

What Is www.SaferProducts.gov?

The United States Congress recently enacted legislation requiring the Consumer Product Safety Commission (CPSC) to “establish and maintain a database on the safety of consumer products” that is publicly available, searchable and accessible through the Internet. The CPSC will maintain and monitor this database and website. The website was to be launched and fully functional on March 11, 2011. On January 24, 2011, the CPSC performed a soft launch of the website to allow the public the ability to review the website and become familiar with it. The address for the website is www.SaferProducts.gov.

Prior to the enactment of this legislation, the only way that a person could obtain “reports of harm” about a consumer product from the CPSC was by submitting a Freedom of Information Act (FOIA) request. A FOIA request takes a great deal of time to process. After a FOIA request is made, a person may wait months to receive the requested reports of harm from the CPSC. The database and website essentially eliminate this time delay. In fact, the purpose of the database and website is to provide timely access to safety-related consumer product incidents.

The database will include reports of harm resulting from the use of consumer products and other products or substances regulated by the CPSC and information, in general, related to recalls. Those who can submit the reports of harm include: (1) consumers, (2) local, state and federal government agencies, (3) health care professionals, (4) child service providers and (5) public safety entities. This is obviously quite a broad list. The CPSC considers just about anyone a “consumer”, including those who are not eyewitnesses to the incident.

In order for a submission to be included in the database, it must be a “report of harm.” The report must identify a “discernable bodily harm or risk of bodily harm.” A report that only relates

to the cost or quality of a product will not be included in the database. The report must also contain a description of the consumer product, identification of the manufacturer or private labeler, the contact information of the person submitting the report and a verification by the submitters that the information is “accurate to the best of the person’s knowledge.” Also, the person must consent to the information being included in the database.



Once the CPSC receives the submission, its goal is to send the report of harm to the manufacturer or private labeler within five business days. If the manufacturer or private labeler wants its response to be available at the same time the submitter’s report is made public, then it must provide its response to the CPSC within ten business days. The manufacturer or private labeler can indicate to the CPSC that the report contains confidential or materially inaccurate information that should not be included in the database. The CPSC, in its sole discretion, will make the determination if such information is confidential or materially inaccurate. The CPSC enables manufacturers or private labelers to register on the website so that they are able to receive the reports of harm via email instead of regular U.S. mail.

The CPSC is committed to the premise that reports of harm should immediately be available to the public when trying to learn more about the purported safety of

a consumer product. In fact, the Government Accountability Office is required to determine the usage of the website to ensure that it is being used by a broad range of the public and, if not, to determine ways to increase the usage.

Wegman, Hessler & Vanderburg represent clients that manufacture consumer products which are subject to the jurisdiction of the CPSC. If you are interested in obtaining additional information regarding how www.SaferProducts.gov may impact your business or litigation strategies, do not hesitate to contact Christopher A. Corpus, Esq. at cacorpus@wegmanlaw.com.

WHV Practice Area Spotlight

Product Liability Defense

In the development, manufacture and sale of safe products, there is no substitute for good engineering. It is equally important to have your company legally prepared for any potential lawsuits or government inquiries. Wegman, Hessler & Vanderburg is prepared to help defend your company and your products with our extensive experience in the defense of product liability claims and lawsuits. A number of attorneys in our office have litigated substantial claims involving significant injuries and deaths, multiple parties, insurance coverage questions, and voluminous records. We have related expertise in governmental regulations, product recalls, standards compliance, and product warranties.

Please visit www.wegmanlaw.com for more information.

Ohio's Intentional Tort Pendulum Continues To Swing

Workplace injuries have always been a minefield for employers, employees and the attorneys who handle them. The United States Bureau of Labor Statistics reports that nonfatal workplace injuries and illnesses among private industry employers have been occurring at a rate of between 3½ and 6 percent since 2001. In some years, one in every sixteen workers reported a workplace injury. In Ohio, like many states, a privately funded insurance fund, “workers compensation,” was established as the exclusive remedy for all workplace injuries.

However, certain injuries were not covered by the fund, so there are and have been exceptions. This was particularly true before April 7, 2005, during which time a legal test – referred to as the “Fyffe” test – focused on the likelihood of an injury occurring. The intention was an equitable one-to punish unsafe employers and compensate injured workers for egregious workplace incidents. Sadly, oftentimes neither occurred. Many safety-minded employers had to pay twice for the same workplace accidents – once through the Bureau of Workers’ Compensation and again to attorneys to defend and/or resolve the employee’s intentional tort case.

But, on April 7, 2005, the Ohio General Assembly passed R.C. 2745.01. Its stated goal was to eliminate the “Fyffe” test and to limit intentional tort recovery to situations where an employer specifically or deliberately intended to injure its employee. Establishing an employer’s “deliberate intent” is, inherently, a difficult evidentiary task because a corporate employer is often comprised of hundreds of individuals whose “intent” often cannot be demonstrated.

But, in closing a door, the Ohio General Assembly (and the Ohio Supreme Court which, to the surprise of many, found R.C. 2745.01 constitutional) may have opened a window.

Key to the Ohio Supreme Court ruling in the seminal case of *Kaminski v. Metal & Wire Prods. Co.* was the fact that R.C. 2745.01(C) creates a “rebuttable presumption” that an employer intended to injure an employee when it can be established that the employer deliberately removed a safety guard. Instantly, the concept of “deliberately removed a safety guard” became the litmus test for additional employer liability.

For example, in the case of *Juhn v. Ford Motor Co.*, an employee fell on some scaffolding where no guardrail or handrail had ever been placed. The court found that fact dispositive, and held: “[T]he plain language of 2745(C) requires the removal of safety equipment guards. There is no evidence that the handrails, toe boards, or safety harnesses were placed around the gap or given to the workers and then deliberately removed or taken away. The court finds the lack of such evidence prevents Plaintiffs from availing themselves of the 2745.01 (C) exception.”

Compare *Juhn*, however, to the case of *Berardelli v. Foster Wheeler Zack, Inc.* There, the court concluded that “the failure to use scaffolding in the final phase of the boiler project states a plausible basis for relief under 2745.01(C). The key distinction, in the Court’s view, is that scaffolding was used initially during the project but was then allegedly removed.” In those two cases, the courts focused on a literal interpretation of an “equipment safety guard,” finding different results each time.

As these cases indicate, employee intentional torts may still be alive and well in Ohio. The battle over R.C. 2745.01(C) will continue until or unless the Ohio Supreme Court or Ohio General Assembly further clarify the issue. And, in the meantime, those same “one in every sixteen workers” who are injured in a given year in Ohio, may continue to seek and



find relief outside of the workers compensation fund.

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WHV Notable News and Events

Wegman, Hessler & Vanderburg welcomes our newest associates, Marisa Zink and Monica Newell.

Marisa earned her BA in Chemistry from Case Western Reserve University in 1997 and her JD from the University of Akron in 2001 and joins our Intellectual Property group.

Monica is a 1999 graduate of Cleveland-Marshall College of Law and joins our Estate Planning, Estate Administration and Elder Law group.

Please visit the firm's website at www.wegmanlaw.com to review all of our attorney bios, contact information and firm practice areas.

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