

# Total recall: Do recalls insulate from later class actions?

By David M. Ross, Esq. and Matthew N. Foree, Esq., Wilson Elser

DECEMBER 2, 2024

Businesses undertake major effort and expense to implement product recalls, including the cost of the resulting remedy and possibly the cost of notices to affected consumers. Recalls provide various forms of relief to consumers who purchase such products. Given the extensive measures involved in a product recall, businesses often expect that they will be shielded from a post-recall class action involving that same product. But is that expectation reinforced by courts handling post-recall product liability class actions? Like so many areas of the law, the answer is sometimes, and often depends on the contours of the recall when the alleged injury is taken into consideration.

Initially, federal courts often consider the alleged injury in the context of the relief provided by the recall to determine whether a plaintiff has standing under Article III of the U.S. Constitution to assert claims after a recall. To establish standing, plaintiffs generally must show (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.<sup>1</sup>

## Case law

In a recent case, the U.S. District Court for the Central District of California considered the standing of purchasers of bath toys subject to recall.<sup>2</sup> In holding that the plaintiffs lacked standing, the court observed that the plaintiffs only alleged injury in the form of the cost of the products and did not avail themselves of the offered refund. Therefore, the court relied on other cases similarly finding a lack of standing for failure to allege injury in fact.<sup>3</sup>

*Given the extensive measures involved in a product recall, businesses often expect that they will be shielded from a post-recall class action involving that same product.*

Additionally, the court recognized that the plaintiffs' complaint raised causation or traceability obstacles to the extent that their own actions or omissions were responsible for their lack of redress.<sup>4</sup> Accordingly, where plaintiffs do not allege injury separate from the remedy offered by the manufacturer as part of the recall process,

some courts have determined that the alleged injury does not establish actual injury or that there is not a causal connection between the injury and the defendant's conduct sufficient to establish standing under Article III.

Issues as to the nature of the injury and the recall remedy also can inhibit a plaintiff's ability to state claims. For example, in *Bui v. Zuru LLC*, after the court determined that the plaintiffs lacked Article III standing, it also determined that the plaintiffs could not state a claim for unjust enrichment because the benefit allegedly retained by the defendant was the purchase price for the products. The court found that the recall notice offering to refund the cost of the products demonstrated that the defendant did not insist on retaining any benefit, unjustly or otherwise.

*Plaintiffs have attempted to avoid these pitfalls by alleging that the recall did not fully resolve the defect or the recall created additional harm.*

Similarly, the court held that the economic loss rule precluded plaintiffs' recovery under a negligence or strict liability theory. The court explained that the economic loss rule provides that when a purchaser's expectations in a sale are frustrated because the product purchased is allegedly not working properly, the remedy is in contract alone, because only economic loss is at issue. Therefore, the court determined that the plaintiffs' claims were barred because they did not allege physical injury or property damage.

Plaintiffs have attempted to avoid these pitfalls by alleging that the recall did not fully resolve the defect or the recall created additional harm. For example, in the context of a General Motors (GM) recall of Chevrolet Bolt vehicles due to the risk of fire posed by batteries, plaintiffs brought a class action challenging the remedy offered by GM. GM had concluded that the battery could pose a risk of fire when fully charged or when charged very close to full.

GM's recall proposed an interim remedy consisting of a dealer-applied software update that would limit the battery charge to 90 percent of its capacity. Until the owners of the vehicles could bring their vehicles into the dealership, they were instructed to manually limit the battery's capacity. As part of the class action,

plaintiffs alleged that GM's interim remedy resulted in a loss of battery mileage or range in the vehicles.<sup>5</sup>

Other courts have found that, even if a plaintiff can establish Article III standing, dismissal may be appropriate on other grounds, including based on prudential standing or ripeness. For example, in *Solak v. Ford Motor Co.*, the U.S. District Court for the Eastern District of Michigan considered a putative class action regarding claims concerning the front-row side curtain airbags in certain Ford vehicles. Shortly after Ford issued a voluntary safety recall for 65,000 vehicles, Solak filed a class action alleging claims including those for breach of express warranty, breach of implied warranty, and unjust enrichment.<sup>6</sup>

Solak contended that the putative class members overpaid for their vehicles because they would not have purchased the cars, or would have paid less for them, had they known about the defective airbags. The court found that these allegations were sufficient to plausibly allege that Solak and the putative class suffered an injury-in-fact.<sup>7</sup>

---

*The recall and the nature of the injury may affect the viability of the class action, including a plaintiff's ability to obtain class certification.*

---

The court also determined that the complaint plausibly alleged that the overpayments were fairly traceable to Ford's failure to disclose the existence of the defect and that money damages were likely to compensate for the overpayment such that Solak satisfied the remaining Article III standing elements.

The court then analyzed prudential mootness, recognizing that the mootness doctrine is an "adjunct to Article III's 'cases' and 'controversies' requirement."<sup>8</sup> The court further noted that mootness may arise in different contexts and take different forms but it always "describes a situation where events in the world have so overtaken a lawsuit that deciding it involves more energy than effect, a waste of effort on questions now more pedantic than practical."<sup>9</sup> The court added that the prudential mootness doctrine "often makes its appearance in cases where a plaintiff starts off with a vital complaint but then a coordinate branch of government steps in to promise the relief [the plaintiff] seeks."<sup>10</sup>

Recognizing this, the court noted that Ford triggered the National Highway Traffic Safety Administration's (NHTSA's) oversight when it issued the recall and that, as part of the recall, Ford intended to replace the curtain air bags and reimburse owners who already paid for repairs out of pocket. The court held that these remedial measures, along with NHTSA's authority to ensure that they were fully implemented, rendered Solak's claims prudentially moot.

In addition, the recall and the nature of the injury may affect the viability of the class action, including a plaintiff's ability to obtain class certification. For example, in a case involving potentially

contaminated peanut butter, the U.S. District Court for the Northern District of Georgia denied class certification as to a particular class where the defendant "contends that it has already instituted a superior method of resolution; it has been issuing full refunds to purchasers of the potentially contaminated peanut butter since the outbreak."<sup>11</sup>

The court determined that non-litigation alternatives, such as the issuance of refunds as part of the recall, can be considered when assessing the superiority of class action litigation. Accordingly, the court denied class certification on the basis that a class action was not superior to other available methods for fair and efficient adjudication of the controversy under Rule 23 of the Federal Rules of Civil Procedure.

### Summary

These and other cases demonstrate that the scope of the recall remedy and the alleged harm can be determinative of the viability of a post-recall class action. The trend appears to be that businesses implementing a comprehensive recall system will be protected against post-recall class actions where the plaintiffs have not taken advantage of the remedy or do not allege an injury different than what the remedy would resolve. Even if plaintiffs are able to establish injury and causation to avoid challenges to Article III standing or mootness challenges, they still must demonstrate that a class action is the superior method to resolve the matter under Rule 23 at the class certification stage.

### Notes:

<sup>1</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 375, 560-61 (1994).

<sup>2</sup> See *Bui v. Zuru LLC*, No. 2:23-cv-06125-MRA-MRW (C.D. Cal. Aug. 8, 2024).

<sup>3</sup> See *Savoy v. Collectors Universe, Inc.*, No. SA CV 20-00632-DOC-ADS, 2020 U.S. Dist. LEXIS 156284, 2020 WL 4938464 at \*5 (C.D. Cal. July 21, 2020) ("it is well established that if a plaintiff utilizes and is granted a refund pursuant to a satisfaction guarantee clause, then that plaintiff has suffered no injury and hence has no standing"); *Whitson v. Bumbo*, No. 07-CV-05597-MHP, 2009 U.S. Dist. LEXIS 32282, 2009 WL 1515597, at \*4 (N.D. Cal. Apr. 16, 2009) (no standing under benefit of the bargain theory where CPSC remedy for baby seat subject to recall was to advise consumers never to use seat on elevated surface or leave child unattended and plaintiff did not allege that any child did so).

<sup>4</sup> See *Sugasawara v. Ford Motor Co.*, No. 18-CV-06159-LHK, 2019 U.S. Dist. LEXIS 142308, 2019 WL 3945105, at \*6 (N.D. Cal. Aug. 21, 2019) (to the extent plaintiff did not avail himself of manufacturer's recall remedy, any harm that persists is not fairly traceable to manufacturer, but to plaintiff).

<sup>5</sup> See *In re Chevrolet Bolt EV Battery Litig.*, 633 F.Supp.3d 921 (E.D. Mich. 2022) (finding certain claims survived dismissal).

<sup>6</sup> *Solak v. Ford Motor Co.*, 683 F. Supp. 3d 658 (E.D. Mich. 2023).

<sup>7</sup> See *In re FCA US LLC Monostable Elec. Gearshift Litig.*, MDL No. 2744, 2017 U.S. Dist. LEXIS 58745, at \*18 (E.D. Mich. Apr. 18, 2017) ("When a manufacturer sells a product that is defective, which causes consumers to be misled at the point of sale into paying more and getting less than they believed they were purchasing, the consumers suffer an injury in fact, even if that defect does not manifest itself in every individual unit." (citation omitted).)

<sup>8</sup> See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

<sup>9</sup> *Winzler v. Toyota Motor Sales USA, Inc.*, 681 F.3d 1208, 1209 (10th Cir. 2012) (Gorsuch, J.).

<sup>10</sup> *Winzler*, 681 F.3d at 1210.

<sup>11</sup> *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 699 (N.D. Ga. 2008).

## About the authors



**David M. Ross** (L) co-chairs **Wilson Elser**'s commercial litigation and class-action defense practice teams and leads the firm's cyber class-action defense team. He works with businesses, individuals and insurers to provide early litigation planning, individual and class settlement or defense strategies, and comprehensive litigation management. He is based in Washington, D.C., and can be reached at [david.ross@wilsonelser.com](mailto:david.ross@wilsonelser.com). **Matthew N. Foree** (R) is of counsel on the firm's commercial litigation and class-action defense practice teams. He works with clients to prepare and implement comprehensive defense strategies in response to individual and class actions involving complex commercial issues, including cybersecurity, privacy and consumer protection. He is based in Atlanta and can be reached at [matthew.foree@wilsonelser.com](mailto:matthew.foree@wilsonelser.com).

This article was first published on Westlaw Today on December 2, 2024.