

PRODUCT RECALLS IN THE UNITED STATES: HOW TO LIMIT YOUR EXPOSURE

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When you begin to sell a product in the United States, the first thing that springs to mind is product liability. While that is a significant concern, an issue which receives less attention – but can be just as expensive – is the recall of a product.

Depending on the nature of your product, there are a number of federal agencies – CPSC, FDA, USDA – that can insist that you conduct a recall for safety reasons. Under the best of circumstances, this is an unpleasant experience. It takes a good deal of time and money to conduct almost any recall. But if your product has been distributed widely, and you haven't taken the proper precautions, a recall can be catastrophic. Not only will you have to pay for your own expenses in recalling the product, but you can be responsible for your customers' expenses and their customers' expenses. Even worse, you can be responsible for their lost profits. But a few steps can dramatically limit this exposure.

Contractual provisions can be a powerful thing in limiting recall expenses or even deflecting them to someone else. If your product incorporates components from another company, make sure that the purchase agreement contains language requiring them to indemnify you for any recalls arising out of a claimed defect in their component. That way, they will be responsible for any claims against you arising out of a recall. But don't limit it to that – require your supplier to add you as an additional insured to their general liability insurance policy. Under some circumstances, this can give you coverage for a product recall claim or at least the possibility of reimbursing you for attorneys' fees involved in any lawsuits.

Don't just use contractual language as a sword against your suppliers; use it as a shield against claims by your customers. The Uniform Commercial Code permits the sellers of products to limit the nature of the claims that can be made in the event of a defective product. These limitations can be extremely important in the recall context. Every one of your sales contracts should have three things: a disclaimer of warranties, a limitation of remedies, and an exclusion of consequential damages. These provisions can limit or eliminate a variety of recall claims and a significant portion of recall damages. And remember to include these provisions even when you don't have a formal contract. All sales documents, including invoices and purchase orders, should have terms and conditions which disclaim warranties, limit remedies, and exclude consequential damages. Accomplishing these things is relatively

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straightforward, but the language must be carefully selected. A small mistake can render these provisions void.

A recall can be a scary thing. But with the proper planning, it doesn't have to be devastating to your business.

