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*Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products*

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It has been my honor over the last 25 years to testify on legislation pertaining to the tort system. Most proposed legislation I have addressed was designed to limit or abolish the rights of those injured by defective products. In short, I have been in a defensive posture for a quarter of a century. How extraordinary then to be present today and speak in favor of the imposition of liability for those who have caused harm—and even more remarkably, to find that this is a position now, magically, supported by both mainstream political parties.

Of course foreign manufacturers should be accountable for goods they produce that cause harm. The formula is simple: when consumers rely reasonably on assurances of product quality, when consumers are in a position where testing products is not only unlikely but by-and-large impossible, one would think the imposition of tort liability is a foregone conclusion. This is and should be true for both domestic and foreign manufacturers.

When a product line fails and millions of people, in this instance mostly children, are placed at risk, hearings like this are conducted to understand the reason this has occurred. In Freudian shorthand, we look for someone to blame. After the massive, deadly fires in Southern California in October, the hunt was on to find a culprit. Notwithstanding the fact that the wooded hills of Southern California were dangerously dry and made ready for conflagration by the Santa Ana winds, many took comfort with the discovery of a ten-year-old child who had, allegedly, been playing with matches. With due and genuine deference to the successful investigators in the San Diego hills, and to those who cornered Mrs. O'Leary and her cow after blocks of bone-dry wooden buildings went up in flames in the Great Chicago Fire, sometimes finding a singular wrongdoer is not really the solution. Sometimes the mode of incitement is not the central problem.

Non-US manufacturers imported into this country products that contain toxic levels of lead. Shortly thereafter, a discovery was made that certain play-beads designed for children contain dangerous and potentially deadly drugs. CD players were found that burst into flames, transparent yo-yo strings were sold that produced an increased risk of serious constriction hazards, and cribs produced in China were found to give rise to the horrifying prospect of infant strangulation. This is not a problem solved by identifying one producer of toy cars in China who, supposedly following a U.S. distributor's design specifications, increased lead levels in paint.

This is a system wide problem.

This is the effluent of tort reform.

Tort reform was designed to limit or in some instances abolish liability in the civil justice system, assuming a sufficiently gullible state legislature or congressional committee could be found Year after year, the tort reformers came to the Capitol and to the state houses, demanding relief from the accountability our law had required. Sometimes in broad strokes, *e.g*. the quest to abolish strict liability, and sometimes in more targeted ways, *e.g*. the push to relieve component part manufacturers of liability, the push to cap non-economic losses, the push to create arbitrary time-frames in which injured persons could file claims, the push to ratchet up standards of proof for scientific evidence to make it prohibitively expensive to litigate a claim, the push to abolish joint and several liability, the push to abolish or grossly limit punitive damages, the push to neuter the Consumer Product Safety Commission, and on and on, the tort reformers forged ahead. With singular determination, they sought to dismantle a system that generated a tough, market-based force that compelled the production of safer and more efficient products and services.

State legislatures and occasional congressional committees gave in to these requests, congratulating themselves that they were leveling the playing field and interjecting sanity into a system gone mad. The so-called liberal press (particularly THE WASHINGTON POST), apparently happy to be free of punitive damages when they defame someone into reputational oblivion, joined the hunt, backing these initiatives.

In the feeding frenzy that resulted, there were casualties. All of the "reforms" mentioned above, in one form or another, have been adopted in different states, and some even made federal law. In so doing, the vital market pressure, the corrective justice force, the incentive value of a strong, well-developed civil liability, sadly, was diluted or lost.[1]

If you are looking for a culprit, your search has ended. It is tort reform. Stripped of many of the strong civil justice incentives to make products at the state of the art and free from coherent regulatory oversight and enforcement, foreign manufacturers and their domestic distributors failed to exercise due care. They went with products that were inexpensive, untested, but shiny and cute...and shiny and cute sell well. With limited or no punitive damages, with no joint and several liability, with future litigation risk minimized, what else would one expect?

The title of this hearing is not a question–it is a fact. The playroom and the nursery are unsafe. With the ability to calculate with some level of precision what remains of downstream liability and breed that small incremental cost into the price of the product they sell, what else

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[1]This is not an academic "I told you so moment..." but I did. With great eloquence, Professors Michael Rustad, Frank Vandal, Joseph Page, Teresa Schwartz, Jerry Phillips, and more than a hundred others have testified year in and year out that these measures would undercut the incentive value of the tort system. With equal eloquence and a often a more practical focus, the same message was delivered by many hundreds of lawyers who work in product safety and related fields. Were this a law review article, this would be a very long footnote.

would you expect?

Knowing the cause for this problem, however, is somewhat hollow. The next step is to figure out whether the civil justice system or the regulatory agencies involved can address the wrongs that have occurred and minimize the probability that they will continue in the future. With the threat of defective products from foreign manufacturers a matter of public record, what can one expect from our critically important tort system (a system that barely survived the self-indulgent onslaught of tort reform) and from a struggling, underfunded federal agency?

## I. Select Casualties of Tort Reform Relevant to Foreign Manufacturers

This is an opportune moment to reflect on that which has been done to our civil justice system. Putting aside arbitrary caps on both punitive damages and non-economic loss and perhaps a dozen other pernicious items on the tort reform agenda, I will address briefly five "reforms:" abolition of joint and several liability, elimination of strict liability in tort,[2] adoption of statutes of repose, limitation on the liability of retail sellers, and the current appalling state of the Consumer Product Safety Commission.

Had many of the states not abolished **joint and several liability**, a prize of tort reformers, the question of accountability for foreign manufacturers would be of far less consequence. In

[2]Strict liability for product liability cases refers to a cause of action in tort where the defendant can be found liable if the plaintiff can prove that the product the defendant sold is in a defective condition, unreasonably dangerous to user or consumer. Showing "defect" and "unreasonable danger" can be demanding for plaintiffs. Liability is considered "strict" because once a product is shown to be in a "defective condition, unreasonably dangerous to user or consumer," the plaintiff does not have to undertake the burdensome task of proving classical negligence, although causation and damages must be established. Restatement (2d) Section 402(a).

those states that retain joint and several liability, retailers, distributors or wholesalers who place a product into the stream of commerce bear full responsibility for harms that are the consequence of a manufacturer's (domestic or foreign) failure to exercise due care or a manufacturers decision to produce a product in a defective condition, unreasonably dangerous to user or consumer. In the absence of joint and several liability, the retailers and distributors bear the responsibility only for the harm they cause, and only to the percent that they cause it. They are not responsible for the harm attributable to the manufacturer.

The attack on **strict liability**, similarly, has made the challenge of those injured by products significantly more difficult. Not only have many states abolished strict liability in tort by legislative action, but the venerated American Law Institute made the horrendous determination not to replicate 402(a) in the Restatement (Third) of Torts, instead adopting a system that required a plaintiff to show a "reasonable alternative design." Consider the difficulties of individual plaintiffs establishing from an engineering and scientific standpoint the criteria for an alternative design in any case involving complex technology.

Strict liability allowed plaintiffs to recover when harmed by a product if they can demonstrate the product is in a defective condition, unreasonably dangerous to the user, and permitted liability notwithstanding the manufacturer or retailers assertions of due care.

There was little question why strict liability was adopted. When products are sold *en masse*, with little or no opportunity for inspection by the consumer, when most product information is delivered to consumers in 30 second soundbites–and the whole of our retail economy depends on consumers believing this information–we had resolved the vulnerability of the purchaser by allowing them to recover when products fail. Under strict liability we do not

require consumers also to master the technology of a manufacturer so that they can show where the specific acts of negligence occurred and how they the injured consumer could have figured out a way to make the product more safely.

Tort reformers have sought also to impose **statutes of repose** in most states and, only months ago, in Congress. Rather than using the date on which a consumer reasonably discovered they have been poisoned by a manufacturer's product to activate a statute of limitations, a statute of repose sets an arbitrary limit based on the day the product was placed into the stream of commerce. If one learns they have been poised by a product years after the product's use (sadly, a common phenomenon for many cancer-causing agents) but after the period of repose has run, they are barred from bringing a claim regardless of the clear fault of the producers and sellers of the product. That, apparently, is part of the "predicate of fairness" to which tort reformers often refer.

Among the many casualties of tort reform, however, one of the most egregious is the quest to remove **accountability of retailers** who sell defective goods. Liability was imposed on retailers, initially, because they place goods into the stream of commerce and profit from the sale of those goods. Retailers were held liable for good reason: Retailers have the most direct opportunity to communicate with consumers, highlighting warnings or problems with the product, the last and best opportunity to test a product if it appears to be problematic, and every incentive in the world to make sure the goods they sell are safe and effective. Perhaps more importantly, large retailers have an enormous impact on the design and quality of goods.

No individual consumer or consumer organization carries the power of retailers in the United States when it comes to the quality of consumer goods. If a large retail chain decides that

a product they are selling can be the basis for civil liability, they will cease to sell that product. Further, unless they suffer from some form of corporate masochism, they will communicate with the manufacturer and exact pressure on the manufacturer or designer to improve the quality and integrity of that product, assuming that it was otherwise a commercially successful item. The fact is, without retailers, manufacturers and fabricators vanish. They are vital to the stream of commerce.

Retailers are also an enormously powerful political constituency. Over the last quarter century, they have managed to convince a number of state legislatures, and a number of congressional committees, that they are an endangered species and entitled to special protection under our tort system. Bill after bill has proposed eliminating strict liability for retailers and at the state level, many of them have been successful.

The problem with foreign manufacturers and the lack of easy accountability can be seen, at least in a limited context, as a problem of retailers. Take for example *France v. Harley Davidson*, 2007 U.S. Dist. Lexis 44213 (D. Utah, June 18, 2007). That case holds, among other things, that no defendant can ever be liable for any amount in excess of their proportional fault attributed to that defendant. That means no joint and several liability. It also means that if the retailer did not participate in the design of a product it sells, there will be a great battle at trial to show that the retailer bears any accountability whatsoever. Moreover, of particular importance given the problem under consideration regarding non-U.S. manufacturers, the law in the state of Utah states that "when a party is determined to be a passive retailer, there is no strict liability for design or manufacturing defects." (*Sanns v. Butterfield Ford,* 94 P.3d 301 (Utah App. 2004)).

A passive retailer is an entity that does not participate directly in packaging, labeling, or

design of a particular product. Without cataloging the various catastrophic product failures that serve as the incentive to conduct this hearing, suffice it to say that a number of retailers involved in the sale of goods produced overseas will lay claim to the label "passive retailer." By virtue of tort reform, they will not be liable. [3]

Given the difficulty of suing successfully foreign manufacturers and putting aside the matter of jurisdiction and the difficulty of enforcing judgments (discussed *infra*), retailers may be all that plaintiffs have left, and retailers as a source for accountability under the currently destabilized, tort-reformed system, are likely to prove a very unsatisfying target for profoundly injured plaintiffs.

There is a significant public expectation that when products fail in the United States, a regulatory and civil justice system is in place to hold accountable those responsible for that failure. As discussed, the tort system has taken a number of direct hits, giving rise to the question of whether the **Consumer Product Safety Commission** can be a powerful agent for accountability and protection of innocent at-risk consumers. After all, one argument made by tort reformers is that it is just unfair to be subject to liability in Article III courts and also subject to the aggressive, intrusive regulatory initiatives of the Consumer Product Safety Commission. It is a completely farcical argument.

The Consumer Product Safety Commission (CPSC), an agency with enormous potential

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[3]One is hard pressed to understand the obsession of tort reformers to protect retailers. Frankly, they already had fairly comprehensive cover by virtue of indemnification agreements common in the sale of goods in the U.S. The Restatement (Second) of Torts, at 886 b, comment h, suggested that a supplier of a defective good ought to indemnify retailers assuming the retailer was not engaged in the direct design, development, or labeling of the particular product in question.

both to inform consumers of product risks as well as abate those risks, has not exactly distinguished itself when it comes to being out front, protecting the interests of consumers who rely on them to check the safety of the products they use. There are good reasons for this insufficiency beginning with the fact that *the entire budget for the Consumer Product Safety Commission is $62 million, a sum one-tenth the annual advertising budget of Wal-Mart*. If Congress intended the CPSC to protect the American public against unsafe products, to communicate with the public regarding a broad range of product risks, to define and analyze substantial product hazards, to test independently products and make recommendations regarding their safety and efficacy, one would think that Congress would want to spend more than is spent in approximately one month by Wal-Mart.[4]

It is not that the statutory structure of the CPSC is inherently problematic. The CPSC has the power to ban products that constitute substantial product hazards. It has extensive communication capacity, were it to exercise that ability. Further, unlike courts, the statutes pertaining to the CPSC allow for accountability for manufacturers, wholesalers, retailers, and distributors. Were the agency functional, this force might be of consequence. Unfortunately, while the agency is many things, fully functional it is not. To be clear, it is not that the CPSC has failed to attract some of the finest personnel in government. There are terrific scientists, lawyers, and policy analysts at the CPSC. With a shoe-string budget and related political problems, even

[4]I will leave to others a comprehensive critique of the CPSC. It is noteworthy that the information regarding the importation of defective goods from China came as a consequence of date generated by a European entity, not the Consumer Product Safety Commission (Story and Barboza, *Mattel Recalls 19 Million Toys Sent From China*, THE NEW YORK TIMES, p. 1, August 15, 2007).

those of great talent and capacity will not be able to achieve the clear legislative mandate of the agency.

With the CPSC playing catch-up and doing so poorly, it will fall on the post-tort reformed system of civil justice to impose responsibility. Assuming that tort reform has not destroyed entirely the ability of injured consumers to seek justice in our courts, the first question to address is whether a U.S. court will ever see one of these foreign manufacturers. It is not easy to sue a foreign manufacturer–nor is it easy to collect a judgement, assuming one has been secured–as the following sections of this statement suggest.

## II. Jurisdictional Issues Relevant to Holding Non-US Manufacturers Civilly Liable in Tort

Non-U.S. manufacturers are subject to the jurisdiction of domestic courts only when the plaintiff has established that there are minimum contacts between the non-U.S. entity and the forum state. Further, a court must determine that the assertion of jurisdiction is consistent with our notions of fair play, substantial justice, fundamental fairness, and reasonability.[5] For this assessment, courts take into account the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the efficient resolution of the controversy, and the interests of the various states in securing fundamental state policies.[6]

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[5]Minimum contacts assessments are bounded by "fair play and substantial justice." *International Shoe v. Washington*, 326 U.S. 310 (1945).

[6]Before ever getting to the substance of a claim, the matter of venue, *in personam* jurisdiction, and subject matter jurisdiction must be resolved favorably. In a nutshell, this requires plaintiff to show that the venue (forum) is proper, that the court has legal authority and power over the parties before it, and that the case it is about to hear is within the range of

The more substantial the activity of the defendant, the more directed or purposeful the activity of the defendant is vis-a-vis the state, the more the defendant's activity suggests that it is "purposefully availing" itself of the rights and obligations the forum state provides,[7] the more likely that the manufacturer will become a party to a civil product liability claim. Of course, if the foreign defendant is doing business in the state, *i.e.*, is physically present, there is not much of an issue.[8] However, there is a real and important difference between the physical presence of the defendant's business enterprise and the simple foreseeable presence of a product the defendant sells in the state.[9]

At the heart of the challenge to understand whether a court will find personal jurisdiction over a foreign defendant *is Asahi Metal Industry v. Superior Court of California*, 480 U.S. 102 (1987). While there was no majority opinion in *Asahi*, two schools of thought emerged. In Justice O'Connor's plurality opinion, the "minimum contacts" required to confer jurisdiction[10] must come from actions that are directed purposely to a state and go beyond the coincidental placement of a product into the stream of commerce of that state. Under this formulation[11] if

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disputes for which the court is juridically competent.

[7]*Burger King v. Rudzewicz,* 471 U.S. 462 (1985).

[8]*Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

[9]*World-Wide Volkswagen v. Woodson*, 444U.S. 286 (1980).

[10]*International Shoe v. Washington*, 326 U.S. 310 (1945).

[11]The O'Connor articulation of "minimum contacts plus" is devastating if the goal is to hold accountable non-US manufacturers when their products are imported by a large U.S. distributors, and then labeled, packaged, and sold the U.S. by a company that handles all of the advertizing and marketing.

the product was designed specifically for a particular demand in the forum state, advertised in the forum state, or if the manufacturer established channels for providing regular advice to customers, or marketed or distributed it by a sales agreement that made clear that the product would be sold in the forum state, the contacts would be sufficient to establish *in personam* jurisdiction.

The competing perspective comes from a separate opinion in *Asahi* by Justices Brennan. In his view, the minimum contacts requirements could be satisfied by demonstrating that a foreign manufacturer produced its goods with knowledge that they will be sold in the United States and knowingly placed them into the stream of commerce. In so doing, the manufacturer avails itself of the protections, rights, and obligations of the laws of the forum state.

Under both the plurality and concurring opinion in *Asahi*, *in personam* jurisdiction requires an assessment beyond the mere or coincidental presence of the defendant's product in the stream of commerce, in part because of the "unique burdens placed on one who must defend oneself in a foreign legal system . . . ." *Asahi* at 114.

Whether a court follows Justice O'Connor's plurality opinion or Justice Brennan's concurrence, a "business may not shield itself from suit by a careful but formalistic structuring of its business dealings."[12] The more a company engages in training, control of distribution networks, development of instructional material designed for U.S. markets, the more likely it is that a court will find its contacts are sufficient regardless of whether it follows the O'Connor or Brennan approach.

In *Vermeulen v. Renault*, 985 F.2d 1534 (11th Cir. 1993) the court found that "the current

[12] *Benitez-Allende v. Alcan Alumino do Brazil*, 857 F.2d 26, 30 (1st Cir. 1988).

state of the law regarding personal jurisdiction is unsettled." The *Vermeulen* court divided *Asahi* opinions into a simple stream of commerce analysis (Brennan) and a "stream of commerce plus" analysis (O'Connor). The court noted that a number of circuits have simply forged their own path in trying to establish standards *in personam* jurisdiction, looking at minimum contacts and then reasonable fairness, assuming the minimum contacts have been met.[13] In trying to define minimum contacts, the court paid particular attention to whether a foreign producer conducts regular meetings in the United States designed to promote wide distribution of their products.[14] This does not bode well for nearly anonymous foreign manufacturers of toys who have who appear never to have set foot in the U.S.[15]

The *Vermeulen* court found that state courts ought to take into account that an individual citizen injured by an arguably defective product will have a far more difficult time moving to a different forum than would a well-financed transnational corporation.[16] In such cases, the

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[13]See *Irving v. Owens Corning*, 864 F.2d 383 (5th Cir. 1989); *Demoss v. City Market*, 762 Fed. Supp. 913 (D. Utah, 1991); *Abuan v. General Electric*, 735 Fed. Supp. 1479 (D. Guam, 1990); *Curtis Management Group v. Academy of Motion Picture Artists*, 717 F. Supp. 1362 (S.D. Ind. 1989)

[14]*In re Perrier Bottled Water Litigation*, 454 F. Supp. 264, 268 (D. Conn. 1990).

[15]It bears mention that *Vermeulen* involved a defendant who asserted that not only were there insufficient contacts but that it was acting on behalf of a nation state and therefore was protected under the Foreign Sovereignty Immunities Act. 28 U.S.C. at 1602 *et. seq*. While this contention is worthy of study, the fact remains that Foreign Sovereignty Immunity Act protection rarely applies when the sovereign is acting as an agent for a commercial provider of goods that are sold into the stream of private commerce in the United States. If the action of the sovereign does not involve the implementation of a law or policy, or is not of consequence in terms of the various diplomatic initiatives a state pursues, the Foreign Sovereignty Immunity defense will often fail.

[16]It is assumed that every state has strong interest in providing effective means of redress for its residents and allowing its residents to litigate those interests in their home state. *McGee v.*

interest of individual state courts in providing a forum is compelling. The inconvenience to the foreign entity is limited, whereas the inconvenience to an individual citizen might be dramatic. Further, witnesses and evidence regarding the harm, including medical testimony, might be extraordinarily difficult to assemble in a forum outside the United States, assuming a U.S. court chooses to declare itself a *forum non conveniens*.[17]

**Recent Cases where in personam jurisdiction failed**.

While U.S. courts are sometimes amenable to asserting jurisdiction over non-U.S. manufacturers who produce defective products,[18] there are a number of recent cases where plaintiffs have had difficulty meeting the minimum contacts requirements. For example, in *Kozial v. Bombardier-Rotax*, 2005 U.S. App. Lexis 7205 (11th Cir. April 22, 2005), the court found that if the sole contact a state has with a product (in this instance an engine that was a component part) is that the part is received in the state and immediately shipped to a different

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*International Life*, 355 U.S. 220 (1957).

[17] In March, 2007 the Supreme Court decided *Sinochem International v. Malaysia International Shipping*, 127 S. Ct. 1184, 1190 (2007), which permits courts to make *forum non conveniens* judgments before hearing personal subject matter jurisdiction determinations. *Sinochem* held that a non-U.S. defendant "bears a heavy burden in opposing the plaintiff's chosen forum." The truth of the matter is that if a court grants a request to dismiss cases on a *forum non conveniens* basis, the likely outcome is that the U.S. plaintiff will fail to find a court outside of the United States to hear their claim. *Gonzalez v. Chrysler*, 301 F.3d 377, 383, note 9 (5th Cir. 2002) citing Robinson, "Forum non Conveniens in America and England: A Rather Fantastic Fiction," 103 L. Q. Rev. 398, 418-419 (1987); *In re Crash off Long Island, New York*, 65 F. Supp. 2d 207, 217 (S.D. N.Y. 1999). In contrast, where non-U.S. citizens are affected by the activities of U.S. companies that occur outside of the United States courts have not been receptive. *In re Union Carbide Corporation Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2nd Cir. 1987).

[18]. In *Asahi* the Court held that it would only be in "rare cases in which the minimum requirements inherent in the concept of fair play and substantial justice" defeat the jurisdiction of a foreign court. *Asahi*, 480 U.S. at 116.

state, the mandates of personal jurisdiction and fairness are not met.

In *Cupp v. Alberto-Culver U.S.A.*, 308 F. Supp. 2d 873 (W.D. Tenn. 2004), the United States District Court found a French cosmetics manufacturer not subject to the personal jurisdiction of a federal court in Tennessee. The court noted that there was an absence of continuous and systematic contacts in the United States, a lack of offices or facilities, the absence of paid U.S. taxes, the absence of board or directors meetings in the United States, the absence of leased or owned property, a bank account, or similar indicia of presence. While *Cupp* is an antitrust case, the use of the jurisdictional factors seems an appropriate analogy–and suggests that securing jurisdiction over foreign manufacturers who have not entered the U.S. will be a real obstacle to imposing liabiliy.

In *Lesnick v. Lorillard*, 35 F.3d 39 (4th Cir. 1994), the court dealt with the problem of assertion of jurisdiction over a U.S. out-of-state corporation, somewhat distinguishing it from those cases involving non-U.S. defendants. With that qualification, it bears noting that *Lesnick* held that there must be conduct beyond mere profit that justifies the assertion of jurisdiction. In particular, *Lesnick* holds that the conduct has to be "directed toward the state" in order for it to suffice for purposes of fundamental fairness under the due process clause. In the case of non-U.S. manufacturers, this case line may become a stumbling block since large foreign producers who sell in the United States may well not be targeting any one particular state, other than by the activities of the domestic retailer or wholesaler, and, like *Lesnick*, have little contact with the U.S. other than profit.

Several other cases tell the same tale. In *Burnshire Development v. Cliffs Reduced Iron*, 2006 LEXIS U.S. App. 21889 (6th Cir. August 23, 2006), *in personam* jurisdiction was denied

even though the plaintiff could show that the defendant had entered the forum state and set up a data room to house corporate documents and set a date for a closing. These were deemed insufficient to show purposeful availment, leaving the plaintiff without recourse. In *TH Agriculture & Nutrition v. Ace European Group*, 488 F.3d 1282 (10th Cir. 2007), a non-US defendant provided insurance coverage in the forum state as part of "world wide coverage." The court decided the minimum contacts requirements were not met since they were a Dutch company lacking offices, employees, and an agent in the U.S. In *Jennings Hydraulic*, A/S 383 F.3d 546 (7th Cir. 2004), the plaintiffs sought to assert jurisdiction over a Danish manufacturer whose product failed in the United States but lost because the plaintiff could not meet the minimum contacts and reasonability requirements established by the Supreme Court.

**Recent Cases where in personam jurisdiction was found**

The challenge in asserting jurisdiction over foreign corporation often boils down to the question of whether the defendant foreign corporation did anything more than "set a product adrift in the international stream of commerce." *Clune v. Alimac Elevator* 233 F.3d 538 (8th Cir. 2000). In *Clune*, the court relied on *Barone v. Rich Brothers Fireworks*, 25 F.3d 610 (8th Cir. 1994), which dealt with the manufacturer who had no office, no agent, no distributor, no advertising in the state, and did not send directly its products into the state, but was none the less subject to personal jurisdiction based on the fact that the manufacturer had nine distributors in six states, one of which was the forum state. When the manufacturer claimed that it did not realize its products entered the forum state, the court said "such ignorance defied reason and could aptly be labeled as willful." 25 F.3d at 613. The *Barone* court found that when the manufacturer "reaps the benefits of a distribution network" it cannot thereafter deny the forum court's

jurisdiction. Other cases have held that merely because a foreign manufacturer has made use of a large scale marketing, several cases mentioning Wal-Mart and Target Corporation, it is fair to conclude that a manufacturer would derive substantial revenue from their distribution supply chain and that could be a sufficient "plus" for a stream of commerce argument.

In some cases it is the sheer magnitude of the sales of the product that seems to be convincing to a court. For example, in *Jones & Pointe v. Boto Co.*, 498 F Supp. 2d 822 (E.D. Va., 2007), the fact that the defendant, a non-US manufacturer, sold $1.1 billion of artificial Christmas trees and derived a significant revenue stream therefrom, seemed to convince the court that it would be reasonable and fair to defend the product liability claim in the United States and specifically in the Commonwealth of Virginia. The *Boto* court paid particular attention to the presence of an Internet website that describes the products that Boto manufactures and allows consumers to retrieve information about the products they have purchased. The court found that because residents of the state of Virginia could access the website and secure further information pertinent to their needs, the requirement for minimum contact was established.

The *Boto* court also held that "in this age of [the North American Free Trade Agreement] and [the General Agreement on Tariffs and Trade] one can expect further globalization of commerce, and it is only reasonable that companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states."[19]

In *Bou-matic v. Ollimac Dairy*, 2006 U.S. Dist. Lexis 14543 (D. Cal., March 15, 2006) a plaintiff sought jurisdiction over the manufacturer of a robotic milking system produced in the

[19]Citing *Barone v. Rich Brothers Fireworks*, 25 F.3d 610, 615 (8th Cir. 1994).

United Kingdom and The Netherlands. The defendant argued that assertion of jurisdiction would conflict with national sovereignty since the defendants were Dutch and British entities. The defendants argued that the *Asahi* plurality prohibited the assertion of jurisdiction if a plaintiff was able to show only that it was merely foreseeable that the defendant's product would find its way into the foreign state's stream of commerce and further that jurisdiction would not be supported merely by showing that the defendant had a level of reasonable awareness that the products would be sold in the foreign state.

The *Bou-matic* court found first that the defendant had an agent in the state in which jurisdiction was sought and had designed the product for sale in that state, meeting the "purposeful availment" test. Where the defendant is knowingly present and the contacts are more than random or fortuitous, the question becomes one of reasonability,[20] *i.e*., would the assertion of jurisdiction offend notions of due process. The court also noted that one must look broadly to the connections the manufacturer has with the United States, not just to the forum state, and that where a distributor has extensive and continuing contacts with the U.S. market, a foreign defendants should expect to be brought into U.S. courts.[21]

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[20]Judging reasonability, the court relies on seven factors: 1) The extent of purposeful interjection; 2) The burden on the defendant to defend the suite in the chosen forum; 3) The extent of conflict with the sovereignty of the defendant's state; 4) The foreign state's interest in the dispute; 5) The most efficient forum for judicial resolution of the dispute; 6) The importance of the chosen forum to the plaintiff's interest in convenient and effective relief; 7) The existence of an alternative forum.

[21]In many cases, including *Bou-matic*, foreign defendants will argue that their presence in U.S. courts is somehow connected with the interests of their sovereign country. The *Bou-matic* court, as most courts, looked carefully at this claim and, as is often the case, if the defendants can find no foreign policy, law or political consideration that would be affected by the assertion of jurisdiction, then the defendants cannot lay claim to the defense that they are acting on behalf of

In *Ely Lily v. Sicor Pharmaceutical*, 2007 U.S. Dist. Lexis 31657 (D. Ind., April 27, 2007), the court analyzed the extent to which having regular and consistent contacts with customers as well as advertising in national trade journals would provide a sufficient basis for personal jurisdiction. The defendant argued that since it sold through an independent, out-of-state wholesaler rather than engaging in direct sales, it was not subjecting itself to the jurisdiction of the Indiana courts. The court disagreed, finding that the presence of a "middleman" does not insulate a company, and in fact shows that a company has "purposefully availed itself of the forum state by generating . . . commercial activity within the state.

In addition to foreseeable presence or knowledge of probable sales, courts have used factors such as sharing a trademark with the distributing company in the state in question and jointly marketing a product in the United States with a U.S. distributor.[22] Non-U.S. manufacturers seem to have great affection for the argument that selling through an independent distributor somehow insulates them from the jurisdiction of the U.S. courts. An examination of the case law suggests that this is a less than fully reliable strategy if the goal is to avoid being "haled" into U.S. courts.

A recent Ohio decision, *State of Ohio ex rel Attorney General Marc Dann v. Grand Tobacco*, 871 N.E. 2d 1255 (Ohio App. 2007), explored the question of the extent to which an using an independent domestic distributor provides some insulation from the jurisdictional reach of U.S. courts. Relying on *Mott v. Schelling*, 1992 U.S. Lexis 13273 (6th Cir. 1992), the Ohio

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a foreign sovereign, and likewise cannot lay claim to any protections under the Foreign Sovereign Unities Act.

[22] *AV Imports v. Colde Fratta*, 171 F. Supp. 2d 369 (U.S. DC NJ. 2001).

court found that the use of an independent distributor is rarely the basis for limiting or prohibiting the exercise of jurisdiction. The court found that if a foreign manufacturer knows that its products are being sold in the United States, cultivates its market there by taking into account U.S. standards in design and manufacture, and benefits from U.S. sales, a mere "paper transfer" to an independent distributor is an insufficient basis to prevent the exercise of jurisdiction.

Along similar lines, an Illinois court held, in *Saia v. Scripto-Tokai*, 366 Ill. App. 3rd 419, 2006 Ill. App. Lexis 423 (May 26, 2006), that it would be "fundamentally unfair" to allow a foreign manufacturer to insulate himself from the jurisdiction of the court solely by the use of a distributor. The *Saia* court found that the use of a subsidiary to introduce a product into a state market may alone be sufficient to exercise jurisdiction over a foreign corporation that designs negligently a product.

*Saia* is a case about a tragic death of a three-year-old child caused by a fire started when a defectively designed "Aim(n)Flame" lighter malfunctioned. *Saia*, relies on the "stream of commerce" argument associated with the Brennan opinion in *Asahi*. All that is required, the *Saia* court said, was whether the defendant had engaged in some action or conduct that invoked the benefits and protection of the law of the forum. The court found that selling a product in a state gives the manufacturer certain benefits from the laws of the state and that any inconvenience the defendant might suffer in having to defend a case in the state is offset by the need of protecting the citizens affected adversely by the product.

The *Saia* case is of interest since the defendant in question, Tokai, is a foreign component part manufacturer of the lighter in question. Both parts were shipped from Japan to Mexico

where they were assembled and then packaged and transferred to K-Mart and presumably other distributors. While Tokai argued that it was not benefitting directing from those sales, the court disagreed, finding that it obtained profits from the manufacture and sale of its products in question and that was sufficient to support the assertion of jurisdiction in the state.

In *Ruiz de Moina v. Merritt and Ferman*, 207 F.3d 1351 (11th Cir. 2000), the court evaluated the factors from *Asahi* and then distilled them down to the notion that so long as the non-U.S. defendant has a "fair warning" that a particular activity may subject it to the jurisdiction of the foreign sovereign, the exercise of that jurisdiction does not offend traditional notions of fair play and substantial justice.

* * *

The above brief review of jurisdictional challenges does not lead to any obvious conclusion. One cannot generalize that non-US manufacturers will or will not be subject to the jurisdiction of domestic courts. It depends on whether the court in which the claim is filed follows the O'Connor or Brennan position, the nature of the relationship the manufacturer has with the domestic retailer, and the broad range of factors discussed in the cases above. In the end, the decision will be made on a case-by-case basis.

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Next, assuming there are minimum contacts subjecting the manufacturer to the jurisdiction of a U.S. court and there are no challenges to jurisdiction based on notions of reasonability or fundamental fairmness, the very real question arises regarding the likelihood that evidence can be marshaled and that a judgment, if rendered against the manufacturer, can be enforced.

## III. Practical Problems Dealing With Non-US Defendants

The problem of holding foreign manufacturers accountable, once jurisdiction and venue are decided, is by no means a simple task.

### Discovery

First, while U.S. courts are a convenient forum for victims of defective products residing in the United States, the case against the defendant must be imported. Design processes, testing data, information regarding product malfunction, company witnesses, and similar data essential required to develop the cause of action are likely to be outside of the United States and difficult to pin down.

It would be naive to assume that the discovery process used in the United States to secure such information in advance of a trial is readily available when the named defendant is a foreign entity. Countries outside of the United States have not been particularly receptive to discovery orders issued by U.S. courts. Preliminarily, most foreign courts will reject any request for information if it is needed to establish *in personam* jurisdiction, limiting consideration solely to cases where there is *in personam* jurisdiction and minimum contacts have been satisfied by evidence and information available in the United States. For every plaintiff, the task will be to secure information first to establish the presence of jurisdiction–and in that instance, they will find foreign courts almost uniformly unhelpful.

### Blocking Statutes

The difficulties in securing cooperation with foreign countries is compounded by the presence of "blocking statutes" that explicitly prohibit foreign courts from implementing U.S. discovery orders for a variety of reasons, some of which have to do with reciprocity, *i.e.*, the

willingness of U.S. courts to implement non-U.S. discovery requests for foreign proceedings.

Efforts have been made in the international law area to facilitate the exchange of documents for precisely this kind of situation. The Hague Convention on Service of Process Abroad for judicial and extra-territorial documents is designed to provide a predictable methodology for service of process abroad. The process is time consuming and requires the participation of the Office of the United States Marshal as well as translation of all discovery requests into the language of the country from which documents are solicited. The methodologies established by the Hague Convention have not been uniformly successful, prompting the Supreme Court to hold that The Hague Convention "is not the exclusive means for obtaining discovery from a foreign entity." *Societe Nationale Industrielle Aerospatiale v.United States District Court*, 482 U.S. 522, 539 (1987).

**Enforcement of Judgements**

Another practical problem is the difficulty of enforcing judgments on parties outside the United States. To put it mildly, the United States has not been in a position where it can lay claim to broad and expansive comity. At the present time, there do not appear to be any treaties or agreements that readily allow for the enforcement of a U.S. judgment outside of the United States. *Enforcement of Judgments*, U.S. State Department, HTTP: //travel.state.gov/law/info/judicial/judicial_691.html (last accessed November 5, 2007).

## IV. Two Simple Suggestions to Deal with Non-U.S. Manufacturers

### A Bond Requirement

First, consideration should be given to requiring non-US producers of consumer goods

sold in the United States to post a bond in the event those goods prove defective and dangerous. The bond requirement could become a condition of doing business in the United States and presumably part of the body of laws and regulations pertaining to customs and trade. Should a foreign manufacturer fail to secure a bond, presumably the distributing wholesaler or retailer would bear responsibility for securing that protection.

**Consent or Party Autonomy**

A second approach would be to require that any non-U.S. manufacturer consent to the jurisdiction of the state courts in which their products are distributed as a condition of importing their goods into the United States. Our legal system has long regarded party autonomy in choice of law (conflict of laws) cases. Consent to jurisdiction, much like agreement regarding the body of laws to apply in a particular transaction is common, understandable and effective.[23]

Requiring foreign manufacturers to post a bond or creating "consent to jurisdiction requirements" as a condition of importing goods into the United States have appeal because of their simplicity but need to be assessed carefully. A bonding requirement could be seen (wrongly) as a *de jure* cap on liability, a tragic consequence that should be avoided. Further, both a bond requirement as well as consent to jurisdiction may raise trade barriers that would be inconsistent with NAFTA and similar provisions in our international trade laws. Presumably,

[23]In the automobile safety area, the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. 30164, requires non-U.S. manufacturers selling vehicles in the United States to designate a permanent resident of the U.S. as an agent for service of process and for purposes of administrative and judicial proceedings that might result if the product turns out to be problematic. A clarification of those rules issued in August, 2005 (Fed. Reg. August 8, 2005, vol. 70, no. 151).

this would be taken into account if such legislation is drafted.

**Conclusion**

First, Congress should create a bond requirement to insure that injured consumers will have some recourse in the event a product made abroad causes injury and (a) the domestic retailer or distributor does not cover the loss either because of the abolition of joint and several liability or because of insolvency; or, (b) the foreign manufacturer is unavailable for suit because of the restrictive language in *Asahi* or because of insolvency.

Second, as part of the U.S. Customs procedures, Congress should require manufacturers of consumer goods produced outside the United States to consent to the jurisdiction of any domestic state court in which their products are sold as a condition of importation.

Third, Congress ought to considering clarifying Title 28 and resolving the confusion surrounding the *in personam* jurisdiction requirement.

I appreciate the opportunity to testify.

Respectfully Submitted,

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