THE NATIONAL
LAW JOURNAL
DAILY UPDATES AT NLJ.COM THE NEWSPAPER FOR THE LEGAL PROFESSION Monday, January 28, 2008 ALM

PRODUCTS LIABILITY

Recall-Related Evidence

By Pamela Yates

Every day there seems to be news of yet another recall. Whether they relate to toys, baby furniture, pet food or raw spinach, all point toward potentially serious business and legal implications. While recalls are costly, failure to timely recall can result in greater cost. Once a recall is necessitated, appropriate recall-related conduct becomes essential because recalls generate evidence.

Intel Corp.'s Pentium-chip recall cost Intel around $500 million, while Casablanca Fan Co.'s recall of ceiling fans cost the company $700 million in retail sales. See Michael R. Lemov and Jason I. Hewitt, "Can you risk a recall? Insuring against product liability," ABA Section of Business Law, Business Law Today, September/October 1999, www.abanet.org/buslaw/blt/9-1recall.html. Some recall-related costs are attributable to fines imposed by regulatory agencies such as the Food and Drug Administration (FDA) or the Consumer Protection Safety Commission (CPSC). Familiarity and compliance with regulations are of paramount importance. In the case of Mattel Inc.'s recent toy recalls, the CPSC required notification of the defect within 24 hours of its discovery. See 15 U.S.C. 2064(b). Mattel's failure to comply with that requirement resulted in hefty civil penalties.

Pamela Yates *(PYates@kayescholer.com) is a partner in the litigation group in the Los Angeles office of New York-based Kaye Scholer, where she represents major corporations in all aspects of litigation, including trial, primarily focusing on products liability. Jennie Levin, an associate in that group, provided assistance with this article.*

Litigation promptly follows a recall. To illustrate, four days after Menu Foods announced its pet food recalls, a class action was filed alleging products liability claims, among others. See Class Action Complaint, *Swarberg v. Menu Foods Holding Inc.*, No. 3:2007cv00706 (S.D. Calif. removal filed April 18, 2007). Likewise, immediately after Mattel announced one of its toy recalls, two consumer class actions were filed alleging products liability claims, among others. See Class Action Complaint, *Monroe v. Mattel Inc.*, No. 07-cv-03410, 2007 WL 2376595 (E.D. Pa. filed Aug. 17, 2007); Class Action Complaint, *Powell v. Mattel Inc.*, No. 2:07-cv-06517 (C.D. Calif. removal filed Oct. 9, 2007).

Products liability lawsuits are, of course, only one component of the potential litigation. Shareholder derivative lawsuits often result, and it should be expected that shareholder suits follow closely the evidence that develops in the products liability action.

The plaintiff has the lead in the evidentiary chessboard: A recall is a party admission. However, the argument does not end there. While it may prove difficult or impossible to prevent plaintiffs from obtaining recall-related evidence during discovery, several legal arguments may help prevent recall-related evidence from being admitted at trial. A company can argue lack of relevance, inadmissible hearsay, inadmissible subsequent remedial measure or prejudice.

Defendants can argue that evidence is not relevant

Recall evidence is relevant if it indicates that a defect was present when the product left the manufacturer. See, e.g., *Manieri v. Volkswagenwerk A.G.*, 151 N.J. Super. 422 (App. Div. 1977) (recall letter relevant and admissible to show that defect occurred while product was under control of the defendant). It is also relevant to show that the defective condition existed at the time of the accident. See, e.g., *Baptist Med. Ctrs. v. Trippe*, 643 So. 2d 955, 962 (Ala. 1994). However, the plaintiff still must show that the product in question proximately caused the plaintiff's injuries because a recall does not admit a defect in a particular product, but rather refers to the possibility of a defect in a class of products. See *Bailey v. Monaco Coach Div.*, 350 F. Supp. 2d 1036, 1045 (N.D. Ga. 2004).

The lack-of-relevance argument is easier when the recall evidence is not related to the same product or component that caused the alleged injury in the lawsuit. See *Jordan v. General Motors Corp.*, 624 F. Supp. 72, 77 (E.D. La. 1985).

When the defect is the same, courts generally hold that the evidence of the recall

is admissible. See *Hessen for Use and Benefit of Allstate Ins. Co. v. Jaguar Cars Inc.*, 915 F.2d 641, 649 (11th Cir. 1990) (recall evidence relevant only if the alleged defect was the same defect involved in the recall). At least one court, however, has held that even when the alleged defect is the same, if it occurred in a different product, evidence of the recall should be excluded. See *Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 175 F. Supp. 2d 881, 888-889 (W.D. La. 2001) (holding evidence of listeria contamination in one food product irrelevant to question of contamination in different food product at different plant).

Plaintiffs will argue exceptions to hearsay rule

Plaintiffs build their case by showing recall letters, press releases, customer reviews and complaints, as well as other recall-related documents. All such documents are hearsay evidence—out-of-court statements offered to prove the truth of the matter asserted. See Fed. R. Evid. 802. Plaintiffs will inevitably argue that a recall constitutes an admission by a party opponent under Fed. R. Evid. 801(d)(2) or its state equivalent and hence should be admitted as an exception to the hearsay rule. In *Zeigler v. Fisher-Price Inc.*, 302 F. Supp. 2d 999, 1021-22 (N.D. Iowa 2004), the court held that Fisher-Price's press release announcing its toy vehicle's voluntary recall was admissible in a products liability action as an admission by the manufacturer.

Plaintiffs will also argue several other hearsay exceptions such as the business records and/or public records exceptions. See Fed. R. Evid. 803(6); Fed. R. Evid. 803(8). If the document pertaining to the recall was made in the regular course of business at or near the time of the event or pertained to activities of the office or regulatory agency or described matters that were observed pursuant to a duty, imposed by law, the document will likely be admitted over a hearsay objection. See *Becker v. Nat'l Health Prod. Inc.*, 896 F. Supp. 100, 104 (N.D.N.Y. 1995) (holding that FDA complaint reports were admissible hearsay under business records and public records exceptions); *Farner v. Paccar Inc.*, 562 F.2d 518 (8th Cir. 1977) (holding that memoranda of a manufacturer's employee concerning a recall campaign by the manufacturer and the manufacturer's recall letter are admissible under Rule 801(d)(2)).

Most subsequent remedial measures are inadmissible

Failing on relevance and hearsay arguments, defendants turn to Fed. R. Evid. 407. This rule makes subsequent remedial measures inadmissible to prove "negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." See Fed. R. Evid. 407; see, e.g., *Ault v. International Harvester Co.*, 528 P.2d 1148 (Calif. 1974); *Werner v. Upjohn Co.*, 628 F.2d 848, 853-56 (4th Cir. 1980) (barring voluntary recall evidence used to show defect or causation); see also *Vockie v. General Motors Corp.*, 66 F.R.D. 57 (E.D. Pa. 1975) (evidence of the defendant's recall campaign and recall notice not admitted due to public policy aimed at encouraging subsequent remedial measures, and because such evidence has minimal probative value as to the existence of a defect, which must be established by direct evidence).

A company can argue against admission of such evidence based on lack of relevance, the hearsay rule, prejudice and more.

As with every good rule, there are exceptions. Recall evidence may be admitted to show feasibility of remedial measures at the time of manufacturing. See *Bush v. Michelin Tire Corp.*, 963 F. Supp. 1436, 1450 (W.D. Ky. 1996); see also *Figueroa v. Boston Scientific Corp.*, No. 00 Civ. 7922, 2003 WL 21488012 (S.D.N.Y. June 27, 2003) (evidence of the recall admissible because it occurred four months prior to the plaintiff's diagnosis).

A word of caution: Recall evidence may also be admissible for impeachment if the product is described as "the best" or "the safest." See *Wood v. Morbark Industries Inc.*, 70 F.3d 1201, 1208 (11th Cir. 1995) (testimony that the subject product had the "safest length chute you could possibly put on the machine" was found to have opened the door to impeachment).

Most, but not all, states have adopted Fed. R. Evid. 407. For example, California makes subsequent remedial measures inadmissible in negligence cases, but not in strict liability actions. See Calif. Evid. Code § 1151; see also *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 118 (1975) (evidence of subsequent repairs is admissible in strict products liability actions).

Defendants can also argue unfair prejudice

When the probative value of a piece of evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, [and] misleading the jury," Fed. R. Evid. 403 precludes admission. See, e.g., *Bizzle v. McKesson Corp.*, 961 F.2d 719, 721 (8th Cir. 1992) (evidence of a product recall was properly excluded under Rule 403 when there was insufficient evidence to establish that the recall involved the same model of cane that the plaintiff was using at the time of his injury).

Moreover, even if there is marginal relevance on liability or damages, admitting such evidence may be highly prejudicial in that the jury might unfairly conclude that all of the recalled products were defective. See *Cameron v. Otto Beck Orthopedic Indus.*, 43 F.3d 14 (1st Cir. 1994); *Muniga v. General Motors Corp.*, 302 N.W.2d 565, 568-69 (Mich. Ct. App. 1980); see also *Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1579, 1581-82 (D. Minn. 1998) (excluding evidence of a voluntary drug recall because of the danger of unfair prejudice in that the jury might consider it as an admission of liability).

Recalls are everywhere. Business costs and litigation management are undeniably intertwined. Similarly, a company's recall-related conduct directly affects evidence at trial.

Reprinted with permission from the January 28, 2008 edition of The National Law Journal © 2008 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-545-6111 or reprints@alm.com. # 005-01-08-0019