Responses re: TechNet Opposition to HB 190

1. "…the bill does not define these key terms."

Response:

- The omission of particularized definitions is by design. For one, the Civil Code generally uses plain, generally understood language (to the extent possible) rather than providing for detailed definitions (again, by design[1]), and we are trying to remain consistent with that convention. For two, any attempt to define these sorts of terms (especially in this context—in relation to rapidly evolving technology) increases the likelihood that the article will become obsolete as industry practices and consumer habits change, and shortens the timeframe in which this is likely to occur, ultimately necessitating additional (and sooner) legislative efforts. As more definitional detail is added, the likelihood increases that a "product" will emerge that both (a) is clearly of the type that this article is meant to capture, but (b) nevertheless falls outside of the article's scope. For three, this article is meant merely to explicitly recognize an existing duty, not to create or impose any new duty; providing a detailed description of the article's scope would arguably suggest the opposite, and would also risk creating the negative implication that *no* duty (new or old) is owed with respect to actions falling outside the article's scope.[2]

2. "…this language could capture virtually every modern software product, including mobile applications, cloud services, artificial intelligence tools, recommendation systems, e-commerce platforms, and enterprise software used by businesses and governments."

Response:

- The language is intentionally broad, but it is also intentionally restrictive in specific ways. In particular, the phrase "interactive or personalized user experience" is meant to exclude "typical" software of the sort that has no adaptive or user-specific functionality but instead operates the same for everyone. For example, MS Word does not provide a personalized "user experience", nor is its functionality specially tailored or dynamically updated based on any sort of user-specific personal info—rather, it operates the same for one user as it does for another user as it does for anyone, and it does so irrespective of age/demographic/location/etc. The same is true of cloud services, for example.
- As for the specific software types listed: We intend for (some) mobile applications to be captured, and some (but obviously not all) are captured (for example, apps such as the camera or a web browser would fall outside the article's scope); we do not intend for cloud services to be captured, and I don't think they are captured; AI tools are meant to be captured, and are in fact captured; "recommendation systems", insofar as this term refers to something like a TikTok algorithm that curates and "serves up" content based on the user information it gradually accumulates, are meant

[1] The intent is for the Civil Code to provide a general legal framework capable of existing in perpetuity, without the need for constant addition/subtraction/revision aimed at specialized policy goals, whereas granular detail is reserved for the revised statutes, which contain much more narrowly tailored and specifically directed provisions (hence, they are sometimes referred to as "special legislation") and are being constantly revised.

[2] In essence: Proposed article 2317.2 is simply pointing to a broad category of activities and saying "the duty of reasonable care still applies, here"; if it were to try and describe the boundaries of that category of activities in great detail, it would suggest that we had taken great care to ensure that certain activities (i.e. those falling outside our carefully crafted boundaries) were not made subject to the rule we describe (i.e. the duty of care)—which would suggest that we did not intend for a duty to apply to those activities at all.

to be captured, and are captured; e-commerce platforms are not meant to be captured, and I don't think they would be captured; "enterprise software" is a category/term too broad to evaluate with an appropriate degree of thoroughness and accuracy.[3] Notably, this breadth illustrates quite well the difficulties associated with attempting to provide granular definitions in the present context.

- In any case, even with respect to the sorts of innocuous, unintrusive technologies we intended to exclude, it is important to bear in mind the actual impact if, hypothetically, these sorts of computer programs were held to fall within the article's scope. In order to face liability under the proposed article, they would, first and foremost, have to cause damage in some way. Moreover, the damage would have to result from the failure of the designer/developer/etc. to exercise reasonable care in the design/development/etc. of the program *and* be *foreseeable* as a result of that party's particular failure.[4] This requirement for foreseeability represents a powerful limitation on the risk of liability for parties who don't have much to do with the program's actual creation. Notably, this risk of liability is not one *created* by proposed article 2317.2 so much as it is merely one that is *recognized* by the proposed article (and should be seen as already existing under article 2315 (see more below)).
- An additional note: The proposed article's description of the sorts of technology to which it applies (i.e. those that provide an "interactive or personalized user experience based on the user's data or information") is one place where substitute language could conceivably improve the intended operation of the article. This is not to say that the current language is bad or does a poor job of addressing precisely the concerns outlined, nor does it justify the inclusion of actual *definitions* of terms or a significant expansion of the description at issue—but insofar as substitute language that more clearly expresses the intended limitations were to be proffered, this is not something that should be dismissed out of hand. Note, however, that the proposed article was the product of drafting, revision, and review by a large number of experienced legislative drafters and attorneys with industry-specific expertise, so the language at issue *did* go through a robust vetting process that failed to produce any preferable alternatives; as such, it should not be discarded absent a high degree of confidence in the alternative presented. In sum, the potential overbreadth of the phrase "software that provides an interactive or personalized user experience based on the user's data or information" is perhaps the one case where the stated objection is not entirely unreasonable, even if one does not in fact agree with it.

3. "Louisiana companies…would face open-ended negligence liability without a clear compliance standard."

[3] According to Wikipedia: "Enterprise software, also known as enterprise application software (EAS), is computer software that has been specially developed or adapted to meet the complex requirements of larger organizations." Notably, the Wikipedia entry for "Enterprise software" goes on to list over twenty distinct categories of enterprise software—including business intelligence, content-management systems, customer-relationship management, database management, network and information security, HR management, billing and accounting, and backup-storage software—many of which themselves contain any number of separate, distinct types of program, if not their own separate subcategories.

[4] Consider the following scenarios: First, a train is boarding at a station; the ticket-taker/attendant is not paying adequate attention to the passengers boarding the train, and as a result an elderly woman with a large suitcase is jostled, loses her balances, and falls while boarding the train, resulting in a broken hip and considerable pain and medical expense. In this case, the harm was both caused by the inattentiveness of the attendant *and* was a foreseeable result of this failure to apply reasonable care. Now consider the same scenario, except that when the lady falls, her suitcase pops open and falls onto the tracks; the suitcase is filled with fireworks, which are ignited and set off in a chain-reaction by sparks from a slowing train on the opposite side, resulting in burns and other injuries to a number of people waiting at the station. The fireworks-related injuries are clearly *not* foreseeable as a result of a train-station attendant's inattentiveness; as such, the attendant would not be liable for them.

Response:

- First and foremost: The prospect of "negligence liability without a clear compliance standard" already exists under the generally applicable negligence duty provided for in article 2315.[5] HB 190 simply clarifies the applicability of the general standard of care in specific circumstances.[6]
- Liability for negligence is, by its very nature, "open ended" and lacks a "clear compliance standard"—these are precisely the qualities that allow it to operate as a governing principle for such a wide range of behaviors in such a wide range of contexts without need for more than a few basic lines of description. It is both self-expansive (i.e. applicable to any scenario) and self-limiting (i.e. imposing no liability except where someone has acted unreasonably and the unreasonable action was the factual cause of foreseeable harm that could have been avoided if the person had simply behaved as a reasonable person would have behaved under the circumstances)
- As mentioned in testimony before the House Committee on Civil Law and Procedure, "clear compliance standard[s]" sound great on their face, but they can create a situation where the requisite standard of care becomes a mere box-checking exercise—i.e. they incentivize the relevant parties to take the minimum degree of precaution necessary to satisfy the standards for immunity from liability, even if a reasonable person in the same circumstances would take additional precautions.
- See also, below, Response to Item 11.

4. "…the scope of the duty would likely be determined through litigation rather than legislative clarity, creating years of legal uncertainty for companies operating in Louisiana."

Response:

- This is, again, by design. Moreover, given the rapidity with which these technologies are advancing, it is a near certainty that even—and, in fact, *especially*—specific compliance standards will be (or will need to be) subject to constant updates, so the legal landscape will be changing and uncertain regardless of whether regulation takes the form of a general negligence duty or specially tailored compliance standards. The difference, however, is two-fold: (1) Under the HB 190 approach, the actual standard itself is already well-understood (in a general sense) with a large, well-developed body of jurisprudence, and, insofar as it is *not* yet well-understood in this specific context, the standard itself will not be subject to change as a mere matter of course (as specialized regulations would), which will allow a robust body of more specific case law to develop; by contrast, more particularized compliance rules will be updated frequently, rendering any prior case law obsolete each time. (2) Under the HB 190 approach, we will not have the inherent lag-time between new technological developments and corresponding regulatory updates aimed at addressing those developments. And given the rate of change with this technology, avoiding this lag is absolutely paramount (consider, e.g., the difference between ChatGPT a year ago and ChatGPT or Claude today; consider what the AI field more generally looked like *three* years ago as compared today—it's almost unrecognizable).

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[5] Civil Code article 2315 provides, in relevant part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." This generally applicable—that is, applicable to all persons in all scenarios for which the law does not provide an explicit exemption—rule is further clarified via Civil Code article 2316, which states the following: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

[6] Notably, proposed article 2317.2 would not be the first article clarifying the applicability of the general standard of care in specific circumstances. For instance, article 2318 makes this clarification with respect to parents vis-à-vis the actions of their children, 2320 does the same with respect to the actions of employees and students, 2321 for owners of animals and livestock, and 2322 for owners of buildings, among others.

5. "… plaintiffs could pursue multiple overlapping claims arising from the same conduct."

Response:

- Insofar as this is referring to the prospect of plaintiffs arguing in the alternative (i.e. going to court and saying "the defendant is liable under X, and if not then the defendant is liable under Y"), this is the default rule under Louisiana (and presumably all other states') law[7] and is permitted irrespective of proposed CC art. 2317.2 or the corresponding comment. Note that our comment merely *clarifies* that article 2317.2 does not foreclose the availability of other causes of action; this would be true (presuming a proper reading of the article) even without the comment.
- Insofar as this means to suggest that HB 190 would allow for the imposition of duplicative liability for the same action or actions, it is simply not accurate. Proposed article 2317.2 sets out a negligence standard (i.e. a particular application of article 2315), just like article 2315; a plaintiff cannot recover twice for the same negligence claim simply because multiple articles are germane. If this were the case, then the Civil Code negligence articles would already allow for duplicative liability in about a dozen or more instances—article 2315 clearly provides for liability in circumstances overlapping with those described in articles 2315.2, 2315.6, 2316, 2317, 2317.1, 2318, 2319, 2320, 2321, and 2322, but nobody believes or has successfully argued that these articles allow for the imposition of duplicative liability. Contrast these with some of the "special" liability articles (e.g. 2315.3, 2315.4, 2315.7, etc.), which *do* authorize the recovery of extra damages in special, extreme circumstances (e.g. damage caused by child porn, DWI, criminal sexual activity involving a minor, domestic abuse, etc.); these latter articles are *explicit* as to the fact that they create *additional* liability, providing "In addition to general and special damages" (i.e. the damages that would otherwise be available for an ordinary claim under article 2315 or any of the other related articles), "exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of others by [one of the especially egregious actions listed in the relevant articles]". Our article does not use language that is in any way similar to this language and would not be interpreted by any reasonable person as imposing "additional" liability of the sort imposed by these articles.

6. "In practice, companies could face negligence claims under proposed Article 2317.2 while also facing strict liability, warranty, and inadequate warning claims under the LPLA and other existing legal theories."

Response

- All of the above logic applies equally with respect to alternative claims brought under proposed article 2317.2 and the LPLA—in fact, the logic applies even more forcefully, because the LPLA is explicitly made an *exclusive* remedy. This means that, if something qualifies as a "product" under the LPLA, all other potential sources of tort liability are cut off (even if the LPLA does not ultimately give rise to liability in the relevant case).
- In other words, with respect to proposed article 2317.2, the only sources of "overlapping liability" would be (a) the Civil Code articles listed above, which in fact just describe the same thing (negligence) as article 2317.2 and therefore cannot impose additional or duplicative liability; and

[7] See Code of Civil Procedure Articles 462 (one plaintiff against one defendant) and 463 (multiple plaintiffs and/or multiple defendants). These articles state explicitly that "inconsistent or mutually exclusive actions may be cumulated in the same judicial demand if pleaded in the alternative." The practice of pleading in the alternative is similarly authorized by the Federal Rules of Civil Procedure, Rule 8(d)(2).

(b) the LPLA, which is itself exclusive and thus is definitionally incapable of giving rise to duplicative liability with 2317.2 or any other provision of tort law.

- Note that "strict liability, warranty, and inadequate warning claims" all simply refer to claims brought under the LPLA.[8]

7. "…additive structure…"

Response:

- Again, the "additive structure" is one that already exists by virtue of Civil Code article 2315.

8. "HB 190 does not … define what "reasonable care" means in the context of modern software development."

Response:

- Likewise, article 2315 does not define "reasonable care", nor do articles 2316, 2317, 2317.1, 2318, 2319, 2320, 2321, 2322, etc. In fact, articles/statutes that define reasonable care are very much the *exception*, not the rule, in this area of law.

9. "This lack of clarity risks discouraging companies from deploying personalized or interactive software products in Louisiana."

Response:

- The enactment of HB 190 would create *more* clarity in this arena, not less. The alternative to proposed article 2317.2 is not "no applicable article"; rather, it is article 2315, which contains even less detail than proposed article 2317.2.

10. "If the Legislature intends to establish liability standards for software systems, it should provide a clear compliance pathway. For example, companies that follow widely recognized frameworks, such as the NIST AI Risk Management Framework or ISO/IEC 42001, could be afforded safe harbor protections."

Response:

- Importantly, the fact that HB 190 does not provide objective criteria for avoiding liability *does not* mean that compliance with "widely recognized [safety] frameworks, such as the NIST AI Risk Management Framework or ISO/IEC 42001" is irrelevant; rather, in hypothetical litigation over damage caused, for example, by an AI system, the fact that the defendant was operating in compliance with the leading industry standards for safety would represent *significant* evidence towards establishing that the defendant satisfied the standard of reasonable care. The difference is simply that proposed article 2317.2 isn't so rigid about the issue (i.e. it doesn't make definitive statements that compliance=reasonableness or that non-compliance=unreasonableness).

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[8] Notably, "strict liability" is not itself an actual theory of liability; rather, it is simply a term that describes the manner in which liability is imposed for certain LPLA claims. The LPLA sets out four theories of liability for a products-liability claim—in order to impose liability under the LPLA, a product must be unreasonably dangerous (1) in its design; (2) in its construction or composition; (3) due to an inadequate warning; or (4) because it fails to conform to an express warranty of the manufacturer.

11. "Louisiana is working to attract technology investment and grow a competitive innovation economy. HB 190 risks sending the opposite signal—that Louisiana is a high-litigation-risk jurisdiction for software developers.

Response:

- First: Again, HB 190 merely recognizes a duty that already exists in the law.
- Second: The proposed article would govern only those actions in which Louisiana law applied—namely, those in which Louisiana, of all states, has the most substantial relationship to the occurrence and the parties, which is typically the state in which the injury occurred. Accordingly, the enactment of article 2317.2, even if (hypothetically) it *did* increase the cost of litigation and the prospect of liability in cases where it was relevant, would presumably have little to no impact on new or continued tech investment in the state.[9]

12. "Small Louisiana software companies and startups would face the same open-ended liability exposure as the largest technology firms, but without the legal resources to defend against litigation."

- It seems equally plausible that the familiar, generalized, one-size-fits-all duty of reasonable care would be *more* favorable to small businesses vis-à-vis large corporations than specialized compliance standards of the sort being advocated for: Whereas large multinational corporations have their own in-house legal departments large enough to assess compliance standards, monitor and stay on top of compliance-related developments across all fifty state legislatures and the federal government, and thereby ensure ongoing compliance at the lowest possible cost, small businesses are comparatively less likely to have the manpower to conduct such operations without having to hire third-party lawyers and consultants at significant cost; accordingly, it stands to reason that a "reasonable person" approach to product safety would be preferable to firms in this latter category.

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[9] See Professor Galligan's Law Review Article (The Louisiana Products Liability Act: Making Sense of it All, 49 La. L. Rev. 629 (1989)) about the initial enactment of the LPLA; in describing the arguments of the various stakeholders throughout the legislative process, it explains the following:

> "Throughout the legislative process the [Louisiana Association of Business and Industry] also asserted that legislation overruling [a seminal Louisiana Supreme Court decision on products liability] was necessary in order to protect Louisiana industry and attract new business to the state. There are obvious logical flaws in this argument." For the reasons stated above, "Louisiana products law should, with few exceptions, apply only to cases in which the plaintiff's injuries occur in Louisiana. If a New York buyer, for example, were injured in New York by an exploding bottle of 'Cajun Cream Soda,' bottled in Baton Rouge, the court would probably apply New York law to the controversy because that is the most appropriate law for that controversy. The fact that the manufacturer produced the soda in Louisiana should not alter the choice of law determination. Thus, in the hypothetical case, [a hypothetical "pro-business" or "pro-defendant" law] would not 'protect' the Louisiana manufacturer. … Consider [also] the case of a Louisiana citizen who is injured in Louisiana by an exploding soda bottle manufactured and bottled in New York. Because the injury occurred here, Louisiana law ought to apply. Thus, to the extent the law is probusiness or pro-defendant, that bias will provide an advantage to the non-Louisiana defendant as well as to the Louisiana defendant. Any protection that the Act provides for Louisiana industry is therefore not only limited in geographic scope but also extends to non-Louisiana manufacturers. Consequently, the Act would have little or no effect in attracting new businesses to the state."

The same logic would apply in reverse to a hypothetical law that is *un*friendly to defendants: Louisiana-based defendants would be no more disadvantaged by such a law than non-Louisiana defendants whose computer programs were also used in Louisiana. It would therefore stand to reason that HB 190—even if it *were* unfriendly to business—would have little or no effect in dissuading tech investment in Louisiana.

13. "Additionally, layering new negligence liability on top of existing products liability claims could make Louisiana an outlier among states and increase the cost of doing business in the state's technology sector."

Response:

- See above Responses.

14. "TechNet supports thoughtful, risk-based approaches to technology policy that target clearly defined harms…"

Response:

- The single most significant basis for the chosen approach was the fact that, in the context of AI technology / machine learning / algorithmic content curation, it is virtually impossible to "clearly define[] harms" in a way that will not be rendered obsolete in short order, if at all. In particular with AI, the programmers themselves are often unaware of why the program "acts" the way it does, because its internal workings are being constantly updated without hands-on input from those programmers. Accordingly, attempts to draw precise boundaries around the sorts of risks and potential harms presented by these technologies are likely to prove unsuccessful.

15. "Developing effective policy in this rapidly evolving area benefits from collaboration between lawmakers, industry experts, consumer advocates, and technical specialists.

Rather than establishing broad statutory liability standards without clear definitions or compliance frameworks, the Legislature may wish to consider engaging stakeholders in a structured policy process to examine software liability and identify targeted solutions."

Response:

- Notably, representatives (or at least one representative) from TechNet was on the notice list for both the Law Institute Committee and Subcommittee that worked on this project, and received notice of (and even attended) all of the Subcommittee and Committee meetings at which the issue was discussed. TechNet representatives also received notice of the Council meeting at which the proposal was ultimately adopted. Moreover, Law Institute staff exchanged several emails with and spoke personally to a representatives of TechNet on multiple occasions, during which conversations TechNet's concerns/uncertainties/questions were outlined and Law Institute staff responded to and provided answers to the extent possible, and further emphasized that, insofar as TechNet had any remaining concerns, it was encouraged to raise those concerns at the subsequent meetings so that anything susceptible of being "ironed out" could in fact be ironed out in advance of the legislative session. Also notably, the TechNet representative who was the primary point of contact for these conversations did, in fact, attend the subsequent meeting(s)—including the meeting at which the proposal was ultimately adopted—but did not voice any concerns or ask any questions regarding the proposal.