An Overview of United States Product Recall Law

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Generally a manufacturer has no duty to recall products. See, e.g., Patton v. Hutchinson Wil-Rich Manufacturing Company, 861 P.2d 1299, 1315-16 (Kansas 1993); Tabieros v. Clark Equipment Co., 944 P.2d 1279 (Hawaii 1997); Gregory v. Cincinnati Inc., 538 N.W.2d 325 (Mich. 1995). See also Restatement (Third) of Torts: Products Liability §11 cmt. a (1998) (“an involuntary duty to recall should be imposed on the seller only by a governmental directive issued pursuant to statute or regulation. Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings”). Nonetheless, once a manufacturer voluntarily undertakes a product recall, that manufacturer generally has a duty to exercise reasonable care in conducting the recall. See Restatement (Third) of Torts: Products Liability, §11 (1998); Blossman Gas Company v. Williams, 375 S.E.2d 117, 120 (Ga. App. 1988).

The law with respect to what actually constitutes reasonable conduct during voluntary recall is, however, somewhat unsettled. For example, the United States Court of Appeals for the Eighth Circuit has held that Missouri does not recognize a cause of action for negligent voluntary recall. Horstmyer v. Black & Decker (U.S.), Inc. 151 F.3d 765, 774 (8th Cir. 1998). In contrast, the United States Court of Appeals for the Seventh Circuit implicitly recognized the existence of such a cause of action under Indiana law. Avery v. Mapco Gas Products, Incorporated, 18 F.3d 448, 454 (7th Cir. 1994). In Avery the court held that a negligent recall claim merges with the underlying products liability claim. The court affirmed the dismissal of a negligent recall claim stating such a claim was barred under the applicable statute of repose. However, the court in Avery noted that: “[W]e perceive the negligent recall claim to be nothing more that a re-named failure to warn claim.” Id.

The Iowa Supreme Court made passing reference to the viability of a cause of action for negligent recall in Krull v. Thermogas Company of Northwood, Iowa Division of Mapco Gas Products, Inc., 552 N.W.2d 607, 613 (Iowa 1994). The court in Krull dismissed an action against a dealer who allegedly failed to identify a furnace control valve that had been recalled, stating: “Assuming, without deciding, that there is such a theory as negligent recall, section 614.1(11) [the Iowa statute of repose], bars that claim too.” Id.

Regardless of whether or not there is a recognized independent cause of action for negligent voluntary recall, as a general principle of law, once a manufacturer discovers a life threatening hazard or a defect in a product, the manufacturer has a post-sale duty to warn end-users of the product of the defect or hazard. See, e.g., Patton, 861 P.2d at 1311-1312. Thus even though a manufacturer may not have an affirmative duty to conduct a voluntary recall, the same duty is effectively imposed upon it by virtue of its post-sale duty to warn.
If, in fact, a cause of action for undertaking a negligent voluntary recall is recognized in a particular jurisdiction, a court is likely to consider the same factors it uses in determining whether the manufacturer had a post-sale duty to warn in analyzing whether a manufacturer was negligent during a recall. In *Patton*, the court listed a number of factors that must be examined in order to determine whether a manufacturer acted reasonably with respect to its post-sale duty to warn. It is likely these same factors would also be analyzed in determining whether a manufacturer acted reasonably in conducting a voluntary recall.

The analysis shall include but not be limited to the examination of such factors as: (1) the nature of the harm that may result from use without notice, (2) the likelihood that harm will occur (Does future continuing use of the product create a significant risk of serious harm which can be lessened if a post-sale warning is given?), (3) how many persons are affected, (4) the economic burden on the manufacturer of identifying and contacting current product users (Does the manufacturer have an on-going relationship with the purchaser or other knowledge of the identity of the owner of the product which provides a practical way of providing a post-sale warning?), (5) the nature of the industry, (6) the type of product involved, (7) the number of units manufactured or sold, and (8) steps taken other than giving of notice to correct the problem.

*Patton*, 861 P.2d at 1314-1315.

The facts of an individual case may establish that it is unreasonable to require a manufacturer to provide notice of a recall to all end-users of a product, but, in the alternative, that providing notice to retailers of that product may be reasonable. *Id.* *See also* *Kozlowski v. John E. Smith’s Sons Co.*, 275 N.W.2d 915 (1979) (finding “[i]t is beyond reason and good judgment to hold a manufacturer responsible for a duty of annually warning of safety hazards on household items, mass produced and used in every American home”). In addition, simply warning an intermediate purchaser or dealer may not be enough. *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1320 (1983). *See also Ford Motor Co. v. Robert J. Poeschl, Inc.*, 98 Cal. Rptr. 702 (holding that “Ford’s production of the defective car, coupled with its failure to attempt direct notice to the customer in a recall campaign, breached a direct obligation it owed to the latter. Ford had a ‘last clear chance’ to avert injury and failed to use it”).

In sum, a manufacturer may be subject to liability if it fails to notify purchasers whom it can reasonably identify about a recall. *Restatement (Third) of Torts: Products Liability, §11 cmt. c, illus. 4 (1998).* A similar analysis is likely to be applied in determining whether it was reasonable for a manufacturer to take a specific action in conducting a voluntary recall. Whether the theory of liability against a manufacturer is negligent recall or breach of a post-sale duty to warn is largely irrelevant because it is likely that the same analysis will be applied in both instances.

It should be further noted that if a plaintiff has a legitimate basis for asserting that the manner in which the defendant conducted the recall was unreasonable, the judge will likely allow the introduction of evidence as to a breach of the post-sale duty to warn. As delineated below, whether a judge allows such evidence to be introduced at trial is an issue which is determined on a case by case basis:

Each trial judge will necessarily be required to make a determination as to whether the record presents a fact question as to knowledge and reasonableness whenever a plaintiff’s claim of negligent breach of a post-sale duty to warn is alleged. Generally resolution of the issue of reasonableness, after an initial court determination that the issue is presented will be one for the jury. The trial judge in instructing the jury on a post-sale duty to warn, shall utilize the relevant factors referenced herein, (see the seven factors set forth above), including the nature and likelihood of the injury posed by the product, the feasibility and expense of issuing a warning, whether the warning would be effective, and whether ultimate consumers who purchased the product can be identified.

*Patton*, 861 P.2d at 1315. It is also likely that a trial judge will allow the introduction of evidence as to the nature and extent of defendant’s efforts in conducting the recall. In addition, a trial court could allow the introduction of similar evidence to support a claim for punitive damages under a products liability theory.

The difficulties in analyzing a manufacturer’s potential exposure to liability is demonstrated by two cases involving the recall of identical products in which two different courts reached opposite results. Both cases involved products liability claims against the White-Rodgers Division of Emerson Electric Company (“White-Rodgers”), a manufacturer of thermostats for gas water heaters.
The control knob for the White-Rodgers thermostat was manufactured from a relatively soft plastic material known as Styron 475. These knobs incorporated a spline or ridge that was smaller than a paper match head. When the knob was depressed to the start the pilot light, gas would be released. If the knob was slightly misaligned, the soft plastic spline would be shaved off when the knob was depressed. These shavings caused the knob to stick in the depressed position, and, if the pilot light went out while the knob was stuck in the depressed condition, gas could continue to be released and cause an explosion.

In 1969, a manufacturer of a water heater using the White-Rodgers thermostat informed White-Rodgers of the defective control knob. White-Rodgers tested the knob in 1970 and learned that the plastic spline could be shaved after turning the knob as few as ten times. In late 1970, White-Rodgers then developed a knob using a harder plastic but it did nothing to remedy the problem with the soft plastic knobs that were manufactured prior to then.

From 1971 through 1974, White-Rodgers was informed of lawsuits arising from gas explosions caused by the soft plastic knobs. White-Rodgers instructed its personnel to respond to damage claims stemming from the control knob by denying any defect or involvement with the alleged damages. In response to the lawsuits and explosions, White-Rodgers again developed a new control knob that went into production in 1976. In late 1976, White-Rodgers again improved the control knob using a stronger plastic and making the spline four times larger. After making these changes, White-Rodgers destroyed its inventory of old knobs. Nonetheless, White-Rodgers did nothing to remedy the problem on control knobs produced prior to late 1976 despite the fact that White-Rodgers had previously recalled an unrelated product after only one reported incident.

From 1976 to 1979 eleven more accidents resulting from the control knobs were reported to White-Rodgers. This brought the total number of explosions to 21, including five deaths. In 1980 White-Rodgers again redesigned the knob. The design changes incorporated in 1980 were also feasible in the mid-1960s at a cost of five to ten cents per control knob.

In late 1980, White-Rodgers finally recalled all control knobs manufactured between 196 and 1980. The recall was approved by the United States Consumer Product Safety Commission and consisted of mailing notices to all of its product dealers informing the dealers of the problem and requesting that they send White-Rodgers their customer lists. The recall notice implied that absent damage to the knob, the thermostat was safe.

Further, the recall notice failed to disclose the existence of the design defect or unsafe condition. White-Rodgers intended to use these lists to send recall notices directly to end-users. However, many dealers did not respond to the request. White-Rodgers began to contact the unresponsive dealers alphabetically by telephone in April and May 1981, but stopped this process after reaching only the letter “C”. Thus there was no follow up with the majority of the nonresponsive dealers.

In August 1985, a Wisconsin plaintiff was severely injured in an explosion caused by the White-Rodgers control knob. The plaintiff filed suit and obtained a verdict in excess of $2,000,000. At trial, the court granted White-Rodgers’ motion to dismiss plaintiff’s claim for punitive damages. White-Rodgers appealed the verdict and the plaintiff cross-appealed, contending it was error for the court to dismiss the plaintiff’s claim for punitive damages. Curiously, very little, if any, of the factual evidence concerning the design and history of the knob was introduced into evidence. The Wisconsin appellate court affirmed the dismissal of the plaintiff’s claim for punitive damages. The court held:

We conclude, as a matter of law, that the evidence before the trial court did not raise an issue of fact as to the “fault” element. The record documents White-Rodgers’ effective and ongoing steps to warn manufacturers, distributors, and customers. It undercuts any factual foundation for the opinion of Bettinger’s (the plaintiff) experts.

Manufactured in 1964, Wartak’s (the owner of the home plaintiff was at when the explosion occurred) control had been in the White-Rodgers design process for two and one-half years; it was subjected to extensive testing before placement into the stream of commerce. Annually thereafter, hundreds of thousands of controls were sold to manufacturers such as A.O. Smith who installed them on water heaters and then sold them to retailers.

In 1980, White-Rodgers, in response to reports of accidents, began a nationwide product recall. The accidents, it turned out apparently involved customer misuse of the control. At significant cost, White-Rodgers: (1) contacted all liquid propane distributors and informed them of a repair/replace program, and later, of the recall program; and (2) obtained customer lists from the distributors and conducted a direct mailing to customers offering replacements and dealer installation free of charge.
The result was announced to the wire services. A.O. Smith particularly advertised the program in Sunday news supplements. It was reported in trade journals . . . .

Upon this record, we determine, as a matter of law, that White-Rodgers engaged in no outrageous conduct; and that it did not act maliciously or in reckless disregard of Bettinger’s rights. No evidence of conscious indifference to the public exists as shown by White-Rodgers documented recall program, which included repair or replacement and installation of the control without charge to numerous owners.

Bettinger v. White-Rodgers Division, Emerson Electric Company, 163 Wis. 2d 1091, 474 N.W.2d 528.

In contrast, in a gas explosion in South Dakota caused by the control knob, five people were severely injured on June 26, 1983. In that case, unlike the Wisconsin litigation, the plaintiffs’ attorney thoroughly investigated the design and recall history of the knob and introduced those facts into evidence at trial. The jury found White-Rodgers liable under both a products liability theory and fraudulent concealment theory (i.e., that White-Rodgers fraudulently concealed the defect from consumers). The jury awarded plaintiffs $846,000 in compensatory damages and $2.5 million in punitive damages ($500,000 for each of the five plaintiffs). White-Rodgers appealed contending that the evidence was insufficient to support the award of punitive damages and verdict for fraudulent concealment. In affirming both the verdict and award of punitive damages, the Supreme Court of South Dakota held:

White-Rodgers’ recall campaign was a factor mitigating against fraudulent concealment. However, the warning or recall must be adequate to counter the effects of ten years of concealment to release White-Rodgers from liability. (citation omitted). As noted above, White-Rodgers’ recall campaign was designed to have LP gas dealers send in their customer lists. The success rate of this recall/warning was poor; the follow-up on unresponsive dealers ceased after reaching the letter “C”; and the recall notice itself implied that, absent damage to the knob, the control was safe - not that it contained a design defect and was unsafe.


Thus in cases involving an identical defective product and identical conduct in connection with the recall of that product, two separate courts reached diametrically opposed results. These two cases illustrate that the manner in which a recall is conducted can affect a product manufacturer’s potential exposure to liability.

As is reflected by the examples noted above, the decision by a manufacturer to conduct a product recall, and the method in which a recall is undertaken, may have serious economic consequences. Consequently, any manufacturer that is faced with a possible product recall should consult counsel in order to ensure that the decision to recall is appropriate and that an effective recall strategy is undertaken once the decision to recall a product has been made.

If you would like additional information regarding the topics discussed in this memorandum, please contact Patrick McKey, Nicola Fiordalisi, or any of the following Gardner Carton & Douglas attorneys.