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A manufacturer notified that one of its products may be contaminated with a foodborne illness faces several important decisions, including whether to issue a post-sale public warning and whether to institute a recall program. In some cases, recalls are requested by government agencies. In other cases, federal or state law may require a seizure of the products. But what if no request or seizure is made? Should a manufacturer institute a voluntary recall program?

In addition to weighing the financial costs of a recall program and the potential harm to the public and to the company's goodwill, a company should immediately assess its potential civil liability. This assessment may not be easy, however, because this area of the law is currently in flux. State law is sharply divided as to whether these obligations exist and, if so, to what extent liability should be imposed. Therefore, it is entirely possible to face liability in one state and not another. Some states impose liability on manufacturers for failing to issue a post-sale warning or recall. Other states do not, but may impose liability for negligently conducting a recall even when it has been undertaken voluntarily.

This analysis is further complicated by the fact that determining whether a company faces liability for failing to issue a post-sale warning or for conducting a negligent recall is only one of several legal questions facing a company whose product has been contaminated. Like the law of recall liability, the law governing product liability varies from state to state. Thus, it may be necessary to review strict liability and punitive damages laws in several states. In some cases, federal law may preempt state laws. Moreover, every state has "choice of law" rules that may require its courts to apply another state's law. Therefore, it is vital that a manufacturer considering a recall assess which states' laws are likely to apply to the recall – possibilities include the law of the manufacturer's principal place of business and the state in which the recalling plant is located – and what duties, if any, those states impose on manufacturers.

Agency-Initiated Recalls

In rare instances, a state or federal agency may seize food products when there is reason to believe that the product poses a public health hazard. In most cases, however, regulatory officials prefer that the manufacturer voluntarily recall the product at issue: A recall is the voluntary removal of a product from commerce because it is suspected of posing a danger to public health. Recalls may be commenced on the manufacturer's own initiative or by the request of the Food and Drug Administration (FDA), Food Safety Inspection Service (FSIS), or other federal or state agencies. As discussed in earlier articles in this series, these agencies frequently work directly with the Centers for Disease Control and Prevention (CDC). Both the FDA and FSIS have published guidelines addressing the nature, scope, and procedures accompanying product recalls (<http://www.fsis.usda.gov/FOIA/dir/8080.htm>). While recalls under these guidelines are typ-

Editor's note: this is the third in a series on food safety and the legalities of product recall.

ically voluntary, FDA and FSIS have oversight over all recall activities and play an integral role in determining how the recall is implemented and carried out.

In fulfilling this role, both agencies follow similar guidelines. First, the agency conducts a health safety evaluation and assigns the product a classification. In classifying the product, the agency considers several factors, including existing injuries or illnesses, the likelihood of potential injuries or illnesses, and the degree of illness or injury caused by the contaminated product.

Second, the agency recommends a recall strategy that reflects the health evaluation results, the degree of obviousness of the health hazard to consumers, the manufacturer's ability to identify the product in the market, the degree of product availability, and other important circumstances.

Third, the agency provides specific guidelines to be met by the manufacturer, including what information must be included in a public notice and plan effectiveness expectations.

Manufacturer's possible post-sale duties

Complying with recall requests gives manufacturers an excellent opportunity to cooperate with government agencies and to avoid adverse consequences as well as the inevitable loss of goodwill that accompanies government-imposed sanctions. In fact, FSIS boasts that "no company has ever refused a request from FSIS to recall a potentially unsafe food."

Still, what if an agency decides against initiating a recall? In some states, manufacturers could face civil liability for failing to provide a public warning or recall a contaminated product. Generally, a manufacturer's liability is limited to situations involving defects that the manufacturer knew existed at the time of manufacture, rather than situations where a manufacturer learns of a defect after the product has already been sold. Some courts, however, recognize post-sale duties to warn, retrofit, or recall products. While these duties exist only in a minority of states, they are recognized enough to warrant attention during the early stages of litigation. Moreover, there are several reasons that post-sale duty cases are attractive to plaintiffs, including the fact that these cases are often less technical and less expensive to litigate than design defect claims.

Duty to warn

The court decision that first established post-sale duties was a 1959 Michigan case known as *Comstock v. General Motors Corp.* In *Comstock*, General Motors ("GM") learned of brake problems in several 1953 Buicks shortly after releasing them for sale, but took no steps to warn buyers. The Michigan Supreme Court held that notice of a defect received shortly after manufacture triggered a post-sale duty to warn consumers and imposed liability on GM. Since *Comstock* was decided, sever-

al states, most significantly New York, have followed and even expanded the *Comstock* ruling.

But unlike most other product liability law, the post-sale duty to warn is based in negligence rather than strict liability - that is, it requires proof that the manufacturer behaved unreasonably, not just that the product was defective. In determining the reasonableness of the manufacturer's conduct, courts consider several factors, including the nature of the harm, the likelihood of injury, the number of potential injuries, and economic burdens on the manufacturer.

Recently, a review of the state of tort law (known as the Restatement (Third) of Torts) suggested four factors that courts should consider before imposing post-sale liability: First, evidence should show that the manufacturer either knew or should have known that the product posed a substantial risk of harm to consumers. Second, evidence should show that unsuspecting consumers were easily identifiable to the manufacturer. Third, evidence should show that a warning could have been effectively communicated to consumers. Fourth, evidence should show that the harm to the public was sufficiently great to justify the burden of providing a warning.

For food producers, the second factor - that consumers are easily identifiable to the manufacturers - is the most critical. This factor typically limits post-sale duties to warn to products such as automobiles, aircrafts, or certain contraceptive devices whose bills of sale, pharmaceutical records, where manufacturers are easily able to identify purchasers.

In contrast, manufacturers of food products, consumer goods or mass-marketed products are less likely to be able to identify the ultimate consumers of their products, and thus less likely to be held liable for a post-sale duty to warn. Courts can conclude, however, that a food manufacturer has a duty to at least attempt to warn consumers by informing its distributors or publishing a notice.

Duty to recall

Courts in most states have rejected arguments favoring a post-sale duty to recall or retrofit. These courts have recognized that recalls place enormous burdens on manufacturers and are only as effective as the public's compliance because consumers may ignore a recall request. So most courts confronted with the issue have concluded that the cost-benefit analysis necessary to impose recall liability is better left to legislatures and governmental agencies.

For example, the Michigan Supreme Court limited its 1959 decision in *Comstock*, which established a post-sale duty to warn. The court declined to impose a post-sale duty to recall, stating that the creation of a duty was more properly a consideration for administrative agencies, which have the institutional resources to make fully informed assessments of the marginal benefits of recalling a specific product.

In recent years, however, several states – including Arizona, California, Minnesota, and New Jersey – have expanded a manufacturer's post-sale duties to include the duty to retrofit or recall a defective product. As a result, recall lawsuits in those states can be especially troubling to manufacturers. Due to increasing public exposure to recalls, juries may have an easier time understanding arguments in favor of recall liability – possibly making them even more sympathetic toward plaintiffs.

Negligent recall

Even if a manufacturer has no duty to conduct a recall, if it elects to do so, it may have a duty to conduct the recall in a reasonable manner. This follows from the "Good Samaritan" rule, which provides that an innocent party has no duty to help an injured person, but if the innocent party undertakes to help, he or she must act reasonably in giving aid.

For example, an appeals court in Georgia recently found a distributor liable for failing to effectuate a manufacturer's recall program by notifying some, but not all, customers. Plaintiffs in the case purchased a gas water heater that contained a thermostat manufactured by Emerson Electric Company. After Emerson learned that the valve was defective, it instituted a recall program. To institute the recall, Emerson published notices in trade journals and mailed notices to all liquid propane dealers and distributors. At the trial, the distributor's executives testified that they did not remember receiving the recall notices, but admitted that they regularly read trade publications that contained the notices. Furthermore, evidence showed that the distributor replaced 41 defective Emerson thermostats, but failed to replace all the defective thermostats that it knew about. The court held the distributor liable, finding that it voluntarily agreed to notify its customers of the recall, but acted negligently in carrying out Emerson's recall program. Therefore, the court affirmed the jury verdict awarding plaintiff \$800,000 in compensatory and punitive damages against the distributor (the plaintiff had already settled with Emerson).

Punitive damages

The good news is that, although food processors face liability risks if they undertake a recall and conduct it negligently, a recall can play a vital role in defending a product liability claim. The major risk in products liability litigation is the award of punitive damages, which could exceed the costs of instituting a recall, but to receive a punitive damages award, a plaintiff generally must establish "willful and wanton" conduct by the manufacturer toward public safety. A post-sale warning or recall program may be crucial in defeating a punitive damages claim.

In one important case, Jewel Companies, Inc. successfully defeated a punitive damages claim by showing that it had taken several precautionary measures including a recall when faced with a salmonella outbreak. An Illinois appeals court affirmed the verdict denying punitive damages, pointing to several actions taken by Jewel after receiving notice of the salmonella outbreak. First, Jewel instituted an immediate recall program. Second, Jewel hired a private lab to inspect its plants and test its products. Third, Jewel fully cooperated with the Illinois Department of Public Health and FDA investigations. Fourth, Jewel immediately implemented the recommendations of the two government agencies.

Assessing potential liability for failure to warn or recall can be tricky, especially when there is no clear indication of which state's law will apply to a case. If there is one overriding rule, however, it is this: Act reasonably. If issuing a post-sale warning or recall program is a responsible solution to a manufacturer's problem, then it should be undertaken – but it must be undertaken carefully with full awareness of the potential risks. **FP**

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