

Admissibility of Recall

By: Gary W. Hart, Jackson Kelly PLLC

For Law360's March 2010 Products Liability Guest Column

Companies who issue voluntary recalls are naturally apprehensive about whether the recall notices may be admitted into evidence to prove a manufacturing defect in product liability cases. The Fifth Circuit Court of Appeals recently addressed this issue in a non-published decision holding voluntary recall notices are not admissible under Rule 407 of the Federal Rules of Evidence because they are “subsequent remedial measures.”

In Rutledge v. Harley-Davidson Motor Co., No. 09-60533, 2010 WL 445498 (5th Cir. Feb. 3, 2010), the plaintiff, an experienced rider, was seriously injured when she was unable to steer her new motorcycle through a curve and crashed. She testified that the weather was clear, the roadway was unobstructed, she was within the speed limit at the time the accident occurred, and the motorcycle failed to steer when she attempted to turn right.

About a month after the accident, Harley-Davidson mailed two recall notices to Plaintiff, indicating that in certain circumstances the voltage regulator of some of its motorcycles could come into contact with the front fender, impeding the driver's ability to steer. Plaintiff was advised that she had purchased one of the model motorcycles that may have this condition.

Rutledge sued Harley-Davidson on claims of negligence, breach of implied warranty, and strict products liability. Harley-Davidson moved for summary judgment, arguing that Rutledge had failed to prove that a specific defect existed in her motorcycle. In support, Harley-Davidson submitted an affidavit from an engineering expert who examined photographs of the motorcycle after the accident and found no signs of contact between the fender and the

voltage regulator, and therefore concluded the condition in the recall notice did not cause the Rutledge accident.

To oppose summary judgment, Rutledge argued that the steering mechanism in her motorcycle was defective and relied solely on the recall notices and her own account of the accident. Rutledge did not produce any expert testimony to oppose the summary judgment motion, perhaps because the actual motorcycle was unavailable for physical inspection, as her insurer had declared it totaled, and sold it for salvage.

The District Court found the recall notices were inadmissible as subsequent remedial measures under Federal Rule of Evidence 407, which states:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

The Court noted that Harley-Davidson issued the recall notices after the accident, and, even if the defect had in fact caused the injury, concluded the notices would have made injury “less likely to occur.” Thus, the notices fell “squarely within the ambit of Rule 407,” especially in light of the public policy rationale behind the Rule, that the threat of litigation should not discourage manufacturers from taking steps designed to enhance safety and otherwise protect the public. Because Harley-Davidson’s voluntary recall was precisely the sort of behavior that Rule 407 intended to encourage, the Court concluded the recall notices were inadmissible to prove a defect.

The District Court further noted that even if the recall notices had been admissible, the notices did not clearly demonstrate that Rutledge’s motorcycle suffered from the alleged defect. According to the Court, expert testimony could have been utilized to match the

recall condition with the alleged defect that Rutledge claimed caused the accident. Absent such evidence, the Court held that Rutledge failed to satisfy her burden of proof, and granted summary judgment in favor of Harley-Davidson.

On appeal, the Fifth Circuit affirmed the dismissal. Applying an “abuse of discretion” standard, the Court found that “had the plaintiff received the notices before the accident and taken the motorcycle to the dealership for repair, it might have made her injury less likely to occur.” Thus, the District Court “correctly identified the recall notices as subsequent remedial measures under Rule 407.”

Rutledge highlights the important role that timing plays when considering the admissibility of a voluntary recall notice. When, as in Rutledge, the voluntary recall notice is sent *after* an accident, the notice may not be admissible at a trial under Rule 407 and its introduction should be resisted.

Gary Hart is a Member of Jackson Kelly PLLC. His practice is focused on the representation of defendants in trial and appellate litigation in both state and federal courts, with an emphasis on product liability cases (automotive, medical device, and general), employer liability actions (deliberate intent / Mandolidis cases) and the defense of trucking companies, as well as the defense of personal injury actions and general civil litigation.