

## **The Intersection Between Product Compliance and Product Liability**

By Lindsay Lorimer, Merton Howard and Sarah Wolfe

Product and vehicle recalls are often regarded as early indicators of potential lawsuits or larger class actions, as they publicly acknowledge possible safety concerns and offer consumers remedies to mitigate the risk of harm. For consumer products, this may include refund or replacement programs, while automotive recalls typically involve free repairs.

Although high-profile or large-scale recalls can attract attention and increase the risk of litigation, a timely and well-managed recall may serve as an effective defence to a proposed class action. In some cases, it may even preclude certification by demonstrating that the manufacturer responded promptly and responsibly to address the issue.

### **I. Background**

In both Canada and the United States, the intersection of regulatory compliance and product liability litigation is complex and continually evolving. While many product safety standards in both jurisdictions are voluntary rather than statutory, they nonetheless play a significant role in establishing the applicable standard of care in negligence claims. Courts often treat these standards as persuasive benchmarks for what a reasonable manufacturer should have done in the design, manufacture, and marketing of a product. Plaintiffs' counsel frequently rely on alleged deviations from such standards to support claims of negligence or defect, arguing that even non-binding guidelines reflect industry expectations and are indicative of reasonable conduct.

In certain jurisdictions within both Canada and the United States, regulatory compliance—while not determinative—may be cited by defendants as evidence of due diligence and responsible behavior. However, adherence to regulatory requirements does not provide blanket immunity from liability. U.S. and Canadian courts alike have held that compliance with applicable laws or standards does not foreclose a finding of negligence or other liability where the product posed a foreseeable risk of harm based on other available information. This becomes particularly nuanced when manufacturers implement post-market changes to warnings, instructions, or design in response to field reports, consumer complaints, or adverse event data. Such modifications may be framed by defendants as evidence of a proactive approach to safety, while plaintiffs may characterize them as admissions of prior or constructive knowledge of a hazard, or subsequent remedial measures admissible to demonstrate feasibility or in some states, evidence in strict liability cases.

The tension between regulatory compliance and evolving product safety knowledge underscores the importance of maintaining thorough records regarding product development, post-sale performance, and the rationale for any changes. Courts in both jurisdictions assess the broader context in which compliance occurs, including whether the manufacturer took reasonable steps in light of what was known—or ought to have been known—at the time the product was distributed.

Ultimately, both Canadian and U.S. legal frameworks reflect a shared emphasis on balancing the role of regulatory systems in promoting safety, with the flexible common-law determination of the standard of care. This standard is not static; it evolves in response to technological advances, emerging risks, and shifts in industry best practices.

### 1. *Legislative Background of Recalls*

In both Canada and the United States, various statutes and regulatory frameworks require companies to take corrective action when products, vehicles, or equipment may not comply with quality standards, and/or pose a risk to health or safety. These regimes emphasize early intervention, placing the onus on manufacturers, importers, and distributors to identify and address potential hazards promptly.

#### **A. Consumer Products**

In Canada, the threshold for reporting under the Canada Consumer Product Safety Act (CCPSA) is notably low. Section 14 requires companies to report not only incidents that have resulted in death or serious adverse health effects, but also any product defect or characteristic that could *reasonably be expected* to pose such a risk.<sup>1</sup> The obligation is triggered by the *possibility* of harm, even in the absence of confirmed injuries. This reflects a precautionary approach aimed at facilitating early risk assessment and regulatory oversight.

Similarly, in the U.S., the Consumer Product Safety Act obliges firms to report to the Consumer Product Safety Commission (CPSC) when a product contains a defect that could create a substantial product hazard or poses an unreasonable risk of serious injury or death. Like the CCPSA, the CPSC's guidance underscores the need to report potential hazards early, even if the risk is not fully substantiated.<sup>2</sup>

The CPSC Recall Guidance also states:

In determining whether a risk of injury associated with a product could make the product defective, the Commission considers the following:

1. What is the utility of the product? What is it supposed to do?
2. What is the nature of the risk of injury that the product presents?
3. Is the risk obvious to the consumer?
4. What is the need for the product?
5. What is the population exposed to the product and its risk of injury?
6. Are there adequate warnings and instructions that mitigate the risk?
7. What is the Commission's experience with the product?
8. Is the risk of injury the result of consumer misuse, and is that misuse foreseeable?

---

<sup>1</sup> CCPSA s. 14

<sup>2</sup> Section 15 of the Consumer Product Safety Act

9. Finally, what other information sheds light on the product and patterns of consumer use?

Finally, the Recall Guidance states:

[s]ince a product may be defective even when it is designed, manufactured, and marketed exactly as intended, a company in doubt as to whether a defect exists should still report if the potential defect could create a substantial product hazard. A firm that is in doubt as to whether a defect exists should only fail to report if the firm is certain that there is no substantial product hazard.

To satisfy its reporting obligation, a company can file an Initial Report with CPSC, either to CPSC's Fast Track team or its Enforcement and Litigation team. The Fast Track team handles reports for which the company intends to initiate a consumer-facing recall and has identified an available fix. The Enforcement and Litigation team handles reports for which the company has not reached a conclusion about the need to recall, does not intend to conduct a consumer-facing recall, or has not identified a fix. Beyond these formal channels, there may be other paths to work directly or indirectly with CPSC to address certain product issues, sometimes without having to conduct a traditional recall.

Across both jurisdictions, recall regimes require companies to disclose detailed information to regulators, including the nature of the risk, the scope of affected products, proposed remedies, and investigative findings.

Health Canada takes a broad view of what constitutes a recall. When a company communicates information to the public, including an information campaign, as a result of a health and safety concern for a consumer product, Health Canada interprets that action as being a part of a voluntary recall. Pursuant to the guidance document, a recall involves any corrective action communicated to a consumer post-production.<sup>3</sup> This approach is consistent with ISO 10393, which describes a corrective action as an "action intended to remove potential for harm and to reduce risk."<sup>4</sup>

While regulators such as Health Canada, and the CPSC<sup>5</sup> have the authority to order mandatory recalls, most recalls are initiated voluntarily by companies—often in response to signals from regulators that corrective action may be warranted. In both countries, such "voluntary" recalls are frequently strategic, as delaying action may invite enforcement, compliance audits, and reputational harm, as well as strain relations with regulators.

While Health Canada takes a more collaborative approach, the CPSC has taken a more aggressive approach. The CPSC has increasingly employed unilateral actions to address what it envisions as

---

<sup>3</sup> <https://www.canada.ca/en/health-canada/services/consumer-product-safety/reports-publications/industry-professionals/recalling-consumer-products-guide-industry.html>

<sup>4</sup> ISO 10393:2013, s.2.12

<sup>5</sup> See *Canada Consumer Product Safety Act*, SC 2010 c 21 s 31, *Safe Foods for Canadians Regulations*, SOR 2018-108, s 84; *Motor Vehicle Safety Act*, SC 1993, c 16 ss 10, 10.01; *Food and Drugs Act*, RSC 1985, c F-27 s 21.3.

May 24, 2025

product hazards. In 2024, the CPSC issued 64 unilateral warnings as compared to three in 2020.<sup>6</sup> Of the 64 warnings, 42 were from China, and 61 were sold online. The rate has only increased during 2025. For example, on May 15, 2025, CPSC issued a press release announcing that during the last seven days, CPSC issued “28 separate product safety recalls and warnings. This is a new agency record and more than double the agency’s previous weekly high for safety warnings. Nearly all the recalls and warnings issued this week involve products manufactured in the People’s Republic of China. They include results from CPSC’s first-of-its-kind enforcement sweep of off-brand Chinese faucets found to leach lead and other contaminants into U.S. drinking water. Additional action is expected in the coming weeks.”<sup>7</sup>

Failure to report known product hazards can expose companies to significant civil penalties. Under 15 U.S.C. § 2069, the CPSC can impose fines of up to \$100,000 per violation, with a maximum penalty exceeding \$17 million USD, adjusted annually for inflation. In 2025, the CPSC issued civil penalties totalling \$28.3M.<sup>8</sup> CPSC has also pursued criminal penalties.

Notable examples of recent CPSC press releases about penalties include these headlines:

- Fitbit Agrees to Pay \$12.25 Million Civil Penalty for Failure to Immediately Report Serious Burn Hazard with Ionic Smartwatches – January 2025
- Bestar Agrees to \$16.025 Million Civil Penalty for Failure to Immediately Report Serious Impact and Crush Hazards Posed by Wall Beds; One Death Reported – November 2024
- HSN Agrees to Pay \$16 Million Civil Penalty for Failure to Immediately Report Serious Burn Hazard Posed by Clothing Steamers - November 2023
- BJ’s Wholesale Club Agrees to Pay \$9 Million Civil Penalty for Failure to Immediately Report Portable Air Conditioners Posing Burn and Fire Hazards; One Person Died in Fire Involving the Air Conditioners – September 2023
- Whirlpool Agrees to Pay \$11.5 Million Civil Penalty for Failure to Immediately Report Glass Cooktops Posing Burn and Fire Hazards – August 2023
- Generac Agrees to Pay \$15.8 Million Civil Penalty for Failure to Immediately Report Portable Generators Posing Finger Amputation and Crushing Hazards – May 2023
- Peloton Agrees to Pay \$19 Million Civil Penalty for Failure to Immediately Report Tread+ Treadmill Entrapment Hazards and for Distributing Recalled Treadmills – January 2023

Recent enforcement actions illustrate the CPSC’s willingness to pursue substantial penalties for late or incomplete reporting, emphasizing the importance of timely and transparent engagement with the regulator. These enforcement tools provide a strong incentive for early disclosure and cooperation in the United States, paralleling the regulatory expectations under Canadian law.

Coordinating cross-border recalls introduces practical challenges. Although Health Canada does not formally approve recall notices, companies often delay Canadian communications until

---

<sup>6</sup> [https://consumerfed.org/press\\_release/the-growing-challenge-of-e-commerce-and-product-safety-cfa-analysis-of-2024-cpsc-safety-warnings/](https://consumerfed.org/press_release/the-growing-challenge-of-e-commerce-and-product-safety-cfa-analysis-of-2024-cpsc-safety-warnings/)

<sup>7</sup> <https://www.cpsc.gov/Newsroom/News-Releases/2025/CPSC-Sets-New-Record-for-Safety-Notices-Protecting-American-Families-and-Leveling-the-Playing-Field-for-American-Business>

<sup>8</sup> <https://www.statista.com/statistics/619556/civil-penalties-issued-by-us-cpsc-since-2006/>

receiving CPSC clearance to ensure consistency across jurisdictions. A simultaneous announcement is typically seen as critical to preserving consumer trust and corporate credibility. Disparities in timing may raise questions about transparency and suggest unequal treatment of consumer safety concerns.

Working cooperatively with regulators enables companies to help shape the scope of the recall and ensure that communications are accurate, timely, and effective. Prompt voluntary action and demonstrated cooperation with Health Canada and the CPSC may be viewed as mitigating factors in subsequent civil litigation. As such, early engagement with regulators is not only a matter of legal compliance, but also a prudent element of broader risk and reputation management strategies.

## **B. Automotive, Tires, Commercial Products**

Transport Canada and the National Highway Traffic Safety Administration (NHTSA) are the most notable enforcement agencies in the automotive and commercial spaces. Both are responsible for investigating and enforcing recalls, but also creating the standards that apply to these products.

The Federal Motor Vehicle Safety Standards (FMVSS) are regulations issued by NHTSA pursuant to statutory authority under Title 49 of the United States Code.<sup>9</sup> The FMVSS specify design, construction, performance, and durability requirements for motor vehicles and regulated automobile safety-related components, systems, and design features. The Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act<sup>10</sup> became law in 2000, following congressional hearings and rapid legislative action in response to fatalities related to Ford Explorers fitted with Firestone tires. The Act aims to increase consumer safety by requiring vehicle manufacturers to report defects, recalls, and injuries in foreign countries. It also establishes early warning and disclosure systems to improve safety and accountability. The Federal Trade Commission (FTC) also plays a role in regulating the automobile industry, particularly concerning the "right to repair." The FTC monitors companies to ensure they do not discourage consumers from exercising their right to repair purchased products without violating manufacturers' warranties.

Transport Canada does not currently have a regulatory reporting regime equivalent to TREAD. Transport Canada has repeatedly delayed its plans to establish an early warning defect and incident reporting regime similar to TREAD which would be called "Analysis of Companies' Technical Information for Vehicles and Equipment" or "**ACTIVE**". Transport Canada has published a policy intent paper on ACTIVE, which describes the proposed approach to classifying companies to establish reporting thresholds, the type of information each class of company will be required

---

<sup>9</sup> See 49 U.S.C. 30101–30169.

<sup>10</sup> Public Law No: 106-414, enacted on November 1, 2000, during the 106th Congress as H.R.5164, codified in various sections of 49 U.S.C.

to acquire and maintain, and when this information would have to be shared with Transport Canada. Transport Canada's planned implementation and timing on ACTIVE remains unknown.

## 2. Product recalls, class action certification, and the three goals of class actions

Product recalls are often litigated in the context of class actions. To contextualize the relationship between recalls and class action risk, it is helpful to begin with a brief overview of class action law. Before class actions can move towards trial, they must clear the initial procedural hurdle of certification, when a court evaluates whether an action is appropriate for class adjudication.<sup>11</sup> Here, the court acts as a gatekeeper to prevent ill-conceived class actions and unproductive litigation.<sup>12</sup>

### Canada

In Canada, at certification, the court does not assess the underlying merits of the claim. Instead, it asks whether the putative class has established that there is "some-basis in fact"<sup>13</sup> for each of the certification criteria<sup>14</sup>: (1) whether the pleadings disclose a cause of action; (2) whether there is an identifiable class; (3) whether the claims raise common issues; (4) whether a class action is the preferable procedure; and (5) whether there is an appropriate representative plaintiff.

The court conducts this assessment in light of the three goals of class actions – access to justice, behaviour modification, and judicial economy.<sup>15</sup> These three objectives underpin the rationale for class proceeding legislation,<sup>16</sup> and the Supreme Court of Canada has consistently endorsed a purposive approach to its interpretation- placing these goals at the forefront of the certification analysis.<sup>17</sup> As discussed below, these objectives are particularly relevant when the courts assess whether to certify class actions arising from product recalls.

---

<sup>11</sup> See Ward K. Branch and Mathew P. Good, *Class Actions in Canada*, 2<sup>nd</sup> ed (Toronto: Thompson Reuters, 2000) (loose-leaf updated 2023, revision 1) ch 4 at § 4:1; See Kalajdzic 2019, *supra* note 47 at 49; Walker et al, *supra* note 27 at 38. In the U.S., see Fed. R. Civ. P. 23(a).

<sup>12</sup> *Richards v The Attorney General of Canada* para 153.

<sup>13</sup> No evidence is admissible for the certification criterion that there is a reasonable cause of action because it is a legal, not a factual, question. The remaining criteria for certification must only show "some-basis-in-fact", see Walker et al, *supra* note 27 at 90–91; see also *Fairview Donut Inc v TDL Group Corp*, 2012 ONSC 125 at 204, *aff'd* 2012 ONCA 867, leave to appeal refused, 2013 CanLII 26760 (SCC), and *Sun-Rype Products Ltd v Archer Daniels Midland Co*, 2013 SCC 58 at paras 52–76; *Hollick v Toronto (City)*, 2001 SCC 68 at [25]; *AIC Ltd v Fischer*, 2013 SCC 69 at [48].

<sup>14</sup> These criteria vary from province to province as class action legislation falls within provincial authority. In Quebec, the putative class must show that: (1) the action raises identical, similar or related issues of law or fact; (2) the facts alleged, if taken as true, appear to justify the conclusions sought; (3) the composition of the class makes it difficult or impracticable to pursue the action under the normal rules of civil procedure; and (4) the class has appointed a proper representative plaintiff. Article 575, *Code of Civil Procedure* ("C.C.P.")

<sup>15</sup> See, e.g., *British Columbia Class Proceedings Act*, RSB 1996, c 50, s 4; *Ontario Class Proceedings Act, 1992*, SO 1992 c 6, s 5; *Alberta Class Proceedings Act, SA 2003, c C-16.5*, s 5(1); *New Brunswick Class Proceedings Act*, RSNB 2011, c 125, s 6.

<sup>16</sup> *Waheed v Pfizer Canada Inc*, 2011 ONSC 5057 at para 24.

<sup>17</sup> See *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para 15 [*Hollick*] (for the SCC's endorsement of purposive interpretation for the *Class Proceedings Act*); see generally Randal N. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: E. Montgomery Publications, 2001) at 2 (purposive interpretation is a method of statutory construction which resolves any interpretive problems with reference to the legislature's objective upon passing the law).

May 24, 2025

Litigation following a product recall is often framed as a consumer protection or warranty-based claim, typically grounded in allegations of economic loss due to the diminished value of the recalled product. While subclasses may be advanced for individuals who suffered personal injuries, the core allegation in most post-recall actions is not physical harm, but pure economic loss. Because the safety risk has generally been acknowledged and addressed through a remedy such as repair, replacement, or refund, these claims raise complex legal questions about the recoverability of economic loss in tort—particularly given the historically restrictive approach taken by Canadian courts in this area.

Traditionally, in the product liability context, the costs incurred by a plaintiff to repair defective goods or structures were non-recoverable “economic loss”, absent a contractual relationship, a special relationship of reliance, or harm to person or property.<sup>18</sup> In the Supreme Court of Canada’s decision in *168782 Ontario Inc. v. Maple Leaf Foods*,<sup>19</sup> the court denied franchisees claims for economic losses sustained following a recall of contaminated meat products.

Courts across the provinces have taken different approaches in applying *Maple Leaf* to cases involving the automotive sector. Plaintiffs in these cases argue that because it would not be reasonably feasible to discard an entire vehicle, they should be entitled to compensation for repair costs, not just disposal costs. Evidentiary questions around the imminence of the danger and the feasibility of discarding a vehicle have led some courts to grant certification in the absence of a recall, demonstrating the heightened litigation risk faced by defendants who do not issue recalls for motor vehicle-related safety defects.

The Saskatchewan Court of Appeal considered the Supreme Court of Canada’s decision in *Maple Leaf* in the context of motor vehicle defects in *Evans v. General Motors of Canada Company*.<sup>20</sup> This proposed class action involved claims for economic loss- specifically overpayment and diminished resale value- arising from alleged defects in the vehicles’ coolant system defects. While General Motors issued technical bulletins to dealerships and service technicians, no formal safety recall was initiated, as the issue was not classified as a safety concern.<sup>21</sup>

On the same day it released its decision in *Evans*, the Saskatchewan Court of Appeal issued reasons in *Kane v. FCA US LLC*, upholding the dismissal of a proposed class action against Fiat Chrysler Automobiles (“FCA”).<sup>22</sup> The proposed class sought certification of issues arising from 23 mandatory recalls and one voluntary customer satisfaction notice, spanning numerous vehicle models and production years. The alleged defects affected a range of components, including fuel tanks and ignition switches. The class sought damages for diminished vehicle value, expenses incurred for repairs, and compensation for the alleged increased risk of future harm associated with the defects. The Saskatchewan Court of Appeal concurred with the chambers judge that the *Maple Leaf* decision establishes an imminence requirement, holding that it stands for the

---

<sup>18</sup> *Winnipeg Condo*, at para 13, citing *Rivtow Marine Ltd v. Washington Iron Works*, [1974] S.C.R. 1189, at 1207 & *Ibid.* at paras 16, 20, citing *d. & F. Estates v. Church Commissioners for England*, [1988] 2 All E.R. 992 (H.L.).

<sup>19</sup> 2020 SCC 35

<sup>20</sup> 2024 SKCA 87

<sup>21</sup> *Ibid.* at para 1-4.

<sup>22</sup> 2024, SKCA 86, leave to appeal to the S.C.C. denied April 17, 2025.

principle that a claim in negligence for pure economic loss is barred where the plaintiff does not allege personal injury, property damage, or an imminent and real risk of such harm.

In *Carter v. Ford Motor Company of Canada*, the Ontario Superior Court of Justice denied certification of the proposed class action for economic loss.<sup>23</sup> The plaintiffs alleged that certain Ford vehicles were equipped with a defective water pump that typically failed after the vehicle reached a certain mileage threshold. They further claimed that the defect posed a safety risk to occupants and the public, and that it frequently resulted in engine destruction and catastrophic failure. No recalls had been issued by Ford in relation to the alleged defect. However, Justice Perell did allow the claims for negligence in design for those consumers who had a water pump fail and sustained either damage to their vehicle or personal injury to be certified.<sup>24</sup>

In *Nissan Canada Inc. v. Mueller*<sup>25</sup>, the British Columbia Court of Appeal allowed an engine failure class action to proceed, where the plaintiffs alleged that defects in the timing chain system could lead to sudden engine failure or loss of control, posing a serious risk of personal injury or death. Although Nissan had issued technical service bulletins in response to rising warranty claims, no recall was issued. Relying on *Maple Leaf Foods*, the Court found the pleadings disclosed a sufficiently imminent danger to warrant certification, noting that unexpected engine failure during ordinary vehicle use could reasonably result in a tragic accident. The Court rejected the defendants' argument—previously accepted by Justice Perell—that the defect's late manifestation rendered the vehicle disposable, and thus the risk avoidable. It held that such a determination required evidence and could not be resolved at the certification stage, cautioning against narrowly characterizing danger in a way that would prevent a plaintiff from advancing a claim.<sup>26</sup>

In the context of consumer product recalls, such claims were fairly routinely certified with little consideration until the decision of Justice Leitch in *Richardson v. Samsung*,<sup>27</sup> which marked a notable departure from prior jurisprudence. In *Richardson*, the proposed class action sought damages for economic loss arising from defective cellphone batteries that overheated, posing a risk of fire and explosion. The court denied certification, finding that Samsung's compensation program was a preferable alternative to a class action. The court held that Samsung's response effectively addressed both access to justice and behaviour modification concerns. The company acted promptly, in coordination with Health Canada, by terminating sales and offering compensation packages—conduct the court described as that of a “responsible corporate citizen,” warranting encouragement rather than sanction.<sup>28</sup> Although not every consumer may have received full compensation, the court emphasized that no recall program can be expected to provide perfect redress, nor is such a standard required, even in class actions.<sup>29</sup> The decision anticipates the legislative shift that would follow less than two years later.

---

<sup>23</sup> 2021 ONSC 4138

<sup>24</sup> *Ibid* at para 6.

<sup>25</sup> 2022 BCCA 338.

<sup>26</sup> *Nissan* paras 42-70

<sup>27</sup> 2018 ONSC 6130

<sup>28</sup> *Richardson* at paras 73-75

<sup>29</sup> *Richardson* at para 78

May 24, 2025

Amendments to Ontario's Class Proceedings Act in 2020 introduced a superiority requirement to the preferability criterion. Notably, the legislature contemplated that product liability class actions may be avoided where a manufacturer agrees to recall, repair, or replace the product.<sup>30</sup> Under the amended Act, courts must determine whether a class action is the most effective means of compensating meritorious claims, relative to all other available options. Prior to these changes, the Supreme Court held that the existence of a compensatory scheme was merely one factor in the preferability analysis and did not, on its own, justify denying certification—even if the scheme offered more timely redress.

In *Bowman v. Kimberly-Clark Corporation*<sup>31</sup>, the British Columbia Supreme Court offered guidance on when a recall program may displace a class action as the preferable procedure. The case involved flushable wipes contaminated with bacteria. The defendant argued that its recall, refund programs, and settlements addressed the goals of class actions—access to justice, behaviour modification, and judicial efficiency—more effectively than litigation. Applying a “practical cost-benefit approach,” the Court found that for class members without personal injury claims, Kimberly-Clark’s prompt and coordinated recall—developed with the FDA and Health Canada—was clearly preferable. The Court emphasized the program’s scope, efficiency, and accessibility, noting its extensive communication efforts, refund mechanisms, and the \$1.6 million investment to implement it. The plaintiff was unable to propose a superior notice plan through the class action.<sup>32</sup>

The Court rejected the argument that a class action would enhance access to justice through *cy-près* distribution, finding such an approach unnecessary where individual compensation was already available and undertaken. Certification, it warned, could undermine behaviour modification by discouraging proactive corporate responses like Kimberly-Clark’s. However, the Court did certify the personal injury subclass, finding that Kimberly-Clark had not implemented a structured compensation program for those claims. Its notices lacked information on injury-related remedies, and no evidence was provided as to how injury claims were assessed or resolved.<sup>33</sup> As a result, certification was justified to ensure accountability and meaningful redress for those with personal injuries.

The decision of the Court of Appeal in *Burr v. Tecumseh Products of Canada Limited*<sup>34</sup> highlights the importance of complying with regulatory regimes when defending failure to warn claims, even in the context of individual claims. The action stemmed from a 2012 incident involving a heat recovery ventilator (the “Ventilator”) which overheated, exploded and caught fire resulting in serious damage. The Ventilator was designed and manufactured by Venmar Ventilation Inc. (“Venmar”) and the motor was designed and manufactured by Fasco Products Company (formerly known as Tecumseh Products of Canada Limited)(“Fasco”). The parties agreed that the fire was caused by the

---

<sup>30</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42<sup>nd</sup> Parl., 1st Sess., No. 143 (19 February 2020), pp. 6970-71

<sup>31</sup> 2023 BCSC 1495 [*Bowman*]

<sup>32</sup> *Bowman* at paras 238-272

<sup>33</sup> *Bowman* at 279-281

<sup>34</sup> 2023 ONCA 135 [*Burr*]

end-of-life failure of the motor in the Ventilator.<sup>35</sup> On the failure to warn, the Court found that Venmar had complied with its obligations under the Electrical Safety Authority's reporting regimes, and found that because of this compliance, Venmar had properly warned consumers of its products' potential end-of-life failure.<sup>36</sup> This is helpful commentary which underscores the importance of manufacturers complying with the applicable Canadian industry reporting and recall regimes (and those of their global equivalents). With this finding, we can rely on compliance with the applicable regulatory regimes to protect against failure to warn allegations.

The emerging trend suggests that well-executed recall programs and compliance with reporting obligations—particularly those that include both economic and personal injury claims—can displace class actions as the preferable procedure. A robust recall program, supported by a well-publicized notice campaign, thorough documentation of efforts and expenditures, and close coordination with regulators, strengthens the argument that the recall process offers a preferable procedure.

### ***United States***

During the certification stage of a class action lawsuit in the United States, the court must establish that the prerequisites under Rule 23 of the Federal Rules of Civil Procedure have been satisfied. These prerequisites include: (1) numerosity: the class is so copious that joinder of all members is unfeasible; (2) commonality: there are questions of law or fact that are common to the class; (3) typicality: the claims or defenses of the named parties are quintessential of the claims or defenses of the class as a whole; and (4) adequacy: the parties represent the class fairly and protect the interests of the class.<sup>37</sup> To make this determination, the court rigorously analyzes evidence presented by both parties.

Even when a class action is certified, a defendant being sued for product liability can successfully end a class action lawsuit. This can occur if it is shown that the product recall provided equally effective or superior relief than what would be achieved through litigation. In *Ward-Richardson v. FCA US LLC*, vehicle owners brought a class action lawsuit against FCA, a vehicle manufacturer, alleging that certain models of vehicles had electrical defects.<sup>38</sup> After the lawsuit was filed, FCA worked through NHTSA to issue a voluntary recall of the targeted model as well as some vehicles not implicated by the litigation. The manufacturer notified the vehicle owners and lessors, acknowledged the existence of a defect, and, in doing so, offered to repair the defect for free or reimburse those who had already paid to repair the defect. The District Court then granted FCA's motion to dismiss the action, holding that the recall "provides Plaintiffs with precisely the relief they seek through th[is suit]. Therefore, any additional relief that this Court could award would constitute an impermissible double recovery." *Id.* at 5.

Another example where the mootness argument has prevailed includes *Charlton v. LG Energy Sol. Mich., Inc.*, where a manufacturer of batteries designed for residential energy storage successfully moved to dismiss a class action lawsuit against it on mootness grounds after initiating a CPSC Fast

---

<sup>35</sup> Burr at para 6.

<sup>36</sup> Burr para 84-87.

<sup>37</sup> Fed. R. Civ. P. 23(a)

<sup>38</sup> 690 F. Supp. 3d 1372 (N.D. Ga. 2023)

May 24, 2025

Track voluntary recall, which included replacement of the overheating batteries.<sup>39</sup> In response to alleged violations of California’s Consumers Legal Remedies Act (CLRA) and California’s Unfair Competition Law (UCL), the Federal District Court held:

Here, Defendant provided a timely response to Plaintiff and had already initiated its recall program, which is being monitored by CPSC, and will provide replacement products and renewed warranties to consumers. Therefore, Plaintiff’s CLRA and UCL claims should be dismissed because there is no live case or controversy as required under Article III. The Court finds that Defendant’s recall program adequately addresses and remedies the alleged [ ] battery defect and, thus, any alleged injury on which Plaintiff bases [his] claims appears to be moot.<sup>40</sup>

However, there are instances in which class action lawsuits generated by product recalls survive a motion to dismiss. This occurs when plaintiffs can assert successful arguments centering around concerns regarding the adequacy of recall remedies and sufficient compensation. The failure to fully address the plaintiffs’ claims or provide comprehensive relief often result in class action lawsuits that must be settled or result in class certification. For example, in *Fisher v. FCA US LLC*, the court ruled that a vehicle manufacturer’s description of a defect did not accurately describe the issue with a product.<sup>41</sup> Consumers plausibly alleged that they did not turn in their vehicles because the problems they experienced would not be solved based on the recall description.<sup>42</sup> As a result, the court denied a motion to dismiss the claim and allowed the class action lawsuit to continue.<sup>43</sup> In this case, actions taken by the manufacturer to address the defect were insufficient to put customers on notice. Therefore, the recall remedy was inadequate. In addition to limited scope, other inadequate recall remedies that can generate a class action lawsuit include the exclusion of certain claims and the failure to address all alleged defects.

## Conclusion

### *Canada*

Several factors help explain the evolving approach to product recalls and product liability litigation in Canada, reflecting a convergence of judicial reasoning, legislative reform, and practical considerations within the legal system.

Class action laws in Ontario and B.C., enacted before the 2011 Canada Consumer Product Safety Act (CCPSA), did not reflect the modern regulatory approach to recalls. The CCPSA introduced a proactive, risk-based system with mandatory reporting and corrective actions, reshaping product safety oversight. Later changes, like the 2018 Motor Vehicle Safety Act amendments improving recall transparency, highlight a shift toward timely consumer protection beyond litigation.

---

<sup>39</sup> No. 321CV02142RBMJLB, 2023 WL 1420726 (S.D. Cal. Jan. 31, 2023).

<sup>40</sup> *Id.* at \*5.

<sup>41</sup> 712 F. Supp. 3d 930, 938 (E.D. Mich. 2024)

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 941.

The shifting regulatory landscape has impacted how courts approach class certification. In *Maple Leaf Foods*, the Supreme Court reaffirmed limits on claims for pure economic loss, narrowing the path for negligence-based recovery. As many recall lawsuits involve non-injury harms, this decision makes certification harder without clear damage. Courts may now see proactive recalls as addressing these losses, reducing the need for litigation.

Amendments to Ontario’s Class Proceedings Act in 2020 added a “superiority” requirement to the preferability criterion, reinforcing the need to demonstrate that a class action is truly the best method of resolving the dispute. This has created new opportunities for defendants to argue that coordinated recall and compensation programs—particularly when executed in partnership with regulators and accompanied by strong consumer outreach—offer a more effective, efficient, and fair mechanism for redress.

Finally, the reality of judicial backlogs, especially in complex multi-party litigation, has prompted a more pragmatic and restrained approach to certification. A comprehensive and well-documented recall may be viewed not only as an effective remedy but also as a more efficient use of limited court resources. Taken together, these trends reflect a shifting paradigm—one in which recall programs, when properly executed, are increasingly recognized as a legitimate and sometimes superior alternative to class action litigation.

### ***United States***

CPSC actions and publicity of recalls, unilateral warnings, and penalties has given ammunition to plaintiff lawyers who are quick to act, even before most consumers understand their options. In the U.S., a recall program that does not adequately compensate consumers for the costs they incur will most likely generate a class action lawsuit. Inadequate compensation or limited scope recalls can result in consumers not being fully covered for their losses, which may include the costs incurred to remedy defective products or the inconvenience and expenses related to participating in the recall process itself. Increasingly, plaintiff lawyers are coming up with creative arguments to overcome the traditional manufacturer defenses based on standing and mootness. In response, a manufacturer must be nimble and anticipate the litigation that will likely follow notice of the recall. Through early coordination of recall planning and litigation risk management, manufactures can best develop defenses by creating a recall program that is transparent, comprehensive, and offers adequate relief (including compensation where appropriate) to consumers.