

FOERSTER

PRODUCT LIABILITY GROUP

# Annual Practice Review

# Message from Co-chairs

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The U.S. economy may have seen some growth in 2010, but we know that many of you are still under enormous pressure not only to control risks, but costs as well. As you will see in the following pages, we continually strive to help our clients overcome their difficult litigation challenges with cost-effective, winning strategies. In 2010, we handled several high-stakes matters for companies in the pharmaceutical, aviation, and consumer products industries, successfully resolving these matters through motion practice, favorable settlement, or trial victories.

We thank you for entrusting your important legal matters to us and wish you all the best in 2011.



A handwritten signature in black ink, appearing to be 'Charles Kerr'.



A handwritten signature in black ink, appearing to be 'Don Rushing'.

Charles Kerr and Don Rushing  
Product Liability Practice Group Co-chairs

# Work Highlights

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■ ***GETZ V. HONEYWELL  
INTERNATIONAL***

We represent Honeywell International Inc. in litigation in San Francisco arising from the crash of an Army special operations Chinook helicopter in Afghanistan on February 17, 2007. Eight people died and 14 were injured when the special operations Chinook crashed while returning from a mission pursuing a member of al Qaeda. In January 2010, Judge Claudia Wilken in the Northern District of California granted summary judgment for Honeywell based on the government contractor defense. The plaintiffs have appealed the summary judgment ruling to the Ninth Circuit Court of Appeals. The appeal will be argued in 2011.

■ ***MAJOR GROUNDWATER  
CONTAMINATION  
LITIGATION***

The Orange County Water District (California) has filed a civil action against 24 corporations, alleging that historical releases of solvents and perchlorate have created a plume contaminating the regional groundwater. This is one of the largest groundwater contamination cases of its kind and it is anticipated to result in important precedent regarding the ability of a water district to take the little-known Water District Act, and utilize its provisions to sue and hold companies responsible on a joint and several basis. We represent one of the defendants and are part of the leadership of the joint defense group in responding to these allegations.

■ ***PAIN PUMP MATTERS***

We served as national counsel for a major pharmaceutical company in hundreds of product liability cases filed in numerous jurisdictions around the nation. The cases allege that local anesthetic products used in pain pumps contribute to the development of post-surgical chondrolysis, a degenerative condition of the shoulder. Most of the cases allege career-ending injuries of young athletes. To date, we have achieved the dismissal of our client from 178 cases consisting of 464 plaintiffs. Many of these dismissals were accomplished through successful motions to dismiss and persuading plaintiffs' counsel to dismiss our client without its paying a single settlement.

■ ***IN RE AIR CRASH OVER  
THE MID-ATLANTIC ON  
JUNE 1, 2009***

We represent Honeywell International in litigation arising from the crash of Air France 447. The crash occurred on June 1, 2009, when an Airbus A330-203 went missing over the Atlantic Ocean on a flight from Rio de Janeiro, Brazil to Paris, France. All 228 passengers and crew perished in the crash. In October 2010, we won our motion to dismiss for forum non conveniens before Judge Charles Breyer in the Northern District of California.

# Work Highlights (cont'd)

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■ ***ENVIRONMENTAL LAW  
FOUNDATION V. MEMBERS  
OF THE GROCERY  
MANUFACTURERS  
ASSOCIATION AND  
RELATED CLASS ACTION***

We were retained by 16 leading members of the Grocery Manufacturers Association to defend them against a threatened Proposition 65 lawsuit alleging that their canned fruit, juice, and baby food products contained and exposed consumers to traces of lead at levels requiring warnings. We were also retained to defend four of the companies against parallel class actions based on the same allegations in both federal and state courts.

■ ***PRODUCT COUNSELING***

In 2010, we advised several consumer products companies regarding the new CPSIA regulations and helped them implement the CPSIA's new tracking label requirements. We also worked closely with two clients on CPSC investigations regarding alleged injuries involving their products and successfully resolved those investigations. We continue to advise clients on product warranties, disclaimers, warning labels, instruction manuals, and risk assessments.

■ ***HEPARIN LITIGATION***

We are national counsel in numerous cases around the country for one of the largest manufacturers of heparin (a prescription injectable blood coagulant often used in hemodialysis and cardiac invasive procedures) in litigation alleging side effects from heparin-induced thrombocytopenia. We are also advising our client regarding possible claims and issues arising from a competitor's recall of its heparin products.

■ ***IN RE CESSNA 208 SERIES  
AIRCRAFT PRODUCTS  
LIABILITY LITIGATION***

We represent Cessna Aircraft Company as national coordinating counsel in a series of cases pending in various jurisdictions in the United States arising from accidents involving Cessna Caravan 208 aircraft flown in alleged icing conditions. In April 2009, the MDL judge granted our motion in limine to exclude certain National Transportation Safety Board documents, other than factual accident reports. In October 2009, the MDL judge also granted our motion in limine to exclude several documents authored by the Federal Aviation Administration as nonfinal and otherwise untrustworthy as evidence. Finally, the MDL judge has either excluded a number of plaintiffs' experts from testifying at trial or limited their opinion testimony pursuant to our *Daubert* motions. After completion of pretrial activities in the MDL, the MDL judge entered a suggestion of remand to the Judicial Panel on Multidistrict Litigation. In July 2010, the JPML remanded all remaining Caravan cases to the various federal courts where the cases began. One Caravan case went to trial in a California state court in October 2009 and resulted in a complete defense verdict for Cessna. Other trials are scheduled in various federal and state courts in five cases in 2011 and 2012.

■ ***CENTER FOR  
ENVIRONMENTAL HEALTH  
V. LULU, ET AL.***

We represented several leading apparel brands and retailers in Proposition 65 litigation concerning lead in wallets, handbags, belts, and shoes. We served on the defendants' steering committee and moved the matter into an alternative dispute resolution (ADR) process that avoided discovery expenses and resulted in a comprehensive settlement.

# Work Highlights (cont'd)

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■ ***IN RE REGLAN/  
METOCLOPRAMIDE  
LITIGATION***

We represent a major generic pharmaceutical company in hundreds of lawsuits that have been filed in Pennsylvania alleging that Reglan/metoclopramide (when prescribed off-label for psychiatric purposes) causes significant side effects and damages health. The cases have been coordinated before the same judge for all purposes under Pennsylvania mass tort procedures.

■ ***GINENA V. ALASKA  
AIRLINES***

We represent Alaska Airlines in a case brought by a group of first-class passengers who were removed from Alaska Airlines Flight 694 on September 20, 2003. The flight was headed from Vancouver, British Columbia to Las Vegas but diverted to Reno in order to remove the passengers. We obtained summary judgment based on the Warsaw Convention and the Tokyo Convention. The case was appealed to the Ninth Circuit, which sustained in part and reversed in part the trial court rulings. The case is now stayed pending a writ of certiorari to the U.S. Supreme Court for review of the ruling on the Tokyo Convention. The outcome of the lawsuit will likely create new case law concerning the ability of airline crews to manage passenger disturbances during flight without concern for civil liability after the fact.

■ ***“PRIVATE SURGEON  
GENERAL” LITIGATION***

This year, we saw a dramatic increase in the filing of “private surgeon general” lawsuits. These are “false advertising” class actions brought by uninjured claimants against food or personal product manufacturers over some allegedly offensive ingredient or label description (the latter we refer to as “wrongful adjective” cases). We won our motion to dismiss, and final judgment was entered in two class actions that alleged that our client’s advertising of its vegetable oil spreads was misleading because the products contain trace amounts of partially hydrogenated vegetable oils or trans fatty acids. The plaintiffs had wanted our client to refund all revenue earned going back four years, an injunction against further misleading statements, relabeling, punitive damages, and costs. We also won dismissal in a class action case against a leading chewing gum manufacturer that challenged the client’s claim that the product helps whiten teeth. Other cases still pending involve claims against olive oil importers (for using the term “extra virgin”), ice cream manufacturers (for using “Dutch” cocoa and claiming the product is “natural”), and tea manufacturers (for advertising the healthful properties of green tea).

■ ***IN RE AREDIA AND ZOMETA  
PRODUCTS LIABILITY  
LITIGATION***

We serve as national counsel for a major pharmaceutical company in an MDL proceeding and state consolidated cases where hundreds of plaintiffs claim an injectable drug causes a degenerative condition of the jaw. There are also numerous cases pending in New Jersey under that state’s mass tort procedures.

# Work Highlights (cont'd)

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■ ***IN RE HELICOPTER CRASH  
NEAR WEAVERVILLE,  
CALIFORNIA***

We represent Columbia Helicopters, a helicopter operator and maintenance facility, in claims arising from the crash of a Sikorsky S-61 helicopter operated by Carson Helicopters in the Shasta-Trinity National Forest during fire fighting operations for the U.S. Forest Service. Columbia Helicopters had performed maintenance and overhaul work on the helicopter's fuel control system. Nine people were fatally injured and four survived—the worst aircraft accident in the U.S. in 2008. The helicopter was transporting firefighters when the accident occurred. Cases were pending in three separate federal courts and have been assigned to the United States District Court, District of Oregon for MDL proceedings. We have settled claims arising from 10 of the 13 cases on terms favorable to Columbia Helicopters, and three crew member cases remain in litigation.

■ ***CONSUMER PRODUCT  
HAZARDOUS WASTE  
LITIGATION***

We represent a major retailer in a lawsuit filed by the California Attorney General's Office, and 30 district attorney and city attorney offices, alleging that consumer products sold by the company should be handled as "hazardous waste," and seeking tens of millions of dollars in civil penalties and injunctive relief. This is the largest case of its kind and is anticipated to result in important precedent regarding the expansive enforcement of California's environmental regulations as applied to ordinary consumer products.

■ ***CALIK V. MD HELICOPTERS,  
INC. AND CAN V. MD  
HELICOPTERS, INC.***

We represent MD Helicopters in two separate lawsuits filed in Arizona state court by the survivors of five individuals fatally injured in a helicopter crash on July 19, 2006 in Antalya, Turkey. The trial courts in both of these lawsuits dismissed the actions for forum non conveniens. Following dismissal, the wife of one of the deceased passengers re-filed her claim in a Turkish court. Appeals from both dismissals for forum non conveniens are pending in the Arizona Court of Appeals, and actions by the Turkish National Police and the decedents' estates are pending in Turkey.

■ ***FAILURE TO WARN AND  
SALES PRACTICES  
LITIGATION***

We serve as national trial and coordinating counsel in product liability and false advertising actions filed across the country. The federal cases have been coordinated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation. There have also been more than 50 cases filed in state courts; those cases are being coordinated in the state courts.

■ ***GENERAL PRODUCT  
COUNSELING IN THE  
PHARMACEUTICAL  
AND MEDICAL DEVICE  
INDUSTRIES***

We represent a variety of pharmaceutical and medical device companies on several product liability issues. Some of the issues include (1) FDA regulation issues including CBE changes to drug labels and AER reporting; (2) contract manufacturing agreements; and (3) safety report submissions.

# Speaking Engagements

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- “Preparing for the FTC’s New Green Guides: How to Market Your Environmental Successes and Avoid Litigation,” ACC Cleantech Committee Meeting (Palo Alto), Michael Steel and William Tarantino, December 16, 2010
- “Preparing for the FTC’s New Green Guides: How to Market Your Environmental Successes and Avoid Litigation,” ACC Cleantech Committee Meeting (San Francisco), Michael Steel and William Tarantino, December 15, 2010
- “Ethical Issues in Aviation Law,” ABA Air & Space Law Forum’s 2010 Annual Conference, William O’Connor, October 27, 2010
- “The Changing Relationship Between Lawyers and Clients,” ABTL Annual Seminar, Erin Bosman, October 23, 2010
- “Off-Label Promotions of Drugs and Medical Devices – Criminal and Civil Liabilities 2010,” PLI Webcast, Adam Hoffinger and Dr. Jae Hong Lee, October 5, 2010
- “Storytelling: The Advocate’s Art,” National Institute of Trial Advocacy’s Pacific Regional Trial Training Program, Don Rushing, October 2010
- “Product Crises and Recalls: Lessons Learned and to Be Learned,” ACI’s National Advanced Forum on Managing and Resolving Mass Tort Products Liability Claims, Linda Lane, September 29, 2010
- “Dietary Supplements: Federal Enforcement and Consumer Litigation,” Audio Conference for the Private Advertising Litigation, Consumer Protection, and Agriculture & Food Committees of the American Bar Association, William Tarantino, September 15, 2010
- “Avoiding Indictment When the FDCA Is Violated,” American Conference Institute’s 7th National Forum on Off-Label Communications, Adam Hoffinger, July 14, 2010
- “Navigating the Waters: Understanding the Intricacies of California’s Unfair Competition Law and Consumer Legal Remedies Act,” ABA Section of Antitrust Law, William Stern, June 28, 2010
- “Document and E-Discovery: Formulating a Compliant Plan that Reduces the Overwhelming Costs and Burdens of Voluminous Requests,” American Conference Institute’s 2nd Annual Forum on Defending and Managing Aviation Litigation, William Janicki, June 22, 2010
- “State and Federal Cooperation in Regulating Toxic Substances,” 38th ABA National Spring Conference on the Environment – Chemicals Regulation: REACHing for TSCA Reform, Peter Hsiao, June 11, 2010
- “California’s 17200 – Its Use and Abuse,” Federalist Society, William Stern, May 19, 2010
- “Criminal and Civil Liabilities for Off-Label Promotions of Drugs and Medical Devices,” Morrison & Foerster Seminar, Adam Hoffinger, James Huston, Dr. Jae Hong Lee, May 6, 2010
- “Vapor Intrusion, Brownfields, and Cleanups,” Environmental Regulation and Commercial Implications 2010: How the New Administration, Congress, and the Courts Have Changed the Rules, PLI Seminar, Peter Hsiao, May 2010
- “States Gone Wild: Trends in State Regulation and What They Mean to You,” Personal Care Products Council’s 2010 Legal and Regulatory Conference, Michèle Corash, May 2010
- “Product Crises and Recalls: Lessons Learned and to Be Learned,” Morrison & Foerster Seminar (San Francisco), Robert Falk, Linda Lane, and William Tarantino, April 28, 2010
- “Product Crises and Recalls: Lessons Learned and to Be Learned,” Morrison & Foerster Seminar (Los Angeles), Linda Lane, David McDowell, and William Tarantino, April 27, 2010
- “Product Crises and Recalls: Lessons Learned and to Be Learned,” Morrison & Foerster Seminar (New York), Linda Lane, Charles Kerr, and William Tarantino, April 22, 2010
- “17200 Practice: Impact of Tobacco II Cases,” The Rutter Group’s Annual 17200 Seminar series, William Stern, March 1, 2010

# Related Publications

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- “Pharmaceutical Product Liability,” a chapter in *Principles and Practice of Pharmaceutical Medicine* (3rd Ed.), Wiley-Blackwell, Han Choi, and Dr. Jae Hong Lee, December 2010
- “Retailers and Consumer Product Makers Beware: California Imposes New Restrictions on VOCs in Cleaners, Lubricants and Insecticides,” Morrison & Foerster client alert, Peter Hsiao, Michael Steel, and Meredith Klein, November 23, 2010
- “CPSC Database: With Sunshine Comes Shadows,” Morrison & Foerster client alert, Linda Lane and Jessica Roberts, November 12, 2010
- “Not Mere Child’s Play: New Rule Refining the Definition of ‘Children’s Product,’” *Product Liability Law360*, Linda Lane and Ellen Adler, October 18, 2010
- “Businesses Beware: FTC Looks to Put ‘Green’ Marketing Claims Under the Microscope,” Morrison & Foerster client alert, William Tarantino and Joshua Simon, October 6, 2010
- “California Issues New Green Chemistry Requirements for Consumer Products,” Morrison & Foerster client alert, Peter Hsiao, William Tarantino, and Andrea Tozer, September 15, 2010
- “Pay Now, Challenge Later: D.C. Circuit Court of Appeals Upholds Constitutionality of EPA Unilateral Administrative Orders in *General Electric Company v. Jackson*,” Morrison & Foerster client alert, Peter Hsiao, Andrea Tozer, and Megan Low, July 6, 2010
- “Manufacturers of Consumer Products Face Extensive California Green Chemistry Requirements,” Morrison & Foerster client alert, Peter Hsiao, William Tarantino, and Andrea Tozer, June 25, 2010
- “California Considers Requiring Disclosure of Consumer Product Ingredients on the Internet,” Morrison & Foerster client alert, Robert Falk, Peter Hsiao, William Tarantino, and Joshua Simon, June 25, 2010
- “Presenting Expert Testimony on Direct Examination,” *ALI-ABA Course of Study*, Peter Hsiao, June 16, 2010
- “Pleading Ignorance: *Twombly/Iqbal* ‘Plausible’ Standard,” *Law360*, Greg Reilly and Don Rushing, May 12, 2010
- “Congress Introduces Significant New U.S. Toxic Substances Control Act Reform Legislation,” Morrison & Foerster client alert, Robert Falk, Alejandra Nunez-Luna, and Robin Stafford, April 23, 2010
- “U.S. Consumer Product Safety Commission Issues Final Rule on Civil Penalty Factors,” Morrison & Foerster client alert, Robert Falk, William Tarantino, and Linda Lane, April 2, 2010
- “McCain Proposal Would Strengthen FDA Oversight of Dietary Supplement Industry,” Morrison & Foerster client alert, Arturo González, William Tarantino, and Alexis Amezcua, February 2010
- “Ring in 2010: The CPSIA Past, Present and Future,” *Law360*, Linda Lane and Robert Falk, January 29, 2010

# Awards + Rankings

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## **CHAMBERS USA**

### **National Transportation: Aviation Litigation (Tier 2)**

- “This firm has been making strides in aviation litigation and has fostered a strong client following among aircraft and component part manufacturers.”
- Don Rushing is “highly respected for his ‘authoritative and effective advice: he anticipates our needs and exceeds them,’ clients say.”

## **LEGAL 500 US**

### **National Product Liability and Mass Tort Defense: Aerospace/Aviation (Tier 1)**

- “‘Beyond excellent’, Morrison & Foerster LLP is ‘a top firm for aviation product liability matters.’”

#### **Leading Lawyers**

- James Huston: “Breadth of experience and innate charisma make him the perfect trial lawyer.”
- Don Rushing: “Methodical, forward thinking and has a view of the big picture.”

#### **Recommended Lawyers**

- “Senior partners Don Rushing and James Huston are ‘absolutely dedicated to obtaining the best results’: Rushing is ‘methodical, forward thinking and has a view of the big picture,’ while Huston’s ‘breadth of experience and innate charisma make him the perfect trial lawyer.’ Erin Bosman is ‘a skilled case manager who is always organized and well prepared’. William O’Connor’s excellence—‘intelligence, judgement and pragmatism’—was rewarded by his election to partner in January 2010.”

### **National Product Liability and Mass Tort Defense: Consumer Products (Tier 1)**

- “‘An excellent team that handles matters promptly,’ Morrison & Foerster LLP’s product liability practice missed out on the tobacco wars but has made enough smoke since to become an important consideration in consumer products litigation.”

#### **Recommended Lawyers**

- “James Huston’s ‘breadth of experience and innate charisma make him the perfect trial lawyer’. In San Francisco, environment lawyer Robert Falk is an expert on California’s Proposition 65 whose expertise is utilized in product-related queries. Falk is ‘personable, professional, and a trusted adviser’. Penelope Preovolos demonstrates ‘expertise and knowledge of the issues and good client communication skills’. David McDowell in Los Angeles and William Stern in San Francisco are also recommended.”

# Awards + Rankings (cont'd)

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## *LEGAL 500 US*

*(Cont'd)*

### **National Product Liability and Mass Tort Defense: Pharmaceuticals/Medical Devices (Tier 3)**

- “Morrison & Foerster LLP has built a product liability practice that is ‘excellent on all counts,’ being ‘well managed, efficient, responsive, reflective and collaborative.’”

#### **Recommended Lawyers**

- “James Huston is ‘the perfect trial lawyer’; he ‘provides sound advice and is always well prepared.’ Erin Bosman is ‘a skilled case manager who is always organized and well prepared.’ Grant Esposito in New York is also recommended. Jae Hong Lee is an associate whose skills as a lawyer and qualified physician ‘brings added value to the scientific aspects of cases—he is able to break down complicated medical concepts into easy-to-understand, but still comprehensive, sound bites.’”

## *BEST LAWYERS IN AMERICA*

- Michèle Corash
- Robert Falk
- Arturo González
- Adam Hoffinger
- Peter Hsiao
- James Huston
- William O’Connor
- Dennis Orr
- Charles Patterson
- Penelope Preovolos
- Don Rushing
- Michael Steel
- William Stern
- Mark Zebrowski

## *DAILY JOURNAL*

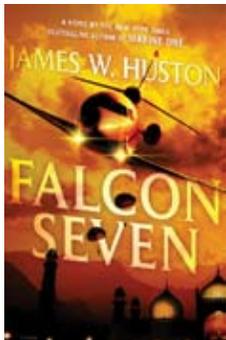
- Recognized Don Rushing and Arturo González as two of “California’s Top 100 Lawyers.”
- Recognized Erin Bosman as one of “California’s Top Women Litigators” and one of California’s “Top 20 Under 40.”

## *LAW360*

- Recognized James Huston as one of the “10 Most Admired Product Liability Attorneys” in the U.S.
- Recognized Erin Bosman as one of 10 “Rising Stars Under 40” in the U.S. in Product Liability.

# In the News

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“Huston provides an intriguing look at international law, current American policies, and modern war.” — *Publisher’s Weekly*

Morrison & Foerster partner and *New York Times* bestselling author James Huston’s latest novel, *Falcon Seven*, was published in May 2010.

A U.S. Navy F/A-18 flying over Afghanistan is suddenly diverted and ordered to bomb a building in Pakistan, where a meeting between al Qaeda and the Taliban is taking place. After destroying its target, the fighter jet is immediately hit by Stinger missiles and the pilots eject over Pakistan. They are captured, assaulted, and dragged through the streets of Peshawar. The world is on edge.

The fliers are quickly forced onto a secret Falcon jet headed for the Netherlands, where they’ll stand trial for war crimes at the International Criminal Court. The building they hit was actually a medical post constructed by Europeans for Afghan refugees—and 65 innocent people were killed.

It’s up to Washington criminal defense lawyer and former Navy SEAL Jack Caskey to defend the two Navy officers and get to the bottom of what is beginning to seem like an orchestrated event. The National Security Council pushes President Obama to employ the act passed under George W. Bush that authorizes the use of force to extract Americans held by the International Criminal Court. While the president initially approves a special operations team to grab the Americans, he later withdraws to cooperate with the ICC. Already fighting a losing battle for his clients, an outraged Caskey works with his contacts in the shadowy world of special operations and CIA operatives to free his clients himself . . . or help them battle through an international show trial and face imprisonment—for life.

*To read more, please visit the [official website for James W. Huston](#).*

# Partners + Of Counsel

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