

# Partner spotlight

## Supply chain claims in product recalls



*Sedgwick's brand protection Spotlight features insight and perspective from our strategic partners across industries on safety issues that have the potential to influence a company's view on product-related crises and business operations.*

Welcome to the latest edition of Spotlight. Spotlight is our way of sharing insights and perspectives from our strategic partners – lawyers, insurers, risk managers and crisis communications experts.

In this edition, we are joined by David Kidman, a Partner at Simmons & Simmons LLP, who shares his thoughts on supply chain claims in product recalls and provides tips for companies to maximize their recovery of losses.



**David Kidman**  
*Partner*  
*Simmons & Simmons LLP*

### About David Kidman

Mr. Kidman is a Partner in Simmons & Simmons' London office where he specialises in resolving product liability disputes and advising on product recalls. He is experienced in handling recovery claims both domestically and internationally as well as regulatory investigations, compliance matters, insurance policy claims, group litigation and jurisdictional disputes.

He is ranked in Chambers & Partners and Legal 500 for Product Liability: Defendant work. He has particular expertise advising producers, distributors, retailers and their insurers in the life sciences, technology, food & drink and retail sectors, but has also counseled on automobiles,

toys, electrical goods and other product categories. He is experienced in robustly defending claims and navigating complex expert evidence, while upholding the reputation of his clients and finding commercially sensible outcomes.

### **After a product recall is announced, when should companies be thinking about recovering damages along the supply chain?**

When a product is recalled, manufacturers' top priority is how to protect consumers and conduct the recall safely and effectively. However, in parallel they should consider how to mitigate damage to their reputation and determine whether parties in the supply chain may have contributed to circumstances around the recall. The earlier a company thinks about recovery, the better its chances of minimising financial exposure and ensuring that those responsible for the recall are held to account. Often, initial steps can be taken on day one.

### **What is the first step companies should take in determining responsibility?**

The most important thing actually happens before the recall. Companies should have a Product Safety Management Plan (PSMP) and a Product Safety Incident Plan (PSIP) in place before a crisis hits. The British Standards Institution published guidance on how to devise a PSMP and a PSIP, available [here](#). These plans will help companies engage with their supply chain partners quickly when the worst happens and help them understand the relative responsibilities of each party. Ideally these plans should be tested at least once a year.

### **How important are legal concerns when assessing responsibility?**

Very important. Companies need to locate, safeguard and carefully catalogue affected products. They must fully understand the relevant contract terms with other parties in the supply chain such as commercial customers and commercial suppliers. Does the contract require that the supplier comply with strict product specifications or express terms regarding the quality or safety of the products? Or is it implied that the products will be of satisfactory quality but not expressly stated? Effective contract terms that seek to limit a company's own liability, secure an indemnity for loss from others and compel disclosure of key information from others are a great aid in supply chain claims and bring a degree of certainty to the likely legal outcome.

### **Should you always assume the worst from your supply chain partners?**

Absolutely not, especially if these are companies with whom you've had a long relationship. Where possible, make others in the supply chain complicit in any decision to take corrective action, or at least give them the opportunity to object. Looping them in early makes it harder for the supplier to argue that corrective action was not justified. Pay attention to what the suppliers say about the safety of the product and the potential reasons for failure. To maintain a good collaboration, give supply chain partners an opportunity to see the draft recall notice so they are aware of what is about to be said to consumers and the public. However, remember that your own free-standing obligations under relevant regulations means that you must independently assess risk and take action. Decision-making should be informed, but not dictated by, the views of others in the supply chain.

Furthermore, you should take a pragmatic approach to the recovery of loss. Is there a positive commercial relationship between the parties that makes it likely that some negotiation may be possible to preserve future trading? Is the supplier based in a remote jurisdiction? If so, it is important to have a network of local experts in that region who can promptly and cost-effectively determine whether the target has significant assets, and whether the target may try to liquidate or move those assets to make them inaccessible.

### **What actions should you expect from other companies involved?**

Others in the supply chain rarely admit liability expressly. Be prepared to set out the legal basis of your claim and the extent of your loss in formal terms. It might be beneficial to engage an independent expert witness early in the process to help determine the root cause of why particular products have failed. That expert can give you authoritative expert opinion that can help persuade another party in the supply chain of your position.

### **What is the threshold that requires a recall?**

It is a common refrain that a supplier will point to pre-release regulatory compliance of a product as evidence that the products were not defective, while wilfully ignoring multiple failures in actual use. It is important to recognise that the threshold that obliges a company to commence a recall can be lower than the threshold required to establish that a product is defective. In fact, case law in England provides a strong indication that the fact of a recall is not itself determinative of there being a defect. The actual defect must still be proven, on balance of probabilities.

### **What records should companies be mindful to keep during a recall?**

It is important to retain a representative sample of recalled products for potential future testing, particularly if others in the supply chain are unwilling to admit that the product was defective or that corrective action was justified. In addition, isolate and retain any products that have been returned to you where a civil claim may be pursued by the consumer. This would include incidents where the consumer has complained of injury or damage of property. What constitutes a "representative" sample depends on the number of returned products, whether there are potential differences between batches, the size of the product, the cost of storing it and the seriousness of harm alleged.

In addition, you should record and retain evidence of your loss, as it unfolds. It may be an unwelcome additional task during a crisis, but it will be far less time consuming and much more accurate to track your loss in real-time, compared to a few weeks or months later. Some losses, such as storage costs or postage and packaging to write to affected customers, are easy to quantify. But other losses, such as management time devoted to an incident or loss of future sales due to reputational damage, are much more difficult to determine. Forensic accountancy evidence may be needed to determine damages. That requires consideration of whether to incur the cost of such expert evidence.

### **What should be considered in terms of consumer compensation?**

Companies should implement a clear and consistent plan for compensation to affected consumers. In many cases, goodwill gestures of refunds, gift vouchers, replacements and/or compensation are criticised by suppliers as having been unnecessary, and not recoverable. However, such measures are typically effective in mitigating loss, both in terms of reducing the number of matters that escalate into formal claims and by reducing damage to reputation. However, being overly generous and/or inconsistent with goodwill gestures can lead to irrecoverable loss.

### **How should companies plan for consequential loss?**

“Consequential” loss, defined as loss that is relatively unusual and not always predictable or within the supplier’s knowledge, is often more difficult to recover. It is sometimes subject to express exclusion under contract terms. For example, the recalled product may have been the central product in a new brand launch. However, the recall might have irreparably damaged consumers’ trust such that the whole brand must be terminated. The anticipated loss of future sales of not just the recalled product but other current and future products could be said to be consequential loss, and more difficult to recover. Understanding which types of loss you wish to seriously recover, and the value and merit of recovering each of them will help set expectations of recovery and make for an easier settlement.

### **What role does insurance play?**

That largely depends on your coverage. Companies should regularly review their insurance program. Do you have product recall insurance? Which types of loss are covered? What assistance will your insurer provide in terms of crisis management and legal advice related to effectively conducting the recall, collating evidence of loss, mitigating loss and pursuing others in the supply chain? The greater the pay out the insurer makes to you, the more interested it will be in pursuing a subrogated recovery of its own loss against others in the supply chain.

The path to recovery is seldom straightforward and gathering the necessary evidence and initiating a claim can be time consuming. However, pervasively thinking about recovery throughout the recall process can greatly help reduce your own exposure and test the co-operation of others in your supply chain through difficult times.

## **About Spotlight**

Brand and reputation are the most valuable and vulnerable assets a business has. Brands embody and encapsulate everything a business does, and everything its customers expect. Nothing says more about a company’s commitment to consumers than its efforts to uphold promises of safety, quality and service. However, too often, recall and remediation management is treated as a low priority, only to be applied – or even discussed – when a product needs to be withdrawn from the market. At Sedgwick, we seek to change that.

Sedgwick’s brand protection Spotlight is one way we share perspectives from our strategic partners – lawyers, insurers, risk managers and crisis communications experts across industries – on product safety issues that have the potential to influence a company’s view on in-market incidents and crisis management. In some cases, the connection is obvious, but the perspective is new. In others, we will raise questions that you may have never considered in the context of recall and remediation management. That’s our intent.

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To learn more about our recall, remediation and retention solutions, contact:

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