

# Product Recall

*Contributing editors*

Alison Newstead and Harley V Ratliff



2017

GETTING THE  
DEAL THROUGH

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*Contributing editors*

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# Preface

## Product Recall 2017

Eighth edition

**Getting the Deal Through** is delighted to publish the eighth edition of *Product Recall*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil, Canada, Chile, China, Denmark, Hong Kong, Korea, New Zealand, Russia, Spain and Sweden.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Alison Newstead and Harley V Ratliff of Shook Hardy & Bacon LLP, for their continued assistance with this volume.

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DEAL THROUGH 

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# Brazil

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## General product obligations

### 1 What are the basic laws governing the safety requirements that products must meet?

The basic law governing the safety requirements that products must meet is the Consumer Protection Code (CDC), which rules all relations regarding the production and placement in the market of products and services, and subsequent acquisition and use of them by consumers. The CDC sets forth that suppliers cannot place in the market products or services that are extremely harmful or hazardous to consumers' health or safety (article 10). A supplier that acknowledges the danger of products or services after placing them in the market must immediately inform the authorities and consumers (first paragraph of article 10). The Justice Ministry issued Ordinance 487/2012 in order to regulate the procedure for recalls in Brazil.

### 2 What requirements exist for the traceability of products to facilitate recalls?

Ordinance 487/2012 provides that suppliers shall provide detailed descriptions of product or services, containing information for their identification (brand, type, lot, series number, chassis, start and end date of manufacture, picture etc), as well as geographic distribution of the harmful products or services.

### 3 What penalties may be imposed for non-compliance with these laws?

Non-compliance with the laws for protection of consumers may subject the supplier to administrative, civil or criminal penalties.

If the public authorities for consumers deem that the supplier violated the provisions of the CDC, they may initiate a procedure for verification of violations and application of penalties that can be accumulated or not, such as:

- fines;
- product seizure;
- destruction of the product;
- cancellation of product registration at the competent authorities;
- prohibition on product manufacture;
- suspension of product or service supply;
- temporary suspension of the activity;
- revocation of concession or permission for use;
- cancellation of permit for the establishment or activity;
- total or partial closing down of the establishment, work or activity;
- administrative intervention; or
- imposition of counteradvertising.

The public authorities can apply fines of up to 3.1923 million reais, in accordance with the severity of the infraction, the advantage obtained and the economic status of the supplier.

A criminal investigation also can be started to ascertain criminal responsibility of anyone who contributed to the lack of mandatory communication, for late communication or for insufficient mandatory communication. According to the CDC, failure to inform the competent authorities or withdraw harmful or hazardous products from the market shall lead to a penalty of six months' to two years' imprisonment, and a fine.

Without prejudice of administrative and criminal penalties, civil actions before the courts may be started in order to compel the supplier, whether jointly or severally, to answer for property or moral damages caused to consumers in connection with defective products.

## Reporting requirements for defective products

### 4 What requirements are there to notify government authorities (or other bodies) of defects discovered in products, or known incidents of personal injury or property damage?

In order that they are subject to notification to government authorities and recall, products or services have to be introduced in the consumer market and extremely harmful or hazardous to consumers' health or safety. The supplier shall communicate the fact forthwith by publicity releases to the competent authorities and to consumers. The recall campaign can be spontaneously started by the supplier or upon the request of the competent authorities.

### 5 What criteria apply for determining when a matter requires notification and what are the time limits for notification?

The main criterion is that the product must be 'extremely harmful or hazardous' to consumers' health or safety. The CDC does not define the meaning of the expression and the interpretation will depend on a case-by-case analysis. In theory, the product may not be considered 'extremely harmful or hazardous' for risks deemed normal and foreseeable as a result of their nature and regular use, neither for potential risks that are already known and duly informed by suppliers. However, again, the analysis will have to be on a case-by-case basis.

As regards the time limits for the notification, the supplier is obliged to inform the public authorities and consumers by publicity releases immediately (ie, as soon as the defect is discovered and the supplier has become aware of the anomaly) regarding the hazard.

### 6 To which authority should notification be sent? Does this vary according to the product in question?

Article 2 of Ordinance 487/2012 states that the supplier has to send notification to the Department of Protection and Defence of the Consumer (DPDC, an entity related to the Ministry of Justice), the state, Federal District (DC) and municipal authorities for the protection of the consumer (known as Procons), and the competent rulemaking and regulatory authority.

The authority to which notification must be sent varies depending on the product in question. There are economic activities that are regulated by public authorities in Brazil that are competent for the registry, surveillance and monitoring of quality and safety of products and services. Therefore, if the supplier activity is regulated by the state, the supplier will have to notify the authority it is subjected to.

### 7 What product information and other data should be provided in the notification to the competent authority?

The supplier shall inform the competent authorities regarding the potential hazardous or dangerous product or service in writing. The report to the authorities must contain the following information:

- particulars of the product or service provider;
- a detailed description of the product or service to the extent necessary for its adequate identification;

- a detailed description of the defect, coupled with technical information necessary to clarify the facts, as well as the date (day, month and year) and means by which the hazardous or dangerous condition was detected;
- a detailed description of the risks and their implications;
- the quantity of potentially defective products or services, and the number of consumers affected;
- the territory covered by the potentially defective products and services introduced into the consumer market (per Brazilian state), and the countries to which those products and services were exported;
- a report on the actions already taken as well as on those being proposed to cure the defect and remedy the risk;
- a description of any accident related to the product or service defect, if applicable;
- the media communication plan;
- the consumer service plan; and
- the template notice of risk to consumers.

Depending on the product or service being recalled, there may be other data or measures that shall be provided, as determined by the rulemaking and regulatory authorities.

#### **8 What obligations are there to provide authorities with updated information about risks, or respond to their enquiries?**

The supplier shall provide the DPDC, Procons and the pertinent rulemaking or regulatory authority with the following information:

- periodical recall status reports (with a maximum interval of 60 days between them), stating the quantity of products or services repaired or withheld from the market, including those in stock, and the respective allocation at state level; and
- a final recall status report, stating the number and percentage of consumers affected, in an overall manner and per federative unit, as well as the reasons and measures to be adopted vis-à-vis the percentage products or services not withheld or repaired, also informing how consumers were advised about the risk.

In addition the competent authorities are allowed to, at any time, request additional or supplementary information and data related to those listed in question 7, so as to verify the efficacy of recall procedures.

#### **9 What are the penalties for failure to comply with reporting obligations?**

Failure to comply with reporting obligations may incur the administrative, criminal and civil penalties described in question 3.

#### **10 Is commercially sensitive information that has been notified to the authorities protected from public disclosure?**

The Law does not set out any protection from public disclosure of commercially sensitive information that has been notified to authorities. Nevertheless, the supplier may inform the public authorities of which information is commercially sensitive, and request them not to disclose the sensitive information.

#### **11 May information notified to the authorities be used in a criminal prosecution?**

Yes. There is no rule that prevents authorities from using the information in a criminal prosecution.

### **Product recall requirements**

#### **12 What criteria apply for determining when a matter requires a product recall or other corrective actions?**

The criteria for determining when a matter requires product recall or other corrective actions are described in question 5.

#### **13 What are the legal requirements to publish warnings or other information to product users or to suppliers regarding product defects and associated hazards, or to recall defective products from the market?**

The requirements for determining when a matter requires product recall or other corrective actions are described in question 4.

#### **14 Are there requirements or guidelines for the content of recall notices?**

The supplier, beyond the notification to competent authorities, must immediately inform consumers about the dangers of the product and service placed in the market by publicity releases. The publicity releases shall provide clear and accurate information about:

- the product or service, to the extent necessary for its identification;
- the defect verified, its risks and implications;
- the preventive and corrective measures that consumers must take;
- the measures to be taken by the provider;
- contact information and place of consumer service;
- information on the free-of-charge condition of the recall; and
- other information intended to protect the safety of consumers with regard to the product or service concerned.

#### **15 What media must be used to publish or otherwise communicate warnings or recalls to users or suppliers?**

The supplier shall communicate the fact forthwith by publicity releases to the competent authorities and to consumers. The publicity releases shall be divulged in the press, on radio and television, at the expense of the supplier of the product or service.

The supplier may use direct and individual communication to consumers, along with publicity releases. Nevertheless, such individual communications will not release the supplier from making collective announcements.

#### **16 Do laws, regulation or guidelines specify targets or a period after which a recall is deemed to be satisfactory?**

Yes. The supplier has to prepare a plan to deal with consumers that shall be notified to the authorities and contain the following:

- the service channels available to consumers;
- the places and times of service;
- the average duration of services; and
- the contingency plan and estimated period for full remedy of all products or services concerned.

The supplier will also have to send to the competent authorities periodical recall status reports stating the quantity of products or services repaired or withheld from the market. A final recall status report shall also be sent to the authorities, stating the number and percentage of consumers affected, in an overall manner and per federative unit, as well as the reasons and measures to be adopted vis-à-vis the percentage of products or services not withheld or repaired.

Based on these reports, the DPDC and the regulatory authority may establish, separately or cumulatively, an extension or expansion of recall measures, at the supplier's expense, upon evidence that recall results were unsatisfactory.

The termination of the period for the recall does not prevent the supplier from the correction or replacement of the defective product or service. The supplier will be obliged to repair or replace the product or service, without any cost to the consumer, as long as the product is on the market.

#### **17 Must a producer or other supplier repair or replace recalled products, or offer other compensation?**

The supplier is obliged to repair and replace recalled products or services without any costs to consumers. In the event the correction or replacement of the defective product is impossible, the supplier must reimburse consumers.

In addition, the supplier may have to offer additional compensation where the consumers prove that they suffered further property or moral damages from the use of the defective product or service.

#### **18 What are the penalties for failure to undertake a recall or other corrective actions?**

Failure to comply with reporting obligations may incur the administrative, criminal and civil penalties described in question 3.

## Authorities' powers

### 19 What powers do the authorities have to compel manufacturers or others in the supply chain to undertake a recall or to take other corrective actions?

The competent authorities can serve notice to suppliers to inform about the defective products or services and request the start of the recall campaign. Any supplier that does not carry out a recall, does so insufficiently or does so outside of the time limit set by the law, may be subject to administrative procedure started by the competent authorities for application of the administrative penalties described in question 3, without prejudice to civil and penal sanctions.

As a rule, the supplier is responsible for the establishment of the actions to be taken to repair or replace defective products or services extremely harmful or dangerous to consumers. Once the corrective actions are defined, they have to be notified to the competent authorities.

### 20 Can the government authorities publish warnings or other information to users or suppliers?

Yes. Article 10, paragraph 3 of the CDC says that: 'Whenever the federal government, states, Federal District and municipalities learn that products or services are hazardous to the health or safety of consumers, they shall inform consumers of the matter.'

Some regulatory authorities and public authorities for the protection of consumers (such as the DPDC and Procons) keep communication channels available from their website or offer a telephone number so that the public can report incidents regarding products or services. Generally, whenever an incident is reported, the competent authorities start an administrative procedure in order to investigate the causes of the incident and notice the supplier to present clarifications.

### 21 Can the government authorities organise a product recall where a producer or other responsible party has not already done so?

The law does not provide for this possibility. As a rule, the recall must be carried out by the supplier.

### 22 Are any costs incurred by the government authorities in relation to product safety issues or product recalls recoverable from the producer or other responsible party?

The law provides that recall expenses are the full responsibility of the supplier. The supplier will have to bear the expenses for recall even if the authorities order the extension of the period or scope of the recall. Therefore, if government authorities incur any expenses in relation to the product recalls, they may request recovery of the expenses.

### 23 How may decisions of the authorities be challenged?

The authorities' decisions may be challenged by administrative appeal, whenever possible, or by the filing of a lawsuit before the judiciary. Article 5, XXXV, of the Federal Constitution sets out that 'the law shall not exclude from review by the judiciary injury or threat to a right.'

## Implications for product liability claims

### 24 Is the publication of a safety warning or a product recall likely to be viewed by the civil courts as an admission of liability for defective products?

Yes. Publication of safety warnings and product recalls are likely to be viewed by the civil courts as an admission of liability for defective products.

The supplier may be held liable for the incidents suffered by consumers in connection to a defective product before, during or after the recall. While there are products on the market that have problems that led to the call, the supplier will be responsible for prompt repair, at no cost to consumers, even if the recall campaign stipulates a deadline for its closure.

The Third Panel of the Superior Court of Justice has already maintained the lower court of appeals' decision that considered, among other peculiarities of the concrete case, that the supplier should be held liable because it publicly recognised a product defect by promoting a recall (Special Appeal 1.010.392-RJ, Reporting Justice Minister Humberto Gomes de Barros). In this decision, the Superior Court also

## Update and trends

Product recall has its legal origins in Brazil since 1990, when the CDC entered into force. However, it is only in recent years that the number of recalls per year has noticeably increased. Official data of the National Consumer Bureau indicate that in 2003, when registration started, there were 33 recall campaigns across the country. In 2015, this number increased to 130 recall campaigns.

Among the factors that can be identified as causes of the increased number of recalls, it is possible to point to the better organisation and structuring of authorities for the protection of consumers as well as more qualified knowledge of the suppliers on the procedure governing the holding of the recall to correction of any abnormalities in their products and services.

At the federal level, we have noticed a greater coordination between the protection agencies and consumers among themselves and with the regulatory authorities to exchange information on products and services, as well as monitoring of recall campaigns. For example, it is worth mentioning the joint decree issued by the DPDC and the National Traffic Department (Joint Ordinance 69/2010) regulating some aspects of recall in automotive vehicles.

In Brazil, suppliers are noticing the importance of programme actions to facilitate consumers' compliance with recalls, so that they can repair or replace the defective product or service. The supplier may be liable for any adverse event related to its products and services, which is why it is important that it take measures to encourage the attendance of consumers to recall campaigns, thus reducing the possibilities of accidents of consumption and to account for penalties, both criminal and civil, at the administrative level.

understood that non-compliance with the recall by the consumer does not remove the liability from the supplier.

In the CDC system, the liability is strict (regardless of culpability) as a rule. There is no relevance whether it comes out of a contractual or non-contractual relationship. As a general rule, the consumer may file an action against all those involved in the chain of production. Those who are not directly responsible will have right of recourse against the responsible party. Only under specific foreseen situations in the law will the supplier not be held liable.

According to the CDC, there are two types of liability in connection to defective products: liability for a fact from the product itself, and liability related to a flaw in the product regarding its quality or quantity.

The first type of liability is related to the idea of a consumption accident. The consumption accident takes place when the deviation goes beyond the defective product and reaches consumers physically or psychologically, affecting their health and safety.

The supplier may not be held liable for the accident of consumption only when it shows that it did not place the product on the market, that, although it did place the product on the market, the defect does not exist, or there is exclusive culpability of the consumer or a third party separate from the chain of production.

The supplier may also not be held liable if it can prove that the defectiveness of the product and scope of the recall was not the direct cause for the property or moral damages suffered by the consumer, discussed before Brazilian courts.

The responsibility of the supplier for damages caused by defective products may also be completely excluded if the supplier can show that it succeeded in repairing or replacing 100 per cent of the defective products, by means of the recall.

### 25 Can communications, internal reports, investigations into defects or planned corrective actions be disclosed through court discovery processes to claimants in product liability actions?

Yes. Communications, internal reports, investigations into defects or planned corrective actions can be disclosed through court discovery processes to claimants in product liability actions.

According to the Brazilian Civil Procedure Code, the judge, ex officio or at the request of a party, shall stipulate the evidence required for judgment on the merits. Thus, the judge can order that the party of the action or a third party (ie, person separate from the proceeding) must disclose the document in its possession. The document must be individualised and relevant for the discovery procedure.

As general rule, the party or third party cannot refuse to present the document, except in specific situations, such as:

- the disclosure may result in the publication of facts that they should keep confidential, in the line of duty or under the work-product doctrine;
- there are other serious reasons which, at the discretion of the judge, would justify the refusal to disclose; and
- there is a legal provision justifying the refusal to disclose.

If the person refuses to present the document without any lawful reason and is a party to the action, the judge shall hold as true the facts which the party sought to prove by means of the document.

In the event the document is presented to the judge, it will be attached to the action case records and, as a rule, anyone will be able to analyse it. This is so because the Brazilian Federal Constitution says that all procedural acts must be public. Nevertheless, the judge shall apply secrecy in any actions whenever the public or social interest would so require.

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