

# After the recall

What to do when litigation may be pending

A company struggling with the complicated issues relating to a food contamination problem and a major product recall now faces challenging and complex civil litigation. Many individual lawsuits alleging personal injuries have been filed against the company, as has a class action lawsuit.

Food manufacturers sued in connection with a nationwide food product recall must make a number of important strategic decisions in the initial stages of the litigation. Among the many important questions a manufacturer and its counsel must ask are, “Which state’s law applies?” and, if the answer is unclear, “Which law do we want to apply?” Also, should the company oppose class certification?

## Which law applies?

If a manufacturer has distributed its product nationwide, it is likely to face at least one nationwide class action. In that event, the company must determine which state’s law applies to the plaintiffs’ cause(s) of action. This determination is important because state laws vary on almost every important issue in a contaminated food case—including:

- the length of the statutes of limitation;
- applicability of strict liability;
- what the plaintiffs must prove to establish causation;
- whether and how the plaintiffs can obtain punitive damages.

When the manufacturer and the plaintiffs are located in the same state where the contamination occurred, the law of that state likely will apply to the

case. But in cases where there is a question as to which state’s (or states’) law will apply, the manufacturer should argue for the law it wants because the outcome of the case may turn on the answer.

A few examples of the differences among state laws illustrate the importance of this issue.

*Statutes of limitation.* The limitation periods governing product liability claims can vary considerably from state to state. Some states require plaintiffs to file product liability claims within one year of the date of injury (for example, California, Kentucky, and Tennessee). By contrast, others impose two-year statutes of limitation (such as Illinois, Indiana, and Louisiana), and still others (such as Connecticut and New York) allow plaintiffs three years in which to file. If you are successful in getting a court to apply the shorter statute of limitations, you may be able to limit the number of claims.

*Strict liability.* If a plaintiff can move forward with a “strict liability” claim, that plaintiff does not have to establish that a company was “negligent” in its conduct. Whether a plaintiff can prevail on a theory of strict liability against a food manufacturer may depend on the test applied. Generally, states apply either the “consumer expectations” or “risk-utility” tests in strict liability cases. For example, Alabama, California, Connecticut, and Illinois follow the “consumer expectations” test. Courts in those states will find a product defective where “it is in a condition not contemplated by reasonable persons.”

Conversely, Colorado, Georgia, and Louisiana follow the “risk-utility” test. Courts applying the law



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of those states will find a product defective if, after weighing several factors—i.e., the probability of the risk occurring, the gravity of the consequences, and the burden of adequate precautions—they determine the risks of the product design or manufacturing process outweigh the utility of the product.

Under the “consumer expectations” test, a plaintiff suffering from a food-borne illness likely will prevail on a theory of strict liability because reasonable people generally do not expect to encounter contaminants in the food they consume. But that same plaintiff may fail the risk-utility test if, for example, the cost of eliminating a bacteria is substantial compared to the number and severity of illnesses it is likely to cause.

## The manufacturer must determine which state’s law will apply in the event of a conflict.

### Causation

Even if a plaintiff can establish that the manufacturer’s product was defective, she must still prove that the defective product caused an injury, and the plaintiff’s ability to do that may well depend on the test applied. In Illinois, Michigan, New Mexico, South Carolina, and Wisconsin, for example, for a plaintiff to prove proximate causation, he must demonstrate that the injury was foreseeable to the manufacturer. However, in states such as New York, North Carolina, and Texas, a plaintiff merely needs to show that the recalled food was a “substantial factor” in causing the harm suffered by the plaintiff.

The evidence needed to prove causation also varies among the states, with some requiring direct scientific evidence and others allowing plaintiffs to establish causation through circumstantial evidence.

### Punitive Damages

In many cases, the decision to settle a case or to try it may depend on the risk of a punitive damages award. A few states do not allow punitive damages in products cases. Other states allow punitive damages in personal injury, but not wrongful death cases.

Among the states that do permit punitive damages, a plaintiff’s ability to recover those damages varies depending on the level of culpability the plaintiff proves. In Illinois, Maryland, Missouri, and Wisconsin, for example, a plaintiff must prove the manufacturer’s “actual knowledge” of the defect or unreasonably dangerous condition, while in Connecticut, Montana, New York, and Oregon, a plaintiff need only prove the manufacturer’s “reckless disregard” for the safety of others.

### Which state’s law applies

Because state laws vary, the manufacturer must determine which state’s law will apply in the event of a conflict. When a conflict of law arises, most states follow the Restatement (Second) of Torts, which counsels courts to consider factors such as where the plaintiff or plaintiffs reside, where the defendant is headquartered, where the defendant manufactured the product, and whether the case involves plaintiffs from multiple states.

Nationwide class actions almost inevitably present conflict of law issues, including issues of constitutional law. Courts in these cases follow the two-part test established in the case *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), when deciding whether, constitutionally,

they can apply the law of their own state (the “forum state”) to a complaint seeking to certify a nationwide class filed.

First, the trial judge must determine whether forum state law conflicts with the laws of the other states potentially applicable to the class action. If the laws do not conflict, the trial judge may apply forum state law to the putative class.

If the laws do conflict, however, the trial judge must determine whether the forum state has “sufficient contacts” or a “sufficient aggregate” of contacts to the claims asserted by each member of the class to ensure the application of forum law is not arbitrary or unfair. If the forum state has sufficient contacts with the claims asserted by each class member, the trial judge may apply forum state law. If the forum state does not have sufficient contacts, the trial judge can either certify the class and apply the law of the state containing the most contacts with the putative class members’ claims, or deny class certification and only hear the claims of the plaintiffs residing in the forum state.

A hypothetical example illustrates how these issues may play out in an actual case. After reports of about 1,000 injuries in multiple states caused by a food-borne bacteria linked to a product manufactured by FoodCo., the manufacturer initiates a nationwide recall of its food product. One year and a day later, a plaintiff files a complaint, seeking certification of a nationwide class in Illinois state court. Reports indicate that illnesses linked to the product are evenly distributed among California, Colorado, Illinois, Michigan, and New York.

Consistent with the Supreme Court’s holding in the *Shutts* case, the Illinois trial judge must first deter-

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mine whether Illinois law conflicts with the laws of any other states potentially applicable to this class action. As it happens, Illinois law conflicts with California's law on the statute of limitations, Colorado's law on strict liability, New York's law on causation, and Michigan's law on punitive damages. Because the Illinois trial judge has discovered conflicts, the judge must proceed to the second part of the *Shutts* test: whether Illinois has sufficient contacts with the claims of each class member to apply Illinois law. The Illinois court has at least three options in deciding the issue; apply Illinois law, apply the law of another state, or apply the laws of different states on different issues.

As a practical matter, if the Illinois court has to apply the laws of different states on different issues, the court is likely to refuse to certify a nationwide class. By contrast, if the court can apply Illinois law or the law of one other state to all of the issues in the case, it is more likely to certify a nationwide class.

Based on its strategic thinking about the case, FoodCo. must decide which of the three options it wants to argue for. If FoodCo. wants a class certified, it may argue for application of the state's law that is most favorable to it on the most important issues in the case. Conversely, if FoodCo. does not want a class certified, then it may argue that different states' laws should apply to different issues (for example, that California law should apply to the statute of limitation issue and Michigan law should apply on the punitive damages issue).

### Should you oppose class certification?

As this example demonstrates, the other significant, and related, strategic decision is whether to oppose class certification. Generally, a manufacturer will not want to oppose nationwide class certification if it wants to settle the case and believes it can so quickly by obtaining a binding judgment on all plaintiffs who did not opt out of the class.

In the settlement class action context, the parties position cases for settlement rather than litigation. In these cases, the parties agree on the composition of the class and the specific settlement terms, and the defendant usually agrees not to challenge certification if the court approves the settlement. The court is asked to certify the class (as the parties have defined it) as a part of the proceedings in which the court

approves the settlement. If, after review of the settlement's substantive terms, the court makes a preliminary determination that the agreement is fair, the court will certify the class (provisionally) for settlement purposes only.

The court then will direct class counsel to notify the settlement class members simultaneously of the pending suit, the class certification and the settlement, and will follow the standard procedure for settlement approval. Ultimately, if the court still finds that the settlement is fair, the judge will enter final orders for class certification and settlement approval.

If a manufacturer wants to litigate because it believes the class claims lack merit, thinks it cannot get a quick settlement, or suspects claims will be too small for plaintiffs to bring them individually, the manufacturer may want to oppose class certification.

Typically, manufacturers involved in nationwide food recalls can successfully oppose class certification on two grounds:

- Questions of law and fact common to all class members do not outweigh questions affecting only individual members.
- The class action is unmanageable.

In a nationwide food recall, important questions of fact such as differences in how much of the product was consumed, when it was consumed, and the nature and extent of injuries and damages will vary among class members. Accordingly, the manufacturer may be able to show that individual questions predominate over common ones as a way to defeat class certification.

Similarly, the manufacturer may demonstrate that choice of law will direct the court to apply the law of the place of the injury, thereby requiring the court to apply the law of 50 jurisdictions, rendering a nationwide class action inefficient and unmanageable.

The legal issues that confront manufacturers in civil litigation are numerous and complex. How successful they are in resolving these issues can—and will—have significant financial consequences. FP

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## A few states do not allow punitive damages in product cases.