THE DUTY TO RECALL OR RETROFIT -- AN OVERVIEW

by
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Introduction

In a regulatory or products liability context the term "recall" is a term of art. It refers to a very specific device by which a manufacturer, seller, licensee, importer, distributor, retailer, or other entity in the chain of commerce of a product, advises purchasers that certain actions/activities should be undertaken with respect to that product. Of course, a recall can be effected in any number of ways. Recall may consist merely of the addition of a warning to a given product; it could entail repair, replacement or retrofit of that product; or it could require repurchase by the manufacturer and a refund of the purchase price to the buyer/consumer. For purposes of this article, the term "retrofit" is used as a component of "recall" wherein a given product is modified with new parts or equipment not available at the time of original manufacture. The reader should also be aware that this article addresses the duty to recall in a generic sense, without regard to the specific laws of any particular jurisdiction within the United States. For advice as to the current law as it relates to a duty to recall or retrofit within a particular jurisdiction, the reader should seek out competent counsel in that jurisdiction.

Recall Under a Regulatory Scheme

In recent years, recalls have become fairly pervasive and have received considerable attention from the media and various business and consumer groups.[1] Several federal administrative agencies, such as the National Highway Traffic Safety Administration, Consumer Products Safety Commission, Food and Drug Administration, Department of Housing and Urban Development, Federal Trade Commission, Federal Aviation Administration ("FAA"), and other entities, have statutory authority to recall products or take action so that a recall or what amounts to a recall (i.e. an airworthiness directive) can be effectuated. Where the government has ordered a recall, there is no question about the manufacturer's duty to comply -- it must.[2]

As is well known in the aviation community, post-sale warnings from aircraft or aircraft component manufacturers generally take the form of "service bulletins" or "service letters" to

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[1] In 1987, for example, pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, more than nine million passenger cars, multi-purpose vehicles, vans, trucks and motorcycles were recalled. *See* U.S. Department of Transportation, NHTSA, *Safety Related Recall Campaigns for Motor Vehicles and Motor Vehicle Equipment, including Tires* (1988).

[2] *But See United States v. General Motors Corp*, 656 F.Supp 1555 (D.C.C. 1987), 841 F.2d 400(D.C.C. 1988).

product purchasers informing them of safety information acquired by the manufacturer subsequent to the sale. In many cases, if the FAA makes a determination from a review of the information submitted by the manufacturer that the alleged product defect is sufficiently serious to warrant FAA action, an airworthiness directive may be issued.[3] Further, the Federal Aviation Regulations require manufacturers to promptly report serious failures, malfunctions or defects to the FAA.[4] These federal regulations apply to all component part manufacturers who hold Parts Manufacturing Authority (Approvals) and Technical Standard Order authorizations and may apply to other manufacturers as well. A manufacturer's failure to comply with these regulations can result in a finding of negligence as a matter of law in some jurisdictions.[5]

While in most cases a product recall is carried out as the result of a regulatory scheme, it is not always so. There is no requirement that a product must be recalled pursuant to a statute, rule or regulation. At times, a manufacturer, in the interest of safety, might institute a recall in the absence of a regulatory scheme requiring a recall.[6]

One of the factors a manufacturer might weigh in deciding whether to issue a recall is what effect it might have on potential litigation. However, it should be noted that there can be a significant distinction between what constitutes a defect in products liability law and a defect under the various regulatory schemes which might give rise to voluntary or mandatory recall. Merely because a product is recalled for a defect, and even when the manufacturer is compelled to state that a product defect exists in a recall letter, this does not necessarily mean that there is a defect under products liability law. For example, the Consumer Products Safety Commission ("CPSC") issued a disclaimer (printed in pertinent part below), emphasizing that a regulatory

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[3] 14 C.F.R. @ 39.1 (1983).

[4] 14 C.F.R. @ 21.3 (1983).

[5] Gatenby v. Altoona Aviation Corp. 407 App.2d 443 (3d Cir. 1969); Gas Service Co. v. Helmers, 179 App.2d 101 (8th Cir. 1950).

[6] For example, in *Taylor & Gaskin, Inc. v. Chris-Craft Industries* 732 F.2d 1273 (6th Cir. 1984), applying Michigan law, there is a discussion regarding the actions of a boat manufacturer upon learning of a defect in the fuel tanks on one of its models. After receiving its first complaint in April 1974, as well as others, the company in late May 1974 suggested a joint recall to the fuel tank manufacturer, who refused. By December 1974, Chris-Craft began conducting its own investigation and in March 1975 concluded that the corrosion was caused by breakdown of the exterior paint on the fuel tank. The Chris-Craft service department contacted a number of dealers who inspected other fuel tanks and confirmed the corrosion. Almost immediately, Chris-Craft alerted all of its dealers and within two weeks began a voluntary recall campaign to replace the painted tanks with galvanized tanks. The fuel tank manufacturer's response was to threaten a trade liable suit.

defect is not a products liability defect:

> Defect as discussed in this section and as used by the commission [CPSC] and staff pertains only to interpreting and enforcing the Consumer Products Safety Act. The criteria and discussion in this section are *not intended to apply to any other area of the law*.[7] (emphasis added)

Nevertheless, it should be noted that the courts have been divided on this issue and some courts have allowed the recall letter to be used against the manufacturer at the time of trial.[8] As is to be expected, plaintiffs' counsel in products liability cases have attempted to have recall letters admitted into evidence at the time of trial. In *Herndon v. 7 Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. N.M. 1983), cert. denied 104 S.Ct. 2170, a student pilot brought an action against a manufacturer of a light aircraft with an allegedly defectively designed pitch trim switch arguably causing the aircraft to go into a dive and crash. Under the Federal Rules of Evidence Rule 407, the trial court admitted into evidence defendant's service bulletin telling owners of the aircraft to modify a spring coil on the switch to avoid problems of sticking or "hanging up". Here, although the trial court failed to give limiting instructions to preclude the jury from considering the bulletin as evidence of defendant's negligence, the bulletin was found to be admissible on the issue of strict liability. The court found that any error in admitting the bulletin into evidence was harmless since this defendant was required to encourage repairs by issuing an airworthiness directive which sets forth *mandatory* precautions. Interestingly, the trial court refused to admit the airworthiness directives themselves on the ground that the service bulletins had already been admitted, so that the prejudicial effect of the directives outweighed the probative value of repetitive evidence.

Conversely, a recall letter issued by an automobile manufacturer to owners warning of the possibility of rupture of brake hoses, was held not to be admissible, in an action arising out of a crash involving an automobile covered by the recall letter. In *Landry v. Adam*, 282 So.2d 590 (La. App. 1973), the court said that exclusion of the recall letter was supported by the policy consideration that if such evidence were construed as an indication of liability, the manufacturer would be discouraged from repairing a defective condition after an accident. Although it found that the recall letters were relevant to the issue of the existence of the defect at the time the automobile left the hands of the manufacturer, the court held that the public policy considerations dictated the exclusion of the recall letter, particularly since federal law mandated that the recall letter be sent. Interestingly, however, despite its holding that the recall letter was not admissible, the appellate court also held that under the circumstances, the admission of the recall letter into

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[7] 16 C.F.R. §1115.4.

[8] *See Millette v. Radsota* 84 Ill. App. 3d 5, 404 N.E.2d 823 (Ill. App. Ct. 1980) where the court implied that the use of the word "defect" in the recall letter is an admission of a defect in a product liability sense.

evidence by the trial court did not constitute reversible error. The court supported this position by pointing out that an expert had stated that numerous automobiles of a similar model year had contained defective hoses, and the court held that public policy objections to the admission of the letter were not credible since the letter merely constituted "superfluous corroborating evidence".

Accordingly, it is dependent upon the specific facts in any given case as to whether a recall letter will be admitted into evidence. In an aviation context, the *Herndon* case indicates that when there is other evidence of defect, service bulletins or airworthiness directives will most likely be admitted into evidence.

What is the "Duty" Outside of a Regulatory Scheme?

Many courts have refused to recognize the duty to recall in the absence of a statutory requirement.[9] However, other jurisdictions have acknowledged the duty of a manufacturer to pursue post-sale remedies of later discovered defects.[10] What follows is a limited survey of some of the leading cases dealing with a “duty”, or the lack thereof, to recall. However, prior to this is a short discussion regarding the differences between a duty to recall and a duty to warn.

Distinguishing A Duty To Warn

It must be noted that the duty to warn about hazards present at the time a product is sold is distinguishable from a duty to recall or retrofit that product. Courts have widely held that although a manufacturer may have a duty to warn about a dangerous condition in a product it manufactured, it may not have the duty to recall or retrofit that product. *See Estate of Kimmell v. Clark Equipment Co.*, 773 F.Supp. 828 (W.D.Va. 1991); *Kolesar v. Navastar Corp.*, N.D.Pa. No. 90-2155 (Dec. 5 1991). Another court discussing the same issue wrote, “Where a manufacturer believing it has sold a non-defective product, subsequently learned that the product was, in fact, defective when placed into the stream of commerce that manufacturer has a responsibility to warn of the defective product.” *Smith v. FMC Corp.*, 754 F.2d 873, 877 (10th Cir. 1985).[11]

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[9] *See Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 134-35 (8th Cir. 1985); *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1200 (11th Cir. 1986) (noting that the punitive damages claim was dismissed because it alleged a "non-existent duty to recall"); *Moorehead v. Clark Equipment Co.*, No. 86-C-1442 (N.D. Ill. Nov. 25, 1987) (refusing to recognize a duty to recall because it would not be appropriate for a federal court to innovate in an area best left to the state).

[10] *See Braniff Airways v. Curtiss Wright Corp.*, 411 F.2d 451, 453 (2d Cir.), cert. denied, 369 US 959 (1969); *LaBelle v. McCauley Industries, Corp.*, 649 F.2d 46, 49 (1st Cir. 1981).

[11] Courts have imposed a post-sale duty to warn where the evidence proved that propeller design was defective and that remedial action was mandatory. *See LaBelle v. McCaully Industrial Corp.*, 649 App.2d 46, 49 (1st Cir. 1981).

Historically, many courts have couched the breach of the duty to recall within negligence theory. In a very early case called *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), Judge Learned Hand stated that "an actor is negligent if the cost of an omitted precaution is less than the probability of harm multiplied by the extent of the harm caused by the omission." In other words, early courts found a breach where the potential for loss exceeded the cost of the recall campaign. Following are selected cases wherein courts have commented on this subject.

Most modern claims of liability for failure to recall flow from a pre-strict liability negligence case called *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir.), cert. denied, 396 U.S. 959 (1969). In this case, an aircraft crashed after the failure of an engine. In discussing the duty to recall, the *Braniff* court opined:

> In reaching our conclusion that there was sufficient evidence of Curtiss-Wright's negligence to require submission of the case to the jury, we do not find it necessary to adopt the rule of *Noel v. United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1964), that a manufacturer is under a continuing duty to improve its product where "human safety" is involved. It is clear that after...a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty to either remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger.

Accordingly, the *Braniff* court was one of the first to articulate the "duty" of a manufacturer to remedy a dangerous condition which comes to that manufacturer's attention. Whether the *Braniff* court intended “remedy” to mean that a manufacturer merely has a duty to warn of a defect or actually has a duty to take steps to recall/retrofit that product, is unclear and a matter of discussion.

In *Smith v. FMC Corp.*, 754 F.2d 873 (10th Cir. 1985), widows of steel workers brought suit for the wrongful deaths of their husbands which occurred when a steel beam carried by a crane, fell on them. The *Smith* court stated that a manufacturer has a responsibility to warn of a defective product at any time after it is manufactured and sold, if the manufacturer becomes aware of a defect.[12] In the last paragraph of the *Smith* opinion, the court noted as follows:

> [Plaintiffs] contend that the district court erred in charging the jury that "the manufacturer is held to that degree of skill and of knowledge of developments in the art of the industry then existing when the product was manufactured.

[12] The defense verdict in *Smith* was reversed because the trial court erred in submitting an assumption of risk instruction.

> However, compliance with industry standards is not a defense to an action predicated upon manufacturer's product liability." *We hold that...this instruction was not improper under the record herein...inasmuch as a manufacturer has a responsibility to warn of a defective product at any time after it is manufactured and sold if the manufacturer becomes aware of the defect.* (emphasis added)

The *Smith* court did not cite previous authority to support its conclusion that a manufacturer has a continuing duty to warn; nor did the court expound on the breadth of that duty. Notably, the court stopped short of articulating a "duty" to recall. As previously discussed, it must be noted that, today, most jurisdictions do impose a continuing duty to warn. This is especially true in an aviation context and under the Federal Aviation Regulations, where a regulatory duty to recall is mandated in many instances.

Johnson v. Colt Industries Operating Corp., 609 F.Supp. 776 (D.Kan. 1985), *aff'd*, 797 F.2d 1530 (10th Cir. 1986), involved in accidental discharge of a revolver. The *Johnson* court assumed, without discussion, that whether a duty to recall exists is a matter for the jury to decide under negligence principles. The court noted as follows:

> The court finds that no prejudice resulted by plaintiff's introduction of evidence into the case concerning the issue of recall. The court did not specifically instruct the jury that defendant had a duty to recall. The jury was instructed on the issue of due care. Whether a manufacturer has a duty to recall in any given case is incorporated into the concept of due care as it generally applies to negligence actions.

Accordingly, this approach permits the jury to determine what the defendant's legal duty is (i.e. should the defendant have recalled the product?) in a negligence context. In most jurisdictions, this is an issue reserved for decision by the court.

Interestingly, a number of recent decisions have held that no legal duty exists to recall or retrofit a product absent regulatory or statutory directive.

Habecker v. Coperloy Corp., 893 F.2d 49 (3d Cir. 1990), applying Pennsylvania law, involved a forklift operator killed when the forklift he was driving down a ramp overturned. The forklift operator's heirs brought an action against the forklift manufacturer, the forklift's lessee, and the ramp manufacturer. As to the recall/retrofit issue, the court noted as follows:

> [N]o Pennsylvania case has recognized a duty to retrofit, and, indeed, one Pennsylvania case has suggested that such a duty would be inappropriate under established principles of Pennsylvania law. *See Lynch v. McStone & Lincoln Plaza Assoc.*, 378 Pa.Super. 430, 440-41, 548 A.2d 1276, 1281 (1988).

Syrie v. Knoll International, 748 F.2d 304 (5th Cir. 1984) involved an action to recover damages for injuries sustained when the back of the teller stool, on which a bank teller was sitting, fell off and the chair rolled out from underneath her. In this case, the court ruled that under Texas law, a manufacturer did not have a duty to warn of hazards discovered years after the product had been manufactured and sold and had no duty to recall the product to correct the deficiency. The *Syrie* court discussed the alleged negligent failure to recall as follows:

> [T]he Syries have offered no evidence that Knoll regained any measure of control over the chairs after they were marketed in 1971. Because Texas does not impose on manufacturers the duty to warn about or to recall products for which a safer design has been developed, we find that the district court did not err in refusing to instruct the jury on negligence regarding a manufacturer's post-marketing failure to warn or recall.

It is important to note that the *Syrie* court adopted the view articulated in an earlier Texas case (*Bell Helicopter Co. v. Bradshaw*, 594 S.W. 2d 519) (Tex. Civ. App.- Corpus Christi 1979), involving very specific facts wherein a product had come back through a manufacturer's service facility. That court stated as follows:

> [T]he combination of the existence and commercial availability of a superior tail rotor system to that incorporated in a line of helicopters, plus the manufacturer's knowledge that the existing rotor system was being mishandled by owners and operators constituted sufficient evidence for a jury to have found that, after a new tail rotor system became available, the mere presence of the older system rendered the helicopters unreasonably dangerous.

While this holding might be read as a broadening of the standard of care to include a duty to issue warnings *and recall*, once the manufacturer has produced a design known to be safer, the court expressly declined to adopt a rule imposing a continuing duty on a manufacturer to recall or improve the product. The key factor in this case was the fact that after having originally lost control of the helicopter when originally placed in the stream of commerce, the manufacturer *regained* a significant degree of control for that product when the product (the helicopter) was repurchased by an authorized service station of the manufacturer. The court stated that the manufacturer failed in its duty to cause the replacement of the tail rotor system and to properly warn about their continued use; *that duty only arose after it had regained some measure of control over the product that would reasonably permit it to take such measures.*

Another case where a court refused to hold that a manufacturer has a continuing duty to recall (outside a regulatory context) is *Jackson v. New Jersey Manufacturers Insurance Co.*, 166 N.J. Super.448, 400 A.2d 81 (1979). The *Jackson* court noted that the duty to warn of defects discovered after the sale, but present at the time of sale, is not the same as a claim that the manufacturer has a duty to monitor changes in technologies and safety and notify its purchasers

thereof. Similarly, in *Bottignoli v. Ariens Co.*, 234 N.J. Super. 353, 560 A.2d 1261 (1989), the court stated that: "We view a situation in which design standards are updated to be different from discovery that a product believed to be safe actually had a latent danger or design defect before sale...the clear effect of imposing such a duty would be to inhibit manufacturers from developing improved designs that in any way affect the safety of their products since the manufacturer would then be subject to the onerous, and oftentimes, impossible, duty of notifying each owner of the previously sold product that the new design is available for installation, despite the fact that the already sold products are, to the manufacturer's knowledge, safe and functioning properly."

Conclusion

Accordingly, a review of the case law in the area of "recall" law reveals that there are no hard and fast rules. Obviously, regulatory authority should be heeded, but not without question. Some jurisdictions require that, upon learning of a defect, a manufacturer recall/retrofit that product; other jurisdictions leave recall to regulatory authority. What is clear is that when a manufacturer learns of a defect, that manufacturer should seek out competent counsel to research and interpret the applicable regulations, and advise on the requirements under the applicable jurisdiction's laws.