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CPSC Database May Mean Messy Discovery Battles

By **Nick Brown**

Law360, New York (February 28, 2011) -- As the Consumer Product Safety Commission moves closer to launching its much-debated online forum to broadcast consumer grievances, defense lawyers are anticipating long and contentious discovery battles to keep those grievances out of the courtroom.

Attempts to bar the information via motions in limine will become standard practice, and debates over whether the database constitutes hearsay will take center stage, attorneys told Law360.

"If the evidence gets into the record at all, the damage is done for defendants," said Beth Naylor, a product liability member at Frost Brown Todd LLC.

The database, a provision of the Consumer Product Safety Improvement Act, will allow consumers to publicly report product-related problems without publishing their names or contact information. Soft-launched on Jan. 24, the website officially goes public on March 11.

Reports will be kept under wraps for 10 days after submission, giving manufacturers the chance to post reaction comments or challenge a submission's accuracy.

But a challenge alone will not delay publication of the report. The CPSC will publish any report whose accuracy is under ongoing investigation, and only a clear showing of material inaccuracy, the inclusion of a trade secret, or a submitter's failure to meet submission guidelines will halt publication, according to experts.

Opposition to the database has gained some traction in Washington, where the U.S. House of Representatives passed an amendment earlier in February to delay its funding.

But the U.S. Senate has yet to act, and the site remained a go as of Wednesday. Under its current soft launch, regulators are accepting but not yet publishing reports as they work to smooth the site's overall implementation.

While the CPSC is working out the kinks, defense attorneys are developing strategies to counter a potential push by plaintiffs to be able to use the reports as evidence in litigation.

For manufacturers, it's critical that database entries be barred from evidence, most notably because they will be unsubstantiated and can be secondary, rather than firsthand, accounts, attorneys said.

Their accuracy can't be thoroughly investigated because the names of those who submit — while provided to the CPSC — will not be published on the website, Holland & Knight LLP partner Charles E. Joern said.

In fact, all a submission must include to meet publishing standards is the name of the product and manufacturer, the incident date and a description of the alleged injury, attorneys said.

"That's very dangerous evidence from a defendant's perspective, especially if it's unverified," said Timothy L. Mullin Jr., principal at Miles & Stockbridge PC.

Motions in limine to bar reports from the database should become standard for defendants during the discovery phase, Mullin said.

Defendants may have to contend with multiple theories of admissibility depending on how the plaintiffs propose to use the evidence.

For instance, plaintiffs could invoke the reports as evidence of prior similar incidents, but they could also use it to demonstrate that the defendant had notice of a problem and failed to act, Joern said.

"That's where the gloves will come off," he said. "That's where the battle will be. What are you trying to do with this evidence?"

The very definition of "prior similar incidents" — which have been used as evidence by product liability plaintiffs for decades but which, up to now, have been verifiable and vetted — may have to change, Naylor said. At the very least, their interpretation will become the subject of vehement debates, she said.

Discovery in general is likely to take longer in the wake of the database, as plaintiffs pore through scores of entries that will likely spark additional questions and requests, Joern said.

"These battles are really fought like little mini-trials, as you try to figure out, 'Is this really a prior occurrence of the same thing?'" he said.

Defense lawyers may want to consider dealing preemptively with the potential use of database evidence, but doing so could be dangerous, lawyers said.

On one hand, asking plaintiffs ahead of time whether they plan to draw on the database for evidence would prevent any surprises, Mullin said.
"But on the other hand, you don't necessarily want to ask that question, because you may point a plaintiffs' lawyer toward an area of data they may not have otherwise thought about," he said. "You have to balance that risk with the risk of being blindsided."

While the unverified, anonymous nature of the reports would seem to scream "hearsay," the database may retain credibility — and admissibility — by virtue of being part of a government-sponsored resource, defense lawyers said.

"Sometimes things that are put out by the government have automatic indicia of credibility as opposed to just a Google search or something," Naylor said. "Plaintiffs' lawyers could argue that these reports are reliable ... especially if the CPSC is screening them for material inaccuracies."

While the reports will contain disclaimers certifying that the CPSC does not guarantee accuracy, admissibility is a case-by-case battle subject to circumstance, jurisdiction and judge, Naylor said.

"Some judges just believe in letting the jury hear everything," she said.

And when the jury hears everything, defendants often wind up on the losing end, she said.

Juries respond strongly to patterns of negligence, and may favor plaintiffs who can point to such patterns, lawyers said.

While defendants would naturally try to convince the jury of the unverified nature of the database, they might have to contend with plaintiffs' efforts to discredit that argument.

"Questions will be raised in litigation as to whether a manufacturer ... conceded the accuracy of a report if it did not mount a CPSC challenge [when the report was submitted]," Naylor said.

Attorneys advising clients on whether to settle or pursue a defense may also have to consider a client's public image to a greater extent than in the past, said Lee L. Bishop, counsel at Miles & Stockbridge.

"The media can confront companies with a lot more information, and any response the company gives is not going to sound good on a five-second sound bite," Bishop said.

With a large number of reports — and the potential leverage of a public relations nightmare — at their fingertips, plaintiffs could have pull when it comes to settlement talks, lawyers said.

"Certainly there's the potential for a large number of reports about a given product to put enormous pressure on companies to settle cases," Joern said.

Thus, for defense lawyers, the strategy lies in not letting it get that far — in knocking the database out of the record as early in the discovery phase as possible.

Naylor said once a few reports go public, a flood is sometimes not far behind.
"When one or two of these complaints become widespread, they can sometimes set off a frenzy of complaints that may or may not be based in fact," she said.

Defense lawyers said their clients are not trying to discredit the validity of the database. Smart manufacturers will keep track of it, and will work to address adverse reports as quickly as possible, they said.

To be sure, the database will leave its mark on litigation: Plaintiffs' lawyers will have a centralized resource for seeking out new cases, and reports that are published on the site are permanent and cannot be removed — not even as a condition of settlement, attorneys said.

Manufacturers are prepared to adjust to a world where consumer complaints are public and centralized, lawyers said — they'd just rather not have to contend with it in court.

--Editing by Pamela Wilkinson and John Williams.