Nordrum, *Popular Internet of Things Forecast of 50 Billion Devices by 2020 Is Outdated* (Aug. 18, 2016), available at <https://spectrum.ieee.org/tech-talk/telecom/internet/popular-internet-of-things-forecast-of-50-billion-devices-by-2020-is-outdated>; see also *State v. McMurray*, 860 N.W.2d 686, 698 (Minn. 2015) (“As the

U.S. Supreme Court has recently and aptly recognized, digital devices and media, ‘[w]ith all they contain and all they may reveal, ...hold for many Americans the privacies of life.’ This trend will only accelerate as we enter the ‘internet of things’ in which hundreds of billions of objects will become digital devices.”) (internal citations omitted).

Although very few reported cases actually mention the “internet of things” specifically, judges have observed the growth of data from the internet of things and expressed concerns about how to manage it. See Casey C. Sullivan, *How the IoT is Solving Murders and Reshaping Discovery* (June 6, 2017), available at <http://blog.logikcull.com/how-the-iot-is-solving-murders-and-reshaping-discovery> (citing interviews and publications from various judges including Judge Shira Scheindlin).

There are a variety of applications we should all find familiar that are potentially impacted by the internet of things:

- **Wearable devices** that track calories, exercise, heart rate, distance covered, and food intake.
- **Health care devices.** These include devices used by hospitals that can track drug administration as well as physical changes that could signal a possible heart attack in a particular patient. Health care devices also include pacemakers and pumps that deliver medical such as insulin and narcotics for pain.

- **“Smart” devices** used by local governments to control lighting, traffic signals, and security systems.
- **Commercial and residential automation systems** such as smoke detectors, security systems, and heating and lighting.
- **Manufacturing processes** used by plants and other manufacturing facilities to track inventory and other assets along with machinery data.
- **Connected cars and related devices.** Cars increasingly have software systems that allow users to remotely manage music, navigation, and monitor vehicle systems to ensure proper maintenance. In addition, many manufacturers are pursuing self-driving vehicle technology and/or ways to reduce or eliminate crash-related deaths through smart connectivity.
- **Smart sensors** used in construction materials such as cement. These sensors could monitor stress and cracks in the cement and provide alerts to when a repair is needed.

Along with the convenience that comes with the variety of applications benefitted by the internet of things is an enormous amount of data and information potentially useful to litigation and subject to discovery. For example, earlier this year police in Hartford,

Connecticut cited a murder victim’s Fitbit data showing that she returned home at a particular time to establish that her husband was lying about the circumstances surrounding her death. See Tracy Connor, *Fitbit Murder Case: Richard Dabate Pleads Not Guilty in Wife’s Death* (Apr. 29, 2017), available at <https://www.nbcnews.com/news/us-news/fitbit-murder-case-richard-dabate-pleads-not-guilty-wife-s-n752526>. Her husband has now been charged with murder. Along with the Fitbit data, police used “[a] slew of other digital fingerprints” including alarm data, Facebook posts, and cellphone activity to help build their murder case. *Id.*

In the civil context, the data gathered by the internet of things could be used to establish the location of a witness alleged to be part of a conspiratorial meeting, or to determine the level of physical activity by a plaintiff alleged to be disabled as a result of a serious accident. In the event of a building fire, information regarding the building’s HVAC and other systems may help establish the origin of the fire. And in a situation involving a motor vehicle accident, automated traffic signal information can prove which driver had the red light at the time of the accident. The possibilities are never ending. Thus, it is imperative that lawyers refine their technical skills to deal with this rapidly changing and growing area. In particular, at a minimum litigators should give considerable thought to the following issues.

First, when speaking with your own clients, be sure to cover all possible “smart” or

“connected” devices that could potentially have discoverable information. This is imperative so that your clients have a clear understanding of the information they need to preserve for litigation and gather and produce during discovery.

Second, during the discovery process think outside the box. The internet of things provides a wealth of additional information that can be sought in litigation. Are there connected devices that you should consider when drafting written discovery to the opposing party?

Third, be sure to consider the potential privacy concerns during discovery and the authentication issues when using evidence from the internet of things in the courtroom. Locating the information during discovery does little if you cannot use it in court.

Finally, counsel for companies that make devices connected to the internet of things need to be informed and prepared for the cybersecurity risks inherent in such devices. Not only does this issue pose a risk from a public relations and crisis management perspective, it may also subject manufacturers to potential liability in class action litigation should a breach happen. Moreover, manufacturers must be aware of the Federal Trade Commission’s actions with respect to the security of connected devices. For example, earlier this year the FTC sued the makers and distributors of D-Link products,

alleging that they did not take reasonable steps to secure their routers and cameras. *FTC Charges D-Link Put Consumers’ Privacy at Risk Due to the Inadequate Security of its Computer Routers and Cameras* (Jan. 5, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-d-link-put-consumers-privacy-risk-due-inadequate>.

The internet of things is the next “big thing” for litigators. The technologies are rapidly changing and the growth is enormous. Litigators on top of this issue will benefit themselves and their clients.

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