PROTECTING THE PLAYROOM: HOLDING FOREIGN MANUFACTURERS ACCOUNTABLE FOR DEFECTIVE PRODUCTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

NOVEMBER 15, 2007

Serial No. 110–166

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
38–868 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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NOVEMBER 15, 2007

PROTECTING THE PLAYROOM: HOLDING FOREIGN MANUFACTURERS ACCOUNTABLE FOR DEFECTIVE PRODUCTS

THURSDAY, NOVEMBER 15, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:43 a.m., in Room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Johnson, Lofgren, Cannon, and Franks.

Staff present: Eric Tamarkin, Majority Counsel; Paul Taylor, Minority Counsel; and Adam Russell, Professional Staff Member.

Ms. SÁNCHEZ. This hearing of the Committee on the Judiciary Subcommittee on Commercial and Administrative Law will now come to order.

I will now recognize myself for a short statement.

From the millions of toys recalled because of lead paint, to last week's recall of Aqua Dots, a popular Chinese-made toy which converts into a dangerous date-rape drug when eaten, it has become increasingly clear that playrooms across the country are in danger. There is a growing business trend of sacrificing safety standards and quality for slightly cheaper imported products.

While defective foreign-manufactured products entering into the U.S. is not a new phenomenon, I have been alarmed by the recent flow that is flooding our marketplace. Unfortunately, the Consumer Product Safety Commission, which is tasked with protecting consumers from harmful and dangerous products, appears to have done little to curb the flow of these problematic imports. In fact, the CPSC has actually cut its total staff by 55 percent and its budget by 49.4 percent since it was created in 1974. It now has fewer than 100 inspectors and investigators nationwide.

Even more troubling was the recent release of records showing that CPSC employees have accepted a large number of trips financed by industries the commission is mandated to regulate, calling into question its independence. I look forward to hearing from Pam Gilbert, former executive director of the CPSC, on how the commission can more effectively do its job.

Given the increase of imported products that do not meet U.S. standards for health, safety and quality and the fact that the CPSC has been largely ineffective in preventing the importation of defective products, consumers are left with little protection. When consumers are harmed by foreign-made products, current law leaves them little recourse in receiving compensation from a foreign manufacturer.

Consumers seeking to hold foreign manufacturers accountable face a number of daunting barriers. First, a consumer must establish personal jurisdiction, an increasingly difficult task given the uncertainty of the law. A consumer must then navigate the complex service of process requirements when serving a manufacturer in a foreign country. This may include translating materials into the language of that country. Finally, even if the consumer succeeds in having the matter heard and winning a favorable judgment, collecting compensation may be difficult as most countries resist enforcing U.S. judgments.

I look forward to hearing from our witnesses on how we can ensure that foreign manufacturers are held accountable for injuries consumers suffer as a result of defective products. As the holiday season comes upon us, we must do what we can to make certain it is both joyful and safe.

Accordingly, I very much look forward to today's hearing and to receiving the testimony from all our witnesses.

I will at this time now recognize my colleague, Mr. Cannon, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair.

The American tort system is nothing to be proud of. As Lawrence McQuillan, director of business and economic studies at the Pacific Research Institute, recently concluded, "America's tort system imposes a total cost on the U.S. economy of $865 billion per year. This constitutes an annual tort tax of $9,827 on a family of four. It is equivalent to the total annual output of all six New England states or the yearly sales of the entire U.S. restaurant industry." These costs hurt domestic American jobs and businesses, and much of these costs are imposed on American wholesalers and distributors.

In the United States, any seller of a product—not just the original manufacturer—is liable for damages caused by a defective product under the legal doctrine of strict tort liability. The fact that a wholesaler-distributor did not create the defect or did not participate in the design or production of the product or did not author the product instructions or warnings is no defense under current law. This often results in great unfairness, and efforts to aggravate that unfairness would simply increase the unjustified costs already imposed on American companies.

Normally, a wholesaler-distributor in a U.S. product liability suit will bring the manufacturer of the defective product into the case as a defendant, if the plaintiff has not already done so, and claim indemnity from the manufacturer as the faulty party. However, this may not always be successful, especially when the product is made by a foreign supplier

If the foreign supplier does not have a legal presence in the United States, such as a U.S. subsidiary, a U.S. plant or other of-

fices, or has not agreed by contract to be subject to the jurisdiction of the U.S. courts, the wholesaler-distributor often cannot obtain jurisdiction over the foreign supplier in America. The wholesaler-distributor may still claim indemnity from the foreign supplier, but it will have to do so in a distant, overseas court system that may not yield reliable compensation.

One prime impediment American courts face when seeking to assert jurisdiction over foreign corporations is the Constitution itself, which cannot be amended through simple legislation. Under the due process clause, as interpreted by the Supreme Court, a foreign corporation that has its principal place of business overseas, engages in little or no economic activity inside the United States and does not otherwise subject itself to the jurisdiction of the United States cannot be subject to the jurisdiction of the various state courts.

These problems for domestic distributors have been brought to the fore by a recent spate of problems with defective products whose defects may be traced to Chinese or other foreign sources.

Tort reform advocates, such as Victor Schwartz, who is a witness before us today, have proposed that Congress consider requiring that substantial suppliers be required to post a bond or appoint an agent for service of process before they can enter into transactions in which their component parts are distributed in the U.S. Such proposals could help ensure that money from foreign manufacturers is available to compensate those injured by foreign component parts in the U.S. and also allow such foreign companies to be subject to the service of process in the United States so Americans courts can assert jurisdiction over them.

Unfortunately, however, legislative proposals that have been introduced to address this issue have tended to focus on misguided attempts to amend the rules governing the Consumer Product Safety Commission in a way that threatens more litigation, but less actual enforcement of product safety issues. As The Wall Street Journal editorialized just last week, "Just in time for toy season, Congress is promoting new legislation to crack down on companies selling products said to be defective or dangerous. A Senate bill would empower all 50 State attorneys general to effectively run their own consumer product safety adjuncts, deciding what constitutes a safety defect and making their own judgments about appropriate remedies.

"The result could be a jigsaw system of conflicting standards across the country. You can see where this is going: banned-in-Michigan toys being smuggled across the border into Indiana and so on. And without a consistent national standard, small businesses would be particularly hard hit, lacking resources to monitor the evolving rules nationwide, all of this happening at a time when the appetite for business self-policing is strong. Businesses have every incentive to clean up their acts, given the costly damage to their brand equity from news stories about tainted toys."

I look forward to hearing from all of our witnesses today, but I hope we can all agree on at least one thing at the outset of this debate, and that is that no attempt to amend the tort liability system in America should increase the burdens the current out-of-con-

trol lawsuit industry already imposes on American jobs and businesses, especially small businesses.

I thank you, Madam Chair, and I yield back.

Ms. SÁNCHEZ. I thank the gentleman for his statement.

Without objection, all Members will be allowed to enter their opening statements in the record.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Last year, half of all the products that the Consumer Product Safety Commission recalled were made in China, and 80% of all products recalled this year were made in China. Among the Chinese-made products recalled were toys containing high levels of lead and tainted pet food that has lead to the serious illness or death of beloved animal companions. The recent discovery of tainted foreign-made products raises several concerns. One concern is whether the Consumer Product Safety Commission, the federal agency charged with protecting the American consumer from such tainted products, has been adequately doing its job. Another concern is whether Congress can provide for a private cause of action for any consumer that has been injured by a tainted product made by a foreign manufacturer. I look forward to considering the suggestions of our witnesses as to how we can protect consumers and hold foreign manufacturers accountable for introducing defective products into the American marketplace.

Ms. SÁNCHEZ. And without objection, the Chair will be authorized to declare a recess of the hearing at any point.

I am now pleased to introduce the witnesses for today's hearing.

Our first witness is Thomas Gowen. Mr. Gowen is special counsel to the Locks Law Firm. His practice is concentrated primarily in the areas of complex personal injury and civil litigation, and he has represented numerous clients in products liability, head injury, construction litigation, medical malpractice and automobile litigation.

Mr. Gowen is a member of the faculty of the National College of Advocacy and a past chairman of the Montgomery Bar Association continuing legal education committee. He has published legal articles in Am Jur Trials, a Guide for Legal Assistance by the Practicing Law Institute, the Barrister, the Pennsylvania Law Journal Reporter and other journals.

We welcome you, Mr. Gowen.

Our second witness is Victor Schwartz. Mr. Schwartz chairs the Public Policy Group at Shook, Hardy & Bacon. He co-authors the nation's leading torts casebook, "Prosser, Wade & Schwartz's Torts," and authors "Comparative Negligence," the principal text on the subject. Mr. Schwartz also serves as general counsel to the American Tort Reform Association and co-chairs the American Legislative Exchange Council's civil justice task force.

Mr. Schwartz is former dean of the University of Cincinnati College of Law and currently serves on its board of visitors. During his academic career, he litigated cases on behalf of plaintiffs and secured the first punitive damages award of the Midwest against the manufacturer of a defective product.

Welcome, Mr. Schwartz.

Our third witness is Pamela Gilbert. Ms. Gilbert is a partner in Cuneo, Gilbert and LaDuca and focuses her practice on government

relations matters. She represents a wide variety of clients before Congress, the executive branch and regulatory agencies.

Ms. Gilbert serviced as the executive director of the U.S. Consumer Product Safety Commission from 1995 until 2001. In that capacity, she was responsible for the full range of government management issues and helped persuade Congress and the Administration to increase funding to the agency by nearly 40 percent.

Ms. Gilbert also served as consumer program director at the U.S. Public Interest Research Group from 1984 to 1989 where she specialized in civil justice and consumer protection issues. She worked for Public Citizen's Congress Watch, one of Washington's largest consumer advocacy organizations, first as legislative director and then as executive director.

Welcome, Ms. Gilbert.

Our final witness, which we are glad to see has arrived, despite the delays caused by the rain, is Andrew Popper who serves as a professor at American University Washington College of Law, in Washington, D.C. He teaches administrative law, government litigation, advanced administrative law and torts and directs the law school's integrated curriculum project. He has served as chair of the administrative law section of the Federal Bar Association and vice chair of the ABA committee on government relations' section on legal education and admission to the bar.

Professor Popper is the author of more than 100 published articles, papers and a number of amicus curiae briefs before the United States Supreme Court. He has served as consumer rights advocate and pro bono counsel for the Consumers Union of America. Prior to his career in legal education, he was a Federal administrative antitrust prosecutor.

I want to thank you all for your willingness to participate in today's hearing. Without objection, your written statements will be placed into the record, and we are going to ask that you please limit your oral remarks to 5 minutes.

You will note that we have a lighting system that starts with a green light when you begin your testimony. At 4 minutes, it will turn yellow to give you a warning that you have a minute remaining. And then when your time has expired, the light will turn red. If the light turns red and you are mid-sentence, we will allow you to finish your final thoughts before moving on to our next witness.

After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

With that, I would now invite Mr. Gowen to proceed with his testimony.

TESTIMONY OF THOMAS L. GOWEN, THE LOCKS LAW FIRM, PHILADELPHIA, PA

Mr. GOWEN. Thank you, Madam Chairman Sánchez and Mr. Cannon. Good morning.

As the Chairwoman stated, the problem that we are here today to discuss is finding remedies to deal with the large number of imported products that are defective and causing injury to people in the United States. Our Federal agencies seem not to have been able to keep up with this large increase in volume. The tort system,

however, can provide an important private vehicle for the policing of dangerous products that are injuring people in this country when it is not hampered by procedure rules as it presently is today.

Presently, foreign manufacturers are able to take advantage of onerous service of process rules, either under the Hague Convention, if their country is a signatory, or even worse if it is not. Once service is achieved—and it takes months and months oftentimes to get service under the Hague Convention—the party comes in and raises the minimum contacts defenses that were set forth in Justice O'Connor's opinion in the *Asahi* case. Discovery can be cumbersome, and collection of judgments can also be very difficult.

One of the problems is that our commercial markets are designed to be national. The foreign manufacturers sell their products for sale in the United States and not to any particular State. The minimum contacts rules are designed for a State-based court system, such that tests, including whether or not a product is specifically designed for Pennsylvania or Maryland or Utah or California, is a factor to be considered, whether there is an office there, whether there is advertising specifically there, when, in fact, the products are very rarely made specifically for any given State and are made for sale in the United States market.

We should not handicap our consumers by tying them to the minimum contacts rules of the State courts when, in fact, our commercial reality reflects that we have a national market.

The Supreme Court in *Asahi*, although the plurality opinion did establish many of the factors that are raised in case after case when a foreign manufacturer is brought in, did specifically note that Congress could legislate to create a standard of national contacts for the standard of minimum contacts, and I would encourage that Congress should consider doing so because it would bring our justice system into line with the commercial reality of our markets.

I have dealt over the years with multiple cases involving foreign manufacturers and have seen that they arise in several different contexts.

The first context is when there is a brand name, such as on a tire. I had a case with Fate S.A.I.C.I., the largest tire manufacturer from Argentina. They were able to be identified and served through the Hague Convention, but, again, came in after many months to get service and raised all of the *Asahi* defenses claiming that they had only imported 8,000 tires through the Port of Baltimore which were then sold in Maryland where our client was injured.

Secondly, you have products that are made for the proprietary names of many retailers, such as Sears, Wal-Mart, Target, and it is often difficult to find out even who this manufacturer is until the lawsuit is well underway and the information can be provided by the defendant retailer. It is important to have the retailer in the case for that reason so that that information can be provided hopefully on a timely basis so the statute does not run.

The third context that I have seen—and this leaves aside the component part one which is an entirely different issue—is where a product is sold to a large marketer or retailer, such as the Easy Pull Stomach Trimmer that I attached to my testimony, where two million units were imported to the United States through seven different importers who could not identify the manufacturer, but they

knew that it was made in China. I think there is a solution to this problem.

The first solution is for Congress to legislate that the standards should be consistent with the due process clause, should be a national standard of contacts rather than the artificial State standards that are presently considered by the courts.

Secondly, I think that Congress should legislate that there be an import license required for all foreign manufacturers who seek to sell their products in our important market. The license should require the disclosure of the name and address of the manufacturer, the product lines and brand names that they make, appointments of an agent of service of process in all the States where the product is sold. It should require consent to jurisdiction of the U.S. courts by accepting the license and selling products in the United States market, much like we have required consent to drive on our highways. It should require insurance in the United States and should contain a provision that the license will be revoked if a judgment of the U.S. court is not satisfied.

Finally, the information——

Ms. SÁNCHEZ. Mr. Gowen?

Mr. GOWEN [continuing]. Should be placed on a searchable Web site.

[The prepared statement of Mr. Gowen follows:]

PREPARED STATEMENT OF THOMAS L. GOWEN

Fairness to Americans Injured by the Products of Foreign Manufacturers

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November 15, 2007

Title of Hearing:
"Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products"

Committee on the Judiciary

The Subcomittee on Commercial and Administrative Law

Madam Chairman, Members of the Subcommittee, thank you for the opportunity to testify this morning on an important issue regarding the system of justice for average Americans.

My name is Thomas L. Gowen. I am an attorney with the Locks Law Firm in Philadelphia. I am a graduate of Haverford College and Villanova University School of Law. In the course of my 30 years in practice, representing people in various contexts in the legal system, a recurring problem has arisen which I would like to address for your consideration this morning.

Background

As the American economy has increasingly become a service, finance and retail oriented economy, the quantity of manufactured goods that we import has increased exponentially. According to the Consumer Product Safety Commission, the United States imported $2.6 trillion worth of goods in 2006. Forty percent of all consumer products imported into the United States or about $200 billion worth in 2006 came from China. Whether these imports are items like automobiles, electronic products, tools, tires, bicycles, recreational products, toys, food, cosmetics or drugs, they have the potential to cause harm to American consumers as a result of negligent design, manufacture, marketing or sale. In recent months we have become aware of what seems to be weekly recalls of toys, most recently the product, "Aqua Dots," a children's toy that is coated with a chemical similar to the date rape drug GHB. This revelation followed the recall of numerous toys containing unacceptable levels of lead. We have also seen a massive recall of de-treading automobile tires and toothpaste containing an ingredient of antifreeze. What all of these products have had in common is that they were made by foreign manufacturers and sold in the American market in numerous states. Serious injuries and deaths have occurred in the United States as a result of the use of these and other products which were purchased from American retailers. This phenomenon has captured the attention of the news media on a regular basis recently, but it is hardly new.

What also is not new is that foreign manufacturers enthusiastically seek access to the American market but assiduously seek to avoid responsibility and accountability in American courts for injuries caused by their products. At the same time, some American retailers claim that they should be protected from liability because the defective design or manufacture was the fault of a foreign company, despite the fact that this foreign company may not be identifiable or reachable by the injured American consumer.

American manufacturers claim that they are at an unfair disadvantage because they must be accountable in American courtrooms for the harm caused by their defective products, while their foreign competition is able to use various devices to avoid equal accountability.

As the volume of imports has grown over 300% over the last decade, the ability of the Consumer Product Safety Commission and the FDA to monitor the safety of these products has declined. Frequently these foreign products do not meet American standards and can be quite dangerous. The tort system provides an important remedy to people who are injured or killed

and an incentive to manufacturers, distributors and retailers to make safer products. The private monitoring of unsafe foreign products through the tort system should be extended on an equal basis to those foreign manufacturers who seek to profit from selling their wares in our American markets.

The Problem

The same manufacturers who enthusiastically enter contracts to sell their goods, often through distributors or large retailers, resist accountability in our courts. Their ability to do so arises in several contexts. Initially, they take advantage of the rules regarding the service of process. Approximately 70 countries in the world, including the United States, have signed the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters. Many others have not. For those that have, the process of bringing them to answer in a federal or state court where their product has caused injury is cumbersome, expensive and slow. A complaint must be translated into the foreign language and then delivered according to the rules of service in the home country of the defendant. In a case that I handled recently, it took approximately three months to obtain service on a large corporation in Buenos Aires, Argentina, after the complaint was directed to the central authority there for service.

If the country has not signed the Hague Convention, such as in the case of India, service of process by methods recognized by the Federal Rules of Civil Procedure may not be acceptable. Service may have to be accomplished by the use of Letters Rogatory through diplomatic channels. In the case of India, these are submitted through the United States Department of State to the Indian Ministry of External Affairs.

After service is obtained, the foreign company will often file a response by special appearance and ask the court to dismiss the claim on the grounds that the company has not established sufficient minimum contacts with the forum state by placing its product in the stream of commerce such that it reached the state in question. The defendant claims that it has not acted purposefully toward the forum state despite the fact that it has derived significant profits from sales in that state and others.

Asahi Metal Industry Co., Ltd v. Superior Court of California, Solano County, (Cheng Shin Rubber Industrial Co., Ltd. Real Party in Interest 480 U.S. 102, 107 S. Ct. 1026, 1987

The Supreme Court has established the minimum contacts test through a series of cases familiar to most lawyers from first year civil procedure. *International Shoe, Hanson v. Denckla, Worldwide Volkswagen and Burger King v. Rudzewicz,* established various tests for the minimum contacts necessary to establish personal jurisdiction in the federal courts consistent with the Due Process clause such that, in the language of the Court, maintenance of the suit will not offend traditional notions of fair play and substantial justice. These decisions have often been followed by state long arm statutes establishing jurisdiction as far as constitutionally permissible. In 1987 the Supreme Court decided the *Asahi Metal* case in a plurality opinion

with distinctly different approaches being advocated by Justice O'Connor and Justice Brennan writing separate opinions. It is important to note that this case involved a claim for indemnity between a Japanese tire manufacturer and a Taiwanese valve manufacturer after the product liability case on behalf of the California residents had been settled. Thus, California no longer had a strong interest in providing a forum for one of its citizens and the remaining claim was between two foreign nationals. Nevertheless, Justice O'Connor wrote that the placement of a product in the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. She wrote, "Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." On the other hand, Justice Brennan wrote, "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale. As long as the participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."

Important for the matters under consideration today, Justice O'Connor's opinion did note that the Court in *Asahi* had no occasion in that case "to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts rather than on the contacts between the defendant and the State where the federal court sits."

Asahi may have been a case in which the classic maxim, "bad facts make bad law" applies, as Asahi Metal did not control the system of distribution to the United States, the California plaintiffs no longer had an interest in the case and the matter essentially involved a dispute between two foreign manufacturers. Nevertheless, in my experience, the possible factors listed in Justice O'Connor's opinion are recited in virtually all of the cases contesting jurisdiction, and the case has been cited, followed, distinguished or criticized in over 2600 opinions.

Specific Examples

I have dealt with this problem recently in the case of an experienced Maryland auto mechanic who was installing new tires on a pick-up truck for one of his customers when one of the tires exploded and shattered his arm, among other injuries. Expert analysis revealed that the tire had not been properly inspected and had a defective bead which rendered the tire unable to hold even normal tire pressure. The tire bore the markings of Fate S.A.I.C.I. and had been purchased through a major tire wholesaler and retailer in Maryland. Internet research revealed that Fate S.A.I.C.I. was the largest tire manufacturer in Argentina. Its official website stated that exports accounted for two thirds of total production and are destined for markets in Europe and the United States. Further research revealed that the National Highway Traffic Safety Administration had assigned a plant code to Fate's San Fernando, Argentina, plant which allowed it to carry the DOT code on its sidewall.

An affidavit attached to the motion to dismiss the complaint admitted that Fate had shipped 8,684 tires from Argentina through the Port of Baltimore as of the date of the injury and that Fate had received $194, 204 for tires shipped through Baltimore. Baltimore was not the only port into which Fate shipped tires with 806,756 tires worth $19 million dollars being shipped into the US through east coast ports, in particular Miami and Jacksonville, Florida. Fate raised all of the arguments that foreign companies do, that it was not incorporated in Maryland, that it had no office there, that it did not make tires specifically for the Maryland market and therefore it claimed that it did not purposely avail itself of the Maryland market. It contended that a mere 8,684 tires imported through the Port of Baltimore should not be sufficient to establish minimum contacts with that state even though it created the likelihood that between 2,000 and 4,000 cars or light trucks would be driving in the State of Maryland on these tires.

The same claims are currently being raised by the Hangzhou Zhongce Rubber Company, Ltd. in the United States District Court for the District of New Jersey and in Philadelphia even though it was required to recall 450,000 tires after numerous tires detreaded, causing serious personal injury and death. Hangzhou, through its chairman's affidavit, asserts that it does not make tires for the New Jersey market, that it does not conduct business in New Jersey, that it does not have offices there, it is not registered to do business there, and that it does not directly market or sell tires in New Jersey. However, it does acknowledge that it has a contract with a large distributor, Foreign Tire Services, an American company, as its exclusive distributor in the United States. The defendant claims that it would be unfair to apply American law to cases involving harm caused by its products because it claims that merely placing products into the stream of commerce without more is not sufficient for jurisdiction to attach.

While, as noted above, dicta in the plurality opinion of the Supreme Court in *Asahi* did suggest the consideration of the types of assertions made by the defendants in these cases in order to determine if a foreign corporation has sufficient contacts with a particular state, consideration of market reality should compel a different result. Consideration of reality should tell us that the sale of products in a state should be the primary consideration in attaching jurisdiction even if sold through a distributor or wholesaler. Most foreign corporations will neither have corporate offices nor be incorporated in a particular state. Very few products, outside of the souvenir category, are designed specifically for the markets in Maryland, Pennsylvania, Virginia, Michigan, Wisconsin, California or other states. But the products are sold in all of these states and cause injury in all of these states. The foreign corporations profit from the sale of their products in each state in which they are sold.

Even more importantly, foreign manufacturers design and manufacture tires, toys, food, cosmetics, electronics and thousands of other products for the national American market, not for individual state markets. They import through importers and wholesalers for sale in the American market. On the other hand, jurisdiction in our state and federal courts has been based upon contacts with individual states. **It is unfair to handicap injured American citizens and provide foreign tortfeasors with a technical defense simply because our court system is not organized on the same basis as our markets**. Congress should note the language from *Asahi,*

and pass legislation to base jurisdiction of the federal courts on the quantum of *national* contacts and the flow of commerce from the foreign corporation to the United States as a whole.

Foreign products' entry into the country also occurs in a less evident way than in the form of branded tires described above. In those cases, Americans seeking to determine the source of their injury can at least begin with the brand name of the tire, tool or automobile. However, many products are sold in this country under the proprietary brand names of retailers such as Sears, Walmart or Target.

I represented a young boy who was riding a "Free Spirit" bicycle when the front tire came off, causing him to fall over the handlebars onto the macadam roadway onto his face. The product had no markings that would identify its manufacturer. The young man's father knew that he had purchased it at Sears and investigation determined that "Free Spirit" was a Sears brand name for multiple lines of bicycles which were made by Link CBC in Hong Kong for Sears. The director of product safety for Sears was deposed in the case and he testified that Sears did not inspect or test these bicycles although they sold millions of them under the "Free Spirit" name. He testified that Sears relied on the manufacturer for the design, specifications and testing. Sears assumed that the manufacturer would comply with any applicable governmental standards, but had none of its own.

In this case, the plaintiff was dependent upon Sears to join the manufacturer in the case or, at a minimum, to timely provide sufficient information to enable the plaintiff to join, and serve the manufacturer, assuming that the statute of limitations had not run by the time such information was provided and leave of court to amend a complaint was obtained. Then the plaintiff would have to deal with the inevitable claim that the manufacturer did not have sufficient contacts with the Commonwealth of Pennsylvania such that it should be haled into court in Pennsylvania to answer for the harm caused by its product. It is important to note that the exposure of American companies to tort judgments in product liability cases would be reduced by reforming the system to make it easier to serve, litigate with, and collect judgments from the foreign manufacturers whose defective products gave rise to cases such as these. Doing so would also give foreign companies greater incentives to achieve higher standards of safety in the design and manufacture of their products destined for sale in this country.

I also represented a woman who saw an advertisement in the Norristown Times Herald in Montgomery County, Pennsylvania, that had been placed by Hanover House, a large mail order marketer, which offered an "Easy Pull Stomach Trimmer" (See attached copy of ad). The ad portrayed a woman doing sit-ups with the device which consisted of a heavy spring extended between foot pedals at the bottom in which to place the feet, and a handle at the top. My client, a 44 year old woman, purchased the "Easy Pull Stomach Trimmer" by responding to this ad, in order to tone and tighten her abdominal muscles in anticipation of wearing a bathing suit during the summer season. The ad promised a "slimmer, younger look in 2 weeks...guaranteed." She had had some prior back pain and would not have used any device that would stress the back. After she did 100 sit-ups with it for several days, she felt a pop and severe pain in the lower back.

She had ruptured a disc at L5-S1 and damaged the disc at L4-L5, requiring surgical excision of the disc and 10 epidural nerve blocks. Upon submission of the device to an expert in exercise physiology it was learned that the "Easy Pull Stomach Trimmer" did nothing whatsoever to stress or tone the muscles of the abdomen but rather heavily loaded the erector spinae muscles and spinal ligaments while placing excessive loads on the lumbar discs in the course of performing the exercises portrayed in the package insert.

This device was marketed to the American public by Hanover House which purchased 1,985,000 of these units from seven different distributors who purchased them from an unnamed manufacturer in China. There were numerous claims involving lower back injuries and of injuries to the face when the pedals slipped off the feet of the users while the spring was extended. In this case it was essential to hold the retailer and appropriate wholesaler in the case, as the manufacturer could not be more clearly identified than one of several Chinese companies, based on the "Made in China" designation on the pedal. Again, the retailer replied in discovery that it relied on the manufacturer for safety analysis of the product and neither the retailer nor its advertising agency did anything to verify the claims made for the usefulness of the product. Needless to say no one created warnings that would have alerted people with any concern for their lower back that they should never use this product.

Solution

This testimony has described the problems with joinder of foreign manufacturers in several contexts–first in which the foreign manufacturer can be identified by product name, second, in which the manufacturer cannot be identified by product name but could be identified by the retailer and a third category where even the retailer could not identify the exporter of the product which was sold in the US by various resellers. All products caused injury to American citizens who purchased the products through retailers in their respective states. All foreign defendants, except the unidentified one, required that the plaintiffs clear multiple hurdles to obtain service and then sought dismissal of the case on grounds that they did not have sufficient contacts with the forum state. No doubt they would have contended that they did not have sufficient contacts with any of the fifty states on the same basis had alternative jurisdictions been sought.

I recommend for the consideration of this honorable Committee legislation to remedy the problems encountered by Americans in attempting to hold foreign manufacturers accountable for defective products that they market in the United States. I respectfully suggest that Congress should note the comment in the *Asahi* case that legislation to base minimum contacts upon an aggregate of national contacts has not been foreclosed. To base the Due Process Clause test for minimum contacts upon the national market into which these manufacturers sell their products, rather than upon the commercially artificial concept of contacts with an individual forum state, would more realistically reflect the commercial reality of the current market. It would go a long way in reducing litigation over jurisdiction, and would remove artificial arguments about things like whether a tire is made for the Maryland market as opposed to the Delaware, Pennsylvania, or

Virginia market.

In practical terms, I suggest for the consideration of this Committee and the Congress establishing an import license for all foreign manufacturers and sellers who seek to sell their products in the United States. The license should require the name, address, product lines and brand names made by the company. It should require the exporter to the US to have an agent for service of process in all states in which the product is to be sold. It should require a seller, in order to avail itself of the privilege of accessing American markets, to consent to the jurisdiction of the American Courts. The import license should require that the foreign company have adequate product liability insurance in the United States to cover foreseeable claims. The information contained on the license should be reportable to the Consumer Product Safety Commission and posted on a searchable website maintained by the Commission. Finally, any foreign company that defaults on a judgment from an American Court should lose its license to sell in this country until such judgment is satisfied.

One of the significant hazards associated with litigation with a foreign corporation is the difficulty in collecting a judgment of an American Court in that foreign country. By providing a means to encourage the payment of judgments in the United States either by insurance or by threat of losing an import license would do a great deal to put foreign companies on more equal footing with domestic companies and would facilitate the pursuit of justice by injured American citizens.

I thank the Committee for its attention to this matter which is of great importance to many Americans. Adoption of a licensing system such as that described above would help to bring accountability to foreign manufacturers and to level the playing field with American companies who already must answer for defective products they make without the benefit of the numerous procedural hurdles raised by foreign defendants who are supplying an increasingly large percentage of the consumer goods purchased in this country.

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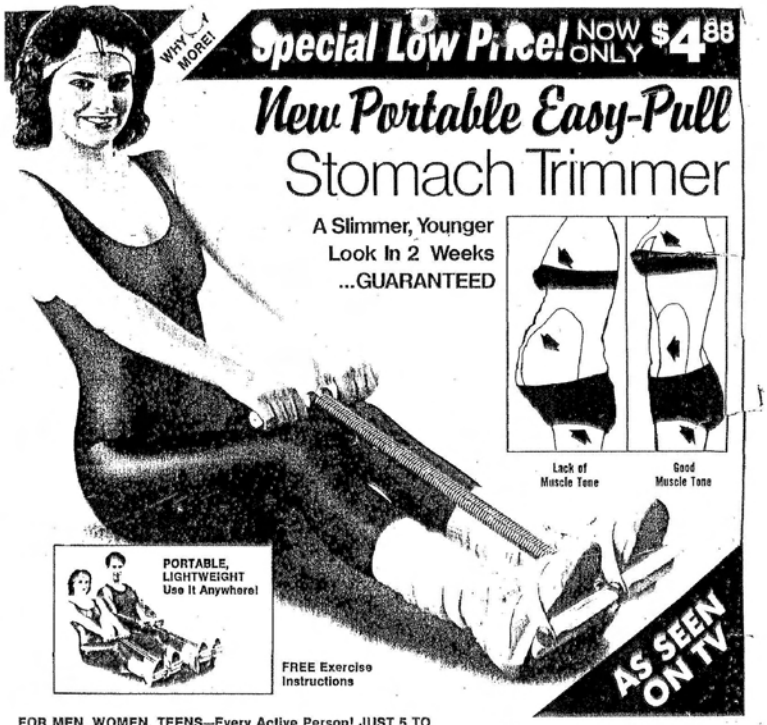

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Ms. SÁNCHEZ. Thank you very much. I was just about to say that your time had expired, but you summarized nicely. Thank you for your testimony.

At this time, I will invite Mr. Schwartz to begin his testimony.

TESTIMONY OF VICTOR E. SCHWARTZ, SHOOK, HARDY AND BACON, LLP, WASHINGTON, DC, ON BEHALF OF THE INSTITUTE FOR LEGAL REFORM, U.S. CHAMBER OF COMMERCE

Mr. SCHWARTZ. Thank you, Madam Chairwoman and Ranking Member Cannon.

This morning, I am testifying on behalf of the Institute for Legal Reform of the Chamber of Commerce of the United States, but the views are my own, and I think that is why I was invited here. And I am just going to discuss three topics briefly.

The first, which Mr. Gowen referred to, is the problem of products coming into the United States that may be defective and a consumer who has a claim cannot reach that party. This is unfair in more than one way. We have a tort tax on every product sold in the United States. In some instances, it is very substantial, maybe as much as 10 percent.

So, if a company is able to come into the United States and not be subject to liability, it has an advantage of setting price that is simply unfair competition. It is coming into a marketplace without the same cost burdens, and that is not right.

More severe is the fact that somebody may be seriously injured by one of these products and, as Mr. Gowen has suggested, there is no remedy to reach the manufacturers.

I have read the *Asahi* case. I think there is room in that case for this body and this Committee to look at alternatives as to ways to impose a fair tort system on people who sell substantial amounts of products here. We are talking about toys where somebody puts the lead in the paint or puts a poison wrapping around a bead. These are very serious things, and to allow such parties to totally escape our system is wrong.

Asahi was a plurality opinion. Footnote 5 in the opinion which Mr. Gowen referred to provides a good menu for Congress to look at it. This is not fair.

I am going to very briefly talk about the tort system a little bit and what Congress has done because some have suggested that some way to cure this is to expand liability for defendants. That, I think, is a very poor idea. When Congress has stepped into address liability reform, it has limited liability and had remarkable success.

In 1994, Congress enacted the General Aviation Recovery Act. That saved an industry. Mr. Glickman was very instrumental in that—Democratic member—and it was signed by the President; it was an 18-year statute of repose. I sat in a similar room and was told if it was enacted, planes would be falling out of the sky. I was told that safety equipment would not be put on aircraft. Now we know—it is a little bit later—that the products that are sold by the General Aviation products—are safe. Twenty-three thousand new jobs were created. Safety equipment is on those planes that was never there before.

This Congress also worked on the Biomaterials Access Assurance Act—that was Mr. Lieberman and Republicans, too—bipartisan legislation limiting liability of people who supplied raw materials to medical devices. People who made the medical devices could not get the raw materials, so a limit was placed. We were told that this would create mayhem, that people who made the raw materials would just take largesse and not be concerned with safety. That has not happened. What has happened is the medical device manufacturers can get the raw materials.

Very recently, this body enacted the Class Action Fairness Act. That was needed because some personal injury lawyers were manipulating the system and bringing interstate commerce cases into local State courts that were friendly to plaintiffs. That also has worked. It has not brought about the serious harm to consumers that was predicted. At the State level, reforms have also helped reduce the cost of medical liability insurance and gained access to medicine.

So the idea that somehow civil justice reform does not work is belied by the facts.

And, finally, I would like to address the Consumer Product Safety Commission. Pam and I know each other a long time, and she knows—and it is true—I have always been supportive of the commission, even before it existed. I wrote a paper when I was a law professor that said tort law comes in too late, that we need a strong agency to protect people before they are injured, and I think it is right that the agency be reauthorized and there should be a focus on the powers of the agency to catch defective products at the border, and they should have adequate personnel and adequate funding to reach that goal.

Unfortunately—and, Madam Chairwoman, you have seen it and Mr. Cannon has seen it—a good legislation gets waylaid by things that people put in there that have nothing to do with the goal, and in the sense——

Ms. SÁNCHEZ. That never happens in Congress. Never.

Mr. SCHWARTZ. Well, no, maybe not under your watch, but I have seen it happen here or there. And that has happened with this bill in some quarters.

For example, authorizing 51 State attorney generals on their own to decide how to enforce the CPSC. I was told, "Well, do not worry about this, Victor, because the CPSC can intervene and help bring about uniform policy." Well, if they do not have enough people to do their job, I think setting them up as sort of monitors for State attorney generals is not a good idea. The CPSC should focus on its purpose.

And I thank you for the time to speak this morning.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF VICTOR E. SCHWARTZ

TESTIMONY OF VICTOR E. SCHWARTZ
BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

Oversight Hearing on
"Protecting the Playroom:
Holding Foreign Manufacturers Accountable for Defective Products"

November 15, 2007

Madame Chairwoman Sanchez, and Ranking Member Cannon, and members of the Subcommittee, thank you for your kind invitation to testify today on the topic of holding foreign manufacturers accountable for defective products. I will directly speak to that question and also, because I understand that the issue has arisen in the context of other presentations, address whether civil justice reforms that have been enacted by Congress have been effective. And, finally, I will also address how the reauthorization of the Consumer Product Safety Act may affect the important issue of protecting our children and our population in general from defective products.

My background for addressing these issues includes practical experience as both a plaintiff and defense lawyer. I also co-author the leading torts casebook in the United States, Prosser, Wade & Schwartz's Cases and Materials (11th ed. 2005). In addition, I have authored the leading text on multi-state litigation and comparative negligence.

While I have the privilege to testify today on behalf of the Institute for Legal Reform of the Chamber of Commerce of the United States of America, the views expressed are my own in light of my experience with these important topics.

Foreign Product Manufacturers and Liability

At the outset, it is important to note that the extent to which foreign manufacturers should be subject to the U.S. tort system is an area of which there is not clear consensus in the business community. However, there is consensus that our tort system can "overheat" and impose liability that is above and beyond what is reasonable (a point I further elaborate upon below). Furthermore, the cost of the American liability system can significantly increase the prices of products that are subject to it.

Major foreign manufacturers who do business in the United States, such as the large foreign-based auto manufacturers, are subject to our legal system and their products are priced accordingly. If they sell a considerable amount of their products in other countries where these is less liability exposure than in the United States, then they may be able to reduce their costs. Nevertheless, if one of their products proves defective and injures a person in this country, they are subject to liability here and the costs associated with such liability. The interesting impact of this phenomenon, though,

is that a foreign-based company that can inappropriately avoid these costs can reduce its price accordingly and place those companies who are subject to the full effects of the U.S. legal system at a competitive disadvantage.

The U.S. legal system should have uniform standards of liability that are consistent with the principle that those who are responsible for harm to the person or property of another should, to the extent of that responsibility, offset the harm they have done. Accordingly, non-domestic manufacturers who deliberately avail themselves of the U.S. marketplace but inappropriately avoid subjecting themselves to the U.S. legal system should be held accountable for the harms caused by their defective products. Currently, there is a disparity between those non-domestic manufacturers who escape accountability and the domestic and international manufacturers who do not. The net result can impact international trade, the pricing of products, and most importantly, incentives for safety.

Positive Results of Federal and State Civil Justice Reforms

While we can enhance the power, the budget and the personnel of the Consumer Product Safety Commission ("CPSC"), a topic that I will address in a few moments, our tort system is a necessary deterrent and a powerful one. However, as I have indicated, it can also engage in overkill. The most recent Tillinghast study indicates that the American tort system costs $261 billion last year. That translates to $880 for each and every American – or a little over $3,500 for a typical family of four.[1] While at least some of this liability may be justified, when the system "overheats," it can cause manufacturers and other businesses to curb innovation, take beneficial products off the market, and people can be denied access to necessary medical care.

Congress, on occasion, has been sensitive to this problem and unlike comments suggested by some, Congress's work at civil justice reform has been effective. For example, in 1994 Congress, on a bipartisan basis, with support of this Subcommittee as well as the full Judiciary Committee, enacted into law the General Aviation Revitalization Act (GARA).[2] At the time, excessive liability had crushed our private plane manufacturing industry. Cessna and Piper had closed almost all their major plants. It was suggested that Congress enact an eighteen-year statute of repose for private aircraft, meaning that if a plane that had worked well for nearly two decades subsequently failed, the manufacturer would generally not be subject to liability, subject to certain exceptions. Opponents of this legislation claimed it would result in the manufacture of thousands of defective products and that planes would be literally falling out of the sky. They suggested further that new innovations in general aviation would never see the light of day. It is now more than ten years later, and history and fact has

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[1] Towers Perrin, Tillinghast, 2006 Update on U.S. Tort Cost Trends 4 (2006), a http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf.

[2] General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. § 40101 note).

proven the proponents of the legislation correct and the opponents wrong. The legislation helped created over 25,000 new jobs and led to safety innovations that have dramatically reduce the number of adverse private plane incidents.[3]

Furthermore, in 1998, Congress enacted the Biomaterials Access Assurance Act.[4] This bipartisan legislation placed strict limits on the liability of suppliers of raw materials to manufacturers of medical devices. Under that legislation, the raw materials manufacturers would be subject to liability for defects in the product they supplied, but not for failures that arose on the part of the manufacturer of the final product. This legislation addressed a crisis where manufacturers of medical devices could not obtain the raw materials they needed. Once again, opponents claimed that the legislation would allow suppliers to commit mayhem, but this adverse prognostication did not occur. The legislation worked. A similar model may be appropriate in this situation.

In 2005, the House of Representatives and the full Judiciary Committee, after a long battle, helped assure the passage of the Class Action Fairness Act (CAFA).[5] Congress intended CAFA to address forum shopping run wild where a certain band of lawyers attempted to place large interstate class actions in local plaintiff-friendly state courts. Once again, opponents claimed it would deny people justice, but results to date show that this did not occur. Rather, class actions involving plaintiffs from a multiplicity of states against out-of-state defendants are now properly heard by federal courts. CAFA has reduced improper forum shopping.

While it is only indirectly related to this hearing, states have achieved similar progress with medical liability reform. Both Mississippi[6] and Texas[7] enacted such reforms and the result has been a revitalization and cost reduction of medical liability insurance.[8]

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[3] *See* Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. of Air Law & Commerce 1269, 1341 (2002).

[4] Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519 (1998) (codified at 21 U.S.C. § 1601).

[5] Class Action. Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

[6] H.B. 2, 1st Extra. Sess. (Miss. 2002); H.B. 13, 1st Extra. Sess. (Miss. 2004).

[7] H.B. 4, Reg. Sess. (Tex. 2003).

[8] *See, e.g., Laura Hipp, Med Malpractice Rates Cut*, Clarion-Ledger, Sept. 13, 2007, *at* http://www.clarionledger.com/apps/pbcs.dll/article?AID=2007709130379 (reporting that since the 2004 reforms, the largest medical malpractice insurer in Mississippi has reduced premiums by 45 percent);*Malpractice Insurer to Cut Rates*, Fort Worth Star-Telegram, Sept. 7, 2007, at C2 (reporting that Texas policyholders have saved about $275 million since enactment of the reforms);*TMLT to Cut Rates for Doctors*, Austin Bus. J., Sept. 7, 2007 (reporting that the Texas Medical Liability Trust, the largest writer of medical malpractice insurance in the state, cumulatively reduced its rates by 31%); David Hendricks, *Insurance Companies, Doctors Flock to Texas*, San Antonio Express-News, June 2, 2007, at 1D (reporting that 30 insurance

Consumer Product Safety Commission Reform Act

I have long been a supporter of the mission and purpose of the CPSC. Before the CPSC existed and I was teaching tort law at the University of Cincinnati, I wrote a paper entitled "tort law sometimes comes in too late." It is a basic fact that tort law only "comes in" after someone is injured. The thesis of my paper was that a national consumer product safety organization could prevent such injuries if it were properly constituted. While there has been a great deal of criticism of the CPSC of late, in general, over the years it has done its job, especially considering its relatively small staff and budget. It has been since 1990 when Congress last carefully looked at the CPSC and its powers, and it is most appropriate that it do so now.

The CPSC Reform Act should focus on the problem this Subcommittee is considering today, namely holding manufacturers of truly defective products responsible for their wrongful behavior. While it is virtually impossible to catch every defective product that crosses our shores, the CPSC should have sufficient resources and the very best enforcement powers to move toward that goal. Unfortunately, especially in S. 2045, reported by the Senate Commerce Committee, this focus has been compromised by provisions that could blunt this basic goal. For example, empowering state attorneys general in fifty-one jurisdictions to enforce CPSC regulations and obligations according to their own subjective judgment would cause havoc. While the S. 2045, empowers the CPSC to intervene in actions when it thinks a state attorney general has gone awry, such action would siphon its limited staff resources to curb uncoordinated and perhaps, unwise, actions of state attorney generals. It does not further its mission of stopping, as soon as practicable, importation of products that contain defective components parts.

As I have indicated, the CPSC can not, no matter how large, monitor every product that is imported into the United States. To accomplish its mission, it is going to need the full cooperation of American manufacturers. The skyrocket-sized penalties in S. 2045 can seriously compromise that cooperation. For example, if a manufacturer fears $100 in million penalties, it is more likely to speak to its lawyers than the CPSC.

There are other provisions in Senate version of the CPSC Reform Act that might also be incorporated into the House bill, that are similarly misdirected, but in the time allotted here, I put forth those two examples. Thank you for the opportunity to testify today and I look forward to your questions.

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companies are offering medical malpractice insurance, a 650% increase from only four prior to the 2003 medical liability reforms and that "[t]he lower cost of being a doctor in Texas has helped trigger a stampede of applications for physician licenses, with the waiting line now up to 12 months.").

Ms. SÁNCHEZ. Thank very much for your testimony.
Ms. Gilbert?

TESTIMONY OF PAMELA GILBERT, CUNEO, GILBERT AND LADUCA, LLP, WASHINGTON, DC

Ms. GILBERT. Thank you very much, Chairwoman Sánchez, Ranking Member Cannon.

I am Pamela Gilbert. I am a law partner in the law firm of Cuneo, Gilbert & LaDuca. I have been asked to testify today, however, to share with you some of the insights that I learned when I was executive director of the Consumer Product Safety Commission from the very end of 1995 through mid-May 2001. I am testifying on my own behalf, and all of my opinions are solely my own.

As the Chairwoman mentioned in the beginning of the hearing, the summer of 2007 might well be remembered as the summer of toy recalls. At one point, it seemed that every day brought new reports of dangers posed by another well-loved toy that could be lurking in our children's playrooms. The list included Thomas and Friends trains with unsafe levels of lead, Easy-Bake Ovens that could entrap and burn children, Polly Pocket dolls with magnets that could also seriously injure children if swallowed, and Barbie doll accessories—Barbies, of all things—with high levels of lead. And this left parents across the country wondering if any toy they buy will be safe for their children.

Adding to the public's concern is the fact that just about all of the recalled toys were manufactured in China, and, in fact, according to the Toy Industry Association, toys made in China make up 70 to 80 percent of all the toys sold in the U.S. Some industry analysts say that only about 10 percent of the toys sold in the USA are actually made in the USA.

So the question of whether we can hold these foreign manufacturers accountable for harms caused by the toys is not merely an interesting academic exercise. It actually is the heart of the issue.

Accountability is the key to making sure that we provide in this country the right incentives for manufacturers and other companies in the stream of commerce to make and sell safer products. Accountability is also the key to ensuring that people who are injured by dangerous products can be compensated and that dangerous products can be removed from the market quickly.

With such a large percentage of the toys we buy for our children being manufactured abroad, it is incumbent upon us to ensure that our system of accountability includes foreign manufacturers, but where that is not possible, that it also includes others in the stream of commerce to make sure they can be held responsible.

Under section 15 of the Consumer Product Safety Act, companies are required to make reports of hazardous products to the commission. Section 15 gives the CPSC authority over manufacturers who are defined to be also importers, distributors and retailers who discover that one of the products they sell does not comply with Consumer Product Safety rules or are otherwise dangerous. Section 15 also authorizes the commission to order a manufacturer, importer, distributor or retailer to inform the public of the dangers in their products and to remove those products from the marketplace and from people's homes.

And so, for purposes of our discussion today, what is critical about the scheme that is adopted by this section 15 is that manufacturers, importers, distributors and retailers are all equally responsible for notifying the public and the commission of hazards and conducting a recall, if they are selling a dangerous product.

The Aqua Dots recall that has already been mentioned today is a really good example of this, because what happened is these beads were supposed to be covered with a safe chemical. Now what happens is you put the beads in water and then they make an art product, an art and craft. The beads were, in fact, covered with a toxic chemical that, when ingested, acted like the date-rape drug GHB, of all things, and a couple of infants actually went to the hospital, were in a coma, hospitalized for a number of days after ingesting many of these beads, and it turns out that the Chinese company or Chinese manufacturer substituted the unsafe chemical for the safe glue.

What is interesting about Aqua Dots is that the chain of ownership of Aqua Dots, until it reached U.S. stores, was all foreign. The manufacturer was an Australian company. The distributor is a company in Canada. And, of course, the products were actually physically manufactured in China. Now the Canadian distributor is the one that voluntarily did the recall with CPSC.

However, many times, companies are not as cooperative with the Consumer Product Safety Commission, and, in that case, when you are dealing with a foreign distributor, it makes it very difficult, if not impossible in some cases, for the CPSC to order a recall of that foreign company, and so what you have is the CPSC, as a last resort, can go after the retailer to make sure the retailer conducts the recall.

And I would argue that in this world of the global economy that we have, that that is a very, very critical piece of the puzzle, and when the Consumer Product Safety Commission cannot reach the others in the stream of commerce that are foreign companies, whether it is the manufacturer or the importer or the distributor, that the buck stops where the retailer is and that the retailers need to take equal responsibility for getting these products out of people's homes and for informing the public of the dangers.

So I will stop there and take your questions.

Thank you.

[The prepared statement of Ms. Gilbert follows:]

PREPARED STATEMENT OF PAMELA GILBERT

Good morning Chairwoman Sanchez, Ranking Member Cannon and members of the Subcommittee. I am Pamela Gilbert and I am a partner in the law firm of Cuneo Gilbert & LaDuca. I have been asked to testify today to share with you insights I gained as executive director of the U.S. Consumer Product Safety Commission from 1996 through May, 2001. I am testifying on my own behalf and all the opinions expressed are my own.

Thank you for giving me the opportunity to testify on the critically important issue of accountability for dangerous products that are sold in the U.S. but produced by foreign manufacturers.

The summer of 2007 might well be remembered as the summer of the toy recalls. At one point, it seemed every day brought new reports of dangers posed by another well-loved toy that could be lurking in our children's playrooms—Thomas and Friends trains with unsafe levels of lead; Easy-Bake Ovens that could entrap and burn children; Polly Pocket dolls with magnets that were dangerous if swallowed

or aspirated; and Barbie doll accessories with high levels of lead. This left parents wondering if any toy they buy will be safe for their children.

Adding to the public's concern is the fact that just about all of the recalled toys were manufactured in China. In fact, according to the Toy Industry Association, toys made in China make up 70 to 80 percent of the toys sold in the U.S. Some industry analysts estimate that only about 10 percent of toys sold here are actually made in the U.S.A.

The question of whether we can hold these foreign manufacturers accountable for harms caused by their toys is not merely an interesting academic exercise. It is really the heart of the issue. Accountability is the key to making sure that we are providing the right incentives for manufacturers and others in the stream of commerce to make and sell safer products. Accountability is also the key to ensuring that people who are injured by dangerous products can be compensated and that dangerous products can be removed from the market quickly. With such a large percentage of the toys we buy for our children being manufactured abroad, it is incumbent upon us to ensure that our system of accountability includes foreign manufacturers, and where that is not possible, to ensure that others in the stream of commerce can be held responsible.

It is not my role here today to discuss the difficulties, under current product liability law, of holding foreign manufacturers accountable to injured people in the U.S. There are other, more qualified witnesses to discuss those issues. I am here to explain some of the obstacles faced by the Consumer Product Safety Commission when the agency tries to conduct a recall of a product that was manufactured in China or in another foreign country. I would note, however, that most of the obstacles that injured individuals face in the product liability system—obtaining jurisdiction, conducting discovery, and enforcing judgments—also make it very difficult for the CPSC to carry out a product recall with a foreign firm.

The Consumer Product Safety Commission is charged with protecting the public from hazards associated with at least 15,000 different consumer products, ranging from toys to home appliances to all-terrain vehicles. CPSC's mission, as set forth in the Consumer Product Safety Act, is to "protect the public against unreasonable risks of injury associated with consumer products." CPSC's statutes give the Commission the authority to set safety standards and work with industry on voluntary standards, collect death and injury data, educate the public about product hazards, and ban and recall dangerous products.

My testimony will focus on the authority of the CPSC over firms that sell defective or dangerous products. As I am sure the subcommittee is aware, over the years, CPSC's budget has shrunk, impairing its ability to effectively carry out its mission. Furthermore, the Commission recently has come under fire for poor leadership and management. I do not intend, however, to address CPSC's current difficulties in my testimony, unless I am asked by a member of the subcommittee.

Section 15 of the Consumer Product Safety Act[1] requires companies to make reports of hazardous products to the Commission and sets forth the procedures for conducting a recall of such products. Under section 15, manufacturers (defined as a manufacturer or importer), distributors and retailers who discover that one of the products they sell does not comply with a consumer product safety rule, contains a defect which creates a substantial risk of injury to the public, or creates an unreasonable risk of serious injury or death, must immediately inform the Commission.

In addition, section 15 authorizes the Commission to order the manufacturer, distributor or retailer to notify the public of the product hazard and to conduct an appropriate corrective action to remove the hazard from the marketplace and from people's homes. The statute allows the manufacturer, distributor or retailer to elect to repair or replace the product, or offer refunds to the public less an allowance for use for products more than one year old. These corrective action plans are commonly referred to as product recalls.

For purposes of our discussion today, what is critical about the scheme adopted by section 15 is that manufacturers—including importers—distributors and retailers are equally responsible for notifying the Commission and the public and conducting a recall when they sell a dangerous product. To illustrate why this is so important, and how it may play out in practice, I am going to use a recent recall as a case study.

Last week, more than four million sets of a children's art product containing beads called Aqua Dots were recalled in cooperation with the CPSC. According to the Commission's press release, the sets were recalled because the coating on the beads that causes the beads to stick together when water is added contains a chem-

[1] Consumer Product Safety Act, 15 U.S.C. 2064, section 15.

ical that turns toxic when many are ingested. Children who swallow the beads can become comatose, develop respiratory depression or have seizures.

Before the recall, the Commission had two reports of serious injuries from children swallowing the Aqua Dot beads. A 20-month-old became dizzy and vomited several times before slipping into a comatose state and being hospitalized after swallowing several dozen beads. A second child who swallowed the beads also vomited and slipped into a coma and was hospitalized for five days before recovering.

According to news reports, the beads contained an adhesive solvent called "1,4 butylene glycol," which can simulate the so-called date-rape drug gamma hydroxyl butyrate or GHB when ingested, causing seizures, coma or death. According to the toy's manufacturer, the problem had been traced to a Chinese factory under contract that substituted a toxic chemical for a safe glue during manufacturing.

This is not the first time we have heard of a Chinese factory substituting a harmful chemical for a safe one. In many of the toy recalls involving unsafe levels of lead, a Chinese factory reportedly bought and used leaded paint, against the specifications of the U.S. manufacturer contracting with the Chinese. The question on most peoples' minds is who is responsible when this happens, and how can we ensure that these harmful practices stop?

In the Aqua Dot case, the chain of ownership was as follows: The manufacturer, Moose Enterprise, is a Melbourne, Australia company. Moose Enterprise produced the product in Chinese factories. The North American distributor of Aqua Dots is Spin Master, a company based in Toronto, Canada. All of this means that, until the toys reached stores in the U.S., they were owned and controlled by foreign firms. This type of scenario is becoming increasingly common with toys and other products that are sold here.

In the Aqua Dots case, Spin Master worked cooperatively with the CPSC to conduct the recall. The company set up a website and an 800 number for consumers to use to get a replacement toy for their children. As far as I know, the recall is running smoothly.

If Spin Master did not willingly cooperate with the CPSC, however, this recall could not have happened as quickly or as comprehensively. When companies refuse to cooperate with CPSC on a product recall, the agency can order the company to conduct a recall if it proves after a hearing in accordance with the Administrative Procedures Act that the product is defective and creates a substantial product hazard or that it violates the law. The Commission can also go to federal court and seek an injunction to stop the product from being sold while the hearing is pending. To take these steps, however, CPSC must have personal jurisdiction over the company. In practice, CPSC will rarely pursue an order for a recall against a recalcitrant foreign firm because of the difficulties of succeeding. CPSC has a very limited budget. It will only proceed against a firm if there is a good likelihood of success. When a company is not cooperating, and has limited assets or presence in the U.S., the Commission will try to find another way to accomplish the recall.

Even back in 1973, when the Consumer Product Safety Act was enacted, Congress recognized that there would be situations in which the only U.S. company involved in selling a product in the U.S. would be the retailer. Therefore, as I mentioned in the beginning of my testimony, under section 15 of the CPSA, retailers are equally responsible for notifying the CPSC when a dangerous product may pose a risk to the public, and for implementing measures to remove the product from the marketplace and from people's homes.

As our economy is increasingly global, and goods and services seemingly have no national boundaries, it is a lynchpin of our product safety system that retailers remain responsible for ensuring a safe marketplace.

In general, CPSC calls on retailers to implement a recall only as a last resort. Usually, a product has only one manufacturer and one distributor, but many retailers. To carry out an effective and comprehensive recall through retailers requires agreements with a number of companies. In addition, depending on how broadly the product was distributed, it may be impossible to include in the recall every retailer that sold the product. This is, therefore, not usually the most efficient or effective method of carrying out a recall. But it is critical, for the reasons already discussed, that this option be available to the commission.

In the years since the Consumer Product Safety Act was enacted, the consumer product industry in the U.S. has changed significantly. It used to be that retailers were considered to be "mom and pop" stores, selling products produced by much larger companies. Think of Barbie dolls, manufactured by Mattel, being sold at local "five and dimes" in every community in the country. With the advent of the "big box stores," that scenario has changed substantially.

Now we have Wal-Mart, the largest retailer in the world, which sells over 20 percent of the toys in the U.S. According to experts, the top five retailers control almost

60 percent of the U.S. toy market. In this environment, you can conduct a product recall of a substantial percent of the market with just a handful of companies.

In addition, these large retailers have greater abilities to influence the quality and safety of products than ever before. Therefore, it makes sense to put greater responsibility on these mega-retailers for ensuring the safety of the products we buy. For example, many, if not most, of these large retailers have contracts with testing facilities to test the products they sell. In some instances, they have their own testing facilities. They should bear responsibility for ensuring that the products they sell meet consumer product safety standards, both voluntary and mandatory.

Large retail chains also have increasing market power, which they can use to make sure the products they sell are safe and high-quality. If Wal-Mart, for example, stops selling a certain manufacturer's products because the manufacturer does not have sufficient quality controls in place, the chances are excellent that the manufacturer will improve its practices rather than lose Wal-Mart as a customer.

Furthermore, some retailers are increasingly "cutting out the middle man." That is, they contract with factories in China to manufacture products and ship them directly to the retailer's distribution center for delivery to the store. In those cases, the retailer is the importer. For purposes of the Consumer Product Safety Act, that means the retailer is also the manufacturer. In those cases, there is no reason the retailer should not bear all the responsibility to ensure the safety of the product.

Times have changed. Our economy is global. It is getting increasingly difficult to ensure the safety of the products on store shelves and in consumers' homes. The responsibility for safety must be shared, or there will be gaps in protection. Manufacturers, importers, distributors, and retailers all must work together to restore the faith of the public in the safety of the marketplace.

Certainly, there is room for strengthening our laws so that foreign manufacturers can be held accountable through the U.S. legal and regulatory systems. But I would argue that the barriers to effectively holding foreign firms accountable in the U.S. are always going to be steep, because of distance, language and sovereignty problems. The only way that we can have effective accountability in our global marketplace is for all firms in the stream of commerce to be responsible for the safety of the products they sell and profit from. Regulation must work that way. Liability must also.

Thank you for the opportunity to testify today. I look forward to answering your questions.

Ms. SÁNCHEZ. All right. We appreciate your testimony. Thank you so much.

And last, but not least, Professor Popper?

We are not super strict with the time limits. So we have given everybody a little bit of leeway.

TESTIMONY OF ANDREW F. POPPER, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, WASHINGTON, DC

Mr. POPPER. Chairwoman Sánchez, Ranking Member Cannon, thank you very much for inviting me. I apologize for my delay in getting here. There were tort reformers in the hall, and they blocked me.

It strikes me as nearly miraculous that the four of us are in agreement on the basic measure that needs to be taken. I think we should pause and enjoy the moment because that does not happen very often in the product liability area.

Ms. SÁNCHEZ. Should we order a moment of silence to absorb that? [Laughter.]

Mr. POPPER. I would be happy with a croissant, but silence is fine.

And out of respect to Professor Schwartz, I want to note that I have used his fantastic book for as long as I have been teaching, and there is just nothing like it, and I thought I would put that on the record.

Ms. SÁNCHEZ. So noted.

Mr. POPPER. Onto my testimony. Of course foreign manufacturers and their domestic counterparts should be liable for the harms they cause when sellers place millions of toys in the stream of commerce with toxic levels of lead and deadly drugs and cribs that can strangle children. Of course they have to be accountable. It is not really much of a question.

I want to first talk a little bit about something on which Victor and I disagree. Why has this happened? Year after year, tort reformers have come to this capital and to state houses demanding relief from the accountability the law required.

They asked for abolition of strict liability. They asked you to relieve retailers and distributors and component parts manufacturers of liability. They sought to cap noneconomic losses. They sought to ratchet up standards for evidence. They sought to abolish joint and several liability, abolish the punitive damages and, ultimately, by indirection, neuter the Consumer Product Safety Commission.

With singular determination, they sought to dismantle a system that had generated a tough market-based force that compelled the production of safe products. State legislatures and occasionally congressional Committees gave in to these requests, congratulating themselves on how they were leveling the playing field. In the feeding frenzy that resulted, known as tort reform, vital market pressures, corrective justice forces, were diluted.

Stripped of the strong civil justice incentives, free from coherent regulation, foreign manufacturers and their domestic distributors put our children at risk. They went with dangerous products, shiny and cute, but deadly. With the ability to calculate with precision downstream liability, with many States abolishing joint and several liability, strict liability and on and on, what else would you expect?

Against this bleak backdrop, what next?

Well, I am done with the negative part. I think there is a lot that you can do. The good news is that the backbone of the tort system, negligence law, has survived the onslaught. The State court doors are open, and they are open for domestic distributors and foreign manufacturers who produce the goods that bring us to the hearing today. Foreign manufacturers are subject to the jurisdiction of domestic courts if there are constitutionally sufficient minimum contacts in the forum State and if the proceeding comports with our notion of fairness, justice and fair play.

While *Asahi* requires us to take into account the unique burdens placed on one who must defend oneself in court, if you reap the distributional benefits of a product in the network, *Asahi* also says you should not be able to escape the jurisdiction of the courts. Too often, that is exactly what happens.

The minimum contacts puzzle is not complicated. The more a foreign manufacturer has domestic facilities, bank accounts, property, pays taxes, has employees, agents, advertisers, communicates with consumers, the less minimum the contacts become.

The problem is that the courts have interpreted both the plurality and Brennan's opinion in different ways. As the Eighth Circuit has said repeatedly, there is no one single interpretation, and that is possibly where you can step in and where this gets interesting. I am not sure, constitutionally, that you can change a Supreme Court decision that declares a Due Process minimum re-

quirement by legislation declaring that Justice Brennan was correct. I do think that the Supreme Court opinion left it wide open for you to adopt a national effects test to secure personal jurisdiction, discussed by all members of this panel today.

I also think that you can adopt a bond requirement. I can see no overt impediment to prevent you from creating, as a condition of importation to that foreign importers post a bond when they bring products into the United States. By the same token, I think that you can require foreign importers to consent to jurisdiction.

Party autonomy has been the heart of our conflict of laws system and in other systems as well. What is wrong with signing a statement that says: "We consent to the jurisdiction of any State in which our products are sold." Once a party actively consents, I think the matter gets far easier.

It does not mean, however, that once you have jurisdiction over foreign manufacturers that these cases are going to be easy. Discovery is difficult when you are dealing with foreign manufacturers. Blocking statutes, as I mentioned in my testimony, are a problem. The Hague Convention is an expensive and unreliable solution in terms of service of process, and the United States, to be perfectly frank, has not exactly done things that would allow it to lay claim to comity and support of foreign courts when it tries to enforce its own judgments.

Let's face it. When you are looking at dangerous product recalls on the order of 30 million and upward, it is time to think boldly about how things can be turned around. No more so-called reforms that cut down consumers at the knees. It is time at last to facilitate justice, not to impede it.

Thank you very much for the opportunity to testify today.

[The prepared statement of Mr. Popper follows:]

PREPARED STATEMENT OF ANDREW F. POPPER

Before the

United States House of Representatives

Committee on the Judiciary

Sub-Committee on Commercial and Administrative Law

November 15, 2007

Hearing Topic:

Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products

Testimony of Professor Andrew F. Popper
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Testimony of Professor Andrew F. Popper

American University, Washington College of law

November 15, 2007

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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

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[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

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[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

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[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

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[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.

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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,

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[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,

Andrew F. Popper

Professor of Law

November 15, 2007

Mr. JOHNSON. [Presiding.] We will now begin the questioning, and I will begin by recognizing myself.

Professor Popper, in your written testimony, you suggest that Congress require foreign manufacturers of consumer goods to consent to the jurisdiction of any domestic State court in which their products are sold as a condition of importation. Please explain further how this could be accomplished.

Mr. POPPER. When you are presented with a problem of this magnitude, you have an opportunity initially to be creative and thereafter to think in detail. I have to tell you, I am still in the creative stage, and I think that we all are. There are problems with NAFTA any time you impose any kind of obstacle to importation and there are issues that come under our customs laws, and there are enforcement problems since this is primarily in the domain of the executive.

All that said, let me give you a simple analogy. When you buy insurance, in your insurance policy, you consent to the laws of a particular State and you consent to be part of compulsory arbitration. We argue about that, whether that is a good idea for consumers or not, but we have done it for years. I do not see anything different about doing this with a foreign importer. When you come in, it is part of the customs statement you sign, "I consent to the jurisdiction of any State in which my products are sold."

I recognize, sir, that there are complexities to this, but I think as a starting point, if the States find, as they do, and the Federal courts affirm, that minimum contacts is a significant problem, a statement that says by the foreign manufacturer, "We consent to the jurisdiction in which our products are sold," would go a long way to solving that.

Mr. JOHNSON. Thank you, sir.

In your written testimony, you also recommend that Congress require foreign manufacturers to post a bond in the event goods they produce prove to be defective, and dangerous. How would that be accomplished?

Mr. POPPER. The same set of considerations would apply here. I think there is a NAFTA problem. I think you have executive enforcement problems. This is Customs, Treasury. And just to be clear, it would not be that they post a bond in the event their goods are defective, it would be that they post a bond as a condition of importation. If it turns out that their goods are defective, then at least an injured consumer has some recourse through the bond, assuming that they have difficulty securing minimum contacts or assuming they cannot secure relief from the foreign manufacturer's distributor.

Let me be clear about something. A domestic distributor or retailer of a foreign entity is responsible under any construction of the law that I know if that foreign product fails and if that foreign entity is unavailable for suit. So there is that recourse that is out there. We have not talked about that. It is not really part of the charge of this hearing, but I would not want that lost today.

Mr. JOHNSON. All right. Thank you.

Ms. Gilbert, do you think that foreign manufacturers would comply with safe product standards if they were held accountable in U.S. courts?

Ms. GILBERT. Yes. I think that that would go a long way toward helping the accountability problem that we have now. Now we have these foreign manufacturers or these foreign factories that really get away scot-free when these problems arise in the U.S. The U.S. companies are the ones that are conducting the recalls.

For the most part, the U.S. companies are the ones that are on the hook if they are sued in a liability lawsuit so that, if you were to have a longer arm reach out to the foreign manufacturers and the foreign factories that are causing some of these problems, then I think that the incentives would be the right incentives, and then you would ultimately get safer products and better accountability

Mr. JOHNSON. Thank you, ma'am.

Mr. Schwartz, H.R. 989, the Innocent Sellers Fairness Act, would completely immunize sellers from liability except under limited circumstances. In light of the facts that consumers currently have a difficult time holding foreign manufacturers accountable, do you support this legislative approach?

Mr. SCHWARTZ. I support a legislative approach that would say that a seller or distributor should not be subject to what is called strict liability, unless the manufacturer is unavailable for suit. You know, I have been supportive of that approach. It is the law in 16 States. It has worked very well. There has been no problem. So it just gets the innocent seller out of court in situations when the manufacturer is available for suit and there is jurisdiction over the manufacturer.

So my answer to the question is if that bill reflects that approach—I do not have that bill in front of me—I have always been supportive of it.

Mr. JOHNSON. Thank you, Mr. Schwartz.

My time has expired. I now recognize the Ranking Member of the Subcommittee, Mr. Cannon, for 5 minutes.

Mr. CANNON. Thank you.

Ms. Gilbert, on October 30, a political newspaper noted that 75 percent of contributions that come from lawyers and their lobbyists go to Democrats, and in October of 2004, in an article in The Nation magazine, you noted that "tort reform would help de-fund the Democratic Party." Can you please describe the connection between a system that allows more lawsuits and more money going to candidates for the Democratic Party?

Ms. GILBERT. I got everything up until your question. I am sorry. What was the question?

Mr. CANNON. Can you describe the connection between a system that allows more lawsuits and increased funding for the Democratic Party?

Ms. GILBERT. Not very well. It is not my area of expertise. I do not recall that Nation article.

Mr. CANNON. Let's go back to the——

Ms. GILBERT. It was a long time ago. Did you say it was 1994?

Mr. CANNON. No, 2004.

Ms. GILBERT. Oh, 2004. I do not recall the article or what the context was, so I cannot really speak to that, and, again, I am not here to be an expert on the funding of either the Democratic Party or the Republican Party.

Mr. CANNON. Do you think there is——

Ms. GILBERT. I am personally a very, very strong believer in a strong civil justice system that places responsibility where it belongs when there are injuries from unsafe products or other unsafe activities.

Mr. CANNON. Regardless, 2004 is a long time ago, and who knows when the discussion happened, if it was an accurate quote, but do you think that there is a relationship between tort reforms or the availability of tort actions for lawyers and contributions for Democrats?

Ms. GILBERT. I do not know. I do not know. Again, it is——

Mr. CANNON. I know.

Ms. GILBERT. It is not my area of——

Mr. CANNON. I know. I think everybody knows.

Ms. GILBERT [continuing]. Expertise, and it is not why I am here.

Mr. CANNON. The fact is this is a Republic-Democrat issue in part because the Republicans want a system that works and makes sense, and the Democrats want to empower lawyers to make money and suck that out of the system.

I see Mr. Popper is furiously making a note, and I suspect you would like to respond to that, Mr. Popper.

Mr. POPPER. I——

Mr. CANNON. You do not need to. I thought you were anxiously engaged there.

Mr. POPPER. I was just noting what I needed to do after the hearing.

Mr. CANNON. You leave academia——

Mr. POPPER. Pick up the laundry. Go to the cleaner's.

Mr. CANNON. No, we do not mean to be mean. Let me just say——

Mr. POPPER. I am happy to respond just——

Mr. CANNON. I will just use some time, but let me just say I am not anti-tort. I mean, I have lots of friends that are lawyers that bring about justice for people in small cases, in certain cases. It is just that there has to be a balance, and I think that there is clearly an imbalance both in the contributions and in the incentives that the different parties have, and I would love to hear what you have to say about that.

Mr. POPPER. Too often tort reform is characterized as an issue between the Democratic Party and the Republican Party. I think while sometimes it seems that way on different votes, it really is not.

The States' rights issue that is at the heart of tort reform is very much an issue of the Republican Party. I think there are many, many people in the Republican Party who have trouble with Congress trying to impose standards on the States.

I think there are many people in the Democratic Party—Senators Dodd and Lieberman, proposed legislation that would have declared the tort system compensatory some years ago. As a consumer advocate, I thought was horrendous.

So I do not think it is quite that clear as a Democrat-Republican matter. I would just as a final comment regarding contributions of lawyers to campaigns. I think Ms. Gilbert is right. That is almost impossible to isolate. People give to campaigns for all kinds of dif-

ferent reasons. If I ran the zoo, campaigns would be publicly financed, and we would not be talking about this.

Mr. CANNON. Thank you. That was a very thoughtful comment. I appreciate it.

If I had my way, people could contribute anything they wanted, and we would have disclosure of everything, and I think that would clean up the cesspool much better than any other system would, but we are not likely to have that, and that makes it sort of a zoo, I agree, and it is sometimes hard to have direct connections in these things because you make good points about States' rights and that sort of thing, and I am personally deeply troubled about some of the aspects of tort reform that go to the prerogatives of States.

Mr. Schwartz, I suspect you could further enlighten us on the issue——

Mr. SCHWARTZ. Well, not on——

Mr. CANNON [continuing]. Or on anything else that you would like to respond to that other people have said on the panel thus far.

Mr. SCHWARTZ. Well, thank you. Since Professor Popper has graciously said he is a customer of my casebook, I have to tread lightly on criticizing anything he said. [Laughter.]

But I do not believe and it is really speculation that the people in China who put lead in paint that would hurt children were thinking about tort reform in the American system. They may have thought that they are immune from the reach of our system of tort law, and that is not good. As I said, there is a tort tax on products. There is no reason for someone who is supplying a substantial number of products to this country to be immunized from our system, and I think it is good that this body is considering ways to address that.

Professor Popper talked about bonding. I think any remedy should be isolated to the problem, not everybody who sends imports, but those who are not really available for suit under the current system, and there is flexibility in these decisions to try to address that particular problem.

You have large importers that can be sued here and have been sued here. That is not the problem. It is those who send a substantial amount of products into the United States and are immune from our tort system, and that is, I think, what this body should look at.

Mr. CANNON. Thank you.

Mr. JOHNSON. The gentleman's time has expired.

We will now proceed with questions from the gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you very much.

And I am glad that this hearing is being held today. This is, I think, an enormously important issue.

Recently, I was in a department store, and I walked past the toy aisle, and I saw all of these toys, and I thought I am so glad that my youngest is 22, and that I do not have to worry about buying one of these things and whether there is lead on it and whether it is going to poison my kid. And when you take a look at parents all over the country thinking about, with Christmas coming up, whether they are going to injure their children by their Christmas gifts, it is just a horrendous situation.

And, you know, I have always supported internationalism, and I have been supportive of trade issues. It just has to be noted that most of these defective products seem to be coming from China, and, you know, how are we going to hold them accountable? That is what really this is about.

The Ranking Member and I worked together on many things. I like him. He knows that. And there are things that we agree on. But I think when it comes to so-called tort reform, for 12 years, the Republican majority pursued efforts so that people would not be held accountable for hurting people who were innocent, and now there is a new approach here, which is how do we hold people accountable?

And part of that is using the court system, the system of civil justice, where people have to be held accountable for what they do, and when it comes to foreign entities who are wrongdoers, no one should want to defend misconduct on the part of toy manufacturers who are either reckless or—who knows what the motivation is—that would harm American children. And noting we had a hearing a couple of weeks ago on a different subject on the IP Subcommittee where the Customs Department admitted that when it comes to penalties for careless dumping and other misconduct, they collect less than 1 percent of assessed penalties. So that whole system is not functioning well.

The Consumer Product Safety Commission is not up to task. We have called for, you know, a complete re-haul of that whole system, but here is my question, I guess maybe to the professor or whoever else could answer it, given the fact that most of what is being imported into the United States is not even inspected, the Customs Bureau is not actually efficiently even collecting the fines, it is not clear——

How would we actually administratively get these importers to consent to jurisdiction? And is there a role in terms of treaties? Do you think it would be constitutionally permissible for, for example, the government of China to consent to jurisdiction on its manufacturers and citizens because it is really in their long-term interest not for this to happen? I mean, nobody is going to buy a toy made in China if this continues. Do you have an opinion on those questions? Any of you?

Mr. POPPER. On the question of consent to jurisdiction, there is the individual party choice that a foreign manufacturer can make, and then there are choices that a country can make to declare that foreign manufacturers are subject to the jurisdiction of the courts of the United States. Constitutionally, I do not think that there is any prohibition on a foreign government doing that.

I mentioned in my statement, however, that this requires real cooperation and agreement from the executive because when you are talking about how the customs system functions in the United States, I do not know that that is something that you can legislate into efficiency. If——

Ms. LOFGREN. Well, certainly, we cannot, and I have a lot of respect for the line officers trying to do a very tough job, but it is administratively a complete mess, and I do not have any hope that under the current Administration that is going to improve despite the very, you know, diligent efforts of the officers on the line.

Mr. POPPER. This is the one thing that you can have an effect on: is resources, which really gets, I think, all of us back to thinking about the CPSC. My alma mater law school and the law school in which I currently work, in both institutions, our budget is larger than the budget of the CPSC, which is just appalling.

Ms. LOFGREN. Right. Well, I think, you know, it is appalling, but if the manufacturers or the government of China know that they are going to face civilian courts in the United States—and it is not about lawyers. It is about parents and their children who have a right to be heard, to have their day in court and to hold somebody accountable, you know, even the fact that the government is dysfunctional at this point—that element could help save the day for American families.

Mr. POPPER. I would agree with that.

Ms. LOFGREN. My time is expired.

Mr. Chairman, I thank you.

Mr. JOHNSON. Thank you, Madam.

We will now turn to Congressman Franks from Arizona for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman. You are doing a good job.

Mr. JOHNSON. Thank you, sir. Your check is in the mail, sir. [Laughter.]

And you can have an extra 5 minutes.

Mr. FRANKS. Mr. Chairman, I guess, you know, some of these esoteric areas of law escape a lot of us, but the one thing that is paramount in our minds is doing everything we can to protect the children of this country and, for that matter, in every country, and you folks have insight into the mechanics and the process of how these toys are not only manufactured, but how they get here and under what auspices, what the protections are, whether it be the Port Authority or legal remedy might be available.

So I want to ask each of you kind of a straightforward question. Let me first say that Ms. Lofgren said, you know, no one will want to buy toys from China if this continues. Now I am not sure that that is such a bad idea. Maybe the market itself, if properly informed, would have an economic impact that would mitigate this quite a lot.

But without trying to color your perspective, I would like to have each person, starting over here with you, Mr. Gowen, if it is all right, to just go down the panel and tell me what you think would be the one thing if you were running the zoo that you would do to solve this problem. What is the one most important single thing? You know, in Congress, we actually try, but sometimes it is hard to stay focused on something that would really make a difference, and we shoot in a lot of directions and we do not hit anything of consequence.

So tell me, if you were emperor of the world, what is the one thing you would do to protect children in this country from dangerous or faulty toys from other countries or, for that matter, this one?

Mr. Gowen?

Mr. GOWEN. Thank you, Mr. Franks.

I would require all who are importing products into the United States or exporting to the United States to have an import license into the United States that would require them to consent to the jurisdiction of the courts, to have insurance in this country and to have that license subject to revocation if the judgment of an American court is not paid, as well as having an agent for service of process here in this country, to put them on an equal footing with American companies and to give American consumers a reasonable remedy in the event that they are injured.

Mr. POPPER. Madam Chairman, that almost sounds reasonable to me.

Ms. SÁNCHEZ. [Presiding.] I am glad we agree on something.

Mr. FRANKS. Mr. Schwartz?

Mr. SCHWARTZ. I would pinpoint responsibility on suppliers of products from foreign countries who are currently on an unequal playing field in our tort system. All of our companies here are subject to it, including those who send goods here and have substantial business, but there are ways to address and pinpoint that responsibility on those companies.

The tort system, when it is fair, can have a deterrent value, and, right now, they escape that deterrent value, and that would be a good policeman since we cannot have the borders staffed with policemen to catch these goods.

Mr. FRANKS. Thank you, Mr. Schwartz.

Ms. Gilbert?

Ms. GILBERT. I am going to try to cheat and give you two things.

My second choice would be the import license and the scheme that Mr. Gowen just laid out.

I would have to say as my first choice, being a devotee of the Consumer Product Safety Commission, I would triple the budget of the agency and the size of the agency to address this problem.

Mr. FRANKS. Thank you.

Mr. Popper? I am sorry.

Mr. POPPER. I think those are all good suggestions. If you could put together a simple piece of legislation that incorporated all three, I would certainly be excited about it. In addition to an import license and focus on the CPSC, I think that the Supreme Court has invited you to declare that minimum contacts can be satisfied with a nationwide-effect tes. I think that is actually fairly easy to do and, arguably would resolve some of the problems that *Asahi* created.

Mr. FRANKS. Well, thank you, Mr. Popper. That is all of the above.

Mr. POPPER. That is all of the above.

Mr. FRANKS. And I appreciate that.

Mr. Gowen, thank you for starting out with a crisp—I am going to vote for Mr. Gowen if that is okay with the rest of you, but I think all of you had good suggestions here.

And I yield back, Mr. Chairman. Thank you. Or Madam Chair. I am sorry. We had a little switch here.

Ms. SÁNCHEZ. Thank you. We pulled the switcheroo on you, so it is understandable.

And I want to apologize to our witnesses. I dashed out because I had a concurrent markup in the Ed and Labor Committee and I was required to vote there.

I understand Mr. Johnson did a very good job chairing the Committee, although when the Chairwoman leaves, the Committee goes to hell and he wants to give away an additional 5 minutes for questioning to each panel member.

I am going to take my round of questions.

Mr. CANNON. The minority would not object if the Chair took her 5 minutes and we did not go to a second round, by the way.

Ms. SÁNCHEZ. Thank you. We will see if there is substantial interest in the second round of questions, but I am going to do my first 5 minutes.

Mr. Gowen, in your written testimony, you note that Justice Sandra Day O'Connor's opinion in *Asahi* suggested that Congress could authorize Federal court personal jurisdiction over alien defendants based on the aggregate of national contacts rather than on the contacts between defendant and the State where the Federal court sits. If that were enacted, how would this proposal impact the ability of injured consumers to hold manufacturers accountable?

Mr. GOWEN. Well, presently, when foreign manufacturers filed their motions to dismiss, which usually comes shortly after service is achieved, they raise the factors that Justice O'Connor suggested as possibilities for looking at the additional factors beyond placement into the stream of commerce.

One of those is: Was the product made specifically for California or Pennsylvania or New Jersey? And I think we know that very few products are really made specifically for any State. They are made for our national market.

Secondly, they look at things like: Do they have an office there? Do they advertise specifically in that State? Frequently, they work through an intermediary, such as an ad agency or an importer. So, if we were able to look at a national standard of minimum contacts instead of saying there were 8,000 tires sold in Maryland and suppose 500 of those had been taken to Delaware where the injury occurred, would that have been enough?

This company that we had the case with there had millions of tires that were sold into the United States as a whole, and I think that it would make the process of establishing minimum contacts much easier?

Ms. SÁNCHEZ. Okay. Mr. Schwartz, sort of along the same line, Justice O'Connor in her opinion suggested that we could potentially use the aggregate of national contacts, and I thought I heard you use the term "substantial business," and I think I heard Professor Popper use the word "nationwide effect," and I am sort of wondering if they all are fairly similar or if there are distinctions between any of those standards that we could potentially use.

Mr. SCHWARTZ. Well, I think that you have two measures there. Having a national measure is a sound idea that is put in Footnote 5 of the opinion. But if it was just a mere sprinkling of sales and not substantial as a whole, that might not satisfy the Constitution. So I think both elements would be required.

Ms. SÁNCHEZ. Okay. And do you have—since you are an author of a torts book—an idea of what criteria might be used to establish substantial?

Mr. SCHWARTZ. Well, I have learned from my work not to draft when one is sitting here——

Ms. SÁNCHEZ. We will allow you some——

Mr. SCHWARTZ [continuing]. But I certainly would be pleased to follow up with this, Chairwoman, on that issue.

Ms. SÁNCHEZ. Sure. I appreciate that.

Ms. Gilbert, as you referenced in your written testimony, the Consumer Product Safety Commission has come under fire for poor leadership and management, and it is recently reported that CPSC employees have accepted a large number of trips financed by industries that the CPSC are mandated to regulate, which sort of sounds a little icky, to use sort of a nongovernmental term. What steps do you think that the CPSC should take in order to overcome those recent problems and to restore the independence of the commission?

Ms. GILBERT. Well, as I mentioned before, the Consumer Product Safety Commission needs an infusion of cash, frankly. I mean, it has been underfunded for decades now, and when I was there, I used to say that the Pentagon spent CPSC's annual budget every hour and a half, and I think that that must be a much shorter period of time now since the Pentagon has gotten bigger and CPSC has gotten smaller. So I am not arguing that CPSC should be as big as the Pentagon, but maybe it should be a little bit larger than 45 minutes worth of the Pentagon to keep American families and children safe. So, to me, that is the most important.

And then, secondly, the current leadership of CPSC is, frankly, quite sad, and it has saddened those of us who worked there, and many of the staff who were quite expert and committed and devoted to that agency who have left out of frustration, and there are many of them, and so we really do need new leadership at the commission.

It appears from what has come out in the press—as you mentioned, the trips—that the current chair and her predecessor really abuse the privilege. I will admit that when I was at CPSC, I did approve some industry-funded travel, mostly for staff, for the technical or legal compliance staff of the agency for product safety work, for specific product safety work that we did not have the budget for, but we did not have chairs and commissioners flying around to this resort and that golfing, you know, excursion on the dime of the industry, and that really does need to stop.

Ms. SÁNCHEZ. Thank you.

My time has expired, but I will beg the indulgence of my Ranking Member. I think we can finish up without going to a second round of questions if I could have 2 additional minutes.

Mr. CANNON. I would be happy.

May I just ask unanimous consent to submit for the record an article in The Wall Street Journal that was printed on Tuesday, November 13 called AGs Gone Wild?

Ms. SÁNCHEZ. Without objection.

[The information referred to follows:]

THE WALL STREET JOURNAL.

TUESDAY, NOVEMBER 13, 2007 - VOL. CCL NO. 114

AGs Gone Wild

District Attorneys have "National Prosecution Standards." U.S. Attorneys have their own ethics manual. But what about state Attorneys General? They get to make everything up as they go, as their increasingly aggressive prosecutions are showing.

Some rules of the road for Eliot Spitzer's political clones.

The problem is laid out in a new report by the Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce, that deserves more publicity. State AGs have no uniform rules governing their conduct, and whatever procedures are in place for initiating investigations and litigating are largely hidden from public view. This includes guidelines on the use of outside trial lawyers; the use of settlement funds; multistate litigation; and public statements regarding an investigation or ongoing trial.

When the Institute commissioned a blind survey of the nation's 51 AGs, only 14 responded. Among those who did, a majority had no standard in place for determining whether to launch an investigation, and none "were able to cite state laws, regulations, office policies or ethical rules that require notice be provided to a defendant company prior to bringing criminal charges."

This lack of transparency is all the more troubling given that state AGs are increasingly assailing long-standing business practices, often driven by a political agenda as much as by a duty to enforce the law. As the old joke goes, "AG" stands for "aspiring Governor." And no one epitomized this better than New York's current Governor Eliot Spitzer. In his previous job as AG, Mr. Spitzer regularly threatened criminal prosecution in order to extract settlements in civil suits and win headlines. (Think AIG and Hank Greenberg.) But he's hardly alone.

Rhode Island Attorney General Patrick Lynch dropped the DuPont Corporation from a lead paint lawsuit in 2005 after the company agreed to donate $12 million to charity. Most of the money went to charities based outside of the state, including a hospital in Boston. The settlement money is being used to satisfy a pledge to the hospital made previously by Motley Rice, which happens to be the plaintiffs firm hired by the state to pursue the case on a contingency fee basis. Motley Rice counsel John McConnell is a campaign contributor to Mr. Lynch, who's been sanctioned twice for comments to the press about the paint litigation.

West Virginia taxpayers already finance an in-house legal staff of nearly 200. Yet last year Darrell McGraw, the state Attorney General, deputized two personal injury attorneys to file lawsuits on behalf of the state. The lawyers had donated to Mr. McGraw's political campaign and were hired to subpoena records from a company they were already suing in private civil litigation. In effect, two McGraw campaign contributors were given the power of the state to conduct discovery for their private litigation.

In 2004, Mr. McGraw extracted a $10 million settlement from Purdue Pharma in a lawsuit filed on behalf of state agencies. A third of the settlement went to lawyers who worked on the case. And aside from a $250,000 payment to the state health department, little of the money has been returned to the agencies named in the initial suit. Instead, Mr. McGraw has doled out the money in grants to his own favorite institutions and projects, however unrelated to the case. The University of Charleston received $500,000 from the AG for a new pharmacy school.

In Mississippi, Attorney General Jim Hood has made a habit of hiring profit-seeking private lawyers—who've supported him politically—as outside counsel to represent the state. In California, former AG Bill Lockyer concealed more than a hundred million dollars' worth of contracts with lobbyists and private law firms, labeling them confidential to block public oversight. Many were no-bid contracts that went to firms with ties to Mr. Lockyer.

We could go on, but you get the idea. Because most state AGs are elected, they are ultimately accountable to voters. But it wouldn't hurt to have some common legal parameters that also protect the due process rights of their targets. To that end, the Institute for Legal Reform has proposed a code of conduct for state AGs.

The code includes nothing that shouldn't already be Legal Ethics 101, such as refraining from public comments that could prejudice a case, and not threatening companies with criminal action to gain advantage in a civil suit. If bringing in outside lawyers is necessary because an AG's office lacks the expertise or manpower to try a case, then paying them hourly instead of on a contingency basis would minimize a gross conflict of interests.

These guidelines ought to be more than acceptable to public servants who wield great power and claim to be ethical watchdogs themselves. That they are consistently ignored—from coast to coast—suggests that the political system needs to start imposing some accountability on AGs gone wild.

Ms. SÁNCHEZ. I have one last question, and I understand this question has been asked of another witness, but I am interested in getting Professor Popper's perspective on this.

Somebody asked about the H.R. 989, the Innocent Sellers Fairness Act, which would completely immunize sellers from liability, except under very limited circumstances, and in light of the fact that consumers already have a difficult time holding foreign manufacturers accountable, do you think that this is a smart legislative approach to the problem?

Mr. POPPER. I think the initial smart answer would be Victor's, which is without the legislation in front of me, I am hesitant to comment. But on the general proposition of relieving retailer sellers of responsibility, I think it is a terrible idea.

It has been an argument for a long time, and you can understand why. Most sellers—retailers in particular—do not design goods, they do not place the warnings, the labels on the goods, and so therefore to tie them into broad-based stream-of-commerce liability might seem, at a certain level unfair.

Anticipating that argument, I would say sellers have an enormous influence on design. If a seller communicates with a manufacturer that the product is not satisfactory, the product will not be sold and the design will change. Further sellers have an affirmative duty to warn, and they are vital to the stream of commerce, they make a profit from the products they sell, and they have the capacity to spread loss. They need to take responsibility for the products they sell. If there is some kind of global wash that eliminated the liability of retail sellers, I think that would be a very bad idea.

And, again, it is like a lot of tort reform. It is not that I am right or Victor is wrong. They are two different points of view. If I am a small seller, and I am getting products from abroad, and I hear that they are great products, and I put them on the shelf, and I sell them, and I had nothing to do with the design or labeling of them, and then, suddenly, I am tied up in a lawsuit, of course, I am going to feel it is unjust. But in the grand scheme of things, we make tradeoffs, and by legislation, to give that wash to the whole of the selling community strikes me as bad legislation.

But, again, I do not have the language of that bill in front of me. I would assume that you have characterized it correctly, and on that assumption, I would say it is a bad idea.

Ms. SÁNCHEZ. Great. Thank you so much.

Mr. SCHWARTZ. Madam Chairman?

Ms. SÁNCHEZ. Yes?

Mr. SCHWARTZ. You were at another Committee when I was asked that question, so I will just very briefly mention my answer.

Ms. SÁNCHEZ. Certainly.

Mr. SCHWARTZ. Most of the bills that have taken the product seller issue on work like this. It relieves the product seller of strict liability. So, if they are selling a steam-and-dry iron and something is wrong with it and it is in a box and they do not know about it, they are not subject to liability. In the laws that have been enacted in the 16 States, it has worked well—not one of them has been repealed. No one has tried to repeal them. They have been law for

20, 25 years—they are subject to liability if the manufacturer cannot be reached by judicial process.

So, in the problem that we are talking about today, if the foreign manufacturer could not be reached, the retailer or wholesaler would be subject to liability. But it does cut legal costs. You are not bringing them in in every single case.

And what sometimes happens is that a plaintiff's lawyer, a good one, who wants to sue a manufacturer but wants to be in a State court, will name the retailer, not for the purposes of suing them at all, but just to get jurisdiction into a State court because then—I may be getting too legal here—the plaintiff and defendant are from the same State, and the Federal court cannot take jurisdiction. So that is the reason for that particular reform.

I would want to review the bill and then have an opportunity to give you my views in writing about it.

Ms. SÁNCHEZ. Sure. I do not want to mischaracterize your testimony, but you agree that if somebody is in that chain of commerce and we do not have the ability to reach the manufacturer, that they do bear some responsibility and should be subject to——

Mr. SCHWARTZ. If you do not strand the complainant.

Ms. SÁNCHEZ. The consumer. The complainant.

Mr. SCHWARTZ. But product seller reform legislation has worked, and also——

Ms. SÁNCHEZ. Would you——

Mr. SCHWARTZ [continuing]. A lot of other civil justice reforms that have been supported by Mr. Cannon have worked. So——

Ms. SÁNCHEZ. But you would also agree, though, that in this instance—and I think I have heard it in different ways from everybody here—there is a general sense that, A, it is unfair, B, it is unsafe for us not to be able to reach the manufacturers who are the starting point in this process——

Mr. SCHWARTZ. Absolutely. I think that to have people who are making a substantial profit from dollars spent in this country to be immune from our tort system is unsound public policy.

Ms. SÁNCHEZ. Thank you very much.

And would everybody agree, if I could just get a verbal on-the-record answer?

Mr. Gowen?

Mr. GOWEN. Yes, I would certainly agree.

Ms. SÁNCHEZ. Ms. Gilbert?

Ms. GILBERT. Yes, I agree.

Ms. SÁNCHEZ. Professor Popper?

Mr. POPPER. I agree as well.

Ms. SÁNCHEZ. We are all in agreement.

Mr. CANNON. May I add my voice to this?

Ms. SÁNCHEZ. Mr. Cannon? Sure. Feel free.

Well, that wraps up pretty much the hearing for today. Again, I want to thank all of the witnesses for their testimony.

Without objection, Members will have 5 legislative days to submit any additional written questions which we will forward to the witnesses and ask that you answer as timely as possible so that we can also include those in the record.

Without objection, the record will remain open for 5 legislative days for the submission of any additional materials.

Again, I want to thank everybody for their time and their patience, and this hearing on the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 10:4 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RESPONSES FROM THOMAS L. GOWEN, THE LOCKS LAW FIRM, PHILADELPHIA, PA, TO POST-HEARING QUESTIONS FROM THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

1. Why is seller liability so important as a means or recourse for consumers injured by defective foreign products?

Seller liability, in a world where more and more products are coming from foreign countries, encourages the sellers to demand higher standards from their suppliers, do more inspections before sale, and enables the collection of fair compensation for people injured by these products without the need to try to enforce a judgement in China or some other country.

The sellers have elected to purchase their products from foreign manufacturers who can be difficult to serve. If they are served, they resist jurisdiction in the state where the case is brought and often do not have assets or insurance in this country, which presents a significant problem in collection of a judgment. Generally, I think most lawyers representing injured people would rather have the designer or manufacturer of the product in the case if they can be brought into court. Passing legislation to ease the problems of getting foreign manufacturers into court would reduce the exposure of the American sellers by having the primarily culpable party in court to answer for the harm caused by their products.

Nevertheless, American sellers, particularly the large ones should do a much more thorough job of specifying their products and conducting safety inspections on those that they import and sell at significant profit. They often do little or nothing to inspect these products and as a result they get onto the market where they have done genuine harm.

2. How do you suggest Congress improve service of process of foreign manufacturers?

I suggest that Congress legislate the requirement of an Import License which would require the following;

1. Appointment of agent for acceptance of service of process in all states in which the product is sold, not just the ones where the middleman is located. We require American companies to be authorized to do business in states other than their native states and to have agents for acceptance of service of process such as CT Corporation. We require trucking companies to have agents for service of process in states which through which they travel.

2. As part of the license the foreign manufacturer consents to the jurisdiction and venue of any state or federal court in the states where the product is sold. If this occurs the corporation manufacturing the defective products will hire a law firm in the state where it has been sued and the case can go forward with no more difficulty than if it was in any other state. Foreign corporations raise minimum contacts plus defenses in hopes of avoiding accountability altogether, rather than to make it more fair or convenient for them to be sued in the courts of another state.

3. The manufacturer should be required to carry adequate product liability insurance in the United States.

4. The license should be subject to revocation if a the judgment of an American Court is not paid.

5. Require that the information be posted on a searchable data base.

3. Is it common for defective products claims against foreign manufacturers to be dismissed on personal jurisdiction grounds, even if a large quantity of these products were sold in the U.S. If so why is this the case?

It is difficult to know the exact number of cases that are dismissed, however we did find that there were over 2600 citations to the *Asahi* opinion of the Supreme Court. It is also clear that foreign manufacturers raise the minimum contacts plus factors that were listed by Justice O'Connor in the dicta in her plurality opinion in that case. They claim that they do not have an office in the state, they are not incorporated in the state, they do not advertise specifically in the state, and that they do not make the product for that state.

It goes without saying that foreign corporations are not incorporated in the states as they are incorporated abroad. Obviously, there are major divisions that are, such as Mercedes Benz North America, for example, although the parent company is not.

But many foreign products are sold through distributors who import them to their warehouse and then distribute them to multiple states. Often the foreign product is sold under a different name such as a Sears brand, or under the name of an American tire manufacturer or cosmetics company. Virtually never are products made specifically for a given state. The products are made for the American market.

Because the *Asahi* plurality opinion invites this type of contest a trial court can look at these factors and say there is no office here, there is no specific advertising here, and the product was not made especially for this state and then dismiss the case particularly if there were not a very large number of the products sold in the state or even if there were. This results in unpredictability in the justice system and makes the pursuit of a just remedy against a foreign manufacturer more difficult and uncertain for American citizens.

Foreign manufacturers sell their products to an intermediary or importer in the United States or directly to a retailer. Both are free to distribute the product as far and wide as they choose. The importer or retailer is effectively an agent for the sale of the manufacturer's product in all of the states in which it is sold and Congress should recognize that the foreign companies are seeking to profit from our national markets while escaping accountability by claiming that it is unfair to be sued in any individual state. This is an incongruity between commercial reality and the legal system, which the Supreme Court acknowledged that Congress could remedy and it should.

Thank you very much for your consideration.

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RESPONSES FROM VICTOR E. SCHWARTZ, SHOOK, HARDY AND BACON, LLP, WASHINGTON, DC, TO POST-HEARING QUESTIONS FROM THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Questions for Victor Schwartz

1. It has been suggested that Congress require foreign manufacturers of consumer goods consent to the jurisdiction of any domestic state court in which their products are sold as a condition of importation.

   Do you agree with this approach? Please explain.

   A distinction should be made between foreign manufacturers who do substantial business in the United States and have assets in the United States and those that have no assets, but merely ship in a substantial amount of goods. Consideration should be given to formulating constitutional legislation that would subject such manufacturers to jurisdiction in the United States. Footnote 5 of the *Asahi* case suggests that such jurisdiction should be placed in Federal courts.

2. It has been recommended that Congress require foreign manufactures to post a bond in the event goods they produce prove to be defective and dangerous.

   Do you agree with this approach? Please explain.

   I do not believe that all foreign manufacturers should be required to post a bond. Many foreign manufacturers have assets in the United States and are subject to liability. Consideration might be given to having some type of bonding requirement for manufacturers that have no assets in the United States, but this would be difficult to implement and enforce. Who would administer the program? How would bonds be set? What would trigger the bond to be accessed? There are many other questions regarding an implementation of a bonding approach. At first, I found this option attractive, but after examining practical ramifications involved with bonding, I do not believe it is a viable approach.

3. H.R. 989, the Innocent Sellers Fairness Act, would completely immunize sellers from liability except under limited circumstances.

   In light of the fact that consumers currently have a difficult time holding foreign manufacturers accountable, do you support this legislative approach? Please explain.

The approach I have supported with innocent sellers appeared in bi-partisan Federal legislation and in the law of a number of states. It also appears in the Uniform Product Liability Act and in numerous state bills. It works like this: a product seller is only subject to liability for its own negligence. In general, it is not subject to strict liability over matters that it has no control, for example, the design of a product. If the manufacturer is unavailable for suit, however, then the product seller would have the same liability as a manufacturer. This approach does not create any additional barriers for plaintiff's holding manufacturers accountable. If the manufacturer cannot be sued, the product seller would be subject to liability. This view is strictly my own and is based on work that I did in drafting the Uniform Product Liability Act and does not necessarily represent the views of the Institute for Legal Reform, or other groups.

4. It has been suggested that foreign manufacturers seeking to sell their products in the U.S. obtain an import license. This license would require the manufacturer to have an agent for service of process in all states in which the product is to be sold. It would also require that the foreign manufacturer have adequate product liability insurance in the U.S. to cover foreseeable claims. Any foreign manufacturer that defaults on a judgment from a U.S. court would lose its license.

Do you support this approach for holding foreign manufacturers accountable?

An approach of this type would have to overcome serious potential constitutional treaty barriers. Those barriers would have to be considered in an in-depth way before the proposal went forward. If these import license requirements were to be implemented, they should be limited to the narrow situations where they might be required, namely manufacturers who have no assets in the United States and are not subject to liability under ordinary "doing business" theories.

Do you think that requiring an import license for foreign manufacturers would cut down on the number of dangerous

products in the United States?

Placing some requirement, whether it is consent to jurisdiction or an import license, on foreign manufacturers who do not have assets in the United States might serve as a deterrent against their sending products into the United States that contain a manufacturing or other defect.

5. Justice Sandra Day O'Connor's opinion in *Asahi* suggested that Congress could authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts rather than on the contacts between the defendant and the State where the federal courts sits.

Do you think Congress should pursue this suggestion?

Of all the different suggestions put forth in this series of questions, I believe that Justice Sandra Day O'Connor's dictum in *Asahi* is the most viable.

What constitutes a constitutionally cognizable national contact to establish jurisdiction?

While the word is not precise a definition, any "substantial flow of products" into the United States in general should be enough to establish this type of federal jurisdiction.

How many national contacts are sufficient for a U.S. court to constitutionally assert jurisdiction?

There is no precise number, such as ten or twelve, but more a world of general tort words such as "substantial flow of products."

Would it be constitutional for Congress to authorize personal jurisdiction over alien defendants in state courts based on an aggregate of national contacts?

We would want to do in-depth constitutional research with respect to this question, but based on precedents involving domestic corporations, any substantial sale of products in the United States should be sufficient to establish jurisdiction.

RESPONSES FROM PAMELA GILBERT, CUNEO, GILBERT AND LADUCA, LLP, WASHINGTON, DC, TO POST-HEARING QUESTIONS FROM THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

CUNEO
GILBERT &
LADUCA,
LLP

TO: Chair Linda Sanchez

FROM: Pamela Gilbert

DATE: January 4, 2008

SUBJECT: Responses to additional questions from the Subcommittee on Commercial and Administrative Law regarding the November 15, 2007 hearing entitled "Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products."

1. **Do you think that we would have less recalls and product injuries if foreign manufacturers were held accountable more often in U.S. courts?**

ANSWER: Yes. If foreign manufacturers were held accountable more often in U.S. courts for deaths or injuries caused by their products, those manufacturers would have significantly greater incentives to make sure the products they sell in the U.S. are safe. Under current law, it is difficult, and often impossible, to hold foreign manufacturers accountable. This, in turn, provides very little financial incentive for those manufacturers to spend time or resources on product safety.

2. **It has been suggested that foreign manufacturers seeking to sell their products in the U.S. obtain an import license. This license would require the manufacturers to have an agent for service of process in all states in which the product is to be sold. It would also require that the foreign manufacturers have adequate product liability insurance in the U.S. to cover foreseeable claims. Any foreign manufacturer that defaults on a judgment from a U.S. court would lose its license.**

Do you support this approach for holding foreign manufacturers accountable?

Do you think requiring an import license for foreign manufacturers would cut down on the number of dangerous products in the United States?

ANSWER: Yes, I support an import license approach precisely because I think requiring an import license for foreign manufacturers would cut down on the number of dangerous products in the U.S. An import license as described above would address most of the obstacles that U.S. residents currently face when they try to hold a foreign

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manufacturer accountable in a U.S. court – inability to serve legal papers; inadequate assets in the U.S. to satisfy a judgment; and no recourse if the foreign manufacturer defaults on a judgment. An import license requirement for foreign manufacturers, combined with the threat of losing that license if the manufacturer does not adhere to U.S. laws and court orders, would provide meaningful incentives for foreign manufacturers to pay attention to and invest more in the safety of the products they sell in the U.S.

3. **H.R. 989, the Innocent Sellers Fairness Act, would completely immunize sellers from liability except under limited circumstances.**

   In light of the fact that consumers currently have a difficult time holding foreign manufacturers accountable, do you support this legislative approach? Please explain.

ANSWER: I strongly oppose this legislative approach. In order to have a safe marketplace in which consumers can place their trust with confidence, all entities in the stream of commerce responsible for selling a product in the U.S. must be fully accountable in the U.S. legal system. This is the scheme that Congress created when it enacted the Consumer Product Safety Act in 1973, and it has served consumers well for over thirty years. Under the CPSA, manufacturers, importers, distributors and retailers are all *equally* responsible for notifying the Consumer Product Safety Commission and the public and for conducting a recall when they sell a dangerous product. This system helps to ensure that all the entities that profit from the sale of a product to U.S. consumers are responsible for taking that product off the market if it is found to be defective or dangerous. The same system should apply for holding companies accountable when a product they have produced, marketed or sold has injured or killed a consumer.

As I explained in my written testimony, in the years since the Consumer Product Safety Act was enacted, the consumer product industry in the U.S. has changed significantly. It used to be that retailers were often "mom and pop" stores, selling products produced by much larger companies. With the advent of "big box stores," that scenario has changed significantly. Wal-Mart, the largest retailer in the world, sells over 20 percent of the toys in the U.S. The top five retailers control almost 60 percent of the U.S. toy market. These large retailers have greater abilities to influence the quality and safety of products than ever before. It makes sense to place responsibility on these mega-retailers for ensuring the safety of the products we buy.

Large retail chains also have increasing market power, which they can use to make sure the products they sell are safe and high-quality. Furthermore, some retailers are increasingly "cutting out the middle man." That is, they contract with factories in China to manufacture products and ship them directly to the retailer's distribution center for delivery to the store. In those cases, the retailer is also the manufacturer and the importer, and should be treated as such for liability purposes.

For all of these reasons, retailers should continue to be accountable to consumers and stand behind the safety of the products they sell. If we undermine this accountability by shielding retailers from legal liability, products will become more dangerous and more consumers will be killed and injured.

RESPONSES FROM ANDREW F. POPPER, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, WASHINGTON, DC, TO POST-HEARING QUESTIONS FROM THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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December 21, 2007

The Honorable Linda Sánchez
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Dear Chairwoman Sánchez,

Thank you again for providing me the opportunity to testify on the problems associated with foreign manufacturers of defective goods. I have reviewed the verbatim transcript of the hearing and have made a few technical changes to that document. I will fax you the marked up copy. I request that those changes be incorporated in the final report of the subcommittee.

In addition to the transcript, you submitted for my consideration several questions, following up on the November 15 hearing.

Question 1

Is it common for defective products claims against foreign manufacturers to be dismissed on personal jurisdiction grounds, even if a large quantity of these products were sold in the United States? If so, why?

It is relatively common for courts to dismiss foreign manufacturers on jurisdictional grounds. In my written testimony I detailed a number of cases in which courts, following Justice O'Connor's plurality opinion in *Asahi*, did just that. In most of those cases, courts determined that the non-U.S. manufacturers had failed to "avail" themselves sufficiently of the entitlements and laws of the forum state.

When a foreign manufacturer has regular dealings with domestic suppliers, has employees in the United States, pays taxes, maintains a bank account, engages in marketing or product description, or otherwise has an active presence, courts can find sufficient contacts to allow for personal jurisdiction. However, where the contact involves primarily manufacturing and importing a product into the U.S., courts struggle with the question of whether the minimum contact requirement is met. The questions are straightforward: Is it enough to show that a line of products was made by non-U.S. manufacturer for the purpose of being sold domestically? Is it sufficient to assert that the goods are "in the U.S. stream of commerce?" Is it enough if the non-U.S. manufacturer is making a profit from the sales? Is it enough if it is reasonably foreseeable that the goods will be sold in more than one state? What level of contact is required to satisfy the constitutional mandate of due process and substantial justice?

In an attempt to address the questions above, I discussed a number of cases in my original statement. The following cases may also help explain the nature of the personal jurisdiction problem:

In *Pierce v. Hayward*, U.S. Dist. Court, E.D. Pa, 2006 U.S. Dist. LEXIS 81393, a plaintiff was seriously injured when a pool filter "violently exploded in his face" while he was performing maintenance work. The manufacturer of the filter was located in Ontario, Canada. The court found that there were insufficient contacts with the forum state, Pennsylvania, despite the fact that it seemed relatively foreseeable that the product in question would be used in Pennsylvania. The court examined both the sales history and internet documentation for the product and concluded that the exercise of specific jurisdiction, under these circumstances, was inconsistent with the mandate in *Asahi*, thus relieving the defendant of any responsibility.

In *Zombeck v. Amada*, U.S. Dist. Court, W.D. Pa., 2007 U.S. Dist. LEXIS 84563, decided November 15, 2007 (ironically, the date of the hearing convened by your committee to consider this very question), plaintiff's fingers were crushed and ultimately required amputation after they were caught in a hydraulic press brake manufactured by defendant Amada Corporation. Plaintiff brought suit against defendant, a Japanese manufacturer. The suit was dismissed because the court found that the plaintiff did not show that the defendant's activity satisfied the "purposeful availment" requirement derived from Justice O'Connor's plurality opinion in *Asahi*. The court noted that the defendant did not "intentionally reach out" to customers in Pennsylvania, did not "actively solicit" business in Pennsylvania, and that while defendant maintained a website for users of its product that included an interactive feature, this was little more than a vehicle for "submission of comments." Although plaintiff was able to show that Amada finances and leases its products in Pennsylvania, it could not show what the court characterized as "day-to-day" control by defendant Amada.

In *Affatato v. Hazet-Werk*, U.S. Dist. Court, E.D. Pa., 2003 U.S. Dist. LEXIS 21067, plaintiff sustained a head injury after a spring clamp he was attempting to install "popped" and struck him. The manufacturer of the spring clamp, Hazet-Werk, is a German corporation. Despite the fact that Hazet is a major supplier for Mercedes-Benz sold in the United States, the court found that it lacked jurisdiction. It noted that there were no exclusive distributorships, and no purposeful availment of Pennsylvania rights and entitlements that would satisfy the minimum contact requirements. Hazet is a foreign-based entity, the court held, with "no employees or assets in the forum and does not market or sell any products in the forum." The fact that Hazet's products are used extensively and foreseeably was insufficient to convince the court to confer jurisdiction.

In *Envirotech Pumpsystems v. Sterling*, Dist. Court, Utah, Central Division, 2000 U.S. Dist. LEXIS 16942, the plaintiff brought an infringement action against several foreign corporations. The defendant, Willser, is a German corporation. Plaintiff, Envirotech, argued that Willser's goods entered the United States "with the full knowledge that those infringing goods would be entering the stream of commerce . . . and could end up in the forum state." Envirotech claimed that Willser "knowingly directed

the importation" and that it was "reasonably foreseeable that the infringing pumps might find their way into Utah." Rejecting the plaintiff's argument, the court found that since the defendants had not "made, used, sold, or offered for sale . . ." the product in question in Utah, the foreign manufacturer could not be subject to the jurisdiction of the court. Its contacts were found to be "not continuous and systematic" and, even though there was ample communication provided through a website, the contacts were deemed insufficient based on the court's understanding of the plurality opinion in *Asahi*.

Adherence to the *Asahi* plurality is also common at the state level. For example, in *Vargas v. Hong Jin*, (636 N.W.2d 291 (Mich. App. 2001) the plaintiff, a minor, sustained a severe head injury in a motorcycle accident. Plaintiff alleged that the injuries were exacerbated by the defective nature of the helmet he was wearing produced by Hong Jin, a Korean manufacturer. The helmet in question was sold regularly throughout the state. The court found, however, that because Hong Jin does not manufacture its products in the state of Michigan, nor does it have an officer, agent or representative in the state, nor does it own or possess property in the state, nor does it promote directly its products in the state, the state has insufficient minimum contacts to ensure a fair trial. All this makes sense until one realizes that these helmets were manufactured with the purpose of being sold in the United States and that it was perfectly foreseeable that they would be sold in Michigan. The store in which the helmets were sold, Specter's Cycles, sells Hong Jin helmets regularly and is located in Owosso, Michigan. The court focused on the fact that the products were imported into the United States to a distributor in Wisconsin, not Michigan, and that they were disseminated from the distributor to Michigan.

In each of the above cases as well as those in my written testimony, the manufacturer of a defective product was not held accountable. That is an unacceptable situation. The simple fact is that many U.S. courts find the requirements in *Asahi* a blunt prohibition against the exercise of jurisdiction over foreign manufacturers. The plurality opinion commands a level of "purposeful availment" of the specific rights and entitlements in the forum state, a requirement that cannot be met in many instances where the product is manufactured abroad and then imported into the United States. As these cases demonstrate, even when a foreign manufacturer's products foreseeably enter the stream of commerce in the United States, generate a profit for the manufacturer, and proximately cause harm, the manufacturer stands a very good chance of avoiding responsibility when those products injure or kill U.S. consumers.

In the final part of your question, you ask why foreign manufacturers are relieved of responsibility when they produce deadly products that are foreseeably present in the stream of commerce in the United States. Beyond the requirement that U.S. courts adhere to the precedent established by the United States Supreme Court[1], there is the fact

[1]It should be noted that not all courts follow Justice O'Connor's plurality opinion. Some follow Justice Brennan's concurrence which permits personal jurisdiction using a more simplified "stream of commerce" test. The Supreme Court has not resolved this difference of opinion. *Asahi* can be read as a direct invitation to Congress to settle this matter.

that 5th and 14th Amendment Due Process demands fundamental fairness and substantial justice – and that requires some form of minimum contacts prior to the assertion of jurisdiction.

For the last half century, legal scholars have debated the activity necessary to constitute minimum contacts. While that debate continues, given the admonition in the plurality opinion in *Asahi*, a number of courts have been hesitant to impose their authority if the plaintiff's claim boils down to the assertion that the products were foreseeably present and, by intention, in the stream of commerce of a particular state. There is, however, no constitutional mandate to implement the definition of minimum contacts articulated in Justice O'Connor's plurality opinion.

Question 2

Whether Congress can authorize federal personal jurisdiction over alien defendants based on an aggregation of national contacts, as opposed to contacts between the defendant and the state in which the court sits.

This question has two parts: what constitutes an aggregation of contacts and whether it is constitutional for Congress to use the aggregation of contacts as a basis for jurisdiction.

As to the question of constitutionality, I am aware of no constitutional impediment to using an aggregation of national contacts for personal jurisdiction. Further, the plurality opinion in *Asahi* stands as an open invitation for Congress to define "minimum contacts" using, *inter alia*, the aggregation of contacts formulation.

If there is a constitutional problem, it might be framed as follows. Once the Supreme Court declares decisively that which constitutes the absolute minimum for personal jurisdiction, based on the 5th and 14th Amendments, a law that undercuts that declaration, diluting further the nature of minimum contacts, would be constitutionally suspect. That said, I do not believe that you can read *Asahi*, *World Wide Volkswagen*, or similar cases as the last word on minimum contacts or the nature of that which is required for a proceeding to conform with our notion of due process, fair play, and substantial justice. Were the court, at some subsequent point, to declare that the absolute minimum requirement for personal jurisdiction includes the cabined notion of "availment" set out in the *Asahi* plurality, the constitutional problem would become rather pronounced.

As to the second part of your question, regarding "how many national contacts are sufficient for a U.S. court to constitutionally assert jurisdiction," while there is no clear answer, two approaches come to mind.

First, if a product is sold in two or more states, an argument can be made that it is a product in *interstate commerce*. A product brought into the United States by a wholesaler or large retailer and shipped through the various states is in interstate commerce. Given that the Supreme Court has interpreted liberally the term "interstate

commerce," you might consider the straightforward nature of an interstate commerce requirement as a basis to determine aggregation of national contacts.

A second approach would be to create a distinction between products that are coincidentally present in a state and those that are *foreseeably present in more than one state*. If it is reasonably foreseeable that a product will be sold in more than one state, that could be used as a foundation requirement for the determination of an aggregation of national contacts.

Other approaches, while possible, are problematic. For example, were Congress to take an approach by which aggregation is determined by a dollar value or amount, it seems almost inevitable that the amount would be controversial and probably both over-inclusive and under-inclusive. Jurisdictional amount requirements have not fared well over the years and this seems an inopportune circumstance for the imposition of a dollar value requirement as a means of defining aggregate contacts. Another approach is to use the enumeration of units of sale as a threshold requirement for aggregation of contacts. Again, as with dollar values, this seems both over-inclusive and under-inclusive and, on its face, arbitrary.

One final point. While I favor an aggregation of national contacts formulation, I would hope that there is consideration given to the straightforward "stream of commerce" test set forth in Justice Brennan's concurring opinion. It provides a perfectly rational and legitimate means to deal with the problem of foreign manufacturers.

Question 3

Whether there is support for holding foreign manufacturers accountable and doing so through an import license requirement.

In the last six months we have learned of virtually millions of foreign manufactured goods sold in the United States that are defective, dangerous, and deadly. The testimony provided on November 15, 2007 by all members of the panel details exquisitely the range and nature of the problem. Based on that testimony[2] and on what I have seen and read thereafter, there is broad-based support to hold foreign manufacturers accountable.[3] This is particularly so since, at present, standard agreements between retailers and manufacturers provide retailers with indemnification in the event of a

[2]The witnesses covered the full range of the field, from those strongly favoring tort reform to those who are stridently opposed.

[3]It should be noted that solving the personal jurisdiction problem and securing accountability are two different tasks. Even assuming federal courts are able to secure jurisdiction over foreign manufacturers, there are difficulties associated with the discovery process and the collection of judgments on foreign entities.

product failure. If foreign manufacturers are outside the jurisdictional reach of the courts, injured consumers could be left without recourse.[4]

Foreign manufacturers who sell goods that, foreseeably, will be purchased and used in the United States ought to bear responsibility when those products fail, much the same as U.S. manufacturers. It is patently unfair to U.S. manufacturers to bear full responsibility for product failures when their foreign competitors can be relieved of liability solely based on the fact that they are located outside the United States.

In other areas of law, for example antitrust, the Congress and the courts have had no difficulty with the notion that non-U.S. entities that have a direct and real effect on U.S. commerce bear responsibility for those consequences. The field of product liability should be no different, both from the perspective of fairness to the manufacturers and, more importantly, from the perspective of fairness to injured consumers.

Finally, you asked whether inserting in import licenses the requirement that foreign manufacturers submit to the jurisdiction of U.S. courts would cut down the number of defective goods sold in the United States.

If foreign manufacturers know they are subject to the jurisdiction of U.S. courts, they would have to take into account their liability before bringing defective and potentially deadly goods into the United States. Further, it would seem only logical that any retailer or distributor of those goods would require, as a condition of importation, that their contracting partner secure a bond or other protection in the event the goods fail.

Incentives of this type have proven effective for the last hundred years. It is the most straightforward proposition in all of tort law. The potential for liability produces an incentive to make safer and more efficient products. Assuming there is some coherent means for enforcement of responsibility, it is a foregone conclusion that the potential for liability, in this instance backed by an import license, would cut down on the number of dangerous goods.

One final concern: I imagine there will be those who argue that the free trade goal in NAFTA and similar agreements suggests caution in imposing any additional obstacles to the importation of goods into the United States. Were the imposition of responsibility unreasonable or unduly onerous, they would probably have a good point. Here, the

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[4]To be sure, state statutes and the common law of product liability suggests that in the event a manufacturer is unavailable for service process or is bankrupt, the retailer or wholesaler is obligated to take up the slack. As a practical matter, unless those parties have prepared for this eventuality, *i.e.*, secured adequate insurance, this protection can be illusory. Small retailers are, for the most part, in no position to cover the costs of a major product failure. Thus the sole meaningful recourse is the foreign manufacturer, recourse that is denied if the plurality opinion in *Asahi* continues to be the dominant position in U.S. courts.

imposition of responsibility is neither unreasonable or onerous. In fact, it is the same obligation that must be met by all U.S. manufacturers.

I appreciate the opportunity to respond to the questions of the committee. If there are further inquiries, please do not hesitate to contact me.

Sincerely yours,

Andrew F. Popper
Professor of Law

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