S. HRG. 111–236

LEVELING THE PLAYING FIELD AND PROTECTING AMERICANS: HOLDING FOREIGN MANUFACTURERS ACCOUNTABLE

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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LEVELING THE PLAYING FIELD AND PROTECTING AMERICANS: HOLDING FOREIGN MANUFACTURERS ACCOUNTABLE

TUESDAY, MAY 19, 2009

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:22 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chairman of the Subcommittee, presiding.

Present: Senators Whitehouse and Sessions.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chairman WHITEHOUSE. The hearing will come to order, with my apologies for a delayed start. I had very much hoped that the votes that are about to get underway on the Senate floor would be done by now, but the usual last-minute wrinkles emerged, so it looks like it would be prudent to get started. We may have to interrupt in 20 minutes or so once the votes get close. I will go over and try to be the last Senator to vote on the first vote and the first Senator to vote on the second one and come back without too much interruption. But I very much appreciate everyone being here.

Every day, Americans in all walks of life are injured by defective products that are manufactured outside the United States. These products hurt consumers—they lead to serious injuries, and even death—and they hurt the American businesses that sell these products, and that must deal with angry customers, product recalls, and unusable inventory.

The list of recent examples of Americans injured by products made in China and other countries is shocking. Last year, a contaminated blood thinner caused severe medical reactions and contributed to numerous deaths. In 2006, a lead-tainted charm bracelet—and by "tainted," I mean 99 percent lead—claimed the life of a 4-year-old.

Food products from seafood to honey have been contaminated with unthinkable chemicals, including veterinary drugs banned in domestic production, potentially harmful antibiotics, and unapproved food additives. Sixty million packages of pet food contaminated with tainted wheat gluten have been recalled in the last 2

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years. Substandard tires have failed, leading to fatalities. It is a long litany.

Most recently, defective imported drywall, imported from China, has been found to contain excessively high levels of sulfur, causing houses to smell like rotten eggs, corroding copper wiring, and making expensive appliances fail. Thousands of homes may be affected. A subcommittee of the Commerce Committee is holding a hearing on Thursday to consider the consequences of those defective products, and I commend that Committee for their leadership on what rapidly is emerging as a major problem for homeowners and businesses.

We all know that American manufacturers must comply with regulations that ensure the safety of American consumers. When they fail to do so, they must answer to regulators and are held accountable through the American system of justice. Unfortunately, however, foreign manufacturers are not being held to the same standards. This puts at risk American consumers and businesses and puts American manufacturers at a competitive disadvantage.

A major cause of this disparity is that Americans injured by foreign products face unnecessary and inappropriate procedural hurdles if they seek to hold foreign manufacturers accountable. First, they must identify the manufacturer of the product that injured them—often not as easy as it would sound—since many foreign products do no more than indicate their country of origin.

Second, an injured American must serve process on the foreign manufacturer. This means the injured American has to deliver legal papers to the company directly or through a registered agent explaining that he or she is bringing a legal action against it. But this simple step often requires enormous time and expense—lawsuits even can fail over it—as the injured American attempts to comply with various complicated international treaties.

Third, an injured American must overcome the technical defense that, even though a foreign manufacturer's product was used by an American consumer, sold to that consumer, nevertheless the courts of that consumer's home State do not have jurisdiction over that company.

Finally, even after an injured American has overcome these hurdles and prevailed in court, a foreign manufacturer can avoid collection on the judgment—often simply cutting off communications or shutting up the business and reopening under different name.

Americans harmed by defective foreign products need justice, and they do not get it when foreign manufacturers use technical legal defenses to avoid paying damages to the people they have injured.

Today's hearing will help us learn more about these failures of justice and what we can do to fix them. If we do nothing, Americans will continue to be injured by foreign products and denied a meaningful remedy. American businesses will continue to be left on the hook for foreign defective products they import, use, or resell, and foreign manufacturers will maintain a competitive advantage over American manufacturers who must follow the rules and are subject to the American tort system.

This hearing will consider the range of legal impediments standing between an injured American and an enforceable, collectible judgment against the foreign manufacturer. It also will dem-

onstrate that these impediments result in enormous harm to American consumers, as well as damage to American businesses that transact business with the foreign entity. The assembled panel of experts will explain the legal hurdles facing Americans injured by foreign products and also put those injuries into real-world context by describing the harm they can cause to families and businesses.

I am very grateful to all the witnesses for taking the time to come before the Committee today. I am especially delighted to have my fellow Rhode Islander Louise Ellen Teitz here to testify. She is a distinguished professor at Roger Williams University Law School in Rhode Island. Her brother is a dear friend of mine of many, many, many years' duration. Her expertise will make a great contribution to this hearing as it has to that wonderful law school of which she was one of the very first professors.

I look forward to continuing to work with Professor Teitz and the other witnesses as I will soon introduce legislation that addresses the difficulty in serving process on foreign manufacturers. My legislation will require that a manufacturer who imports goods into the United States must designate an agent for service of process who will accept the legal papers required to initiate a lawsuit. It will require the development of a register of these agents so that an injured American can inform the manufacturer defendant of a lawsuit quickly and cheaply. I look forward to working with Ranking Member Sessions and other Senators on this legislation. Similarly, I look forward to hearing the witnesses' perspectives on the approach I have proposed.

Protecting Americans and holding foreign manufacturers accountable for the injuries they cause is not a partisan issue. Everyone agrees that we should do what we can to keep Americans safe from defective products, wherever they may come from. So too, I think, we all agree that American companies should not be at a competitive disadvantage to their foreign counterparts, particularly not for a wrong reason. With these fundamental agreements, I look forward to finding legislative solutions that will level the competitive playing field and protect Americans.

I will ask for our first witness, Professor Louise Ellen Teitz, as I said, a professor of law at Roger Williams University School of Law in Bristol, Rhode Island. Ellen has been teaching and writing about transnational litigation, civil procedure, conflicts of law, private international law, and comparative procedure for over 20 years, both here and abroad. She is the author of a treatise on transnational litigation and has participated as a member of the U.S. State Department delegation to The Hague Conference in connection with the Jurisdiction and Judgments Convention, the Choice of Court Convention, and the Conventions on Service of Process, Evidence, and Apostille.

Professor Teitz is a member of numerous professional associations, including the American Law Institute and the International Association of Procedural Law. She has practiced law in Washington, D.C., and Dallas, Texas, in the fields of antitrust, competition, and trade regulation practice, and Federal and State litigation. She received her B.A. from Yale University and her J.D. from Southern Methodist University School of Law.

Professor Teitz.

STATEMENT OF LOUISE ELLEN TEITZ, PROFESSOR OF LAW, ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW, BRISTOL, RHODE ISLAND

Ms. TEITZ. Thank you, Chairman Whitehouse, Ranking Member Sessions, and members of the Subcommittee. I am honored to be here today to address the Committee on the difficulties of suing foreign parties, specifically foreign manufacturers in U.S. courts. I will speak briefly to three major procedural hurdles: obtaining personal jurisdiction; serving process or notice to the defendant; and enforcing U.S. judgments abroad, the first two of these being more easily remedied by some form of legislation.

A party suing in the U.S. must first be able to find a court that has constitutional authority over the defendant, or what is called "personal jurisdiction." Then after filing, the party must inform the defendant of the lawsuit and its contents—that is, serve process (of the summons and complaint.) At the end of the lawsuit, the party must be able to collect any money awarded, especially when the defendant's assets are outside of the U.S.—that is, be able to enforce the judgment abroad.

As a result of different approaches in other legal systems, U.S. consumers face difficulties recovering in U.S. courts—or enforcing U.S. judgments abroad—in fact, more difficulty than many foreign consumers face in the reverse situation. In addition, there is a competitive impact, obviously, on U.S. manufacturers who are sued more easily and cheaply here in the U.S. and against whom judgments can be enforced throughout the U.S. under the Full Faith and Credit Clause.

First, personal jurisdiction. It is important not only for the initial litigation, but for subsequent enforcement of the judgment, here or abroad. When the defendant is an alien, there is the additional concern with potential enforcement in foreign locations where the defendant has assets. Personal jurisdiction in the U.S., as you are all well aware, is governed by the Due Process Clause, generally under the 14th Amendment, both in State and Federal court, which requires that the defendant have certain minimum contacts, such as not to offend traditional notions of fair play and substantial justice. Even when the defendant is a foreign individual or entity, State boundaries are generally, unfortunately, the measuring unit.

The Supreme Court's most recent case concerning a foreign defendant and a product in the stream of commerce is the *Asahi* case from 1987. It broke the requirements into two parts: the defendant's purposeful minimum contacts with the forum, and the fairness to the defendant in having to be subject to jurisdiction in the forum. The finding of no jurisdiction over the alien inadvertently encouraged foreign manufacturers to challenge the assertion of personal jurisdiction in many cases by providing a basis for them to argue that there was unfairness to the alien defendant.

While lower courts, both State and Federal, have, in fact, upheld jurisdiction over foreign manufacturers since *Asahi*, the determination is ultimately very fact-specific, both as to whether the contacts were purposefully directed at the forum and whether it is fair. This fact-specific nature encourages litigation—litigation that is very expensive and time-consuming for a plaintiff and costly in terms of judicial resources.

A Federal statute that required consent to jurisdiction—as well as designation of a domestic agent for service—for foreign manufacturers importing certain types of products into the U.S. could reduce the uncertainty that plaintiffs face about if and where they can sue and maintain jurisdiction in the U.S.

Service of process, the second procedural problem that a U.S. party faces once a party has filed is notifying the defendant of the lawsuit, as constitutionally mandated. Suing foreign defendants raises several additional issues that add delay and expense for the consumer. First, if the defendant is located in a country with which the United States has a relevant treaty or agreement, that treaty controls, both in Federal and State court. The Hague Convention on Service of Process, which currently 59 countries are party to, includes many of our major trading partners—Japan, Canada, and China—and is the exclusive means of serving a defendant in a member country. If no treaty controls, there are several options but, nonetheless, these are time-consuming and, in fact, in some cases take 6 months to a year to execute, if at all.

Since The Hague Convention is generally applicable to service of defendants from our major trading partners, I want to highlight briefly the implications of service under the treaty. There is a process with a central authority which is set up. It is time-consuming. All documents normally must be translated. At a Special Commission meeting in The Hague in February, many countries indicated that they have been trying to do this in 3 months, but countries such as China indicated they would have trouble meeting a 6-month deadline.

What is crucial for triggering The Hague Service Convention, in Federal or State court, is that service is effected abroad—that is, that the document is served abroad. However, that determination of whether service is made abroad is made by reference to national law, and in the U.S., that is mostly state law. Thus, if service is complete under the law of a specific State without transmittal abroad, then the Convention, with its added expenses and delay, is not triggered.

Thus, this is one area that, in fact, legislation that required a foreign manufacturer to appoint a domestic agent for service might reduce the cost of service abroad, especially if the agent would be appointed for all lawsuits throughout the U.S., and it would be even more effective, obviously, if in addition the legislation were expanded to require explicit consent to jurisdiction in the U.S. Consent is a traditional basis for personal jurisdiction, and one that thereby could avoid the need for lengthy litigation over the nature and extent of minimum contacts necessary for the court to have authority over the defendant.

I see my time is up, and I will just close by saying that it is difficult to enforce U.S. judgments abroad. It is a trade imbalance. We enforce incoming judgments quite readily, but we are faced with difficulty in enforcing our judgments abroad. And so many of the manufacturers have no assets in the U.S. They structure their business to avoid personal jurisdiction, and, unfortunately, in the end a U.S. plaintiff who is choosing among potential defendants is obviously well advised to choose a domestic defendant.

I look forward to your questions and having the opportunity to work with the Committee as it develops its legislation. Thank you.

[The prepared statement of Ms. Teitz appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you very much, Professor Teitz. Once again, American manufacturers on the losing end of American trade policy.

The next witness we will hear from—and we will go to general questions—is Thomas Gowen. He is a partner at the Locks Law Firm in Philadelphia, Pennsylvania. He has practiced law for 30 years with his primary concentration in the areas of complex personal injury and civil litigation. He has represented numerous clients in product liability, head injury, construction litigation, medical malpractice, and automobile litigation. Mr. Gowen is a member of the faculty of the National College of Advocacy and a past chairman of the Montgomery Bar Association Continuing Legal Education Committee. He has published legal articles in Am. Jur. Trials, "A Guide for Legal Assistants" by the Practicing Law Institute, the Barristers, the Pennsylvania Law Journal Reporter, and other journals. Mr. Gowen is a graduate of Haverford College and Villanova University School of Law. We are delighted to have him with us.

Please proceed, Mr. Gowen.

STATEMENT OF THOMAS L. GOWEN, PARTNER, LOCKS LAW FIRM, PHILADELPHIA, PENNSYLVANIA

Mr. GOWEN. Thank you, Senator. The problem has grown in an exponential fashion. President Bush appointed an Interagency Working Group on Import Safety, chaired by Secretary Leavitt, which reported to the President in November of 2007 and largely recognized the problems and recommended numerous solutions. We now import $2 trillion worth of imported goods, over $200 billion of which come from China, and that number is expected to triple by 2015, according to the Commission. The Commission recommended a structured response by the United States of prevention, intervention, and response, and recognizing that it would not be able to inspect nearly all of the products coming into the country.

The response portion of the American reaction to the product liability issues raised by imports is a critical part that has roles to play for the Consumer Product Safety Commission and others, but the civil justice system has long been a potent and effective method for bringing about safety. The Interagency Working Group recommended using the principles of hazard and risk recognition or simply the practice of safety engineering, which are used to prove a products liability case in the United States.

The problem today with bringing these cases against foreign manufacturers, as Professor Teitz has indicated, is that you have numerous civil procedural hurdles which subsume much of the litigation in this case. And the issues are identification, service of process, jurisdiction of the court, and collectability.

Professor Teitz addressed the issue of service of process. It is no joke that identification is a major problem because many of the products that come into this country bear nothing more than a

label saying made in a particular country, with no link the particular manufacturer. And we have seen in some cases that I have handled that the importer has not even been able to identify the manufacturer.

I think it is important to recognize that the Supreme Court in the *Asahi* decision, in a footnote in Justice O'Connor's opinion, did recognize that it was not addressing the issue of whether Congress could legislate to allow the system of justice to be based upon an aggregate of national contacts. That would be bringing our system of justice into sync with the system of commerce. These companies sell into the market of the United States and then claim that they do not sell into a particular State, but you cannot sell to the American market without the product going to one of the 50 States. It simply is an impossibility. So we need to bring our system of commerce into sync with the system of justice, or the other way around.

I recommend that the Congress consider legislating an import license which would require that there first be identification of a product with the manufacturer and its address that is posted on a U.S. Government website that is searchable and available to the public.

Second, that we require the designation of an agent for the service of process, as your bill is recommending, and service of process anywhere in the United States.

Third, that the license require consent to jurisdiction in the States where the product is sold or causes injury.

And, fourth, that there be product liability insurance in the United States.

The collectability issue I think raises another somewhat more subtle issue. It is obvious when the company cannot collect a judgment, but it also greatly impairs the process of settlement when the foreign defendant is not concerned that its assets may be at risk and, therefore, it fails to negotiate reasonable and sensible settlements, as occur in most of our domestic litigation.

I think that the use of an import license and the interagency task force recommend a system of verification and essentially licensing could be done and could go a long way toward leveling the playing field so that foreign manufacturers had to come to the courts in the United States and be amenable to process and justice in the same way that American companies are.

Thank you, Senator.

[The prepared statement of Mr. Gowen appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you very much, Mr. Gowen.

I understand that the Ranking Member, Senator Sessions, is on his way, and I know that he will be very keen to hear from Mr. Stefan, who hails from his home State. So what I think I will do is step out of order, if Professor Schwartz would not mind, and go directly to Victor Schwartz, and then we will go to Mr. Stefan afterwards so that Senator Sessions can be here.

Victor Schwartz chairs the Public Policy Group at Shook, Hardy & Bacon. For over two decades, he has co-authored the Nation's leading torts casebook, "Prosser, Wade & Schwartz's Torts," and also authors "Comparative Negligence," the principal text on the

subject. Mr Schwartz serves as general counsel to the American Tort Reform Association and co-chairs the American Legislative Exchange Council's Civil Justice Task Force. Mr. Schwartz is former dean of the University of Cincinnati College of Law and currently serves on its Board of Visitors. During his academic career, he litigated cases on behalf of plaintiffs and secured the first punitive damages award of the Midwest against the manufacturer of a defective product.

Mr. Schwartz has been inducted as a life member of the American Law Institute and served on the Advisory Committee to the restatement (third) of torts, products liability, and apportionment of liability projects. Mr. Schwartz holds a J.D. from Columbia University and a B.A. from Boston University. He is extremely distinguished as a witness, and we are delighted to have him here.

Would that be Dean Schwartz, Professor Schwartz, Counselor Schwartz?

Mr. SCHWARTZ. Just Victor.

STATEMENT OF VICTOR E. SCHWARTZ, CHAIR, SHOOK, HARDY & BACON, LLP, PUBLIC POLICY GROUP, ON BEHALF OF THE INSTITUTE FOR LEGAL REFORM, U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C.

Mr. SCHWARTZ. Thank you, Mr. Chairman, and I appreciate the invitation. One thing you did not include in my biography is that I taught at UVA Law School in 1971. My whole life has been this way. I know that you graduated after I left, and every place I have been, something good has happened after I left.

Chairman WHITEHOUSE. Maybe something good will happen in this hearing today.

Mr. SCHWARTZ. It may, because you are leading the way, I am testifying today on behalf of the Institute for Legal Reform of the United States Chamber. I am privileged to do that. The views I set forth are my own. I have thought about this problem for a long time and see it as very serious to American manufacturers and large manufacturers of foreign goods overwhom there is jurisdiction in this country. Every manufacturer on its products pays what I call a "tort tax." With something like a stepladder, many of which are imported, it is as much as 16 percent. So having American manufacturers and foreign manufacturers who can be sued here pay the tort tax and having foreign manufacturers not pay, as you hinted in your opening remarks, Senator, is simply unfair competition and it is wrong. And this is an area where you can get agreement between a distinguished member of the plaintiffs bar and some of us on the other side to do something.

As I said to Mr. Gowen earlier, the main problem is getting this issue highlighted enough so that it really can be addressed. The House looked at the issue last year. They had some legislation that overreached a bit, but I think consensus can be reached.

One of the things that I have noted is that many people have viewed this *Asahi* case, which Professor Teitz referred to, as a barrier. If you read the case, it is not a product liability case. It was two foreign manufacturers who were trying—one of whom was trying to seek jurisdiction in the United States. And Justice O'Connor, who wrote the plurality opinion, was clear that she might have had

a different point of view if it were a personal injury case, that jurisdiction might have been appropriate in that case if it had been somebody who was injured by a product, a Californian, where the State would have a greater interest than in refereeing a dispute between two foreign manufacturers who were not present there.

And I mentioned this in my House testimony, and behold, two courts—and I will submit the opinions to you—have held that *Asahi's* rules do not apply when there is a personal injury case and that there is broader jurisdiction when there is a personal injury case and someone is hurt here in the United States by a foreign product. In other words, this body has more latitude to develop legislation on jurisdiction than some might think.

Senator Sessions, good to see you, sir.

I note that your focus has been on service of process, and we would work with you on that. But I would urge you to also consider legislation that addresses the jurisdictional issue. It is very rare in a Supreme Court opinion that a Justice provides a road map to Congress as to what to do. But that is exactly what Justice O'Connor did in the *Asahi* case. In a very pregnant footnote, she outlined how legislation could be formed, and that is, to have jurisdiction in Federal courts only, assembling contacts throughout the United States. A company can sell a few products in California. Under the rules, you cannot get jurisdiction over that company. But if it sells products throughout the United States and you assemble those contacts, you can have jurisdiction in a Federal court. And I think the legislation, as my testimony indicates, has to be very carefully drawn not to go overboard and be directed to the specific problem. And that was the problem with some of the House legislation. It got into issues such as choice of law and other irrelevant things. It also affected domestic distributors. You do not want to do that. But I think apart from service of process, addressing the jurisdictional issue is very important, and only this body can do it.

And I have a final suggestion that should be included is any legislation, one that might be of interest to you. I have dealt and talked with many foreign manufacturers who are sophisticated, but a lot of them do not really fully understand what our tort system does. And I think if this body passes legislation that information should be provided that reaches these foreign companies about our tort system. Tell them that they are subject to punitive damages with no limit. Tell them that they can be subject to strict liability. Let them know about the power of folks like Mr. Gowen who can see that they never will exist on the face of the Earth again if they sell defective products in this country. And I think that will be a deterrent as well as any legislation you may pass.

Thank you both.

[The prepared statement of Mr. Schwartz appears as a submission for the record.]

Chairman WHITEHOUSE. I very much appreciate your testimony, Dean Schwartz, Professor Schwartz, whatever it will be.

I would like to recognize the Ranking Member, the distinguished Senator from Alabama, Jeff Sessions, who has appeared. I do not if the Senator would care to make an opening statement at this point. We are through the testimony of Professor Teitz, Mr. Gowen,

and Professor Schwartz, awaiting only the testimony of your fellow Alabaman, Mr. Chuck Stefan.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. It is great to have Chuck here. Mr. Stefan, we are delighted to have you here and look forward to your testimony. I know because of the votes we have gotten behind. I will not issue any long statement.

I was on the way up here, and the Armed Services staff, which is meeting down the hall, grabbed me. They needed one more for a quorum, so we got 2,400 military promotions done just 2 minutes ago because I was another 5 minutes late.

But let me just say this, Mr. Chairman. This is a good hearing on an important subject. I think we ought to do the right thing for good public policy. It should be a bipartisan effort. There may be some disagreements, but I do not know what they will be. But I believe that this is not working adequately. I believe clarity and rationality can be improved in this system. And so I am glad you are having a hearing. I think it is the kind of thing we ought to do more of, get into the nitty-gritty of a problem that makes life miserable for judges, lawyers, and parties when we can probably fix it.

I look forward to hearing Chuck's testimony.

Chairman WHITEHOUSE. I am delighted to have you here, and I would like to thank you and compliment you for your and your staff's cooperation in putting this hearing together on a thoroughly cordial and highly bipartisan basis. It is really almost a joint hearing at this point. These are joint witnesses, and I could not be more delighted by the way this has gone.

Now we get to hear from Chuck Stefan, who currently serves as the Senior Executive President for Apartment Development at the Mitchell Company, a home builder in Alabama, Florida, and Mississippi, that has been ranked among the top 100 single-family builders in the country. Mr. Stefan has been associated with the Mitchell Company, Incorporated, and its predecessors in interest since 1973, following his tenure with the Multi-Family Finance Section of the U.S. Department of Housing and Urban Development.

Since joining the company, Mr. Stefan has been responsible for the site selection, acquisition, and long-term financing of the division's various apartment programs. Mr. Stefan was appointed to the Office of Senior Vice President in 1988 and is also a principal in the firm. Mr. Stefan received a B.A. from DePauw University in 1967 and an MBA from Florida State University in 1971, and we welcome him to the hearing. We believe he has the award for farthest traveled.

STATEMENT OF CHUCK STEFAN, VICE PRESIDENT, THE MITCHELL COMPANY, MOBILE, ALABAMA; ACCOMPANIED BY STEVEN NICHOLAS, ESQ.

Mr. STEFAN. Good morning, Chairman Whitehouse and Senator Sessions. Thank you for allowing me the opportunity to share my experience with you this morning. And, Senator Sessions, thank

you for stopping at the Armed Services Committee because my middle son is up for lieutenant colonel in the Air Force, and we really needed that vote.

[Laughter.]

Mr. STEFAN. The Mitchell Company builds homes in Alabama, Florida, and Mississippi. Prior to the current housing crisis, we were one of the top 100 builders in the country.

My story today does not originate in Alabama, Florida, or Mississippi. It originates in China and Germany. You see, we currently have 45 houses, including homes located in Alabama and Florida, that have been positively identified as containing "Chinese Sheetrock"—the same Chinese sheetrock that has been so much in the news lately. This drywall emits corrosive gases that smell like rotten eggs and quickly damage copper both in the piping and wiring systems.

We received our first complaints on this problem in late 2008, when our homeowners complained of a "rotten egg" smell in their Mitchell homes. We also discovered that we were replacing the air conditioning coils in air conditioning units in these houses as often as once every year. Further investigation and a Wall Street Journal report confirmed that the smell and corrosion stemmed from the Chinese drywall.

This calamity greatly impacted our business and the homes of our customers. Little did we realize the unnecessary and unfair procedural battles we faced, simply because the defective product had been manufactured abroad.

First, it was difficult trying to figure out where the sheetrock came from. Some pieces from our Alabama homes had the word "Knauf" stamped on the back of the product, while others were simply stamped "Made in China" without any further identification.

In order to identify the manufacturer of the sheetrock from our Florida homes, we had to pay $2,300 simply to access shipping data from the Customs Department. We had to navigate through many different search terms and descriptions of the possible product, ranging from sheetrock, to drywall, to plasterboard, to gypsum board. These searches, along with other information we are obtaining, will allow us to identify the manufacturer, but only after substantial time and expense. If the product had been properly marked to begin with, identification would have been as easy as reading the manufacturer's name on the product itself.

We have had a great deal of difficulty holding Knauf accountable through the U.S. court system because the Hague Convention requires us to serve this company as an overseas defendant, even though Knauf has extensive operations in the U.S., is familiar with the U.S. language and customs, and sends and receives Federal Express packages daily from its Chicago headquarters.

The rules vary by country, but under the Hague Convention, we had to translate all of the complaints into both Mandarin Chinese and German. The translators then have to send the complaints to the country involved and get an official there to serve them. We estimate that it will cost $2,300 for the German service and delay our case for an additional 12 to 16 weeks. Serving the two Chinese

manufacturers will cost us $3,000 and could add as long as 6 to 8 months.

Unfortunately, all of these delays and expenses are especially harmful to our clients. One home had such a severe drywall problem that we had to replace the refrigerator, the washer, and the dryer because the wiring had corroded and ruined these appliances.

We have also relocated one homeowner over her concerns about living in an affected house. We have offered to move another homeowner to a different house in the same subdivision, but are still awaiting her answer.

As you can see, the lack of registration and identification of these imported products and the difficulties involved in serving a foreign manufacturer have made a challenging task even more daunting. Foreign manufacturers should not be let off the hook for harming U.S. consumers and businesses like ours, especially if they are conducting substantial operations here in the U.S. If American businesses cannot hold foreign manufacturers accountable, it hurts our bottom line in addition to harming U.S. consumers and homeowners.

I look forward to answering any questions you may have about my experience, and thank you again for allowing me the opportunity to testify today.

[The prepared statement of Mr. Stefan appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you, Mr. Stefan. Your testimony I think is particularly important because it provides such a concrete example of the situation and the consequences of the situation that I think Mr. Gowen in his testimony described so well. Mr. Gowen said, ". . .foreign manufacturers enthusiastically seek access to the American market but assiduously seek to avoid responsibility and accountability in American courts for injuries caused by their products." And that seems to be the case. They have no hesitation marketing the sheetrock. They have no hesitation shipping it to you. They have no hesitation taking the check. But when it came to cleaning up the damage that they caused, suddenly you have to translate things into Mandarin and German and chase people to foreign countries.

An interesting element of your story that I would like you to expand on a little bit is that there seems to be a double whammy here for American business in the sense that from the very get-go an American gyp board manufacturer lost the sale of sheetrock to whoever manufactured the defective sheetrock, so there was harm to the manufacturer that lost the sale. And then here you are, the innocent intermediary, and now you evidently have to—they are your customers, and they are upset, and they cannot find the sheetrock manufacturer, so it sounds like that is all on you right now to try to keep your customers happy, and you are getting no support from the foreign sheetrock manufacturer. Is that correct?

Mr. STEFAN. That is correct, Senator, and I would also like to point out that the American manufacturer of the air conditioning equipment, Goodman, sent their representatives to the site, replaced their product, and continue to replace their product even after they know that it is not a defect in their manufacturing. And even though Knauf sent its attorney and a Ph.D. in toxicology and

a lab assistant to the site, they have offered no assistance with finding a solution or paying any bills or even calling us back now that we have pestered them a little.

Chairman WHITEHOUSE. And the harm to the air conditioners is because the release of sulfur from the sheetrock causes an environment in which copper corrodes very rapidly?

Mr. STEFAN. Yes. We are not exactly sure that it is the sulfur or some compound that is in the sheetrock, but about once a year you have to change the coils. It is a very thin copper, and it eats right through, and the coils just have to be thrown away. They are not of any use.

Chairman WHITEHOUSE. Ordinarily, how often would you have to change the coils in a regular home?

Mr. STEFAN. We have plenty of apartments after 20 years with the same coils still operating in the air handler.

Chairman WHITEHOUSE. And these ones do not last a year.

Mr. STEFAN. That is correct. That problem is not solved, but it has been obviated by every time we replace a copper coil today, we change out the entire unit and use an aluminum coil from a different manufacturer.

Chairman WHITEHOUSE. Professor Teitz, would requiring foreign manufacturers who sell defective products in this country to abide by a service of process requirement and appoint a registered agent and perhaps even consent to jurisdiction, is that a trade issue that would interfere with our treaty obligations with respect to the WTO? Is it addressed in NAFTA or CAFTA or any of the trade treaties we are under?

Ms. TEITZ. I do not think those are, but service, at least under the Hague Convention, the question is whether the service is actually effected and made in the U.S. And it is left to the national interpretation, which, as I mentioned, in this country is state law, and the argument is that service is complete in the U.S.; therefore, it is sufficient and the Hague Convention is not triggered.

Similarly, consent is generally viewed as an acceptable basis for jurisdiction, and I think in terms of——

Chairman WHITEHOUSE. And that would not be seen as a trade barrier being erected?

Ms. TEITZ. I do not think either one would be a trade barrier because consent is also available as a basis for jurisdiction against domestic manufacturers. And more specifically, certainly with the service issue, most U.S. corporations to get incorporated they have to designate an agent for service or under most State law, if you do business and you have not designated an agent, you are deemed to have designated the Secretary of State.

So it seems to me—I am not an expert in trade law, but I do not see anything that would suggest a favoring of nationals, of one's own national.

Chairman WHITEHOUSE. And you mention in your testimony that U.S. consumers face difficulties recovering in U.S. courts or enforcing U.S. judgments abroad—in fact, more difficulty than many foreign consumers face in the reverse situation. So in light of that lack of reciprocality, if you will, what would the effect be if foreign countries retaliated and imposed similar rules as the service of

process legislation? Would that be significant, or are American manufacturers already held accountable abroad?

Ms. TEITZ. Well, U.S. manufacturers are already held accountable abroad. Many of these consumers come to the U.S. and sue our manufacturers here because they prefer our legal system, they prefer the jury, they prefer large pain and suffering, they prefer the opportunity to be part of a class action. So I think it is more likely that they will come here, and if they do get a judgment overseas, the enforcement of foreign judgments incoming is a matter of State law, but as a practical matter, the Uniform Foreign Money Judgment Recognition Act and its amended version tend to enforce judgments as long as there was personal jurisdiction. And usually our notions of personal jurisdiction are sufficient to accept what was used there.

Chairman WHITEHOUSE. So this really would be a matter of balancing rather than creating what one might call a race to the bottom?

Ms. TEITZ. I would think that is the case. Certainly, one of the things to keep in mind, for instance, in terms of jurisdiction, in the European countries at the moment, normally a person injured can sue at the place of injury, and that is not always true here. A perfect example is a recent case out of the Third Circuit that had to do with an airplane crash. But, nonetheless, you could not sue at the site of injury. Conceivably, you may be able to sue a Swiss company that imports lots and lots of its planes to the U.S. in Colorado, but that is not clear even at this point.

So I think that our notions of personal jurisdiction in certain areas are narrower because they are activity based and have a constitutional component and, therefore, they look at what the defendant does rather than where the injury occurs.

Chairman WHITEHOUSE. The distinguished Ranking Member.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Stefan, first let me say how much I appreciate the Mitchell Company and its good work. It is one of Alabama's and Mobile's finest companies, and we wish you every success.

You have contracted with an attorney. Have you yet gotten service of process? And how long has it been?

Mr. STEFAN. Can I let my attorney address that?

Senator SESSIONS. All right.

Mr. Nicholas. Good morning, Senator Sessions.

Senator SESSIONS. You are?

Mr. Nicholas. I am Steve Nicholas with Cunningham Bounds.

Senator SESSIONS. Well, Cunningham Bounds knows how to get service, if anybody does.

Mr. STEFAN. They know how to get a judgment, too.

Senator SESSIONS. They are one of the best plaintiff law firms in America, quite an honorable and effective group.

Mr. Nicholas. Thank you, Senator. It is my understanding the complaints have been translated and they have been sent over to Germany and China, respectively, but exactly where they are in the process, I cannot tell you. We started that process probably 8 weeks ago, so while we sue local defendants, distributors, and, of course, we have service over them, but everybody is just sort of sitting there waiting for the foreign defendants to appear.

Senator SESSIONS. Well, it is just a big problem. I guess you have had to spend considerable hours in research, and there is no one easy source to go find exactly how to get this done. Is that fair to say?

Mr. Nicholas. Well, the service issues, there are companies out there that will do it for you—of course, for a fee. And so to get service over the two foreign defendants will cost the Mitchell Company ultimately a little over $5,000, and it is the delay involved, and we hope it will all work out and we will be able to get that service.

Senator SESSIONS. All right. Now, I think I like what Mr. Schwartz said, because I do know that major foreign companies, really good companies that invest in Alabama and other places, want to know about the legal system. They want to know what they are subjected to, and if they think they are going to a haven for abusive torts, it makes them nervous. They are not as willing to invest in that area. And so these are matters that are very important.

It is also unthinkable that we would allow a system to occur in which our American manufacturers are more liable and more subject to lawsuits than a foreign manufacturer. If they sell in the United States, seeks access to our markets, they should be subject to the same rules.

And, Mr. Schwartz, I like your statement a lot, which is that we should be able to tell them precisely what they are subjected to and what kind of liability insurance they may need to have or what kind of behavior they need to demonstrate to avoid getting sued in U.S. Federal court.

Mr. Gowen, you have filed these lawsuits, I believe. Do you think that is something that makes sense to you, what the professor said—who, by the way, is the editor of Prosser on Torts and one of the great legal minds in the country.

Mr. GOWEN. Absolutely, Senator, and I must say that although I was flattered, I was not quite sure that I or my colleagues have quite the draconian level of power that Mr. Schwartz ascribed to us in his testimony. But——

Senator SESSIONS. You have been known to get companies' attention.

Mr. GOWEN. Well, we have, and we think that is a good thing because we think that that gives them some considerable incentive to increase the safety of their products. And when we apply the principles of safety engineering to prove a product liability case, the term "strict liability" is strictly a misnomer. You do have to prove that the product was defectively designed, defectively manufactured, defectively sold, which is essentially the same as proving that it was done negligently. And it is a considerable burden. It is a considerable litigation. But that is where the litigation should take place, not on the issue of civil procedure.

In response to Senator Whitehouse's question on the issue of jurisdiction and the comments that Mr. Schwartz made, Mr. Stefan does not have any idea of what is going to happen next in his litigation once they come and answer because he is going to get a brief saying that the court in Alabama does not have jurisdiction.

Senator SESSIONS. That is what the defendant will say.

Mr. GOWEN. And that is what the defendant will say. And when I testified in the same hearing that Mr. Schwartz did in November of 2007, the *Asahi* case had been cited 2,600 times. I checked just yesterday, and it has now been cited 5,778 times, which tells you how often that this defense is being raised in the Federal courts, and then involves substantial briefing. As Professor Teitz said, there was just a decision from the Third Circuit this week involving an airplane crash.

So it is a considerable problem, and I think it is one that Congress should consider addressing through the consent to jurisdiction mechanism, and as Professor Schwartz said, Justice O'Connor did set forth an invitation to Congress to act in this manner.

Senator SESSIONS. Briefly, how comfortable are you with Justice O'Connor's suggestion?

Mr. GOWEN. I am very comfortable with her suggestion. I am not so comfortable with the factors that she set forth in her opinion. I think Justice Brennan set forth in the stream of commerce approach to the jurisdictional issue a much more realistic thing, because I think our system of commerce has grown where these companies in the trillion dollar range are sending products to what they call the American market, and then they come and say, "But we are not selling it to the State of New Jersey or the State of Alabama or the State of Pennsylvania." And it is simply impossible to sell to the American market without the product going to one of the States.

Senator SESSIONS. Professor Teitz, what about the—are there any dangers to the American companies that if we do the wrong thing, our companies could be subjected to similar type circumstances where perhaps the courts are less objective in foreign countries? Do you see any concern there?

Ms. TEITZ. I think there is certainly always the danger that countries adopt reciprocal legislation, but at this point, I think in general, our computers are at a competitive disadvantage because of their being subject to suit here and overseas for that matter, and they are getting judgments, parties getting judgments in Germany and bringing them over here to be enforced where there are assets.

Once upon a time, it was not quite as bad because foreign companies generally had assets in the U.S. so you could enforce a judgment you got here against one of them here. But that, of course, has changed. With a click of the mouse, one can move assets offshore and then you are stuck.

Senator SESSIONS. Well, I remember one that I was involved in, at least for a while, involving an antique automobile, and involving a great ally of ours, Germany. But the person agreed, at least I thought, ended up spending more money, and I am not sure he ever got the car. The expense of litigating abroad really can be significant and can wipe out any gain you get from an ultimate victory.

Mr. GOWEN. Senator, if I might, in response to your question, the common practice, if one of our companies is sued in this country by a group or individual foreign plaintiff is to file a form non-convenience petition and ask the court to send it back to the country of origin. And that has occurred in pharmaceutical litigation. It has occurred in oil company litigation. It has occurred in numerous

areas, so that the American companies are actually saying to the United States courts that they would rather be sued in England or Germany or wherever their product has caused harm.

Mr. SCHWARTZ. I think you can meet the *Asahi* case head on without having to go to dissents, because as I mentioned just before you came in, Senator, the *Asahi* case was a strange case. It was a case of two foreign companies seeking to use a California court for their dispute which arose abroad. And I would throw it out, and probably both of you would. It was not where a person was injured in California by a product sold in California. And Justice O'Connor in her opinion made that distinction clear.

So if your jurisdiction is over cases where somebody has been injured or there has been property damage, and you assemble the contacts nationwide, as she suggested, and place the jurisdiction in Federal courts, first you gain a little bit more in terrorem effect, meaning to make those folks, who we are going to tell them about the tort system, worry a little bit that they can be sued here. Second, you address the 5,700 cases interpreting this decision of a plurality of 21 years ago. So you cut down on litigation. You have clarity. You provide at least some in terrorem effect to foreign manufacturers, and I do think it is good for them to know about our tort system.

The tort tax situation, which I very briefly said, is intriguing. One company I represent makes the best, I think, respirators in the world, but they pay a tort tax on each product. A Chinese company comes in with a cheap perversion, they can sell it for much less because they do not pay any liability. And it is blatant unfair competition that needs to be addressed.

Chairman WHITEHOUSE. Professor, just to follow up a little bit on *Asahi*, if I can be amateur lawyer for 2 seconds, the principle that we are talking about that comes out of the *Asahi* decision is the sort of purposefulness test that is required for there to be jurisdiction in any particular State. And as I read it, the five judges who joined in the concurring opinions, all in one way or another disassociated themselves from that part of the opinion. So you actually have a majority of the Supreme Court that refused to sign on to that principle, and yet it seems to have become—gained considerable currency. It is an interesting phenomenon that a minority of the Court in that sense through its plurality opinion has set the law when a majority of the Court said, you know, we are not comfortable with that. Do you agree with that reasoning?

Mr. SCHWARTZ. Absolutely. You read the case exactly right, and you make a map with these plurality opinions, which for anybody are difficult to read. You did exactly the right thing, and that is, map out where each Justice made his or her statement. So you have a majority of the Court there—I agree with your analysis of the case, yes, sir.

Chairman WHITEHOUSE. It creates a very bizarre anomaly, as I read it, which is that you can be a company that wants to sell a product in the United States, that definitely, assuredly, purposefully wants to sell its product in the United States; but because tort law tends to be a State law, State court matter, and because of this purposefulness requirement, you can intend to sell it in the United States and then not intend to sell it in any particular State, with

the result that your product is everywhere physically and yet nowhere legally for purposes of jurisdiction.

Mr. SCHWARTZ. That is absolutely correct.

Chairman WHITEHOUSE. It is a puzzle, isn't it?

Mr. SCHWARTZ. Well, I think you can solve the cases cause—with 5,700 cites, the case has caused more confusion than it is worth. It is unlikely that the Court is going to be addressing the issue again soon. You have been given an invitation by the court to come into this area. It is not as if the Court is saying we are the only body that can tell you what to do. Justice O'Conner provided a road map. Your reading of the case is exactly right. And I would encourage you to address the jurisdictional issue as well as the service of process issue. And Mr. Gowen makes a good point about identification and also enforcement.

Chairman WHITEHOUSE. Should we require consent to jurisdiction as part of the service of process legislation? Would you join the other two legal witnesses in agreeing with that and making the panel unanimous?

Mr. SCHWARTZ. Yes, if it meets the basic constitutional requirements, because probably you have the same constitutional requirements for consent that you would have for obtaining jurisdiction. So I would concur as long as the basic constitutional requirements are met.

Chairman WHITEHOUSE. You would still have to have minimum contacts, but you would not necessarily have to have purposefulness.

Mr. SCHWARTZ. Yes, Senator.

Chairman WHITEHOUSE. OK. I understand.

One interesting point that was raised by the discussion between the Ranking Member and Mr. Stefan and his attorney is that there are other parties, domestic parties, American distributors and so forth, involved in your litigation. As I understand it—and this is a question for the lawyers—as a general proposition, if you assume that the damages that Mr. Stefan's clients have experienced are worth $1 million—that is just what it is. It is a $1 million case, and we all know that that is a given. And you have an array of different defendants, the distributors, perhaps Mitchell itself, stores that sold it—who knows? There could be an array of them. It does not make the damages any less simply because the foreign defendants cannot be found. Under principles of joint and several liability, the $1 million does not get carved up and go away. And so, in effect, by dodging responsibility under the American law, not only did they cause the American manufacturer to lose out, not only did they cause Mr. Stefan's company to have to take on a project of coping with irate consumers who, frankly, are not truly your problem, they are their problem; but you also have the other constellation of defendants who, if they are not found, will end up bearing their share of the costs in litigation out of the eventual judgment. So they are sort of triply loading up other American businesses in an uncompetitive way. Is that a fair explanation? Let me start with Mr. Gowen and then Professor Teitz and then Professor Schwartz.

Mr. GOWEN. Yes, I think it is very fairly stated, Senator, and I think all of us want to see American companies succeed. And this

is an area where there is definite unfairness because the American companies can be left holding the bag because they cannot get them there. As you say, the damages do not go down or do not go away. These folks just are able to avoid their responsibility or, you know, sufficiently add complexity to the case before you can ever get them to the court, that it becomes extremely onerous to get them there.

Chairman WHITEHOUSE. And, of course, we focused a certain amount in this discussion on the commercial defendants and the business effect of this. But behind all of that is some, in this case, Alabaman who is out of their house.

Mr. GOWEN. That is right.

Chairman WHITEHOUSE. Or who cannot get the air conditioner up and rolling because the coils have corroded out. And I gather the weather can be pretty warm down there sometimes. You need an air conditioner. So there is a real human cost in addition to the business cost.

Professor Teitz.

Ms. TEITZ. I think that as a practical matter as well, what happens is if you are a lawyer who is consulted about this, you would advise the client to go after the domestic defendants because there are so many procedural hurdles; and if you have a Chinese defendant, who you ultimately get jurisdiction over, the question is: Are you going to be able to enforce a judgment? Are there any assets in the U.S. or debtors to the Chinese company in the U.S.? So they may be for all purposes not really a viable defendant anyway. So if you already have a viable defendant who has joint and several liability, why necessarily continue on that?

Chairman WHITEHOUSE. Yes, I understand. Some people might not even take the effort that Mr. Stefan's company did to chase down the true miscreants if they are satisfied that they can collect their judgments from the American companies, and the injustice compounds itself.

Professor Schwartz, did you want to comment on that?

Mr. SCHWARTZ. I think that you have stated this very, very well, because it is in terms that everybody can understand.

Senator SESSIONS. I would just note for the record that the august professor has complimented you twice. That is——

Chairman WHITEHOUSE. I did not do that well in law school.

[Laughter.]

Mr. SCHWARTZ. I taught at his school 10 years before he was there, and as I said in my beginning remarks, that is why he probably did well, I had already left.

If this issue is broken down into terms that everybody can understand, I think it will get solved. When I hear it discussed, it is discussed in too complex a manner. But you put it well. No. 1, the rules let a foreign manufacturer take away business from American companies, and right now that is something that rings true. We are worried about jobs in this country. We are worried about business in this country.

Second, the foreign company can sell it cheaper because it does not pay the tort tax and the American company does.

And then, third, the irony is that under our joint and several liability rules, some American distributor or manufacturer who did

not do anything wrong or marginally was involved pays the whole liability.

And if you break it down into those three things and just talk about it over and over again, the media will pick it up, and you will get some wind behind the sails of some legislation that can address the problem.

I think it would be addressed when you have consensus other than when other issues that seem more important to some people, take the front seat. But this is something that is affecting this gentleman, businesses all over America, and people who are left with nobody to sue in some situations.

Chairman WHITEHOUSE. Well, let me ask the distinguished Ranking Member to conclude the questioning of this panel, unless another Senator should turn up with a question that they are burning to ask. And we will then close the hearing after that.

Senator SESSIONS. Thank you.

Well, I do think it is something we can fix and we should fix. It is not impossible. And as a practical matter, Mr. Schwartz, what about a requirement—I do not know where it would be in the system, but that the products themselves, where practical, should have on it the original manufacturer or at least some requirement that if a distributor sells it in the United States, that they have on record information dealing with who actually manufactured the product?

Mr. SCHWARTZ. You are absolutely right, Senator. You have to address the identification issue, and that may be a very practical way to do it. If we do not know whose product it is, as I recall when I did plaintiffs' work, and certainly Mr. Gowen, you do not know where to begin. So I think a requirement of that type, carefully worked out, carefully crafted, is essential to having the portal open so these companies can be held responsible.

Senator SESSIONS. You suggested there is some danger if we get too far abroad in what we write as a legislative fix that could create political controversies. But what about the question of Federal-State jurisdictions or to what extent should it be Federal if a product is sold in all 50 States? And what about venue, forum shopping, where if a product is sold in all 50 States, the plaintiff could then choose the one county that has one judge that they like and file a lawsuit there?

Mr. SCHWARTZ. You are so kind to ask that question. You know, I trademarked a term called "judicial hellholes," and I will not address any of the States of this Committee, but yes, they become places where people go, and I think your solutions to this issue should be in Federal courts, which are neutral in their application, and not create pendant jurisdiction problems and other problems where State court jurisdiction could result in situations that adversely affect domestic manufacturers.

Some of the House legislation unintentionally did that, and for getting a solution, we should stick to the core problem, it is a national problem. Sandra Day O'Connor, Justice O'Connor, said it was national in scope. She provided a road map, and I do not think it would be good to have litigation tourism going on by solving a problem and creating another one that we do not want.

Senator SESSIONS. Well, thank you. I believe we have made some progress, and I look forward to working with you.

Chairman WHITEHOUSE. I thank the distinguished Ranking Member. I thank the witnesses. I would note just in response to the very interesting colloquy between the Ranking Member and Professor Schwartz that if there is such a thing as a judicial hellhole, there are probably ones on both sides of the aisle, and what you would also not want is to allow the foreign defective product manufacturer to be able to choose venues in which their defense was favored. So that is an issue very much worth working on, but I think particularly the questions of service of process and of consent to jurisdiction have emerged from this hearing as one where there appears to be both room for progress, unanimity, and some real practical benefit from going forward.

So I am grateful to the witnesses for having framed it this well. I am grateful to the Ranking Member for his cooperation and his staff's cooperation in pulling this hearing together in so collegial a fashion.

The record will remain open for another week if anybody wishes to supplement the record. Without objection, and with the Ranking Member's consent, I will add into the record a statement of Chairman Leahy, the Chairman of the Judiciary Committee, on this question. And if there is no further business, the hearing will stand adjourned.

[Whereupon, at 11:33 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

IMPROVING ACCESS TO JUSTICE WHEN IMPORTED PRODUCTS CAUSE HARM IN THE UNITED STATES

ACCOUNTABILITY and FAIRNESS IN THE CIVIL JUSTICE SYSTEM

THOMAS L. GOWEN
PARTNER
LOCKS LAW FIRM
601 Walnut Street, Suite 720 E Philadelphia, Pa. 19106
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LEVELING THE PLAYING FIELD AND PROTECTING AMERICANS-HOLDING FOREIGN MANUFACTURERS ACCOUNTABLE

HEARING BEFORE THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE
MAY 19, 2009

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Senator Whitehouse, Senator Sessions and other members of the Judiciary Committee.

My name is Thomas L. Gowen. I am an attorney with the Locks Law Firm in Philadelphia. I am a graduate of Haverford College and Villanova University School of Law. In the course of my 30 years in practice, representing people in various contexts in the legal system, a recurring problem has arisen which I would like to address for your consideration this morning. The problem of dangerous and defective products imported into the United States has raised sufficient concern that President Bush appointed an Interagency Working Group on Import Safety which reported to the President in November of 2007. The Committee, chaired by Secretary Leavitt recognized the magnitude of the problem and recommended that "all actors involved in the production, distribution and sale of imports must be held accountable for meeting their obligations to ensure that imported products meet safety standards in the United States."

Background

As the American economy has increasingly become a service, finance and retail oriented economy, the quantity of manufactured goods that we import has increased exponentially. According to the Consumer Product Safety Commission, the United States imported $2.6 trillion worth of goods in 2006. Forty percent of all consumer products imported into the United States or about $200 billion worth in 2006 came from China. Whether these imports are items like automobiles, electronic products, tools, tires, bicycles, recreational products, toys, food, medical devices, fireworks, cosmetics or drugs, they have the potential to cause harm to American consumers as a result of negligent design, manufacture, marketing or sale. Many have already caused harm in this country. Chinese fireworks were responsible for the deaths of three young men in South Carolina and the serious injury of a Pennsylvania man running the fireworks show in Annapolis Maryland and defective tires have caused injury and death in multiple states.

During the past two years we have become aware of the sale in the American market of dangerous toys like , "Aqua Dots," a children's toy that was coated with a chemical similar to the date rape drug GHB, trains painted with lead paint, defectively designed or manufactured heparin, defective wall board, de-treading automobile tires and toothpaste containing an ingredient of antifreeze. What all of these products have had in common is that they were made by foreign manufacturers and sold in the American market in numerous states. Serious injuries and deaths have occurred in the United States as a result of the use of these and other products which were purchased from American retailers. This phenomenon has captured the attention of the news media on a regular basis recently, but it is hardly new.

What also is not new is that foreign manufacturers enthusiastically seek access to the American market but assiduously seek to avoid responsibility and accountability in American courts for injuries caused by their products. At the same time, some American retailers claim that they should be protected from liability because the defective design or manufacture was the fault of a foreign company, despite the fact that this foreign company may not be identifiable or reachable by the injured American consumer.

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American manufacturers claim that they are at an unfair disadvantage because they must be accountable in American courtrooms for the harm caused by their defective products, while their foreign competition is able to use various devices to avoid equal accountability. In fact American retailers and distributors themselves may not have the ability to join the primarily culpable manufacturers of the dangerous foreign products that have been distributed through that American company.

As the volume of imports has grown over 300% over the last decade, and according to Secretary Leavitt is expected to triple again by 2015, the ability of the Consumer Product Safety Commission and the FDA to monitor the safety of these products has declined. The Interagency Working Group on Import Safety, recommended that the Federal Government adopt a series of measures applying the principles of hazard and risk recognition to imported products that would enable "smarter" enforcement measures. The American law of product liability has, for years utilized the principles of hazard and risk recognition and safety engineering to hold manufacturers of defective products accountable and to provide remedies to those who are injured by these products. American citizens have been able to obtain compensation for injury while providing significant incentive for safer design and manufacturing of products by proving that they were negligently or defectively designed, manufactured or sold.

Unfortunately, when the product comes from abroad an unfair and unnecessary battle over civil procedure becomes the focus of the litigation which has the effect of diminishing the response mechanism to dangerous foreign products through our civil justice system. We need the Congress to adopt legislation to strengthen the private enforcement mechanism of product liability law as it applies to foreign products by addressing the issues of service of process, in personam jurisdiction and collectability of judgments. The private monitoring of unsafe foreign products through the tort system should be extended on an equal basis to those foreign manufacturers who seek to profit from selling their wares in our American markets.

The Problem: Identification, Service of Process, Personal Jurisdiction and Collection

The same manufacturers who enthusiastically enter contracts to sell their goods, often through distributors or large retailers, resist accountability in our courts. Their ability to do so arises in several contexts. Initially, they take advantage of the rules regarding the service of process. Approximately 70 countries in the world, including the United States, have signed the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters. Many others have not. For those that have, the process of bringing them to answer in a federal or state court where their product has caused injury is cumbersome, expensive and slow. A complaint must be translated into the foreign language, transmitted to the Central Authority in the foreign country, and then delivered according to the rules of service in the home country of the defendant. In a case that I handled recently, it took approximately three months to obtain service on a large corporation in Buenos Aires, Argentina, after the complaint was directed to the central authority there for service after compliance with all of the requirements of the Hague Convention.

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If the country has not signed the Hague Convention, such as in the case of India, service of process by methods recognized by the Federal Rules of Civil Procedure may not be acceptable. Service may have to be accomplished by the use of Letters Rogatory through diplomatic channels. In the case of India, these are submitted through the United States Department of State to the Indian Ministry of External Affairs.

A significant problem arises in the import of products in that even the retailer or distributor is often not able to identify the company that manufactured the product once it has determined the country of origin. That was a problem in two foreign product cases that I handled and I understand that it is also a problem with the Chinese wall board that the next witness will address. The exercise device I describe below said, "Made in China" on it but the retailer was not able to trace it farther back than the importer in the United States.

When a company can be identified and service is obtained, the foreign company will further delay and encumber the process by filing a response by special appearance asking the court to dismiss the claim on the grounds that the company has not established sufficient minimum contacts with the forum state by placing its product in the stream of commerce such that it reached the state in question. The defendant claims that it has not acted purposefully toward the forum state despite the fact that it has derived significant profits from sales in that state and others. The availability of this defense amply demonstrates that our system of justice has not changed to match the vast changes in our system of commerce. Unfortunately, the plurality opinion in the *Asahi Metal Industry* case from the Supreme Court has been used to create cumbersome and expensive litigation to avoid the day of reckoning in an American courtroom for the manufacturers of dangerous foreign products.

Asahi Metal Industry Co., Ltd v. Superior Court of California, Solano County, (Cheng Shin Rubber Industrial Co., Ltd Real Party in Interest 480 U.S. 102, 107 S. Ct. 1026, 1987

The Supreme Court has established the minimum contacts test through a series of cases familiar to most lawyers from first year civil procedure. *International Shoe, Hanson v. Denckla, Worldwide Volkswagen and Burger King v. Rudzewicz,* established various tests for the minimum contacts necessary to establish personal jurisdiction in the federal courts consistent with the Due Process clause such that, in the language of the Court, maintenance of the suit will not offend traditional notions of fair play and substantial justice. These decisions have generally been followed by state long arm statutes establishing jurisdiction as far as constitutionally permissible. In 1987 the Supreme Court decided the *Asahi Metal* case with plurality opinions having distinctly different approaches by Justice O'Connor and Justice Brennan. It is important to note that this case involved a claim for indemnity between a Japanese tire manufacturer and a Taiwanese valve manufacturer after the product liability case on behalf of the California residents had been settled. Thus, California no longer had a strong interest in providing a forum for one of its citizens and the remaining claim was between two foreign nationals. Nevertheless, Justice O'Connor wrote that the placement of a product in the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. She wrote, "Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum

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State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." On the other hand, Justice Brennan wrote, "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale. As long as the participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."

Important for the matters under consideration today, Justice O'Connor's opinion did note that the Court in *Asahi* had no occasion in that case "to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts rather than on the contacts between the defendant and the State where the federal court sits."

Asahi may have been a case in which the classic maxim, "bad facts make bad law" applies, as Asahi Metal did not control the system of distribution to the United States, the California plaintiffs no longer had an interest in the case and the matter essentially involved a dispute between two foreign manufacturers. Nevertheless, in my experience, the possible factors listed in Justice O'Connor's opinion are recited in virtually all of the cases contesting jurisdiction. I gave testimony on this subject before the House of Representatives in November of 2007 and at that time the *Asahi* case has been cited, followed, distinguished or criticized in over 2600 opinions. It has now been cited in more than 5700 cases, giving some indication of the increasing use of the minimum contacts plus factors as a defense to accountability in American courts.

Specific Examples

I have dealt with this problem recently in the case of an experienced Maryland auto mechanic who was installing new tires on a pick-up truck for one of his customers when one of the tires exploded and shattered his arm, among other injuries. Expert analysis revealed that the tire had not been properly inspected and had a defective bead which rendered the tire unable to hold even normal tire pressure. The tire bore the markings of Fate S.A.I.C.I. and had been purchased through a major tire wholesaler and retailer in Maryland. Internet research revealed that Fate S.A.I.C.I. was the largest tire manufacturer in Argentina. Its official website stated that exports accounted for two thirds of total production and are destined for markets in Europe and the United States. Further research revealed that the National Highway Traffic Safety Administration had assigned a plant code to Fate's San Fernando, Argentina, plant which allowed it to carry the DOT code on its sidewall.

An affidavit attached to the motion to dismiss the complaint admitted that Fate had shipped 8,684 tires from Argentina through the Port of Baltimore as of the date of the injury and that Fate had received $194, 204 for tires shipped through Baltimore. Baltimore was not the only port into which Fate shipped tires with 806,756 tires worth $19 million dollars being shipped into the US through east coast ports, in particular Miami and Jacksonville, Florida. Fate raised all of the arguments that foreign companies do, that it was not incorporated in Maryland, that it had no office there, that it did not make tires specifically for the Maryland market and therefore it claimed that it did not purposely avail itself of the Maryland market. It contended that a mere

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8,684 tires imported through the Port of Baltimore should not be sufficient to establish minimum contacts with that state even though it created the likelihood that between 2,000 and 4,000 cars or light trucks would be driving in the State of Maryland on these tires.

The same claims are currently being raised by the Hangzhou Zhongce Rubber Company, Ltd. in a death case in court in Pennsylvania even though it was required to recall 450,000 tires after numerous tires detreaded, causing serious personal injury and death. Hangzhou, through its chairman's affidavit, asserts that it does not make tires for the Pennsylvania market, that it does not conduct business in the state, that it does not have offices there, it is not registered to do business there, and that it does not directly market or sell tires in Pennsylvania. However, it does acknowledge that it has a contract with a large distributor, Foreign Tire Services, an American company, as its exclusive distributor in the United States. The defendant claims that it would be unfair to apply American law to cases involving harm caused by its products because it claims that merely placing products into the stream of commerce without more is not sufficient for jurisdiction to attach. Presently it is arguing on appeal in the Pennsylvania Superior Court that it should not be compelled to answer discovery requests that would address the issue of the amount of contact it had with the Commonwealth on the grounds that this information is confidential.

The Supreme Court of New Jersey is presently considering a case in which a British manufacturer of large scrap shears for use in the scrap industry is claiming that it intended only to sell its products in the United States --not in New Jersey. Every time we allow this argument we allow these manufacturers to foist a fiction upon our courts. A company cannot design, manufacturer or sell a product into the American market without selling it into one of the fifty states or the District of Columbia. In the New Jersey case the foreign manufacturer attended industry trade shows in Las Vegas and had an exclusive national distributor located in Ohio but is resisting jurisdiction of the New Jersey courts where its product caused serious injury based on the fiction that it was selling only to the American market not to the market in one of the states. Justice Brennan more accurately understood the nature of commerce in foreign products in this country when he said that the stream of commerce refers not to unpredictable eddies but to the regular and anticipated flow of product from manufacturer to consumer in any of the fifty states when it is sold into the American market.

While, as noted above, dicta in the plurality opinion of the Supreme Court in *Asahi* did suggest the consideration of the types of assertions made by the defendants in these cases in order to determine if a foreign corporation has sufficient contacts with a particular state, consideration of market reality should compel a different result. Consideration of reality should tell us that the sale of products in a state should be the primary consideration in attaching jurisdiction even if sold through a distributor or wholesaler. Most foreign corporations will neither have corporate offices nor be incorporated in a particular state. Very few products, outside of the souvenir category, are designed specifically for the markets in Maryland, Rhode Island, Alabama, Pennsylvania, Virginia, California or other states. But the products are sold in all of these states and cause injury in all of these states. The foreign corporations profit from the sale of their products in each state in which they are sold.

Even more importantly, foreign manufacturers design and manufacture tires, toys, food, cosmetics, electronics, medical devices and thousands of other products for the national

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American market, not for individual state markets. They import through importers and wholesalers for sale in the American market. On the other hand, jurisdiction in our state and federal courts has been based upon contacts with individual states. **It is unfair to handicap injured American citizens and provide foreign tortfeasors with a technical defense simply because our court system is not organized on the same basis as our markets.** Congress should note the language from *Asahi,* and pass legislation to base jurisdiction of the federal courts on the quantum of *national* contacts and the flow of commerce from the foreign corporation to the United States as a whole.

Foreign products' entry into the country also occurs in a less evident way than in the form of branded tires described above. In those cases, Americans seeking to determine the source of their injury can at least begin with the brand name of the tire, tool or automobile. However, many products are sold in this country under the proprietary brand names of retailers such as Sears, Walmart or Target.

I represented a young boy who was riding a "Free Spirit" bicycle when the front tire came off, causing him to fall over the handlebars onto the macadam roadway onto his face. The product had no markings that would identify its manufacturer. The young man's father knew that he had purchased it at Sears and investigation determined that "Free Spirit" was a Sears brand name for multiple lines of bicycles which were made by Link CBC in Hong Kong for Sears. The director of product safety for Sears was deposed in the case and he testified that Sears did not inspect or test these bicycles although they sold millions of them under the "Free Spirit" name. He testified that Sears relied on the manufacturer for the design, specifications and testing. Sears assumed that the manufacturer would comply with any applicable governmental standards, but had none of its own.

In this case, the plaintiff was dependent upon Sears to join the manufacturer in the case or, at a minimum, to timely provide sufficient information to enable the plaintiff to join, and serve the manufacturer, assuming that the statute of limitations had not run by the time such information was provided and leave of court to amend a complaint was obtained. Then the plaintiff would have to deal with the inevitable claim that the manufacturer did not have sufficient contacts with the Commonwealth of Pennsylvania such that it should be haled into court in Pennsylvania to answer for the harm caused by its product. It is important to note that the exposure of American companies to tort judgments in product liability cases would be reduced by reforming the system to make it easier to serve, litigate with, and collect judgments from the foreign manufacturers whose defective products gave rise to cases such as these. Doing so would also give foreign companies greater incentives to achieve higher standards of safety in the design and manufacture of their products destined for sale in this country.

I also represented a woman who saw an advertisement in the Norristown Times Herald in Montgomery County, Pennsylvania, that had been placed by Hanover House, a large mail order marketer, which offered an "Easy Pull Stomach Trimmer" (See attached copy of ad). The ad portrayed a woman doing sit-ups with the device which consisted of a heavy spring extended between foot pedals at the bottom in which to place the feet, and a handle at the top. My client, a 44 year old woman, purchased the "Easy Pull Stomach Trimmer" by responding to this ad, in order to tone and tighten her abdominal muscles in anticipation of wearing a bathing suit during

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the summer season. The ad promised a "slimmer, younger look in 2 weeks... guaranteed." She had had some prior back pain and would not have used any device that would stress the back. After she did 100 sit-ups with it for several days, she felt a pop and severe pain in the lower back. She had ruptured a disc at L5-S1 and damaged the disc at L4-L5, requiring surgical excision of the disc and 10 epidural nerve blocks. Upon submission of the device to an expert in exercise physiology it was learned that the "Easy Pull Stomach Trimmer" did nothing whatsoever to stress or tone the muscles of the abdomen but rather heavily loaded the erector spinae muscles and spinal ligaments while placing excessive loads on the lumbar discs in the course of performing the exercises portrayed in the package insert.

This device was marketed to the American public by Hanover House which purchased 1,985,000 of these units from seven different distributors who purchased them from an unnamed manufacturer in China. There were numerous claims involving lower back injuries and of injuries to the face when the pedals slipped off the feet of the users while the spring was extended. In this case it was essential to hold the retailer and appropriate wholesaler in the case, as the manufacturer could not be more clearly identified than one of several Chinese companies, based on the "Made in China" designation on the pedal. Again, the retailer replied in discovery that it relied on the manufacturer for safety analysis of the product and neither the retailer nor its advertising agency did anything to verify the claims made for the usefulness of the product. Needless to say no one created warnings that would have alerted people with any concern for their lower back that they should never use this product. In this case it was necessary to hold the retailer responsible for the sale of a defective product as even it could not identify the manufacturer of the product. The culpable manufacturer was able to escape responsibility.

Fireworks have been the source of severe injury and death in the United States. Chinese manufactured fireworks killed three young warehouse men in South Carolina and seriously injured a Pennsylvania man setting up the fireworks show in Annapolis. In the case brought in Pennsylvania the manufacturer ignored the jurisdiction of the court and has continued to ignore the entry of a $4 million judgment against it, even raising the defense of sovereign immunity on the ground that the parent company is partially owned by the Chinese government.

Solution

This testimony has described the problems with joinder of foreign manufacturers in several contexts—first in which the foreign manufacturer can be identified by product name, second, in which the manufacturer cannot be identified by product name but could be identified by the retailer and a third category where even the retailer could not identify the exporter of the product which was sold in the US by various resellers. All products caused injury to American citizens who purchased the products through retailers in their respective states. All foreign defendants, except the unidentified ones, required that the plaintiffs clear multiple hurdles to obtain service and then sought dismissal of the case on grounds that they did not have sufficient contacts with the forum state. No doubt they would have contended that they did not have sufficient contacts with any of the fifty states on the same basis had alternative jurisdictions been sought.

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I recommend for the consideration of this honorable Committee legislation to remedy the problems encountered by Americans in attempting to hold foreign manufacturers accountable for defective products that they market in the United States. I respectfully suggest that Congress should note the comment in the *Asahi* case that legislation to base minimum contacts upon an aggregate of national contacts has not been foreclosed. Congress should adopt legislation to declare that the test for minimum contacts with a forum shall be based upon the aggregate of contacts in the national market into which these manufacturers sell their products, rather than upon the commercially artificial concept of contacts with an individual forum state. This would more realistically reflect the commercial reality of the current market. It would go a long way toward reducing litigation over jurisdiction, and would remove artificial arguments about things like whether a tire is made for the Maryland market as opposed to the Delaware, Pennsylvania, or Virginia market.

The problem with increasing the necessary accountability of foreign manufacturers through our justice system and at the same leveling the playing field for American business has several components. The identification of the manufacturer, the efficient service of process on the company, the jurisdiction of the state and federal courts, the reasonable conduct of the litigation in the United States, and the collectability of judgments rendered by our courts.

In practical terms, I suggest for the consideration of this Committee and the Congress that establishing an import license for all foreign manufacturers and sellers who seek to sell their products in the United States could address all of these problems. The license should require the name. address, product lines and brand names made by the company. It should require the exporter to the US to have an agent for service of process in all states in which the product is to be sold. It should require a seller, in order to avail itself of the privilege of accessing American markets, to consent to the jurisdiction of the American courts in the states where there products cause injury. Finally, the import license should require that the foreign company have adequate product liability insurance in the United States to cover foreseeable claims. The information contained on the license should be reportable to the Consumer Product Safety Commission and posted on a searchable website maintained by the Commission. Finally, any foreign company that defaults on a judgment from an American Court should lose its license to sell in this country until such judgment is satisfied. By providing a means to encourage the payment of judgments in the United States either by insurance or by threat of losing an import license would do a great deal to put foreign companies on more equal footing with domestic companies and would facilitate the pursuit of justice by injured American citizens.

The Interagency Working Group on Import Safety issued a report to the President in November of 2007 recommending a strategic framework for dealing with dangerous and defective foreign products based upon the principles of prevention, intervention and response. It recommended the creation and strengthening of existing safety standards and that product safety become an important principle of our diplomatic relationships with foreign countries. The Commission recommended the adoption of import certification with strong penalties for bad actors. The civil justice system is an important and available tool for protecting and compensating our citizens as well as for improving safety. A system of certification through an import license carrying the requirements recommended above would strengthen our response system through our courts and provide considerable incentive to foreign manufacturers to

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improve their design and manufacturing practices so that their products do not become the source of serious injury and death among the American public. Making the licensing information publicly available through an official website would help to connect the manufacturers to the products in questions and assure that they could be held accountable for harm caused in this country. It would also serve to put foreign companies on equal footing with American companies and even enable American companies to shift the appropriate share of economic damage caused by defective products to their foreign manufacturers.

I thank the Committee for its attention to this matter which is of great importance to many Americans. Adoption of a licensing system such as that described above would help to bring accountability to foreign manufacturers and to level the playing field for American companies who already must answer for defective products they make without the benefit of the numerous procedural hurdles raised by foreign defendants who are supplying an increasingly large and rapidly growing percentage of the consumer goods purchased in this country.

Thomas L Gowen, Esquire
Locks Law Firm
Philadelphia, Pennsylvania 19106
www.lockslaw.com

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Statement of Chairman Leahy
Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable
Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts
May 19, 2009

I thank Chairman Whitehouse for holding today's hearing on an issue that affects American businesses and consumers alike.

As our world becomes more interconnected, and as foreign-made goods become more prevalent in our markets, this hearing is a timely examination of the legal issues that affect American consumers and businesses harmed by a foreign-made defective product. The witnesses at today's hearing will all discuss the issue of a foreign manufacturer who avails itself of the American marketplace, but is able to escape the American justice system. I recognize that there are different approaches to addressing this issue, and I look forward to receiving the views of today's witnesses.

As a result of Supreme Court precedent interpreting the Fourteenth Amendment's Due Process Clause, there are limitations on state courts that seek to exercise jurisdiction over foreign defendants. As today's witnesses will explain, it has become clear that these limitations on the reach of jurisdiction over foreign defendants can produce unfair and undesirable outcomes tantamount to immunity from liability. Though not all foreign defendants escape judicial process in the United States, some do. Today's hearing will examine possible approaches to close the gap between unfair market outcomes and corporate accountability.

Where American businesses or individuals purchase goods manufactured by a foreign company that turn out to be defective, the law should protect consumers and require accountability for those who seek the economic benefits of the American marketplace. The availability of redress for consumers, as well as the standards for commercial conduct by foreign manufacturers, should be guided by commonsense, workable, and realistic rules. And where necessary, it is up to Congress to modernize these rules to meet the demands and realities of an evolving global marketplace.

Once again, I thank Chairman Whitehouse and I look forward to working with him on this issue.

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Testimony of

Victor E. Schwartz, Esq.
Partner, Shook, Hardy & Bacon, LLP
On behalf of the U.S. Chamber Institute for Legal Reform
and the U.S. Chamber of Commerce

Before the
Subcommittee on Administrative Oversight and the Courts
of the
U.S. Senate Committee on the Judiciary

Hearing on
"Leveling the Playing Field and Protecting Americans:
Holding Foreign Manufacturers Accountable"

Dirksen Senate Office Building Room 226
May 19, 2009
10:00AM

Submitted by:
Victor E. Schwartz, Esq.
Shook, Hardy & Bacon, LLP
1155 F Street, NW – Suite 200
Washington, D.C. 20004
Phone: 202-783-8400
Fax: 202-783-4211
Email: vschwartz@shb.com

TESTIMONY OF VICTOR E. SCHWARTZ
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY
U.S. SENATE

Hearing on
"Leveling the Playing Field and Protecting Americans:
Holding Foreign Manufacturers Accountable"

May 19, 2009

Chairman Whitehouse, Ranking Member Sessions, and members of the Subcommittee, thank you for your invitation to testify today on the topic of holding foreign manufacturers accountable for defective products. Last May and the preceding November, I had the opportunity to testify on this topic before your colleagues on the other side of the Hill in the House Judiciary Committee Subcommittee on Commercial and Administrative Law. I am pleased to testify on this issue in front of you.

My background for addressing these issues includes practical experience as both a plaintiff and defense lawyer. I am a former law professor and law school dean, and co-author the leading torts casebook in the United States, Prosser, Wade & Schwartz's Cases and Materials (11th ed. 2005). In addition, I have authored the leading texts on multi-state litigation and comparative negligence.

While I have the privilege to testify today on behalf of the U.S. Chamber of Commerce and its Institute for Legal Reform, the views expressed are my own in light of my experience with these important topics.

Background

All domestic and major foreign manufacturers who do business in the United States, such as large foreign-based auto manufacturers, are subject to our legal system. Their products are priced accordingly. If they sell a considerable amount of their products in other countries where there is less liability exposure than in the United States, then they may be able to reduce their costs. Nevertheless, if one of their products proves defective and injures a person in this country, they are subject to liability here and the costs associated with such liability. The interesting

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impact of this phenomenon, though, is that some foreign-based companies may be able to inappropriately avoid these costs and reduce their prices accordingly. This places those companies who are subject to the full effects of the U.S. legal system at a competitive disadvantage because their competitors are avoiding this "tort tax."

The U.S. legal system should be consistent with the principle that those who are deemed culpable and responsible for a harm should be subject to liability to the degree of their responsibility. Accordingly, foreign manufacturers who deliberately avail themselves of the U.S. marketplace, but inappropriately avoid subjecting themselves to the U.S. legal system, should be held accountable for the legitimate harms caused by their truly defective products.

Currently, there is a potential disparity between those foreign manufacturers who escape accountability and the domestic and foreign manufacturers who do not. The net result can impact international trade, the pricing of products, and most importantly, incentives for safety. I commend the Subcommittee for examining this issue.

The Concept

The Subcommittee has called this hearing to discuss the goal of ensuring that a foreign manufacturer whose defective products injure people in the United States does not escape responsibility because it is beyond the reach of our judicial system. My understanding is that the Subcommittee is exploring, in general terms, legislative approaches to achieving this goal.

There are two aspects to this issue. The first is the difficulty and complexity of serving process on a foreign manufacturer in its home country. The second is establishing the requisite "minimum contacts" necessary to obtain jurisdiction over the foreign manufacturer in our Nation's courts. Last year, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law, discussed draft legislation to address this second aspect by expanding jurisdiction over foreign manufacturers based on their contacts with the nation as a whole, rather than individual states. My testimony will focus on that aspect and highlight some of the pitfalls that this Subcommittee should avoid.

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Establishing Jurisdiction Over Foreign Manufacturers

While product liability is guided by state law, the Due Process Clause of the Constitution of the United States only permits a state to exercise personal jurisdiction over a defendant if that entity has "minimum contacts" with that specific state. In some instances, a foreign manufacturer may do business throughout the United States, or in a limited number of states, but its product may injure a U.S. resident in a state in which its business does not rise to a level permitting a state court to constitutionally exercise jurisdiction over it.

The Supreme Court of the United States addressed such a situation in *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102 (1987). *Asahi* is frequently characterized as a suit between a California plaintiff, who was injured when a tire blew, and a tire manufacturer. This was not the actual dispute before the Supreme Court. The dispute before the Supreme Court involved an indemnity claim brought by a Taiwanese manufacturer, Cheng Shin Rubber Industrial Co. ("Cheng Shin"), which made the defective tire, and Asahi, a Japanese manufacturer of a component part, a valve, that allegedly played a part in the driver's injury. The injured California resident *did have* jurisdiction over Cheng Shin. Justice Sandra Day O'Connor's opinion relied on the fact that the plaintiff was not a California resident and that "[t]he dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety." *Id.* at 115. The Court was persuaded in its decision by the fact that it was unclear whether California law would apply in what was a contract dispute and that Cheng Shin could easily have had the dispute heard in either a Taiwanese or Japanese judicial forum. *Id.*

In this context, the Court's plurality opinion found that the manufacturer lacked the necessary "minimum contacts" with California because it did not have an office, an agent, employees, or property in the state, it did not advertise or solicit business in the state, it did not create or control the distribution system that sent its product into the state, and it did not purposely seek to send products into the California market. Mere foreseeability that the product would end up being sold in the United States, the Court found, was insufficient to establish jurisdiction. Again, in this context, the Court stated that minimum contacts requires a "substantial connection" between the defendant and the forum state that is demonstrated by "an action of the defendant purposefully directed toward the forum State." *Id.* at 112.

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Justice O'Connor's Dicta Suggests an Approach

In a footnote to *Asahi*, Justice O'Connor, perhaps concerned with an overly broad reading of the decision, provided a not-so-subtle invitation for Congress to expand jurisdiction over foreign manufacturers who purposefully send their products into the United States, but may not have sufficient contact with any particular state to allow that state to establish a "substantial connection."

In *dicta*, meaning language that was not necessary as a basis for its opinion, Justice O'Connor volunteered the following:

> 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.

Id. at 113 (emphasis in original).

In other words, Justice O'Connor suggested that Congress might, by statute, authorize federal courts to hear product liability cases involving foreign defendants who direct their products into the United States as a whole, even if they do not have a substantial connection to the state in which the injury occurred. This language could serve as the basis for legislation that would establish federal court jurisdiction over foreign manufacturers on the basis of contacts with the overall United States, whether or not such contacts occurred in the state or locality where the injury occurred.

Questions and Concerns

I appreciate the general purpose of this hearing and the overall concept of legislation to level the playing field between those foreign manufacturers who may evade overheated tort liability in the United States and others who are subject to the tort tax. In drafting legislation to implement Justice O'Connor's dicta in *Asahi*, however, I must stress that it is very important to pay close attention to the details so as not to overreach.

For example, several specific provisions of the draft legislation presented in the House last year raised substantial concerns that need to be addressed to ensure that the bill does not have unintended adverse consequences on the federal judiciary or domestic litigants, that it falls

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within the bounds of the Constitution, and that it is consistent with our international treaty obligations.

Scope. While the apparent purpose of the draft legislation considered in the House was, as it is here, to address defective products sent into the United States from abroad that cause injury to U.S. residents, it went well beyond that scope. The House draft applied this new jurisdiction to an "injury that was sustained in the United States and that *relates to* the purchase or use of a product, or a component thereof, that is manufactured outside the United States. . . ." (emphasis added). This "relates to" language is particularly problematic. It could be interpreted by courts as establishing jurisdiction far broader than product liability cases, to include *any* case that merely involves a product manufactured outside the United States. This could include a contract dispute between two foreign manufacturers, as was the case in *Asahi*, or a dispute between a manufacturer and distributor, among any other number of potential claims related to a product. Such expansive jurisdiction could burden the U.S. judicial system and its ability to promptly handle the cases of American citizens.

Constitutionality. Legislation on this issue must be carefully drafted to stay within the bounds of the U.S. Constitution. For example, the draft bill considered in the House included two aspects that would likely be invalidated as unconstitutional.

First, the House's draft legislation authorized jurisdiction over foreign entities by virtue of their *national* contacts in both federal and *state* courts. It is long-standing judicial precedent that state courts may only assert personal jurisdiction over defendants who purposefully establish minimum contacts with that forum state. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Those minimum contacts permitting jurisdiction in a state court must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws." *Asahi*, 480 U.S. at 109 (O'Connor, J. joined by Rehnquist, C.J., Powell and Scalia, JJ.) (quoting *Burger King Corp. v. Rudzewucz*, 471 U.S. 462, 475 (1985)). Any legislation on this issue should only authorize personal jurisdiction over foreign defendants on the basis of national contacts *solely in the federal courts*, as suggested by Justice O'Connor in *Asahi*.

Second, the House's draft legislation authorized jurisdiction when the foreign manufacturer "knew or reasonably should have known that the product or component part (or the product) would be imported for sale or use in the United States" *or* "had *contacts* with the United

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States." This language is significantly more relaxed than the Supreme Court's instruction in *Asahi* as to the sufficiency of contacts needed to reasonably and constitutionally assert personal jurisdiction under the Due Process Clause. Again, any legislation seeking to address this issue must recognize that a foreign manufacturer must have "purposefully directed its sale of products toward sale in the United States" *and* had "sufficiently aggregated contacts with the United States" to be subject to federal jurisdiction. Without such language, foreign companies that have made as much as an international phone call into the United States unrelated to the product at issue could unconstitutionally be hauled across the sea into the already overburdened and dysfunctional American liability system.

Litigation Tourism. In addition to the constitutional questions presented above, there are other very significant concerns. For example, if the legislation authorized jurisdiction in state courts such a provision would also permit plaintiffs' lawyers to forum shop their cases against foreign defendants to what they perceive as the most favorable or substantially anti-corporate state court in the United States. Experience dating back to the Class Action Fairness Act has shown that certain local courts could become magnets for claims against foreign defendants. This "litigation tourism" would encourage lawyers to not only bring claims from across the country but the *entire world* to particular plaintiff-friendly state courts.

Effect on domestic defendants. While the House draft legislation was, on its face, targeted at foreign manufacturers, it could have also had the consequence of significantly expanding federal jurisdiction and changing choice of law rules for *domestic* manufacturers, distributors, or retail product sellers.

The House's legislation would have permitted a plaintiff to sue a foreign entity in a federal or state court in any state in which the entity "resides, is found, has an agent, or transacts business." Because of long-standing pendant and ancillary jurisdictional rules, this language could easily have the effect of subjecting domestic distributors to lawsuits in virtually any federal or state court in the United States.

In addition, the House's draft bill provided that the "law of the State where the injury occurred shall govern *all issues concerning liability and damages.*" (emphasis added). Thus, it would appear that if a product manufactured outside of the United States forms the basis of jurisdiction (even if the claim is not related to a product defect, as discussed above), any other issue involved in the suit will be subject to the law of the place of injury. Such language appears

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to subject any domestic entity that is pulled into the lawsuit to the law of that same state even if common law choice of law rules or a contract between the parties would otherwise require application of another state's law. Such a result must be avoided.

Any legislation on this subject needs to clarify that the scope of this new federal jurisdiction is limited to claims involving an alleged defect in a product manufactured by a foreign citizen – perhaps through a rule of construction. The legislation might state, for example, that "nothing in this Act shall be construed to affect personal jurisdiction, choice of law, or liability of any entity that is not a citizen or subject of a foreign state." This language would convey Congress's intent that the law does not expand jurisdiction over or change choice of law rules with respect to domestic defendants. The purpose of such a law would be solely to subject foreign manufacturers that send defective products into the United States to the jurisdiction of federal courts.

Potential violation of treaty obligations. A final issue that needs very careful consideration is whether requiring foreign manufacturers to designate an agent for service of process in the United States or obtain a special import license as a condition to importing goods into the country would constitute a non-tariff barrier to trade. In some circumstances, requiring foreign goods to meet requirements not applicable to domestic goods may violate the terms of international treaties, such as the General Agreement on Tariffs and Trade (GATT). I am not, however, an expert in international trade and treaty obligations and would leave further examination of this issue to others who may appear before this Subcommittee.

Conclusion

It is important to note that the extent to which foreign manufacturers should be subject to the U.S. tort system is an area of which there is not clear consensus in the business community. However, there *is* consensus that the U.S. tort system can "overheat" and impose liability that is above and beyond what is reasonable. Furthermore, the cost of the American liability system can significantly increase the prices of products that are subject to it. For these reasons, it is particularly important that Congress not inadvertently expand jurisdiction or liability in such a way that would further damage our already weakened economy.

Thank you for the opportunity to testify today and I look forward to your questions.

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Testimony of

Chuck Stefan
Vice-President
The Mitchell Company

Before the
Subcommittee on Administrative Oversight and the Courts
of the
U.S. Senate Committee on the Judiciary

Hearing on
"Leveling the Playing Field and Protecting Americans:
Holding Foreign Manufacturers Accountable"
Dirksen Office Building Room 226

May 19, 2009
10:00 AM

Submitted by:
Chuck Stefan
The Mitchell Company
P.O. Box 160306
Mobile, Al 36616
cstefan@mitchellcompany.com

Chairman Whitehouse, Ranking Member Sessions, and members of the Subcommittee, thank you for allowing me the opportunity to share my experience with you this morning.

My name is Chuck Stefan and I'm one of the owners of The Mitchell Company. Mitchell builds homes in Alabama, Florida and Mississippi. Prior to the current housing crisis we were one of the top 100 single-family builders in the country.

My story today does not originate in Alabama, Florida, or Mississippi but in China and Germany. You see, we currently have 45 houses, including homes in Alabama and Florida, that have been positively identified as containing "Chinese Sheetrock" –the same defective Chinese-made drywall that has recently been reported on in the news. According to government and media investigations, these walls emit corrosive gases that smell like rotten eggs and quickly damage copper piping and wiring.

We received our first complaints about this problem in 2008, when our customers (homeowners) complained of a "rotten egg" smell in their Mitchell homes. We also discovered through our warranty records that we were continuously replacing the thin copper coils found in the air handlers in our homes, about once a year per house. After further investigation and a Wall Street Journal report about imported drywall, we confirmed that the smell and corrosion stemmed from the Chinese-made drywall in our homes.

We began to seek a resolution of the drywall matter, since this greatly impacted our business and the homes of our customers. Little did we realize that we would be up against many unnecessary and unfair procedural hurdles, simply because the defective product had been manufactured abroad.

First, it was difficult trying to figure out where the sheetrock came from. Some pieces from our Alabama homes had "Knauf" stamped on the back, while others were simply stamped "Made in China" without any manufacturer designation.

In order to identify the manufacturer of the sheetrock from our Florida homes, we had to pay $2,300 simply to access shipping data from the Customs Department. Even with the access, we had to navigate through many different search terms and descriptions of the possible product, ranging from sheetrock, to drywall, to gypsum board. These searches, along with other information we are obtaining, will allow us to identify the manufacturer, but only after substantial time and expense. If the product had been properly marked, identification would have been as simple as reading the manufacturer's name on the product itself.

We have had a great deal of difficulty trying to hold Knauf accountable through the US court system because the Hague Convention requires us to serve this company as an overseas defendant. This is required even though Knauf has extensive operations in the US, is familiar with US language and laws, and even though Knauf is likely sending and receiving federal express packages to and from the United States on a daily basis.

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The rules vary by country, but under the Hague Convention, we had to translate all of the complaints into both Mandarin Chinese and German. The translators then have to send the complaints to the country involved and get an official there to physically serve them. We estimate that it will cost $2,100 for the German service and delay our case for an additional 12-16 weeks. Serving the two Chinese manufacturers will cost us $3,000 and could take as long as 6 to 8 months. If we identify other Chinese defendants, we are facing additional costs and additional delays.

Unfortunately, all of these delays and expenses are especially harmful to our clients. One home had such a severe drywall problem that we had to replace the owner's washer, dryer, and refrigerator after the wiring corroded and ruined these appliances.

We have also relocated one homeowner over her concerns of living in an affected home, and we have offered to move another family to different house in their subdivision.

As you can see, the lack of registration and identification of these imported products and the difficulties involved in serving a foreign manufacturer have made a challenging task even more daunting. Foreign manufacturers should not be allowed off the hook for harming U.S. consumers and businesses like ours, especially if they are conducting substantial business here in the U.S. If American businesses can't hold foreign manufacturers accountable, it hurts their bottom line in addition to harming US consumers and homeowners. It also puts US businesses like Mitchell Homes at a competitive disadvantage. I look forward to answering any questions you may have about my experience, and thank you again for allowing me the opportunity to testify this morning.

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Statement of Professor Louise Ellen Teitz
Professor of Law, Roger Williams University School of Law

Before the Senate Judiciary Committee,
Subcommittee on Administrative Oversight and the Courts

May 19, 2009

I am Louise Ellen Teitz and I am a Professor of Law at Roger Williams University School of Law in Bristol, Rhode Island. I have been teaching and writing about Transnational Litigation, Civil Procedure, Conflicts of Law, Private International Law, and Comparative Procedure for over twenty years, both here and abroad. With respect to the particular issues of suing foreign manufacturers, I have written extensively about crossborder litigation, including a treatise on Transnational Litigation[1], and have participated as a member of the US State Department delegation to The Hague Conference in connection with the Jurisdiction and Judgments Convention, The Choice of Court Convention, and the Conventions on Service of Process, Evidence, and Apostille.

I am honored to be here today and appreciate the opportunity to address the Subcommittee on the difficulties of suing foreign parties, specifically foreign manufacturers in US Courts. I will speak briefly to three major procedural hurdles: (1) obtaining personal jurisdiction; (2) serving process or notice to the defendant; and (3) enforcing US judgments abroad. The first two of these are more readily remedied by some form of legislation. A party suing in a US court must first be able to find a court that has Constitutional power/authority over the defendant, or what is called personal jurisdiction. Then after filing, the party must inform the

[1] LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION (Michie 1996 and Lexis Law Publishing 1999 Supplement).

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defendant of the lawsuit and its contents, or serve process (of the summons and complaint.) And at the end of the lawsuit, the party must be able to collect any money awarded, especially when the defendant's assets are outside of the US, or be able to enforce the US court's judgment in another country.

As a result of different approaches in other legal systems, US consumers face difficulties recovering in US courts (or enforcing US judgments abroad), in fact more difficulty than many foreign consumers face in the reverse situation.[2] In addition, there is a competitive impact on US manufacturers who are sued more easily and cheaply here in the US for obvious reasons and against whom judgments can be enforced throughout the US under the Full Faith and Credit Clause.

I. Personal Jurisdiction (Adjudicative Jurisdiction)

First, personal jurisdiction is important, not only for the initial litigation, but for subsequent enforcement of any judgment, either here or abroad. When the defendant is an alien, there is the additional concern with potential enforcement in a foreign location where the defendant has assets. Legislation which required foreign manufacturers of certain products to appoint an agent for service and consent to jurisdiction in the US would in my judgment be a useful step towards leveling the playing field for domestic manufacturers as well as benefiting the US purchaser (consumer or business).

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[2] The Brussels Regulation which controls jurisdiction among members of the European Community provides rules for bringing suit based on tort "in the courts for the place where the harmful event occurred or may occur…." Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art. 5 (5), O.J. Eur. Comm. L 012/1, 16 Jan. 2001, *as amended by* Council Regulation (EC) No 1496/2002 of 21 August 2002 (amending Annex I and Annex II), O.J. Eur. Comm. L 225/13, 22 August 2002. The Regulation also includes special rules for consumer contracts.

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Personal jurisdiction in the US as you are well aware is governed by the Due Process Clause, generally under the 14th Amendment, both in state and federal court. Those concepts require that the defendant have "such minimum contacts as does not offend traditional notions of fair play and substantial justice."[3] Even when the defendant is a foreign individual or entity, state boundaries are generally the measuring unit. This standard is generally broken into two components--(1) minimum contacts and (2) fairness. Another aspect of due process requires a method of service "reasonably calculated under the circumstances" to provide notice of the litigation and an opportunity to be heard.[4]

The Supreme Court's most recent case concerning a foreign defendant and a product in the stream of commerce, *Asahi Metal Industry Co. v. Superior Court,*[5] from 1987, broke the requirements down clearly into two parts: (1) the defendant's purposeful minimum contacts with the forum; and (2) the fairness to the defendant in having to be subject to jurisdiction in the forum. The finding of no jurisdiction over the alien defendant in *Asahi* provided significant help to foreign defendants arguing that it was unfair to be sued in the US, based on Justice O'Connor's language for the majority: "Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair."[6] Although the facts of *Asahi* were quite unique, involving two foreign component part manufacturers and a plaintiff who had settled, and a Court that split on the stream of

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[3]International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[4]Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1987)(quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[5]480 U.S.102, 102 (1987).

[6] *Id.* at 116.

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commerce minimum contacts aspect, the result was inadvertently to encourage foreign manufacturers to challenge the assertion of personal jurisdiction in many cases.[7]

While lower federal courts and many state courts have upheld jurisdiction over foreign manufacturers since *Asahi*, the determination is ultimately very fact specific-- both as to whether the contacts were purposefully directed at the forum and whether it is fair to the foreign defendant to be haled into a US court. This therefore encourages litigation-- litigation that is very expensive and time-consuming for a plaintiff and costly in terms of judicial resources. Courts are often less solicitous of a Rhode Island defendant who might have to defend in California than of a Mexican defendant in the same court who might be sued 3000 miles closer to home than our Rhode Island defendant but who would be required to cope with a foreign legal system and foreign language. And in the end, when the consumer cannot get personal jurisdiction over the foreign manufacturer, the plaintiff often sues the US retailer who may frequently have trouble recovering from the foreign manufacturer of a dangerous product.

The obstacles to obtaining personal jurisdiction over foreign defendants can be broken down further, to the difficulty in reaching foreign manufacturers with minimal (insufficient) contacts with multiple states. Because the contacts are based on state lines and generally not

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[7] At the hearing, *Asahi* was discussed in connection with three different contexts: (1) minimum contacts for stream of commerce for satisfying the 14th Amendment due process provisions; (2) fairness when an alien defendant is involved in connection with satisfying the 14th Amendment requirements; and (3) the dicta referred to in footnote 5 of the opinion concerning aggregation of contacts nationally when a foreign defendant is involved and the satisfaction of 5th Amendment due process concerns.

Footnote 5 was characterized as "inviting action," which in fact occurred. *See infra* Note 8. Legislation that required foreign manufacturers to designate an agent for service would not necessarily change the outcome in *Asahi*-like fact situations or even when the suit involves a plaintiff suing a foreign manufacturer directly. Legislation that included consent to jurisdiction could help, with or without adding a national aggregation.

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aggregated, a foreign manufacturer with minimal but insufficient contacts with multiple states, may not be able to be sued in the US at all.[8] Legislation that would allow the aggregation in federal court of a defendant's contacts with the entire US for diversity jurisdiction cases would increase the ability of domestic plaintiffs to sue in US federal courts for those cases that are above the jurisdictional minimum.[9]

A federal statute that required consent to jurisdiction (as well as designation of a domestic agent for service) for foreign manufacturers importing certain types of products into the US could reduce the uncertainty that domestic plaintiffs face about if and where they can sue and maintain jurisdiction within the US. Although not on all fours, a recent case which involved a Swiss- made single engine plane that was enroute from Florida to Rhode Island and crashed in Pennsylvania in connection with a planned stop there demonstrates the difficulties that US plaintiffs may have in suing foreign manufacturers without extended litigation in what would seem to be a reasonable forum, the site of the crash, for a manufacturer where the majority of

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[8] The Court specifically refused to decide the issue of aggregating national contacts in *Asahi.* ""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. " *Asahi,* 480 U.S. at 113 n.5.

This problem was addressed specifically in federal courts by the addition of Federal Rule 4(k)(2) which however is limited to cases in federal court based on Section 1331 "arising under" jurisdiction and not reaching those based on Section 1332 diversity jurisdiction.

Legislation that provided for aggregating contacts on a national basis for all claims against foreign manufacturers who imported certain products and were required to designate a domestic agent for service would appear to satisfy the Fifth Amendment due process requirements. Indeed, many have suggested that an extension of Rule 4(k)(2) to reach diversity-based cases when aliens are involved and no jurisdiction can be obtained in any individual state would be constitutional.

[9] One could control inconvenience through venue rules or internal transfer under 28 U.S.C. § 1404.

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that model of the plane "ultimately are sold in the United States."[10] Indeed, in many civil law jurisdictions, there would be no trouble bringing suit against the manufacturer of a product where the injury occurred.

II. Service of Process

The second procedural problem a US party faces once suit is filed is notifying the defendant of the lawsuit, or service of process, the constitutionally mandated requirement of meaningful notice under the circumstances, as well as the procedural mechanism required along with filing for bringing a lawsuit in either state or federal court.[11] Suing foreign defendants raises several additional issues that add delay and expense for a consumer. First, if the defendant is located in a country with which the United States has a relevant treaty or agreement, that treaty controls, both in federal and state court. The Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters,[12] to which currently 59 countries are party, including many of our major trading partners such as Japan, Canada, and China, is the exclusive means of serving a defendant in a member country. In contrast, the Inter-American Convention on Letters Rogatory, [13] to which Mexico subscribes,

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[10] D'Jamoos v. Pilatus Aircraft Ltd., 2009 U.S. App. LEXIS 10268, *3 (3d Cir. May 14, 2009).

[11] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314.

[12] *Opened for signature* Nov. 15, 1965, art. 2, 20 U.S.T. 361, 658 U.N.T.S. 163. The Convention, along with all reservations, is available on the website of The Hague Conference for Private International Law, www.hcch.nl. It is also incorporated into Rule 4 of the Federal Rules of Civil Procedure.

[13] Signed in Panama on January 30, 1975, *entered into force for the* U.S., August 27, 1988, S. Treaty Doc. 98-27, 98th Cong., 2d Sess. (1984) does not preempt other means of service. The U.S. has a treaty relationship only with those countries that also have signed the Additional Protocol. The following have signed : Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru,

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does not preempt other means of service. If no treaty controls, there are several options both under Federal Rule 4 and applicable state procedures, but one also needs to be aware of limitations on service imposed by the foreign country where service is sought. There is also the possibility of the traditional use of letters rogatory or letters of request,[14] either through judicial or diplomatic channels,[15] both of which are less frequent with the increased use of the Hague Convention.

While compliance with the U.S. federal or state court rule for service is necessary to obtain valid jurisdiction in this country, one must *also* observe the foreign law, especially if there is the potential because the defendant has insufficient assets in the US of seeking subsequent enforcement of any judgment outside of the U.S., either in the country in which service is made, or another country. Validity of service then involves both looking backward to obtaining valid jurisdiction and looking forward to achieving enforcement of any subsequent judgment. While the violation of foreign law may not necessarily invalidate service for purposes of complying with the U.S. law, service in contravention of foreign law may be ineffective when it comes time to enforce a resulting judgment overseas. On a more immediate level, service in the foreign country must conform with the foreign domestic law since some countries sanction violations of their sovereignty by criminal or civil penalties. Serving judicial documents and proceedings in some countries is viewed as the sole prerogative of the sovereign.

United States, Uruguay, and Venezuela. Mexico and Venezuela are also members of the Hague Service Convention.

[14]The latter is the more modern term. *See* FED. R. CIV. P. 4 advisory committee notes (1993).

[15] 28 U.S.C. § 1781. On outbound letters rogatory sent through diplomatic channels for service of process, unofficial State Department figures suggest that execution takes from six months to a year for service.

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Since The Hague Service Convention is generally applicable to service of defendants from our major trading partners, I want to highlight briefly the implications of service under that treaty. Specifically it sets up a governmental Central Authority in each country to whom service is generally given, although some countries also do not object to the use of direct mail and other means of service. The use of the Central Authority adds not only costs (most lawyers use a private company to prepare the documents) but time since the documents must go to the foreign Central Authority, which then makes service domestically, and then returns proof of service. At a recent Hague Conference Special Commission on the Service Convention for which I was on the US State Department delegation, many countries were trying to complete service within three months, but many others, including China, indicated that adopting guidelines requiring service within three months was not feasible. In addition to delay based on service through a Central Authority, the Convention generally requires that documents be translated into the relevant foreign language, an added expense. A US plaintiff considering between the option of suing a foreign or a domestic defendant would obviously save time and money by suing the US defendant.

What is crucial for triggering The Hague Service Convention, in federal or state court, is that service is effected abroad ("where there is occasion to transmit a judicial or extrajudicial document for service abroad"). However, the determination of when service abroad is mandated is made by reference to national law (and in the US, in most cases, that is state law). Thus if service is complete under the law of a specific state without transmittal abroad, then the Convention, with its expenses and delay, is not triggered. However, one often advises clients of

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the preference for making service under the Convention when subsequent enforcement of a judgment overseas is contemplated.

Thus one area that is a significant expense to American consumers is service. Legislation that required a foreign manufacturer to appoint a domestic agent for service might reduce the cost of service abroad, especially if the agent would be appointed for all lawsuits throughout the US. In addition, if legislation required the appointment of a specific agent by a foreign manufacturer importing certain goods into the US, that legislation might be expanded to require explicit consent to jurisdiction in the US (either countrywide, or in the specific locale, or even in the place of injury). Consent is a traditional basis for personal jurisdiction, and one could thereby avoid the need for lengthy litigation over the nature and extent of minimum contacts necessary for the court to have authority over the defendant, as discussed above.[16]

III. Enforcement of US Judgments Abroad

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[16] Arguably, even if a party consented, there could be a question as to the validity of the consent. There is also mixed caselaw as to whether consent in itself satisfies due process or whether one can still challenge due process. Much of that caselaw has developed in connection with state "registration to do business" statutes and is not directly on point, as the parties have tried to use registration and appointment of an agent as sufficient to create consent. For example, one of the better known cases, Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183-84 (5th Cir. Cir. 1992), specifically states that registering an agent doesn't act as consent. "No Texas state court decision has held that this provision [registering an agent for service] acts as a consent to jurisdiction over a corporation.... Learjet does not contest the 'potential' jurisdiction of Texas courts. They do assert and we agree that the appointment of an agent for process has not been a waiver of its right to due process protection." *Id.* at 183. *Compare* Ratliff v. Cooper Labs, Inc., 444 F.2d 745 (4th Cir. 1971) *with* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196 (8th Cir. 1990). Some courts have found that designating an agent and service on the agent confer jurisdiction. *See, e.g*, Jacobson Distrib, Co. v American Standard, Inc., No. 4:07-cv-00208-JAJ, 2007 U.S. Dist. LEXIS 79994 (S.D. Iowa Sep. 5, 2007); Chick v. C&F Enterprises, LLC, 938 A.2d 112, 112-15 (N.H. 2007)(applying the federal Motor Carrier Act designation to amount to express consent to personal jurisdiction).

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The third area that US parties suing foreign manufacturers often face is collecting abroad since the foreign defendant often will have no assets in this country against which to enforce a judgment. I want to emphasize that the US is not a party to any bilateral or multilateral agreements for the enforcement of civil judgments,[17] although I hope that the Administration will soon submit, and the Senate will give advice and consent in the near future to, a recently concluded multilateral agreement on enforcing judgments in the limited context of choice of court or choice of forum clauses.[18] As a result of the lack of a multilateral convention, a foreign country is under no legal obligation to recognize a US civil judgment. In contrast, the US generally recognizes and enforces foreign judgments. The reality is that we have a trade imbalance, in that we import and enforce most incoming foreign judgments[19] far more often than we are able to export and enforce our judgments overseas. Foreign countries are reluctant to enforce our judgments for a series of reasons, including hostility to the jury system and to

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[17] There is extensive literature on the Hague jurisdiction and judgments negotiations and drafts. *See generally* SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION (2003); Ronald A. Brand, *Jurisdictional Common Ground: In Search of a Global Convention*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 11 (James A. R. Nafziger & Symeon C. Symeonides ed., 2002); Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319 (2002); Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections of the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17 (1998).

[18] The Hague Choice of Court Agreements Convention was signed by the US on January 19, 2009, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98n The Hague Conference website. *See generally* Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 American Journal of Comparative Law 543 (2006).

[19] One area that is currently controversial is that of defamation judgments, where both the House and Senate have considered federal legislation, H.R. 6146, generally known as The Libel Terrorism Act.

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compensatory awards that include significant amounts for pain and suffering.[20] And, as mentioned earlier, when service was not made in accordance with an applicable treaty or when our basis for personal jurisdiction is not recognized by the foreign country, the resulting judgment will not be recognized. Even when the US judgment is recognized by a foreign court, the process may be lengthy and costly, requiring relitigation of many issues. Nor do I see this imbalance of trade in incoming and outgoing judgments changing any time in the near future, having watched the negotiations first hand in the Hague for a comprehensive foreign judgments convention collapse after more than a decade of efforts.

American plaintiffs who can find a foreign defendant's assets in this country can of course enforce a judgment from one state in a sister state under the Full Faith and Credit Clause and use expedited procedures under uniform state law. But so many of the manufacturers of products that injure US citizens at home have no assets here in the US and indeed often deliberately structure their business with the use of an independent distributor to reduce their exposure to suit or judgments in the US courts. In the end, a US plaintiff who is choosing among potential defendants would be well-advised to sue any domestic defendant with potential substantive liability over a potential foreign defendant unless that defendant has assets (or at least debtors to it) in the US.

One final comment I might make is that I would hope that this Subcommittee would be sensitive to the fact that whatever its recommendations for legislation that would help domestic consumers injured by foreign products, there is the strong possibility that our trading partners

[20] In addition, judgments that include punitive damages or are the result of class actions are especially difficult to enforce in foreign countries.

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will adopt similar legislation in their own countries that may make it harder for US manufacturers to export their products overseas.[21]

I look forward to your questions and welcome the opportunity to work with the Subcommittee as it moves forward with legislation.

[21] At the hearing, there was some discussion of potential trade issues. While I am not an expert in international trade law, federal legislation, especially as to designation of an agent, probably would not violate rules on national treatment since it would not place foreign defendants at a disadvantage procedurally. In general, corporations doing business in a state must register with a state authority and designate an agent and similar practices are required under some federal regulations. The rules of the GATT, GATS, and NAFTA require national treatment in respect to products, services, and investors, none of which would be implicated directly by legislation concerning service of process and personal jurisdiction. For a discussion of procedure in litigation and trade issues under the GATT, *see generally* Ronald A Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930*, 24 J. WORLD TRADE 5-30 (1990).

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Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
May 19, 2009

Opening Statement of Sheldon Whitehouse
Chairman, Subcommittee on Administrative Oversight and the Courts
Hearing on "Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable"
As Prepared for Delivery

Every day, Americans in all walks of life are injured by defective products that are manufactured outside the United States. These products hurt consumers – they lead to serious injuries, and even death – and they hurt the American businesses that sell these products, and that must deal with angry customers, product recalls, and unusable inventory.

The list of recent examples of Americans injured by products made in China and other countries is shocking. Last year, a contaminated blood thinner caused severe medical reactions and contributed to numerous deaths. In 2006, a lead-tainted charm bracelet claimed the life of a 4-year-old. The autopsy demonstrated that the charm was 99 percent lead, 1,650 times more than the 0.06 percent lead limit specified in CPSC enforcement guidelines for children's jewelry.

Food products from seafood to honey have been contaminated with unthinkable chemicals, including veterinary drugs banned in domestic production, potentially harmful antibiotics, and unapproved food additives. 60 million packages of pet food contaminated with tainted wheat gluten have been recalled in the last two years. Substandard tires have failed, leading to fatalities.

Most recently, defective drywall imported from China has been found to contain excessively high levels of sulfur, causing houses to smell like rotten eggs, corroding copper wiring, and making expensive appliances fail. Thousands of homes may be affected. A subcommittee of the Commerce Committee will hold a hearing on Thursday to consider the consequences of these defective products. I commend them for their leadership on what rapidly is emerging as a major problem for home owners and businesses.

We all know American manufacturers must comply with regulations that ensure the safety of American consumers. When they fail to do so, they must answer to regulators and are held accountable through the American system of justice. Unfortunately, however, foreign manufacturers are not being held to the same standards – this puts at risk American consumers and businesses, and puts American manufacturers at a competitive disadvantage.

A major cause of this disparity is that Americans injured by foreign products face unnecessary and inappropriate procedural hurdles if they seek to hold foreign manufacturers accountable. First, they must identify the manufacturer of the product that injured them – often not an easy task since many foreign products do no more than indicate their country of origin.

Second, an injured American must serve process on the foreign manufacturer. This means the injured American has to deliver legal papers to the company directly or through a registered agent explaining that he or she is bringing a legal action against it. But this simple step often requires enormous time

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and expense – lawsuits even can fail over it – as the injured American attempts to comply with various complicated international treaties.

Third, an injured American must overcome the technical defense that, even though a foreign manufacturer's product was used by an American consumer, the courts of that consumer's home state do not have jurisdiction over that company.

Finally, even after an injured American has overcome these hurdles and prevailed in court, a foreign manufacturer can avoid collection on the judgment – often simply cutting off communications or shutting up its business and starting up again with a different name.

Americans harmed by defective foreign products need justice, and they do not get it when foreign manufacturers use technical legal defenses to avoid paying damages to the people they have injured.

Today's hearing will help us learn more about these failures of justice and what we can do to fix them. If we do nothing, Americans will continue to be injured by foreign products and denied a meaningful remedy American businesses will continue to be left on the hook for foreign defective products they import, use or resell; and foreign manufacturers will maintain a competitive advantage over American manufacturers who must follow the rules and are subject to the American tort system.

This hearing will consider the range of legal impediments standing between an injured American and an enforceable, collectible judgment against the foreign manufacturer. It also will demonstrate that these impediments result in enormous harm to American consumers, as well as damage to American businesses that transact business with the foreign entity. The assembled panel of experts will explain the legal hurdles facing Americans injured by foreign products and also put those injuries into real-world context by describing the harm they cause our families and our businesses.

I am very grateful to all the witnesses for taking the time to come before the committee today. I am especially delighted to have Louise Ellen Teitz here to testify. She is a distinguished professor at Rogers Williams University Law School in my home state of Rhode Island. Her expertise will make a great contribution to this hearing as it has to that wonderful law school of which she was one of the very first professors.

I look forward to continuing to work with Professor Teitz and the other witnesses as I will soon introduce legislation that addresses the difficulty in serving process on foreign manufacturers. My legislation will require that a manufacturer who imports goods into the United States must designate an agent for service of process who will accept the legal papers required to initiate a lawsuit. It will require the development of a register of these agents so that an injured American can inform the manufacturer defendant of a lawsuit quickly and cheaply. I look forward to working with Ranking Member Sessions and other Senators on this legislation. Similarly, I look forward to hearing the witnesses' perspectives on the approach I've proposed.

Protecting Americans and holding foreign manufacturers accountable when their products harm consumers is not a partisan issue. Everyone agrees that we should do what we can to keep Americans safe from defective products. So too, I think, we all agree that American companies should not be at a competitive disadvantage to their foreign counterparts. With these fundamental agreements, I look forward to finding legislative solutions that will level the competitive playing field and protect Americans.

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