Fairness to Americans Injured by the Products of Foreign Manufacturers

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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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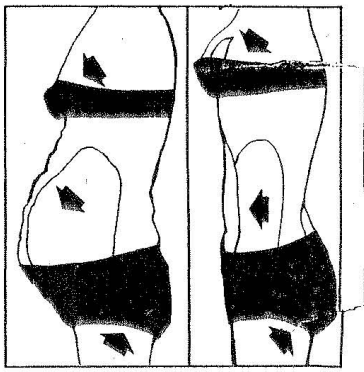

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