

## The aftermath of a product recall: when the dust settles

WHEN FACED WITH A PRODUCT RECALL, energy is focused on the immediate issues: risk assessments determine the nature of the problem and how it has arisen, decisions are taken as to how to address potential safety risks, logistical challenges need to be overcome and regulators are informed. The business and the legal team naturally focus on the 'here and now'.

However, there are also a number of wider considerations of which in-house lawyers need to be aware.

### IMPACTS UPON PROFITABILITY AND SHARE PRICE

Product recalls invariably generate negative publicity, which has an adverse impact on the company's share price, sales and hence overall profits. Unless a recall is handled appropriately business can spiral downwards very quickly.

In addition to the decline in share price, the company will also face additional associated costs such as advertising, repair or replacement products, destruction costs, potential claims from affected customers and possible regulatory fines.

### BRAND REPUTATION

Closely linked to the share price is brand reputation, which can suffer immensely if a recall is handled badly. Damage to brand can be long term and on a global scale, particularly given the speed at which information circulates via the internet and social media.

Recalls will be exploited by competitors, who will commonly step up their advertising to entice those customers who are keen to find a replacement for their previously trusted brand.

Each company will have a different approach to handling a recall, but the best approach is to 'acknowledge and fix'. Openness with customers is key,

quick and efficient action is essential and, quite often, saying 'sorry' goes a long way.

Well-managed recalls have shown CEO's acting fast to acknowledge the problem and attempt to keep customers loyal. For example, in 2008, the CEO for Maple Foods said 'Sorry, it's totally our fault and we'll fix it'. Similarly, in 2007 Mattel's CEO said 'I can't change what has happened in the past, but I can change how we work in the future'.

### REVIEW OF RECALL SYSTEMS

Once the immediate investigations, recall logistics and notifications have been made and the recall is underway, this is a good time to review your recall systems. A post-mortem will identify how effectively procedures worked in practice and highlight areas for improvement. Look at your recall policy and plan, review contractual agreements. Assess whether support systems and resources were adequate and if communication lines worked efficiently. Consider whether training would be beneficial, particularly for the incident management team.

### CIVIL CLAIMS

It is likely that any recall will lead to an increase in complaints and claims – even if they are not concerned with the particular batch or model which is subject to the recall action.

Claimant lawyers commonly trawl through recall notices, trying to gather together groups of aggrieved consumers to bring claims. Sadly, there are many online adverts urging claimants to 'fill in our online claims form for free legal advice'.

It is important to be aware that a safety recall notice can be used as evidence to support a civil claim. If an individual suffers injury as a result of an unsafe product, it is likely that they will plead that a recall notice and any associated warnings amount to an



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admission that the product in question was unsafe.

Whether a product is unsafe or not is a matter for the court to determine as a question of fact. A claimant will still have to prove defect. A judge may be open to argument that the recall was precautionary. However, unless evidence can be produced to substantiate this proposition, a judge is likely to decide that on the balance of probabilities the recall notice was evidence that a defect existed.

One issue that will be examined by the court in relation to any recall or warning is whether that individual would have acted upon that warning had it been seen. This is illustrated in the case of *Coal Pensions Properties Ltd v Nu Way Ltd* [2009], where the court decided that, due to their poor maintenance record, a warning would not have been acted upon by the claimant, even if it had been previously given.

## DISCLOSURE

One thing to bear in mind is the plethora of documentation that is created when the issues surrounding the unsafe product are being investigated and the recall action is underway.

Claimant solicitors commonly request pre-action disclosure of documentation. You can expect that all documents created during the investigations, including notifications to the authorities, will be subject to pre-disclosure requests.

It is also important to remember that all documents created in relation to a recall are at risk of disclosure in any subsequent litigation, including informal e-mails, except those that are privileged. While this should not affect the way in which any recall is conducted, it should be borne in mind as the process progresses. Personnel need to be alerted to the dangers that stray (and commonly unfounded) comments about liability can have on future matters.

There are ways in which disclosure requests can be resisted. Privileged communications

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will not need to be disclosed. Reasons for challenging requests for disclosure also include relevance and proportionality. In addition, it may be the case that a particular product may not have been included in the cohort of products affected in any event.

Of course, if requests for pre-action disclosure are not resolved, the claimant could make an application for pre-action disclosure. If successful, a lot of information regarding the recall may fall into the hands of a claimant's solicitor. Here, the bigger commercial picture needs to be taken into account. There may be a policy decision that the business does not want internal investigations and strategic documentation regarding the recall to fall into the hands of claimant lawyers. Consequently, a decision may be made to close down potential claims at the earliest stage within an overall strategy not to release internal documentation.

Key personnel in the business, those who handle complaints as well as those who may receive formal claims, should be kept informed of the approach to be taken with regard to disclosure and claims strategy.

Insurers should not be forgotten either, as they are likely to have an opinion as to whether large numbers of low-value claims should be settled for commercial reasons.

## FREEDOM OF INFORMATION REQUESTS

One issue that is often overlooked is Freedom of Information requests made to the authorities to whom an unsafe product notification is made, such as Trading Standards or the Food Standards Agency.

Requests for notification information, including risk assessments and notification

documents, could be made by claimant's solicitors, competitors or the media.

There are exemptions from disclosure, and the Freedom of Information Act recognises that, in certain circumstances, it is inappropriate to disclose documents that have been provided in the wake of a recall. For example, exemptions include:

- information relating to investigations;
- law enforcement; and
- information provided in confidence, such as 'commercially sensitive' information.

The obligation to consider and apply exemptions rests with the authorities. The provider of the information has no right to prevent disclosure. It is important to remember that the exemptions do not prevent a public authority from disclosing information. They merely relieve it from the obligation to do so.

## CONCLUSION

In the aftermath of a product recall, it is always advisable to thoroughly assess what has happened and identify what lessons can be learned for the future of the business. The in-house lawyer plays a key role in maintaining value in the company's brand both during the recall process and in reviewing risk management issues over the long term. Being alert to the key issues post-recall will go some way in ensuring that this role is carried out successfully.

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