

Product Recalls: Why is Tort Law Deferring to Agency Inaction?

Jill Wieber Lens

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

PRODUCT RECALLS: WHY IS TORT LAW DEFERRING TO AGENCY INACTION?

JILL WIEBER LENS[†]

INTRODUCTION

In 2014, General Motors recalled some models of its cars due to a defective ignition switch.¹ Product recalls are common and usually not too noteworthy. But this recall became noteworthy when it was revealed that GM knew of the potential problem with the ignition switch as early as 2001.² Yet, it waited thirteen years to actually recall the cars.³

The thirteen-year delay was likely unreasonable. The ignition switch posed a risk of death both to drivers of the defective cars and to other motorists. In fact, GM has agreed to pay compensation for 124 deaths, 18 catastrophic injuries, and 257 other injuries related to the ignition switch.⁴ Given this

[†] Professor of Law, Baylor University School of Law. J.D., University of Iowa College of Law; B.A., University of Wisconsin. The author thanks the organizers and participants at the 2015 Texas Legal Scholars Conference, especially Joe Sanders, and the organizers and participants at the 2014 Oklahoma Junior Scholars Conference for their feedback. The author also thanks Jess Dees (Baylor J.D. 2015), Jake Jones (Baylor J.D. 2016), and Mitch Garrett (Baylor J.D. 2016) for their valuable research assistance. Any mistakes are, of course, the author's.

¹ Danielle Ivory, *'Bellwether' G.M. Trial Opens over Defect Claim*, N.Y. TIMES (Jan. 12, 2016), <http://www.nytimes.com/2016/01/13/business/trial-begins-in-gm-ignition-defect-case.html> ("In February 2014, G.M. began recalling what eventually numbered 2.6 million Chevrolet Cobalts, Ions and other small cars for a defect in the ignition switch.").

² Danielle Ivory, *G.M. Reveals It Was Told of Ignition Defect in '01*, N.Y. TIMES (Mar. 12, 2014), <http://www.nytimes.com/2014/03/12/business/gm-reveals-it-was-told-of-ignition-defect-in-01.html>.

³ Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NAT'L PUB. RADIO (Mar. 31, 2014, 4:33 PM), <http://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect>.

⁴ Bill Vlasic, *G.M. Compensated Some Pre-Bankruptcy Crash Victims*, N.Y. TIMES (Dec. 10, 2015), <http://www.nytimes.com/2015/12/10/business/gm-compensated-some-pre-bankruptcy-crash-victims.html>. After the recall, GM hired Kenneth Feinberg to create and run a compensation fund for those injured or killed due to the defective ignition switch. Michael A. Fletcher & Rebecca Robbins, *GM Offers Millions To Compensate Some Ignition Switch Victims, Families*, WASH. POST (June

grave risk, if the costs of a product recall were manageable, a reasonable manufacturer likely would have recalled the product.

But GM will not face tort liability related to its thirteen-year delay in recalling the vehicles.⁵ Why not? Because the National Highway Traffic Safety Administration never ordered nor encouraged GM to recall its affected vehicles within that thirteen-year period. Essentially, tort liability cannot exist because no agency ordered a product recall.

This effectively complete deference to agency determinations contrasts starkly with courts' treatment of other agency actions. For example, courts give little deference to agency safety standards. A manufacturer can easily be liable for compensatory and punitive damages despite complying with an agency's safety standards, like a required product warning. Similarly, the post-sale duty to warn that many courts have recently adopted pays

30, 2014), http://www.washingtonpost.com/business/economy/gm-offers-millions-to-compensate-some-ignition-switch-victims-families/2014/06/30/032d45c0-ffbc-11e3-8572-4b1b969b6322_story.html.

⁵ Many individuals allegedly injured by the defective ignition switches chose not to seek relief and instead have filed traditional defect products liability claims against GM. A multi-district litigation against GM is pending in the Southern District of New York as of the date of publication of this Article. The court was set to conduct six bellwether trials in 2016. Ivory, *supra* note 1. Within these six bellwether trials, the court addressed a post-sale duty to recall three times. Remarkably, the court allowed the first plaintiff to pursue a "negligent recall" claim under Oklahoma law, concluding it was no different than a general negligence claim. *See In re Gen. Motors LLC Ignition Switch Litig. (In re Gen. Motors I)*, No. 14-MD-2543 (JMF), 2015 WL 9582714, at *9 (S.D.N.Y. Dec. 30, 2015). The vast majority of states and the Third Restatement of Torts reject such a claim. *See infra* Section II.A. The court also allowed the claim to proceed because GM had instituted a voluntary recall. *See In re Gen. Motors I*, 2015 WL 9582714, at *9 ("In any event, New GM also assumed a duty when it instituted the recall."). That claim is consistent with the overwhelming majority view. *See infra* Section II.A. But the claim based on the voluntary recall is limited to injuries incurred due to unreasonableness within the recall GM undertook and does not cover injuries incurred due to GM's unreasonable failure to recall the product earlier. The court dismissed claims related to post-sale conduct in the second bellwether trial, which was based on Louisiana law. *See In re Gen. Motors LLC Ignition Switch Litig. (In re Gen. Motors II)*, No. 14-MD-2543 (JMF), 2016 WL 874778, at *6 (S.D.N.Y. Mar. 3, 2016). The court later found no post-sale duty to recall under Virginia law. *In re Gen. Motors LLC Ignition Switch Litig. (In re Gen. Motors III)*, No. 14-MD-2543 (JMF), 2016 WL 4367959, at *6 (S.D.N.Y. Aug. 15, 2016). Of the 2016 bellwether trials pending in the Southern District of New York, "one . . . was dropped before trial, GM won two, and three have been settled." Associated Press, *General Motors Settles 2 Bellwether Ignition Switch Cases*, NBC News (Sept. 5, 2016, 6:26 PM), <http://www.nbcnews.com/business/consumer/general-motors-settles-2-bellwether-ignition-switch-cases-n643046>.

no attention to whether the agency ordered a manufacturer to issue a post-sale warning. Again, a manufacturer can easily be liable for compensatory and punitive damages even though no agency ever required it to issue a post-sale warning.

Courts see product recalls differently, however. Courts believe they are ill equipped to evaluate the reasonableness of a product recall and thus defer to agencies. Tort law defers to agency determinations of whether the benefits of the recall justify the costs; in other words, whether a reasonable manufacturer would have recalled the product. If an agency determines that a recall would be reasonable and orders one, then a manufacturer can be liable in tort if it acts unreasonably within that recall. But if not, then tort liability cannot exist; after all, a reasonable manufacturer would not have recalled the product.

Thus, agency action is a prerequisite for tort liability. If a government agency never orders nor otherwise encourages a manufacturer to recall a product, the manufacturer is unlikely to ever face tort liability related to a recall. A glaring problem exists with this complete deference. An agency's not ordering a recall is not the same thing as deciding that no recall was appropriate; instead, it is inaction. Deference to agency inaction is nonsensical. It is also inconsistent with negligence per se principles. There is nothing special about product recalls to merit this unique legal treatment. Yet, courts allow agency inaction to preclude the possibility of tort liability for what seems likely unreasonable conduct.

Part I of this Article explores tort law's treatment of agency standards and regulations regarding determinations of product defectiveness, the propriety of post-sale warnings, and whether to punish the manufacturer with punitive damages. Part II then explains how tort law treats agency determinations—and lack thereof—on product recalls. This Part explains how tort law's narrow standards for liability defer to agency orders to determine the reasonableness of a product recall and how that deference is illogical and inconsistent with negligence per se principles. Part II also concludes that product recalls are not so special so as to deserve special treatment within tort law.

I. A DEFAULT OF NO DEFERENCE

“Products liability is a mixture of state tort law and federal regulation.”⁶ State tort law could easily look to those federal regulations to help resolve many issues within the products liability claim. And state courts do—violation of a regulation can show defect or unreasonable conduct as a matter of law. But courts refuse to treat compliance the same. Compliance with regulations does not preclude the possibility of a defect nor does it preclude the possibility of a finding of unreasonable conduct based on a failure to issue a post-sale warning. Courts also refuse to defer to agency regulations to determine the appropriateness of punishment.

A. *No Deference in Determinations of Defectiveness*

A products liability cause of action enables the plaintiff to recover compensatory damages for injuries caused by a product defect. Among other elements, the plaintiff has to demonstrate that the product is defective. Courts have developed tests for three different types of product defects.⁷ A manufacturing defect exists if the manufacturer fails to make the product as it intended, regardless of the reason for the departure from that intent.⁸ A design defect exists if “the foreseeable risks of harm posed by the product could have been . . . avoided by the adoption of a reasonable alternative design.”⁹ Last, a warning defect exists if the manufacturer fails to warn of foreseeable dangers about which it either knew or should have known at the time of sale.¹⁰

⁶ Richard C. Ausness, *The Case for a “Strong” Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1217 (1996).

⁷ All of these traditional definitions of defect focus on the time of the product’s sale to determine defectiveness.

⁸ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a) (AM. LAW INST. 1998).

⁹ *Id.* § 2(b). This Third Restatement definition of design defect is controversial because of its dependence on an alternative design. Some states that evaluate design defectiveness under a risk-utility test do not require an alternative design. *See, e.g., Vautour v. Body Masters Sports Indus., Inc.*, 784 A.2d 1178, 1182–83 (N.H. 2001). Also, some states use the consumer expectations test for design defectiveness, which dictates that a product is defective if it is more dangerous than the ordinary consumer would expect. *See, e.g., Horst v. Deere & Co.*, 769 N.W.2d 536, 554 (Wis. 2009).

¹⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(c) (providing that a warning defect exists if “the foreseeable risks of harm posed by the product could

In addition to applying these tests to determine if a product is defective, a court could easily look to an outside source—an administrative agency. Congress long ago created administrative agencies to help improve product safety. For example, Congress wanted to “reduce traffic accidents and deaths and injuries resulting from traffic accidents.”¹¹ To do so, it created the National Highway Traffic Safety Administration (“NHTSA”) and mandated that it “prescribe motor vehicle safety standards.”¹² Similarly, Congress wanted to “protect the public against unreasonable risks of injury associated with consumer products.”¹³ Congress thus created the Consumer Product Safety Commission (“CPSC”) and empowered it to “promulgate consumer product safety standards.”¹⁴ The same is true for the Food and Drug Administration, which exists to “promote the public health.”¹⁵ The FDA has the statutory power to implement regulations for products under its jurisdiction, including prescription drugs, nonprescription drugs, cosmetics, some foods, medical devices, and tobacco products.¹⁶

Courts could easily look to these agency safety standards to determine product defects. As one example, the NHTSA recently passed a safety standard requiring that all “vehicles under 10,000 pounds . . . manufactured on or after May 1, 2018 . . . come equipped with rear visibility technology . . . to enable the driver of a motor vehicle to detect areas behind the vehicle to reduce death and injury resulting from backover incidents.”¹⁷ This regulation could be the basis for whether a defect exists if a plaintiff is hurt by a backover accident.

have been reduced or avoided by the provision of reasonable instructions or warnings”).

¹¹ 49 U.S.C. § 30101 (2012).

¹² *Id.* § 30101(1).

¹³ 15 U.S.C. § 2051(b)(1) (2012).

¹⁴ *Id.* § 2056(a).

¹⁵ 21 U.S.C. § 393(b)(1) (2012).

¹⁶ *Id.* §§ 371(a), 393(d)(2)(A)–(D).

¹⁷ Press Release, NHTSA, NHTSA Announces Final Rule Requiring Rear Visibility Technology (Mar. 31, 2014) [hereinafter NHTSA Press Release], <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2014/NHTSA+Announces+Final+Rule+Requiring+Rear+Visibility+Technology>. The ability to promulgate safety standards and regulations enables an agency to regulate proactively—to ensure that a product is safe from the start. The drivers in vehicles equipped with the mandatory back-up camera will be better able to avoid backover crashes. Although the potential for proactivity exists, in practice it will not always happen. Oftentimes, the agency may not realize the need for a safety standard until people have been

And courts do look to regulations like this to an extent. If a car involved in a backover accident lacked rear visibility technology as mandated by this regulation, then the car would be defective as a matter of law. This is the application of negligence per se to the products liability context.¹⁸ Under negligence per se, an appropriate statute or regulation can define reasonable conduct,¹⁹ and any violation of such a statute constitutes unreasonable conduct as a matter of law.²⁰ Applied to the products liability context, an agency safety standard defines defectiveness and a violation of it establishes defect as a matter of law.²¹

A violation of a safety standard establishes a defect, but compliance lacks the same effect. Under general negligence per se principles, compliance with a statute “does not prevent a

hurt and/or have sued the manufacturer. Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1161 (1988) [hereinafter Schwartz, *Role of Federal Safety Regulations*] (“The tort system also spurs government to act upon discovery of the otherwise undetectable risks associated with products.”). Professor Schwartz offered asbestos, the Dalkon Shield, and cigarette lighters as three examples of products “that first became known through the tort system and later were regulated by the government.” *Id.* at 1161–62. The NHTSA knew of the need to mandate back-up cameras because, on average, backover crashes cause 210 deaths and 15,000 injuries per year. NHTSA Press Release, *supra* note 17.

¹⁸ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. d (AM. LAW INST. 1998) (“The rule in Subsection (a) that noncompliance with an appropriate governmental product safety regulation renders a product defective in design or defective because of inadequate warnings or instructions finds its origin in a common-law rule holding that the unexcused omission of a statutory safety requirement is negligence per se.”).

¹⁹ RESTATEMENT (SECOND) OF TORTS § 286 (AM. LAW INST. 1965) (listing the requirements for when “a legislative enactment or an administrative regulation” can be adopted as the standard of care); *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (AM. LAW INST. 2010) (explaining that an actor is negligent if he “violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect”).

²⁰ RESTATEMENT (SECOND) OF TORTS § 288B(1) (“The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.”); *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (explaining that an actor is negligent if he violates “a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect”).

²¹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4(a) (“[A] product’s noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation.”).

finding of negligence where a reasonable man would take additional precautions.”²² Similarly, “a product’s compliance with an applicable product safety statute or administrative regulation . . . does not preclude as a matter of law a finding of product defect.”²³ If a manufacturer uses an agency-approved design or warning, that is, at best, evidence that the product is not defective and a layperson jury can still find liability in tort for a defective design.

Many reasons exist for the lack of deference to regulatory compliance.²⁴ One main reason is based on the following hypothetical. Suppose an agency-required warning warns of risks X and Y, but not Z. There are two possible reasons why the agency did not require a warning about risk Z. The agency “may have considered risk Z too insignificant to warrant a warning,” or “the agency may not have considered risk Z at all.”²⁵ If “the agency did not consider the risk and did not apply its expertise, its silence should be meaningless in resolving the tort action.”²⁶ Put another way, “when the administrator has passed no judgment on the problem before the court, the administrative process can furnish no acceptable criteria of care.”²⁷ Because of this possibility—that the agency never even considered the risk—

²² RESTATEMENT (SECOND) OF TORTS § 288C.

²³ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4(b).

²⁴ Professor Owen summarized those reasons:

[A]rguments favoring [the regulatory compliance] defense are more than offset by a large number of problems: statutes (and sometimes regulations) tend to be abstract, vague, limited in scope, and incapable of adequately addressing the myriad factual situations that may arise in individual cases; conversely, regulations may be so narrow and specific that they fail to capture related matters at the margins of the regulation, leaving large categories of similar matters unregulated; statutes and regulations are difficult to amend to reflect changes over time, and those dealing with science and technology quickly become obsolete; statutes and regulations both may be shaped more by lobbyists for the regulated parties than by detached and objective decisionmakers neutrally balancing all affected interests in pursuit of optimal safety; and, unlike the inherent flexibility of the common law, the rigidity of regulatory safety standards tends to stifle creativity and innovation.

DAVID G. OWEN, PRODUCTS LIABILITY LAW § 14.4, at 870 (3d ed. 2015) [hereinafter OWEN, PRODUCTS LIABILITY].

²⁵ Schwartz, *Role of Federal Safety Regulations*, *supra* note 17, at 1132.

²⁶ *Id.*

²⁷ Clarence Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEX. L. REV. 143, 167 (1949).

commentators argue and courts agree that compliance with agency regulations cannot conclusively show the absence of a defect.²⁸ Instead, we leave the question of defect to juries.²⁹

Another problem with deference is that regulations are not specific enough to the alleged defect or injury at issue:

Because the circumstances of cases vary, courts often find that the exigencies of a case fall outside the “normal” or “optimum” circumstances covered by the statute. In product cases, courts may find that the product poses special risks and that the broad regulation covering many products does not account for those special risks.³⁰

If the regulation is not specific, it is irrelevant to defectiveness.

Similarly, the lack of a regulation is irrelevant to defectiveness; no court has found that the absence of a standard is relevant to showing the lack of a defect. Suppose a plaintiff alleges that a lawnmower engine is defective because it does not stop within ten seconds. If no agency standard regulates how fast a lawnmower engine must stop, that absence of a standard will not help the defendant show its engine is not defective.

Some states have, by statute, created greater deference to compliance with agency standards.³¹ For example, Indiana and Texas mandate a rebuttable presumption of no defect if the manufacturer complied with applicable safety standards.³² Such states, however, still leave room for the plaintiff to show defect and negate any increased deference. Indiana’s statute allows the plaintiff to rebut the presumption if the plaintiff can “establish the presence of a safer alternative.”³³ Texas allows the plaintiff

²⁸ *See id.* at 162–63.

²⁹ Schwartz, *Role of Federal Safety Regulations*, *supra* note 17, at 1132–33 (“Traditionally, courts have avoided the issue of agency silence largely by ignoring it.”).

³⁰ *Id.* at 1143 (footnotes omitted).

³¹ *See, e.g.*, ARK. CODE ANN. § 16-116-205 (1979); COLO. REV. STAT. § 13-21-403 (2003); FLA. STAT. ANN. § 768.1256 (West 1999); IND. CODE ANN. § 34-20-5-1 (West 1998); N.D. CENT. CODE ANN. § 28-01.3-09 (West 1995); OKLA. STAT. ANN. tit. 76, § 57.2 (West 2014); TENN. CODE ANN. § 29-28-104 (2011); UTAH CODE ANN. § 78B-6-703 (West 2008).

³² IND. CODE ANN. § 34-20-5-1; TEX. CIV. PRAC. & REM. CODE ANN. § 82.008 (West 2003).

³³ *Rogers ex rel. Rogers v. Cosco, Inc.*, 737 N.E.2d 1158, 1167 (Ind. Ct. App. 2000).

to rebut the presumption if she shows that the safety standard was “inadequate to protect the public from unreasonable risks of injury or damage.”³⁴

Because of the exceptions, these statutes do not really alter the common law. With or without the presumption, the plaintiff has the burden to establish defect. And the way the plaintiff does so is the same regardless of the presumption. Take Indiana’s presumption, for example. The plaintiff has to show a safer alternative either (1) to establish defect under the risk-utility test if no presumption exists³⁵ or (2) to establish defect to overwhelm the presumption.³⁶ Thus, the way the plaintiff rebuts the presumption is the same way the plaintiff would establish defect without the presumption. Although not yet interpreted by case law, the same is likely true of Texas’s exception. Regardless of the presumption, the plaintiff will want to establish that the product designed as is—in compliance with applicable regulations—poses unreasonable dangers to the public and that a safer design exists. The presumption does not make the plaintiff’s case any more difficult, nor does the presumption make it any more likely that the defendant will prevail. Thus, even states that appear to mandate deference really do not do so.

Leaving the question of defectiveness to juries sacrifices the possible uniformity that would result from agency deference. For instance, deference to an FDA-approved warning would provide a uniform standard regarding the warning’s adequacy.³⁷ But no such deference exists. As it now stands, “states can reach dramatically different results in terms of whether the plaintiff

³⁴ TEX. CIV. PRAC. & REM. § 82.008(b)(1).

³⁵ See *Weigle v. SPX Corp.*, 729 F.3d 724, 734 n.2 (7th Cir. 2013) (discussing Indiana’s test for design defect, which, in practice, is a risk-utility test possibly requiring evidence of a reasonable alternative design).

³⁶ *Rogers*, 737 N.E.2d at 1166–67.

³⁷ Uniformity is one reason why courts and academics claim that tort liability for failure to recall should be based on an agency order to recall. There are other advantages and disadvantages to a regulatory defense less relevant to this Article that have been debated by academics elsewhere. See generally, Ausness, *supra* note 6; Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175 (1989); David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1 (2005); Teresa Moran Schwartz, *Regulatory Standards and Products Liability: Striking the Right Balance Between the Two*, 30 U. MICH. J.L. REFORM 431 (1997) [hereinafter Schwartz, *Striking the Right Balance*]; Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167 (2000).

has raised a jury question on the issue of design defect.”³⁸ This consequence “may well induce manufacturers to simply ignore tort doctrine in individual states.”³⁹ Manufacturers just pay the damages to the plaintiffs who can establish defect and do not alter the design.⁴⁰ This would not be possible if states had more uniform standards, which would result from deference to agency safety standards. But courts have left defectiveness for juries to decide.

B. No Deference on Decisions To Require Post-Sale Warnings

In 1998, the Third Restatement of Torts: Products Liability helped awaken a debate about whether tort law should also impose liability for a manufacturer’s post-sale conduct. Criticized for not restating the law so much as defining it, the Third Restatement includes a post-sale duty to warn, imposing liability for a manufacturer’s failure to issue a post-sale warning of dangers discoverable after the product is sold.⁴¹

Liability for post-sale conduct may seem unnecessary if a plaintiff can already establish that the product was defective at the time of sale.⁴² Some products, however, may not be defective

³⁸ Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 928 (1996).

³⁹ *Id.* at 930.

⁴⁰ Tort law could conceivably require a design change if the court issued injunctive relief. Such relief generally will not be available, however, as legal damages are typically adequate. “Courts prefer money damages to equitable remedies whenever such awards provide adequate relief.” *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 266 (D.D.C. 1990) (denying class certification to plaintiffs seeking injunction forcing the defendant to recall and retrofit allegedly defective product because money damages were adequate); *see also* RESTATEMENT (SECOND) OF TORTS § 938 cmt. b (AM. LAW INST. 1979) (“[I]f all that is needed is a judgment for damages, an injunction is normally not the more appropriate remedy.”). A products claim is for the personal injuries the plaintiff suffers or the property damage the plaintiff may have suffered. Damages traditionally and adequately compensate these injuries, and thus, an injunction would be inappropriate. *See, e.g.*, *Rhynes v. Stryker Corp.*, No. 10-5619 SC, 2011 WL 2149095, at *3 (N.D. Cal. May 31, 2011) (denying request for injunctive relief to prevent further alleged misrepresentations regarding product because money damages would provide adequate remedy for injury due to product); *Adams v. I-Flow Corp.*, No. CV09-09550 R(SSx), 2010 WL 1339948, at *7 (C.D. Cal. Mar. 30, 2010) (same); *see also* RESTATEMENT (SECOND) OF TORTS § 938 cmt. b (listing the few areas of substantive tort law that give rise to claims for injunctive relief instead of damages and not listing a products liability claim).

⁴¹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (AM. LAW INST. 1998).

⁴² Courts that have adopted a post-sale duty to warn differ regarding whether the later-discovered danger—triggering the need for a warning—must be related to a defect existing at the time of sale. Under the Restatement view, a post-sale duty to

under the traditional tests at the time of sale. It may not be until later that the product's danger is discoverable. If this is true and the product hurts a plaintiff, her only chance at recovering damages in tort is if the jurisdiction recognizes liability for post-sale conduct.⁴³ A majority of states now do so.⁴⁴

But states take a cautious approach. A post-sale warning campaign would be very burdensome for manufacturers, as it would involve costs associated with identifying those who need to be warned and then actually warning them.⁴⁵ Courts do not want to impose liability for a manufacturer's failure to undertake such a burdensome, and thus possibly unreasonable, precaution. Thus, the Restatement rule is factually dependent and fault based. Liability for a failure to warn post sale is proper only if a reasonable manufacturer would have issued the post-sale

warn exists "whether or not the product is defective at the time of original sale." RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. a. Some states, however, have required that a latent and undetectable design defect exist at the time of sale for a manufacturer to owe a duty to warn of the later-revealed danger. *See, e.g.,* *Romero v. Int'l Harvester Co.*, 979 F.2d 1444, 1450 (10th Cir. 1992) (interpreting Colorado law as limiting the post-sale duty to warn to "defects in design, existing but unknown or unappreciated at the time of the original sale, which are subsequently discovered by the manufacturer"); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1313 (Kan. 1993) (recognizing a post-sale duty to warn "when a defect, which originated at the time the product was manufactured[,] is later discovered). In such states, liability for the post-sale warning is superfluous in that the plaintiff will already be able to recover her damages.

⁴³ In a jurisdiction that recognizes only point-of-sale liability, "[a] defendant cannot be liable for failing to warn of dangers that were unforeseeable at the time of the sale," with the exception of conduct falling under strict liability. Jill Wieber Lens, *Warning: A Post-Sale Duty To Warn Targets Small Manufacturers*, 5 UTAH L. REV. 1013, 1016 (2014). In contrast, a jurisdiction that acknowledges post-sale liability recognizes a manufacturer's duty to warn of a new danger if the manufacturer discovered or should have discovered the danger after the sale. *Id.* at 1018.

⁴⁴ *See id.* at 1020 n.24 (listing states that have adopted some version of a post-sale duty to warn).

⁴⁵ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. a (explaining that courts must consider the "serious potential for overburdening sellers" when examining whether to impose the post-sale duty).

warning.⁴⁶ Whether a reasonable manufacturer would have done so depends on the risk posed by the product and the costs associated with issuing a post-sale warning.⁴⁷

Another way courts could proceed with caution in imposing liability for post-sale warnings is by deferring to agency action. Congress can empower an agency to require manufacturers to notify product users of dangers that emerge after the time of sale.⁴⁸ As an example, assuming a “substantial product hazard” exists, the CPSC can require a manufacturer “[t]o give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website[] [and] providing notice to any third party Internet website on which such manufacturer . . . has placed the product for sale.”⁴⁹ The CPSC can also require a manufacturer “[t]o mail notice to every person to whom the person required to give notice knows such product was delivered or sold.”⁵⁰ Before requiring a post-sale warning, the agency would have evaluated the costs of that warning.

⁴⁶ *Id.* § 10(a); see also Victor Schwartz, *The Post-Sale Duty To Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 896 (1983) (explaining that “cost should be considered in determining whether a manufacturer has made a reasonable effort to warn product users” and that “the facts of a particular case . . . should all be relevant in determining” liability for post-sale failure to warn).

⁴⁷ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. i.

⁴⁸ See, e.g., 15 U.S.C. § 2064(c) (2012).

⁴⁹ *Id.* § 2064(c)(1)(D).

⁵⁰ *Id.* § 2064(c)(1)(F). The NHTSA also has a limited ability to order a post-sale warning. After the NHTSA makes the initial determination of a defect, it must give the manufacturer an opportunity to explain that the product is not defective or does not affect motor vehicle safety. 49 U.S.C.A. § 30118(b)(1) (West 2015). During this time, the Secretary of Transportation may settle with the manufacturer for a lesser remedy, such as a post-sale warning. This exact scenario was the subject of *Center for Auto Safety v. Lewis*, where the court upheld the agency’s requirement of the manufacturer to send owners of certain automobiles notice of the alleged transmission defect along with a warning to not leave the automobile with the engine running. 685 F.2d 656 (D.C. Cir. 1982). Notably, however, the NHTSA may be able to require just a post-sale warning—and not an additional remedy, such as replacement—if a defective vehicle is over fifteen years old, or if a defective tire was purchased more than five years prior to the determination of defect. See 49 U.S.C.A. § 30120(g) (West 2015). The FDA also can require post-sale warnings in certain circumstances. The FDA can require a change to a warning when it is misbranded or adulterated. See 21 U.S.C. § 321(n) (2012). Additionally, “[m]anufacturers and distributors of drugs and the Food and Drug Administration occasionally are required to mail important information about drugs to physicians and others responsible for patient care.” 21 C.F.R. § 200.5 (2016).

Courts could thus defer to agency decisions that the warning itself was reasonable and the costs justified, and impose liability only when the agency had so acted.

But no one seems to acknowledge this opportunity for deference. The only mention of agency-required post-sale warnings is buried in the comments to the Third Restatement provision regarding the effect of violations of or compliance with agency safety standards.⁵¹ The commentary clarifies that this Third Restatement provision is limited to agency safety standards:

Conduct involving products but not related to product defect may also be governed by statute or regulation. For example . . . statutes or regulations may govern such matters as post-sale warnings or recalls. When and whether liability arises when there has been noncompliance or compliance with such statutes or regulations is governed by Restatement (Second) of Torts §§ 286–288C.⁵²

The referenced Second Restatement sections are the basic negligence per se rules, which easily apply to an agency order to issue a post-sale warning. An agency orders a post-sale warning to protect users of the product and to help prevent those users from being injured by the defective product.⁵³ If an agency ordered a manufacturer to issue a post-sale warning and the manufacturer failed to comply with that requirement, the manufacturer will have violated an agency regulation and will have acted unreasonably as a matter of law.⁵⁴

⁵¹ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 (AM. LAW INST. 1998).

⁵² *Id.* § 4 cmt. f. This comment obviously also refers to regulations that may govern product recalls. But compliance and noncompliance with agency recall orders is not governed by the Second Restatement's negligence per se rules; it is governed by the Third Restatement's § 11. See *infra* Section II.A.

⁵³ See RESTATEMENT (SECOND) OF TORTS § 286 (AM. LAW INST. 1965) (describing the requirements for a statute to define the standard of care under negligence per se).

⁵⁴ One exception would be if the post-sale warning requirement was vague, like if the agency simply ordered the manufacturer to act reasonably and notify its customers. See *Short v. Spring Creek Ranch, Inc.*, 731 P.2d 1195, 1199 (Wyo. 1987) (explaining that “in order to invoke the statute or regulation as a standard the statute or regulation must prescribe or proscribe specific conduct” and that “[u]sing the statute or regulation as a standard is not appropriate if it sets out only a general or abstract standard of care”).

Applying negligence per se principles further, if the agency ordered the post-sale warning and the manufacturer complied, the manufacturer could still later be found to have acted unreasonably in a products claim.⁵⁵ Compliance with agency action is not a shield from tort liability.⁵⁶

If the agency never required a post-sale warning, however, no agency regulation is implicated and negligence per se cannot apply. For a regulation to substitute as the standard of care and define reasonable conduct, the regulation must be intended to benefit a class of persons including the plaintiff and it must be designed to prevent the type of accident that injured the plaintiff.⁵⁷ These negligence per se requirements assume a positive, affirmative regulation. The lack of an order from an agency requiring a post-sale warning—really, inaction or agency silence—cannot meet these negligence per se requirements.

The manufacturer could creatively argue that it technically complied with a regulation—it was never ordered to issue a post-sale warning and thus did not do so. But even if the manufacturer could convince a court that this was compliance, compliance with an agency requirement does not establish reasonable conduct. It “does not prevent a finding of negligence where a reasonable [manufacturer] would take additional precautions.”⁵⁸

Either way, courts give no deference to agency inaction, that is, to not ordering a post-sale warning. If negligence per se is inapplicable, the jury can obviously find the manufacturer unreasonable. And if the manufacturer’s inaction—not issuing a post-sale warning—is considered as compliance with agency inaction, compliance does not equal reasonable conduct. A jury is still free to find that the manufacturer acted unreasonably even though it technically “complied” with agency regulations.

⁵⁵ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 16 (AM. LAW INST. 2010); RESTATEMENT (SECOND) OF TORTS § 288C.

⁵⁶ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 16; RESTATEMENT (SECOND) OF TORTS § 288C.

⁵⁷ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14; RESTATEMENT (SECOND) OF TORTS § 286.

⁵⁸ RESTATEMENT (SECOND) OF TORTS § 288C.

Depending upon the circumstances, the costs of a post-sale warning can be excessive.⁵⁹ Presumably, an administrative agency could evaluate those costs better than courts, and could better weigh them against the risk to users of the product if not warned, meaning deference to agencies might be appropriate. Deference would also improve uniformity in that only government agencies would define the reasonableness of expensive post-sale warnings. But courts ignore the agency's possible superior ability in this area and give no deference to an agency's not ordering a post-sale warning. The manufacturer can be found unreasonable for not issuing a post-sale warning even though an agency never ordered the manufacturer to do so.

C. No Deference Within Determinations of Whether and How To Punish

Tort law's main remedy is compensatory damages, which compensate the plaintiff for her injury.⁶⁰ If the plaintiff is able to establish defect, or unreasonable conduct in failing to issue a post-sale warning, she will receive compensation based on the extent of her injury caused by that defect or unreasonable conduct. Tort law also recognizes another remedy, punitive damages, which punish defendants for their tortious conduct and

⁵⁹ Courts and academics both consider a post-sale warning campaign generally expensive, and perhaps prohibitively so. *See, e.g.,* *Modelski v. Navistar Int'l Transp. Corp.*, 707 N.E.2d 239, 246 (Ill. App. Ct. 1999) (“[T]he law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products”); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 cmt. a (describing the “daunting” “costs of identifying and communicating with product users years after sale”). But the specific costs will depend on the factual circumstances of how many people there are to warn and the method of that warning. In a challenge to an NHTSA recall order decades ago, Ford asserted that the cost of merely giving notice of the defect to all present owners would exceed \$500,000. *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 494 (D.D.C. 1975) (Hart, J., dissenting), *aff'd*, 425 U.S. 927 (1976).

⁶⁰ RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. LAW INST. 1979) (explaining that the aim of compensatory damages is to put the injured plaintiff “in a position as nearly as possible equivalent to his position prior to the tort”).

deter tortfeasors.⁶¹ Because of these purposes, punitive damages are available only if the defendant acts with an evil intent or its conduct evidences a reckless disregard for the safety of others.⁶²

As with liability determinations for compensatory damages, opportunities for deference to agency actions exist within determinations of whether to impose punitive damages. Maybe a violation of agency action could automatically trigger the availability of punitive damages, or compliance with a regulation could automatically render punitive damages unavailable.

However, no such deference exists. A violation of safety standards does not render punishment automatic.⁶³ A violation of such standards can be the basis of a punitive damage award, but it is frequently a basis only when the violation is knowing or intentional.⁶⁴ And even with a knowing violation, punitive damages are not automatically available. Despite the initial appeal of a rule that automatically punishes defendants for intentional safety standard violations,⁶⁵ "a manufacturer's decision to violate a product safety standard may be far less culpable than a decision to expose consumers to an unreasonable risk of harm."⁶⁶ For instance, the "safety standard may be more stringent than is actually required for the public safety,"⁶⁷ or it "may be essentially worthless or may even create more hazards than it eliminates."⁶⁸ That is why Professor David G. Owen long

⁶¹ *Id.* § 908(1). Initially, some questioned whether punitive damages should be available in a products liability claim. That thought has been overwhelmingly rejected and punitive damages are recoverable if the plaintiff can establish their propriety. See David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1270-71 (1976) [hereinafter Owen, *Punitive Damages*]. Additionally, modern definitions of design and warning defects are fault based, again reinforcing the compatibility of punitive damages with products claims.

⁶² RESTATEMENT (SECOND) OF TORTS § 908(2).

⁶³ *Id.*

⁶⁴ Owen, *Punitive Damages*, *supra* note 61, at 1335.

⁶⁵ *Id.* at 1337 ("There is substantial initial appeal to reasoning that an intentional violation of a product safety standard, especially one promulgated by a legislative body, that injures a consumer is ipso facto an intentional violation of the consumer's rights . . . and that therefore the manufacturer should automatically be liable for punitive damages.").

⁶⁶ *Id.* at 1338.

⁶⁷ *Id.*

⁶⁸ *Id.*

ago explained that the jury should be able to consider a safety standard violation when deciding whether and to what extent to punish, but no per se rule should exist.⁶⁹

Similarly, compliance with agency safety standards does not render punitive damages unavailable.⁷⁰ “The basic concept of the compliance-with-law punitive damages defense appears logical and fair, for ordinarily a manufacturer or other product supplier is far from quasi-criminal in doing what the government explicitly permitted or required it to do.”⁷¹ But again, many reasons exist why a deferential per se rule would be inappropriate. Agencies “often have much less information than manufacturers on specific safety problems” and agencies “move much more slowly and with far less flexibility than private manufacturers.”⁷² Safety standards necessarily set only a minimum safety level and a manufacturer could easily comply with them yet still act in a way that should be punished. Thus, courts do not defer to agency safety standards as a basis for imposing punitive damages.

Along the same lines, courts do not defer to agency orders on post-sale warnings within the punishment context. A violation of a post-sale warning order would show unreasonable conduct as a matter of law,⁷³ but it would not render punitive damages automatically available. And even if an agency never requires

⁶⁹ *Id.* at 1339.

⁷⁰ As with statutorily enhanced deference to compliance with agency regulations in determinations of defect, discussed *supra* Section I.A., some states have also increased the amount of deference given to compliance with agency regulations in the punitive damages context. For example, Ohio prohibits liability for punitive damages “if the manufacturer . . . fully complied with all applicable government safety and performance standards . . . relative to the product’s . . . design or formulation, [and] adequate warnings or instructions . . .” OHIO REV. CODE ANN. § 2307.80(D)(1) (West 2004); *see also* 735 ILL. COMP. STAT. ANN. 5/2-2107 (West 1995); TENN. CODE ANN. § 29-28-104(b) (2011). Other states have more specific statutes precluding liability for punitive damages if the product complied with FDA regulations. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-701 (1989); N.J. STAT. ANN. § 2A:58C-5 (West 1995); OHIO REV. CODE ANN. § 2307.80(C)(1)(a); OR. REV. STAT. ANN. § 30.927 (West 1987). But even this deference is limited as exceptions exist. For example, under Ohio law, a plaintiff can still obtain punitive damages if she can show that the manufacturer withheld material information from the government agency. OHIO REV. CODE ANN. § 2307.80(D)(2).

⁷¹ 2 DAVID G OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY 305 (3rd ed. 2000) [hereinafter MADDEN & OWEN].

⁷² *Id.* at 306.

⁷³ *See supra* notes 53–54 and accompanying text.

the manufacturer to issue a post-sale warning, a manufacturer's failure to do so is frequently the basis of a punitive damages award.⁷⁴

The lack of deference to agency safety standards again sacrifices possible uniformity. Deference could also enable predictability. Manufacturers would know that their violations could trigger punitive damages; they could have the comfort of knowing that they would not be punished in tort as long as they complied. But no such deference exists. Manufacturers can still be found liable for compensatory and punitive damages even if they comply with applicable agency regulations.

II. YET COMPLETE DEFERENCE ON RECALL ORDERS

Although courts refuse to defer to agency safety standards to determine defect, courts are eager to defer to agency orders on product recalls. Courts are so eager to defer, in fact, that they recognize only very narrow bases for tort liability that depend on an agency ordering or encouraging a recall. In effect, courts look to agencies to determine the reasonableness of a recall; a recall would have been reasonable if an agency ordered one, but not if the agency did not order one. This extensive deference is illogical given that it includes deference to agency inaction—that is, to an agency not ordering a recall. Ultimately, there is nothing so special about product recalls to merit this level of deference.

A. *Narrow Bases for Tort Liability Related to Product Recalls*

Courts recognize only very narrow bases of tort liability related to product recalls,⁷⁵ both of which depend on agency action. The reason for this limited liability is courts' belief that agencies are better equipped to evaluate whether the safety benefits of a recall justify the costs.

⁷⁴ Owen, *Punitive Damages*, *supra* note 61, at 1352–61 (describing the questions raised by cases in which a defect is discovered post sale).

⁷⁵ A product “recall” can actually mean multiple things. “[N]o consistent usage unites this word as it appears in the United States Code and the Code of Federal Regulations.” Anita Bernstein, *Voluntary Recalls*, 2013 U. CHI. LEGAL F. 359, 362 (2013). For purposes of this Article, a recall is “a notification to consumers of a product hazard and procedures for accomplishing its repair” at the manufacturer’s expense. OWEN, *PRODUCTS LIABILITY*, *supra* note 24, § 10.8, at 705. The offer to fix the product, often called retrofitting, is a necessary part of this definition as it distinguishes a recall from a post-sale warning of a product’s danger.

1. Agency Action as a Prerequisite

Tort liability related to product recalls is very limited. The Restatement recognizes only narrow circumstances in which a manufacturer can be liable for failing to undertake a recall. Specifically, the Third Restatement dictates that a manufacturer can be liable for injury or damage caused by a seller's failure to act reasonably in recalling a product in only two circumstances: if (1) "a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product," or (2) the manufacturer voluntarily "undertakes to recall the product" when not required to do so.⁷⁶

The first instance of potential liability occurs when a manufacturer violates a recall ordered by the government. Liability is possible both for a violation of the directive and for a "failure reasonably to comply with the relevant directive."⁷⁷ An agency's power to order a recall derives from Congress. For instance, Congress mandates that the National Highway Traffic Safety Administration ("NHTSA") order a product recall if the agency finds a defect creating an "unreasonable risk of injury."⁷⁸

⁷⁶ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 (AM. LAW INST. 1998). A few states recognize broader liability. California law "recognizes a common law duty to recall or retrofit even in the absence of an order from a government agency." *Roberts v. Electrolux Home Prods., Inc.*, No. CV 12-1644 CAS (VBKx), 2013 WL 7753579, at *12 (C.D. Cal. Mar. 4, 2013); *see also* *Hernandez v. Badger Constr. Equip. Co.*, 34 Cal. Rptr. 2d 732, 755 (Ct. App. 1994) (finding substantial evidence of negligence in failing to recall when the manufacturer "decided not to try to retrofit with ATBDs cranes it had already sold or notify owners of previously sold cranes about its decision to make ATBDs standard equipment"). Georgia courts have also recognized liability for a failure to initiate a recall even if one was not ordered. *See Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 636 (Ga. 1993) (explaining that the jury returned a special verdict finding that the defendant was liable for "negligent failure to recall or warn").

⁷⁷ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. b. This basis of liability has been criticized because of the rarity of a government-ordered recall. Bernstein, *supra* note 75, at 367 (explaining that a government-ordered recall "almost never happens"); *see also* James T. O'Reilly, *Product Recalls & the Third Restatement: Consumers Lose Twice from Defects in Products and in the Restatement Itself*, 33 U. MEM. L. REV. 883, 891 (2003) ("The fact is that section 11(a)(1) will not apply to virtually any of the product recalls performed every year.").

⁷⁸ *See* 49 U.S.C.A. § 30118 (West 2015); § 30102(a)(9) (defining "motor vehicle safety" to "mean[] the performance of a motor vehicle . . . in a way that protects the public against . . . against unreasonable risk of . . . injury in an accident"). Congress similarly empowered the CPSC to order a recall under prescribed circumstances. 15 U.S.C. § 2064(b)(4), (c)(1) (2012). The FDA's recall powers differ depending on the product. The FDA has authority to order a recall of medical devices and some foods

Tort liability based on a violation of the agency directive is really just a recall-specific form of negligence per se;⁷⁹ the directive substitutes as the standard of care and a violation of it establishes unreasonable conduct. If an agency orders a product recall, but the manufacturer “unreasonably fails to notify [product] owners, whom it can reasonably identify, about the recall,”⁸⁰ the manufacturer could face tort liability for any damages caused by that violation of the agency order.

The second instance of potential tort liability occurs when a manufacturer voluntarily recalls its product even though it was not required to do so.⁸¹ If a manufacturer voluntarily undertakes a recall, the manufacturer is obligated to act reasonably within that recall and can face liability if it fails to do so. For instance, if a manufacturer voluntarily recalls but “thereafter unreasonably fails to notify owners whom it can reasonably identify about the recall,” it could be liable.⁸²

An additional note on this second instance is necessary. The Third Restatement does not consider these voluntary recalls to actually be voluntary. “[C]ourts appear to assume that voluntary recalls are typically undertaken in the anticipation that, if the seller does not recall voluntarily, it will be directed to do so by a governmental regulator.”⁸³ Thus, even voluntary recalls, which can create tort liability, are actually motivated or encouraged by

but, surprisingly, has little authority to order a recall of the other products under its jurisdiction. Bernstein, *supra* note 75, at 364.

⁷⁹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. b; *see also infra* notes 100–01 and accompanying text.

⁸⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. b, illus. 2. The author was unable to locate any case where a manufacturer was sued under this provision for simply not obeying a government directive to recall.

⁸¹ This is similar to traditional tort law imposing a duty, where one did not otherwise exist, if an actor voluntarily assumes it. The most common example is if an actor voluntarily helps another in need. RESTATEMENT (SECOND) OF TORTS § 324 (AM. LAW INST. 1965).

⁸² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. c, illus. 4. This basis of liability has also been criticized because it is rarely used. Bernstein, *supra* note 75, at 369 (“Manufacturers are virtually never held liable for that breach of duty. Similarly—and unsurprisingly—case law presents very few illustrations of the maladroit recall, where a manufacturer undertakes this post-sale rectification but performs it negligently.”).

⁸³ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. c.

agency action. Additionally, agencies are still involved in these voluntary recalls because they oversee and coordinate the recalls with the manufacturers.⁸⁴

Because of agency involvement even in voluntary recalls, the reality is that the Restatement does not impose any tort liability related to recalls unless an agency has been involved with the recall in some way—either ordering an involuntary one, or being about to do so and motivating the manufacturer to undertake a voluntary one. Except in the uncommon case of purely voluntary recalls, if an agency does not act, tort liability cannot exist.

Not surprisingly, current tort law does not appear to incentivize a product recall. Certainly, the manufacturer is motivated to recall if ordered or encouraged to do so by the government. In that instance, the manufacturer could face tort liability if it acts unreasonably within that recall. But without government action, the manufacturer may be better off not recalling. There is no chance of tort liability based on such inaction. The lack of liability means tort law provides no direct incentive for a manufacturer to recall a product. Why would the manufacturer do so? Again, there is no chance of liability based on the decision to not recall,⁸⁵ as long as an agency never ordered one.

⁸⁴ For example, a vehicle manufacturer is required to inform the NHTSA when it undertakes a recall on its own. See 49 C.F.R. § 573.6(a) (2014). The manufacturer must identify the defect and what vehicles are being recalled. *Id.* § 573.6(c)(2). It must also describe the plan for “remedying the defect.” *Id.* § 573.6(c)(8)(i).

⁸⁵ Failure to recall could be the basis for punitive damages, however. See *infra* Section II.B. This possibility could incentivize a recall. Also, already existing liability for pre-sale defects could motivate a recall. If the product is defective and the manufacturer recalls it, the plaintiff could get his product fixed. “A prompt recall can prevent injuries and thus reduce, although not eliminate entirely, product liability claims.” Teresa M. Schwartz & Robert S. Adler, *Product Recalls: A Remedy in Need of Repair*, 34 CASE W. RES. L. REV. 401, 416 (1984). Even if the plaintiff does not get the product fixed, the fact of the recall will be advantageous to the manufacturer in any litigation against it because a plaintiff’s failure to follow recall guidance can reduce her recovery wholly or partially. Specifically, the plaintiff’s “failure to bring [the product] in for repair is relevant to the issue of legal causation . . . and the issue of comparative responsibility.” RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. d, illus. 5. Relevant to legal causation, the plaintiff’s failure to respond to the recall could constitute a superseding cause, an unforeseeable intervening cause that precludes the manufacturer’s liability. *Id.* § 15 cmt. b, illus. 2 (illustrating that a plaintiff’s modification of and failure to repair a product could be “sufficiently unforeseeable [so] that the defect was not a substantial factor in causing the . . . injury”). Or, relevant to comparative responsibility, the jury may find that the plaintiff acted unreasonably in failing to respond to the recall. Depending on the

2. Due to Courts' Perceived Inadequacy

The next question is why tort liability related to recalls is so limited. The answer is not federal preemption.⁸⁶ No court has found that Congress has expressly preempted state tort law causes of action for failure to recall.⁸⁷ Further, federal regulation of product safety is not so dominant so as to preclude state regulation, whether through local administrative action or tort law.⁸⁸

There is also little support for the argument that failure to recall liability is preempted because of its implicit conflict with federal law. The first type of this implied preemption is impossibility preemption, which means it is impossible to comply

state, this finding could negate the plaintiff's recovery. Alternatively, the jury would assign some portion of fault to the plaintiff. If the portion of fault assigned is high enough, again depending on the state, this could negate the plaintiff's recovery or reduce it. *Id.* § 17.

⁸⁶ Extensive analysis of the possibility of preemption of liability for failure to recall is outside the scope of this Article. Of the few cases where courts have found preemption, a majority have involved a plaintiff seeking injunctive relief forcing a recall as opposed to damages resulting from the failure to recall. See *supra* note 40 for a discussion of why injunctive relief is generally not available in products liability claims.

⁸⁷ See, e.g., *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1195 (C.D. Cal. 2010) [hereinafter *In re Toyota Motor Corp.*] (“[T]he Safety Act expressly provides that rights and remedies created by the Act are supplemental to rights and remedies provided by State law.”); *In re Bridgestone/Firestone Inc., Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935, 943 (S.D. Ind. 2001) (“We first note that express preemption is not an issue here. Defendants point to no provision of the Safety Act explicitly superseding state-law-based injunctive relief.”).

⁸⁸ See, e.g., *In re Toyota Motor Corp.*, 754 F. Supp. 2d at 1196–97 (noting that “[m]otor vehicle safety is an area of law traditionally regulated by the states”); *Marsikian v. Mercedes Benz USA, LLC*, No. CV 08-04876 AHM (JTLx), 2009 WL 8379784, at *8–9 (C.D. Cal. May 4, 2009) (explaining that the regulatory field in question—car safety—is an area of traditional state police power); *Burgo v. Volkswagen of America*, 183 F. Supp. 2d 683, 689–90 (D.N.J. 2001) (explaining that Congress intended to give the federal government primary responsibility to regulate the automotive manufacturing industry, but not the exclusive responsibility). *But see, e.g., Namovicz v. Cooper Tire & Rubber Co.*, 225 F. Supp. 2d 582, 584 (D. Md. 2001) (explaining that the NHTSA has the “exclusive authority” to determine if a defect related to motor safety exists and the effect of the Safety Act is to “completely preempt the area of vehicle and equipment recalls”); *Coker v. DaimlerChrysler Corp.*, No. 01 CVS 1264, 2004 WL 32676, at *4 (N.C. Super. Ct. Jan. 5, 2004) (finding tort law claim for injunctive relief to force a recall to be “solely within the purview of [the] NHTSA” based on “the comprehensive role that the federal government occupies in motor vehicle recalls”), *aff'd*, 617 S.E.2d 306 (N.C. Ct. App. 2005), *aff'd*, 627 S.E.2d 461 (N.C. 2006).

with both federal and state law.⁸⁹ An agency never issues a “do not recall” order, which would be the only type of order that would make it impossible to comply with a state law providing that the manufacturer should have undertaken a recall.

Similarly, there is little argument for preemption under obstacle-conflict implied preemption. This type of preemption exists if enforcement of the state tort law obligation would frustrate the purposes of federal law. It is unclear how liability for failure to recall could frustrate federal law; state law liability actually furthers Congress’s desire to improve product safety.⁹⁰ Congress likely did not intend to create an exclusive, expert federal agency given the lack of expressed preemption.⁹¹

Still, courts decline to recognize broader liability for a failure to recall because of deference to government agencies. As the Third Restatement explains:

⁸⁹ The Supreme Court labeled this a “demanding defense.” *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). Most courts have rejected an impossibility implied preemption defense to a failure to recall claim. *See, e.g., In re Toyota Motor Corp.*, 754 F. Supp. 2d at 1195–99 (refusing to find impossibility preemption based on a hypothetical conflict between a court order and what an agency may order); *Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208, 1213–15 (N.D. Cal. 2002) (refusing to find impossibility preemption because of a lack of a conflict between an agency order and a court order).

⁹⁰ Most courts have also rejected conflict preemption arguments. *See, e.g., In re Toyota Motor Corp.*, 754 F. Supp. 2d at 1198–99 (explaining that a court-ordered recall would not interfere with congressional intent to reduce traffic accidents and resulting deaths and injuries); *Marsikian*, 2009 WL 8379784, at *8 (finding that Congress “did not intend that there be an exclusive and uniform federal remedy for motor vehicle defects”); *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1116 (C.D. Cal. 2008) (“Given that the regulatory record does not indicate a clear preference for a bar against a state law replacement remedy, the Court cannot say that allowing a replacement remedy in this case ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the CPSC voluntary recall regulations.”); *Kent*, 200 F. Supp. 2d at 1218 (holding that allowing pursuit of tort claims will not “divert resources and attention from [the] NHTSA” nor “disturb the careful administrative procedure envisioned by Congress”). These courts are likely correct.

⁹¹ *See Wyeth*, 555 U.S. at 573–74 (rejecting argument that Congress wanted to create the FDA as an expert agency because, at least in part, Congress was aware of state tort lawsuits yet did not and has not created an express preemption provision).

[E]ven when a product is defective . . . an involuntary duty to recall should be imposed on the seller only by a governmental directive issued pursuant to statute or regulation. Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings.⁹²

Similarly, commentators explain that recalls involve the “enormous” “cost[s] of locating, recalling, and replacing mass-marketed products.”⁹³ Agencies, and not courts, “are best suited to examine the issues attending recalls.”⁹⁴ Courts repeat these sentiments of inferiority, concluding that they “have traditionally not been suited to consider the economic effect of such repair or recall campaigns.”⁹⁵

⁹² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. a (AM. LAW INST. 1998). The commentary to the Third Restatement’s § 11 announces that “[d]uties to recall products impose significant burdens on manufacturers,” but it does not identify those burdens. *Id.* It does mention that later redesigns of products cannot trigger a duty to recall because “manufacturers would face incalculable costs every time they sought to make their product lines better and safer.” *Id.* This concern is off base for multiple reasons. First, a new warning or design does not automatically make the older warning and design defective. If it did, courts should again be hesitant to impose liability for warning and design defects. Similarly, a new warning or design would not create a need for a recall, or liability for a failure to undertake one. Second, liability for failure to recall would require the manufacturer to pay damages for injuries caused by the failure to recall, not to actually undertake a recall.

⁹³ Schwartz, *supra* note 46, at 901.

⁹⁴ Douglas R. Richmond, *Expanding Products Liability: Manufacturers’ Post-Sale Duties To Warn, Retrofit, and Recall*, 36 IDAHO L. REV. 7, 78 (1999); *see also* Schwartz, *supra* note 46, at 901 (“As Congress has recognized, administrative agencies have the institutional resources to make fully informed assessments of the marginal benefits of recalling a specific product.”). *But see* Kevin M. McDonald, *Recall the Recall*, 33 TRANSP. L.J. 253, 262 (2006/2007) (explaining that the “NHTSA has never studied the effect of recalls on vehicle safety” and “hasn’t effectively analyzed the ‘cost’ of recalls, either”).

⁹⁵ *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 334 (Mich. 1995) (footnotes omitted) (citation omitted) (“[W]e believe the duty to repair or recall is more properly a consideration for administrative agencies and the Legislature who ‘are better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products,’ as well as other economic factors affecting businesses and consumers.”); *see also In re Human Tissue Prods. Liab. Litig.*, 488 F. Supp. 2d 430, 433 (D.N.J. 2007) (“Plaintiffs are essentially asking the [c]ourt to perform [a] task[] traditionally relegated to the FDA. The [c]ourt . . . does not have the expertise to undertake such a task.”); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1316 (Kan. 1993) (“The decision to expand a manufacturer’s post[-]sale duty beyond implementing reasonable efforts to warn ultimate consumers who purchased the product of discovered latent life-threatening hazards unforeseeable at the point of sale should be left to administrative agencies and the legislature.”).

B. Presuming Reasonableness Based on Whether the Agency Ordered a Recall

Courts thus completely defer to an agency's affirmative recall order in that a manufacturer can be liable for failing to act reasonably in carrying out an ordered recall.⁹⁶ Courts also completely defer to an agency's not ordering of a recall in that a manufacturer cannot be liable in tort if the agency never ordered—or otherwise encouraged—a recall.⁹⁷ Yet, and most curiously, this deference disappears in the context of punishing the defendant through punitive damages.⁹⁸

Within a tort claim, if the agency affirmatively ordered the recall, the court does not re-evaluate the recall order itself.⁹⁹ Instead, the court assumes that the agency properly ordered the recall because the dangers posed by the product justified the costs of the recall¹⁰⁰—essentially, that a reasonable manufacturer

⁹⁶ See *supra* Section II.A.1; see also discussion *infra* note 99.

⁹⁷ See *supra* Section II.A.1.

⁹⁸ See *infra* notes 103–05 and accompanying text.

⁹⁹ The recall order itself can be at issue when a manufacturer directly challenges that recall order. This occurs in one of two ways. First, the manufacturer may directly challenge the order in federal court. This challenge “may be sought under 28 U.S.C. § 1331 (1948) (general federal question jurisdiction statute); 28 U.S.C. § 1337 (1948) (federal jurisdiction over commerce issues); 28 U.S.C. § 2201 (1948) (Declaratory Judgment Act); and terms of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702 (1966).” Kevin M. McDonald, *Judicial Review of NHTSA-Ordered Recalls*, 47 WAYNE L. REV. 1301, 1320 n.95 (2001). Alternatively, the manufacturer may choose to just ignore the recall order in which case the agency's only method of enforcing it is to go to court. Per statute, the agency can refer the matter to the U.S. Attorney General, and the Attorney General may bring a civil action in federal court to enjoin “a violation of this chapter . . . or order issued under this chapter.” 49 U.S.C. § 30163(a)(1) (2012). In those cases, courts apply a test just like the Hand formula. See discussion *infra* note 128. Specifically, courts evaluate an NHTSA recall order based on “(1) the severity of the harm it threatens; (2) the frequency with which that harm occurs in the threatened population relative to its incidence in the general population; and (3) the economic, social, and safety consequences of reducing the risk to a so-called ‘reasonable’ level.” *United States v. Gen. Motors Corp.*, 656 F. Supp. 1555, 1578 (D.D.C. 1987), *aff'd*, 841 F.2d 400 (D.C. Cir. 1988). But the recall order itself would not be subject to challenge in a tort claim for failure to act reasonably within a government-ordered recall.

¹⁰⁰ The agency's evaluation of the costs of a product recall may be exaggerated. See McDonald, *supra* note 94 (explaining that the “NHTSA has never studied the effect of recalls on vehicle safety” and “hasn't effectively analyzed the ‘cost’ of recalls, either”). Nothing in Congress's empowerment of the NHTSA to order a recall expressly requires, or even allows, the agency to consider the costs of recalling the product. See 49 U.S.C.A. § 30118(a) (West 2015) (enabling a product recall if the vehicle contains “a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard”); § 30102(a)(9) (defining “motor vehicle

would have recalled the product. The tort claim thus focuses not on the propriety of ordering the recall but rather on whether the manufacturer acted reasonably within the ordered recall. If the manufacturer violated the recall order itself, that violation would conclusively establish unreasonable conduct via negligence *per se*.¹⁰¹ Or, the allegations of negligence may be based on the manufacturer not acting reasonably in contacting those at risk, and that would be the focus of the case. But the manufacturer is unable to challenge the need to do the recall in the first place; the reasonableness of the recall is essentially presumed based on deference to the agency's order.

If the agency never ordered a recall, courts, due to their inability to evaluate the costs of a product recall, essentially presume that a recall would not have been reasonable. Courts believe that recalls are so complicated and expensive that courts are unable to consider whether a manufacturer should have undertaken one. Only government agencies are able to evaluate whether the dangers posed by the product justified the costs of a recall, the same inquiry as to whether a reasonable manufacturer would have recalled the product. No agency ever ordered a recall, meaning no agency ever decided that a reasonable manufacturer would have recalled the product. Therefore, courts necessarily presume that a recall would not have been reasonable and deny potential tort liability for the unordered and untaken recall.

Thus, courts interpret an agency's lack of a positive declaration that a recall is justified to be a declaration that a recall was not justified. The manufacturer's failure to do a recall on its own technically complies with the agency's lack of a

safety" to "mean[] the performance of a motor vehicle . . . in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident"). The irrelevance of costs is also clear in the recall order the court affirmed in *United States v. General Motors Corp.*, 565 F.2d 754 (D.C. Cir. 1977). There, the court assumed to be true that the defect would cause "between less than one and three injuries in the future" and "that the number of future plug failures will be negligible." *Id.* at 758. Additionally, most people already injured by the defect had not suffered severe injury. Still, the court enforced the NHTSA's recall order—to prevent about three nonserious injuries. *Id.* at 759.

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 288B(1) (AM. LAW INST. 1965) ("The unexcused violation of . . . an administrative regulation[,] which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.").

declaration. In this context, that compliance is not merely “a piece of the evidentiary puzzle” of whether the manufacturer acted reasonably; it is instead “an impenetrable shield from liability” based on a failure to recall.¹⁰²

One exception exists though. The lack of an agency recall order is not an impenetrable shield from liability for punitive damages. A manufacturer can be punished for failing to recall a product even though no agency ever ordered it to do so. The deferential treatment and presumed unreasonableness of the recall disappears if the question is whether to punish the defendant for not recalling the product.¹⁰³

As a practical matter, failure-to-recall punitive damages may be imposed if the manufacturer is otherwise liable for a time-of-sale defect, like a design defect. As a basis for punitive damages, the plaintiff may then argue that the defendant knew of the danger and failed to recall the product.¹⁰⁴ That knowledge and

¹⁰² *Doyle v. Volkswagenwerk Aktiengesellschaft*, 481 S.E.2d 518, 521 (Ga. 1997).

¹⁰³ Just as the lack of an agency recall order will not preclude punitive damages, violation of an affirmative recall order does not automatically trigger punitive damages. A violation of such an affirmative recall order renders compensatory damages available, but not punitive damages. This is treated the same as a violation of a safety standard, which does not make punitive damages automatically available. See *supra* text accompanying note 24.

¹⁰⁴ There is thus a distinction between actions that are the basis for compensatory versus punitive damages. 2 MADDEN & OWEN, *supra* note 71, at 259 (“[C]ourts usually do not focus on the appropriateness of attaching punitive damages to individual theories of recovery. When courts do address the separate underlying liability claims, the inquiry usually is whether the evidence was sufficient to establish the particular causes of action, and whether the defendant’s conduct was sufficiently egregious to support a punitive damages verdict, rather than whether punitive damages properly attach to a particular products liability cause of action.”). Typically, the defendant first improperly designed the product, which is what obligates the defendant to pay compensatory damages. Then, the defendant knew of that dangerous improper design, but did not recall the product. This failure to recall, however, is not what legally injured the plaintiff as it does not produce an injury compensable in tort. The failure to recall is thus not even tortious. Still, tort law allows punishment of that failure to recall. This distinction between types of conduct may present constitutional questions. In *Philip Morris USA v. Williams*, the Supreme Court mandated that a punitive damages award can punish the defendant only for how it injured the plaintiff. 549 U.S. 346, 353 (2007). If tort law does not recognize liability for injury due to the failure to recall, then how can tort law constitutionally punish the same conduct? Similarly, the Supreme Court has mandated that some “reasonable relationship” exist between the injury caused and the amount of punitive damages awarded. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–81 (1996). When a defendant fails to recall a product, though, no such reasonable relationship between injury and award exists, because the failure to recall did not cause any injury.

inaction could show that the defendant acted with reckless disregard for the safety of others, triggering the availability of punitive damages. In fact, “[t]he failure of a manufacturer to remedy a known defect in an already marketed product has given rise to punitive damages in a good many products liability cases.”¹⁰⁵ This is punishment for failing to recall the product—even though an agency never ordered the product recall.

Professor Owen cautioned: “[P]unitive damages are appropriate in post-marketing cases only when the probable reduction in the risk of harm from such remedial measures clearly outweighs the manufacturer’s costs.”¹⁰⁶ This is the same calculation that courts claim only government agencies can make; that is why courts defer to government agencies and do not award compensatory damages for a failure to recall unless a government agency ordered such a recall. But apparently courts and juries are capable of this calculation when the question is whether to punish the defendant for its failure to recall.

The lack of deference to government agencies with respect to the imposition of punitive damages hurts uniformity and predictability. A manufacturer can be punished for not doing something it was not ordered to do, and the manufacturer has little chance of predicting the punishment ramifications of not recalling the product. Currently, the manufacturer knows that it cannot be obligated to compensate a plaintiff injured by the failure to recall unless the government had ordered a recall. But that predictability disappears in the tort law punishment context, which is the same context that the United States

¹⁰⁵ 2 MADDEN & OWEN, *supra* note 71, at 254. *E.g.*, *Reed v. Ford Motor Co.*, 679 F. Supp. 873, 880 (S.D. Ind. 1988) (alleging that defendant’s failure to voluntarily recall the product manifested its recklessness, rendering punitive damages available); *Holmes v. Wegman Oil Co.*, 492 N.W.2d 107, 113 (S.D. 1992) (affirming a jury’s imposition of punitive damages on a manufacturer that “knew of the potential danger of explosion from the control knob for ten years prior to deciding to recall it”); *see also Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975) (reinstating a jury’s imposition of punitive damages where the manufacturer knew of its product’s tendency to cause fires but failed to inform “purchasers and prospective purchasers of the hazard”). Not surprisingly, the plaintiff’s attorney in the first trial against GM for the defective ignition switch mentioned to the jury GM’s alleged knowledge of the defect plus its thirteen-year delay in recalling the defective cars. *See Ivory, supra* note 1.

¹⁰⁶ 2 MADDEN & OWEN, *supra* note 71, at 256.

Supreme Court has already criticized as unpredictable.¹⁰⁷ The lack of deference to agency action in the punishment context only worsens that unpredictability.

C. *The Illogic of Deference to Inaction*

Refusal to recognize tort liability for failure to recall because the agency never ordered a recall is deference to agency inaction. An agency's not ordering a recall is not an affirmative decision; it is merely the lack of an order. The lack of an order is not based on agency expertise, so there is no reason to defer to it. Similarly, it is inconsistent with negligence per se principles to allow an agency's not ordering a recall to dictate that the manufacturer acted reasonably in not recalling the product. And an untaken product recall is no different from any other untaken precaution that juries evaluate in every negligence claim. In short, there is no reason to defer to agency inaction and refuse tort liability for failing to recall a product.

1. Not Even Agency Action

Multiple explanations exist for an agency's not ordering a recall. It is possible that the agency considered the circumstances and, after a full and thorough investigation, concluded that no recall was necessary. Maybe the agency determined that no defect existed or that the danger presented was not severe enough to justify the costs of the recall. Why this determination would be worthy of deference is unclear given that this type of determination receives no deference in a warning, in a design defect claim, or in a post-sale warning claim.¹⁰⁸

¹⁰⁷ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (criticizing punitive damages for their unpredictability and explaining that a punitive damages award "should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another").

¹⁰⁸ Language describing agencies' better ability to decide whether a defect justifies a recall just as easily applies to agencies' better ability to decide whether a design or warning defect exists. In refusing to recognize liability for failure to recall, one North Carolina court explained that "expertise on interlock systems and design defects in minivans is more likely found in [the] NHTSA than in this [court]." *Coker v. DaimlerChrysler Corp.*, No. 01 CVS 1264, 2004 WL 32676, at *5 (N.C. Super. Ct. Jan. 5, 2004), *aff'd*, 617 S.E.2d 306 (N.C. Ct. App. 2005), *aff'd*, 627 S.E.2d 461 (N.C. 2006). This should stop the court not only from resolving failure to recall claims, but also from resolving design defect claims. The court also explained that it "does not have the resources to scientifically determine the danger that the absence of an

Admittedly, however, such a determination is agency action and deference to it might make sense.¹⁰⁹

In most cases, a decision after a full investigation with complete information is not likely what happened. Agencies are very dependent on receiving information from the manufacturer,¹¹⁰ which may only tell part of the story. If, after an investigation, the agency concluded that no recall was necessary, such a conclusion was likely based only on incomplete information.¹¹¹ A decision based on incomplete information does not deserve deference.

Another real possibility for why an agency did not order a recall is because the agency never investigated the possible need for a recall. Given the demand on agencies, this reason is not just possible, it is plausible. Maybe the agency did not even know that the specific product caused a potential problem, or

interlock system poses to consumers,” whereas the NHTSA does. *Id.* If this is true, no North Carolina court should hear any design or warning defect products claim, both of which will require the factfinder to determine the extent of danger of the product as is.

¹⁰⁹ This factual possibility makes the imposition of punitive damages for failure to recall even more remarkable. This informed decision to not order a recall shields the manufacturer from compensatory damages, possibly appropriately so. But tort law still allows the jury to punish the manufacturer for not recalling the product.

¹¹⁰ See Margaret Gilhooley, *Innovative Drugs, Products Liability, Regulatory Compliance, and Patient Choice*, 24 SETON HALL L. REV. 1481, 1489 (1994) (arguing that agencies rely on industries for information); John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1930 (2010) (mentioning that agencies are subject to “political influence” and “budgetary constraints” and are “dependen[t] on regulated entities for information”); Schwartz, *Striking the Right Balance*, *supra* note 37, at 445–46 (arguing that the FDA is dependent on the pharmaceutical industry for information); Schwartz, *Role of Federal Safety Regulations*, *supra* note 17, at 1147 (“Industry often controls indispensable [sic] data about the nature and extent of the safety problem that an agency is attempting to address, as well as information about the technology and costs of reducing or eliminating the risk.”).

¹¹¹ The NHTSA twice investigated GM’s defective ignition switch. In 2007, an NHTSA official proposed an official investigation into the failure of air bags to deploy in crashes involving Saturn Ions and Chevrolet Cobalts, but the NHTSA ultimately concluded that the evidence did not warrant a probe. Christopher Jensen, *7 Years Before Recall, Crash Investigator Raised Concern over Switched-Off G.M. Air Bags*, N.Y. TIMES (Feb. 21, 2014), <http://www.nytimes.com/2014/02/22/automobiles/7-years-before-recall-crash-investigator-raised-concern-over-switched-off-gm-air-bags.html>. In 2010, NHTSA officials again considered a probe into the air bag deployment failures, but determined that “the data did not show a trend.” Gregory Wallace & Chris Isidore, *Documents Show GM, Regulator Dropped Ball Before Fatal Crashes*, CNN MONEY (Mar. 31, 2014, 12:25 PM), <http://money.cnn.com/2014/03/30/autos/general-motors-recall-documents>.

maybe the agency did not even know that the product existed. Regardless, the agency did not act. An agency's failure to order a recall is not the same as an order to not recall; it is not the same thing as a decision that a recall would not be reasonable. Really, a failure to order a recall communicates nothing to the manufacturer regarding the reasonableness of a recall. Yet, courts still defer to that inaction and refuse the possibility of tort liability.

2. Inaction Is Not Based on Agency Expertise

To the extent that courts cite any law in explaining why they cannot recognize liability for failure to recall, it is usually the doctrine of primary jurisdiction.¹¹² Primary jurisdiction over a judicially cognizable claim applies where "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."¹¹³ The doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties."¹¹⁴ Usually, under primary jurisdiction, the court refers the issue to the agency and "stay[s] further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling."¹¹⁵

The doctrine of primary jurisdiction seemingly applies to recalls. Product recalls "are properly the province of administrative agencies, as the federal statutes that expressly delegate recall authority to various agencies suggest."¹¹⁶

¹¹² See, e.g., *Clark v. Actavis Grp.* HF, 567 F. Supp. 2d 711, 714–17 (D.N.J. 2008); *In re Human Tissue Prods. Liab. Litig.*, 488 F. Supp. 2d 430, 432 (D.N.J. 2007); *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 627–28 (M.D.N.C. 2006); *Coker*, 2004 WL 32676, at *4–5; *Ford v. Toys R Us, Inc.*, No. W2005-01117-COA-R3-CV, 2006 WL 561865, at *3 (Tenn. Ct. App. Mar. 9, 2006).

¹¹³ *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (citing *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)).

¹¹⁴ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976) (quoting *W. Pac. R.R. Co.*, 352 U.S. at 63).

¹¹⁵ *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

¹¹⁶ *Schwartz*, *supra* note 46, at 901; see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 cmt. a (AM. LAW INST. 1998) ("Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings.").

But primary jurisdiction is “a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency.”¹¹⁷ If the agency never investigated a particular product, the agency never used its special competence to evaluate whether a recall is necessary. In such a scenario, deference under primary jurisdiction makes little sense.

Moreover, when the “agency did not consider the risk and did not apply its expertise, its silence should be meaningless in resolving the tort action.”¹¹⁸ This is the exact reason why courts refuse to defer to agency safety standards—the mere chance that the agency’s nonconsideration of risk Z is the reason why the agency did not include risk Z in the required warning.¹¹⁹ That mere chance is enough to refuse deference to the agency-approved warning.

The same chance exists within the failure to order a recall and it is likely more than mere. At least with the warning, even though mention of risk Z was not required, it is known that the agency evaluated the product and its risks. This is known because the agency did produce a required warning. In the case of a not ordered recall, however, there is no evidence that the agency evaluated the product at all. Thus, there is greater reason to suspect nonconsideration of the need for a recall than there is to suspect nonconsideration of risk Z within the warning.

Surely some products escape agency attention. Law professors A. Mitchell Polinsky and Steven Shavell recently made waves in products liability jurisprudence by arguing for the elimination of products liability law.¹²⁰ As part of their argument, Polinsky and Shavell explained how agency regulation already incentivizes the production of safe products, making any safety incentive created by products liability law less necessary.¹²¹ But even they realized that this incentive is strongest for mass-marketed products, meaning those products

¹¹⁷ *Reiter*, 507 U.S. at 268.

¹¹⁸ Schwartz, *Role of Federal Safety Regulations*, *supra* note 17, at 1132; *see also* Morris, *supra* note 27 (“[W]hen the administrator has passed no judgment on the problem before the court, the administrative process can furnish no acceptable criteria of care.”).

¹¹⁹ *See supra* notes 25–27 and accompanying text.

¹²⁰ *See generally* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010).

¹²¹ *Id.* at 1451–52.

likely to actually be the subject of agency regulation.¹²² And thus, Polinsky and Shavell limited their proposed elimination of products liability law to only mass-marketed products. But courts ignore the reality that some products escape agency attention in the context of an agency's power to order a recall.

Agency inaction on a product recall is agency inaction of "such indeterminate relevance that the courts would do well to exclude it in the absence of some indication that the administrator had considered the problem."¹²³ Current law, however, allows the agency's inaction to dictate the outcome of the tort claim. The agency's not ordering a product recall—its inaction—precludes liability.

Courts make no further effort to obtain and utilize agency expertise. Usually, under primary jurisdiction, the court will stay the action and refer the issue to the agency. With respect to product recalls, however, courts obviously do not stay the proceeding and ask the agency whether the manufacturer should have recalled the product five or ten or however many years ago.¹²⁴ Instead, the court treats the agency's not ordering of a recall as dictating that any such recall would have been unreasonable.

3. Inconsistent with Negligence Per Se Principles

Remember that the commentary to § 4 of the Third Restatement also states that "whether liability arises when there has been noncompliance or compliance with [product safety]

¹²² *Id.* at 1476 ("[M]arket forces and regulation are likely to be less effective in promoting safety for products that are not widely sold than for products that are widely sold."); see also Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2502 (2013) ("[T]he vast majority of products liability cases—the portion of product space on which the law effectively operates—involve products that have the combination of observable utility, which attracts consumers, and hidden risk. . . . Government is too small and cannot possibly grow large enough to effectively regulate such a vast area of the market.").

¹²³ Morris, *supra* note 27, at 161.

¹²⁴ Applied to a products liability claim:

The primary jurisdiction doctrine . . . would require a court hearing a products liability claim concerning an FDA-approved product to stay the case and refer the parties to the FDA for a determination of certain issues, including whether the product is defective and whether a defect caused the plaintiff's injuries.

Catherine T. Struve, *Greater and Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims Concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039, 1043 (2008).

statutes or regulations” addressing “such matters as post-sale warnings or recalls” is to be governed by negligence per se principles.¹²⁵ Section 11’s narrow standards of liability, which preclude tort liability absent an agency order to recall, are far from consistent with negligence per se principles.

Under negligence per se, the lack of an agency order could never define the relevant standard of conduct. A regulation can only substitute as the standard of care if it was intended to protect people like the plaintiff and to prevent accidents like the one that happened to the plaintiff.¹²⁶ Necessarily, the regulation must be an affirmative one; the lack of a regulation cannot substitute as the standard of care.

This is exactly what happens, however, with an agency’s not ordering a recall. If the agency never ordered a recall, it must have been reasonable for the defendant to not have undertaken one. And the manufacturer cannot be liable in tort for failing to recall because no agency ever acted.

This is equivalent to a defendant being able to conclusively demonstrate the lack of a defect, and thereby preclude tort liability, because no safety standard prohibited the design. Suppose the alleged defect is that the lawnmower engine should have stopped running sooner than ten seconds after the lawnmower is turned off. But no agency regulation requires that it be designed in such a way. The agency had the opportunity to evaluate such a regulation, but did not adopt one. There is no applicable safety standard; technically, the defendant complied with the absence of safety standard. If the court treated the lack of a safety standard as it treats the lack of a recall order, the court would find no defect as a matter of law.

¹²⁵ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. f (AM. LAW INST. 1998). As noted, this comment clearly also refers to regulations that may govern product recalls. Compliance and noncompliance with agency recall orders, however, is not governed by negligence per se rules; it is governed by § 11 of the Third Restatement. *See supra* Section II.A.

¹²⁶ RESTATEMENT (SECOND) OF TORTS § 286 (AM. LAW INST. 1965) (listing the requirements for when a “legislative enactment or an administrative regulation” can be adopted as the standard of care); *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (AM. LAW INST. 2010) (explaining that an actor is negligent if he violates “a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect”).

It is not even possible to come up with a hypothetical application in the more general negligence per se context. Suppose the defendant is texting while driving. The legislature or local authority had the ability to prohibit texting while driving, but it did not do so. Maybe the legislature decided to not prohibit it, or maybe the legislature never even considered the possibility of criminalization. Regardless, the defendant technically complied with the lack of a law prohibiting texting. If the court treated the lack of a prohibition in the same way it treats the lack of a recall order, the defendant could establish reasonable conduct as a matter of law. But under negligence per se principles, the lack of a prohibition on texting while driving means that it is legal. And simply complying with the lack of a prohibition—that is, acting legally—does not establish reasonable conduct because a reasonable person may have exercised more care and not texted while driving.

It is difficult to even write these hypotheticals because they are nonsensical. But this is the current law on product recalls. If the agency never ordered a recall, and the manufacturer never did one, the manufacturer acted reasonably as a matter of law and cannot be liable in tort. All of this is inconsistent with negligence per se.

4. There Is Nothing Special About Product Recalls

Courts' extreme deference to agency action on recalls is based on the perceived superiority of agencies to evaluate the need for recalls, and agency proceedings may be a better forum for investigating the extreme costs of a recall.¹²⁷ Juries, however,

¹²⁷ *But see* note 110 and accompanying text (discussing agencies' dependence on industries for information). Regardless, this sentiment is partly based on perceived institutional limitations. "Courts deal with the business of individual cases grounded on specific facts." *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1315 (Kan. 1993). The agency may be better equipped to investigate whether the product is endangering the public, as opposed to the court, which has only one injured plaintiff in front of it. *Schwartz*, *supra* note 46, at 901. True, in litigation for failure to recall, the plaintiff would present evidence of injuries other than just his or her own—just as a plaintiff does when trying to demonstrate that a product is defectively designed or has an inadequate warning. *See, e.g., Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21, 23–25 (Ga. 2001); *Ray v. Ford Motor Co.*, 514 S.E.2d 227, 230–31 (Ga. Ct. App. 1999); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 612–16 (Iowa 2000); *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 983–86 (Pa. Super. Ct. 2005), *aff'd*, 922 A.2d 890 (Pa. 2007); *Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 300 (S.C. 2005); *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 138 (Tex. 2004). If the introduction of this evidence is not problematic for design and warning

consider the costs of an untaken precaution in every negligence claim.¹²⁸ Juries also evaluate costs related to products in almost every design defect claim.¹²⁹ Plus, juries will consider the costs of a post-sale warning in determining whether the defendant's failure to issue a post-sale warning was unreasonable. No one doubts that the costs of a post-sale warning can be extensive, which is why some courts have hesitated or refused to adopt this type of liability.¹³⁰ There is also little doubt that agency proceedings would be a superior forum to investigate and evaluate those costs. But a majority of courts still trust juries to evaluate those costs.¹³¹

Admittedly, the costs of a recall are extensive,¹³² but tort law has never before imposed some sort of limitation on a jury's

defect claims, courts should not have a problem with it for failure to recall claims either. Additionally, there may be some hesitance because of the perceived breadth of a liability finding for failure to warn—that is, that the manufacturer should have recalled the entire product line—even though only one injured plaintiff is before the court. Again, this same effect occurs in design and warning defect claims. If that breadth—that all products so designed or with the same warning are defective—is not problematic for those claims, it should not be problematic for a failure to recall claim. Obviously, liability for design or warning defect does not require the manufacturer to alter the design or warning, just as liability for failure to recall would not require the manufacturer to undertake a recall.

¹²⁸ Hylton, *supra* note 122, at 2505 (“Negligence law has long required plaintiffs to bring forth a specific untaken precaution as evidence of negligence.”). The question of whether the failure to undertake that precaution was reasonable then focuses on the costs and benefits of that untaken precaution, and how the burden—the cost—of undertaking that precaution weighs against the likely injury to result from the failure to undertake that precaution. Judge Learned Hand famously first introduced this analytic framework in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). In a claim based on a failure to recall, the jury would simply compare the likely injuries to result without the recall and the costs of the recall.

¹²⁹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (defining a design defect as existing when “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe”).

¹³⁰ See *supra* note 59 and accompanying text.

¹³¹ See *supra* note 44 and accompanying text.

¹³² The costs of the recall will overlap with the costs of the post-sale warning. The costs of a product recall include the costs to notify product users and then also to remedy the defect. In a challenge to an NHTSA recall order decades ago, Ford asserted that the cost of merely giving notice of the defect to all present owners would exceed \$500,000 and the replacement of the seat pins would cost the company approximately \$31 per car or \$19 million in total. *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 494 (D.D.C. 1975) (Hart, J., dissenting), *aff'd*, 425 U.S. 927 (1976). The costs related to fixing the actual product, however, assume that product users will take advantage of the remedy. General thought is that recalls have a very low

ability to evaluate unreasonable conduct because the costs of an untaken precaution exceed some undefined ceiling. This would be equivalent to a court finding reasonable conduct as a matter of law because of the extensive costs of the untaken precaution without first evaluating the costs of the injuries that would result without that precaution. Courts rarely ever decide breach of a duty of care as a matter of law,¹³³ and certainly could not do so without first evaluating the costs of the injuries.

Additionally, if product recalls are so special, why do courts allow juries to punish the untaken recall? If product recalls are so complicated and costly, such that juries cannot impose liability for failing to take one, juries should similarly not be trusted to consider that exact same untaken, complicated, and costly recall as a basis to punish the defendant.

response rate. The rate improves if the product being recalled is a children's product or a car. Even then, the rate is low. According to one study, less than four percent of children's products in consumer hands are fixed. JORDAN DURRETT, KIDS IN DANGER, A DECADE OF DATA: AN IN-DEPTH LOOK AT 2014 AND A TEN-YEAR RETROSPECTIVE ON CHILDREN'S PRODUCT RECALLS 17–18 (2015), http://www.kidsindanger.org/docs/research/2015_KID_Recall_Report.pdf. This report was referenced by USA Today in a February 2014 article. Alicia McElhaney, *Only 10% of Recalled Kids Products Fixed or Returned*, USA TODAY (Feb. 21, 2014, 7:32 PM), <http://www.usatoday.com/story/money/personalfinance/2014/02/18/child-safety-recall-effectiveness-report/5425555>. A study of car recalls from 2000 through 2008 revealed that 55% to 75% of all passenger vehicles with safety defect recalls are fixed. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-603, AUTO SAFETY: NHTSA HAS OPTIONS TO IMPROVE THE SAFETY DEFECT RECALL PROCESS 24–25 (2011), <http://www.gao.gov/assets/320/319698.pdf>. Some years, however, had a response rate as low as 23% to 53%. *Id.* at 25.

¹³³ The Third Restatement explains the jury's role in deciding breach:

The longstanding American practice has been to treat the negligence question as one that is assigned to the jury; to this extent, the question is treated as one that is equivalent to a question of fact. Accordingly, so long as reasonable minds can differ in evaluating whether the actor's conduct lacks reasonable care, the responsibility for making this evaluation rests with the jury. To be sure, in some cases reasonable minds can reach only one conclusion. Accordingly, the rule recognized in this Section permits a directed verdict or judgment as a matter of law—that the actor's conduct must be found negligent, or free of negligence. Yet most of the time, the rule set forth in this Section calls for a jury decision on the negligence issue.

RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 8 cmt. b (AM. LAW INST. 2010).

Complete deference to agency inaction on product recalls creates “uniformity and consistency in the regulation of business entrusted to a particular agency.”¹³⁴ Uniformity cannot be too important, however, if courts refuse to defer to agency safety standards and post-sale warning requirements.¹³⁵ Regardless, what type of uniformity is achieved by deferring to inaction? A uniform lack of product recalls? That same uniformity would exist even if a court found liability for failure to recall, which would obligate the manufacturer only to pay the injured plaintiff's damages, not to undertake an actual recall. It is simply false that “courts that impose a post-sale obligation to remedy or replace products already in the marketplace arrogate to themselves a power equivalent to that of requiring product recall.”¹³⁶ A court cannot order a design change nor can it order a recall.¹³⁷ Thus, uniformity in the lack of recalls would still exist. Similarly, uniformity in who has the authority to order a recall—agencies only—would still exist.

It is somewhat understandable that courts may feel uncomfortable deciding whether the manufacturer should have recalled a product, and instead believing that an agency should decide. That same discomfort should exist, however, every time the jury considers an expensive untaken precaution. If taken seriously, that discomfort would cause a rewrite of much of negligence law, something that is not likely to happen. There is

¹³⁴ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303–04 (1976); *see also* *Commander Props. Corp. v. Beech Aircraft Corp.*, 745 F. Supp. 650, 652 (D. Kan. 1990) (deferring determination of whether a product was defective to agency partly because “the interests of uniformity and consistency in the aviation field would be promoted by the FAA’s resolution of these issues”).

¹³⁵ *See supra* Part I.

¹³⁶ Schwartz, *supra* note 46, at 901.

¹³⁷ Again, the remedy for failure to recall is payment of the plaintiff's damages that result from that failure to recall, as opposed to a court ordering a recall. Admittedly, injunctive relief forcing a recall would create administrative problems. Unlike an agency, a court does not “have in place a system to order a nationwide recall.” *Coker v. DaimlerChrysler Corp.*, No. 01 CVS 1264, 2004 WL 32676, at *1, *5 (N.C. Super. Ct. Jan. 5, 2004), *aff'd*, 617 S.E.2d 306 (N.C. Ct. App. 2005), *aff'd*, 627 S.E.2d 461 (N.C. 2006). Plus, a nationwide recall would likely be inappropriate if ordered in a state court case, as states have different definitions of defectiveness; a product defective in North Carolina could easily not be defective under South Carolina law. But an actual recall can only be ordered as a part of injunctive relief, and general limits on equitable relief, namely, the adequacy of the plaintiff's damages, make it unlikely that a court would grant such an injunction.

no reason for any discomfort to preclude courts from imposing liability for a manufacturer's failure to undertake a product recall.

CONCLUSION

Products liability law should be suffering from a cognitive dissonance. The law allows violations of agency standards and regulations to define defect and unreasonable conduct with respect to post-sale warnings. But compliance with the same does not define a lack of a defect nor does it define reasonable conduct with respect to post-sale warnings. And neither violations of nor compliance with agency regulations defines whether punishment is appropriate. But agency orders on product recalls do define reasonable conduct. In fact, an agency's not ordering a recall defines that the manufacturer acted reasonably in not recalling the product and precludes tort liability. However, those same orders lack that effect when the question is whether to punish. Rather, the manufacturer can be punished for not recalling even though no agency order required it to do so.

The inconsistencies are troubling. But what is more troubling is the very idea that inaction currently precludes tort liability, especially given the high likelihood that products escape the agency's attention. Returning to GM's ignition switches, the National Highway Traffic Safety Administration did actually have notice of a potential problem with GM's vehicles. It twice investigated the nondeployment of air bags in crashes in certain GM vehicles, but neither investigation proceeded past the preliminary stage.¹³⁸ And for that reason, GM cannot face liability for its failure to recall. As the law currently stands, the agency's failure to order a recall immunizes the manufacturer's failure to recall.

¹³⁸ See *supra* note 111 (describing the NHTSA's actions).