

## Why Companies are Missing the Mark on Product Recalls and Liability

### From the Experts

By Randall Goodden  
Corporate Counsel



**Randall Goodden**

It has become apparent that in today's marketplace, far too many corporate management teams and manufacturers are focused almost solely on increasing sales—and of course profits—and

lastly, if at all, assuring their products are safe and reliable. To further compound that problem, they are also making the false assumption that their employees know what to do with regard to preventing product recalls and product liability lawsuits. This area tends to be misclassified as one of "common sense," with little-to-no need for training. As a result, we are faced with ever-growing upward trends in product recall statistics, record-breaking product liability lawsuit verdicts, and a spike in bankruptcies.

It really doesn't matter if you're a \$5 billion company or a \$50 million one; whether you manufacture consumer products, automotive, medical, industrial, or commercial products; or whether you have a legal department or don't have one—corporations are missing the mark across the board.

This means they will also continue to suffer under the current trends until they begin to pursue training in these issues and do it from the top down. CEOs and corporate vice presidents are making mistakes just like the rest of the

team, with countless news stories that support this claim. I have had GCs bring me onboard at numerous corporations to help educate their management teams on these issues.

Product recalls are at record numbers, and have been growing every year for the past 6-10 years. Whether automotive products, medical devices, consumer products, or for that matter recalls throughout Europe, the problems are getting worse instead of better. Manufacturers of all kinds of products are recalling tens of thousands of their products, sometimes millions of them.

With those key indicators displaying such negative trends, companies involved in industrial, commercial, and other untracked industries are logically facing the same issues.

In my analysis, studying product recalls as they are being announced, one of the largest causes of these recalls is "Design Defects." The product designs were defective from conception, as opposed to cases involving "Manufacturing Defects," where some portion of the product was manufactured defectively. The first category of products contain defects in design that result in injury, accidents, sometimes even death, or that are simply failing to perform up to the expectations of the customer, and the manufacturer ends up having to recall the product.

Once the manufacturer openly admits its product is defective and initiates a recall, it then opens the door to product liability lawsuits and even



class action lawsuits, where negative statistics are climbing in parallel. If the manufacturer doesn't recall the product, the same information will surface through the legal discovery process, and they will subject themselves to possibly huge punitive damage awards.

Here are the primary focus areas that I see as needing improvement:

### **The Design Review Process**

*Don't race your product to the marketplace before a thorough analysis is done by trained employees.*

Every company I work with initially says they regularly hold design reviews on new product designs, but they commonly say this out of ignorance, because they don't fully understand what a thorough design review looks like.

The negative statistics speak for themselves. If manufacturing management teams had new-product development under control and understood what they needed to be doing and looking for, recalls and product liability lawsuits would largely be a thing of the past instead of constantly increasing in number. What the management team fails to understand is how design reviews really need to be handled. Until the CEO recognizes this and takes the time to get everyone trained and on the same page regarding the procedures for design reviews and product safety reviews (please note: there is a difference), manufacturing corporations will continue the recall and product liability lawsuit trends just as they have and will only learn a specific lesson from each major incident that surfaces. That is, if they survive the process.

### **Customer Service and Sales**

*These groups need to pay closer attention to product complaints—and learn to identify the difference between common product failures and red flags warning of potential future catastrophes.*

Usually, before any catastrophic event occurs, the question is whether or not the company is paying adequate attention to early warning signs or "red flags." Such early reports will normally begin to filter in through the customer service

department, account management, sales, distribution, tech support, or warranty return departments, and the question will be whether anyone is paying attention and if this information is getting back to the right individual(s).

At Toyota, chairman Akio Toyoda referred to the problem as "their failure to connect the dots." The company's North American and European sales offices were receiving information about the product failures, but the information wasn't finding its way back to corporate headquarters in Japan and the right departments that could investigate the causes—if there really was a right individual or department.

All of your customer contacts need to learn how to decipher everyday potential product problems and failures from ones that could lead to future serious safety/liability implications. This requires the right training and procedures.

### **Sales and Marketing**

*These groups must recognize the need to make their company and product line look better than the competition, and periodically push the envelope further than they should with unfounded claims.*

For many sales and marketing departments, pushing the envelope or slightly exaggerating the quality or performance of a product is just standard operating procedure. They fail to see any legal repercussions from their efforts to make the sale, especially if they're not putting it in writing. In most cases they have little if any knowledge of "implied" or "express" warranties, and situations can go well beyond even that and enter into marketing fraud.

### **Legal and Purchasing**

*New suppliers are sought out, including Asian suppliers, primarily based on the product they can supply, especially the price, and the time frame for delivery, and these departments bank on their "Terms and Conditions" for protection.*

Offshore suppliers can't be dragged into a U.S. courtroom unless they maintain a U.S. presence, regardless of whether or not your purchase order terms and conditions contained an "indemnification" clause.

In addition, there are other requirements your company needs to consider, such as requiring that all key suppliers anywhere in the world carry a certain level of product liability insurance through an international carrier, and naming your company as "also insured" on their policy. Without this, any U.S. supplier could instantly claim bankruptcy and leave you holding the bag for something they created, and foreign suppliers can just turn their backs on you in a disaster.

### **Dangerous Documents**

*The entire management team needs to receive training on how to recognize such documents—and how to prevent them from being used in the first place.*

The central piece of advice in this huge area of liability is: "Quit sending so many emails." Documents that surface in discovery in every type of legal action, even congressional investigations, tend to hang defendants. And this isn't a middle-management problem. It involves CEOs, as well as product engineers, quality professionals, corporate VPs, test engineers, and members of sales, account management, customer service, and numerous other departments.

We all tend to create records of things we shouldn't, but at the time we do so we feel confident no one outside the company will ever see it. And email allows us to quickly give our two cents or get something off our chest, then move on to other issues, eliminating the time it used to take to type out a memo.

Management teams are going to periodically face serious concerns about this and will have to make some difficult corporate decisions. But they need to learn to make more phone calls to discuss their concerns—and quit putting so much in writing, even though they think hitting "Delete" on their keypads will end any concerns of their emails ever being found. They need to understand why this isn't true.

Lastly, manufacturers need to understand that having certified quality programs, the mere practice of routinely performing failure mode and effects analysis, or any of the other numerous programs in effect to maintain or improve efficiency, will not change the current direction of

the ever-growing product recall trend. It didn't work for Toyota, General Motors, Ford, Firestone, and countless other product manufacturers that have faced monumental recalls and product liability lawsuits. It takes specific training in this field to understand where we continue to miss the mark in manufacturing.

*Randall Goodden is a leading authority on product safety and product liability prevention and the author of several books on these subject, the latest of which is titled **Lawsuit! Reducing the Risk of Product Liability for Manufacturers**. Mr Goodden is also the leading educator to manufacturing management teams worldwide on the topic. You can read more about the author at <http://RandallGoodden.com>.*



# How to avoid a product recall? Test, test, and test some more

**LSE** [blogs.lse.ac.uk/businessreview/2016/06/16/how-to-avoid-a-product-recall-test-test-and-test-some-more/](https://blogs.lse.ac.uk/businessreview/2016/06/16/how-to-avoid-a-product-recall-test-test-and-test-some-more/)

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Randall Goodden's business is advising companies on how to survive product liability lawsuits and recalls. He thinks the recent rise in recalls is being driven by regulators in "overkill mode." But he has blunt advice for businesses seeking to avert the financial and reputational losses that flow from a recall: take pains to avoid putting out a defective product in the first place.

"Every day [companies and regulators] announce recalls, five or six a day," says Goodden, who heads an eponymous Milwaukee-based firm and has written three books on preventing product liability. "I read what's wrong with the product—it could overheat and start a fire, or the circuit board could short out, or the product could break down. My first question [to the manufacturer] is: 'Why didn't you know that?'"

Companies facing the unwelcome surprise of a recall probably didn't test the product sufficiently before launch, Goodden tells freelance journalist Sharon O'Malley in her recent report for SAGE Business Researcher. He is among a growing number of consultants, lawyers—and, yes, regulators—who are counseling manufacturers that rigorous pre-release testing and tweaking are ultimately better for their balance sheets, to say nothing of the health and safety of their customers, than trying to redress problems afterward.

Goodden's message should have a wide audience, because recalls of dangerous, defective or deceptive products are growing, in the United States and around the world. And as the recalls mount, so do the stakes for businesses, as social media platforms and high-tech devices make it ever easier for consumers to vent about poor products. Companies can rise or fall based on how they navigate these dangerous currents.

Take the case of Takata, the Japanese auto airbag maker. Its product contained a propellant made with ammonium nitrate—the same chemical used in the Oklahoma City federal building bomb—that when coupled with high temperatures and moisture caused the airbags to rupture and spew metal fragments like shrapnel. The statistics tell the unlovely tale: 10 people dead since 2009, 28.8 million airbags already recalled and another 35 million to 40 million ordered by regulators, a \$200 million civil penalty imposed by the U.S. National Highway Traffic Safety



Administration (NHTSA).

Due in part to the airbag problem, auto recalls in the United States set a record in 2015 for the second year in a row, according to NHTSA. And the automakers are hardly alone. In the U.S., recalls of pharmaceuticals, food products, and consumer goods other than autos and food have all trended upward in recent years, according to the relevant federal agencies. In Europe, the number of safety notifications and recalls of dangerous non-food products has risen steadily every year except one since 2003, according to the European Union's Rapid Alert System.

O'Malley writes that a complex interplay of factors is causing this trend:

Both government regulators and consumers are getting tougher on manufacturers selling products that kill, harm or jeopardize users.

The internet, cellphones and social media have made it easier to report a malfunctioning device or a misprinted product label to the government and to disseminate that complaint to a massive audience.

Imports are increasing of products and components from countries where safety standards are less rigorous than those in the United States, making an already complex supply chain even more cumbersome to manage.

The greater U.S. government scrutiny is in part a reaction to a rolling scandal over dangerously defective imports from China that began in 2007. It eventually encompassed lead-tainted toy trains, chemically contaminated baby formula and pet food, fire-prone coffee makers and defective drywall, among other products. Congress responded in 2008 and again in 2011 by enacting legislation strengthening the powers of regulators, and they have followed suit.

"We're seeing the government is being more aggressive, more diligent," regulatory compliance lawyer Katherine Ann Cahill, president of Cahill Consultants in New York, told SAGE Business Researcher. "They're conducting more robust investigations, and they're bringing the C-suite into those investigations a lot sooner than they had before."

And there's reason to believe that some companies are taking to heart Goodden's advice to test first, market later. One of the things driving the rise in recalls is the fact that manufacturers have increased their in-house testing of products and are being more diligent about complying with government rules for self-disclosure of health and safety threats, says Jonathan Bernstein, president of Bernstein Crisis Management.

"Companies are more aware that if they get caught, their legal and reputational risk is much higher than it might have been in the past," says Bernstein, whose California-based firm advises companies facing reputational threats.

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**Ken Fireman** is managing editor for SAGE Business Researcher, which delivers deep dives on contemporary business issues to students and faculty twice a month. He was previously a senior editor for economics and politics at Bloomberg News and a White House correspondent, national political reporter and Moscow bureau chief for Newsday. @kfireman1

