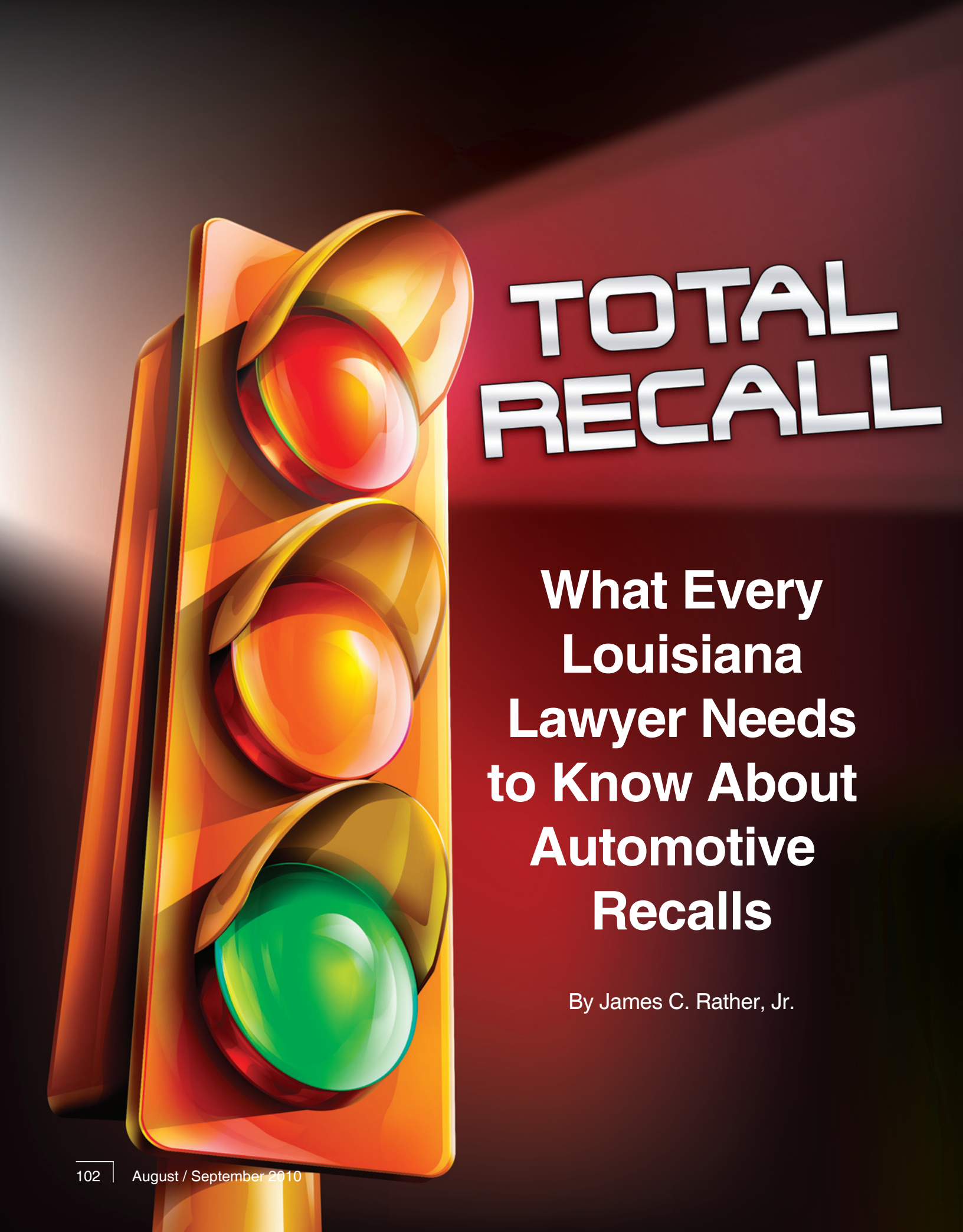

TOTAL RECALL

What Every Louisiana Lawyer Needs to Know About Automotive Recalls

By James C. Rather, Jr.

Nationwide recalls present unique challenges for product manufacturers and the attorneys who represent them. Removing millions of vehicles from the garages of once-loyal customers can place a tremendous strain on a corporation's bottom line. The short-term costs associated with recalling a product can be staggering. Notifying consumers of the recall, pulling products off of the market and, where appropriate, repairing products already in commerce can cost hundreds of millions of dollars.

The long-term effects of product recalls are incalculable. If handled improperly, recalls can shake consumer confidence in a product's safety and reliability. Consumers are typically a forgiving bunch. Proactive manufacturers that aggressively manage recalls can win back consumers' trust in their products. Through the years, many reputable product manufacturers have navigated unscathed through highly publicized recalls. When recalls are mishandled, however, generations of consumers may lose faith in a product.

These same consumers may end up serving on juries hearing class-action lawsuits where the safety and reliability of recalled products are the central issues for their determination. Attorneys representing manufacturers will seek to exclude evidence of the recall, while the claimants' attorneys will attempt to offer them as a corporate admission of product defects. Those who practice in the field of automotive products liability routinely engage in these evidentiary battles. Many more battles are looming over the horizon.

Even casual media observers have been unable to escape the recent news of Toyota's automotive recalls. Since the beginning of the year, Toyota has recalled roughly 6 million vehicles in the United States alone.[1] However, automotive recalls are not rare. Following Congress' enactment of the National Traffic and Motor Vehicle Safety Act of 1966,[2] manufacturers have recalled more than 390 million vehicles, 46 million tires, 66 million pieces of motor vehicle equipment and 42 million child safety seats.[3] In the past three years, there have been 524 recalls involving 23.5 million vehicles.[4] Most consumers, and, more importantly, potential jurors, have received in the mail recall notifications warning of potential defects and advising of the manufacturer's recommended remedies. For this reason, having a basic understanding of automotive recalls will benefit any attorney with an active trial practice.

This article will address three topics relating specifically to automotive recalls:[5]

► the statutory authority giving the National Highway Traffic Safety Administration (NHTSA) recall power;

► procedures for voluntary and involuntary automotive recalls; and

► evidentiary considerations involving automotive recalls.

Statutory Authority Granting NHTSA Recall Power

Seeking "to reduce traffic accidents" by regulating the safety of motor vehicles, Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act).[6] In 1994, the Safety Act was repealed, reenacted and recodified without material change as part of the National Highway Traffic Safety Administration Authorization Act.[7] Congress delegated its authority to administer the Safety Act to the Secretary of Transportation, who subsequently re-delegated her administrative duties to NHTSA.[8]

NHTSA possesses the statutory authority to regulate foreign and domestic automobile manufacturers, distributors, sellers and suppliers.[9] A major component of its regulatory authority is its power to issue recalls. NHTSA's recall power is aimed at ensuring "motor vehicle safety." The Safety Act defines motor vehicle safety, in part, as:

> the performance of a motor vehicle... in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction or performance of a motor vehicle, and against the unreasonable risk of death or injury in an accident...."[10]

NHTSA's recall power extends to vehicles that contain defects relating to motor vehicle safety, or vehicles out of compliance with Federal Motor Vehicle Safety Standards (FMVSS).[11] First promulgated in 1967 to address seatbelt performance and safety, FMVSS has grown into a comprehensive regulatory scheme setting minimum safety and performance standards for various vehicle systems.

Vehicles that do not comply with FMVSS are subject to mandatory recall.[12] Vehicles in compliance with FMVSS may still be recalled if NHTSA determines they contain safety-related defects. NHTSA publications offer guidance about the types of defects it considers to be safety-related, and those it does not.[13] Examples of safety-related defects include:

► accelerator controls that may break or stick;

► wiring system problems resulting in fires or loss of lighting;

► airbags that deploy under unintended circumstances;

► seats or seatbacks that fail (yield) under normal conditions; and

► critical vehicle components that break or fall off, causing potential loss of vehicle control or injuries to persons inside or outside the vehicle.

Defects NHTSA does not consider safety-related typically involve systems or components designed for passenger comfort and convenience, such as air conditioner and radio problems, excessive oil consumption and cosmetic paint blemishes.

Procedures for Automotive Recalls

Recalls are triggered in one of two ways. NHTSA may initiate a mandatory recall or the manufacturer may initiate a voluntary recall.

NHTSA will only order a mandatory recall after a thorough investigation of an alleged safety defect. The Office of Defects Investigations (ODI) is the arm of NHTSA charged with the responsibility for investigating vehicle defects.[14] ODI receives complaints in a variety of ways. Consumers are encouraged to notify ODI of potential safety concerns by means of mail, telephone or Internet.[15] Engineers and other experts within ODI review each complaint and, when they observe a developing safety trend, initiate a formal investigation. There is no established number of reports that ODI must receive before launching an investigation.

ODI's investigative process consists of four parts: screening, petition analysis, investigation and recall management. Screening involves the review of customer complaints and defect information manufacturers submit voluntarily and as required by the Transportation Recall Enhancement

Accountability Documentation (TREAD) Act.[16] If ODI detects a safety-related trend during screening, a formal investigation will be opened. Any person or organization may also petition ODI to open an investigation. Consumer advocacy groups frequently file petitions asking ODI to investigate vehicles they deem dangerous. Once ODI elects to open an investigation, it first conducts a preliminary evaluation by reviewing its own data as well as technical information manufacturers submit regarding the alleged defect. Manufacturers and their engineers become actively involved in ODI evaluations by submitting their own research, testing and field data, defending the integrity of their products.

Many defect investigations proceed no further than the preliminary evaluation stage.[17] If, however, ODI determines the problem warrants additional study, it may commence an engineering analysis. Building on information obtained during the preliminary evaluation, the engineering analysis undertakes additional testing, surveys and inspections to study the alleged defect. ODI often sends a series of detailed questions and document requests to the manufacturers. In response, manufacturers are given the opportunity to submit the research and testing conducted by their internal engineers and safety officials. The engineering analysis process can last as long as one year from the date of inception.

If ODI concludes that a safety-related defect does not exist, it will issue a "resume" or closing report and terminate the investigation. If ODI believes the data demonstrates a safety defect, engineers prepare a brief, which is presented to a panel of automotive safety experts for peer review and comment. The panel can either disagree with ODI's recall recommendation or, if it believes a safety-related defect exists, it can recommend that ODI send a "recall request letter" to the manufacturer ordering it to notify its customers of the defect or non-compliance and, where appropriate, remedy the defect.

Proactive automobile manufacturers may issue voluntarily recalls when their internal testing data evidences a potential safety defect. Although manufacturers must notify NHTSA of a potential defect within five working days of its discovery, federal regulations do not prescribe a specific amount of time within which manufacturers must issue a recall.[18] Rather, recall notifications must be issued "within a reasonable time" after the manufacturer first identifies the problem. Typically, manufacturers initiate a voluntary recall by filing a "Part 573 Report," notifying NHTSA of its concerns and proposing a remedial program.[19]

Federal regulations tightly govern what information manufacturers must include within their recall letters.[20] Generally speaking, recall letters must provide vehicle owners with detailed information about the defect or non-compliance, the risk to motor vehicle safety, and the measures that must be taken to remedy the problem.[21] Regulations dictate the precise language manufacturers must use both in the letter and the envelope, even prescribing the font size of certain mandatory statements.[22]

The Safety Act and the applicable regulations also govern what manufacturers must offer consumers to remedy recalled vehicles.[23] When a vehicle is recalled, manufacturers must offer one of the following services, free of charge: repair the vehicle, replace the vehicle with an identical or reasonably equivalent vehicle, or refund the purchase price, less a reasonable allowance for depreciation.[24] Remedial action must be taken within a reasonable time, not to exceed 60 days after the vehicle is returned for service or replacement.

Companies reluctant to carry out mandatory recalls are subject to civil enforcement actions in federal court.[25] Those found in violation of recall-related procedures are subject to stiff civil and criminal penalties.[26] Under certain circumstances, NHTSA is authorized to seek penalties of $6,000 per violation, up to $16,375,000.[27] A separate violation is deemed to have occurred for each vehicle found to be in violation of the Safety Act's recall procedures.

Evidentiary Considerations

In any trial involving a recalled automobile, the central evidentiary dispute will inevitably focus on the admissibility of the recall. Counsel representing the defendant-manufacturer will typically attempt to exclude evidence of the recall, arguing that it is an inadmissible subsequent remedial measure by operation of La. C.E. art. 407 and Fed. R. Evid. 407. Louisiana's art. 407, which tracks the federal version in large part, excludes from trial evidence of "measures" taken "after an event" which "if taken previously, would have made the event less likely to occur," when that evidence is introduced to prove "negligence or culpable conduct in connection with that event." However, the article specifically permits the introduction of such evidence if "offered for another purpose, such as proving... knowledge, control, or feasibility of precautionary measures, or for attacking credibility."[28]

Louisiana jurisprudence regarding the admissibility of automotive recalls is not well developed. Many of the cases discussing this issue were decided before the enactment of art. 407 and the Louisiana Products Liability Act (LPLA).[29] However, several core principles are emerging in the case law. First, recall letters issued *after* an accident or event are generally treated as subsequent remedial measures and are, therefore, generally found to fall within the scope of art. 407.[30] Recalls initiated before an accident or event are generally found to fall outside the scope of art. 407 because they do not constitute *subsequent* remedial measures.[31]

Second, an increasing number of courts appear willing to admit evidence of recalls and post-accident investigations by relying on the exceptions identified in Louisiana's art. 407 and Fed. R. Evid. 407. One Louisiana court upheld the admissibility of the defendant's post-accident investigation because the evidence was used at trial to attack the defendant's credibility and undermine its affirmative defenses, and not to "prove negligence or culpable conduct."[32] Under this expansive interpretation of the exceptions, skilled trial counsel would presumably be permitted to introduce evidence of subsequent remedial measures any time a product manufacturer argued as an affirmative defense that its product was not unreasonably dangerous as defined in the LPLA.

In a complex breach of contract claim involving an industrial water-purifying system, the United States 5th Circuit recently held that evidence of subsequent remedial measures "can be introduced on the issue of causation if that is in controversy."[33] The same panel also observed that evidence of subsequent remedial measures is admissible in breach of warranty claims, because Fed. R. Evid. 407 only excludes evidence of measures taken to make an "injury or harm less likely to occur."[34] Because injury and harm are not issues in contractual disputes involving warranty breaches, the court found Rule 407 inapplicable and evidence

of subsequent remedial measures admissible. Though this ruling appears limited to contractual disputes where there is no "injury or harm," vehicle manufacturers with recalled products are often sued under breach of contract theories such as redhibition, fraud and breach of express warranty. Practitioners, particularly those in federal court, should be mindful of this broad jurisprudential interpretation of the subsequent remedial measures doctrine.

The third emerging trend centers around the meaning of the term "measures." As discussed above, the rule excluding evidence of subsequent remedial measures only applies when "*measures* are taken, which, if taken previously, would have made the event less likely to occur."[35] Evidence of a party's analysis or investigation of its product, even if conducted after an incident or event, could be deemed admissible to prove negligence or culpable conduct.[36] "The fact that the analysis may often result in remedial measures being taken... does not mean the analysis may not be admitted."[37] Stated another way, "post accident investigations would not make the event 'less likely to occur,' only the actual implemented changes make it so."[38]

There are significant implications to this interpretation of the term "measures." Even if a vehicle manufacturer successfully excludes the recall from trial as a subsequent remedial measure, evidence of its underlying investigation and analysis might ultimately be admitted.

Case-specific factors will obviously determine the ultimate outcome of any evidentiary dispute. However, the message of the above cases is that, in personal injury litigation pending in state court, evidence of an automobile manufacturer's post-accident recall is likely to be held inadmissible as a subsequent remedial measure. But the exceptions may end up swallowing the rule, in many instances.

Conclusion

Despite the recent news accounts highlighting the experience of certain foreign manufacturers, automotive recalls are common occurrences. Hundreds of millions of automotive products have been recalled over the past 45 years. Neither automobile manufacturers nor consumers should view recalls as proof of systemic failure. Rather, successful recalls demonstrate that the system designed to ensure vehicle safety is working. However, manufacturers unaware of the challenges involved in executing a successful recall campaign potentially face daunting challenges with investors, while their lawyers face challenges of equal measure in the courtroom.

FOOTNOTES

1. "NHTSA Launches Probe Into Timeliness of Three Toyota Recalls," National Highway Traffic Safety Administration, Press Release, DOT 29-10, Feb. 16, 2010.

2. The National Traffic and Motor Vehicle Safety Act (Safety Act) was originally enacted in 1966 and later codified in 1970 as 15 U.S.C. §§ 1381 *et seq*. It is now recodified as 49 U.S.C. §§ 301, *et seq*.

3. "Motor Vehicle Safety Defects and Recalls: What Every Vehicle Owner Should Know," DOT, HS 808 795, March 2006, at *http://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf.*

4. Statement from U.S. Transportation Secretary Ray LaHood on Toyota's Agreement to Pay Maximum Civil Penalty, National Highway Traffic Safety Administration, DOT 71-10, April 19, 2010.

5. Various federal agencies possess the power to recall products under their jurisdiction. Though the general principles may be the same, this article will focus exclusively on automotive recalls.

6. Pub. L. No. 89-563, 80 Stat. 718, originally codified as 15 U.S.C. §§ 1381, *et seq*.

7. *See*, Pub. L. No. 103-272, 108 Stat. 745, 1379, 1385, and 49 U.S.C. §§ 301, *et seq*.

8. *See*, 49 C.F.R. §§ 1.50(a), 501.2(a)(1)(2005).

9. *See generally*, 49 U.S.C. §§ 30,102, 30,112 and 30,118.

10. 49 U.S.C. § 30,102(a)(8).

11. 49 U.S.C. § 30,118(a), and 49 C.F.R. §§ 571, *et seq*. (Federal Motor Vehicle Safety Standards).

12. 49 U.S.C. §§ 30,118(a)-(b).

13. "Motor Vehicle Safety Defects and Recalls: What Every Vehicle Owner Should Know," DOT, HS 808 795, March 2006, at *http://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf.*

14. *See generally*, 49 C.F.R. §§ 554.5, *et seq*.

15. *www.safecar.gov.*

16. The Transportation Recall Enhancement Accountability Documentation Act, Pub. L. No. 106-414 (Nov. 1, 2000), was enacted in response to the Ford/Firestone experience. Its purpose is to enhance the flow of information between manufacturers and NHTSA regarding potential vehicle defects. Sections of the TREAD Act were later codified into the Safety Act and the applicable C.F.R. *See generally*, 49 U.S.C. § 301, *et seq*., and 49 C.F.R. §§ 573 and 579.

17. Under certain circumstances, the LPLA imposes a duty on product manufacturers to issue post sale warnings concerning certain dangerous characteristics even if those characteristics do not constitute "defects" or "unreasonably dangerous" conditions as defined by the Act. *See*, La. R.S. 9:2800.57(C).

18. *Note*, 49 U.S.C. § 301, *et seq.,* and 49 C.F.R. §§ 573.6 contain certain elements of the TREAD Act imposing on manufacturers strict, time-sensitive reporting requirements once they become aware of potential safety defects here or abroad. NHTSA recently imposed a substantial penalty upon one foreign manufacturer for violating this reporting provision.

19. 49 C.F.R. § 573.6 (2005) and 49 C.F.R. § 573.5 (1998) (reporting requirements for defects and non-compliance between 1996 and 2002).

20. 49 C.F.R. § 577.

21. *See*, 49 U.S.C. § 30,119 and 49 C.F.R. § 577.

22. 49 C.F.R. § 577.5.

23. 49 U.S.C. § 30,120.

24. *Id.*

25. 49 U.S.C. § 30,121.

26. 49 U.S.C. §§ 30,165 and 30,170.

27. 49 U.S.C. § 30,165 and 49 C.F.R. § 578.6. On April 19, 2010, Toyota agreed to pay the maximum fine for failing to notify NHTSA of a safety-related defect. *See generally*, nn. 4 and 18, *supra*.

28. Attorneys who practice in federal court should note the critical distinctions between Fed. R. Evid. 407 and La. C.E. art. 407, particularly involving product liability matters, and the classification of "events" (Louisiana) versus "an injury or harm" (federal).

29. There is a line of cases in Louisiana and elsewhere holding that recall letters are admissible in "strict product liability" matters. *See generally*, Toups v. Sears, Roebuck and Co., Inc., 507 So.2d 809 (La. 1987); Hefner v. Wilson Inn, Inc., 95-0485 (La. App. 1 Cir. 11/9/1995), 665 So.2d 9; Donahue v. Phillips Petroleum, Co., 866 F.2d 1008, 1013 (8 Cir. 1989); Rinker v. Ford Motor Co., 567 S.W. 2d 655 (Mo. App. 1978). The Louisiana Products Liability Act, La. R.S. 9:2800.51, *et seq.*, enacted in 1988, eliminated the notion of strict products liability in Louisiana.

30. *See,* Northern Assurance Co. v. Louisiana Power & Light Co., 580 So.2d 351 (La. 1991); Landry v. Adam, 282 So.2d 590 (La. App. 4 Cir. 1973); Rutelege v. Harley Davidson Motor Co., 2010 WL 445498 (C.A. 5 (Miss.)); Bryan v. Emerson Electric Co., Inc., 856 F.2d 192 (6 Cir. 1988).

31. *See*, Figueroa v. Boston Scientific Corp., 2003 WL 21488012 (S.D.N.Y.).

32. Thornton v. National Railroad Passenger Corp., 2000-2604 (La. App. 4 Cir. 11/14/2001), 802 So.2d 816.

33. Brazos River Authority v. GE Ionics, Inc., 469 F.3d 416 (5 Cir. 2006).

34. *Id*. at 428-429. *Note*: La. C.E. 407 refers to "event."

35. La. C.E. 407.

36. *See generally*, Brazos (*citing*, Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc., 972 F.2d 6 (1 Cir. 1992)).

37. Prentiss & Carlisle, *supra*, 972 F.2d at 9.

38. Brazos, *supra*, 469 F.3d at 430, citing Weinstein, *Federal Evidence* (2d ed. 1997) § 407.06[1] ("It is only if changes are implemented as a result of the tests that the goal of added safety (under Rule 407) is furthered.")

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