Chapter 33

Post-Sale Responsibilities in the United States and Foreign Countries*

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§ 33:1 Overview

Post-sale duties of manufacturers and other entities in the chain of production and distribution have been in existence since 1959, before the adoption of strict liability in the 1960s. Since that time, a majority of states have adopted some form of post-sale duty through court decision or legislative action. Some courts have rejected the duty where the product was not defective when it was sold, and some courts have not considered the issue.

In addition to the common law and legislative law, U.S. and foreign safety laws and regulations have added legal requirements for those making and selling products. These requirements have become quite significant and have added a level of complexity to this area.

While generally a plaintiff cannot recover in court because a manufacturer violated these regulatory requirements, plaintiff may attempt to offer such a violation as evidence that the product was defective, that the manufacturer was negligent, and that the manufacturer should be subject to punitive damages. As a result, it is important for a manufacturer and others in the chain of production and distribution to be very aware of the common law and regulatory requirements, and to do its best to comply.

This chapter will discuss U.S. common law, U.S. and foreign regulatory law, how to prepare for recalls, and some ideas on how to defend a case where a recall or some post-sale activity was involved.
§ 33:2 U.S. Common Law

§ 33:2.1 Generally

Over thirty states have adopted some type of post-sale duty, most notably a post-sale duty to warn.\(^1\) In addition, the American Law Institute (ALI) considered the status of product liability law in the United States, and in 1998 published the *Restatement (Third) of Torts: Products Liability* ("Third Restatement"). While the *Second Restatement of Torts* did not include any mention of post-sale responsibilities, a number of courts, beginning in 1959\(^2\) and continuing over the years, have created rules describing when manufacturers should issue post-sale warnings of hazards to product users.

In the 1990s, the ALI ultimately decided that a sufficient body of law existed to justify including a post-sale duty to warn in the Third Restatement. These duties are basically set forth in three sections of the Third Restatement.

§ 33:2.2 Third Restatement Law on Post-Sale Duty to Warn

Section 10 of the Third Restatement requires, in certain instances, that manufacturers or product suppliers should provide post-sale warnings. It provides as follows:

§ 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 when 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 when:

[1] the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

[2] those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and

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1. For a fifty-state survey of post-sale law, see ABA SECTION OF LITIGATION, *Post-Sale Duty to Warn* [Feb. 2004].
a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.\(^3\)

Section 10 and its comments make it clear that the product does not have to be defective when it was sold, but can become defective after sale. Also, section 10 is a separate cause of action and additional to section 2 liability for selling a defective product. As such, a manufacturer cannot cut off liability by undertaking a non-negligent post-sale program such as warning, recall, or retrofit. The manufacturer can still be liable for selling a defective product.

Section 10 does not include a duty to do anything other than warn. However, because a few courts have held that, in certain narrow instances, a manufacturer may have a duty to recall or retrofit a product, the ALI included section 11 in the Third Restatement that severely limits the duty to recall a product.

Section 11 provides that the seller or distributor is not liable for a failure to recall a product unless the recall is required by statute or regulation, or the seller or distributor voluntarily undertakes to recall the product and does so negligently. The main reason for including section 11 in the Restatement was to make it clear that section 10 does not include a duty to recall. However, it also included the so-called “Good Samaritan” doctrine, where liability can attach for a negligent recall, even if it is voluntary.

The last section pertaining to the post-sale duty to warn is section 13. This section concerns a successor’s responsibility to issue a post-sale warning where the successor has a continuing relationship with the customer, such as providing maintenance services, and gains an economic advantage from this customer. This section is consistent with the common law.

Another issue related to post-sale duties is whether the manufacturer has a duty to inform prior customers of each safety improvement made in similar products manufactured after the sale of the less safe product. Some courts have found it reasonable to impose a duty to inform purchasers of safety improvements when:

1. There is a continuing relationship between the manufacturer and the purchaser;

2. The market is limited; and

\(^3\) Restatement (Third) § 10 (1998).
3. The cost of providing notice of the safety improvement is negligible.  

Most courts, however, have found that there is no post-sale duty to inform customers of safety improvements when the original product has been properly designed and manufactured.  

Section 10 does not foreclose the imposition of a post-sale duty to warn of safety improvements but makes it clear that the four factors in that section must be met. It says that “in most cases it will be difficult to establish each of the four factors of section 10 that are a necessary predicate for a post-sale duty to warn if the warning is merely to inform of the availability of a product-safety improvement.”  

A manufacturer should carefully consider whether it is reasonable and prudent to notify prior customers of safety improvements. In part, they should perform the kind of analysis that is done under section 10 in deciding whether a duty arises in the first place.  

A manufacturer must also be very careful in making this decision since a plaintiff might use a manufacturer’s post-sale warning of a product safety improvement to argue that the original product, without the safety improvement, was defective at the time of sale. However, any attempt to use the improvement as evidence of a time-of-sale defect will generally run afoul of evidentiary rules that preclude the introduction of “remedial measures” evidence.  

§ 33:2.3 State Courts  

Those three sections of the Third Restatement dealing with post-sale duties have received a mixed but generally favorable reception in the law since 1998. Where the post-sale duty issue was one of first impression, the Restatement position has been adopted more often than rejected. However, state courts have not formally adopted section 10 in the several states whose law had already developed along the lines of  

4. Kozlowski v. John E. Smith Sons Co., 275 N.W.2d 915, 923–24 (Wis. 1979) [holding a duty to inform users of machine of post-sale safety improvements where users were traceable]; Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519 (Tex. Civ. App. 1979), overruled in part, Torrington Co. v. Stutzman, 46 S.W.3d 829 (Tex. 2000) [holding a duty to retrofit where manufacturer assumed duty to notify users of safety improvements].  


6. Id.  

7. Id. § 10 (Reporter’s Note to cmt. a).  

8. FED. R. EVID. 407 provides that evidence of measures taken after an injury “is not admissible 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.” Most state rules of evidence also bar the introduction of such evidence to prove a time-of-sale defect.
that section’s principles, but before the adoption of the Restatement. At least one state has rejected section 10 but does impose a post-sale duty to warn of risks that were inherent in the product at the time of sale. And a few states have explicitly rejected section 10 either because a state statute or its rules of evidence limit liability to situations where there was a failure to warn at the time the product left the control of the manufacturer or seller or, under “strict liability” principles, liability can only be imposed for warning failures at the time of sale. And lastly, a few states that had earlier decided against adopting a post-sale duty to warn have not changed their minds even after the adoption of section 10. 9

The bottom line is that while not all states have adopted a post-sale duty to warn, it is important for manufacturers who sell nationwide to assume that they have such a duty since they have no idea in which state a claim could arise.

§ 33:3 U.S. Regulatory Law

§ 33:3.1 Generally

Even though the common law limits the manufacturer’s post-sale duties, U.S. regulatory law for decades has required manufacturers and sellers of various products to report safety problems to government agencies and undertake some sort of remedial action, depending on the severity of the problem and the ability to find the purchasers of the product.

The U.S. Consumer Product Safety Commission (CPSC) is the most important federal safety agency because it has jurisdiction over all consumer products. Section 15(b) of the Consumer Product Safety Act (CPSA) 10 independently requires manufacturers, importers, distributors and retailers to notify the Commission immediately if they obtain information that reasonably supports the conclusion that a product distributed in commerce (1) fails to meet a consumer product safety standard or banning regulation, (2) contains a defect that could create a substantial product hazard to consumers, (3) creates an unreasonable risk of serious injury or death, or (4) fails to comply with a voluntary standard upon which the Commission has relied under the CPSA.

The most important basis for reporting to the Commission is section 15(b)(2), which requires both a defect and the possibility of a substantial product hazard. The regulations to the CPSA provide some guidance on


how to analyze the need to report. The first question is whether there is a
defect. Under this section, a product without a defect is not subject to
the reporting requirements even if injuries occur. Many products are
reasonably safe and not defective, and people still get hurt.

There is an additional reporting responsibility that applies even if
there is no defect. Section 15(b)(3) requires a report if there is an
unreasonable risk of serious injury or death, even if the product does
not have a defect.

§ 33:3.2 Addressing Global Safety Issues

In 2001, these regulations were expanded in part to deal with global
safety issues. In November 2001, the CPSC clarified its position by
saying that a manufacturer must, in part, evaluate product use,
experience, performance, design, or manufacture outside the United
States to determine if a reporting responsibility has arisen.

Fines for failure to report or for late reporting have become more
frequent and more expensive in recent years. The CPSC has significantly
increased the number of cases where civil penalties were sought. In the
2002 fiscal year, there were five manufacturers or retailers that were fined;
fines ranged from $30,000 to $885,000. In the 2003 fiscal year, ten
manufacturers or retailers were fined, ranging from $100,000 to
$1 million. And, in the 2004 fiscal year, eight manufacturers were fined
with fines ranging from $300,000 to $4 million. Many of the fines during
that fiscal year involved multiple violations (for example, late reporting or
no reporting for different products over different periods of time).

In the 2005 fiscal year, four manufacturers paid fines ranging from
$100,000 to $700,000. In the 2006 fiscal year, fines for four manu-
facturers ranged from $50,000 to $975,000. Fines ranged up to
$1 million in 2008, and up to $2.3 million in 2009.

§ 33:3.3 Consumer Product Safety Improvement
Act of 2008

On August 14, 2008, the Consumer Product Safety Improvement
Act of 2008 (CPSIA)\textsuperscript{11} was signed by the President. Civil penalties
increased to $100,000 per violation with a cap of $15 million.
Congress prescribed a list of factors that the CPSC must consider in
deciding whether and how much to fine a company and required the
CPSC to develop a regulation interpreting these factors. Criminal
penalties also increased, permitting imprisonment and forfeiture of
assets.

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In addition, CPSIA created a number of new safety standards, regulations, and bans. This increased the responsibility of a manufacturer, importer, or product seller to report to the CPSC if the product fails to comply with these new rules. As a result, we can expect to see many more recalls in the coming years based on sales of noncompliant products.

The increase in recalls also increases the possibility that harmful admissions will be made in recall press releases, letters to customers, and posters in stores—and that a possible fine could be imposed for late reporting or no reporting. All of these activities could provide a challenge to any lawyer defending a case involving a report to the CPSC and a recall.

§ 33:4 Foreign Regulatory Activity

§ 33:4.1 Generally

Recalls and other post-sale remedial programs are also required under the laws of many foreign nations. Recently, there has been an expansion of a manufacturer’s responsibilities to monitor safety, report problems to government bodies, and possibly recall its products. Global recalls convinced the European Commission that there is an interrelationship between the safety in products sold around the world, that current laws were inadequate, and that it was appropriate to expand a manufacturer’s responsibilities.

Safety problems in one country may indicate a problem in another country. And, despite the lack of U.S.-style product liability litigation, foreign governments have not been shy about demanding remedial action in appropriate situations. United States and foreign government agencies dealing with safety are regularly communicating with each other to identify instances where safety problems or remedial actions in one country could signal a problem in another country.

§ 33:4.2 European Response

The most significant recent European effort to address post-sale duties is implementation of the 2004 General Product Safety Directive (“Directive”) throughout the European Union (EU). The Directive obligates EU member countries to impose upon consumer product manufacturers a general requirement to place only safe products on the market. The Directive substantially expands manufacturers’ and governments’ post-sale responsibilities. It attempts to strengthen each member country’s powers to monitor and improve collaboration on market surveillance and enforcement. The mechanism for this effort is a Product Safety Network and Rapid Alert System [RAPEX] procedures. RAPEX requires member countries to inform the European
Commission of serious risks so that it can alert other member countries. These alerts are placed on the Internet for viewing by other agencies and the public. The number of RAPEX notices has been growing quickly.

In addition, the Product Safety Network’s goal is to facilitate the exchange of information on risk assessment, dangerous products, test methods and results, and recent scientific developments. Presumably, there will be closer cooperation among member states in tracing, withdrawal, and recall of dangerous products. The obligations and enforcement powers of the member countries have been expanded to meet these objectives. This includes clarification of when a member country can order or organize the issuance of warnings or a recall of a dangerous product.

The Directive also increases responsibilities for manufacturers and distributors. Distributors will have to monitor the safety of products placed on the market, especially by passing on information on product risks, keeping and providing documentation necessary for tracing the origin of products, and cooperating in actions taken by manufacturers and government agencies to avoid the risks. Both manufacturers and distributors have a duty to immediately notify government agencies when they know or ought to know that a product they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement of the Directive.

The Directive defines a “safe product” as one that “does not present any risk or only the minimum risks compatible with the product’s use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons.” This threshold for reporting appears to be much lower than under any U.S. statute or regulation, and therefore should result in more reports and certainly more recalls.

§ 33:4.3 Foreign Standards and Regulations

Post-sale responsibilities are increasing significantly around the world. Legislation in countries such as Canada, Australia, and Japan have established or will establish greater government oversight over manufacturers, and a greater responsibility to report safety issues and remove products from the market. It is expected that more countries will adopt such laws and regulations so that any post-sale duty for products sold globally could involve reporting and warnings, recalls, or retrofits in virtually all of the countries in which the product has been sold.

While noncompliance with foreign standards and regulations has generally not been admissible at trial in the United States, plaintiffs’ attorneys may try to use noncompliance of reporting requirements in the European Union and elsewhere to support an allegation for
punitive damages. As a result, a manufacturer that recalls a product in the United States and not in a foreign country, or in a foreign country and not in the United States, should have a good basis for the different conduct.

§ 33:5 Meeting a Manufacturer’s Post-Sale Duties

Any manufacturer who has or might have to recall its product should take steps to prepare for the recall before or at the time the product is sold. This will allow the manufacturer to obtain information necessary to make a timely recall decision and to do the recall in a cost-effective manner.

§ 33:5.1 Information-Gathering Network

The foundation of a post-sale program is establishment of an information network that will allow a company to determine how its product is performing in the United States and around the world. This information is necessary for the manufacturer to make decisions about whether any post-sale corrective action is appropriate.

The increased impact of foreign events on U.S. responsibilities makes it even more important that this network gather information received anywhere in the world. In addition, the regulatory and common law requirements discussed above apply to information the manufacturer obtained (or should reasonably have obtained) that identifies any unsafe condition. Therefore, anything less than a “reasonable” effort at obtaining information may be considered deficient by the jury or government agency in determining whether the manufacturer should have known about the problem.

A manufacturer has a number of readily available sources of information. For example, notices of claims or accidents might provide information on the types of products that are failing, the mode of failure, and possible misuse of the product. Personnel should be trained to ensure that sufficient information is gathered concerning the claims and accidents so that potential problems can be identified. Lawsuits (including settlements and verdicts) will provide the same information.

Customer complaints and warranty returns provide fertile sources of information. A pattern of complaints and returns may indicate that a product is failing in a particular mode on a regular basis. Again, personnel should be trained to identify and clarify the information so that it is accurate and substantiated. The manufacturer does not want to gather and maintain inaccurate and overstated complaints and claims that incorrectly make it appear that a problem exists.

An unusual number of sales of safety-critical component parts may indicate that a part is failing prematurely. Of course, observations by
sales and service personnel who are actually out in the field talking to customers are invaluable sources of information. Post-sale information can also come from competitors at trade shows or as part of membership in a trade association.

Post-sale information, albeit some of it unsubstantiated or even incorrect, is now posted by consumers on the Internet. Some companies monitor the Internet, especially sites customers might visit, to read comments about their products. Each manufacturer will need to determine whether a follow-up investigation of safety issues raised by customers or product owners who post such information is warranted. Ignoring such information can be perilous, but following up on all alleged safety issues could be time-consuming and fruitless.

Some statutes and regulations, especially with vehicles and medical devices, set forth post-sale monitoring requirements. These need to be considered in establishing such a program. Monitoring requirements include the kinds of information that should be considered and the kinds of documentation that need to be maintained.

§ 33:5.2 Risk Assessment

Once a manufacturer has obtained all relevant information, it must determine whether post-sale action is necessary. This includes reporting to the relevant governmental agency and undertaking some form of remedial plan.

Ideally, a corporate or divisional product safety committee will analyze the information. This committee should be made up of representatives from various areas of the company, including engineering, service, sales, marketing, and legal. The lawyer advising the committee should be experienced in product liability and regulatory law in the countries where the affected product was sold.

Analyzing the information and deciding what it means is the most critical phase of this process. Many manufacturers use or should use risk assessment prior to selling their products. This process identifies the risk, probability of the risk occurring, consequences if it occurs, and methods to minimize the risk. Before sale, the manufacturer should make a projection on the probability of the risk occurring. It is, of course, difficult to estimate the probability of an event occurring when it has never happened before.

After sale, the manufacturer is, in effect, inserting new data into its risk assessment. Post-sale incidents may indicate risks or consequences that were never imagined, or an increase in the estimated probability that is calculated before sale. Redoing the pre-sale risk assessment is a good way to formally recalculate the numbers and assumptions. Unfortunately, that does not really answer the question of whether remedial action is necessary and what form it should take.
§ 33:5.3 Determining the Necessity of Post-Sale Action

Because the manufacturer’s products have presumably been sold in all fifty states, it is necessary to assume that a post-sale duty to warn exists. And, because the laws in the states differ, the best approach is to examine the Third Restatement to gain a general sense of the national law on post-sale duty to warn. Therefore, determining whether post-sale action is necessary under the common law requires applying the factors in the Third Restatement to the facts learned through the information-gathering network and the results of the revised risk assessment.

For regulated products, the manufacturer needs to identify the threshold for taking action as required by the appropriate government agency. Using the criteria established by the applicable agency will provide guidance to the manufacturer about what post-sale information to gather and how to analyze it.

Recalls can be extremely difficult and very ineffective, despite the best of efforts. There are no clear guidelines in the common law or even with government agencies on how effective a recall has to be. Recalls or retrofit programs with an effective rate of less than 10% have been deemed acceptable by the CPSC. And, the CPSC has said that the average response rate from consumers for most recalls is between 4% and 18%.

Virtually no recalls have 100% compliance. As a result, the manufacturer will have many products in the field that it has admitted or intimated are defective or at least pose a risk of injury. When a product has been recalled, how can the manufacturer defend this product when an injury has occurred and a lawsuit filed?

§ 33:6 Defending a Product After a Recall

§ 33:6.1 Generally

Even the most airtight recall campaign may result in a finding of liability. If the accident occurs after the recall, the manufacturer may need to defend the integrity of the recall process. If so, the manufacturer will need to prove that it acted reasonably—reaching out as best it could to product users to inform them of the recall. Contacts with registered owners, distributors, and retailers through letters, posters, press releases, and ads in trade and consumer publications are the most common recall notification vehicles. If the recall information did not reach the particular consumer involved in the accident, the manufacturer may need to explain why it did not. If the consumer received the recall information but did not act upon it, the manufacturer may have a comparative fault defense against the claim.
However, many recall-related cases involve accidents that occurred before the recall was commenced. The mere fact of a product recall is often a magnet for lawsuits, regardless of the true cause of the accident. Defending against a recall is challenging, given that most recall letters admit that the product is defective and such evidence leaves a lasting impression on juries.

Whether the accident occurred before or after the recall started, manufacturers can position themselves to make their best defense in court with the following practical strategies.

§ 33:6.2 Manufacturer Strategies

[A] Act Decisively and Expeditiously in Conducting the Recall

Manufacturers are best positioned to defend their products if they can demonstrate that they acted swiftly and affirmatively in proceeding with the recall. It is more difficult to defend products where accidents occurred during the decision-making period. Juries will not take kindly to manufacturers who appear as if they stalled or tried to blame someone else.

[B] Draft the Recall Message with Care

Manufacturers should assume that documents involved with the recall process will be admissible in court and, thus, should draft these with care. The way the recall message is drafted may determine its admissibility in court. For example, manufacturers may choose to characterize the measure as a “product improvement” rather than admit that the product is defective. The manufacturer may explain that the product change is offered to protect against misuse of the product. Even the term “recall” can carry a negative connotation, and some manufacturers choose to substitute the terms “product safety bulletin” in their consumer and distributor alerts. It is important to emphasize in the communication that the safety issue requiring the recall may not exist in every product. In addition, the communication should create an incentive for the user to fix the product to reduce the number of products in the field containing the recall condition.

[C] Pick “Losers” and “Winners”

Prompt evaluation of claims and lawsuits is key. Oftentimes, settlement is the best option when it is determined that the accident at issue was caused by the recall condition. Early evaluation and settlement in these cases will save on costs and attorney fees. On the other hand, manufacturers may take a stand and defend their product when they determine that the accident was not caused by the recall condition. Recognize that, whenever a recall is involved, even a
“winner” of a case can be difficult to defend as evidence of a recall can be very prejudicial, leaving juries with the impression that a product is defective even when it is not.

[D] Weigh Pros and Cons of Excluding Recall Evidence

Sometimes the admission of product recall evidence at trial may be beneficial, and a manufacturer should consider that before immediately moving to exclude. For example, manufacturers may want to admit evidence of a recall to defend against a punitive damages claim. Such evidence would prove the manufacturer’s commitment to safety and the well-being of its consumers. On the other hand, a recall notice can be prejudicial to manufacturers because it can create an assumption that the manufacturer had prior knowledge of a problem and has admitted to a product defect.

Courts are split as to whether product recall evidence is admissible in products liability litigation, but there are several approaches for manufacturers who choose to try to keep the recall from being introduced into evidence. For example, a manufacturer may treat the recall as a subsequent remedial measure that occurred after the accident. Under Rule 407 of the Federal Rules of Evidence, subsequent remedial measures are inadmissible to prove negligence or a defect in a product, although such evidence may be offered for other purposes such as proving ownership, control, or for impeachment.

Manufacturers should also be prepared when plaintiffs argue that recall evidence is admissible as an admission that a product is defective. Barry v. Manglass\(^\text{12}\) and its progeny can be used to counter that argument. The Barry court ruled that a recall letter issued after an accident is not to be construed as an admission that the product is defective, and that it was reversible error to instruct a jury to the contrary. Tober v. Graco Children’s Products, Inc.\(^\text{13}\) provides ammunition for the exclusion of CPSC correspondence notifying a manufacturer that a product is hazardous. In Tober, the Seventh Circuit affirmed the Indiana District Court’s decision to bar evidence of the CPSC’s preliminary determination that a manufacturer’s child swings presented a substantial risk of injury to children. The court rejected plaintiff’s appeal that the CPSC’s notice to the manufacturer was admissible as an adoptive admission by a party-opponent.

Defense counsel may also attempt to exclude product recall evidence on the basis of relevancy, arguing that the evidence is not related to the same product or defect as the component and alleged defect.

\(^{12}\) Barry v. Manglass, 55 A.D.2d 1, 389 N.Y.S.2d 870 (1976).

\(^{13}\) Tober v. Graco Children’s Prods., Inc., 431 F.3d 572 (7th Cir. 2005).
involved in the accident. A Rule 403 objection is also appropriate if such evidence would be unfairly prejudicial or would mislead or confuse the jury.

Even when the recall evidence is admitted, defendants may argue for a jury instruction limiting the weight of the evidence pursuant to Rule 105 of the Federal Rules of Evidence.

Defense counsel must also assess whether it is likely that the recall will remain excluded throughout the trial. If the evidence is admitted in the middle of the trial, the defense may find its credibility impaired. It may be better to deal with the recall up front and to explain why the recall condition did not exist or cause the accident.

**[E] Police Claims Against Manufacturer**

Generally, there is no common law duty to recall a product, but once a recall is undertaken, the manufacturer must act reasonably in implementing the recall. At trial, manufacturers should be careful to police plaintiff’s arguments that are not supported by legal duties. For example, a claim that the recall should have been conducted earlier is simply a variation on the impermissible argument that the manufacturer had a duty to recall the product.

Manufacturers should also seek dismissal of claims that they should have reported incidents to the CPSC or National Highway Traffic Safety Administration (NHTSA). There is no private cause of action for violating CPSC or NHTSA reporting requirements. Manufacturers should use motions *in limine* to exclude recall-related evidence and claims not supported by legal duties.

**[F] Put the Risk of Injury into Perspective**

If the recall letter pertains to a safety condition, manufacturers should provide some context for the jury. Contrast the number of accidents and injuries involving a particular safety condition with the total use of the product to demonstrate the minimal risk involved. Use such factors as the number of products produced each year, the

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16. For more information and authority on evidentiary issues, see DEFENSE RESEARCH INSTITUTE, DEFENDING AGAINST PRODUCT RECALL EVIDENCE AT TRIAL, FOR THE DEFENSE (Apr. 2002).
17. See RESTATEMENT (THIRD) § 11.
number of years the product has been in use, and the total miles or hours of product use per year. In the case of a motorcycle, for example, juries will find an isolated number of accidents and injuries more reasonable when they find that consumers have used thousands of that particular motorcycle over millions of miles.

[G] Tell the Due Care Story

Manufacturers should explain to the jury how they are careful, prudent, and concerned with product safety. Tell the jury about the numerous government regulations and industry standards that the product meets and surpasses, and the continual in-house product testing and risk evaluation the product undergoes. Jurors also should be informed about the many warnings and instructions displayed in product literature, owner’s manuals, on-product warnings, and hang tags. This evidence is needed for the jury to understand why the recall condition was not discovered in the product’s design process and why the product was not defective when it was sold.

[H] Prove Accident Not Due to Recall Condition

A manufacturer’s best bet for winning a case involving a recall is by proving that that recall condition does not exist in the particular product or that the recall condition did not cause the accident. If the recall involves a stuck throttle, then prove that the throttle was not stuck and the accident was caused by operator error. If the recall involves a defective seat belt, then prove that plaintiff was not wearing the seat belt at the time of the accident. Given the prejudicial impact of the recall, the defense will bear the practical burden of persuasion in proving the true cause of the accident.

[I] Prove Another Factor Caused the Accident

Similar to the discussion above, the manufacturer’s recall becomes irrelevant when other factors or conduct is to blame for the accident—point to any after-market modifications to the product and any risk-taking use of the product by the plaintiff. In addition, point to any misuse or inadequate maintenance of the product. The case for defendant is stronger when plaintiff’s conduct violates explicit guidelines in the owner’s manual or in product warnings.

[J] Try the Comparative Fault Case Against Others

Even if the plaintiff can make a case that the product is defective, a manufacturer can mitigate its share of the liability by persuading the jury to allocate fault to the plaintiff or third parties. For example, argue that the plaintiff is at fault for failing to respond to the recall letter or that a third-party user is at fault for ignoring on-product warnings.
§ 33:7 Conclusion

Post-sale duties have significantly expanded in scope and complexity over the years. The common law, while it has differences among the states, is a fairly typical negligence standard. Determining compliance is up to the jury. As a result, manufacturers need to be prepared to analyze post-sale responsibilities and to recall their products even if they have never had to do so in the past. Once a product safety issue arises, it is too late to develop a plan. Preparing for a recall before it occurs can significantly increase its effectiveness and lessen the costs and disruption.

Manufacturers and product sellers also need to be very knowledgeable about all post-sale regulatory requirements for all countries in which the product is being sold. They need to retain expert legal counsel who can help them determine their legal duties and how to comply.

Finally, manufacturers and product sellers need to be prepared to defend the adequacy of the recall or other post-sale program after it takes place. And, if an accident occurs and suit is filed, the manufacturer should retain defense counsel who is experienced with defending cases involving recalled products.