

ARTICLES

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Services

Product Liability
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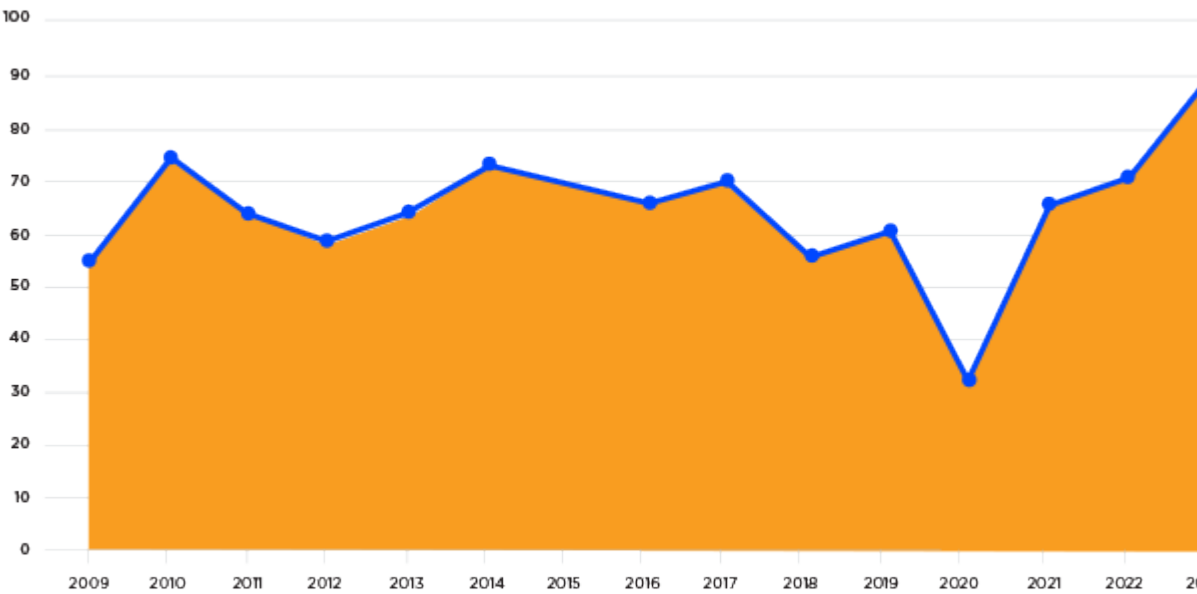
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Legal Insights for Manufacturing:
Product Liability, Safety & Marketing

This article is excerpted from our third-annual *Legal Insights for Manufacturing* report, published in October 2024.

In last year’s report, we noted a post-pandemic trend of more filings in products-related cases and a higher level of sophistication from the plaintiffs’ bar in pursuing litigation. These trends continue to exert influence and are now becoming evident in the form of so-called “nuclear verdicts,” that is, jury verdicts that surpass \$10 million in damages. In 2023, we reached a new high-water mark for such verdicts, continuing the post-Covid trend toward costlier damage awards.

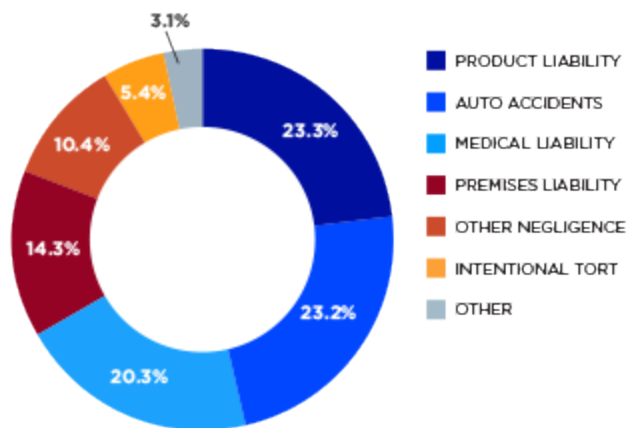
CORPORATE NUCLEAR VERDICTS, 2009-2023



Source: Marathon Strategies, *Corporate Verdicts Go Thermonuclear* (2024 edition).

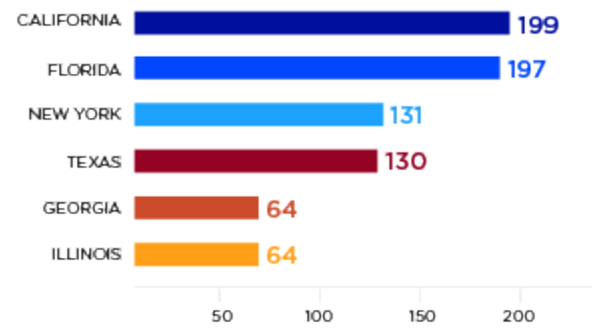
Clearly, the risks posed to product manufacturers by private litigation are broad-based and growing. Among the types of litigation that figure into these outsized jury verdicts last year, product liability ranks at the top of the list at 38 percent, according to Marathon Strategies, a communications and public relations consultancy. Similarly, according to the U.S. Chamber of Commerce, product liability nuclear verdicts are rising in size far more quickly than other verdict types, experiencing a 50 percent increase since 2013. There were over 50 industries that faced exposure to nuclear verdicts according to Marathon's research, including chemicals, automobiles, and home furnishings, to name a few in the manufacturing sector.

**NUCLEAR VERDICTS BY TYPE AND LOCATION
2013-2022**



Source: U.S. Chamber of Commerce Institute of Legal Reform.

**TOP STATES BY CUMULATIVE
NUCLEAR VERDICTS**



Given that the threat of a nuclear verdict is far higher in state courts, venue is an important risk factor to consider; simply put, some states are more plaintiff-friendly than others. And that list could be growing. Maine, Delaware, Illinois, Minnesota, and Rhode Island each passed plaintiff-friendly laws that could encourage larger verdicts; by contrast, Florida has recently passed reforms likely to lead to a measurable drop in the damages associated with jury verdicts in the future, a notable development given that product liability has been the state's most frequent source of nuclear verdicts over the past decade.

A handful of other states—including Iowa, Indiana, Texas, West Virginia, Utah, and Wyoming—has passed or contemplated more modest legislation that could limit nuclear verdicts in those jurisdictions. These reforms typically address discrete elements of litigation that are prone to abuse, including third-party litigation funding disclosures, caps on noneconomic damages, and protections for specific industries (e.g. trucking and transportation) or against certain claims (e.g. asbestos-related).

As seen above, state legislatures have taken very different approaches to legal reform. Manufacturers need to be aware of how key jurisdictions intersect with their operations and factor venue into their private litigation risk assessments.

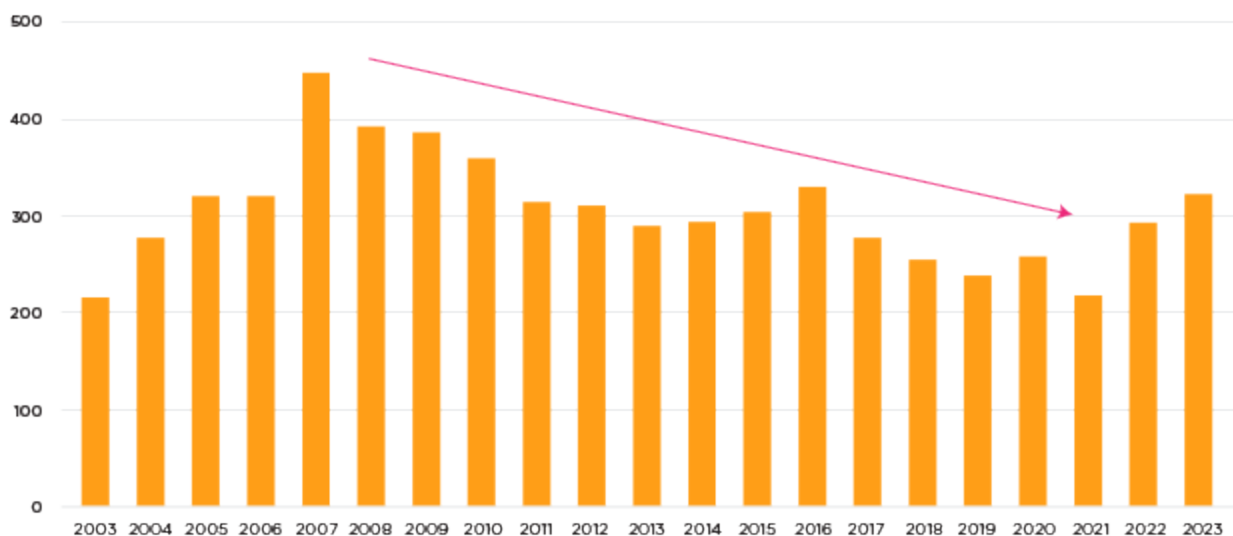
Recalls and Unilateral Press Releases

Private litigation is not the only threat faced by manufacturers. Federal and state regulatory agencies are also actively ramping up enforcement—sometimes employing unconventional or novel approaches—in connection with perceived violations of the many laws that regulate the manufacture, distribution, sale, and marketing of products.

Product recalls remain a source of worry for manufacturers. According to Sedgwick, a brand consultancy and insurance technology firm, the total number of allegedly defective products across U.S. industries surged 96.4 percent in the second quarter of 2024. This follows on a trend of increasing recall events established in the first quarter of the year, which saw the overall number of recalls increase eight percent on a quarterly basis, reaching the highest total in a single quarter since the onset the COVID pandemic. Specifically, the Consumer Product Safety Commission (CPSC) instituted 92 recalls during the first quarter, a slight increase from the previous quarter and the previous year's trend. Since the onset of COVID, CPSC recalls have reversed a decade-long trend toward fewer recalls, and early 2024 data suggest the new trend is gathering momentum.

CPSC PRODUCT RECALLS, 2003-2023

The post-COVID period has reversed a decade-long trend line of declining recalls.



Source: U.S. Consumer Products Safety Commission.

Perhaps as concerning as the rise of CPSC's use of formal recalls is its increasing reliance on so-called unilateral press releases. These are press releases issued by CPSC advising consumers to stop the use of certain products without the agreement of the manufacturer. The Commission has dramatically expanded its use of these releases. From 2011 to 2019, CPSC issued two such press releases. According to the Commission, it issued 26 unilateral warnings in 2023—that's more than the last five years combined.

When CPSC elects to forego the procedures of a formal recall, it places manufacturers in a uniquely vulnerable position where traditional due-process constraints are absent. Manufacturers will need to consider carefully how to engage with the CPSC when questions arise concerning alleged product defects and hazards in light of this regulatory approach. When a product is unambiguously hazardous to consumers or if a recall makes strategic sense when considering all factors, making use of CPSC's fast-track recall process and providing full cooperation can help manufacturers quickly overcome product-related challenges. In FY 2023, CPSC staff completed 313 voluntary recalls, and 167 of those were completed under the fast-track program; however, when an alleged product defect or hazard is a matter of dispute between a private business and the Commission, manufacturers need to be alert to the full range of actions available to CPSC, including unilateral press releases.

Regulatory Compliance and Risk Management

The trends touched on above do not alter the basic parameters for compliance teams engaged with the challenges posed by product safety and marketing. Disclosure requirements are front and center, and CPSC has signaled its intent to aggressively pursue civil penalties for noncompliance in accordance with the statutory, regulatory, and sub-regulatory factors it has set forth in prior guidance. Since the beginning of 2022, those penalties total \$120,000 for each violation and \$17,150,000 for any related series of violations.

At times regulatory authorities and manufacturers disagree over what is "reasonable," which is often the legal standard for the variables at play in regulatory compliance. When those disputes arise, having an effective compliance program is invaluable, as it allows a business to defend itself when regulators overreach, and when product defects are uncovered, it allows businesses to mitigate civil penalties. But perhaps more importantly, a strong compliance program, which includes a robust employee training program and investigation procedures, can alert companies to problems before they emerge into public view. Being the subject of a government enforcement action is bad; getting hit with a thermonuclear verdict in private litigation—along with the associated destruction of brand value—can be far, far worse.

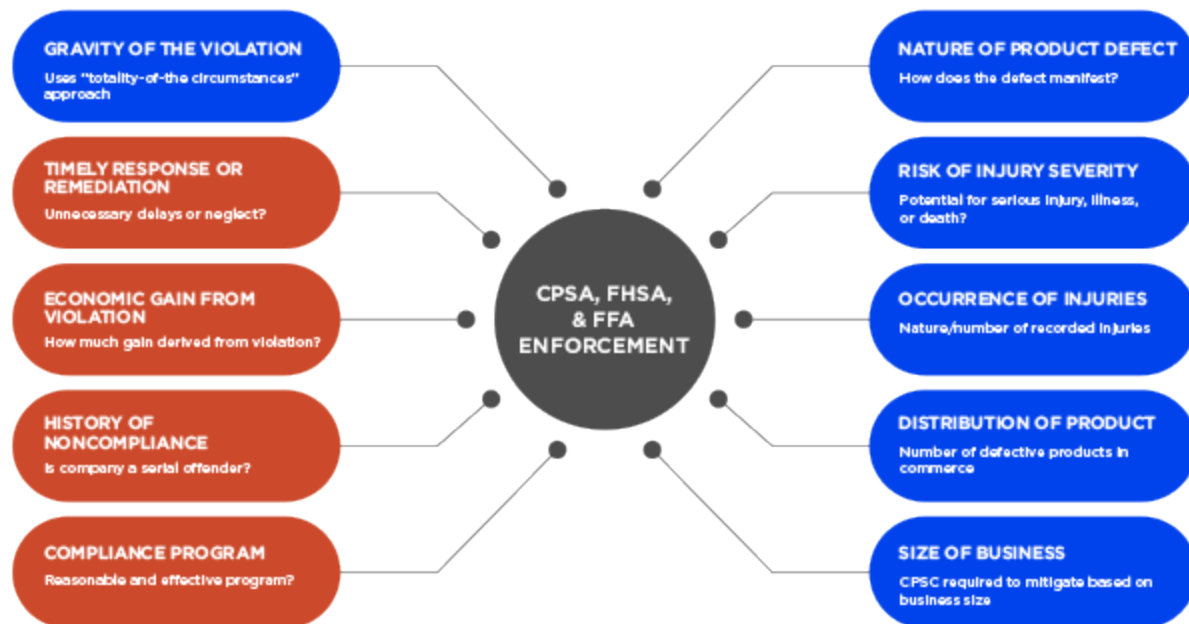
Product Perspectives

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WHAT DOES CPSC CONSIDER IN DETERMINING CIVIL PENALTIES?

■ STATUTORY FACTORS ■ OTHER FACTORS



Source: U.S. Code of Federal Regulations § 1119.4.