

Figures Lie and Liars Figure

By David S. Osterman
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The data collected by the Consumer Product Safety Commission has many holes, and defense counsel must prepare to challenge experts who rely on it as the bases for their conclusions.

Abuses of CPSC Accident Data

As various pundits have observed over time, there are three kinds of lies: lies, damn lies, and statistics. Product liability defendants know all too well the importance and effect of other accident evidence. It is for this reason that

most product liability cases involve significant fights over the discoverability and admissibility of evidence of other similar accidents. Not satisfied with accident data limited to just the defendant's products, some creative attorneys and experts are now relying on broader pools of accident data that do not necessarily involve the same product, manufacturer, or even accident mode. Accident statistics published by the government and other third-party sources have been admitted as evidence to prove generalized product risk and notice. Product liability defendants need to be prepared to address the uses and abuses of such information.

The purpose of this article is to discuss the sources of such information, as well as

the problems, limitations, and admissibility of third-party accident data.

Accident Data from the Consumer Product Safety Commission

One main source that enterprising plaintiffs' attorneys and experts commonly rely on for evidence of other similar accidents is the Consumer Product Safety Commission (CPSC). The CPSC is a federal regulatory commission charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of types of consumer products under the agency's jurisdiction. The Consumer Product Safety Act requires the CPSC "to collect, investigate, analyze, and disseminate injury data, and information, relat-

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ing to the causes and prevention of death, injury, and illness associated with consumer products.” 15 U.S.C. §2054(a)(1).

The data collected by the agency comes from a variety of sources, including the general public, through the hotline, website reporting, and news clips. Additionally, data on product-related death information from hospitals and coroners are collected

The CPSC accident

data, including that in the NEISS database, is publicly available, which means creative experts can access the data to tease out narratives that they subjectively determine to be similar to the accident mode at issue.

through the Medical Examiners and Coroners Alert Project (MECAP). Death certificates with the external cause of death codes from fifty-two health jurisdictions in the United States (fifty states plus the District of Columbia and New York City) are also routinely tracked, providing the CPSC with a view of the deaths nationwide from consumer products.

National Electronic Injury Surveillance System

The CPSC also collects and tracks nonfatal, product-related accident data through the National Electronic Injury Surveillance System (NEISS). NEISS is a national probability sample of hospitals in the United States and its territories. Patient information is collected from each participating NEISS hospital for every emergency visit involving an injury associated with a consumer product. From this sample, the total number of product-related injuries treated in hospital

emergency rooms nationwide can be estimated. The CPSC uses this data to produce nationwide estimates of product-related injuries. NEISS is an important public health research tool, not just for CPSC, but for researchers and consumers throughout the United States and around the world. These studies facilitate the hazard analysis of particular products and the evaluation of trends in product-related deaths.

NEISS data is comprised of injury descriptions taken from emergency room records reviewed by CPSC “coders,” that is, individuals who work in approximately 110 hospital emergency rooms across the country and who review, collect, and code information about products, accidents, and injuries. Whenever a consumer product is referenced in an emergency room record narrative, the coder is required to assign a corresponding product code and enter a brief summary (up to 600 characters) in the accident description field. Additional information about the injury severity is also coded and entered. An extrapolation is then made about the estimated number of emergency room visits nationwide believed to be “associated with” different categories of products.

The CPSC describes the NEISS collection process as follows:

The data collection process begins when a patient is admitted to the emergency department of a NEISS hospital with an injury. An emergency department staff member elicits critical information about how the injury occurred and enters that information into the patient’s medical record.

At the end of each day, a NEISS hospital coordinator reviews all emergency department records for the day, selecting those that meet the criteria for inclusion in NEISS. The NEISS coordinator abstracts pertinent data from the selected emergency department record and transcribes it into coded form and onto a NEISS coding sheet, using rules described in a NEISS Coding Manual.

Identifying the consumer product(s) related to the injury is crucial for CPSC. The NEISS coordinator assigns a product code from an alphabetical listing of hundreds of products and recreational activities, using as much detail as the data allow. For example, if a lawn mower

were involved in an injury, the coordinator would use a different product code for a walk-behind mower than for a riding mower. If the emergency department record contains additional product detail, the coordinator includes that information in a line or two of narrative text (e.g., gasoline-powered rotary mower made by XYZ Company).

The victim’s age, gender, race, ethnicity, injury diagnosis, affected body parts, and incident locale are among other data variables coded. A brief narrative description of the incident is also included.

Once the abstracting and coding are completed, the NEISS coordinator enters the data for the day’s NEISS injury cases into a computer provided by CPSC. As the coordinator keys in data, CPSC-designed software interactively edits the data, requiring that all fields be completed and allowing only acceptable entries (for example, a concussion of the foot is not acceptable).

Following completion of data entry at the hospital, the NEISS coordinator transmits the data to CPSC via a secure Internet connection. After undergoing a second computer editing process, acceptable cases are automatically incorporated into the Commission’s permanent NEISS database daily. The data are available immediately for further review.

The CPSC analytical process begins on the same day the data are collected. Analysts in the Directorate for Epidemiology review the data, not only checking items for quality control, but also screening the data for a potential emerging hazard.

NEISS Frequently Asked Questions, Consumer Product Safety Comm’n, cpsc.gov.

It is important to emphasize that NEISS data and estimates are based solely on emergency room reports that patients identify as *related* to a product. That does not at all mean that a reported injury was *caused* by a product. For example, a “bicycle-related injury” includes reports of people who fall off bicycles, people who are struck by bicycles, and people injured lifting bicycles. For this reason, the NEISS data has traditionally included the following warning: “NEISS Data and estimates are based on injuries treated

in hospital emergency rooms that patients say are related to products. Therefore, it is incorrect, when using NEISS data, to say the injuries were caused by the product.”

How Experts Use CPSC Accident Data

The CPSC accident data, including that in the NEISS database, is publicly available, which means creative experts can access the data to tease out narratives that they subjectively determine to be similar to the accident mode at issue. For example, the website of one expert-consulting firm has an article that uses accident data from third-party sources, including CPSC data and news articles, to support an argument in favor of mandatory seatbelts in “golf cars.” *Golf Cart Occupant Ejections*, Technology Associates-Engineering Experts, <http://www.technology-assoc.com>. (Although commonly called “golf carts,” the applicable industry standard, ANSI Z130. 1, uses the term “golf cars” because, by definition, “carts” are not self-propelled.) And one expert who frequently testifies in cases involving “golf car” accidents, including rollovers and side ejections is associated with that firm. The article states, among other things:

Based on CPSC statistics, roughly 40 percent of golf car accidents involve a person falling out of the car, and many of these accidents involve young children. In addition to ejection accidents, approximately 10 percent of golf car accidents involve a rollover and statistics indicate that such accidents are roughly twice as likely to lead to injuries requiring a hospital stay as non-rollover accidents....

Technology Associates-Engineering Experts, *supra*.

The article elaborates:

Since there are currently no occupant restrictions or seatbelt requirements for these vehicles set forth in the applicable ANSI safety standards or manufacturers’ operator’s manuals, young children of any age are often permitted to ride in open, off-road vehicles that are capable of traveling up to 20 mph on flat ground and are not equipped with seatbelts. The results of this practice are headlines like the ones listed here:

Child dies in golf cart accident: “An 8-year-old girl...died Sunday after falling from a golf cart two days earlier...”

The Neshoba Democrat, September 07, 2005

Volunteer, 15, Dies Days After Golf Cart Fall: “A boy, 15, from West Covina died several days after falling off a golf cart while doing volunteer work at a Long Beach festival...” cbs2.com, Aug 5, 2007....

Id. The article uses the NEISS data to draw conclusions about the need for seatbelts in golf cars to prevent injuries to children. *Id.*

In one expert report (publicly available and discussed extensively in a court ruling concerning the admissibility of the expert’s analysis), the expert uses the CPSC data as part of his liability syllogism, which starts from the premise that “thousands” of people each year are injured by golf cars.

Golf Car Accident Statistics

It is estimated that there were, on average, approximately 11,000 golf car related injuries requiring emergency room treatment in the United States per year from 1991 to 2008, not including fatalities that did not involve emergency room treatment. The estimated number of accidents increased from roughly 6,000 in 1991 to approximately 16,000 in 2008.¹ Of these, approximately 40 percent (*i.e.[sic]* over 5,000 per year) involved an ejection from a moving car, representing by far the most common type of accident.

In addition to traditional golf cars that are driven on golf courses, resort and retirement communities in the United States have, over the past decade, experimented with allowing golf cars on streets as primary means of local transportation.^{2,3} In fact, advertising for many vehicles produced by the major golf car manufacturers (*i.e.[sic]* Club Car, E-Z-Go and Yamaha) specifically indicates that these vehicles are intended for “playing golf or cruising your neighborhood”⁴ and “hauling kids”⁵ and feature photos of young children riding in the vehicles. In CPSC accident cases where the location of the injury was reported, approximately 70 percent occurred at sports or recreational facilities (*e.g.[sic]* golf courses) while the remainder occurred at locations such as private homes or public streets.

Seluga Rep. Aff., *Lynn et al., v. Yamaha Golf-Car Company et al.*, 2011 WL 9527899 (W.D. Pa. 2011) (note citations omitted). Specifically, note “1,” above, reads:

“Consumer Products Safety Commission (CPSC), National Electronic Injury Surveillance System (NEISS) Database,” and it also has a now-dead URL to the database appended to the end.

Of course, not all golf cars are created (or maintained) equal, nor are all accidents the same. The source of the data cited by the expert is available on the CPSC’s website

Plaintiffs’ attorneys

typically argue that the accident statistics are not being offered to prove the truth of the matter asserted; are relevant to notice; and are otherwise reliable, relevant, and admissible.

and can easily be downloaded to an Excel spreadsheet and sorted by product code. In the 2017 data, there were a total of 408 entries involving the product code 1213, which corresponds to “golf carts.” Figure 1 is a snapshot of the first ten entries in the spreadsheet for product code 1213, which illustrates how different the accidents generally are from one another.

While plaintiffs’ experts use the data to argue that “thousands” of such golf car accidents occur each year, the reality is that the claim of “thousands” is an estimate derived from a much smaller number of actually reported falls from golf cars. Plaintiffs’ attorneys argue that the data is relevant to the issues of notice, foreseeability, and product defect or failure to warn. For obvious reasons, defense attorneys need to be prepared to challenge the admissibility of this data.

Admissibility Analysis

The arguments against admitting third-party accident data are hearsay, relevance, and prejudice. Defense attorneys typically argue that the NEISS data about product injuries is inadmissible hearsay because the

database is a compilation of out-of-court statements offered to prove the truth of the matter asserted.

Specifically, the database is derived from a patient’s “self-serving account of an accident to a doctor or nurse,” or the report of someone who accompanied the patient to the emergency room, the report is summarized by a medical provider in a medi-

Courts have split on the reliability of the NEISS data and whether it constitutes inadmissible hearsay.

cal record, and the medical record is then paraphrased by a coder and added to the NEISS database. *Jenks v. New Hampshire Motor Speedway*, 841 F. Supp. 2d 533, 2012 DNH 09 (D. N.H. 2012).

Plaintiffs’ attorneys typically argue that the accident statistics are not being offered to prove the truth of the matter asserted; are relevant to notice; and are otherwise reliable, relevant, and admissible. *Id.*

Some courts have found that NEISS data qualifies as a public record under Federal Rule of Evidence 803(8). *Jenks*, 841 F. Supp. 2d at 533. That rule provides that a public record is not excluded by the rule against hearsay if it is “[a] record or statement of a public office [and] it sets out... factual findings from a legally authorized investi-

gation... and [] neither the source of information nor other circumstances indicate a lack of trustworthiness.” However, for the public record exception to apply, the public record must be shown to be trustworthy. Fed. R. Evid. 803(8)(B). The opponent of its admission bears the burden of showing that the data is unreliable. *Id.*

Defense Arguments to Support Excluding CPSC and NEISS Data

The main arguments that defense counsel can make to exclude CPSC and NEISS data are that the data is untrustworthy, inadmissible hearsay; the evidence of other accidents should be excluded because it is not “substantially similar” to the product and facts in the present-day case; the data is unfairly prejudicial to the defendant; and introducing the data will lengthen the trial and delay resolution.

The Data Is Untrustworthy, Inadmissible Hearsay

Courts have split on the reliability of the NEISS data and whether it constitutes inadmissible hearsay. Some courts confronted with this issue have excluded CPSC data and witness testimony interpreting such data as untrustworthy and rank hearsay. See *McKinnon v. Skil Corp.*, 638 F.2d 270, 278–79 (1st Cir. 1981) (upholding the trial court’s preclusion of CPSC reports as inadmissible hearsay); *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1040 (N.D. Ohio 2002) (precluding an expert as failing to “meet the requirements under *Daubert*” where the expert relied on CPSC accident reports, which constituted hear-

say and were otherwise untrustworthy); *Henkel v. R and S Bottling Co.*, 323 N.W.2d 185, 193 (Iowa 1982) (excluding CPSC reports of injuries caused by bottles as hearsay); *Hilaire v. DeWalt Indus. Tool Co.*, 54 F.Supp.3d 223, 245–46 (E.D.N.Y. 2014) (deeming expert defendant opinions based on CPSC and NEISS data unreliable and lacking “scientific rigor.”); *Svindland v. Nemours Found*, 2009 WL 2603183, at *2 (E.D. Pa. Aug. 21, 2009) (excluding testimony of a statistical expert on mortality rates because the government data relied on by expert was not scientifically reliable or relevant); *Jackson v. E-Z-GO Division of Textron*, 326 F. Supp. 3d 375, 391 (W.D. Ky 2018) (finding an expert’s analysis of NEISS data for purposes of opining that the defendant “knew or should have known of the inherent dangers of the [product’s]... potential for rollover [was] unreliable.”).

Notably, some courts have admitted official CPSC reports under Federal Rule of Evidence 803(c)(8). See *Jenks v. New Hampshire Motor Speedway*, 841 F. Supp. 2d 533 (D. N.H. 2012); *Morales v. Am. Honda Motor Co., Inc.*, 151 F.3d 500, 511 (6th Cir. 1998); *United States v. Midwest Fireworks Mfg. Co.*, 248 F.3d 563, 566 (6th Cir. 2001); *Wielgus v. Ryobi Techs., Inc.*, No. 08 CV 1597, 2012 WL 3614642, at *7 (N.D. Ill. Aug. 21, 2012). Unlike NEISS data, however, the CPSC reports admitted in *Morales* and *Midwest Fireworks* involved official CPSC laboratory test reports that met strict CPSC regulations; as a result, the official reports satisfied the government records exception of the Federal Rules of Evidence. In stark contrast, courts have made it clear that

Figure 1

	A	B	C	D
1	1/7/2017	26	1213	26YOM WAS THROWN OUT OF A RAPIDLY MOVING GOLF CART THAT FLIPPED OVER ST
2	1/1/2017	41	1213	41 YOM FELL OFF OF GOLF CART AND AND IS C/O LUMBAR PAIN
3	1/15/2017	79	1213	79YOF FELL GETTING INTO A GOLF CART AND HIT HEAD CLOSED HEAD INJURY ADM
4	1/9/2017	71	1213	71YOF GETTING OUT OF A GOLF CART AND STEPPING INTO A HOLE FRACTURED FOOT
5	1/11/2017	73	1213	73YOF PINNED LOWER LEG BETWEEN A GOLF CART AND A TELEPHONE POLE LACERAT
6	1/6/2017	63	1213	63YOF FELL OUT OF A GOLF CART AND SUSTAINED A WRIST FX
7	1/22/2017	66	1213	66YOF HIT BY A GOLF CART AND SUSTAINED A WRIST FX
8	1/10/2017	78	1213	78YOM WAS PINNED BETWEEN A GARAGE DOOR AND A GOLF CART AT HOME & FRACT
9	1/11/2017	64	1213	^64YOM INTOXICATED DRIVER OF A GOLF CART BAC OF 216 CRASHED INTO THE BA
10	1/30/2017	61	1213	PT WAS WORKING ON A GOLF CART AND HAND SLIPPED AND CUT FINGER LACERATION

Snapshot from CPSC.gov of the first ten entries in the spreadsheet for product code 1213, which illustrates how different the accidents generally are from one another.

factual reports from CPSC NEISS data are entirely different from official reports, and therefore, they are inadmissible. *Campos*, No. 2-07-0029, 2009 WL 2252257, at *20–21; *Knotts*, 204 F. Supp. 2d at 1041.

For example, in *Campos v. MTD Prods., Inc.*, a product liability action against a lawnmower manufacturer, the district court precluded the plaintiff's witness from testifying about a statistical summary that was based on CPSC data regarding injuries associated with lawnmowers. No. 2-07-0029, 2009 WL 2252257, at *20–21 (M.D. Tenn. July 24, 2009). In so doing, the district court determined that the CPSC data on which the witness's testimony and studies were predicated were "factual reports" of incidents; as such, they constituted inadmissible hearsay. *Id.* at 20–21.

Similarly, in *McKinnon*, the First Circuit precluded evidence that was based on CPSC data on the grounds that the evidence was "untrustworthy" since it "contained double hearsay in many instances." *McKinnon*, 638 F.2d at 278–79. The court explained that the CPSC data was derived from a CPSC investigator, which constituted the first hearsay level, and an accident victim interviewee, which constituted the second hearsay level. *See id.* The court further held that the CPSC data was untrustworthy because it constituted nothing more than a "paraphrasing of versions of accidents given by the victims themselves who surely cannot be regarded as disinterested observers." *Id.*

A strong argument can be made that product-related complaints made by consumers to government regulatory agencies generally are self-serving. For example, the National Highway Traffic Safety Administration (NHTSA) launched a formal study and investigation in response to media attention and a flood of consumer complaints regarding claimed, sudden, unintended acceleration involving Toyota vehicles. As part of that investigation, the NHTSA reviewed the tens of thousands of consumer-submitted Vehicle Owner Questionnaires (VOQs) and found, among other things, that the reported "incidents are very likely the result of pedal misapplication," and the complainants' "good faith assertion about having applied the brake is contradicted by the absence of braking effectiveness." *See Nat'l Highway Traffic Safety Admin., Technical Assessment of*

Toyota Electronic Throttle Control (ETC) Systems (Feb. 2011).

NEISS data inherently involves multiple layers of hearsay. The first layer of hearsay occurs when a patient relays a self-serving account of an accident to a doctor or nurse. At this hearsay level, the medical professional's paramount job is obviously to treat an injury and not to investigate an incident. The second layer is introduced where the person reporting the accident is someone other than the injured person. The third hearsay layer occurs when the health care provider passes on a truncated version of events (often filtered through a medical record) to a NEISS "coder." What the doctor or nurse writes his or her summarizing notes documenting care may not be entirely accurate, a fact best illustrated in a case where the plaintiff disputes statements in his or her own medical records. The final hearsay layer is formed when the NEISS coder interprets the medical professional's summary by paraphrasing that summary and adds it to the CPSC NEISS database. *Id.* The NEISS coder's entry is limited to a maximum of 600 characters (effectively, the length of four Tweets). Accordingly, the NEISS narratives are usually not complete sentences and are typically made up only of keywords. Anyone who has played the child's game of "Telephone" understands the inherent unreliability of statements filtered through multiple declarants. As for the final NEISS entry, the information coming from the far end of the hearsay chain is even more suspect because the last declarant is forced to condense information to make it fit into a limited field.

One expert who we deposed charitably described the transfer of information from patient-to-nurse-to-coder-to-database as "imprecise":

Q. You think that there's a perfect transfer of information from patient to nurse to hospital coordinator every single time?

A. Well, we know from their CPSC documentation that it's not perfect. They use the word abstract.

Q. Okay. So, therefore, we concede that the data is imperfect as it's entered into the CPSC system?

A. Imperfect is probably the wrong word. I would say that it's imprecise.

When deposing plaintiffs' experts who rely on this data, defense counsel will want

to test such an expert's knowledge of the data-collection system and develop testimony that will support an anticipated motion to preclude.

Admissible Evidence of Other Accidents Must Be "Substantially Similar"

Defendants should also move to preclude all NEISS data and any experts' opinions that rely on such data as irrelevant to the extent the other accidents are not substantially similar to the accident at issue. *See generally Moulton v. Rival Co.*, 116 F.3d 22, 27 (1st Cir. 1997); *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981); *Cooper v. Firestone Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991); *Black v. M&W Gear Co.*, 269 F.3d 1220, 1227 (10th Cir. 2001); *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1988).

"Substantial similarity" is generally the touchstone of any analysis regarding the admissibility of other accident evidence. For example, the Sixth Circuit has made clear that "[o]nly prior incidents that are 'substantially similar' to the one at issue will be admissible in evidence" for the purpose of "show[ing] [that the] Defendant had been on notice of incidents likely to lead to the kind of injury suffered by [the] Plaintiff." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 297 (6th Cir. 2007) (citing *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989)).

And "[s]ubstantial similarity means that the accidents must have occurred under similar circumstances or share the same cause." *Croskey v. BMW of N. Am., Inc.*, 532 F.3d 511, 518 (6th Cir. 2008) (citing *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1195 (D.C. Cir. 1986)). *See also McKinnon*, 638 F.2d at 278; *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 339 (5th Cir. 1980); *Lohr v. Stanley-Bostitch Inc.*, 135 F.R.D. 162, 164–65 (W.D. Mich. 1991); *Benson v. Honda Motor Co.*, 32 Cal. Rptr. 2d 322, 327 (Ct. App. 1994); *Hasson v. Ford Motor Co.*, 650 P.2d 1171, 1180 (Cal. 1982).

The purpose of the substantial similarity requirement is to "insure [] that the evidence meets the relevancy requirements of Rules 401 and 403." *Surles*, 474 F.3d at 297. A "plaintiff has the burden of showing the substantial similarity between prior accidents and [the plaintiff's] own." *Croskey*, 532 F.3d at 518 (citing *Lewy v. Rem-*

ington Arms Co., 836 F.2d 1104, 1109 (8th Cir. 1988)).

It is important to emphasize that substantial similarity means that the accidents involve (1) the same or a substantially similar product *and* (2) a substantially similar accident scenario. Absent proof of substantial similarity, evidence of prior accidents is simply irrelevant and often prejudicial. *See*

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Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 121–22 (1974); *Marocco v. Ford Motor Co.*, 7 Cal. App. 3d 84, 90 (Ct. App. 1970) (excluding evidence of other accidents involving 1964 Thunderbirds despite the fact that the case involved the same make and model, noting that some of the prior incidents were caused by a defective parking brake and therefore were not similar to the plaintiffs theory of a defective gear shifter).

In *Brake v. Beech Aircraft Corp.*, 229 Cal. Rptr. 336 (Ct. App. 1986), the plaintiffs claimed that the trial court erred in excluding National Transportation Safety Board publications regarding prior acci-

dents. The court of appeals affirmed the trial court's exclusion of the evidence, stating that the "plaintiffs failed to lay a foundation of similarity between the accident as discussed therein and the accident in this case.... Plaintiffs cannot overcome the myriad of problems by relying on similarity of air foils or tail design." *Id.* at 339.

In *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1458 (10th Cir. 1990), the plaintiffs sought to introduce evidence of government-reported statistics involving accidents and injuries associated with all-terrain vehicles. The Tenth Circuit affirmed the district court's preclusion of such evidence on relevance grounds since the plaintiffs had failed to establish that the subject data involved the same make, model, year, or manufacturer of the all-terrain vehicles at issue.

Similarly, in *Koch v. Kaz USA, Inc.*, the U.S. District Court for the District of Colorado precluded the plaintiff's expert from testifying about the statistical analysis that he performed after he reviewed the NEISS database. No. 09-CV-02976-LTB-BNB, 2011 WL 4087942, at *1 (D. Colo. Sept. 13, 2011). The court found that the expert failed to demonstrate that the heaters referenced in the NEISS database were substantially similar to the heater that had purportedly caused the plaintiff's injury. Consequently, it determined that the expert's conclusions were irrelevant. *Id.* *See also Campos v. MTD Prods.*, No. 2-07-0029, 2009 WL 920337, at *5 (M.D. Tenn. July 24, 2009) (holding that the plaintiff failed to establish that the CPSC data describing lawnmower accidents were substantially similar to the lawnmower product and accident scenario at issue); *Riley v. Yamaha Motor Co., Ltd.*, No. CIV.A. 85-110, 1986 WL 1560, at * 1 (E.D. Pa. Jan. 30, 1986) (finding that "CPSC reports did not occur under circumstances substantially similar to those in the present action," and accordingly, stating, "I believe the documents plaintiff seeks to have admitted are inadmissible as irrelevant").

Developing the Record

Plaintiffs' experts must be challenged at a deposition on whether the NEISS data on which they rely involve a product that is the same as, or substantially similar to, the product in the current case. Because of the NEISS database's deficiencies, its data sim-

ply will not permit comparing accident-producing products in the database with products at issue in a legal case.

For one, regardless of the particular make or model of the product at issue, in using the NEISS data, it is often not possible to distinguish accurately within a general product category. Going back to the golf car example, for example, the NEISS data does not distinguish between a utility vehicle and an all-terrain vehicle (ATV). The article on golf cart safety referred to and quoted above acknowledged as much: "These statistics include the class of vehicles of categorized as Personal Transport Vehicles (PTV's [*sic*]), which are golf cart style vehicles used at locations other than golf courses." Technology Associates-Engineering Experts, *supra*. NEISS product codes have changed from 1991 to 2007. During that time period, NEISS coding manuals did not always distinguish between golf cars, utility vehicles, low-speed vehicles, and all-terrain vehicles. In other cases, other experts have conceded they could not say with confidence whether any of the NEISS coders mixed reports of injuries associated with utility vehicles, low-speed vehicles, all-terrain vehicles, and golf cars under a single code. For example, one expert we deposed testified as follows:

- Q. Do you know whether LSVs [low-speed vehicles] were included in the data for golf cars that are contained in the NEISS data?
- A. They may have been. But, again, it's what someone comes in and says [a] golf cart [is], whatever that means to them.
- Q. In other words, if the coding manual didn't tell you, that, hey, be careful, there's a different code for a utility vehicle and a different code for an ATV, people might just lump it all in one category?
- A. People's understanding of the code might be erroneous...
 * * *
- Q. How long has the coding manual reflected that distinction between golf cars and utility vehicles and ATVs?
- A. That's a good question. I don't know the answer to that.
- Q. As you sit here today, are you able to say that in 1997 that the coding manual reflected [a distinction

between golf cars, utility vehicles and ATVs]?

A. No.

Defense counsel should also be able to extract a concession from the plaintiff's expert concerning the lack of information about how the CPSC- or NEISS-reported accident happened. In *Jackson v. E-Z-GO Division of Textron*, 326 F. Supp. 3d 375, 389–90 (W.D. Ky 2018), the court stated in its opinion:

In its motion to exclude, Defendant argues that, though [the plaintiff's expert] identified 8.9 percent of incidents as having involved rollovers, [the plaintiff's expert's] testimony made clear he had not examined the underlying accident reports from which the NEISS data projections were extrapolated to determine any circumstances of the reported accidents, the manufacturer of the vehicles involved, and whether any actual accident, or the extrapolated projected number of accidents, involved any of the 'four areas of concern' that the Plaintiffs use as the foundation for their case." During his deposition, Defendant asked [the plaintiff's expert] whether he investigated "the NEISS data to determine how it's collected," and [the plaintiff's expert] responded that he tried to do so, however he explained that "[a] lot of... the data that I specifically notated did not give me the ability to look at anything other than the data that they had provided—the numbers that they had provided. Plaintiff's expert further testified that he was not "able to obtain from the NEISS data how the rollovers occurred," nor did he "look up every single last one of them, and determine how each one was occurred." Rather, [the plaintiff's expert] simply opines that, because E-Z-GO had "a large share of the market industry" from 1991 to 1993, it "would have been involved in many of these rollover accidents."

(internal citations omitted).

Again, this is representative of the type of testimony that defense counsel will want to develop from the plaintiff's expert to support a motion.

Defense counsel should also be prepared to argue that NEISS data simply does not provide critical information regarding the product at issue to the extent that is necessary for a determination of substan-

tial similarity to the product at issue. For example, the NEISS data omits such important information as the following: (1) the product manufacturer's identity; (2) the brand name, trade name, model number, and year; (3) the presence or absence of critical safety features and other product attributes; (4) accident details, such as speed, misuse, and alcohol involvement; and (5) whether the product was new or modified; (6) the presence or absence of warnings, and if warnings were present, whether they were read by the injured consumer.

Given the dearth of information about the products and accidents in the NEISS database in particular, it should be possible to develop a sufficient record to challenge the reliability and admissibility of such third-party accident data.

The Data Is Prejudicial to the Defendant

Introducing evidence of dozens of prior, unrelated, and dissimilar accidents as the basis for the expert's extrapolation that there were "thousands" of other "similar" accidents is nothing more than an attempt to sneak through the back door what plaintiffs clearly cannot get through the front door. Evidence of unrelated accidents will be highly prejudicial to the defendant.

The potential exists that such third-party accident data will unduly influence a jury, given that it is tied to an "independent" agency such as the CPSC. See, e.g., *Gehel v. Soo Line R.R. Co.*, 967 F.2d 1204, 1208 (8th Cir. 1992) (noting the "danger" that government documents will unduly influence a jury, given "their 'aura of special reliability and trustworthiness.'" (internal citation omitted); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 822 (10th Cir. 1981) (recognizing the "real possibility that the jury would give undue deference to a [governmental report]").

It is particularly unfair, given that the CPSC explicitly warns that it is improper to use NEISS data as a basis for claiming that an injury was caused by any one product. Specifically, the NEISS reports give this caution: "It is incorrect when using NEISS data to say the injuries were caused by the product." Clearly, in our experience, plaintiffs' experts present the data in a way that will lead a jury to conclude just that.

Introducing the Data Will Delay Resolution

Finally, an argument can be made that the introduction of NEISS data will unfairly and inefficiently extend the trial since the defendant will need to challenge the plaintiff's expert in detail about each of the factual scenarios contained in the NEISS reports on which the expert relies. Consequently, the trial would evolve into various "mini trials" involving collateral issues and causing juror confusion because the various parties would undoubtedly seek to offer and rebut evidence concerning what is and is not a "substantially similar" product and accident mode. See *Vincent v. Louis Marx and Co.*, 874 F.2d 36, 43 (1st Cir. 1989). See also *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1198 (D.C. Cir. 1986) (excluding government statistics because it would raise collateral issues resulting in prejudice, delay, and juror confusion).

Conclusions

Jurors are likely to place an undue emphasis on government statistics. Unfortunately, a plaintiff's expert will do his or her best to manipulate available data to make the point that a defendant "knew or should have known" about the particular product risk at issue. Defendants, therefore, need to be prepared to challenge the admissibility of other accident data, particularly from third-party sources, such as the CPSC and NEISS.

To do so effectively, however, it is important that counsel understand the source of the data to develop successful challenges to the reliability and admissibility of the underlying data. Defendants will want to engage their own expert (including, if necessary, a non-testifying consultant) to help review the NEISS data to help prepare for the opposing expert's deposition and trial cross. 