Product liability

Issues for foreign manufacturers

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discuss US product liability issues for foreign manufacturers and recent developments in the area.

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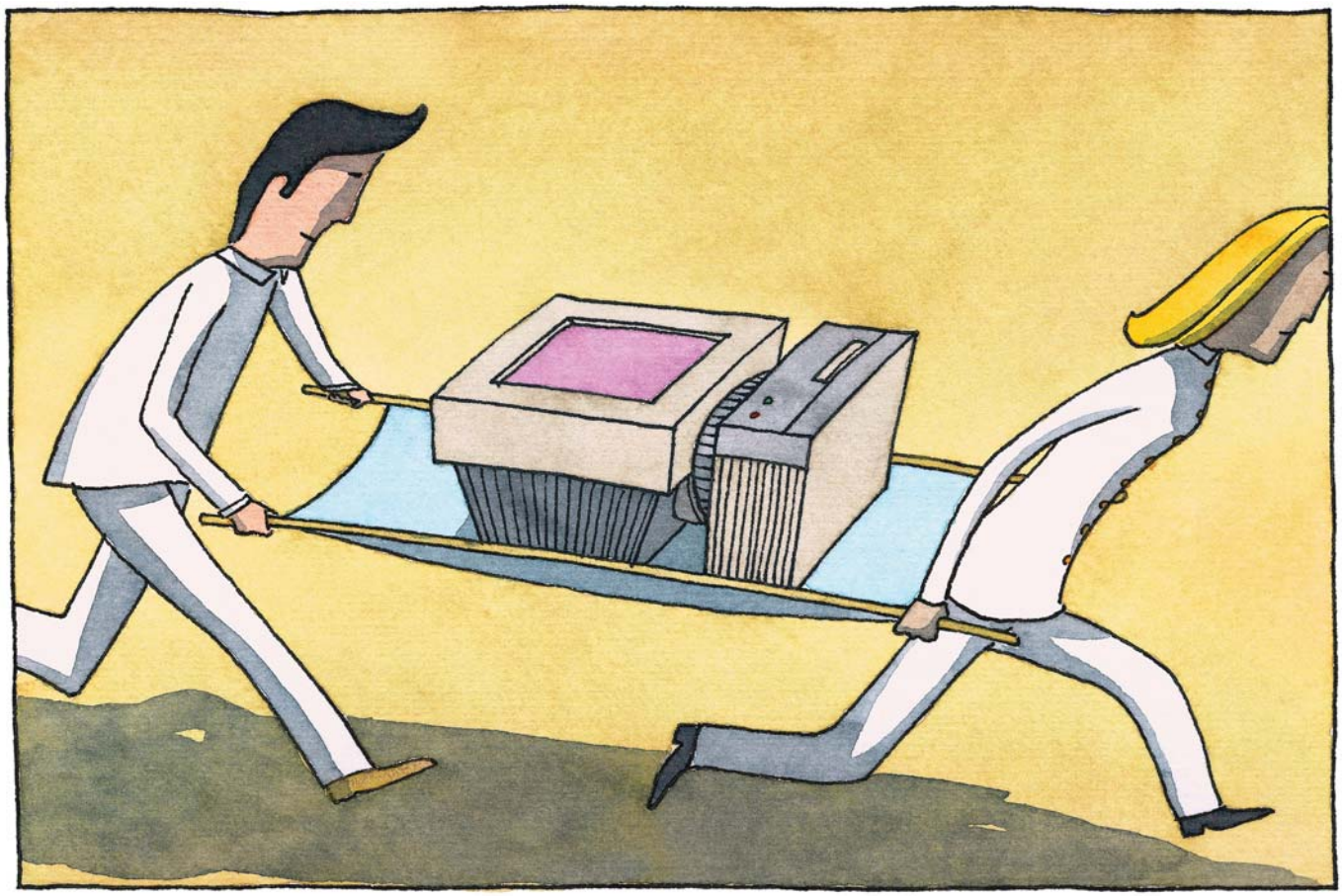

While foreign product manufacturers are eager to tap into the US market, they must be aware of the potential exposure to liability in product-related litigation. To help minimise the product liability risk, foreign product manufacturers should understand both the structure and substance of US product liability law, as well as strategies employed by plaintiffs to exert pressure on corporate defendants.

This article examines US product liability law and its impact on foreign product manufacturers, in particular:

- The framework for US product liability law, including causes of action and available defences.
- Recent developments in state tort reform.
- Tactics used by plaintiffs to pressure domestic and foreign manufacturers, and potential defence countermeasures, including state court litigation, mass advertising and case collection; and multi-district litigation.
- Litigation issues specific to foreign manufacturers, including personal jurisdiction, service of process, discov-

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ery abroad, and enforcement of judgments.

THE FRAMEWORK

There is no federal product liability law in the US. Therefore, product liability is determined by the laws of each state. While several states have passed comprehensive statutes, most state product liability law is based on common law (case law precedent as set out in previous judicial opinions). Despite the fact that state law varies, there are similarities among the jurisdictions. This section will focus on these similarities. Manufacturers, however, should be aware of the intricacies of product liability law in the states in which they do business.

Parties subject to product liability laws

Parties involved in the business of selling or distributing a product are subject to liability for harm caused by a defect in that product (*Restatement (Third) of Torts: Products Liability §1*). This includes all parties in the chain of manufacture and distribution, such as the component manufacturer, assembling manufacturer, wholesaler, and retailer. Some jurisdictions, however, have enacted so-called innocent seller statutes, which provide that a mere seller is not subject to liability in a product liability action if all of the following apply to the seller:

- It did not manufacture the product.
- It was unaware of the defect.
- It could not have reasonably discovered the defect.
- It did not change the product but merely passed it on in the chain of commerce.

Types of claim

Product liability claims can be based on breach of warranty, negligence or strict liability. Claims based on the breach of an express or implied warranty are generally governed by Article 2 of the Uniform Commercial Code (UCC), which has been adopted in similar form in every state except Louisiana. The UCC provides remedies when a product fails to satisfy express representations, is not merchantable, or is unfit for its particular purpose.

In a negligence claim, the defendant can be held liable for failing to use due care. Strict liability claims, however, do not depend on the degree of care exercised by the defendant. Strict liability focuses on product defect rather than a manufacturer's conduct.

Every plaintiff basing a claim on the theory of strict liability must establish that the product was defective. There are three types of product defects (*Restatement (Third) of Torts: Products Liability § 2*):

- Design defects.
- Manufacturing defects.
- Warning defects.

Design defects. A product is defectively designed when the foreseeable risks presented by the product could have been reduced or avoided by employing an alternative design, and the failure to use an alternative design renders the product unreasonably dangerous. The alternative design must be reasonable. In determining reasonableness, the court may consider, among other things, the effect on production costs, durability, maintenance, and aesthetics. Additionally, the overall safety of the product must be considered. For example, an alternative design would not be reasonable if it created or increased other risks of equivalent danger simply to minimise a particular risk. Generally, the plaintiff has the burden of proving that a reasonable alternative design was available at the time of distribution.

Manufacturing defects. Unlike a design defect, a manufacturing defect does not depend on the design specifications of a product; instead, a manufacturing defect arises when a product fails to meet those specifications. In other words, a product has a manufacturing defect when it fails to meet its intended design, despite the use of care. The plaintiff typically has the burden of establishing that the product was defective when it left the hands of the manufacturer. If a defect arises during shipment or storage, a distributor down the chain of commerce can be held liable, just as if the product were defectively manufactured.

Warning defects. A product contains a warning defect when the foreseeable risks of the product could have been reduced or avoided by providing reasonable warnings or instructions and, due to the absence of such information, the product is unreasonably dangerous. While most warnings are generated by manufacturers, sellers and distributors are required to provide warnings when doing so is reasonable.

Plaintiffs bear the burden of proving that adequate warnings or instructions were not provided. The court must weigh a number of factors to determine the adequacy of a warning, including the targeted consumers. For example, a product intended for children may require more information than a product intended for adults. Additionally, it should be noted that a product can have an adequate warning without providing information on every possible risk. In fact, a warning with too much information can make it difficult for a consumer to focus on the most important details.

Available defences

Defences, like the product liability claims themselves, are a matter of state law. Accordingly, defences can vary from jurisdiction to jurisdiction.

Statutes of limitation. A plaintiff must file a lawsuit within a certain period of time following injury. The period depends both on the jurisdiction and the type of liability (*see "Causes of Action: types of claim" above*). For personal injury claims, statutes of limitation can range from one year to six years. Many states employ the "discovery rule" to determine when the statute of limitations begins to run. Generally, the discovery rule provides that the period does not begin to run until the plaintiff knows or should know that he has been injured by the product in issue.

Statutes of repose. Unlike statutes of limitation, statutes of repose do not depend on when the plaintiff is injured. Instead, they require a plaintiff to bring a claim within a certain period of time after the product is manufactured or sold. While statutes of repose are usually longer than statues of limitation, they are not subject to the discovery rule and represent an absolute bar to a product liability claim.

Learned intermediary doctrine. In the prescription drug context, the learned intermediary doctrine provides that a prescription drug manufacturer discharges its duty by adequately warning the plaintiff's prescribing physician. The manufacturer has no duty to warn the plaintiff directly, because, under federal law, prescription drugs are only available through a licensed physician, who acts as the learned intermediary between the patient and the manufacturer.

There are recognised exceptions to the learned intermediary doctrine. Some courts have held that the doctrine does not apply to mass immunisation programmes due to the lack of physician-patient contact (*for example, Petty v US, 740 F.2d 1428, 1440 (8th Cir. 1984)*). Certain contraceptives have also been excluded from the doctrine because patients actively participate in contraceptive decision-making (*for example, Odgers v Ortho Pharm. Corp., 609 F. Supp. 867, 878 (ED Mich. 1985)*). Finally, at least one court has held that the doctrine does not apply to products that have been advertised directly to consumers (*Perez v Wyeth Labs., Inc., 734 A.2d 1245 (NJ 1999)*).

The learned intermediary doctrine has been adopted by more than 40 states. Only one state, West Virginia, has expressly rejected the learned intermediary doctrine (*State ex rel. Johnson & Johnson Corp. v Karl*, 647 S.E.2d 899 (2007)). Most recently, however, the US District Court for the District of New Mexico held that the New Mexico Supreme Court would not adopt the learned intermediary doctrine despite the fact that there were three New Mexico Court of Appeals decisions adopting or applying the doctrine (*Rimbert v Eli Lilly and Co., No. Civ 06-0874, Memorandum and Order (DNM 22 August 2008)*).

Intervening/superseding cause. If a plaintiff's injury was caused by the intervening conduct of another, and that conduct is also a superseding cause, a defendant may avoid liability in most jurisdictions. An intervening act is a superseding cause when a manufacturer could not reasonably be expected to protect against things such as:

- Criminal acts.
- Use of a product in an unforeseeable manner.
- Alteration of the product.
- Negligent use.
- Failure to properly maintain a product.

Contributory negligence/comparative fault. Under the theory of contributory negligence, a plaintiff is barred from recovery if his own negligence caused or contributed to his injury. Most jurisdictions, however, have abandoned contributory negligence in favour of comparative fault. Under comparative fault, a plaintiff's recovery is reduced if his own negligence (or fault) contributed to his injury. There are two types of comparative fault:

- Pure comparative fault. The jurisdictions that apply pure comparative fault reduce a plaintiff's recovery by the percentage of fault attributed to the plaintiff.
- Modified comparative fault. Jurisdictions using modified comparative fault also reduce a plaintiff's recovery by the percentage of his fault, but completely bar recovery if the plaintiff's fault exceeds a specified percentage. In some jurisdictions, for example, a plaintiff is barred from recovery if the percentage of his fault is greater than that of the defendant.

Assumption of risk. In some jurisdictions, a plaintiff may also be barred from recovery if he is aware of a product defect and the accompanying dangers, but proceeds to use the product anyway. The assumption of risk defence is based on what the plaintiff actually knew, not what a reasonable person would know.

Pre-emption. When governmental statutes, rules and regulations control certain aspects of product safety, some courts have held that product liability claims imposing different or additional requirements on manufacturers are pre-empted. The pre-emption doctrine attempts to prevent manufacturers from being subject to different and conflicting standards. The pre-emptive effect of a statute or regulation can be expressly stated or implied from the comprehensive nature of the enactment.

State of the art. If a manufacturer can establish that a product was manufactured according to the scientific and technical achievement in the relevant field (the "state of the art"), that evidence may be used to show the manufacturer acted with due care. Additionally, state of the art evidence is relevant to warning issues; plaintiffs have the burden of showing the defendant failed to provide reasonable and adequate warnings in accordance with the current state of medical or scientific knowledge (*see "Warning defects" above*). Finally, this evidence may also be key to design defect claims under state law where the plaintiff must show the existence of a safer alternative (*see "Design defects" above*). State of the art evidence, however, is not admissible in every court.

RECENT DEVELOPMENTS IN TORT REFORM

Plaintiffs' trial lawyers annually take in about $40 billion, 50% more than the annual turnover of Microsoft and double that of Coca-Cola ("*Trial Lawyers, Inc., Message from the Director", James R. Copeland, www.triallawyersinc.com*).

Recent developments in tort reform

Punitive damages. Large punitive damage awards have "seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases" according to the American Tort Reform Association (ATRA) (*www.atra.org*). The US Supreme Court recently held that punitive damages could not be imposed on a defendant for harm allegedly done to non-parties (*Philip Morris USA v Williams* (*127 S.Ct. 1057, 549 US 346 (2007)*)). However, more limitations need to be imposed to level the playing field. Accordingly, ATRA has pushed for the following:

- The establishment of an appropriate punitive damages "trigger", such as actual malice.
- Application of the "clear and convincing evidence" standard to establish liability.
- Proportionality between the punitive damage award and the offence.
- Federal legislation to deal with multiple punitive damage awards.

To date, 32 states have enacted some type of punitive damage reform, while two states had reforms held unconstitutional and have not enacted further reforms (*Tort Reform Record: July 2008, www.atra.org*).

Joint and several liability. Under joint and several liability, a plaintiff can recover from multiple defendants collectively, or a single defendant alone. This rule encourages the inclusion of "deep pocket" corporations, even if that corporation had a remote role in the alleged harm. 40 states have modified joint and several liability (*Tort Reform Record: July 2008, at www.atra.org*).

Non-economic damages. Non-economic damages include losses for intangible injuries such as pain and suffering, and emotional distress. The trend has been toward excessive non-economic damage awards. Accordingly, 23 states have modified the rules for awarding such damages, while four states have had reforms held unconstitutional and have not passed further reforms (*Tort Reform Record: July 2008, www.atra.org*).

Product liability reform. Imposing liability for defective products is intended to compensate injured individuals and deter manufacturers. Product liability law does not serve these functions when manufacturers and distributors are uncertain on how to avoid liability and are subjected to liability for risks they could not have anticipated. 16 states have passed legislation directed specifically at product liability, and three states have had reforms held unconstitutional and have not passed further reforms (*Tort Reform Record: July 2008, www.atra.org*).

Collateral source rule. Under the collateral source rule, evidence cannot be admitted to establish that a plaintiff's losses have been reimbursed by other sources. Accordingly, a significant percentage of the payments made to plaintiffs are to compensate for losses that have already been covered. 24 states have modified the collateral source rule, and two states have had reforms held unconstitutional and have not passed further reforms (*Tort Reform Record: July 2008, www.atra.org*).

Appeal bond reform. While many astronomical awards are overturned on appeal, defendants in many states are required to post an appeal bond of up to 150% of the damages awarded. Such a bond can force a company or industry into bankruptcy. 35 states have adopted some form of appeal bond reform (*Tort Reform Record: July 2008, www.atra.org*).

Jury service reform. According to ATRA, up to 20% of those summoned for jury duty do not respond, and some jurisdictions have an even higher "no-show" rate. "Occupational exemptions, flimsy hardship excuses, lack of meaningful compensation, long terms of service and inflexible scheduling results in a jury pool that makes it difficult for working Americans to serve on a jury and disproportionately excludes the perspectives of many people who understand the complexity of issues at play during trial" (*Tort Reform Record: July 2008, www.atra.org*). To date, 13 states have enacted reform legislation in this area.

Not surprisingly, these numbers have fuelled the impetus for tort reform in a number of important areas (*see box "Recent developments in tort reform"*).

PLAINTIFF TACTICS AND DEFENCE COUNTERMEASURES

Plaintiffs want to be in state courts because the environment there is generally more "plaintiff friendly" on legal rulings and there is a greater potential for large awards. ATRA has issued a report identifying jurisdictions that have attracted lawsuits from across the country due to their "plaintiff-friendly" reputation. Not surprisingly, all the forums identified as "judicial hellholes" are state courts that are known for producing huge awards and ignoring established procedure. The "judicial hellholes" identified by ATRA in 2007 were (*www.atra.org*):

- South Florida.
- Rio Grande Valley and Gulf Coast, Texas.
- Cook County, Illinois.
- West Virginia.
- Clark County, Nevada.
- Atlantic County, New Jersey.

ATRA also identified the following for the "Watch List" in 2007:

- Madison County, Illinois.
- St. Clair County, Illinois.
- Northern New Mexico.
- Hillsborough County, Florida.
- Delaware.
- California.

Federal courts are less political and, generally, judges in federal court are more likely to consider dispositive motions (that is, motions that if granted, conclude all or part of the cause of action), including motions to exclude expert testimony under the standards for reliability and relevance set out by the US Supreme Court in *Daubert v Merrell Dow Pharm. Inc.* (*509 US 579 (1993)*).

A case filed in state court can only be removed (transferred) to federal court if either:

- There is a federal question involved (federal question jurisdiction).
- There is complete diversity of citizenship between the parties and more than $75,000 is in dispute (diversity jurisdiction).

Federal questions are rare in the context of product liability claims; as a result, corporate defendants are forced to rely on diversity jurisdiction as the basis for removal. Yet, because of the huge awards of damages being in state courts, plaintiffs have developed numerous strategies for destroying diversity.

Joinder of non-diverse parties

To establish complete diversity, no defendant can be a citizen of a state where any plaintiff is also a citizen. To destroy complete diversity, plaintiffs will join a defendant that is a citizen in a state where the plaintiffs are located (non-diverse defendants). For example, if a corporate defendant is a citizen of Delaware and the plaintiffs are citizens of Missouri, the plaintiffs will add a Missouri defendant to the lawsuit. In the product liability context, this additional defendant usually has had little or no role with regard to the product defect or injury at issue. Non-diverse defendants include parties such as:

- Sales representatives.
- Local distributors.
- Local employees.

In pharmaceutical product liability cases, plaintiffs have also been known to join local pharmacies or local prescribing physicians.

Plaintiffs may also attempt to join other plaintiffs from the state where the defendant is a citizen (non-diverse plaintiffs). For example, if the defendant corporation is a citizen of Delaware and the plaintiffs are citizens of Missouri, the plaintiffs will add an additional, unrelated plaintiff from Delaware.

A defendant can remove a case to federal court if it can establish that the non-diverse party was fraudulently joined. To meet the fraudulent-joinder standard, the defendant must show that there is either:

- No reasonable basis for recovery against the non-diverse defendant.
- No reasonable basis for the joinder of the non-diverse plaintiff.

Some courts in product liability cases have recently recognised plaintiffs' ongoing joinder of non-diverse parties as a charade. For example, in *In re Diet Drugs*, the MDL Court held that such joinder of physicians, pharmacies, and sales representatives "can only be characterised as a sham, at the unfair expense not only of [the manufacturer] but of many individuals and small enterprises that are being unfairly dragged into court simply to prevent the adjudication of lawsuits against [the manufacturer], the real target, in a federal forum" (*220 F. Supp. 2d 414, 425 (ED Pa. 2002); see also In re Rezulin, 133 F. Supp. 2d 272 (SDNY 2001)*).

Impact on foreign manufacturers. Foreign manufacturers may be forced to litigate in state court jurisdictions that are less sympathetic (or even hostile) to a foreign defendant. The juries in the state court "judicial hellholes" are typically less well-educated and biased against corporate defendants and even more biased against foreign corporate defendants. Likewise, judges in the "judicial hellhole" jurisdictions are likely to be less experienced with issues specific to foreign manufacturers.

Potential countermeasures. To counter (or at least help minimise) the threat of state court litigation, a foreign manufacturer needs to be aware of the US jurisdictions in which it maintains related entities that potentially could be joined in the lawsuit. There is little a manufacturer can do with regard to the other, non-related entities that are often joined.

Advertising and mass case collection

Plaintiffs' counsel will put pressure on manufacturers who are facing product liability exposure by collecting a large number of potential cases. This collection of cases will inevitably include a few high value cases and numerous low or minimal value cases. Strategically, plaintiffs' counsel leverage their high value cases to boost the value of their low (or no) damage cases.

The internet has revolutionised the ability of lawyers to solicit potential plaintiffs. A simple search on the internet for any one of the major products currently the subject of litigation will return numerous websites hosted by plaintiffs' counsel. These websites provide a method for a "free case review" and an avenue for that counsel, regardless of location, to collect cases. Of course, television and radio advertisements are still regularly used as well.

Impact on foreign manufacturers. The ability of plaintiffs' counsel to advertise and solicit cases not only allows for the easy collection of cases, it also serves as a method to influence public opinion. Any consumer who goes on to the internet with a question regarding a targeted product will be inundated with biased information generated by plaintiffs' counsel. This makes the challenge of defending the company even more difficult in an already hostile environment.

Potential countermeasures. Having a publicly available website to provide accurate

information can help provide consumers with a more balanced presentation of the facts. A manufacturer can also purchase potential website addresses before plaintiffs' counsel has an opportunity to do so (that is, "widget-lawsuit.com" and so on). Lastly, simply knowing plaintiffs' counsel's techniques can help a manufacturer appreciate the weaknesses and pressure points that the plaintiffs' counsel face.

Multi-district litigation

Multi-district litigation (MDL) is a vehicle to consolidate cases in federal courts. The initiation of an MDL proceeding is one way that plaintiffs attempt to pressure a manufacturer, but MDL can also be a very helpful countermeasure for the defendant. Under the relevant legislation, litigation pending in multiple federal districts can be transferred to one district court for consolidated pre-trial proceedings (*28 USC § 1407*).

The decision to transfer cases to an MDL is made by the Judicial Panel on Multi-district Litigation, a panel of seven federal judges appointed by the Chief Justice of the US Supreme Court. Once consolidated and co-ordinated pre-trial proceedings have been completed, individual cases are sent back to the district court from which it was transferred for trial.

MDL courts often encourage both sides to agree to bellwether trials before the MDL judge as a way to establish values and encourage resolution. (Bellwether trials provide for a random sample of cases from a mass tort to be tried, and the results extrapolated to the remaining cases.) While MDL has been available for more than 25 years, it has recently gained popularity. Since 2000, about 50 MDLs have been established to handle large-scale product liability litigations (*www.jpml.uscourts.gov*).

Advantages. MDL provides potential benefits for product liability defendants. Specifically, it allows a defendant to streamline discovery. For example, instead of producing the same documents to numerous individual plaintiffs, MDL allows a defendant to produce documents once to a central depository. In addition, it allows depositions of company witnesses and experts to be taken only once, saving resources.

Importantly, the MDL provides defendants with consistency on legal rulings. When large numbers of cases relating to the same product are pending in various federal districts, a defendant is sure to face inconsistent and contradictory pre-trial rulings. With an MDL, pre-trial rulings affecting all cases are made by one judge with comprehensive knowledge of both the history of the litigation and the relevant facts.

Disadvantages. While MDL allows corporate and expert depositions to be taken only once, if those depositions go poorly, defendants are stuck with that result in all of the MDL cases (and in the state court cases as well).

In addition, while the MDL judge will provide consistent rulings, those rulings may go against the manufacturer: a result that could be more damaging than rulings that cut both ways across a number of jurisdictions. Finally, plaintiffs tend to file large numbers of their less serious injury cases in the MDL while pursuing parallel litigation in state courts for more seriously injured plaintiffs who used the same product. They try to use the large number of cases in the MDL as leverage to settle all their cases, including those with plaintiffs who may not have suffered any injury.

Impact on foreign manufacturers. For a foreign manufacturer, it is desirable to obtain consistent rulings regarding complicated issues involving discovery. Moreover, in an MDL, a foreign manufacturer is more likely to get a judge who is well versed in legal issues unique to foreign defendants.

LITIGATION ISSUES

Product liability law has an enormous impact on foreign product manufacturers who sell products in the US. Product liability lawsuits raise issues unique to foreign manufacturers, including personal jurisdiction, service of process, discovery, and enforcement of judgments.

Personal jurisdiction

Under current law, a foreign manufacturer can potentially be sued in any state where its products are distributed and, for this reason, subject to the product liability laws of that state. The elements of personal jurisdiction must, therefore, be understood.

The due process clause of the Fourteenth Amendment to the US Constitution places boundaries on a court's ability to exercise jurisdiction over foreign defendants. While many states have adopted a so-called long-arm statute governing personal jurisdiction for their own courts, in no case may the exercise of jurisdiction violate due process. The US Supreme Court has developed a two-part test to determine if the requirements of due process are met:

- The defendant must have sufficient contacts with the forum (minimum contacts requirement).
- The exercise of personal jurisdiction must be reasonable.

Minimum contacts. To satisfy the minimum contacts requirement, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws" (*Hanson v Denckla, 357 US 235, 253 (1958)*).

Whether a defendant purposefully availed itself of the forum state hinges on the facts presented by each particular case. First, minimum contacts must be based on the acts of the defendant, not on the unilateral conduct of a consumer (*World-Wide Volkswagen Corp., 444 US at 298*). Second, in the context of a product liability case, the court will look to see if the defendant specifically intended to serve the forum market (*World-Wide Volkswagen*

Corp., 444 US at 297). Facts relevant to this inquiry would include whether the defendant (*Asahi Metal Indus. Co., Ltd. v Super Ct. of California, 480 US 102, 112 (1987)*):

- Designed a product specifically for the forum market.
- Advertised in the forum.
- Established direct lines of communication with customers in the forum.
- Marketed the product through a sales agent located in the forum.
- Expected consumers in the forum to buy products placed in the stream of commerce.

Simply placing a product in the stream of commerce alone is not likely to be enough to establish personal jurisdiction.

When a defendant's contacts with the forum are not systematic and continuous, the contacts must be related to the claim at issue. However, when a defendant's contacts with the forum are systematic and continuous, the contacts need not relate to the claim (*Perkins v Benguet Consol. Mining Co., 342 US 437, 438 (1952)*). Systematic and continuous contacts arise when a defendant does things such as:

- Maintain an office in the forum.
- Keep company files in the forum.
- Carry on correspondence in the forum.
- Tacitly solicit business in the forum.

Reasonableness. The reasonableness test can be either a shield or a sword. When the defendant's contacts with the forum state are marginal, a heightened sense of fairness can validate personal jurisdiction. Conversely, even when contacts with the forum state are significant, an unjust burden on the defendant can nullify the exercise of jurisdiction (*Burger King Corp. v Rudzewicz, 471 US 462, 476-77 (1985)*). The court will consider (*World-Wide Volkswagen Corp., 444 US at 292*):

- The burden on the defendant.
- The forum state's interest in adjudicating the dispute.
- The plaintiff's interest in obtaining convenient and effective relief.
- The interstate judicial system's interest in obtaining the most efficient resolution of controversies.
- The shared interest of the several states in furthering fundamental substantive social policies.

The reasonableness test is of particular importance when a foreign manufacturer is involved: "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders" (*Asahi Metal Indus. Co., Ltd., 480 US at 114*). In addition, asserting personal jurisdiction over a foreign manufacturer requires the court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction.

Recent cases. In recent cases the courts have tended to focus on two questions when examining personal jurisdiction over foreign product manufacturers:

- Was the product designed or marketed for the US market?
- Did the foreign manufacturer distribute or control distribution of the product knowing the product would reach the state at issue?

When a foreign product manufacturer markets a product specifically for the US and knows that, through the chain of distribution, the product will reach a particular state, the manufacturer will almost certainly be subjected to personal jurisdiction.

For example, *Tungate v Bridgestone Corp.* involved an allegedly defective automotive tyre. Despite the fact that the defendant, Bridgestone, was a Japanese corporation, the Southern District of Indiana held that "Bridgestone foresaw and intended that the model of tyre would be distributed across the US to American consumers, including those in Indiana. That intended activity was sufficient to support jurisdiction in Indiana (*2002 WL 31741484, at *4 (SD Ind. 2002); see also Hein v Cuprum, SA DE CV., 136 F. Supp. 2d 63, 69 (NDNY 2001)*).

Conversely, when a foreign manufacturer does not design a product for the US and does not control distribution, the courts are much less likely to exercise jurisdiction. In *Irizarry v East Longitude Trading Co. Ltd.*, an individual was injured by an allegedly defective woodworking tool. The US District Court for the Northern District of Ohio did not exercise jurisdiction, finding that there was no evidence that the manufacturer designed its products expressly for the US or Ohio markets, or retained any control over how, when or where the US distributor distributed the products (*2003 WL 22989038, at *6 (ND Ohio 2003); see also Four B Corp. v Ueno Fine Chemicals Indus., Ltd., 241 F. Supp. 2d 1258 (D. Kan. 2003)*).

Service on foreign manufacturers

Service of process can become complicated when foreign manufacturers are named as defendants.

Applicability of the Hague Convention on Service Abroad. Of particular importance is the applicability of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Service Convention) (*20 UST 1361; 658 UNTS 163; TIAS No. 6638*). The determination of whether the Service Convention ap-

plies will hinge on the law of the forum state.

In *Volkswagenwerk Aktiengesellshaft v Schlunk*, the US Supreme Court held that the Service Convention applies if the internal law of the forum state defines the applicable method of service of process as requiring the transmittal of documents abroad (*486 US 694, 700 (1988)*). However, if the forum state allows service on a US agent instead of service abroad, the Service Convention does not apply.

In a more recent example, the US District Court for the District of Minnesota held that the Service Convention did apply to service on foreign corporations in Minnesota courts (*Froland v Yamaha Motor Co., Ltd., 2003 WL 22971360 (D. Minn. 2003)*). The court relied on the fact that, under Minnesota law, service on a foreign entity was not fully effected until the Secretary of State transmits the document to the foreign corporation.

Provisions of the Service Convention. If the Service Convention applies, foreign manufacturers can often raise insufficiency of process as a defence. The provisions of the Service Convention are straightforward, but the designations and reservations made by each country make its application much more complicated.

The Service Convention provides for service through a central authority, established by each contracting country, which receives requests for service from other contracting countries (*Article 2, Service Convention*). The central authority must then serve the judicial documents itself or arrange to have them served by an appropriate agency (*Article 5, Service Convention*). The central authority of each contracting country may have additional requirements for service, including having the judicial documents translated into the official language of the state.

The Service Convention also allows service through domestic or consular agents (*Article 8, Service Convention*). In addition, Article 10 specifically states that the Service Convention must not interfere with:

- The freedom to send documents by postal channels.
- The freedom of judicial officers in the country of origin to effect service through judicial officers of the country of destination.
- The freedom of any person to effect service directly through the judicial officers of the country of destination.

Contracting countries are also free to agree with each other on additional methods of transmission for the purpose of service (*Article 11, Service Convention*). Finally, the Service Convention does not affect any method of service provided for by the internal law of a contracting country (*Article 19, Service Convention*).

To satisfy the requirements of the Service Convention, the plaintiff must know the details of each country's declarations, including the service methods available, both under the Service Convention and under the country's internal law. For example, in *Froland*, the court held that service did not satisfy the requirements of the Service Convention simply because Japan requires all service documents to be translated into Japanese, and the plaintiffs failed to do so (*2003 WL 22971360 (D. Minn. 2003)*).

Recent cases. There has been a division in US Courts over whether Article 10(a) of the Service Convention would, in fact, allow service by mail.

Article 10(a) states that the Service Convention must not affect "the freedom to send judicial documents, by postal channels, directly to persons abroad" (*Article 10(a), Service Convention*; *see also Recent Developments in the Service of Process Abroad, Jeffrey A Fuisz & Carly Henek, 38, Int'l Law. 320, 321 (2004)*).

In 2004, the US Court of Appeals for the Ninth Circuit interpreted Article 10(a) broadly, as allowing service abroad by mail (*Brockmeyer v May, 383 F.3d 798, 802 (9th Cir. 2004); see also Fuisz & Henek, supra at 321*). Several other courts have recently adopted this approach (*Sibley v Alcan, Inc., 400 F. Supp. 2d 1051 (ND Ohio 2005); Ballard v Tyco Int'l, LTD, 2005 WL 1863492 (DNH 4 August 2005)*).

The Tennessee Court of Appeals, however, took a different approach, holding that Article 10(a) only allowed service of documents after service of process had already been completed (*Basbam v Tillaart, 2003 Tenn. App. LEXIS 536, at *12-13 (Tenn. Ct. App. 31 May 2003); see also Fuisz & Henek, supra at 321*). This is in line with earlier decisions from the Fifth and Eighth Circuits (*Nuovo Pignone, SpA v Storman Asia M/V, 310 F.3d 374 (5th Cir. 2002); Bankston v Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989)*).

Courts have also rejected service by courier firms under the Service Convention (*see, for example, Baker v Kingsley, 294 F. Supp. 2d 970, 980 (ND Ill. 2003); see also Fuisz & Henek, supra at 322*).

In practice, this division of authority means that plaintiffs should not rely on service by mail.

Discovery abroad

The scope of discovery in the US is significantly broader than in most foreign jurisdictions. As a result, foreign manufacturers are often hesitant to produce evidence in a US proceeding that would be considered off-limits in their own country.

The applicability of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention) is relevant (*23 US. 2555; 847 UNTS 231; TIAS No. 7444*).

The US Supreme Court has rejected the argument that the Evidence Convention must be applied exclusively when soliciting discovery from a foreign entity (*Soci-*

eté Nationale Industrielle Aerospatiale v US District Court, 482 US 522, 529 (1987)). In fact, the Supreme Court held that the Evidence Convention was not even required to be used as a first resort. Instead, courts will employ the Evidence Convention when it will facilitate discovery abroad.

The Evidence Convention simply provides an option that can be employed to obtain evidence. The Evidence Convention does not modify the law of contracting states or require them to use the Evidence Convention in place of their own procedures. For example, the Evidence Convention does not deprive the US district court of its jurisdiction to order a foreign party to produce evidence physically located in another nation.

Despite the non-exclusivity of the Evidence Convention, the Supreme Court in *Société Nationale Industrielle Aerospatiale* did instruct US courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position".

Enforcement of judgments

Finally, even if a foreign manufacturer is subjected to jurisdiction in the US, a judgment against it may not be enforced by the foreign country. Unlike service of process and discovery abroad, there is no treaty or convention in force regarding the recognition and enforcement of judgments. This is largely due to the global perception that monetary judgments in the US are often excessive. As a result, the enforcement of a judgment will depend on the laws of the foreign country and the principles of comity.

Under the general principles of international law, a foreign state has the right to examine US judgments based on four factors, namely:

- Did the US court have jurisdiction?
- Was the defendant served properly?
- Were the proceedings tainted due to fraud?
- Is the judgment contrary to the foreign country's public policy? (*US Department of State's website, Enforcement of Judgments, at www.travel.state.gov/law/info/judicial/judicial_691.html*).

This review provides a foreign manufacturer with important potential protection. However, if the defendant has a US subsidiary or assets located in the US, the plaintiff can levy execution on such assets to satisfy the judgment obtained in the US.

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