STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

"Protecting Americans from Unsafe Foreign Products Act"

May 1, 2008

Chairwoman Sanchez and Members of the Subcommittee:

Thank you for the invitation and opportunity to discuss the many difficulties associated with holding foreign manufacturers accountable in cases involving defective and dangerous imported products.

My name is Richard R. Schlueter and I live in the suburbs of Atlanta, Georgia with my wife, Michelle, and three children. I am a Partner with the law firm of Childers, Buck & Schlueter, LLP in Atlanta, Georgia. I received my Associate of Arts Degree at Emory at Oxford University; my Bachelors Degree from Emory University; and my Law Degree from Georgia State School of Law. In the course of my fifteen years of practice as an attorney I have represented individuals and companies primarily in the Federal and State Courts of Georgia. Over the last several years I have been confronted with legal matters involving product liability claims against foreign manufacturers. I have come here today to share with you the experience that a client of mine recently endured in seeking justice for a defective product that was responsible for the death of her 13 year old daughter and only child.

The product was a Chinese-made electric scooter that was imported through the Port of Long Beach, California, distributed and branded by a California corporation, and sold by a retailer at a booth at a flea market in Gainsville, Georgia. The scooter, though marketed for children, was not a toy. It was capable of reaching speeds in excess of 20 mph and had a single-band braking system made of an organic composite material similar to leather. From an engineering standpoint, this product was defective by design and, as a result, was incapable of stopping a rider after a short time of operation. Additionally, the front wheel was small and capable of turning 180 degrees. Though this vehicle was marketed and sold as a toy and labeled as an off-road vehicle, it had a headlight, turn signals, and a tail light. By definition, this product

should have been required to meet Federal Motor Vehicle Safety Standards (FMVSS) and declared as such on the HS-7 customs form. Proper inspection should have resulted in an inspection and detention of this illegal product at the port. Federal Motor Vehicle Safety Standards would have required, among other rigid requirements, that the vehicle have a dual safe brake system.

Foreign corporations appear to have learned to send non-conforming products that do not meet either certain safety standards or compliance regulations through specific ports at which there is a lower likelihood or chance of inspection of products that would otherwise be subject to seizure. Essentially, it is my understanding that very few containers are inspected at the Port of Long Beach for violations of rules and regulations of the Consumer Product Safety Commission or the U.S. Dept. of Transportation as compared to other ports.

The defective and illegal product in my case resulted in the death of my client's 13 year old daughter while she was attempting to meet her friends at a bus stop. My client's daughter, Lauren, was hospitalized for three days while she fought for her life, with her mother standing vigil for those three days. My client ultimately realized that she would have to let her daughter go while at the same time making the difficult decision to donate her daughter's organs to give another child a chance at life. She was permitted to rock her child one last time in the hospital morgue after making the donation of her child's organs.

Following her daughter's death, my client sought an investigation from the Consumer Product Safety Commission, and sought the assistance of a lawyer. She was told by the first attorney she contacted that they would not take the case because the manufacturer was believed to be a Chinese entity. Our firm was later contacted and we agreed to take the case while at the same time explaining that manufacturing defect claims against a Chinese corporation could be

proven, but that it would be difficult, if not impossible, to hold the manufacturer accountable if we obtained a judgment. Under Georgia law, as in many other states in the United States, a distributor or end retailer does not have liability for design defects or defects in the manufacturing process. We knew the distributor was a California corporation, but had no information as to the manufacturer. An inspection of the scooter revealed no identifying information either by serial number or name. We had no guidance whatsoever as to the name of the manufacturer.

We later filed a case against the California distributor and Georgia retailer, both of whom were easily served with process. Depositions taken of the California distributor revealed the name of the Chinese company, which was then added to the lawsuit. At the outset it seemed that the Chinese company could be found and served, as we initially assumed that it had to have a registered office or business in the United States. We believed this to be so because the company's web site claimed that every year, it exported $120 million in goods, including a wide array of toys and vehicles, to U.S. retailers like Wal-Mart. However, after much effort, we were not able to identify any Registered Agent or office in the United States. As a result, the complaint and an Acknowledgement of Service was initially sent by Certified Mail, which is a permitted mechanism under Georgia as well as Federal law. This method of service allows a defendant to acknowledge service and potentially tax the cost of service to a defendant who does not cooperate in acknowledging service--admittedly, this rule is not applicable to extraterritorial service. After no answer was received from the Chinese company, we concluded that service would have to be performed pursuant to the provisions of the *Hague Convention Of The Service Abroad Of Judicial And Extra Judicial Documents In Civil And Commercial Matters.* This is a costly and complicated process. Pursuant to the provisions of the Treaty, the complaint and

related documents were translated to Mandarin Chinese and then forwarded to the Central Authority, which is the Bureau of International Judicial Assistance. The *Hague Convention* is the controlling international treaty related to service of process between the United States and China. The *Hague Convention* stipulates the methods for service. Each participating nation filed certain reservations when signing the Convention, including specific restrictions prohibiting service by non-governmental persons (private process servers). The only method available for service in China is through the Central Authority.

Approximately three months after sending the translated documents, service was accomplished by the Central Authority on a security guard at the factory where the product was manufactured, rather than on the Registered Agent. According to an expert in the field of extra-territorial service abroad, service of process in China upon a corporate defendant is typically completed by serving someone other than the officer of the corporation or the Registered Agent. Top level officers and agents routinely shield themselves from outside contacts, even when they are made aware of service of process being attempted upon them.

China is a Communist nation ruled by a totalitarian government with strict laws and regulations related to every aspect of life within the country. An American litigant has absolutely no influence, right or control on the method, manner or timing of service. He or she has no other option but to turn the service papers over to the Ministry of Justice for service of process through the Central Authority, hope for the best, and wait.

In this case, after service of process was perfected by the Central Authority, contact was made by the Chinese company via a direct letter from the company requesting an extension of time to file its Answer. The next communication we received was a phone call from a Georgia lawyer indicating he was going to be retained and requesting an extension of time to answer the

complaint, which we granted. The Chinese company then sent a letter to my firm and the court stating in part that they were reserving their "right to ignore the charges." They did not retain a lawyer and did not file an Answer. The case then went into default, and after sending notice to the Chinese company we obtained a judgment against the Chinese company. We knew the judgment would likely never be collected because China does not recognize the validity or enforcement of judgments rendered in the courts of the United States.

After obtaining the judgment, we sent post judgment discovery to the Chinese corporation, which it ignored. Customs data compiled by a private corporation was purchased and revealed the destination of goods that were shipped to the U.S. under the name of the Chinese corporation. Of note, after the judgment was obtained, the name under which the company shipped goods to the U.S. was changed. Based upon historical data of shipments made prior to the judgment, discovery was sought from third party U.S. corporations who were receiving goods from the Chinese defendant. After sending said discovery and copying the Chinese company by mail to its Chinese address, we received notice from a well known and recognized Atlanta-based defense firm that it would be representing the Chinese company. The defense firm then filed a Motion to Set Aside the Judgment, and eventually appealed the judgment premised largely on lack of proper service and personal jurisdiction. The maneuver had the effect of delaying our efforts to gain information concerning the Chinese company's activities in the United States while post judgment motions were heard. The motions were decided in favor of the plaintiff, and the Chinese company appealed.

In an effort to prove that the Chinese company had minimum contacts to Georgia, a central issue that was being raised by the company in its appeal, we had to retain the services of a well-respected civil procedure professor from the University of Georgia School of Law, as well

as two additional Georgia lawyers. We further hired law firms in Florida, Texas, California and New York to assist in our attempts to locate assets, and retained experts in the field of service of process under the *Hague Convention*, as well as experts in U.S. Customs. While the Georgia judgment was on appeal, we sought to domesticate the judgment in Florida, Texas, California and New York to assist in the discovery process and any potential attachment of assets of the Chinese company. Each state had different requirements as to comity, and required additional notice and service on the Chinese company. These requirements again cast confusion whether service would need to be perfected under the *Hague Convention* for domestication of the judgment in other states.

The Chinese company claimed it had no contacts with the United States, and claimed that the title of its goods passed at the port in Shanghai. It essentially claimed that the goods were sold in China and not in the United States (FOB Shanghai). The Chinese company further claimed that it was not foreseeable that it could be hailed into a court in Georgia, as it claimed that any shipments it made were not sent directly to Georgia. This argument required extensive discovery of information from Customs' documents because of the Chinese manufacturer's lack of cooperation. Eventually we were able to prove that shipments were made to a warehouse in Georgia several miles from my home, and were able to obtain two affidavits to that effect.

In an abundance of caution due to not knowing the outcome of the appeal, service was decided to be again performed on the Chinese corporation in the underlying Georgia action on the chance the appellate court would rule against us. During the appeal process, the Chinese company advertised on its web site that it would be displaying its products at a booth at the SEMA Las Vegas Automotive Show in upcoming months. Even though we knew and later documented this visit, Georgia law did not permit this as a service opportunity. We, therefore,

attempted service again under the *Hague Convention* at additional significant expense which took eight months. We later learned that the Chinese company had designated a shell Florida corporation for the purpose of meeting the service of process requirement relating to regulatory issues for the EPA in regard to air quality issues. Such a designation was required for the importation of its gas operated ATVs. The Florida shell corporation was set up through an accountant, and performed no actual business. I personally flew to Florida and visited the address for the shell corporation. A freight forwarding company under another name was located at the address. I later learned after taking depositions in Florida that the address was being "borrowed" and used simply for receiving mail sent to the shell Florida corporation. The Chinese company took the legal position that the Florida entity was only authorized to accept service related to regulatory issues on its behalf, that it had no assets and conducted no business, and that it was not authorized to accept general service of process for civil claims. There was no statutory or case guidance to determine if service on the Chinese company through its designated EPA regulatory agent would act as service for a civil claim.

When the company failed to post a supersedes bond, we renewed our efforts to garner information and potentially garnish or hold any asset that could be found within the territorial confines of the United States pending the outcome of the appeal. There was an extreme heightened concern that if the Chinese company had any assets or holdings within the United States, such assets would be concealed or fraudulently transferred to another entity pending the appeal. We later learned that such a transfer did occur in a multi-million dollar wire transaction to Hong Kong within days of the deposition of a Nevada corporate representative whose principal place of business was in Texas that was holding assets of the Chinese Company. This transfer of assets resulted in additional litigation in Texas with the Nevada corporation and new

Chinese company that received the funds. As a new Chinese company was now involved, adding it to the litigation would have required service under the *Hague Convention* as it had become an essential party because the Nevada corporation was believed to be judgment proof after the transfers.

I have relayed the aforementioned to merely summarize my recent experience on how foreign manufacturers who enthusiastically seek to enter the U.S. market do not have the same accountability as domestic manufacturers. In China, a United States judgment can be ignored. Frankly, the foreign manufacturers do not have equal accountability. American consumers may not be aware that these foreign manufacturers employ substandard quality control to inflate their profit margins with little concern for liability. Lately, we have seen this in the news with an array of products being imported, those most prominently highlighted from China being medicine, food and toys. A bill that would allow a plaintiff to have additional avenues to expedite or insure service of process for foreign manufacturers that have access to our open markets will at least give the consumer a chance at seeking accountability in situations where they have been sold a defective product.

For these reasons, I strongly support your legislation, H.R. 5913, the "Protecting Americans from Unsafe Foreign Products Act." Thank you, Chairwoman Sanchez, for taking the much needed first step towards safer imported products for American consumers. It is respectfully submitted that this Committee should look long and hard at the growing trend and problems associated with foreign manufactured goods and items reaching our ports with little oversight, protection, or inspection of the containers they arrive in. It is the end user, the consumer, who is harmed. It is proper and fair to not only give the consumer a voice but to ease

their burden in seeking a remedy from the harm created by the foreign manufacturer. I look forward to working with you and your staff on passing this very important legislation.

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