



# PRODUCT LIABILITY

Locke Lord's Looking Ahead 2011

## Changes Ahead Will Affect Variety of Industries in 2011

### CPSC's New Consumer Product Incidents Database Goes Online in March 2011

For decades, the Consumer Product Safety Commission ("CPSC") has gathered and maintained a database of complaints regarding consumer products from a variety of sources including newspapers, death certificates, hospital emergency rooms, and information received from consumers.

The data collected by the CPSC has not been immediately available and searchable by the public. By March 2011, however, the CPSC will launch its new Publicly Available Product Safety Information Database ([www.saferproducts.gov](http://www.saferproducts.gov)) which may have a significant impact on product liability litigation.

## Food Safety Modernization Act Gives FDA New Powers and Responsibilities

On January 4, 2011, President Obama signed into law the FDA Food Safety Modernization Act, which gives the FDA new powers and responsibilities, and imposes new obligations on food producers, with exceptions for small, local producers.

The law has three key provisions. First, it authorizes the FDA to order companies to recall tainted food if it is determined that the food will cause serious adverse health consequences or death to humans or animals. This is a departure from current FDA authority which only permits the FDA to ask companies to voluntarily undertake recalls. The law also provides federal oversight of produce although produce suppliers are not subject to the FDA's recall power. In an effort to limit the impact on local produce farmers, the new law generally exempts farmers with sales less than \$500,000 that directly sell their produce to local communities.

Second, the law requires that owners or operators of food facilities implement controls that identify and prevent hazards that could affect food. The FDA is granted the power to prohibit facilities from operating if it deems a facility to have failed in these requirements.

Finally, the law directs the FDA to issue contaminant-specific and science-based guidance documents and/or regulations related to the most significant foodborne contaminants. The FDA, acting through the Director of the Centers for Disease Control and Prevention is required to enhance foodborne illness surveillance systems to improve the collection, analysis, reporting, and usefulness of that data.

The CPSC intends to publish incident reports that meet its minimum requirements including a description of the consumer product, identity of the manufacturer or private labeler, description of the harm, approximate date of the incident, and type of submitter (consumer, government agency, health care professional, etc).

To the extent practicable, the CPSC will provide the incident report to the manufacturer or private labeler identified in the report within five business days after receiving the report. The company then has just ten business days to review it for accuracy and confidentiality, conduct its own investigation, submit its comments to the CPSC, and request that the CPSC publish its comments in the database. If the incident report contains materially inaccurate or confidential information, the company can request that the CPSC correct or exclude such information. The CPSC will then publish the incident report on the tenth business day after transmitting the report to the company.

Given the very short timetable involved in this CPSC process and the database's potential impact, manufacturers and private labelers must have the ability to respond quickly and effectively and therefore need to have a proactive plan in place prior to receiving notice from the CPSC. Locke Lord can assist companies with the creation and implementation of such a plan. By registering with the CPSC, the company increases its chances of receiving timely notification of new incident reports and maximizes the time to investigate and respond.

Locke Lord also can assist manufactures, retailers and distributors with the mandatory CPSC self-reporting requirements when the company has information that its product was involved in a "reportable incident." A reportable incident is one in which a product: (1) contains a defect which could create a substantial product hazard, (2) creates an unreasonable risk of serious injury or death, (3) fails to comply with an applicable consumer product safety rule or voluntary safety standard, or (4) fails to comply with other rules or regs under the CPSA or other statutes. The new statute imposes very tight deadlines on companies for reporting such incidents.

## Illinois Supreme Court Expected to Rule Soon in *Jablonski V. Ford*

The Illinois Supreme Court is expected to rule soon in a case that could vastly expand the duties of manufacturers that sell products in Illinois. The issue in *Jablonski v. Ford Motor Co.* is whether an automobile manufacturer had a post-sale duty to warn the plaintiff of a potential hazard.

Jablonski was killed and his wife seriously injured when their Lincoln Town Car was rear-ended. The collision caused a wrench in the trunk of the Town Car to penetrate the steel walls of both the trunk and the fuel tank, causing a fire. The wife sued Ford, alleging negligent design (although not strict product liability) and willful and wanton conduct. The jury awarded the plaintiffs more than \$28 million in compensatory damages and \$15 million in punitive damages.

In affirming, the intermediate appellate court rejected Ford's arguments including that the trial court applied the wrong standard of care in a design-defect claim; that it improperly imposed a duty that will require all manufacturers to give post-sale warnings to product users whenever changes are made to improve the safety of future products; that it improperly allowed evidence of post-sale, pre-injury remedial measures; and that it improperly found that a general verdict insulated the error of submitting the post-sale duty-to-warn theory to the jury.

The Illinois Supreme Court accepted review, and the case was argued in November 2010. A decision is expected in the first half of 2011. If the supreme court affirms liability against Ford, manufacturers will likely have a new and ongoing post-sale duty to keep purchasers of its products informed of newly discovered improvements that will enhance the safety of the products. This would constitute a significant expansion of manufacturers' current legal duties.

## CPSC's New Rule on Children's Products

Under a new Consumer Product Safety Commission ("CPSC") rule, a multitude of consumer goods previously considered general use products will be reclassified in 2011 as "children's products" – generally products designed or intended primarily for children under the age of 12. By a close 3-2 vote, the final interpretive rule provides additional guidance for manufacturers, distributors and retailers on the factors that will be used in determining whether a product is a children's product under the Consumer Product Safety Improvement Act ("CPSIA"). This determination is significant because children's products are subject to additional requirements under the CPSIA, such as compliance with lead content limits under Section 101(a), mandatory third party testing of certain children's products under Section 102, and mandatory tracking labels under Section 103. While the CPSC cautions that the determination of a children's product depends on the unique facts of each product, its final rule effectively expands the scope of children's products. We discuss below a few categories of products included.

### Sporting Goods and Recreational Equipment

Sporting goods that are marketed to children 12 years of age or younger or have extra features that make them more suitable for children than for adults may be considered children's products. Similarly, recreational equipment such as roller blades, skateboards, bicycles, camping gear, and fitness equipment may be children's products if they are sized to fit children or if they are decorated with childish features by the manufacturer.

### Jewelry

Jewelry characteristics that may suggest a product is intended for a child include size, low cost, play value, children's themes as well as sale with other children's products. When determining the age of consumers for whom the product is intended, the CPSC may consider many aspects of an item's design and marketing, including the item's advertising, promotional materials, packaging graphics and text, dexterity requirements for wearing, appearance and cost.

## Aircraft Lessor Liability

We continue to see the filing of aviation cases in the United States arising out of foreign aviation accidents where the plaintiffs have no real nexus to the U.S. In order to overcome significant venue problems, foreign plaintiffs have brought suit against aircraft lessors, often a U.S. company. The developing issue of aircraft lessor liability in foreign aviation accidents is at the cutting edge of commercial aviation litigation, and Locke Lord is handling the majority of such cases pending throughout the United States.

Relying primary upon the principles of negligent entrustment, plaintiffs seek to hold aircraft lessors liable under the theory that the lessor was negligent in entrusting the aircraft to a non-U.S. airline which was allegedly incompetent or incapable of operating and maintaining the aircraft in a safe manner. These claims raise significant issues, essentially of first impression, regarding the scope of an aircraft lessor's duty, if any, to conduct due diligence into an airline's operations and safety record prior to entrusting an aircraft to the airline, and to thereafter monitor the airline's operations. Intertwined in these issues is the ability of aircraft lessors to rely upon a foreign government's aviation authority and the auditing arm of international trade organizations to oversee the operations and maintenance practices of airlines. These claims also invoke issues of federal preemption of state tort law claims based on the Federal Aviation Act.

This litigation trend may have implications for others involved in the aircraft lessor chain including banks, financial institutions and special purchase trustees.

## Collectibles

The final rule distinguishes adult collectibles from children's collectibles based on a number of factors including the collectible's theme as well as product features which may preclude child play including high cost, fragile nature, limited production, and display characteristics (e.g., hooks or pedestals.)

## CDs and DVDs

CDs and DVDs that have encoded content intended for and marketed to children, such as children's movies, games, music or educational software, could now be considered children's products. To make the age determination, the CPSC may consider ratings from the entertainment or software industries and whether the digital product was specifically marketed to children and has no appeal to older audiences. However, CDs and DVDs that contain content for very young children will be exempt because a very young child would not likely contact the CD/DVD due to young child's lack of motor skills necessary to operate the media player.

The categories of consumer goods discussed above are some of the ones that appear in the final rule, codified at 16 C.F.R. Part 1200, *et seq*, which became effective on October 14, 2010. The rule also discusses books, art materials, musical instruments, science equipment, home furnishings and other consumer goods.

## Texas Supreme Court Revisiting Standards for Causation Evidence in the Form of Epidemiological Studies

In the currently pending case of *Merck & Co., Inc. v. Garza* (No. 09-0073), the Texas Supreme Court is revisiting standards for product liability causation evidence in the form of epidemiological studies. The Court set forth the basic standards in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). *Merrell Dow*, represented by Locke Lord (through its predecessor firm), successfully argued that Bendectin studies were not scientifically reliable causation evidence. The Court agreed, holding that a causation opinion based on epidemiological studies is scientifically reliable when based on at least two statistically significant studies showing a relative increased risk of 2.0.

This holding left open questions such as:

- Do clinical trials constitute “epidemiological studies” governed by the *Havner* standards?
- Would a study showing a relative risk of less than 2.0 be legally sufficient causation evidence if coupled with other credible and reliable evidence?
- Can numerous studies, when taken together, satisfy the *Havner* standards even if none, on its own, meets all of the standards?

These questions, and others, are posed in *Garza* and were discussed at oral argument. (At argument, one of the most active questioners was Justice Harriet O’Neill, who has since retired from the bench.) The Court seemed disinclined to impose a bright line test, but equally hesitant to create unwieldy standards for trial courts to apply. This may result in an opinion, consistent with other recent opinions regarding scientific and expert evidence (see, e.g., *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 239-40 (Tex. 2010)), that retains flexibility but “fleshes out” the applicable standards. Ultimately, we should see a clarification of *Havner* and a decision on whether the same standards apply to clinical trial evidence in product liability cases.

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