2008

Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Consumer Goods

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On Nov. 15, 2007, Professor Andrew F. Popper testified before the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law. The hearing topic, *Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products*, involved the continuing product liability problems associated with the sale of defective goods produced by foreign manufacturers. Professor Popper's written testimony, including a legislative update, is reprinted below, followed by a post-hearing addendum.

The following is the full written testimony, as edited after the hearing. Edits were made to clarify and update various arguments presented during the course of the hearing.

Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Consumer Goods

By Professor Andrew F. Popper

Professor Popper is on the Advisory Board of Product Safety & Liability Reporter. He is a Professor of Law at American University, Washington College of Law, where he teaches administrative law and torts. He can be reached at apopper@wcl.american.edu

I. Defective Goods From China: Who Is to Blame?

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. How extraordinary then to be in a hearing, speaking in favor of the imposition of liability for

 ISSN 0092-7732

those who have caused harm, and find this is a position, magically, supported by both mainstream political parties and U.S. manufacturers.

The basic question posed is not complicated: 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 2007, 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 10-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 immediate mode of incitement is not the central problem.

Non-U.S. manufacturers imported into the United States children's toys containing 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 a risk of constriction, and cribs made in China were discovered to have design flaws that created 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. They begged legislators to abolish strict liability, relieve component part manufacturers of liability, cap non-economic losses, create arbitrary time-frames in which injured persons could file claims, ratchet up standards of proof for scientific evidence, abolish joint and several liability, abolish or grossly limit punitive damages, and neuter the Consumer Product Safety Commission. 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 press (particularly *The Washington Post*), apparently delirious at the prospect of being 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 system, 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, popular, profitable, and deadly. 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 products they sell, again, what else would you expect?

II. 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.

A. Joint and Several Liability

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 those states that retain joint and several liability, retailers, distributors, or wholesal-

[1] This is not an academic ''I told you so moment. . .'' but, frankly, Congress was told that something like this would happen. With great eloquence, Professors Michael Rustad, Marshall Shapo, Frank Vandal, Joseph Page, Teresa Schwartz, Jerry Phillips, and many more testified, year in and year out, that these so-called reform measures would undermine the incentive value of the tort system. With equal eloquence, the same message was delivered by scores of lawyers who work in product safety and related fields.

[2] Strict liability for product liability 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 (Second) Section 402A.

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ers 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 manufacturer's 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.

B. Strict Liability

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 Section 402A 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 retailer's 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 recovery 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 safer.

C. Statutes of Repose

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 he or she has 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 that one has been poisoned 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, one is 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.

D. Retailer Liability

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 it is selling can be the basis for civil liability, it 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*.[3] That case holds, among other things, that under the applicable Utah common law, a defendant cannot be liable for any amount in excess of the 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, Utah law states that ''when a party is determined to be a passive retailer, there is no strict liability for design or manufacturing defects.''[4]

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 served as the incentive to conduct this hearing, suffice it to say that a number of domestic retailers involved in the sale of foreign goods will lay claim to the label ''passive retailer.'' By virtue of tort reform, they will not be liable.[5]

Given the difficulty of suing successfully foreign manufacturers and putting aside the matter of jurisdic-

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[3] 2007 U.S. Dist. Lexis 44213 (D. Utah, June 18, 2007).

[4] *Sanns v. Butterfield Ford,* 94 P.3d 301 (Utah App. 2004).

[5] 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.

tion 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.

E. Marginalization of the Consumer Product Safety Commission

Finally, 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 whether the Consumer Product Safety Commission (CPSC) 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 CPSC. It is a completely farcical argument.

The CPSC, an agency with enormous potential both to inform consumers of product risks as well as to abate those risks, has not exactly distinguished itself when it comes to being out front, protecting the interests of consumers who rely on it 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 on advertising in approximately one month by Wal-Mart.[6]

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 of 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 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 judgment, assuming one has been secured, as the following sections of this statement suggest.

III. Jurisdictional Issues Relevant to Holding Non-U.S. 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.[7] 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.[8]

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,[9] 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.[10] 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.[11]

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*.[12] 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[13] 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,[14] if the product was designed specifically for a par-

[6] 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 data generated by a European entity, not the Consumer Product Safety Commission. Barboza, *Mattel Recalls 19 Million Toys Sent From China*, THE NEW YORK TIMES, August 15, 2007, p. 1.

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

[8] 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 disputes for which the court is juridically competent.

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

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

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

[12] 480 U.S. 102 (1987).

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

[14] The O'Connor articulation of ''minimum contacts plus'' is devastating if the goal is to hold accountable non-U.S. manufacturers when their products are imported by large U.S. dis-

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ticular 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 Justice 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 . . . .''[15]

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.''[16] 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.[17]

In *Vermeulen v. Renault*,[18] the court found that ''the current 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 for in personam jurisdiction, looking at minimum contacts and then reasonable fairness, assuming the minimum contacts have been met.[19] 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.[20] This does not bode well for nearly anonymous foreign manufacturers of toys who appear never to have set foot in the United States.[21]

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.[22] In such cases, the interest of individual state courts in providing a forum is compelling. 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.[23]

While a number of courts have elected to follow Justice Brennan's concurrence in *Asahi*, the majority follow Justice O'Connor's plurality opinion, resulting in a far more difficult jurisdictional challenge for injured plaintiffs. What follows is a representative sample of recent cases in which a court faced the *Asahi* problem: whether to permit a case to go forward involving a foreign defendant who has allegedly harmed a domestic plaintiff.

A. 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,[24] there are a number of recent cases where plaintiffs have had difficulty meeting the

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tributors, and then labeled, packaged, and sold the U.S. by a company that handles all of the advertising and marketing.

[15] *Asahi* at 114.

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

[17] 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.

[18] 985 F.2d 1534 (11th Cir. 1993).

[19] 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).

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

[21] 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.

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

[23] 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).

[24] 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.

minimum contacts requirements. For example, in *Kozial v. Bombardier-Rotax*,[25] 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 state, the mandates of personal jurisdiction and fairness are not met.

In *Cupp v. Alberto-Culver U.S.A.*,[26] 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 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 of 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 United States will be a real obstacle to imposing liability.

In *Lesnick v. Lorillard*,[27] 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 United States other than profit.

Several other cases tell the same tale.

In *Pierce v. Hayward*,[28] 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*,[29] decided Nov. 15, 2007 (ironically, the date of the hearing convened 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 Corp. 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 Web site 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*,[30] 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 vehicles 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*,[31] 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 Web site, 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*,[32] 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

[25] 2005 U.S. App. Lexis 7205 (11th Cir. April 22, 2005).
[26] 308 F. Supp. 2d 873 (W.D. Tenn. 2004).
[27] 35 F.3d 39 (4th Cir. 1994).
[28] U.S. Dist. Court, E.D. Pa, 2006 U.S. Dist. LEXIS 81393.
[29] U.S. Dist. Court, W.D. Pa., 2007 U.S. Dist. LEXIS 84563.
[30] U.S. Dist. Court, E.D. Pa., 2003 U.S. Dist. LEXIS 21067.
[31] Dist. Court, Utah, Central Division, 2000 U.S. Dist. LEXIS 16942.
[32] 636 N.W.2d 291 (Mich. App. 2001).

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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, Mich. 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.

Finally, in *Burnshire Development v. Cliffs Reduced Iron*,[33] 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 activities were deemed insufficient to show purposeful availment, leaving the plaintiff without recourse. In *TH Agriculture & Nutrition v. Ace European Group*,[34] a non-U.S. 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 United States. In *Jennings v. AC Hydraulic* A/S,[35] 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.

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.

B. Recent Cases Where In Personam Jurisdiction Was Found

The challenge in asserting jurisdiction over a foreign corporation often boils down to the question whether the defendant foreign corporation did anything more than ''set a product adrift in the international stream of commerce.''[36] In *Clune*, the court relied on *Barone v. Rich Brothers Fireworks*,[37] which dealt with a 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 nonetheless 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.''[38] 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 Corp., 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.*,[39] the fact that the defendant, a non-U.S. 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 Web site 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 Web site 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 for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states.''[40]

In *Bou-matic v. Ollimac Dairy*,[41] a plaintiff sought jurisdiction over the manufacturer of a robotic milking system produced in the 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,[42] i.e., would the assertion of juris-

[33] 2006 LEXIS U.S. App. 21889 (6th Cir. August 23, 2006).
[34] 488 F.3d 1282 (10th Cir. 2007).
[35] 383 F.3d 546 (7th Cir. 2004).
[36] *Clune v. Alimac Elevator* 233 F.3d 538 (8th Cir. 2000).
[37] 25 F.3d 610 (8th Cir. 1994).
[38] 25 F.3d at 613.
[39] 498 F Supp. 2d 822 (E.D. Va., 2007).
[40] Citing *Barone v. Rich Brothers Fireworks*, 25 F.3d 610, 615 (8th Cir. 1994).
[41] 2006 U.S. Dist. Lexis 14543 (D. Cal., March 15, 2006).
[42] Judging reasonability, the court relies on seven factors: 1) The extent of purposeful interjection; 2) The burden on the defendant to defend the suit 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.

diction 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 defendant should expect to be brought into U.S. courts.[43]

In *Eli Lilly v. Sicor Pharmaceutical*,[44] 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.[45] 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*,[46] explored the question of the extent to which using an independent domestic distributor provides some insulation from the jurisdictional reach of U.S. courts. Relying on *Mott v. Schelling*,[47] the Ohio 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*,[48] that it would be ''fundamentally unfair'' to allow a foreign manufacturer to insulate itself 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 negligently designs 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 directly from those sales, the court disagreed, finding that it obtained profits from the manufacture and sale of its products in question, and saying that was sufficient to support the assertion of jurisdiction in the state.

In *Ruiz de Moina v. Merritt and Ferman*,[49] the court evaluated the factors from *Asahi* and then distilled them down to the notion that so long as the non-U.S. defendant has a ''fair warning'' that a particular activity may subject it to the jurisdiction of the foreign sovereign, the exercise of that jurisdiction does not offend traditional notions of fair play and substantial justice.

* * *

The above brief review of jurisdictional challenges does not lead to any obvious conclusion. One cannot generalize that non-U.S. 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.

Next, assuming there are minimum contacts subjecting the manufacturer to the jurisdiction of a U.S. court and there are no successful challenges to jurisdiction based on notions of reasonability or fundamental fairness, 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.

IV. Practical Problems Dealing With Non-U.S. Defendants

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

[43] 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 identify 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 a foreign sovereign, and likewise cannot lay claim to any protections under the Foreign Sovereign Immunities Act.

[44] 2007 U.S. Dist. Lexis 31657 (D. Ind., April 27, 2007).

[45] *AV Imports v. Colde Fratta*, 171 F. Supp. 2d 369 (D.C. N.J. 2001).

[46] 871 N.E. 2d 1255 (Ohio App. 2007).

[47] 1992 U.S. Lexis 13273 (6th Cir. 1992).

[48] 366 Ill. App. 3rd 419, 2006 Ill. App. Lexis 423 (May 26, 2006).

[49] 207 F.3d 1351 (11th Cir. 2000).

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A. Discovery

First, while U.S. courts are a convenient forum for victims 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 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 often find foreign courts unhelpful.

B. 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 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.''[50]

C. Enforcement of Judgments

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.[51]

[50] *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 539 (1987).

[51] *Enforcement of Judgments*, U.S. State Department, HTTP: //travel.state.gov/law/info/judicial/judicial_691.html (site last accessed November 15, 2007).

D. Two Simple Suggestions to Deal With Non-U.S. Manufacturers

1. Bond Requirement

First, consideration should be given to requiring non-U.S. 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.

2. 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 agreements regarding the body of laws to apply in a particular transaction, is common, understandable and effective.[52]

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. For example, a bonding requirement could be seen (wrongly) as a de jure cap on liability, a tragic consequence that should be avoided.

There may be some 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 imposition of responsibility is neither unreasonable nor onerous. In fact, it is the same obligation that must be met by all U.S. manufacturers.

V. Post-Hearing Addendum

After the hearing on Nov. 15, 2007, The Honorable Linda Sánchez, chair, United States Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, began the process of drafting legislation to address many of the issues mentioned in the above testimony. As of the date of this publication, that legislation is being circulated for comments. The current proposal would amend Title 28 and confer jurisdiction over foreign manufacturers of defective products in U.S. District Courts anytime those products are reasonably and foreseeably sold in the state in which the federal court is located.

In another initiative, Rep. Peter Visclosky (D-Ind.), Chairman of the House Appropriations Energy and Wa-

[52] 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).

ter Development Subcommittee, announced that he was supporting *The Food and Product Safety Act,* a bill designed to require importers of goods to secure bonding prior to introducing their products into the United States. The idea is to ensure that ''importers have enough money or insurance to pay for damages their products might cause, and [to compel] . . . importers to take extra effort to ensure the quality of the goods they bring into this country.''[53]

An expansive companion bill sponsored by Sen. Sherrod Brown (D-Ohio) and Robert Casey (D-Pa.) would require U.S. Customs and Border Protection to monitor all imports and to set up a system that allows an assessment of insurance or other assets to guarantee coverage in the event a product manufactured abroad and sold in the United States causes injury as a result of a design or manufacturing defect. That same legislation would give the Secretary of Agriculture and the Food and Drug Administration recall authority over defective food or drugs, and would give Homeland Security responsibility to oversee and evaluate these measures.[54]

Finally, Congress was presented with the *Consumer Product Safety Modernization Act*,[55] which has the stated purpose of providing the CPSC with adequate funding.

As this legislation works its way through the process in Washington, the Chinese government claims it is taking action to address the situation. The government promises to promulgate ''10,000 national quality standards,'' for consumer goods, including food. The Chinese regulatory model is supposed to result in 31,000 product standards, though the enforcement mechanism for export control is, at this point, unclear.[56]

In addition to federal and extra-jurisdictional measures, several states have drafted legislation to deal with the importation of defective goods. In Michigan, Governor Granholm supported a bill proposed by State Representative Andrew Coulouris and State Senator Roger N. Kahn that bans the sale of children's toys with high levels of lead paint.[57] This legislation establishes fines for the sale of defective goods and does not resolve the jurisdictional issues that plague the sale of defective products manufactured by non-U.S. companies.

Legislators in Connecticut recently proposed the Children's Product Safety Act that would ban the sale of recalled goods. Connecticut became the ninth state in the country to ban the sale of recalled products.[58]

Thus far, while these initiatives seem unlikely to resolve in any meaningful manner the jurisdictional problems associated with the importation of defective products, the industry has responded with an aggressive public relations effort.[59] Moreover, while U.S. manufacturers were vocal at the hearing in urging Congress to take steps to impose liability on foreign producers of defective products, the relentless quest to relieve domestic producers of liability both through the agencies and the Congress continues unabated.[60]

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 Nov. 15, 2007, by all members of the panel detailed exquisitely the range and nature of the problem. If foreign manufacturers are outside the jurisdictional reach of the courts, injured consumers could be left without recourse.[61]

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. Among other things, it is simply 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.

There are obvious options. Congress could 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; or, (b) the foreign manufacturer is unavailable for suit because of the restrictive language in *Asahi*.

Further, as part of the U.S. Customs procedures, Congress could 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.

Finally, Congress ought to clarify Title 28 and resolve the problems surrounding the in personam jurisdiction requirement by adopting the ''aggregate of national contacts'' test. There is no constitutional mandate to implement the definition of minimum contacts articulated in Justice O'Connor's plurality opinion in *Asahi*. To the contrary, the opinion avoids limiting the capacity of Congress to take action to resolve this matter, noting only that it is not deciding whether an ''aggregate of

[53] ''Visclosky Bill Protects Consumers from Unsafe Products,'' STATES NEWS SERVICE, January 17, 2008.

[54] Id.

[55] H.R. 4040, 110th Congress, 1st Session, 153 Cong Rec H 16874, December 19, 2007.

[56] ''More Legislation to Combat Shoddy Products,'' FINANCIAL TIMES, January 9, 2008.

[57] Barrie Barber, ''Kahn Targets Toxic Toys,'' SAGINAW NEWS, (December15, 2007).

[58] Filvio Cativa, ''Tracking recalls: Whose Job,'' HARTFORD COURANT, January 25, 2008, B9.

[59] Donald Greenlees, ''Toy Makers Mount Drive to Salvage China's Safety Reputation,'' THE NEW YORK TIMES, C4, January 10, 2008

[60] ''Kennedy, Colleagues Question FDA Liability Shield Proposal,'' BNA, Inc. Product Safety & Liability Reporter, Januray 28, 2008.

[61] 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 adequated 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.

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national contacts'' would suffice for minimum contacts.[62]

[62] *Asahi Metal Industry v. Superior Court of California*, 480 U.S. 102, 105, fn 1(1987). ''We have no occasion here 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 in which the federal court sits.'' [citations omitted]

Legislation that requires foreign manufacturers to post a bond and consent to the jurisdiction of state courts, and adopts the ''aggregate of contacts tests'' test, would go a long way to resolving the problems associated with the domestic sales of defective foreign goods.