

# 2011

## PRODUCT LIABILITY

---

A N N U A L R E V I E W

MORRISON | FOERSTER


PRODUCT LIABILITY

# ANNUAL REVIEW

---

2011

Who We Are	04
Letter from Chair	07
Practice Highlights	08
Notable Matters	14
Publications	24
Key Contacts	26

A photograph of a desert landscape under a blue sky with light clouds. In the foreground, a paved road with yellow dashed lines and a white arrow pointing forward splits into two paths that lead towards the horizon. The surrounding terrain is flat and covered with sparse, dry vegetation. In the distance, low mountains are visible under the sky.

▶ Things can get really complex fast. When they do, it's important to have someone by your side who's been down that road before.

## WHO WE ARE

We have all aspects of complex litigation down cold. We're a trial firm. The courtroom is our home away from home. This is what we do. Our clients can take great comfort in that.



The most successful industry players maximize reward and minimize risk—and we help them do it.

- ▶ All things considered, we're all better off when we successfully practice preventive medicine. When a new product goes "bad," we ensure you are not left in the boardroom guessing how a front page article will impact your business goals.

# ▶ LETTER FROM CHAIR

---



This year, I had the honor of taking over the leadership of the Product Liability Group from my partners Don Rushing and Chet Kerr, who oversaw dramatic growth in our product liability practice during their six and half-year tenure. I hope to build upon their legacy and continue to develop our practice to better serve the needs of our clients.

As a group, we have much to be proud of this past year. We handled numerous high-stakes matters for companies in the pharmaceutical, aviation, and consumer products industries, successfully resolving these matters through motion practice, favorable settlement, and arbitration and appellate victories. We continue to thrive in this competitive marketplace due to the faith our clients place in us, our professional network, our commitment to training and mentoring that make us among the best in this field, and our high-level recognition in such publications as *Chambers USA* and *Legal 500 US*.

I would like to thank all of our clients for the privilege of representing you in some of the most important legal matters in the United States. We look forward to continuing to represent your interests around the globe and wish you all the best in 2012.

Sincerely,

Erin Bosman  
Chair, Product Liability Group

# ▶ PRACTICE HIGHLIGHTS

---

**Prevailed** in a 9th Circuit appeal on the government contractor defense in a case regarding the crash of a special operations Chinook in Afghanistan.

**Implemented** a pharmaceutical product liability litigation training program.

Obtained the **dismissal** of our clients (virtually all U.S. producers of canned fruit, non-citrus juice, and baby food) from multidistrict litigation alleging fear of injuries resulting from trace levels of naturally occurring lead in fruit and juice products.

To date, achieved our client's dismissal from 186 cases consisting of 478 plaintiffs, who allege that local anesthetic products used in pain pumps contribute to the development of post-surgical chondrolysis, a degenerative condition of the shoulder.

“Morrison & Foerster LLP has an ‘**outstanding**’ product liability practice that is ‘**excellent in every area**’.”  
– *Legal 500 US*

---

*Best Lawyers in America* recognized 14 of our partners:

**Michèle Corash**  
**Grant Esposito**  
**Robert Falk**  
**Arturo González**  
**Adam Hoffinger**  
**Peter Hsiao**  
**James Huston**  
**William O'Connor**  
**Dennis Orr**  
**Charles Patterson**  
**Penelope Prevolos**  
**Don Rushing**  
**Michael Steel**  
**William Stern**

---

Reached a **tentative settlement** of a lawsuit arising from the crash of Flash Airlines Flight 604 in the Red Sea off Sharm-El Sheikh, Egypt, on January 3, 2004.

**Handled more than 945** active product liability matters in 2011.

Obtained two arbitration awards from a three-judge London tribunal for Honeywell in connection with the Gol Airlines Flight 1907 crash, dismissing Gol's indirect economic loss claim and completely exonerating Honeywell from any liability for the accident.

Achieved Arizona appellate confirmation in the **dismissals of two lawsuits** against our client MD Helicopters, Inc., based on forum non conveniens, in connection with a helicopter crash on July 19, 2006 in Antalya, Turkey.

Achieved a favorable **settlement for a major pharmaceutical company in litigation** alleging that our client defectively designed a seizure medication, failed to communicate its risks, and falsely represented the safety of the medication.

Coordinated the defense of more than 90 lawsuits and multidistrict proceedings, alleging personal injury and wrongful death due to exposure to asbestos fibers in the workplace.

---

Assisting a client in seeking cleanup and injunctive relief for solvent (toluene) contamination at one of its properties caused by a prior facility operator, whose motion for partial summary judgment on our RCRA claim was **defeated**.

Obtained the **dismissal** of a lawsuit arising from the February 21, 2010 crash of a U.S. Army OH-58D helicopter while conducting a transit flight near Forward Operations Base Qayyarah West.

Recognized as a **leading firm** in four of *Legal 500 US*'s product liability and mass tort defense categories: aerospace/aviation, consumer products, pharmaceuticals and medical devices, and toxic tort.

Six of our partners were recognized by *Chambers USA*: **Michèle Corash, Arturo González, Adam Hoffinger, Dennis Orr, Don Rushing, and Michael Steel.**

Ranked Tier 1 in San Diego for product liability litigation (defendants) and Tier 1 in San Francisco for personal injury litigation by *U.S. News & World Report/Best Lawyers*®.

**Linda Lane**, one of our product liability attorneys, was elevated to partner.

*Legal 500 US* recognized **Michèle Corash, Arturo González, James Huston, and Don Rushing** as “Leading Lawyers.”

“Morrison & Foerster LLP’s ‘excellent’ and ‘superior’ practice ‘provides timely and responsive advice and handles cases with professionalism and expertise’.

The team is ‘strong across the board’ and is regularly instructed on ‘high-exposure, high-profile aviation product liability litigation’.”

– *Legal 500 US*

Advised retailer of high-end children’s products on product safety incidents, flammability requirements, third-party testing requirements, required law labels for bedding and fabrics, and Proposition 65 warnings.

---

Represent a coalition of U.S. coffee producers as well as **two of the largest sellers of coffee beverages in the United States** in responding to claims based on the presence of acrylamide in coffee products

Represent a pharmaceutical company in **litigation in which more than 2,000 individual claims** have been made around the United States, alleging that Reglan/metoclopramide, when prescribed off-label for psychiatric purposes, causes significant side effects.

## **Washingtonian** magazine named **Adam Hoffinger** to its “Top Lawyers” list.

In June 2011, defeated an attempt by plaintiffs to revive the Air France 447 litigation by dropping the French defendants; the court denied the plaintiffs’ request to reconsider the court’s earlier order dismissing the litigation on forum non conveniens grounds.

Represent 30 members of the Global Organization for EPA and DHA Omega-3 oils (GOED) in connection with a Proposition 65 lawsuit concerning polychlorinated biphenyls (PCBs), dioxins, and furans in **fish oil supplements and related food additives**.

### **Published 23**

legal updates and articles in 2011.

**Retained in more than 260** new product liability matters in 2011.

Represent two companies in one of the **largest groundwater contamination cases of its kind**, involving a precedent-setting issue of whether a water district has the ability to create its own mini-Superfund.

Serve as **lead national trial and coordinating counsel in multidistrict litigation** (102 matters are currently pending in the MDL, including 22 class actions) alleging that a major nutritional supplement causes a variety of medical ailments.

Serve as national coordinating counsel for a pharmaceutical company in numerous cases filed around the United States, alleging side effects from heparin-induced thrombocytopenia.

**Julie Park** made *The Daily Transcript's* "**San Diego County Young Attorney**" list for 2011.

Recognized as a **leading firm** in aviation litigation (nationwide) and environmental litigation (California) by *Chambers USA*.

---

Obtained a **dismissal** for a waiver of costs for MD Helicopters in a lawsuit arising from the crash of an MD369E helicopter near Lake of the Ozarks on May 25, 2008.

Worked with a client to implement a fast-track recall of its products and negotiated a corrective action plan with the CPSC.

Represent the **three largest U.S. cereal manufacturers** in a Proposition 65 lawsuit filed by Environmental World Watch against cereal manufacturers for failure to warn about acrylamide in their products.

Michèle Corash was recognized by *San Francisco Business Times* as one of the “**Most Influential Women in Bay Area Business**” and by The Recorder as one of California’s top 20 “**Women Leaders in Law.**”

*Daily Journal* recognized **Erin Bosman** as one of California’s “**Top Women Litigators.**”

**Successfully mediated** and completed settlement of 13 lawsuits arising from the crash of a Sikorsky S-61 helicopter in the Shasta-Trinity National Forest.

---

Advised a video game developer and publisher on its duties and responsibilities under the CPSIA in marketing, selling, and labeling its products.

Helped a client develop a response plan, a public relations plan, and **customer settlements** in connection with two product incidents. We also helped to determine whether these incidents constituted reportable events to the CPSC.

Advised a luxury, **high-performance eyewear manufacturer** on the use of warning labels and instruction manuals for its sunglasses, 3D eyewear, and Hydro Pens.

# ▶ NOTABLE MATTERS

---

We defend and counsel all types of product manufacturers and suppliers. We serve as trial and national coordinating counsel in product liability and toxic tort cases, including numerous large class actions, multi-party serial tort litigation, mass tort litigation, and MDL proceedings. We have tried hundreds of cases to judges and juries, arbitrators, and administrative bodies. Our appellate lawyers have argued some of our clients' most challenging legal issues, and won, including before the U.S. Supreme Court. Our experience also reaches beyond the courtroom. We advise on all aspects of regulatory compliance, labeling, and warning requirements. We also provide comprehensive support for any client whose product needs to be removed or recalled from the market.

The following pages provide some examples of the notable matters that we handled in 2011.

## A Successful and Early Exit from the Avgas Prop 65 Litigation

The Center for Environmental Health (CEH), an environmental advocacy group and well-known private enforcer of Proposition 65, issued a series of notices of intent to sue aviation fuel (avgas) producers, distributors, and users, alleging that avgas used in small aircraft exposes people living near airports to lead at levels that require warnings under Proposition 65. CEH demanded that the companies either cease the sale of avgas or provide warnings to people living near airports stating that they are exposed to lead, which causes cancer or reproductive harm. CEH demanded the companies pay its legal fees and a significant civil penalty of up to \$1.3 billion.

Operators of small aircraft must use avgas, which contains tetra-ethyl lead to enhance combustion stability and prevent against vapor lock. There is no unleaded version of avgas suitable for use in small aircraft. It's either avgas, or being grounded.

We knew it would be essentially impossible to establish that any of the avgas manufacturers knowingly and intentionally discharged lead into sources of drinking water in California or caused exposures to lead.

Even though avgas and its use are regulated by the Federal Aviation Administration (FAA) and the U.S. Environmental Protection Agency (EPA), CEH targeted avgas through a unique provision in Proposition 65 that prohibits the discharge of a listed chemical, including lead, into a source of drinking water. CEH argued that avgas, emitted through the exhaust of small aircraft, ultimately settles in reservoirs, wells, and other sources of drinking water, resulting in exposure that requires a warning. CEH also argued that the avgas discharge was absolutely barred in California unless appropriately permitted. Because one cannot obtain a permit for this type of discharge, the implications of CEH's argument were



clear: The use of avgas would be completely illegal in California under Proposition 65.

We worked closely with the major oil companies on a strategy to thwart the threatened suits. We met several times with the California Attorney General and CEH to convince them that they would not be able to prove their case against these companies. We knew that to be the case because we had defended engine manufacturers and fuel suppliers in other Proposition 65 cases and knew it would be essentially impossible to establish that any of the avgas manufacturers knowingly and intentionally discharged lead into sources of drinking water in California or caused exposures to lead. We persuaded CEH to withdraw its discharge claim, leaving only the failure to warn claim. We then worked closely with CEH and the Attorney General's office to convince CEH that it should withdraw its notice of intent to sue the major oil companies based on the problems of proof and the tenuousness of the oil companies' connection to the exposures allegedly resulting from the use of avgas. CEH withdrew its notices.

CEH's litigation against parties other than the oil companies is pending.

## The Road Less Traveled

We fight hard for our clients in court. That's a given. We can also chart a less direct course if that's what it takes to deliver outstanding results. And sometimes, as was the case here, good things do indeed come to those who wait.

That's what happened when one of our clients, a generic drug manufacturer, was caught up in the maelstrom of litigation over the drug Aredia, which is used to treat bone disorders in cancer patients. In 2005, plaintiffs' attorneys started filing claims that their clients, after taking Aredia, suffered osteonecrosis of the jaw, a severe bone disease. These cases were consolidated in a multidistrict litigation ("MDL").

Our client, who manufactures "pamidronate," a generic form of Aredia, was a latecomer to the litigation. It wasn't until 2008 that generics were targeted, and it appeared at first that we would take a back seat as the first waves of cases rolled on. We attended the status conferences and ensured that substantive discovery was deferred against our client whenever the issue arose.

The MDL, however, took an unpredictable turn when the judge overseeing the Aredia suits ordered the generics back to their original courts in 2009. This was baffling and completely impractical—any plaintiff who had taken both the branded and generic drugs would be forced to litigate in two separate proceedings—and both sides successfully fought the remand order. But the MDL judge was determined to keep the generic manufacturers out of his court and reissued the remand order. We

We hit pay dirt in June 2011, during a flurry of briefing on the motions to dismiss, when the U.S. Supreme Court handed down *PLIVA v. Mensing*, which held that FDA regulations governing the labeling of prescription drugs preempt state law failure-to-warn claims against generic drug manufacturers.

regrouped and petitioned for our own MDL for generic pamidronate.

Meanwhile, plaintiffs continued to file suits against the generics, which were assigned to an MDL in the Eastern District of New York in December 2009. That's when we chose a different approach.

During the initial case management conference, we pointed out that plaintiffs in product liability litigation are obligated to identify and prove the manufacturer of the product that allegedly caused the injury and that the plaintiffs had made very little progress in doing that. The judge agreed and ordered the plaintiffs to amend their complaints to specify which defendants' drug had been taken.

The judge's deadline, August 20, 2010, came and went. Apparently, the plaintiffs' firms were overwhelmed with litigating two MDL proceedings, and didn't get around to amending complaints until January 2011. (Our client was a named defendant in 24 cases with 139 plaintiffs.) Yet, despite the MDL judge's admonition, the plaintiffs' amended complaints still did not properly identify the products used by the plaintiffs.

Time was working to our advantage. In April 2011, we moved to dismiss the cases for inadequate identification. In June 2011, during a flurry of briefing on the motions to dismiss, the U.S. Supreme Court handed down *PLIVA v. Mensing*, which held that FDA regulations governing the labeling of prescription drugs preempt state law failure-to-warn claims against generic drug manufacturers.

Although the Supreme Court decision seemed like a silver bullet, plaintiffs around the country were holding their ground, many of them successfully. We expected these plaintiffs to do the same. Still, we sent off an email to plaintiffs' counsel one hour after the case came down and asked them to dismiss their cases. To our surprise, they agreed. Plaintiffs realized they were able to identify the brand-name product, not our client's generic product; and even if they had been able to circumvent the preemption argument, we had shown that it would have been a difficult path if plaintiffs had continued to pursue their claims against our client. All cases were dismissed against our client without us having to answer a single complaint.

## GOL Flight 1907 Litigation: A Complete Victory for Honeywell

On September 29, 2006, a Boeing 737-800 (GOL Flight 1907), carrying 154 passengers and crew members, was en route from Manaus, Brazil to Rio de Janeiro when tragedy struck. The commercial flight collided with a brand-new Embraer Legacy 600 executive jet operated by ExcelAire Service, Inc., an aircraft charter company, on its maiden delivery flight from a plant near São Paulo to the U.S. The GOL 737 crashed into the Amazon rainforest, killing everybody on board, while the Legacy jet was able to make an emergency landing at a then-secret Brazilian Air Force Base in the rainforest.

The two planes came together because Brazilian Air Traffic Control had placed them on reciprocal headings at the same altitude on the same airway. The Legacy was equipped with a Honeywell Avionics and Radio System, including a transponder used to communicate an aircraft's identity, location, and altitude to Air Traffic Control (ATC) and to other aircraft Traffic Collision Avoidance Systems (TCAS). Unfortunately, the transponder was on STANDBY mode at the time of the collision and was not "squawking" a reply to ATC or other aircraft inquiries. As a result, the Boeing 737 was "blind" to the presence of the Legacy jet. Likewise, because the Legacy jet's transponder was in the STANDBY position, its own TCAS system was turned off and was not generating traffic alerts or resolution advisories.

The families of the victims retained U.S. plaintiffs' firms and filed suit in the U.S. federal courts, seeking the advantages of the court system and the level of damages accorded by American juries to victims of air crashes. These suits, initiated within weeks of the tragedy and before the circumstances were known, named the corporation and individuals responsible for the operation of the aircraft as well as manufacturers of the Legacy jet and its components. The first suit was filed in the Eastern District of New York, with others quickly following in federal courts in California, Missouri, Massachusetts, and Florida. The allegations against Honeywell included charges of design defects in its avionics, including the displays for the transponder that resulted in its deactivation before the collision.

In January 2007, Honeywell filed a motion to dismiss for *forum non conveniens* in favor of a Brazilian forum and to stay merits discovery in the Eastern District of New York. On June 22, 2007, the Judicial Panel on Multi-District Litigation ordered all of the cases consolidated in the Eastern District of New York. The court granted the *forum non conveniens* motion on July 3, 2008 and the ruling was affirmed by the Second Circuit.

In June 2007, Honeywell, ExcelAire, and GOL entered into a sharing agreement to resolve the passenger and crew claims and address other losses. A key provision of the agreement was a pledge to arbitrate, under English law, the allocation of liability before a three-judge tribunal in London. CENIPA, the Brazilian investigative agency, issued findings that the Honeywell avionics were working properly and conformed to applicable certification standards. CENIPA also found that the crew inadvertently placed the transponder on STANDBY mode and failed to notice the status indication.

The families of the victims settled their claims under the sharing agreement in Brazil, but when it became apparent that the parties could not reach a final agreement on apportionment of liability and entitlement



to certain economic loss claims, they commenced an arbitration in London. In two separate hearings, the first concerning entitlement to an economic loss claim and the second allocation of responsibility, a distinguished tribunal completely vindicated Honeywell. They ruled that it was not responsible for any economic losses and was not negligent in the design and manufacture of the avionics. They granted Honeywell an award of costs under English law.

This strikingly successful outcome was the product of a highly effective collaboration among Honeywell's Legal and Product Integrity departments, Global Aerospace claims attorneys, Morrison & Foerster lawyers and paraprofessionals from the San Diego, New York, and London offices, Brazilian counsel Wald Associados, and barristers from Fountain Court Chambers. It was also a historic event in the aviation insurance market, marking the first time in recent memory that market participants under a sharing agreement would arbitrate to a final award rather than reach a negotiated resolution.

In the end, however, it was Honeywell's conviction that its avionics products were properly designed and functioning perfectly on the day of the accident, and the company's confidence that the Morrison & Foerster trial team could take the case all the way, that paved the way for the stunning victory.

It was also a historic event in the aviation insurance market, marking the first time in recent memory that market participants under a sharing agreement would arbitrate to a final award rather than reach a negotiated resolution.

## Leading Under Pressure: Crisis Management for the “Bet the Company” Toxic Tort Case

In a merger situation, there’s always a possibility that another company’s problems could suddenly become your own, in a big way. That’s what happened when our client discovered that it had acquired a facility with a hidden and serious environmental problem. A prior owner of the facility had used and improperly handled an industrial chemical, one that our client did not use, that had leaked into the soil and groundwater, and found its way into potential drinking water supplies used by the facility.

The ensuing crisis threatened enormous liability to the company and irreparable damage to its reputation. It demanded an immediate response. In these types of situations, companies have to deal with various factions with competing needs and interests: federal and state regulators, current and former employees, property owners, citizen groups, community stakeholders, and the media. The company was faced with making decisions within 24 hours on a complex series of response actions. A successful outcome requires a high degree of legal acumen, deep experience in crisis management, and much more.

Companies come to Morrison & Foerster when faced with these types of “bet the company” cases. Our job is to help our client mount a coordinated response that addresses the needs and interests of each constituency. Using our experience, we assisted the client in forming a team of experts, investigating the facts, identifying and prioritizing the most critical goals for the organization, and deploying a rapid and logical set of action steps, all under intense time pressure and the constant scrutiny of the government agencies, press, and potential plaintiff law firms.

In this case, we looked for opportunities to align the company’s interests with those of the various stakeholder groups. The company immediately made full disclosures to the government agencies and worked to involve them in its investigations and communications with its employees and the press. We also reached out to the experts in the fields of occupational health and exposures, and provided a high level of transparency and information sharing with the government agencies based upon those interactions.



We also knew at the outset that our client needed a proactive employee outreach program that was aligned with its corporate responsibility commitment. That meant more than 100 public meetings (with interpreters) to share information and provide direct access between the government agencies, the health experts and the employees. The client created a website, set up a toll-free hotline, prepared direct mailings, and provided free medical screening to all former and current employees under a program developed in conjunction with the health experts and government agencies. The result was the largest and most comprehensive employee outreach program ever performed in the state for such an event.

As we worked to ease community and employee concerns, we were simultaneously developing a strategy for the site cleanup and the resolution of claims by the government. We quickly resolved and settled those claims, resulting in full releases of civil penalty claims against the client. More complex, multiparty negotiations resulted in a global settlement where our client, the former facility owner, the government, and six landowners agreed to share in the site cleanup costs. Under the settlement, our client made a one-time payment and obtained a complete release of all cleanup liability and full protection from any claims for contribution. The prior facility owner performed the cleanup work and paid most of the costs of the work and the government oversight.

The landlord of the property filed a lawsuit for environmental damages. The case was removed to federal court and vigorously litigated, resulting in a series of successful defense judgments. The parties ultimately settled the remaining claims on very satisfactory terms for our client.

Former employees also were solicited by plaintiff lawyers, who claimed to have more than 60 clients with personal injuries resulting from exposure to the chemical contaminant. Six test cases were filed, which we removed to federal court, then successfully moved to dismiss based upon the failure to exhaust administrative remedies, in the form of workers' compensation. In subsequent administrative proceedings, we presented factual evidence and expert testimony that persuaded the administrative law judge to deny the workers' compensation claims. Each of these cases were ultimately settled under a confidential agreement. Our aggressive and effective litigation strategy has resulted in no further claims filed against the company, and no attempt to certify or pursue a class action.

In the end, our coordinated, multifront response dramatically limited and resolved the company's

exposure to liability. Damage to the company's reputation was avoided with the company's enhanced and well-publicized efforts to constructively respond to the crisis and to provide appropriate care to its employees. It was a relief and the best possible outcome in a nightmarish and unpredictable situation—a situation that could befall any company.

Using our experience, we assisted the client in forming a team of experts, investigating the facts, identifying and prioritizing the most critical goals for the organization, and deploying a rapid and logical set of action steps, all under intense time pressure and the constant scrutiny of the government agencies, press, and potential plaintiff law firms.

## Getz v. Honeywell International, et al.: A Roadmap for Future Government Contractor Cases

On February 17, 2007, a U.S. Army Special Operations Aviation Regiment MH-47E Chinook helicopter crashed in Zabul Province in Afghanistan. The helicopter was one of three Chinooks on a mission to drop off personnel to capture or kill someone in the Al-Qaeda network. The mission was cancelled for “intel” reasons after the target did not develop as planned. After takeoff, weather conditions deteriorated, and within 35 minutes of takeoff the Chinooks encountered snow, mist, and heavy icing. Several witnesses described the weather as the worst in which they had ever flown. Sixty-four minutes into the flight, the helicopter crashed, killing eight and injuring 14. Combat search and rescue forces evacuated the survivors.

The U.S. Army investigated the crash, and a U.S. Army-led “Integrated Product Team” (IPT) investigated to determine the cause. The IPT, which included the Army, the manufacturer (Boeing Company), and the component part manufacturers of the engines and engine parts (Honeywell International and Goodrich Corporation), determined that the most probable cause of the accident was engine flameout caused by snow, slush, ice, and/or water ingestion.

On October 5, 2007, 15 of the 22 passengers filed suit in California state court against Boeing, Honeywell, and Goodrich. The allegations included causes of action for wrongful death and personal injuries, under the theories of strict liability, negligence, and breach of express and implied warranties. Boeing removed the case to federal court based on the Federal Officer Removal Statute.

Honeywell moved to dismiss the complaint, joined by Boeing and Goodrich, as a non-justiciable political question under the U.S. Constitution. We argued that plaintiffs’ claims met the six independent tests for the political question doctrine, but the court denied our motion because it was unclear whether inquiries into military decisionmaking would be necessitated by plaintiffs’ claims based on the limited discovery conducted to date. The court, however, left the door open to bringing a similar motion to dismiss at a later stage in discovery.



After extensive briefing in the district court, our motion for summary judgment was granted in a careful, well-reasoned 30-page opinion.

Honeywell next filed a motion for summary judgment based on the Combatant Activities Exception of the Federal Tort Claims Act, with Boeing and Goodrich again joining. This exception retains the government’s sovereign immunity for claims arising from the military’s wartime combatant activities. Prior case precedent established a quasi-battlefield preemption for manufacturers of military equipment. The judge again denied our motion, holding that plaintiffs’ claims were not preempted under the FTCA.

After considerable discovery, Honeywell, Boeing, and Goodrich each filed motions for summary judgment on the grounds that plaintiffs’ claims were barred by the Government Contractor Defense, which establishes that government contractors can be protected from tort liability when the government approves reasonably precise specifications, when the contractor built the product in conformance with those specifications, and when the contractor warned of dangers known to the contractor but not the government. After extensive briefing in the district court, our motion for summary judgment was granted in a careful, well-reasoned 30-page opinion. The court held that Boeing, Honeywell, and Goodrich’s products were each built according to government specifications, that the products were built in conformance with those specifications, and that the manufacturers had warned the U.S. Army of all known dangers known to themselves but not to the Army.

One of the key issues was whether the manufacturers had warned that the ingestion of snow, water, or ice could cause an engine to flame out. The briefing established, and the district court ruled, that the U.S. Army, due to its long-standing operation of Chinooks and the engines, knew and understood that engines could flame out with sufficient water ingestion. Plaintiffs appealed to the Ninth Circuit.

On August 2, 2011, the Ninth Circuit denied plaintiffs’ appeal and issued a seminal decision regarding the Government Contractor Defense. The court solidified its precedent in two key areas and created new precedent relating to a third area, clarifying that a contractor is not required to warn about dangers of which it merely should have known. The ruling is expected to serve as a roadmap for future cases in the Ninth Circuit.

## Recall

The mere mention of the word is enough to send chills up the spine of even the steeliest CEO. You may be the most meticulous, reasonable, and responsible manufacturer, importer, distributor, or retailer in the world, but the words “product recall” will still fill your heart with dread.

There’s good reason. The consequences stemming from a product recall are ominous, and the landscape is treacherous. That’s where we come in. We know what it takes to navigate this perilous terrain in a way that minimizes reputational damage, business disruption, and the legal fallout that product recalls can generate. Our goal is to ensure that you can get on with the business of doing business as quickly and smoothly as possible.

Consider a typical scenario. A client calls and says they’ve received a report that a product has caught fire. We know that time is of the essence. We need to move quickly to find the facts and assess potential liability.

In some instances, there will be a threshold issue to address: which agency has jurisdiction over the product? In many cases, it’s the Consumer Product Safety Commission (“CPSC”), which takes calls on an anonymous basis—a perfect opportunity to get answers to questions such as this. If the CPSC has jurisdiction, it can tell us whether, in its opinion, the issue is reportable in a “Section 15(b)” report under the Consumer Product Safety Act (“CPSA”). This is important, as the CPSC has heightened its scrutiny of consumer product safety in recent years, and is wielding increased enforcement power to impose stiffer penalties against companies that fail to report. We want to make sure our clients reduce their exposure to these increased criminal and civil penalties while still weighing other concerns associated with recalls, such as negative publicity and customer relations.

Notifying the CPSC is not as cut-and-dried as it might appear on the surface. The CPSA obligates a manufacturer, distributor, or retailer of a consumer product to notify “immediately” on learning that a product fails to comply with an applicable safety requirement, contains a defect that could create a

substantial product hazard, or creates an unreasonable risk of serious injury or death to consumers.

The regulations are intentionally vague to encourage over reporting of potential issues. However, for isolated events with an unknown cause, it’s difficult to decide whether those events are reportable. Valid concerns about the adverse consequences of a public recall can also affect that decision.

Multiple incidents involving the same product make the decision easier. In 2011, we handled a situation where a client, heeding our advice, decided to move quickly to report a problem to the CPSC and opted for the CPSC’s Fast Track program. Under Fast Track, a company must report a potential product defect and, within 20 working days of the report, begin implementation of a corrective plan with the CPSC. In exchange for this quick action, the CPSC will make no preliminary determination that the product contains a defect that creates a substantial product hazard.

In this case, we faced several hurdles as we were developing our client’s corrective action plan, including determining the exact product at issue, the model of the product at issue, the location of potentially affected consumers, the cause of the incidents, and the appropriate corrective action. Like many clients, this one could not pinpoint the cause of the incidents, including whether the incidents were inherent to the product itself or only occurred in certain applications. Our client was in a quandary over what corrective action to take. Should it recall or not? Should it replace the product? Should it fix the product? To answer some of these questions, we

Throughout the recall process, we maintained an open line of communication with our CPSC compliance officer, fostering a good rapport that helped in the development of our corrective action plan.



worked closely with our client to hire an outside firm that independently investigated the incidents.

Throughout the recall process, we maintained an open line of communication with our CPSC compliance officer, fostering a good rapport that helped in the development of our corrective action plan. When we needed extension of deadlines or other allowances, the compliance officer understood our situation and granted the requests. That flexibility and latitude allowed us to help our client develop an appropriate corrective action plan that would fix the problem in the safest and most cost-effective manner.

To address the adverse publicity and customer relations that can be associated with product recalls, our client hired a public relations firm to help craft communications to its customers. These communications were critical in maintaining customer satisfaction through the recall process. Early on, our client sent letters to its customers

explaining the problem and how they could safeguard themselves until a fix was in place. Our client also set up a call center to assist customers with questions or concerns. We were also able to limit any adverse publicity recall because the customers potentially affected by the product issues were readily identifiable—this helped us convince the CPSC that we could limit the recall notice to the identified customers. Instead of its usual email blasts and media alerts, the CPSC agreed to limit public pronouncement to posting the recall notice on the CPSC’s website.

Each product safety incident is unique and requires highly experienced counsel familiar with the interplay of the many factors that must be considered. These include:

- Product type
- Defect type
- Patterns of product complaints
- Nature, severity, and likelihood of potential risks
- Production window
- Number of affected products
- Client’s role in the distribution process
- Product inventory
- Type of user and user population
- Most effective form of communication
- Type of notice
- Public relations strategy and messaging
- Remediation plan

We have that experience, and that experience gives our clients peace of mind. That’s why when our clients hear the dreaded word “recall,” we are the first place they turn.

# PUBLICATIONS

---

**“California Revives Green Chemistry Initiative with Draft Program Regulations,”**  
*Product Safety & Liability Report*, November 11, 2011, Peter Hsiao, Michael Steel, William Tarantino, and Meredith Klein

**“California Revives Green Chemistry Initiative with Draft Program Regulations,”**  
*Toxics Law Reporter*, November 10, 2011, Peter Hsiao, Michael Steel, William Tarantino, and Meredith Klein

**“Consumer Product Alert: California Revives Green Chemistry Initiative with Draft Regulations that Impact Manufacturers, Importers, and Retailers,”**  
Morrison & Foerster Client Alert, November 2, 2011, Peter Hsiao, Michael Steel, and William Tarantino

**“Culling Class Action Waivers under Magnuson-Moss,”**  
*Class Action Law360*, October 20, 2011, Rebekah Kaufman and Alexei Klestoff

**“The Physician Payments Sunshine Act: Little Guidance, But Many Potential Risks,”**  
Morrison & Foerster Client Alert, October 19, 2011, Adam Hoffinger and Demme Doufekias

**“California Takes Action on Bisphenol-A: What Is the Impact?”**  
Morrison & Foerster Client Alert, October 17, 2011, Peter Hsiao and Robin Stafford

**“TCE Revisited: U.S. EPA Releases Long-Awaited Toxicity Reassessment of Trichloroethylene with Potentially Vast Implications on Historically Contaminated Sites, Industrial and Consumer Products, and Liability,”**  
Morrison & Foerster Client Alert, October 5, 2011, Peter Hsiao, Robert Falk, and Meredith Klein

**“The Institute of Medicine’s Broad Recommendations for Replacing the 510(k) Clearance Process,”**  
Morrison & Foerster Client Alert, August 3, 2011, Jae Hong Lee, Jessica Roberts, Erin Bosman and James Huston

**“Ninth Circuit Affirms District Court Ruling Based on Government Contractor Defense,”**  
Morrison & Foerster Client Alert, August 2, 2011, James Huston, Erin Bosman, William O’Connor, Joanna Herman, Greg Reilly

**“U.S. Consumer Product Safety Commission Set to Further Reduce Lead Content Limit for All Children’s Products,”**  
Morrison & Foerster Client Alert, July 11, 2011, Robert Falk, Linda Lane and William Tarantino

**“The Supreme Court Limits Personal Jurisdiction over Foreign Defendants: A Potential End to the Stream of Commerce Theory,”**

Morrison & Foerster Client Alert, June 30, 2011, Grant Esposito and Brian Matsui

**“Generic Drug Makers Protected from Failure to Warn Claims,”**

Morrison & Foerster Client Alert, June 23, 2011, James Huston, Erin Bosman, and Julie Park

**“The Evolving *Twombly* and *Iqbal* Federal Pleading Standard,”**

Morrison & Foerster Client Alert, March 24, 2011, Jessica Ederer, Joanna Simon, and Don Rushing

**“Recent Developments in Air Carrier Litigation,”**

*Journal of Air Law and Commerce*, Volume 76, Number 2, Spring 2011, Don Rushing, Linda Lane, and Kimberly Gosling

**“3-2-1, Ready for Launch: [www.saferproducts.gov](http://www.saferproducts.gov),”**

Morrison & Foerster Client Alert, February 25, 2011, Linda Lane and Jessica Roberts

**“Fasten Your Seatbelt: U.S. Supreme Court Rules Federal Seatbelt Regulation Does Not Preempt State Law Tort Suit,”**

Morrison & Foerster Client Alert, February 24, 2011, James Huston, Joanna Simon, and Linda Lane

**“Late Breaking Changes to the CPSIA: The CPSC Grants Additional Stay for Portions of Lead Requirements,”**

Morrison & Foerster Client Alert, February 8, 2011, Linda Lane

**“*Kwikset* Reset: Why The California Supreme Court’s Latest Horror May Be Less Scary Than It Looks,”**

Morrison & Foerster Client Alert, February 2, 2011, William Stern, Sylvia Rivera, and William Tarantino

**“CPSIA: What 'To Expect' In 2011,”**

Morrison & Foerster Client Alert, January 18, 2011, Linda L. Lane and Ellen Nudelman Adler

**“Manufacturers, Importer and Private Labelers Beware – U.S. Consumer Product Safety Commission Lifts Stay of General Conformity Certification Requirements for Certain Non-Children’s Products, Including Clothing,”**

Morrison & Foerster Client Alert, January 4, 2011, Robert Falk and Linda Lane

**“California’s New Green Chemistry Initiative,”**

*American College of Environmental Lawyers Blog*, January 2011



# KEY CONTACTS

---

**Jim Bergin**

Partner, New York  
(212) 468-8033  
jbergin@mofo.com

**James Huston**

Partner, San Diego  
(858) 720-5154  
jhuston@mofo.com

**Dennis Orr**

Partner, New York  
(212) 468-8161  
dorr@mofo.com

**Erin Bosman (Chair)**

Partner, San Diego  
(858) 720-5178  
ebosman@mofo.com

**William Janicki**

Of Counsel, San Diego  
(858) 720-5195  
wjankicki@mofo.com

**Charles Patterson**

Partner, Los Angeles  
(213) 892-5553  
cpatterson@mofo.com

**Michèle Corash**

Partner, San Francisco  
(415) 268-7124  
mcorash@mofo.com

**Rebekah Kaufman**

Partner, San Francisco  
(415) 268-6148  
rkaufman@mofo.com

**Penelope Prevolos**

Partner, San Francisco  
(415) 268-7187  
pprevolos@mofo.com

**Robert Falk**

Partner, San Francisco  
(415) 268-6294  
rfalk@mofo.com

**Charles Kerr**

Partner, New York  
(212) 468-8043  
ckerr@mofo.com

**Don Rushing**

Partner, San Diego  
(858) 720-5145  
drushing@mofo.com

**Fioccola, David**

Partner, New York  
(212) 336-4069  
dfioccola@mofo.com

**Linda Lane**

Partner, San Diego  
(858) 720-7989  
llane@mofo.com

**James Schurz**

Partner, San Francisco  
(415) 268-6449  
jschurz@mofo.com

**Grant Esposito**

Partner, New York  
(212) 468-8166  
gesposito@mofo.com

**Daniel Levison**

Partner, Tokyo  
011 81 3 3214 6717  
dlevison@mofo.com

**Robin Stafford**

Of Counsel, San Francisco  
(415) 268-6674  
rstafford@mofo.com

**Arturo González**

Partner, San Francisco  
(415) 268-7020  
agonzalez@mofo.com

**David McDowell**

Partner, Los Angeles  
(213) 892-5383  
dmcdowell@mofo.com

**Michael Steel**

Partner, San Francisco  
(415) 268-7350  
msteel@mofo.com

**Adam Hoffinger**

Partner, Washington, D.C.  
(202) 887-6924  
ahoffinger@mofo.com

**Andrew Muhlbach**

Partner, San Francisco  
(415) 268-7221  
amuhlbach@mofo.com

**William Stern**

Partner, San Francisco  
(415) 268-7637  
wstern@mofo.com

**Peter Hsiao**

Partner, Los Angeles  
(213) 892-5731  
phsiao@mofo.com

**William O'Connor**

Partner, San Diego  
(858) 720-7932  
woconnor@mofo.com

**William Tarantino**

Partner, San Francisco  
(415) 268-6358  
wtarantino@mofo.com



- ▶ We all know bad things can happen, but we know how to minimize the chances they will happen to you, and can soften the blow, if and when they do happen.

**MORRISON | FOERSTER**