Product Liability Recalls on the Rise: Legal Strategies

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Defense Strategies Before Recall:

- **Difficult Balancing Act**: A manufacturer needs to ensure that its products are safe and maintain credibility with its customers. At the same time, it must defend against claims and lawsuits
- Be prepared to fight back against meritless claims while simultaneously resolving claims with merit.
- Establish a plan on how consumers will be notified about the recall. This process is monitored by the governmental agency (NHTSA, CPSC, or FDA) and typically includes:
  - Press releases
  - Point-of-sale posters
  - Direct customer notices
  - Website notices
- In negotiating the notice requirements, companies must balance the necessity of providing adequate notice, the requirements of the governmental agency, and how the notice could affect subsequent products liability litigation.

Defense Strategies in the Public Forum :

- **Modern media means unrelenting publicity**, unending questions and uncertain outcomes. Companies should:
  - Investigate, learn, and understand before speaking.
  - Involve legal, marketing, engineering, service, and parts departments.
  - Educate and involve the distribution chain.
  - Preserve relationship with the government.

Defense Strategies in the Courtroom:

- **Consider whether the relevant jurisdiction imposes a post-sale duty to warn.**

  More than thirty states recognize some form of a post-sale duty to warn. If the relevant jurisdiction imposes such a duty, counsel should evaluate whether it applies to the client's facts.

- **Discoverability of Recall Evidence.**

  Despite broad discovery rules, companies should limit the discoverability of recall evidence where possible. Limitations on discovery may be imposed where:

  A. Production requests are overly broad or vague ("all recall documents" or "any documentation relating in any way to the recall"

  B. The recall's target vehicle does not have the same component at issue in the lawsuit

  C. The product has a long history or was widely distributed and production requests may constitute an undue burden.

  - Uitts v. General Motors Corp., 58 F.R.D. 450, 453 (E.D. Pa. 1972) (Discovery allowed)
  - Uitts v. General Motors Corp., 62 F.R.D. 560 (E.D. Pa. 1974) (Discovery denied)
  - Swain v. General Motors Corp., 81 F.R.D. 698, 700 (W.D. Pa. 1979) (Discovery allowed)

  Regardless, Plaintiffs have other avenues of discovering recall campaigns.

Defense Strategies in the Courtroom:

- **Decide whether admitting recall evidence would help the company's case.**
  - In certain situations, admitting evidence of a recall may be beneficial to a company. If plaintiffs seek punitive damages, companies may cite the recall as evidence of efforts to improve the product and protect the public. Holmes v. Wegman Oil Co., 492 N.W. 2d 107, 112-113 (S.D. 1992); Denton v. DaimlerChrysler Corp., 2008 WL 5111222 *2 (N.D. Ga. 2008).
  - Second, in cases where pre-recall complaints come into evidence, excluding recall evidence means that the manufacturer loses the benefit of showing the measures it took to make the product safer. Also if the plaintiff ignored the recall letter or refused remedial offers, recall evidence could assist with a contributory negligence defense.

Defense Strategies in the Courtroom:

- **Evidentiary strategies to exclude or limit recall evidence where appropriate.**

1. Relevancy – Companies may successfully exclude evidence on relevancy grounds:

a) If the recall involves different model vehicles than the one in question. *Olson v. Ford Motor Co.*, 410 F. Supp. 2d 869, 872-873 (D.N.D. 2006); J*enkins v. Chrysler Motors Corp.*, 316 F. 3d 663, 665 (7th Cir. 2002); *Nay v. General Motors Corp.*, 850 P.3d 1260, 1263 (Utah 1993); *Williams v. Ford Motor Company*, 2003 WL 21010601*1 (Tex. App. 2003).

b) If the recall involves only a manufacturing defect and the claim is one of design defect. *Olson v. Ford Motor Company*, 410 F. Supp. 2d 869, 874 (D.N.D. 2006); *Brethauer v. General Motors Corp.*, 2009 WL 820120*5 (Ariz. App. 2009).

c) If the plaintiff's vehicle had the same defect as the recall vehicle, but differed in other respects, *Muniga v. General Motors Corp.*, 302 N.W.2d 565, 568 (Mich. Ct. App. 1980).

d) Where the plaintiff offers the recall letter that reported that the problems caused by the defect occurred under certain conditions and plaintiff failed to show those conditions appeared in the accident. *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 133 (6th Cir. 1984).

e) Where the manufacturer admitted the defect. *Muniga v. General Motors Corp.*, 302 N.W.2d 565, 568 (Mich. Ct. App. 1980).

Defense Strategies in the Courtroom:

- **Evidentiary strategies to exclude or limit recall evidence where appropriate.**

  2. Hearsay – Because the recall letter is an out-of-court statement offered to prove the matter asserted, companies should consider all the relevant exceptions plaintiffs may use to admit the letter (i.e., admission by party opponent, *Higgins v. General Motors Corp.*, 465 S.W.2d 898, 900 (Ark. 1971).

  3. Subsequent Remedial Measure – Companies should argue that recall evidence is a subsequent remedial measure excludable under Rule 407. *Giglio v. Saab-Scania of Amer.*, Inc., 1992 WL 329557*4 (E. D. La. 1992); *Chase v. General Motors Corp.*, 856 F.2d 17, 21 (4th Cir. 1988).

  4. Impeachment – To whatever degree recall evidence is admissible, counsel should argue that it be used only for impeachment (e.g., if defense controverts feasibility). Buckman v. Bombardier Corp., 893 F. Supp. 547, 553-554 (E.D. N.C. 1995).

  5. Unduly Prejudicial – Companies should argue that the recall evidence, whatever probative value it may have, is unduly prejudicial and excludable under Rule 403. Jordan v. General Motors Corp., 624 F. Supp 72 (E.D. La 1985).

- **Limiting Jury Instruction**

  Counsel should consider requesting a jury instruction that explains that the evidence of a recall campaign can only be considered after the plaintiff, independent of the recall, establishes by a preponderance of the evidence that a defect existed in the vehicle. *Manieri v. Volkswagenwerk*, 376 A. 2d 1317 (N.J. Super. 1977); *Allstate Ins. Co. v. Jaguar Cars*, 915 F.2d 641, 649 (fn 16) (11th Cir. 1990).

Defense Strategies in the Courtroom:

- **Failure to Recall:**
  - Distinction between a post-sale duty to warn and a duty to recall or retrofit a product after sale.
  - More than 30 states now recognize some form of post-sale duty to warn.

    3RD Restatement, Product Liability, Section 10: § 10. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn

    (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.

    (b) A reasonable person in the seller's position would provide a warning after the time of sale if:

    - the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
    - those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
    - a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
    - the risk of harm is sufficiently great to justify the burden of providing a warning.

Defense Strategies in the Courtroom:

- Compare that with 3RD Restatement, Product Liability, Section 11: § 11. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product
- One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

  (a)(1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or

  (a)(2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and

  (b) the seller or distributor fails to act as a reasonable person in recalling the product.

- **Failure to Recall:**
  - *Bell Helicopter v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. – Corpus Christi 1979, writ ref'd n.r.e.)
  - *Salvage v. Scripto-Tokai Corp.*, 266 F. Supp. 2d 344, 351 (D. Conn. 2003).
  - *Tabieros v. Clark Equipment Co.*, 944 P. 2d 1279 (Haw. 1997).
  - *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1315-16 (Kan. 1993).
  - *Gregory v. Cincinnati Inc.*, 450 Mich. 1, 538 N.W.2d 325 (1995).
  - *Syrie v. Knoll International*, 748 F.2d 304 (5th Cir. 1984).

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