CHAPTER 5
PRODUCTS LIABILITY

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Foreign manufacturers, distributors and exporters of products destined for the United States have faced a high number of lawsuits in U.S. courts stemming from personal injuries their products may cause in the United States.[1] The damages that an American court may assess can amount to millions of dollars, and the grounds on which liability may be imposed are broad and encompassing. Therefore, foreign businesses need to become familiar with American product liability law and the defenses available to counter the substantial risks created by such law.

Set out below are the basic legal principles that generally govern product liability lawsuits, the rules of jurisdiction that may apply, the reach of U.S. law, the targets of such suits, and the ability of injured parties to pursue collection of judgments against foreign businesses or their affiliates. To minimize the risk of litigation, foreign manufacturers need to adhere to all applicable regulatory and industry standards, test and carefully design their products, document their compliance with all applicable laws and regulations, and label and otherwise adequately warn about their products. Foreign businesses must become completely familiar with advances in the art and science of the product, quality control procedures, and design alternatives evaluated on a risk-benefit basis.

1. VERY SUBSTANTIAL JURY VERDICTS

The United States has witnessed a substantial increase in the number of product liability lawsuits. Even in the 1980s and 1990s, courts in the United States annually processed more than 90 million civil cases.[2] Of those, a small percent (for example, about 3% in 1992), were products liability cases, but the sheer number was still huge (over 2 million cases). Recent data on product liability filings in federal courts alone reveals that it is highly likely a great number of cases will continue to be brought in U.S. courts. According to a recent report on federal caseloads, during the 12-month period ending March 31, 2015, there were 43,187 cases filed under the category "product liability" in United States District Courts (the federal trial courts).

Median jury verdicts for product liability cases were the highest among all personal injury cases. The median jury verdict in product liability cases was $1,500,000[3] for the 2000-2006

[1] The growth of exports from abroad to the United States will likely result in a further increase in the number of lawsuits between American and foreign business that arise from contract disputes such as non-payment, breach of warranty (goods not conforming to the agreement), or delivery disputes (products delivered late or in short supply). These types of lawsuits are addressed elsewhere in this booklet. This chapter focuses primarily on the liability of foreign businesses whose products cause personal bodily injuries, rather than solely economic loss, in the United States.

[2] Kauder, *1 Caseload Trends* (August 1995). This article contains much of the data referenced in this section.

[3] We are unable to provide the actual median value of all product liability cases, since about 90% of all cases settle, and the parties typically do not publish and often keep the settlement amount confidential. Jury Verdict Research study, however, recently reported that the above figure is the median compensatory award in products liability cases.

time period, and 30% of the cases resulted in verdicts over $1,000,000. Although plaintiffs only prevailed in 19.6% of product liability cases in state courts in 2005 (compared with 54.9% for toxic substance cases (like asbestos), and 64.3% for auto accident suits), when plaintiffs won, they won large damage awards.[4] Foreign businesses should therefore give high priority to managing risk associate with product liability litigation.

2. EVOLUTION OF BASIC PRODUCT LIABILITY LAW IN THE UNITED STATES

Product liability law in the United States has undergone a steady evolution from a fault-based system to one primarily associated with charging a product manufacturer with a very strict duty to pay injured parties for injuries associated with the manufacture, distribution and sale of inherently dangerous products. During most of the 20th century, persons injured by dangerous products had to establish that the manufacturer or seller was at fault for the accident and that such fault was a cause of their injuries. This fault-based liability system, typically referred to as negligence law, originated in English common law and prevented many injured parties (the plaintiff) from recovering damages against manufacturers and sellers (the defendant) because the plaintiff could not prove that the defendant had failed to exercise reasonable care under the circumstances. The plaintiff was required to show that the defendant did not comply with the then existing standard of care for the design, manufacture, or warning about the risks inherent in the use of the product.

Courts in the United States[5] became increasingly concerned with the plight of persons severely injured by products, since most companies had the ability to insure against the risks associated with the sale of their products and, therefore, could spread such risks among all consumers (customers) of their products. In the early 1900s, American courts began to apply legal concepts, such as absolute or strict liability, to cases involving injuries caused by tainted food, but they did not extend the reach of those concepts to ordinary product claims. Courts reasoned that the public health hazard of tainted food was so great that it was appropriate for food sellers and processors (such as restaurants and slaughter houses) to bear full responsibility for the damage caused by a person eating their food products – regardless of whether the defendant had exercised all possible care in the manufacture or handling of such products.

During the mid-1900s, American courts began expanding the use of strict liability principles to so-called "inherently dangerous" products (such as explosives), because

[4] Special Report, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (Revised April 9, 2009) at p.4

[5] Under the United States federal system, each state can develop its own law in areas such as product liability. In each of the states, common law rulings by the courts supplement the state's statutory law to some extent. In addition, the extent to which the state's previous existing common law remains applicable to product liability claims on issues such as damages can differ depending upon the state. Until the United States Congress adopts uniform standards for product liability cases, we would expect the states to continue expanding each state's laws and common law principles, resulting in differences in verdicts and settlements depending upon where a case is filed. The size of jury verdicts also varies substantially by and within states. This results from differences in substantive law, abilities of trial counsel, specific case facts, economic perceptions and experiences of juries, and demographic factors such as the composition of the jury, the wealth of the region and the current economic climate.

courts believed that manufacturers should exercise a very high degree of care in making and selling such inherently dangerous products. The courts held defendants liable for injuries caused by such products if the courts found the products were defective in manufacture or design. In some states, this liability became absolute for certain dangerous products.

Courts in the United States began focusing on the adequacy of warnings given by product sellers about the nature of the risks associated with product use, including warnings for products designed for use by children. Gradually, the courts began expanding these various categories of strict liability until, by the 1960s and 1970s, in virtually all states, any product that caused injury would expose a manufacturer or other product seller to liability, regardless of fault, if the product were found to be "unreasonably dangerous."

Under these strict liability principles, a product seller (including a seller or manufacturer of a component or the entire product) can be held "strictly liable" if the defendant is one of the parties in the chain of the delivery of the product that caused the injury. The plaintiff has to prove that (a) the product was defective,[6] (b) the defective product caused the injury, and (c) the plaintiff suffered damages resulting from the injury. The plaintiff generally does not have to demonstrate that the manufacturer was negligent, although some recent changes in statutory law have reintroduced fault concepts. Instead, a defendant can be held liable for injuries if the product is found defective, even if the defendant had done everything possible to make the product safe.

The courts and legislatures define "defect" in various ways. Defects can exist in both the construction and design of the product or in any lack of adequacy of the product seller's warning. Courts have declared products to be unreasonably dangerous, and thus defective, if the product is dangerous to an extent beyond that which would be contemplated by ordinary consumers who purchase the product with ordinary knowledge common to the community.

American law requires product sellers to warn of dangers about which the manufacturer should know, and inform consumers about how to avoid them. Medicines now come with labels on dosage and side effects of the product. Cigarettes in the United States contain warnings about the severe health hazards associated with their use. Not only must the warnings be present, they also must adequately and sufficiently describe the most basic risks of using the product, and be conspicuous. If the warnings are on a label that no one can reasonably expect to notice or read (because the print is too small or not understandable to an average American consumer), a court may rule such warning is inadequate and rule the product is defective as a result.

Liability for product defects can also arise from how products are marketed. If a product seller advertises its products in a certain manner, consumers will claim they relied upon

[6] The concept of "defective products" has expanded over time as discussed more fully below. A product can be "defective" if it is found "unreasonably dangerous" for its intended purpose.

such marketing in using those products in that manner. If representations or advertisements are made, they must be accurate.

A party injured by a defective product usually can recover compensatory damages consisting of the party's medical costs and expenses, lost wages, property losses, and similar out-of-pocket damages. In most states, a plaintiff can recover an unlimited amount of money for pain and suffering; in other states, limits are placed on such damages. If a party is unable to work or might require medical treatment in the future, juries can award damages based on the prospective value of such losses. Plaintiffs use economists to estimate the amount of losses that an injured party will suffer. Defendants counter this testimony by trying to disprove the extent of injury and the amount claimed. Finally, state law on the amount of and whether a jury can award punitive damages vary by state. Punitive damages are imposed to punish a product seller when it grossly fails to produce safe products.[7] Only some states allow a plaintiff to seek punitive damages.

3. THE REACH OF U.S. COURTS IS EXTENSIVE

Courts in the United States frequently deal with cases brought against businesses abroad that have manufactured or sold a product made outside the United States which caused an injury to a person in the United States. For a U.S. court to exercise its authority or jurisdiction over such a defendant in a product liability action, the plaintiff must show that the defendant has a connection to the jurisdiction. To successfully challenge the court's jurisdiction, the defendant must establish the lack of such a connection. Even if the defendant delivered its product in another country, this may not serve as an adequate defense to jurisdiction, as long as the seller or manufacturer connected with the defective product had reason to know that the product was entering the stream of commerce and could cause damage in the state where the lawsuit is started.[8]

However, a plaintiff must comply with conventions, treaties and applicable foreign law for serving its lawsuit on the foreign-based defendant, if it wants to bring that business into a U. S. court.[9] In the case of a service based on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which has been adopted by the United States and

[7] In a limited number of cases, juries have awarded catastrophic punitive damages. Although the claims did not arise from product liability, a jury awarded $5 billion in punitive damages against EXXON Corporation as a result of the grounding of an oil tanker off the coast of Alaska. A federal Court of Appeals ultimately reversed that decision.

[8] Of course, as a practical matter, if a large foreign exporter has purchased a defective product from a small regional or local U.S. manufacturer that has limited assets, we would be surprised if that manufacturer were sued in the United States. Plaintiffs would try to sue the exporter. American law might place ultimate responsibility for a loss on the exporter, if the court concludes that the foreign manufacturer cannot be brought in to answer for the damage to the plaintiff. Moreover, we understand that foreign businesses frequently provide for litigation in their home country of disputes that arise from their business dealings *in* their home country. Thus, a foreign exporter may have to pursue its claims in its home country for defective products made by the local U.S. manufacturer. This can, at times, result in a party with less responsibility for causing an injury ultimately paying all or most of the damages paid to a plaintiff in the United States.

[9] We do not attempt to provide a comprehensive discussion of these points but only highlight a couple of the key principles.

many other countries, the legal documents can be served by first being sent to a specific arm of the foreign government, and then delivered to the defendant manufacturer or supplier through the foreign court system. Although service of these papers is relatively simple, this does not mean that jurisdiction is automatic.

Assuming the plaintiff follows the proper rules for commencing the lawsuit, the defendant must appear in the court, in the United States, in the state in which suit was filed, within the time period provided in the notice, through counsel licensed or otherwise admitted to practice in that court. The defendant can challenge whether the plaintiff adhered to the proper means of commencing the lawsuit, whether the notice of the lawsuit complied with legal requirements and whether jurisdiction existed.[10] If the defendant fails to appear to defend itself, the plaintiff can secure a judgment against the defendant by default.[11] The plaintiff can then proceed to enforce the default judgment to collect the amount awarded. If a foreign-based defendant has assets in the United States, the plaintiff can seek a court order requiring a sale of the defendant's property to satisfy the judgment.

4. THE EFFECT OF INTRA-CORPORATE RELATIONSHIPS AMONG FOREIGN PARENT CORPORATIONS AND AMERICAN SUBSIDIARIES

Many foreign businesses have created United States-based subsidiaries for legitimate tax, customs and business reasons. Those entities can be sued for injuries caused by products made by foreign-based manufacturers.[12] Numerous issues arise from these relationships including:

- Is the presence of a subsidiary in the United States an adequate ground for jurisdiction over the foreign parent corporation?

- Does the joinder of a subsidiary require the parent corporation to produce evidence in the United States, including personnel, even if the parent is not a party?

- Does a judgment against a subsidiary serve as a judgment against the parent corporation?

[10] Jurisdiction refers to the authority of a court. A court has to have "jurisdiction" or authority to act in a case before the court's rulings will be valid. The court must have jurisdiction over the person, including the corporate entity sued, and jurisdiction over the subject matter of a case.

[11] A default judgment is entered when a defendant, over which the court has personal jurisdiction, fails to appear in court to defend itself. Under U.S. law, a default judgement has the same force and effect.

[12] Risk management of product-related claims will arise from agreements with joint venture partners, American-based agents and sales representatives, joint marketing agreements and other business arrangements. For example, companies can contractually agree on which entity will bear liability for a product claim through indemnity and contribution agreements and contracts obligating a party to acquire insurance. These subjects, although highly relevant to risk management of product liability claims, are too broad to be covered thoroughly in this chapter.

- Can the parent corporation's assets be seized to collect a judgment against the subsidiary?

There are no simple answers to these questions. Although a subsidiary's presence in the United States generally does not create jurisdiction over the parent, if the parent made the defective product, it could be subject to U.S. jurisdiction for that reason alone, regardless of whether it has a subsidiary. When the parent has no connection with the subsidiary's manufacturing activity, the plaintiff should not be able to obtain jurisdiction against the parent simply because it owns a U. S. subsidiary. Sometimes, however, an officer of the subsidiary is also an officer of the parent and service on this officer would be considered service on the parent. To defend itself in that situation, the parent would have to retain counsel in the United States to try to convince the court that the parent has no responsibility for the defective product involved in the case.

Unless a judgment is imposed against both the parent and its subsidiary, U.S. courts generally do not permit seizure of the parent's assets to satisfy a judgment against a subsidiary. Once the parent delivers cash or assets, including merchandise, to the subsidiary, a plaintiff can seize those assets to satisfy a judgment against the U.S. subsidiary, even if the parent does not receive payment for those goods from the subsidiary. Therefore, provided a subsidiary has operated properly under U.S. law, a judgment against a subsidiary is not usually a judgment against a parent.

However, U.S. law provides for the "piercing" of a corporation's veil[13] when the corporate form has not been maintained or has been abused. If a subsidiary has been adequately capitalized and run as a separate entity, courts will generally not permit a plaintiff to pierce the veil of the subsidiary to seize the assets of the parent to satisfy the plaintiff's judgment. However, each case turns on its facts and the particular state's law governing such matters.

5. CONCLUSION

This chapter cannot explain the extensive risk management problems of product liability law in the United States, and it only touches on some of the more important and common issues. U.S. product liability law has evolved and will change in this century as products become increasingly sophisticated and the risks of unforeseeable injuries grow. Claimants will seek to expand the scope of responsibility of manufacturers as a result. If a foreign business wants to reduce risks of selling into the U.S. market, it should become familiar with those risks and their causes. Only then can those risks be efficiently and economically managed.

[13] The "veil" refers to the usual protection afforded corporations. In most cases, a creditor cannot attach the assets'of shareholders, including a parent corporation, to satisfy a claim against a subsidiary. If, however, the proper corporate legal requirements are not followed or the parent corporation so controls the subsidiary that they are alter egos of one another, a court could permit the creditor to pierce the veil of the subsidiary and allow collection to proceed against the parent corporation, as well as the subsidiary.

Every foreign business contemplating exporting products to the United States should seek legal advice as part of its risk assessment and risk management process. The business should work with legal counsel to minimize its risk of being pulled into lawsuits and/or preparing for them. The business should have adequate insurance. It should ensure that its agreements (sales, representation, distribution, marketing and joint venture contracts) comply with applicable U.S. law and allocate liability to others, as appropriate. The business should have a records and retrieval system that permits it to show that its products were manufactured and designed properly. Additionally, the business should have a key manager able to monitor and supervise any litigation internally.

Lastly, the business should work with its U.S. counsel to cover claims and deal with insurers when a claim arises. If a business is faced with more than one claim, then management of those claims must be coordinated. Giving different and inconsistent statements of the facts (even if they can later be explained) can jeopardize a defendant's defense from one case to the next. With teamwork, product liability litigation is much more manageable and will keep such claims from undermining the success of a foreign enterprise's venture in the United States.

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