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Developments in US product liability law and the issues relevant to foreign manufacturers

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As foreign product manufacturers enter and expand in the US market, they should be aware of their exposure to liability in product-related litigation. To help minimise the liability risk, it is essential to understand both the structure and substance of US product liability law, as well as strategies employed by claimants to exert pressure on corporate defendants.

This article examines US product liability law and its impact on foreign product manufacturers, in particular:

- The framework for US product liability law, including:
  - — causes of action; and
  - — available defences.
- Developments in pre-emption.
- Developments in state tort reform.
- Tactics used by claimants, and potential defence countermeasures, including:
  - — state court litigation;
  - — mass advertising and case collection; and
  - — multi-district litigation.
- Litigation issues specific to foreign manufacturers, including:
  - — personal jurisdiction;
  - — service of process;
  - — discovery abroad; and
  - — enforcement of judgments.

The framework for US product liability law

Causes of action

There is no federal product liability law in the US, therefore, the liability of product manufacturers is determined by the laws of each state. While several states have passed comprehensive statutes, most state product liability law is based on common law. Despite the fact that state law varies, there are many similarities among the jurisdictions. This section will focus on these similarities. Manufacturers, however, should be aware of the intricacies of product liability law in the states in which they do business.

Parties subject to product liability laws

Parties involved in the business of selling or distributing a product are subject to liability for harm caused by a defect in that product.[1] This includes all parties in the chain of manufacture and distribution, such as the component manufacturer, assembling manufacturer, wholesaler, and retailer. Some jurisdictions, however, have enacted so-called innocent seller statutes, which provide that a mere seller is not subject to liability in a product liability action if it:

- did not manufacture the product;
- was unaware of the defect;
- could not have reasonably discovered the defect; or
- did not change the product but merely passed it on in the chain of commerce.

Types of claim

Product liability claims may be based on breach of warranty, negligence or strict liability.

Claims based on the breach of an express or implied warranty are generally governed by Art 2 of the Uniform Commercial Code (UCC), which has been adopted in similar form in every state other than Louisiana. The UCC provides remedies when a product fails to satisfy express representations, is not merchantable, or is unfit for its particular purpose.

In a negligence claim, the defendant can be held liable for failing to use due care. Strict liability claims, however, do not depend on the degree of care exercised by the defendant. Strict liability focuses on product defect rather than a manufacturer's conduct. In every claim based on strict liability, the claimant must establish that the product was defective. There are three types of product defects:[2]

1. Design defects

A product is defectively designed when the foreseeable risks presented by the product could have been reduced or avoided by employing an alternative design, and the failure to use an alternative design renders the product unreasonably dangerous. The alternative design must be reasonable. In

determining reasonableness, the court may consider, among other things, the effect on production costs, durability, maintenance, and aesthetics. Additionally, the overall safety of the product must be considered. For example, an alternative design would not be reasonable if it created or increased other risks of equivalent danger simply to minimise a particular risk. Generally, the claimant has the burden of proving that a reasonable alternative design was available at the time of distribution.

2. Manufacturing defects

Unlike a design defect, a manufacturing defect does not depend on the design specifications of a product. Instead, a manufacturing defect arises when a product fails to meet those specifications. Put another way, a product has a manufacturing defect when it fails to meet its intended design, despite the exercise of due care. The claimant typically has the burden of proving that the product was defective when it left the hands of the manufacturer. If a defect arises during shipment or storage, a distributor in the chain of commerce can be held liable, just as if the product were defectively manufactured.

3. Warning defects

A product contains a warning defect when the foreseeable risks of the product could have been reduced or avoided by providing reasonable warnings or instructions, and due to the absence of such information, the product is unreasonably dangerous. While most warnings are generated by manufacturers, sellers and distributors are required to provide warnings when doing so is reasonable. Claimants bear the burden of proving that adequate warnings or instructions were not provided. The court must weigh a number of factors to determine the adequacy of a warning, including the targeted consumers. For example, a product intended for children may require more information than a product intended for adults. Additionally, it should be noted that a product can have an adequate warning without providing information on every possible risk. In fact, a warning with too much information can make it difficult for a consumer to focus on the most important details.

Available defences

Defences, like the product liability claims themselves, are a matter of state law. Accordingly, defences can vary from jurisdiction to jurisdiction.

Statutes of limitation

A claimant must file a lawsuit within a certain statutory period of time following injury. The period depends both on the jurisdiction and the type of liability. For personal injury claims, statutes of limitation can range from one year to six years. Many states employ the "discovery rule" to determine when the statute of limitations begins to run. Generally, the discovery rule provides that the period does not begin to run until the claimant knows or should know that he has been injured by the product in issue.

Statutes of repose

Unlike statutes of limitation, statutes of repose do not depend on when the claimant is injured. Instead, they require a claimant to bring a claim within a certain period of time after the product is manufactured or sold. While statutes of repose are usually longer than statutes of limitation, they are not subject to the discovery rule and represent an absolute bar to a product liability claim.

Defences, like the product liability claims themselves, are a matter of state law. Accordingly, defences can vary from jurisdiction to jurisdiction.

The learned intermediary doctrine

In the prescription drug context, the learned intermediary doctrine provides that a prescription drug manufacturer discharges its duty by adequately warning the claimant's prescribing physician. The manufacturer has no duty to warn the claimant directly, because, under federal law, prescription drugs are only available through a licensed physician, who acts as the learned intermediary between the patient and the manufacturer.

There are recognised exceptions to the learned intermediary doctrine. Some courts have held that the doctrine does not apply to mass immunisation programmes due to the lack of physician-patient contact.[3] Certain contraceptives have also been excluded from the doctrine because patients actively participate in contraceptive decision making.[4] Finally, at least one court has held that the doctrine does not apply to products that have been advertised directly to consumers.[5] The learned

intermediary doctrine has been adopted by more than 40 states. Only one state, West Virginia, has expressly rejected the learned intermediary doctrine.[6] Most recently, however, the United States District Court for the District of New Mexico held that the New Mexico Supreme Court would not adopt the learned intermediary doctrine despite the fact that there were three New Mexico Court of Appeals decisions adopting or applying the doctrine.[7]

Intervening/superseding cause

If a claimant's injury was caused by the intervening conduct of another, and that conduct is also a superseding cause, a defendant may avoid liability in most jurisdictions. An intervening act is a superseding cause when a manufacturer could not reasonably be expected to protect against things such as:

- criminal acts;
- use of a product in an unforeseeable manner;
- alteration of the product;
- negligent use; and/or
- failure to properly maintain a product.

Contributory negligence/comparative fault

Under the theory of contributory negligence, a claimant is barred from recovery if his own negligence caused or contributed to his injury. Most jurisdictions, however, have abandoned contributory negligence in favour of comparative fault. Under comparative fault, a claimant's recovery is reduced if his own negligence (or fault) contributed to his injury. There are two types of comparative fault:

- **Pure comparative fault.** The jurisdictions that apply pure comparative fault reduce a claimant's recovery by the percentage of fault attributed to the claimant.
- **Modified comparative fault.** Jurisdictions using modified comparative fault also reduce a claimant's recovery by the percentage of his fault, but completely bar recovery if the claimant's fault exceeds a specified percentage. In some jurisdictions, for example, a claimant is barred from recovery if the percentage of his fault is greater than that of the defendant.

Assumption of the risk

In some jurisdictions, a claimant may also be barred from recovery if he is aware of a product defect and the accompanying dangers, but proceeds to use the product anyway. The assumption of the risk defence is based on what the claimant actually knew, not what a reasonable person would know.

State of the art

If a manufacturer can establish that a product was manufactured according to the scientific and technical achievement in the relevant field (the "state of the art"), that evidence may be used to show the manufacturer acted with due care. Additionally, state of the art evidence is relevant to warning issues. Claimants have the burden of showing the defendant failed to provide reasonable and adequate warnings in accordance with the current state of medical or scientific knowledge. Finally, this evidence may also be key to design defect claims in jurisdictions where the claimant must demonstrate the existence of a safer alternative. State of the art evidence, however, is not admissible in every jurisdiction.

Developments in pre-emption

Federal governmental statutes, rules and regulations control certain aspects of product safety. Some jurisdictions have held that state product liability claims imposing different or additional requirements on manufacturers are pre-empted. The pre-emption doctrine attempts to prevent manufacturers from being subjected to a federal standard on one hand and a conflicting state standard on the other. The pre-emptive effect of a statute or regulation can be expressly stated or implied from the comprehensive nature of the enactment.

Pre-emption is a particularly hot issue in the area of prescription drugs and medical devices which are regulated by the US Food and Drug Administration (FDA). The US Supreme Court has recently addressed pre-emption in the medical device context in *Riegel v Medtronic, 129 S Ct 999 (2008)*. In *Riegel*, the US Supreme Court held that state-law tort claims against medical device manufacturers were pre-empted so long as the device was approved by the FDA through the pre-market approval (PMA) process. The ruling in *Riegel* then set the stage for *Wyeth v Levine*, which presented the issue of pre-emption in the context of prescription drugs. Specifically, in *Levine* the Supreme Court was presented with the question of "whether the prescription drug labeling judgments imposed on manufacturers by the [FDA] ... preempt state-law product liability claims...". On 4 March 2009, the Supreme Court, in a six to three decision, held that federal law did not pre-empt claimant's claims based on the facts of the case.[8] Specifically, the court stated: "We conclude that it is not impossible for *Wyeth* to comply with its state and federal law obligations and that Levine's common-law claims do not stand as an obstacle to the accomplishment of Congress' purposes in the FDCA".

On 9 March 2009, following the ruling in *Levine*, the Supreme Court granted certiorari in *Pa Employees Benefit Trust Fund v Zeneca, Inc* and *Colacicco v*

Apotex, Inc, two Third Circuit cases involving pre-emption. The Supreme Court immediately vacated the judgments in both cases and remanded them for further consideration in light of the *Levine* decision. The reach of the *Levine* decision will be a hotly debated issue in the months and years ahead.

Update on the recent developments in tort reform

Claimants' trial lawyers annually take in more than US $40 billion.[9] Remarkably, this is 50% more than the annual turnover of Microsoft and double that of Coca-Cola. Not surprisingly, these numbers have fuelled the impetus for tort reform. Some of the more important reform initiatives are summarised below.

Punitive damages

Large punitive damage awards have "seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases".[10] The US Supreme Court recently held that punitive damages could not be imposed on a defendant for harm allegedly done to non-parties.[11] More limitations need to be imposed in order to level the playing field. Accordingly, the American Tort Reform Association (ATRA) has pushed for the following:

- The establishment of an appropriate punitive damages "trigger" such as actual malice.
- Application of the "clear and convincing evidence" standard to establish liability.
- Proportionality between the punitive damage award and the offence.
- Federal legislation to deal with multiple punitive damage awards.

To date, 32 states have enacted some type of punitive damage reform, while two states had reforms held unconstitutional and have not enacted further reforms.[12]

Joint and several liability

Under joint and several liability, a claimant can recover from multiple defendants collectively, or a single defendant alone. This rule encourages the inclusion of "deep pocket" corporations, even if that corporation had a remote role in the alleged harm. 40 states have modified joint and several liability, making it more difficult to recover fully against all of the defendants.[13]

Non-economic damages

Non-economic damages include losses for intangible injuries such as pain and suffering, and emotional distress. The trend has been toward excessive non-economic damage awards. Accordingly, 23 states have modified the rules for awarding such damages, such as placing caps on the amount that can be awarded. In four states, reforms have been held unconstitutional, and they have not passed further reform legislation.[14]

Product liability reform

Imposing liability for defective products is intended to compensate injured individuals and deter manufacturers. Product liability law does not serve these functions when manufacturers and distributors are uncertain how to avoid liability, or they are subjected to liability for risks they could not have anticipated. 16 states have passed legislation directed specifically at product liability, and three states have had reforms held unconstitutional and have not passed further reform legislation.[15]

Collateral source rule

Under the collateral source rule, evidence may not be admitted to establish that a claimant's losses have been reimbursed by other sources, such as insurance. Accordingly, a significant percentage of the payments made to claimants are to compensate for losses that have already been covered. 24 states have modified the collateral source rule, and two states have had reforms held unconstitutional and have not passed further reforms.[16]

Appeal bond reform

While large damage awards are often overturned on appeal, defendants in many states are required to post an appeal bond up to 150% of the damages awarded. Such a bond can force a company or industry into bankruptcy. 35 states have adopted some form of appeal bond reform.[17]

Jury service reform

According to ATRA, up to 20% of those summoned for jury duty do not respond, and some jurisdictions have an even higher "no-show" rate. "Occupational exemptions, flimsy hardship excuses, lack of meaningful compensation, long terms of service and inflexible scheduling results in a jury pool that makes it difficult for working Americans to serve on a jury and disproportionately excludes the perspectives of many people who understand the complexity of issues at play during trial".[18] To date, 13 states have enacted reform legislation in this area.

Tactics used by claimants to pressure domestic and foreign manufacturers, and potential defence countermeasures

State court litigation

Claimants want to be in state courts because the environment there is generally more "claimant friendly"

on legal rulings and there is a greater potential for large awards. ATRA has issued a report identifying jurisdictions that have attracted lawsuits from across the country due to their "claimant-friendly" reputation. Not surprisingly, all the forums identified as "judicial hellholes" are state courts that are known for producing huge awards and ignoring established procedure. The "judicial hellholes" identified by ATRA in 2008/2009 were:[19]

- West Virginia.
- South Florida.
- Cook County, Illinois.
- Atlantic County, New Jersey.
- Montgomery and Macon Counties, Alabama.
- Los Angeles County, California.
- Cark County, Nevada.

ATRA additionally identified the following for the "Watch List" in 2008/2009:

- Rio Grande Valley and Gulf Coast, Texas.
- Madison County, Illinois.
- Baltimore, Maryland.
- St Louis (the City of), and St Louis and Jackson Counties, Missouri.

Federal courts are less political, and, generally, judges in federal court are more likely to consider dispositive motions (that is, motions that if granted, conclude all or part of the cause of action), including motions to exclude expert testimony under *Daubert*.

How claimants keep cases in state court

A case filed in state court can only be removed (transferred) to federal court if either:

- there is a federal question involved (federal question jurisdiction); or
- there is complete diversity of citizenship between the parties and more than US $75,000 is in dispute (diversity jurisdiction).

Federal questions are rare in the context of product liability claims; as a result, corporate defendants are forced to rely on diversity jurisdiction as the basis for removal. Yet, because so many large awards of damages are in state courts, claimants have developed numerous strategies for destroying diversity.

Joinder of non-diverse parties

To establish complete diversity, no defendant can be a citizen of a state where any claimant is also a citizen. To destroy complete diversity, claimants will join a defendant that is a citizen in a state where the claimants are located (non-diverse defendants). For example, if a corporate defendant is a citizen of Delaware and the claimants are citizens of Missouri, the claimants will add a Missouri defendant to the lawsuit. In the product liability context, this additional defendant usually has had little or no role in relation to the product defect or injury at issue. Non-diverse defendants include parties such as:

- Sales representatives.
- Local distributors.
- Local employees.

In pharmaceutical product liability cases, claimants often join a local pharmacy or a local prescribing or treating doctor to destroy diversity of citizenship, and therefore prevent removals to federal court.

Claimants may also attempt to join non-diverse claimants. For example, if the defendant corporation is a citizen of Delaware and the claimants are citizens of Missouri, the claimants will add an additional, unrelated claimant from Delaware.

A defendant may remove a case to federal court if it can establish that the non-diverse party was fraudulently joined. To meet the fraudulent-joinder standard, the defendant must show that there is either:

- No reasonable basis for recovery against the non-diverse defendant.
- No reasonable basis for the joinder of the non-diverse claimant.

Some courts in product liability cases have recently recognised claimants' ongoing joinder of non-diverse parties as a charade. For example, in *In re Diet Drugs*, the MDL Court held that such joinder of physicians, pharmacies, and sales representatives "can only be characterised as a sham, at the unfair expense not only of [the manufacturer] but of many individuals and small enterprises that are being unfairly dragged into court simply to prevent the adjudication of lawsuits against [the manufacturer], the real target, in a federal forum".[20]

Impact on foreign manufacturers

Foreign manufacturers may be forced to litigate in state court jurisdictions that are less sympathetic (or even hostile) to a foreign defendant. The juries in the state court "judicial hellholes" are typically less well educated and biased against corporate defendants and, in some instances, even more biased against foreign corporate defendants. Likewise, judges in the "judicial hellhole" jurisdictions are likely to be less experienced with issues specific to foreign manufacturers.

Potential countermeasures

To counter (or at least help minimise) the threat of state court litigation, a foreign manufacturer needs to be aware of the US jurisdictions in which it maintains

related entities that potentially could be joined in the lawsuit. There is little a manufacturer can do with regard to the other, non-related entities that are often joined. However, it is important to have US counsel knowledgeable and experienced in removal and fraudulent joinder issues.

Advertising and mass case collection

Claimants' counsel will attempt to create pressure on manufacturers in product liability litigation by collecting a large number of potential cases (often through internet advertising). These cases will inevitably include a few potential high exposure cases and numerous cases of little or no value. Strategically, claimants' counsel leverage their high value cases in order to boost the value of their low (or no) damage cases.

How claimants' counsel collect cases

The internet has revolutionised the ability of lawyers to solicit potential claimants. A simple search on the internet for any one of the major products currently the subject of litigation will return numerous websites hosted by claimants' counsel. These websites provide a method for a "free case review" and an avenue for that counsel, regardless of location, to collect cases. Of course, television, radio, and billboard advertisements are still regularly utilised as well.

Impact on foreign manufacturers

The ability of claimants' counsel to advertise and solicit cases not only allows for the easy collection of cases, but it also serves as a method to influence public opinion. Any consumer who goes to the internet with a question regarding a targeted product will be inundated with biased information generated by claimants' counsel.

Potential countermeasures

There is little a manufacturer can do to avoid the advertising onslaught. Having a publicly available website to provide accurate information can help provide consumers with a more balanced presentation of the facts. A manufacturer can also purchase potential website addresses before claimants' counsel has an opportunity to do so (that is, "widget-lawsuit.com"). Lastly, simply knowing the technique claimant's counsel will employ helps a manufacturer appreciate the weaknesses and pressure-points that the claimants' counsel likewise face.

Multi-district litigation

Multi-district litigation (MDL) is a vehicle to consolidate cases in federal courts for co-ordinated pre-trial discovery, therefore avoiding conflicting schedules in multiple cases and duplication of discovery. The initiation of an MDL proceeding is one way that claimants attempt to pressure a manufacturer, but an MDL can also be very helpful for the defendant. Under relevant legislation, litigation pending in multiple federal districts can be transferred to one district court for consolidated pre-trial proceedings.[21] The decision to transfer cases to an MDL is made by the Judicial Panel on Multi-district Litigation (JPML), a panel of seven federal judges appointed by the Chief Justice of the United States. Once consolidated and co-ordinated pre-trial proceedings have been completed, individual cases are sent back to the district court from which they were transferred for trial. Note, however, that MDL courts often encourage both sides to agree to bellwether trials before the MDL judge as a way to establish values and encourage resolution. While MDL has been available for more than 25 years, it has recently gained popularity. Since 2000, more than 100 MDLs have been established to handle large scale product liability litigations.[22]

Advantages

An MDL provides potential benefits for product liability defendants. Specifically, it allows a defendant to streamline discovery. For example, instead of responding to many requests for production of documents, in an MDL, a defendant produces documents once to a central depository. In addition, it allows depositions of company witnesses and experts to be taken only once, saving resources.

Importantly, the MDL provides defendants with consistency on legal rulings. When large numbers of cases relating to the same product are pending in various federal districts, a defendant is sure to face inconsistent and contradictory pre-trial rulings. With an MDL, pre-trial rulings affecting all cases are made by one judge with comprehensive knowledge of both the history of the litigation and the relevant facts.

Disadvantages

While an MDL allows corporate and expert depositions to be taken only once, if those depositions go poorly, defendants are stuck with that result in all of the MDL cases (and in the state court cases as well). Additionally, while the MDL judge will provide consistent rulings, those rulings may go against the manufacturer, a result that could be more damaging than rulings that cut both ways across a number of jurisdictions. Finally, claimants tend to file large numbers of their less serious injury cases in the MDL while pursuing parallel litigation in state courts for more seriously injured claimants who used the same product. They try to use the large number of cases in the MDL as leverage to settle all their cases, including those with claimants who may not have suffered any injury.

Impact on foreign manufacturers

For a foreign manufacturer, it is desirable to obtain consistent rulings regarding complicated issues involving discovery. Further, in MDL, a foreign manufacturer is more likely to get a judge who is well versed in legal issues unique to foreign defendants.

Litigation issues specific to foreign manufacturers

Product liability law has an enormous impact on foreign product manufacturers who sell products in the US. Product liability lawsuits raise issues unique to foreign manufacturers, including personal jurisdiction, service of process, discovery, and enforcement of judgments.

Personal jurisdiction

Under current law, a foreign manufacturer can potentially be sued in any state where its products are distributed and, therefore, subjected to the product liability laws of that state. The elements of personal jurisdiction must, therefore, be understood.

The Due Process Clause of the Fourteenth Amendment to the US Constitution places boundaries on a court's ability to exercise jurisdiction over foreign defendants. While many states have adopted a so-called long-arm statute governing personal jurisdiction for their own courts, in no case may the exercise of jurisdiction violate due process. The US Supreme Court has developed a two-part test to determine if the requirements of due process are met:

- the defendant must have sufficient contacts with the forum (minimum contacts requirement); and
- the exercise of personal jurisdiction must be reasonable.

Minimum contacts

To satisfy the minimum contacts requirement, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws".[23]

Whether a defendant purposefully availed itself of the forum state hinges on the facts presented by each particular case. First, minimum contacts must be based on the acts of the defendant, not on the unilateral conduct of a consumer.[24] Second, in the context of a product liability case, the court will look to see if the defendant specifically intended to serve the forum market.[25] Facts relevant to this inquiry would include whether the defendant:[26]

- designed a product specifically for the forum market;
- advertised in the forum;
- established direct lines of communication with customers in the forum;
- marketed the product through a sales agent located in the forum; or
- expected consumers in the forum to buy products placed in the stream of commerce.

Simply placing a product in the stream of commerce alone is not likely to be enough to establish personal jurisdiction.

When a defendant's contacts with the forum are not systematic and continuous, the contacts must be related to the claim at issue. However, when a defendant's contacts with the forum are systematic and continuous, the contacts need not relate to the claim.[27] Systematic and continuous contacts arise when a defendant does such things as:

- maintain an office in the forum;
- keep company files in the forum;
- carry on correspondence in the forum; and/or
- tacitly solicit business in the forum.

Reasonableness

The reasonableness test can be either a shield or a sword. When the defendant's contacts with the forum state are marginal, a heightened sense of fairness can validate personal jurisdiction. Conversely, even when contacts with the forum state are significant, an unjust burden on the defendant can nullify the exercise of jurisdiction.[28] The court will consider:[29]

- the burden on the defendant;
- the forum state's interest in adjudicating the dispute;
- the claimant's interest in obtaining convenient and effective relief;
- the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and
- the shared interest of the several states in furthering fundamental substantive social policies.

The reasonableness test is of particular importance when a foreign manufacturer is involved. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders".[30] In addition, asserting personal jurisdiction over a foreign manufacturer requires the court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction.

Cases involving foreign manufacturers

A review of case law reveals that courts tend to focus on two questions when examining personal jurisdiction over foreign product manufacturers:

1. Was the product designed or marketed for the US market?
2. Did the foreign manufacturer distribute or control distribution of the product such that it knew the product would reach the state at issue?

When a foreign product manufacturer markets a product specifically for the US and knows that, through the chain of distribution, the product will reach a particular state, the manufacturer will almost certainly be subjected to personal jurisdiction. For example, *Tungate v Bridgestone Corp* involved an allegedly defective automotive tyre. Despite the fact that the defendant Bridgestone was a Japanese corporation, the Southern District of Indiana held that "Bridgestone foresaw and intended that the model of tyre would be distributed across the US to American consumers, including those in Indiana, for the benefit of Bridgestone. That intended activity is sufficient to support jurisdiction in Indiana".[31]

Conversely, when a foreign manufacturer does not design a product for the US and does not control distribution, the courts are much less likely to exercise jurisdiction. In *Irizarry v East Longitude Trading Co Ltd*, an individual was injured by an allegedly defective woodworking tool. The US District Court for the Northern District of Ohio did not exercise jurisdiction, and stated that "there is no evidence in this case that [the manufacturer] designed its products expressly for the US or Ohio markets. Here, there is no evidence that [the manufacturer] retained any control over how, when, or where [the US distributor] distributed the products".[32]

Service on foreign manufacturers

Service of process must be accomplished by following explicit rules when foreign manufacturers are named as defendants.

The applicability of the Hague Convention on Service Abroad

Of particular importance is the applicability of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Convention on Service Abroad).[33] The determination of whether the Hague Convention on Service Abroad applies will hinge on the law of the forum state.

In *Volkswagenwerk Aktiengesellshaft v Schlunk*, the US Supreme Court held that "if the internal law of the forum state defines the applicable method of service of process as requiring the transmittal of documents abroad, then the Hague Convention applies".[34] However, if the forum state allows service on a US agent instead of service abroad, the Hague Convention on Service Abroad does not apply.

In a more recent example, the US District Court for the District of Minnesota held that the Hague Convention on Service Abroad did apply to service on foreign corporations in Minnesota courts.[35] The court relied on the fact that, under Minnesota law, service on a foreign entity was not fully effected until the Secretary of State transmits the document to the foreign corporation.

The provisions of the Hague Convention on Service Abroad

If the Hague Convention on Service Abroad applies, foreign manufacturers can often raise insufficiency of process as a defence. The provisions of the Hague Convention on Service Abroad are straightforward, but the designations and reservations made by each country make its application much more complicated.

The Hague Convention on Service Abroad provides for service through a Central Authority, established by each contracting country, which receives requests for service from other contracting countries.[36] The Central Authority must then serve the judicial documents itself or arrange to have them served by an appropriate agency.[37] The Central Authority of each contracting country may have additional requirements for service, including having the judicial documents translated into the official language of the state.

The Hague Convention on Service Abroad also allows service through domestic or consular agents.[38] In addition, Art 10 specifically states that the Convention must not interfere with:

- The freedom to send documents by postal channels.
- The freedom of judicial officers in the country of origin to effect service through judicial officers of the country of destination.
- The freedom of any person to effect service directly through the judicial officers of the country of destination.

Contracting countries are also free to agree with each other on additional methods of transmission for the purpose of service.[39] Finally, the Hague Convention on Service Abroad does not affect any method of service provided for by the internal law of a contracting country.[40]

To satisfy the requirements of the Hague Convention on Service Abroad, the claimant must know the details of each country's declarations, including the service methods available, both under the Hague Convention on Service Abroad and under the country's internal law. For example, in *Froland*, the court held that service did not