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Admissibility of Recall Documents

In the course of a recall, numerous documents are generated by the recalling firm and the governmental agency overseeing the recall which would be prejudicial to the firm if admitted into evidence in a product liability lawsuit. Unfortunately, the law in this area is conflicting. This article will examine the admissibility of a manufacturer's recall documents and ways in which recalling firms can attempt to prevent the admission of such documents. This article will not address the separate issue of the admissibility of federal or state agency correspondence regarding a recall.

Generally, a manufacturer's recall letters are insufficient to establish that the defect which was the subject of the recall was present in the particular product that caused the plaintiff's injuries. See John M. Kobayashi, "Subsequent Remedial Measures and Recall Letters and Notices," Product Liability 1989, Warnings, Instructions and Recalls, Practicing Law Institute (1989). See also, Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984); Harley-Davidson Motor Co. Inc. v. Daniel, 244 Ga. 284, 260 S.E.2d 20 (1979); Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa 1977). However, recall documents are generally admissible for the purpose of demonstrating that the alleged defect existed at the time the product left the manufacturer. See, Hessen v. Jaguar Cars, Inc., 915 F.2d 641 (11th Cir. 1990); Wright v. General Motors Corp., 717 S.W.2d 153 (Tex. App. 1986).

When plaintiffs attempt to admit recall documents to show that the defect existed at the time a particular product left the manufacturer's possession, general objections of hearsay, relevancy, and authentication can be asserted by the recalling firm. For example, last month the Supreme Court of Utah held that the trial court properly excluded recall documents because the defect which allegedly caused the accident and the defect which was

the subject of a General Motors recall were significantly different. Nay v. General Motors Corp., No. 910244, April 2, 1993.

Generally, defendants which have successfully convinced courts to exclude recall documents rely upon Rules 403 and 407 of the Federal Rules of Evidence. Under Rule 403, evidence which is otherwise admissible can be excluded if its probative value is substantially outweighed by its prejudicial effect. See, Bizzle v. McKesson, 961 F.2d 719 (8th Cir. 1992) (Recall document's minimal probative value was outweighed by the dangers of unfair prejudice to the defendant because of the possibility that the particular product was not subject to the recall).

More problematic is the use of Rule 407 to exclude recall documents. Under Rule 407, evidence of a subsequent remedial measure is not admissible to prove negligence. This rule is predicated on the public policy of encouraging parties to correct defective conditions or products. However, Rule 407 is inapplicable if the recall documents are offered to prove disputed issues other than the existence of a defect, such as ownership, control, or the feasibility of an alternative design.

Although divided, the majority of the federal circuits, pursuant to Rule 407 of the Federal Rules of Evidence, bar the admission of evidence of subsequent remedial measures to prove strict liability. See, Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986); Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463 (7th Cir. 1984); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Joseph v. Harris Corp., 677 F.2d 985 (3rd Cir. 1982); Cann v. Ford Motor Co., 658 F.2d 54 (2nd Cir. 1981) cert. denied 456 U.S. 960, 102 S.Ct. 2036 (1982); Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978) cert. denied 440 U.S. 916, 99 S.Ct. 1234, (1979). But see Farmer v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977); Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322 (10th Cir. 1983), cert. denied 466 U.S. 958, 104 S.Ct. 2170 (1984). State courts are also divided. See, Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516 (1985) cert. denied 303 Md. 471, 494 A.2d 939 (1985) (inadmissible); Ault v. International Harvester Co., 13 Cal.3d 113, 528 P.2d 1148 (1975); Millette v. Radosta, 84 Ill.App.3d 5, 404 N.E.2d 823 (1980) (post accident recall admissible); Carey v. General Motors Corp., 377 Mass. 736, 387 N.E.2d 583 (1979) (admissible); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981); Connelly v. Roper Corp., 590 A.2d 11, 404 Pa.Super. 67 (1991) (subsequent design charges inadmissible while repairs and recalls are admissible); Shaffer v. Honeywell, 249 N.W.2d 251 (S.D. 1976) (admissible); Chart v. General Motors Corp., 80 Wis.2d 91, 258 N.W.2d 680 (1977) (admissible).

In addition to a disagreement as to whether Rule 407 is applicable to strict liability cases, courts are also divided over whether a recall is a subsequent remedial measure. In Chase v. General Motors Corp., 856 F.2d 17 (4th Cir. 1988), the Fourth Circuit affirmed Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980)

which had that recalled documents should be excluded under Rule 407 for both negligence and strict liability claims. In Werner v. Upjohn Co., the court stated the rationale behind the exclusion of such documents:

> The rationale behind Rule 407 is that people in general would be less likely to take subsequent remedial measures if their repairs or improvements would be used against them in a lawsuit arising out of a prior accident. By excluding this evidence defendants are encouraged to make such improvements. It is difficult to understand why this policy should apply any differently where the complaint is based on strict liability as well as negligence. From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvements. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed. The reasoning behind this asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product.

Id. 628 F.2d at 857. Other courts applying similar rationales have also excluded recall documents on the basis that such documents constitute evidence of subsequent remedial measures. See, Vockie v. General Motors Corp., Chevrolet Division, 66 F.R.D. 57 (D.C. Pa. 1975), aff'd mem., 523 F.2d 1052 (3d Cir. 1975); Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); Landry v. Adam, 282 So.2d 590 (La. App. 1973).

Conversely, a number of courts have declined to apply Rule 407 to exclude recall documents. For instance, in Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322 (10th Cir. 1983), cert. denied, 466 U.S. 958, 104 S.Ct. 2170 (1984), the Court of Appeals held that Rule 407 should not apply in strict liability cases:

> Rule 407's exclusion of evidence, however, is inappropriate in actions against defendants who are pursuing activities for which society has decided to assess strict liability. For instance, in strict liability regimes . . . society chooses to place responsibility for the potential losses from producing an unsafe airplane with the manufacturer, regardless of the reasonableness of the manufacturer's design decisions. In actions against such manufacturers, therefore, the jury's sole

(1) It must result from a critical self-analysis undertaken by the parties seeking protection;
(2) The public must have a strong interest in preserving such self-analysis; and
(3) The information must be of the type whose flow would be curtailed if discovery were allowed.

Note, The Privilege of Critical Self-Examination, 96 Harv. L. Rev. 1083, 1086 (1983). While the privilege for critical self-examination is a promising development, the authors are unaware of any case in which it has been applied to prevent recall documents from being admitted into evidence.

Conclusion

A manufacturer's recall correspondence is often a very prejudicial piece of evidence which plaintiffs' seek to admit to prove defect, causation and punitive damages. Although some courts have excluded a manufacturer's recall letters on relevancy grounds, the majority of courts which have excluded recall documents have done so under Federal Rule of Evidence 407 or its state counterpart.

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