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# **Caveat Manufacturer: A Basic Guide for Non-U.S. Manufacturers & Distributors to Understand the Judicial System and Products Liability Law in the United States**

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## Prologue

This guide has been made in an effort to be responsive to major areas of interest and concern affecting non-U.S. manufacturers and distributors to the United States. This presentation is intended to provide an overview of the American legal system and those aspects of U.S. substantive and procedural law as they pertain to products liability claims against overseas manufacturers and distributors.

The United States will remain an important source of export revenue and profits for the foreign manufacturer and distributor. It is important that foreign manufacturers and distributors have an understanding of the concepts of American jurisprudence that will affect their continuing relationship with the American consumer.

Every manufacturer or distributor is, of course, concerned with the substantive issues of its ultimate liability and with limiting that potential exposure. The foreign manufacturer or distributor, however, has certain more fundamental concerns than its domestic counterpart; namely, its amenability to the jurisdiction of American state or federal courts and the legal issues that it will face when sued by a consumer in the United States for damages based on a claim arising from its product. This guide provides an overview regarding these subjects, as well as ways a foreign manufacturer or distributor can attempt to minimize its potential liability exposure, both before and after the event that gives rise to a claim.

The purpose of this guide is to provide you with (i) a basic understanding of the American legal system and products liability law and (ii) a framework to develop and formulate questions that you may have with respect to your business' particular needs. It is not intended to provide legal advice to any particular person or entity with respect to any specific legal issue. In addition, there are important differences in many of the legal principles discussed herein, both between the U.S. federal and state systems and from state to state. Thus, specific legal issues require a case-by-case analysis. You should always consult with an experienced lawyer, licensed to practice within the United States (such as the editor of this guide), in connection with any specific legal issues that your company may have in the United States.

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# I. THE JUDICIAL SYSTEM OF THE UNITED STATES IN THE CONTEXT OF A PERSONAL INJURY ACTION

## A. THE JUDICIAL SYSTEM

The United States of America is a federal system of government, i.e., a union of autonomous states sharing power with the federal government. A salient feature of the federal system is the direct operation of both the states and the federal government within their respective territorial limits. One aspect of this system is the existence of two fully organized and functioning court systems -- state and federal.

### 1. Federal Judicial System

Article III, Section 2, of the U.S. Constitution sets forth the areas to which federal judicial power extends. Two types of cases over which federal district courts may exercise jurisdiction are (1) lawsuits involving a federal question – cases in law or equity arising under the U.S. Constitution, the laws of the United States and treaties between the U.S. and other countries, and (2) diversity cases – lawsuits commenced in federal court between citizens of different states or between citizens and foreign nationals that involve a claim for damages valued at more than \$75,000, exclusive of interest and costs.

The federal court's subject matter jurisdiction, therefore, derives from the Constitution or Congress, acting within the limits of the Constitution. A final judgment entered by a federal district court may be timely appealed to the appropriate U.S. Circuit Court of Appeals. A decision of the U.S. Circuit Court of Appeals may be appealed to the U.S. Supreme Court.

### 2. State Courts

The various states have courts with general jurisdiction over actions at law or in equity. Unless they are specifically prohibited from exercising jurisdiction over a particular type of action by a valid Act of the U.S. Congress or by the U.S. Constitution, state courts have concurrent jurisdiction with the federal courts. A state court may, therefore, entertain an action even though it is based entirely on a federal question.

The U.S. Congress has the power to give the federal courts exclusive jurisdiction of matters within the judicial power of the United States. It has, indeed, done so on numerous occasions, granting exclusive jurisdiction to the federal courts to adjudicate matters of bankruptcy, admiralty, patent, copyrights, trademarks and anti-trust. Other than these enumerated areas of law, the state courts have jurisdiction over all actions in law and equity. As federal courts are of limited jurisdiction, there are numerous areas of the law where state courts have exclusive jurisdiction.

The structure of state courts reflect the English heritage of the United States. Each state has, in addition to the trial court, one or more appellate courts.

### 3. Interface Between Federal and State Courts

To a great extent, each judicial system works independently. There is concurrent jurisdiction over federal law questions (unless Congress has by statute granted jurisdiction exclusively to the federal courts) and over cases where complete diversity is present. Generally, the state courts decide issues without federal intervention, or even federal review.

As noted, where federal court jurisdiction exists, state courts have concurrent jurisdiction over those matters unless Congress has given the federal courts exclusive jurisdiction. Consequently, even though citizen "X" is a resident of New York and citizen "Y" is a resident of Florida, citizen "X" may sue citizen "Y" in state court in Florida or New York (if the New York court can exercise personal jurisdiction over citizen "Y") to vindicate a right granted by federal law. The federal courts have jurisdiction over the action, but this jurisdiction is concurrent with the state courts. However, where an action could have been commenced in a federal court, but was brought instead in a state court, the

defendant may apply to the federal court for removal of the action to federal court. This “removal” rule applies only to civil actions. Thus citizen “Y,” sued in a New York court on a matter governed by federal law, could remove the action to the United States District Court (federal court) sitting in New York. This right is granted to a foreign defendant to help obviate any “home town” advantage that the local plaintiff may have by suing in his or her home state.

## **B. CIVIL LITIGATION**

Generally in the United States, where the conduct of one party has harmed another party, either in the form of bodily injury or property damage, the injured party may commence a lawsuit against the party or parties that caused the harm under a tort theory of liability. A tort is committed when a recognized duty owed by one to another has been breached or violated and, as the proximate result of the breach, an injury has occurred. The person injured as a result of the breach of a duty owed can seek to be compensated for the wrong done to him. The injured party is known as the plaintiff in the lawsuit and the party that has been sued is known as the defendant.

### **1. Initiation of Litigation - Service of Process**

After making a determination in which court the lawsuit will be commenced (which decision involves a number of factors specific to the matter at hand), the attorney representing the plaintiff must take steps to commence the action in accordance with the applicable laws and court rules. Most judicial systems require the filing with the court of a Complaint as the proper method of commencing an action. Once an action is commenced, the attorney for the plaintiff must serve the defendant with a copy of a Summons and the Complaint. It is the proper service of a Summons which confers the power of the court over the defendant. If the plaintiff has failed to properly serve the defendant, the defendant may make a motion to dismiss the case for defective service of process.

There is an international treaty, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 (Hague Service Convention), [1969] 20 U.S.T. 361, T.I.A.S. No. 6638, for service abroad by mail of process. Also, the United States courts, and most state courts, will typically recognize as valid, service via personal delivery which is in accordance with either the applicable local service of process statute or the law of the country where service is made. Many lawsuits are commenced against foreign companies in the U.S. under the treaty by service of mail for the obvious reason that it is less expensive to effect service of process.

The Complaint sets forth the allegations of the plaintiff against the defendant and the damages that he is seeking. The purpose of the Complaint is to give the defendant information of all material facts upon which the plaintiff relies to support plaintiff’s legal theories of liability – known as causes of action – allowing the defendant to prepare for its defense.

Once service has been effectuated, it is then incumbent upon the defendant to respond to the factual allegations of the plaintiff. The defendant’s Answer to the allegations of the Complaint serves the purpose of raising issues of fact, by either admitting or denying each of the allegations in the Complaint. Those allegations that are denied by the defendant must then be proven by the plaintiff. The issues of fact must ultimately be decided by a jury, made up of members of the community where the court is located. With the submission of the Answer to the plaintiff’s Complaint, issue is joined in the case. The case then proceeds on to the discovery phase.

### **2. Discovery**

Discovery procedures are used to make lawsuits a genuine search for truth and to eliminate surprise at the trial. Broad discovery is used in the federal courts and most of the state courts in the United States.

There are essentially five discovery devices which are used in the state and federal courts in the United States. They are: (1) interrogatories, (2) depositions, (3) production of documents and/or of objects, (4) physical and mental examinations, and (5) request for admissions. Prior to a discussion of each device, it should be mentioned that not all information is subject to the discovery process. Privileged communications are not subject to disclosure, including communications between attorney and client, and depending on the law of the relevant jurisdiction, between husband

and wife, physician and patient, and clergyman and parishioner. Additionally, strategy and other information which are developed by the attorney during the investigation of the case are not generally discoverable. This privilege, known as the work-product doctrine, protects the work-product of the attorney in preparing for trial.

The discovery phase of a simple case can last a mere matter of months, and a more complex case can involve discovery that lasts for years. The discovery phase in a product liability lawsuit is typically more complex and very expensive. It is imperative that a defendant in a product liability lawsuit utilize an experienced law firm and develop protocols for discovery in the United States to reduce the fees and expenses that will be incurred in this phase of litigation.

After discovery has been completed, the case is ready to be put on the trial calendar. An overwhelming majority of lawsuits are settled before the trial is concluded.

### **3. The Trial**

A jury trial begins with the selection of jurors. In civil cases today the number of jurors is often six. Depending on the particular court in which the trial is being held, the attorneys for the respective parties or the trial judge will conduct the questioning of the jurors. This examination of the jurors is known as voir dire. Its purpose is to ferret out any bias, prejudice, or preconceptions which the jurors may possess and which consequently would lead to disqualification. In federal court, voir dire is typically conducted by the judge; in state court, voir dire more often is conducted by the attorneys.

After the judge has offered these preliminary instructions to the jury, the attorneys are permitted to make opening statements. The purpose of the opening statement is to inform the jury in a narrative form what each side believes the case is all about.

After the opening statements are concluded, the attorney for the plaintiff will present plaintiff's case in chief. Witnesses are called for direct examination and offer into evidence certain documents and photographs, if applicable. Upon conclusion of the direct examination of each witness for the plaintiff, the defendant is entitled to conduct cross-examination of the plaintiff's witness. Upon conclusion of the cross-examination, the attorney who called the witness to the stand may then ask additional questions on re-direct examination.

When the plaintiff's attorney has called all witnesses and has introduced all evidence, the plaintiff will rest its case. If the plaintiff has presented sufficient evidence to make out a prima facie case on its legal theories of liability, the defendant will next have the opportunity to present its case in chief, following the same process as the plaintiff's presentation of witnesses, documents, etc.

At the close of the defendant's case, each attorney is permitted to summarize the evidence and to point out the defects in the opponent's case.

After the summations are completed, the judge charges or instructs the jury on the law. The judge explains the law and emphasizes that the jury must apply the law to the facts as it finds them.

After deliberation, the jury will return to the courtroom with the verdict it has rendered. Depending on the jurisdiction, the verdict can either be a general verdict or a special verdict. A general verdict simply finds for or against a party. A special verdict includes specific findings on each ultimate fact put in issue.

## II. JURISDICTION OF COURTS IN THE UNITED STATES OVER OVERSEAS MANUFACTURERS

### A. SUBJECT MATTER JURISDICTION

Jurisdiction is comprised of two separate and necessary elements. The first, known as subject matter jurisdiction, is concerned with the authority of a court to entertain a particular type of action. Most states have at least one trial court of unlimited jurisdiction which is competent to adjudicate any action, unless preempted by federal law, and to render a judgment for any amount. Thus, each state has a court with subject matter jurisdiction to hear the merits of virtually any case. Similarly, the United States District Courts all have subject matter jurisdiction over (1) an action arising under the laws or treaties of the United States, and (2) a cause of action between citizens of different states, or between a citizen of one of the several states and a foreign citizen or corporation, where damages claimed are in excess of \$75,000 exclusive of interest and costs. Generally, any serious product liability suit would be within the subject matter jurisdiction of at least one trial court in each state and, in appropriate circumstances indicated above, a United States District Court.

### B. JURISDICTION OVER A PARTY

The second element of jurisdiction, known as jurisdiction over a party, deals with the authority of any given court over the person or presence of a party to the action by reason of its contacts with a territorial jurisdiction or the activity which he undertakes within that jurisdiction. Similarly, jurisdiction over some asset or property in which such a person or party has an interest is comprehended by this term.

Jurisdiction is a concept which must be understood in terms of limitations imposed by the Constitution of the United States. "Due process" under the United States Constitution includes the principle that a foreign corporation will not be subject to jurisdiction of a state unless it undertakes some purposeful activity to avail himself of the rights, privileges and protections of that state. When it has made such a choice and engages in such activity, it may be subject to personal jurisdiction in that state. Where it does not, it would be manifestly unfair and arbitrary to force it to defend an action and to litigate in a state where it never intended to and did not pursue any business activities.

Once such purposeful activity is found to exist, the U.S. Constitution also requires giving notice to a party that the court will adjudicate its rights. Such notice is accomplished by the service of process, usually a Summons and Complaint, outside of the state by delivery to the defendant manufacturer. The contacts of a defendant manufacturer with the state provide the Constitutional basis for such extra-territorial service of process and the assertion by the state of jurisdiction over the foreign manufacturer. Where a foreign manufacturer conducts business in a state on a regular, purposeful basis, it will be deemed to be present in the state for jurisdictional purposes for any lawsuit against it. Additionally, most states have specific statutes, known as "long-arm statutes," which allow for the exercise of jurisdiction over a foreign entity when certain wrongful acts have been committed.

#### 1. Personal Jurisdiction

Where a foreign corporation maintains employees and offices within an area where which a court exercises territorial jurisdiction and conducts business there on a regular basis then it is maintaining a presence in that territory and is subject to the power of its courts. The court may exercise jurisdiction over that entity with respect to any matter whatsoever since it is deemed to be at all times "present" within that jurisdiction and may be sued on any cause of action. It is said that the courts of the state have "general jurisdiction" over the foreign corporation under such circumstances.

The more difficult situations are presented where a foreign manufacturer has irregular contacts with a particular state. Where the manufacturer does not maintain offices within a state, but regularly solicits business from the state, ships goods into that state, engages in advertising within the state, sends salespeople to the state (who may even have an office there), maintains bank accounts within the state, and visits the state on a regular basis for business purposes,

its conduct rises to the level of “doing business” on a regular basis such that it may be subjected to jurisdiction on any cause of action (again, “general jurisdiction”).

Another form of personal jurisdiction is based on the occasional “transaction of business” within a state, known as “specific jurisdiction.” The conduct discussed previously, if it does not reach the level of “doing business” within the state, may yet be enough to qualify as “transacting business” within the state to subject the foreign corporation to jurisdiction with respect to its specific transactions in the state. It may be that a manufacturer which has never before done business within a state chooses to solicit business from within such state which results in its shipping a particular product to that state and receiving payment for that product. That product may then cause injury to an ultimate consumer within that state. In such case, the ultimate consumer would in all likelihood be able to convince a court within that state that it may exercise personal jurisdiction over that foreign manufacturer with respect to injuries growing out of the single transaction.

Generally speaking, the foreign manufacturer will be found to be “transacting business,” subjecting it to specific jurisdiction, if it places an article in the stream of commerce which causes injury within the territorial jurisdiction and there was a reasonable expectation that the product was capable of reaching and causing injury within the jurisdiction. The foreign manufacturer must derive substantial profits from international or interstate commerce, or consistently act within the state and derive revenues from the state. The revenues derived from the state for purposes of specific jurisdiction may be substantially less than that necessary to exercise general jurisdiction over the foreign company.

The U.S. Constitutional restrictions on the power of the states to exercise jurisdiction over foreign entities apply to all states. The states may choose to exercise as much authority as they wish within the U.S. Constitutional limitations. The U.S. Supreme Court has interpreted the U.S. Constitution to allow the exercise of jurisdiction as long as it does not offend “traditional notions of fair play and substantial justice.”

Many foreign manufacturers have taken steps to protect themselves from being subject to personal jurisdiction in the United States. One practice is the establishment of a distribution company responsible for sales in the United States. The manufacturer sells the product to the distributor outside the United States, usually at the point of manufacture. Such practices have been treated as effective in some states and ineffective in others. Notwithstanding, the distribution company would most likely be subject to jurisdiction in the various states.

### **C. A CHALLENGE TO PERSONAL JURISDICTION MUST BE MADE PROMPTLY**

The subject of service of process, or the manner in which a Summons and Complaint are formally served upon a foreign manufacturer, is an issue which must be carefully reviewed in each instance.

Neither the service of a Summons and Complaint upon a foreign manufacturer nor acceptance of them by the manufacturer necessarily means that the court acquires jurisdiction over the “person” of the corporation or that the manufacturer loses any defenses with respect to personal jurisdiction. Nevertheless, upon service of process, the court does at least acquire “jurisdiction to determine its jurisdiction” over the foreign manufacturer. A challenge by the defendant on grounds of lack of personal jurisdiction must, however, be done promptly before the lawsuit reaches the merits of the claim. If too much time elapses and the lawsuit proceeds without a resolution of the issue of personal jurisdiction, the court may likely hold such a defense to have been abandoned and waived. That is, if the foreign defendant appears in the action, addresses the merits of the case, and fails to promptly raise objections as to personal jurisdiction, the foreign defendant may be deemed to have waived its right to object to lack of personal jurisdiction.

Again, if a foreign company has received a Summons and Complaint for a lawsuit against it that has been filed in a court in the U.S., or learns that it has been named as a party in such a lawsuit, the foreign company should immediately retain an experienced U.S. attorney to discuss its options and analyze the specific legal issues presented. It is hoped that the foregoing will present the basic principles to allow the foreign company to recognize the initial issues, pursuant to which it can formulate the right questions once it has contacted and retained appropriate U.S. counsel.

### **III. A PRIMER OF THE SUBSTANTIVE LAW OF PRODUCTS LIABILITY IN THE UNITED STATES**

Generally, there are three theories upon which recovery can be sought against an overseas product manufacturer in the United States:

- (1) Negligence;
- (2) Strict tort product liability; and
- (3) Breach of warranty.

While there are certain common themes which run through these theories, each theory presents different burdens of proof for the plaintiff to sustain and distinctive thresholds for consideration in the defense of the action.

#### **A. THE NEGLIGENCE THEORY**

Actionable negligence, or negligence in the legal sense, has been defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation to whom a duty of care is owed. In products liability cases, a manufacturer or seller of a product may be held liable if that product is defective and causes injury. Such liability is premised on the failure of the manufacturer and/or seller (i.e., retailer) to exercise due care in the manufacture or handling of the product. As in all other cases founded upon negligence, to prevail the plaintiff must establish the elements of negligence. Specifically, the plaintiff must establish that the manufacturer and/or seller breached a duty of care owed towards the plaintiff and that the plaintiff sustained an injury which proximately resulted from that breach of duty. The plaintiff bears the burden of proving that the manufacturer and/or seller were negligent.

To establish a negligence cause of action against a manufacturer and/or seller, the injured person must show the following: (1) that the act of negligence complained of amounted to a breach of a duty owed by the manufacturer or seller to the plaintiff; (2) that injury was a foreseeable consequence of the defendants' negligence; and (3) that the manufacturer's or seller's negligence was the proximate cause of the injury. The general method of proof of negligence has been through the use of expert testimony.

##### **1. Duty**

The standard of care owed by a manufacturer or seller of goods has been stated in various ways. One prominent commentator has observed that it is the practice of the courts to set forth the obligation of care of a defendant in debatable or inexact language, such as the duty to exercise the care of a "reasonable man of ordinary prudence" to see that the product does not harm the user. This duty is usually equated with care commensurate with the risk that a product might cause harm in a particular situation. What is necessarily implied is that greater care is required with respect to some products than is for others. For example, manufacturers and sellers are charged with a higher standard of care in connection with such products as foods and beverages, drugs, explosives and inflammables. Similarly, a greater degree of care may be required where the possibility of injury or damage may be reasonably foreseen by the defendant.

It should be noted that an extraordinary degree of care is not required. A defendant will not be held liable in negligence for an injury which was not foreseeable. Moreover, the mere fact that danger might result from the character of the product sold is insufficient to make the manufacturer liable for injury; it must appear that the injury would probably result.

As noted above, manufacturers of products are required to exercise reasonable care, i.e., they are required to exercise a degree of care commensurate with the risk of harm involved, and to keep their products free from latent or hidden defects so as to avoid unreasonable risk of harm to users and others if injury to such persons is a foreseeable or likely consequence of the manufacturer's negligence.

## **2. Defect in Product Design**

Because of their general duty to exercise care, manufacturers are required to exercise ordinary care in the design, construction and assembly of products. A critical issue in a design defect case is whether an omission of a reasonable alternative design rendered the product unreasonably dangerous.

A manufacturer properly performs its duty as to the design of a manufactured product when that product is safe for the use for which it is intended and unintended but reasonably foreseeable uses. This includes a duty to design the product so that it will fairly meet any "emergency of use" which can reasonably be anticipated. The courts of most of the major industrial states have couched the manufacturer's product design duty in these terms. Consequently, a manufacturer must use reasonable care and skill in designing its product for safety in all foreseeable uses.

## **3. Failure to Warn of Latent Dangers**

One who has been injured by a product may also seek to hold the manufacturer liable on the theory that because the design of the product made it dangerous, the manufacturer was negligent by its failure to warn of the danger. We note that liability premised under a theory of "failure to warn" is apart from whether the manufacturer was negligent in the design or manufacturing of the product. Most courts hold that manufacturers are required to exercise ordinary care to warn purchasers and other contemplated users of a product's known dangerous characteristics and of those circumstances and/or uses likely to make the product dangerous to use.

Where the use of a product is dangerous to users who are ignorant of the product's dangerous conditions, and where the manufacturer or distributor of the product has no reason to believe that users will recognize the dangers in the product's use, the product's manufacturer and distributor(s) are charged with a general duty to warn expected users of the product's dangerous conditions. The duty to warn extends to products which are perfectly safe for their intended use but which may, because of the action of some foreseeable external force, become dangerous.

## **4. Duty to Test**

In the absence of special circumstances indicating that tests and inspections should be required, the general rule is that the seller of a product manufactured by another has no duty to test or inspect the product where such seller does not know nor have reason to know that the product is (or is likely to be) dangerously defective. Accordingly, a non-manufacturing seller will not be held liable in negligence on the ground of failure to test or inspect to one who suffers a product caused injury or loss. This principle has been affirmed in the Restatement (Second) of Torts, and has been applied in a number of court decisions.

The courts of most states have adopted a special rule with respect to manufacturers of food products which are sold in bottles or containers. The general rule is that the manufacturer has a duty to exercise due care to test or inspect such containers. This duty applies particularly to bottles of carbonated beverages or similar products and such a manufacturer has a duty to test the strength of the bottles used to ensure that they can withstand ordinary and expected use, and if testing is not commercially practicable, the manufacturer is bound by a duty not to use the untested bottles. In order to ensure the production of a safe article, the duty exists not only to the bottling process but also after the bottling is completed. The courts of California, Florida, Kentucky, New York, Ohio, Pennsylvania and Wisconsin are among those courts which apply this special rule.

## **5. Liability of Component Part Sellers**

Section 5 of the Restatement (Third) of Torts subjects component sellers to liability when the components themselves are defective or when component providers substantially participate in the integration of components into the design of the other products. Product components include raw materials, bulk products, and other constituent products sold for integration into other products. Some components, such as raw materials, valves, or switches, have no functional capabilities unless integrated into other products. Other components, such as a truck chassis or a multi-functional machine, function on their own but still may be utilized in a variety of ways by assemblers of other products.

As a general rule, component sellers should not be liable when the component itself is not defective. If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.

The refusal to impose liability on sellers of non-defective components is expressed in various ways, such as the "raw material supplier defense" or the "bulk sales/sophisticated purchaser rule." However expressed, these formulations recognize that component sellers who do not participate in the integration of the component into the design of the product should not be liable merely because the integration of the component causes the product to become dangerously defective.

## 6. Violation of Statute

Negligence litigation growing out of injury caused by a product which has been sold may at times involve the issue of a manufacturer's or seller's violation of a statutory provision. A question in such a case will be whether an action for negligence may be asserted on the basis that such a statute has been violated. In order for the injured person to recover from the manufacturer under a statute imposing a duty upon the manufacturer for the benefit of others, most courts require that the injured party show that he was within the class of persons which the statute was intended to protect and suffered an injury that the statute was intended to prevent. If the injured party is successful in making such a showing, the defendant, if proven to have violated the statute, may be deemed to be negligent per se in the lawsuit.

## 7. Res Ipsa Loquitur

The term *res ipsa loquitur* means, literally, that "the thing speaks for itself." Res ipsa loquitur is a doctrine wherein the facts and circumstances accompanying an injury may be such so as to create a presumption (or at least permit an inference) of negligence on the part of the defendant. To prove negligence by means of the doctrine of res ipsa loquitur, a plaintiff must demonstrate that the instrumentality which caused the injury was under the exclusive control of the defendant and that the occurrence was one that ordinarily would not take place if the entity which had the instrumentality under its control had used proper care. Some jurisdictions apply a condition to this doctrine that the accident must not have been caused by any voluntary act or contribution on the part of the plaintiff that set in motion the chain of events leading to the injury.

Res ipsa loquitur is ordinarily applicable in cases where consumers have sustained injury because of foreign substances in bottled drinks. Some states take the view that there must be a showing that there was not reasonable opportunity for the bottle to have been tampered with, otherwise the doctrine is not applicable. However, an appreciable number of states hold that proof of defectiveness amounts to a prima facie showing of negligence on the part of the bottler. Notwithstanding, where equipment and appliances and the like have caused injury, plaintiffs are ordinarily not permitted to rely on res ipsa loquitur to establish negligence because the defendant no longer has exclusive control or management of the product.

## 8. Privity

Initially, privity of contract was required for an injured person to maintain a claim for damages against a product manufacturer. In 1916, the New York Court of Appeals rendered its landmark decision in the case of MacPherson v. Buick Motor Company, 217 N.Y. 832, 111 N.E. 1050 (1916). In that case, the Court held that, notwithstanding lack of privity of contract, an automobile manufacturer was liable to a remote purchaser of an automobile for an injury caused by the manufacturer's negligent failure to inspect a wheel which had a discoverable defect.

The MacPherson decision stands for the proposition that if it is reasonably certain that a product would place life and limb in peril or if the product is negligently made, plaintiff need not establish privity with the seller to maintain an action in negligence. The Restatement (Second) of Torts, § 395, as well as most U.S. courts, has adopted the

reasoning in the MacPherson case. Consequently, today the privity doctrine has virtually no application in connection with products liability actions grounded upon negligence.

## **B. STRICT TORT PRODUCT LIABILITY**

Strict liability in tort involves the imposition of liability without fault upon manufacturers or sellers of defective products. Proof of negligence is not required to impose liability. Liability for product-caused harm is imposed even if it is shown that the manufacturer or seller had exercised all possible care.

The strict liability doctrine was created to lessen the burden of proof for consumers injured by defective products in order to motivate manufacturers to produce safe products and because manufacturers are deemed to be in the best position to spread the cost of injury resulting from defective products by passing it on to consumers as costs of doing business.

The most common formulation of the rule of strict tort product liability is that contained in § 402A of the Restatement (Second) of Torts, entitled “Special Liability of Seller of Product for Physical Harm to User or Consumer,” which sets forth that:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

According to the Restatement (Second) of Torts, § 402A, the doctrine applies to any person engaged in the business of selling products for use or consumption, but does not apply to occasional sellers – for example, the owner of an automobile who may sell the car to a neighbor or to a dealer, even if the owner is fully aware that the dealer intends to resell the car.

The chief elements which a plaintiff must prove in order to maintain a strict liability cause of action are: (1) the defective and unreasonably dangerous condition of a defendant’s product, and (2) a causal connection between such condition and the plaintiff’s injuries or damages. It is also necessary to establish the defendant’s connection with the injury-causing product, for example, to show that the defendant manufactured the product, or sold the product to the plaintiff, or in some other specified manner placed the product in the stream of commerce.

A plaintiff has established a *prima facie* case once the aforementioned elements are established as well as meeting any other local requirements as to pleading or proof. As indicated by the very term, “strict liability in tort,” proof of negligence is unnecessary. Accordingly, there is no necessity of proof that the manufacturer or seller is guilty of misconduct in connection to the manufacture and/or marketing of the product, and there is no rule for application of such traditional contract or warranty defenses as lack of privity, lack of reliance on a warranty, lack of notice to the defendant of breach of warranty, or disclaimers of implied warranties. In short, strict liability requires proof of a product’s defect, and lack of such proof is fatal to recovery by the plaintiff. In order to prove a defect, the plaintiff is not required to eliminate with certainty all possible causes of an accident; it is sufficient if the evidence reasonably eliminates improper handling or misuse of the product by entities other than the manufacturer, thus permitting the jury reasonably to infer that it was more probable than not that the product was defective.

### C. BREACH OF WARRANTY

An important factor in the development of products liability law has been the liability imposed by the law of warranty. A warranty may be defined as a representation, express or implied, having reference to the character or quality of the article sold. Liability in warranty arises where damage is caused by the failure of a product to measure up to such representations made on the part of the manufacturer or seller.

To hold a manufacturer and/or seller liable for breach of warranty, the plaintiff must generally prove the following: (1) the existence of the warranty; (2) that the warranty was violated; (3) that plaintiff was injured; and (4) that the breach was the proximate cause of the injury sustained. The damages recoverable in a warranty action are calculated as the difference between the actual value of the product and what it would have been worth if as warranted, in addition to consequential damages, i.e., damages to the person or to the property, suffered as a direct result of the breach.

Liability for breach of warranty is generally governed by the Uniform Commercial Code ("UCC"). The UCC is a uniform act created by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), designed to provide rules governing transactions involving the sale of goods. The UCC is not itself the law, but rather a recommendation of laws that should be adopted by the states. A state may adopt the UCC verbatim as written by NCCUSL and ALI, or a state may adopt the UCC with certain changes as determined by the state's legislature. While the goal of the UCC is to promote uniformity of law governing the sale of goods among the various states, persons doing business in different states must check the local law and make note of any differences in the various states' statutory scheme.

Article 2 of the UCC contains three sections defining the scope of the warranties made by the seller. The first sets the basis for the express warranties that accompany a sale of goods. These arise from affirmations of fact, promises, descriptions, samples or models. The remaining two sections establish the implied warranties, warranties which accompany a sale of goods: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

An express warranty is an assertion of the fact or promise by the seller relating to the quality of the goods. The creation of such warranties is governed by UCC § 2-313, which reads as follows:

- (1) Express warranties by the seller are created as follows:
  - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
  - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

As contrasted with express warranties, implied warranties arise by operation of law rather than as part of the bargain through statements or agreement of the parties. The warranty of merchantability is a warranty that the goods are reasonably fit for the general purpose for which they are sold. This warranty is embodied in UCC § 2-314, which states:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied

- in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
    - (a) pass without objection in the trade under the contract description; and
    - (b) in the case of fungible goods, are of fair average quality within the description; and
    - (c) are fit for the ordinary purposes for which such goods are used; and
    - (d) run within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
    - (e) are adequately contained, packaged, and labeled as the agreement may require; and
    - (f) conform to the promises or affirmations of fact made on the container or label if any.
  - (2) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

The key concept of merchantability is that goods must be “fit for the ordinary purposes for which goods are used.” This standard is grounded on the justifiable expectations of the average consumer, including the expectation of reasonable safety while the goods are in use.

The warranty of fitness for a particular purpose is usually implied whenever a buyer can establish that he has relied on the judgment of a seller who knows the purpose for which the product was purchased. UCC § 2-315 provides as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

A warranty of fitness differs from that of merchantability primarily in that the warranty of fitness requires a greater degree of reliance on the part of the buyer. A presumption exists that an ordinary purchaser expects goods to be warranted as “fit for the ordinary purposes.”

## **D. PRODUCTS LIABILITY AND WORKERS’ COMPENSATION**

When a products liability case arises due to the failure of a product in the workplace, an injured worker’s first remedy is no-fault workers’ compensation insurance. State workers’ compensation laws require employers to cover medical expenses, indemnify against lost wages, and compensate for permanent physical disabilities for employees who sustain work-related injuries or occupational diseases. Workers’ compensation guarantees that employees have insurance for losses due to workplace injuries, but in return they give up the potential for claims against their employers. Workers’ compensation also covers dependents of workers who die in work-related accidents.

An employee who collects workers’ compensation benefits, as well as his employer and the workers’ compensation insurance carrier may all have a role in pursuing a recovery against a manufacturer and others that may be liable for the work-related injury. When an individual who has been injured on the job consults an attorney about a workers’ compensation claim, the attorney will almost always consider whether the worker has a “third-party” claim based on a negligence or products liability theory. Simultaneously, when the workers’ compensation insurance adjuster investigates an on-the-job injury, there is almost always an inquiry into whether the carrier can bring a subrogation claim against a third-party, which may be liable for the injury and which may be required to repay the carrier for the medical expenses and the indemnity benefits it paid. State workers’ compensation laws typically recognize a

statutory lien in favor of the carrier against any recovery by an injured worker to enable the carrier to recover the disability payments and medical expenses incurred. An injured worker and workers' compensation carrier must coordinate their claims in a single action, and settlement of claims may be precluded unless the lien is released. Also, there are occasions when an employer, whether self-insured or covered by an insurance policy, sustains losses due to an employee's injury in the workplace independent of the employee's disability and medical expenses, and such employers may also sue to recover for their losses. An employer's right to recover in these circumstances is analogous to that of other plaintiffs, and might depend on applicable principles of contributory or comparative negligence, etc.

## **IV. DEFENSES THAT AN OVERSEAS MANUFACTURER MAY ASSERT**

### **A. PROXIMATE CAUSATION**

In addition to proving a manufacturer or seller's negligence, a plaintiff bears the burden of establishing the proximate causal relationship between the negligence of the manufacturer or seller and the injury. Most courts have defined "proximate cause" as that which, in a natural and continuous sequence, unbroken by any superseding, intervening cause, produces the injury and without which the result would not have occurred.

Manufacturers and sellers of injury-causing products can avoid liability for negligence upon proof that their negligence was a remote cause and not the proximate cause of a particular accident or injury. Intervening causes, however, usually are not defenses if the manufacturer realized or should have anticipated that the negligence of a third person might coincide to cause injury to another. Where concurrent negligence proximately results in an injury, the injured person may maintain an action against either or both of the persons responsible as they are joint tortfeasors.

Acceptance of the strict liability doctrine has effectively enlarged manufacturers' and sellers' liability by limiting the availability of various defenses. Where warranty is relied upon as the basis of recovery, some courts have managed to ignore or construe away sales law defenses which in earlier times would have defeated recovery. Such defenses include reliance, notice, disclaimers and no actual "sale" of a product to disprove the existence of a warranty. Where the strict liability in tort doctrine is pleaded, the various contract rules that have developed in connection with the sale of goods are inapplicable.

The Restatement (Second) of Torts provides that the strict liability rule does not require any reliance on the part of the consumer upon the reputation, skill or judgment of the seller. Moreover, it also states that the rule is not governed by the provisions of the UCC – that the consumer is not required to give notice to the seller of its injury within a reasonable time after it occurs, and that liability is not affected by any disclaimer or other agreement.

As a prerequisite to recovery under the sales laws, a buyer is ordinarily required to give the seller notice of the breach of any warranty within a reasonable time after he has accepted the goods or should have known of the breach. Otherwise, the seller is not liable. Under the strict liability doctrine, the consequences of the consumer's failure to give notice have frequently been avoided by construing the provisions of the sales acts as being applicable only to the parties to a contract of sale.

### **B. THE CONSUMER'S CULPABILITY**

#### **1. Contributory Negligence**

In certain jurisdictions, if a plaintiff's action is based upon general principles of negligence, the defendant is ordinarily given the opportunity to show that on the basis of the plaintiff's own conduct, the right of recovery is precluded by contributory negligence or plaintiff's assumption of risk. In strict tort liability cases, too, recovery may be barred by

evidence concerning the conduct of the injured party, and there is considerable case law on the question whether, in a strict liability case, the defendant is entitled to raise the defenses of contributory negligence or assumption of risk. The defenses of contributory negligence or assumption of risk go to the issue of proximate causation, that is, whether plaintiff's injury was caused, not by the product, but by plaintiff's own acts. Contributory negligence and assumption of risk are recognized as defenses which, if proven, will in some states defeat actions sounding in negligence.

The differences between the defenses of contributory negligence and assumption of risk are minimal. Assumption of risk involves conduct in the face of a known and actually appreciated danger, whereas contributory negligence involves conduct which the injured person should have known involved an unreasonable risk of harm to himself. The continued use of a product or article with knowledge of its defectiveness ordinarily defeats recovery either on the ground of assumption of risk or contributory negligence. Inattentiveness or carelessness when using an article known to be defective or hazardous usually amounts to contributory negligence. The disregard of warnings and cautionary instructions given by manufacturers and sellers usually constitutes negligence on the part of the user, thereby barring a claim for injuries in those states which have not adopted the comparative negligence doctrine and continue to follow the contributory negligence rule.

While a few jurisdictions require the injured plaintiff to allege and prove freedom from contributory negligence, the majority of jurisdictions place the burden on the defendant to prove the plaintiff's negligence. Whether certain types of conduct amount to assumption of risk or contributory negligence is ordinarily a question of fact requiring determination by the jury.

There is general agreement that contributory negligence in the sense of a failure to discover or guard against product defects is not a defense to an action upon strict liability in tort but that the assumption of risk, or conduct in the face of a known or actually appreciated danger, constitutes a valid defense to a strict liability action in tort.

## **2. Comparative Negligence**

The legislatures in many states have enacted comparative negligence statutes on their own or have adopted the comparative negligence rule by statute as a result of case law in the jurisdiction. Under the comparative negligence rule, the culpable conduct of the plaintiff that is less than 100% is no longer a complete bar to recovery in an action, but diminishes the amount of damages otherwise recoverable by the percentage of the plaintiff's fault.

In those states which have adopted the comparative negligence rule, it is generally held that comparative negligence is applicable in strict product liability cases. The manufacturer is strictly liable due to the existence of a defective condition in the product. On the other hand, the plaintiff's liability attaches as a result of plaintiff's conduct in using the product. It is appropriate, therefore, that the parties' contribution to the injury be apportioned. The courts have, therefore, usually held that the award of damages be reduced in proportion to the plaintiff's contribution to plaintiff's injury.

## **3. Product Misuse Defense**

The manufacturer is typically not liable for injuries resulting from abnormal or unintended use of its product, if such use was not reasonably foreseeable. In some states, under the product misuse defense, if the injury resulted from an unforeseeable use of the product, judgment should be for the defendant because of failure of the plaintiff's proof, either as to breach of duty or proximate cause. The rationale in such states is that there is simply no actionable negligence in the first instance.

To impose liability for negligence upon manufacturers and other sellers of products for injury arising out of their use, the injury must have been foreseeable. That is, a reasonably prudent person would have anticipated injury because of the use of the particular product. Manufacturers and retailers should incur liability only for those risks that are typical or normally expected to occur; there should not be liability for remote eventualities. Therefore, where a product has been misused or put to an unexpected use, or where unusual consequences have followed the proper use of a product, most of the courts in the United States have agreed that liability will not be imposed.

Breach of warranty is shown by proof of the failure of a product when the product is being put to its normal and intended use. Liability on the ground of breach of a seller's warranty does not exist where it appears that the product was being used at the time of the injury unreasonably or in an abnormal manner. The key to this defense is the foreseeability of the use of the product. If the use is abnormal, but clearly foreseeable on the part of the seller, it presumably can be guarded against.

### **C. DISCLAIMERS OF PRODUCT LIABILITY**

With respect to disclaimers by a manufacturer that it is not liable for any injury arising out of the use of the product that it has manufactured, the courts have generally disregarded such disclaimers on grounds of public policy. The usual reason for disregarding a disclaimer is that a contract exempting a person from his/her own liability for future negligent acts is subject to the objection that it tends to induce a want of care. Such agreements are often declared invalid on grounds of public policy. Most courts that have considered the question of disclaimers and the effect thereof have taken this position.

The UCC has the effect of prohibiting a disclaimer of liability for negligence in connection with the sale of goods to a consumer. UCC § 2-719 provides as follows:

#### Contractual Modification or Limitation of Remedy

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
  - (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
  - (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Under UCC § 2-719, parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within Article 2 of the UCC they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus, any clause purporting to modify or limit the remedial provisions of Article 2 of the UCC in an unconscionable manner is subject to deletion and in that event the remedies made available by Article 2 of the UCC are applicable as if the stricken clause had never existed. Similarly, under subsection (2) of 2-719, where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of Article 2 of the UCC. Subsection (1)(b) of 2-719 creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed. Subsection (3) of 2-719 recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases, however, is free to disclaim warranties in the manner provided in UCC § 2-316.

While many courts have said that they recognize the validity of disclaimers, the courts have strictly construed such agreements against the maker. Accordingly, disclaimers releasing a manufacturer of liability for consequential damages resulting from breach of warranty, express or implied, are generally construed not to relieve the manufacturer or other defendant from liability for negligence. The courts have almost universally agreed that in no event will disclaimers constitute a defense to negligence as a result of statutory violation.

## **D. MISCELLANEOUS DEFENSES**

### **1. No “Sale”**

Another defense which a manufacturer might assert in a strict liability action is that there was no “sale” of the product. The rationale of this defense is that where there has been a rendition of a service utilizing a product but no actual sale of the product to the consumer, no warranty attached to the transaction with respect to the product. Some courts have taken the position that where a manufacturer can demonstrate that there was no “sale” of the product and that only personal services were involved, a manufacturer would not be liable under a strict liability doctrine.

### **2. Allergies and Unusual Susceptibility**

Injuries traceable to allergies and unusual susceptibility on the part of users of cosmetics and similar products are ordinarily not compensable. The reason advanced for the rule which is applied in the majority of courts is that the manufacturer or seller is entitled to assume that a cosmetics product will be put to a normal use by a normal buyer and that a reasonable manufacturer or seller is not expected to foresee an allergy and to anticipate harmful consequences therefrom. However, the trend in the more recent decisions has been that “allergy” is not a defense where a particular product has a tendency to injure an appreciable number of persons, although they cannot be designated as within the class of so-called “normal persons.” Therefore, where a manufacturer knows or has reason to believe that a substantial number of consumers will likely develop an allergy or sensitivity to its product, it is obligated to warn consumers of the possibility of harm.

There is support for the view that where a cosmetics manufacturer makes claims amounting to assurances of safety in advertisements or through labels on its products, that such constitutes an express warranty of safety. This view seems, however, to have support in only those cases alleging breach of express warranty.

### **3. Time Bar: Statute of Limitations**

Another defense that may be raised to defend against a product liability action is that the applicable statute of limitations period has expired. The limitations period is set by state law (not federal law) and governs the time within which suit must be commenced. Actions that are commenced outside the limitations period are barred and subject to dismissal.

We note that limitations periods may vary considerably from state to state based on the particular theory under which the products liability action has been brought. In addition, there are many special rules and statutes of limitation assigned to particular types of litigation, including, for example, intrauterine devices, toxic substances (e.g., chromium, defoliants, herbicides, Agent Orange), asbestos and diethylstilbestrol (DES).

The applicable statute of limitations may be tolled (i.e., delayed from expiring) by various factors. Examples include the infancy of the plaintiff, if the plaintiff is in active military duty, or fraudulent concealment of the defect by the defendant.

In products liability actions based upon negligence, a majority of the states have adopted the view that the date of injury commences the running of the limitations period (i.e., the statute of limitations “accrues” on the date of the injury). The applicable statute of limitations in negligence cases is generally one to three years.

In contrast to actions based on negligence, the limitations period for a products liability action sounding in breach of warranty commences (or “accrues”) on the date of the sale of the product and not on the date of injury. Section

2-725 of the UCC governs actions of this sort, and provides that an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. Although the UCC usually applies in actions involving economic loss, it has been applied to personal injury actions as well.

## V. RISK MANAGEMENT AND LOSS PREVENTION

### A. THE SUBSIDIARY CORPORATION

A manufacturer might be in a position to set up a subsidiary corporation that manufactures and distributes a particular product line believed to have a greater potential of exposure. The fact that a manufacturer owns a controlling interest of another corporation's equity does not destroy the separate legal identity of the owned corporation. Generally, liability by a subsidiary corporation cannot be imposed on its parent. To fully ensure that the liability of a subsidiary is not imposed on the parent corporation, however, the subsidiary corporation must be organized and operated so that its separate and independent identity is maintained.

The legal principle in the United States of imposing on the parent corporation the liability of a subsidiary is known as "piercing the corporate veil." There are two legal theories on which to premise a "piercing of the corporate veil" claim. The first is commonly called the "agency" theory, wherein the subsidiary corporation is deemed to be so completely under the control of the parent corporation that it behaves merely as the agent of the parent during its business operations. The second is the "identity" theory, where the subsidiary is so similar to the parent in its structure and capitalization that the subsidiary and its parent are considered to be one corporation.

Generally, the mere fact that the parent owns stock in a subsidiary is, alone, insufficient to render the subsidiary to be deemed a "mere instrumentality" of the parent company in terms of establishing the parent's liability for the acts of the subsidiary. Courts will consider a variety of additional factors to ascertain whether the parent exercises such a degree of control over the subsidiary so as to warrant the piercing of the subsidiary's corporate veil, including:

- (1) the presence of the same officers and directors in both corporations;
- (2) common shareholders;
- (3) financial support of the subsidiary operation by the parent;
- (4) the fact that the subsidiary was organized with a grossly inadequate capital structure;
- (5) a joint accounting and payroll system;
- (6) the subsidiary lacks substantial contacts with any business organization other than the parent;
- (7) in the parent's financial statements, the subsidiary is referred to as a division of the parent or that the subsidiary's obligations are included with those of the parent;
- (8) the property of the subsidiary is used by the parent corporation as its own;
- (9) the individuals who exercise operating control over the subsidiary do so in the sole interest of the parent corporation; and,
- (10) the failure of the parent to observe formal requirements necessary to establish the separate operation of a subsidiary.

For a parent corporation to be protected from the liabilities of its subsidiary as a result of the particular product, it is essential that a subsidiary corporation be given an independent existence with proper capitalization and corporate structure.

## **B. QUALITY CONTROL**

Aside from attempting to limit liability by means of creating adequate subsidiaries, an essential method by which a manufacturer may avoid liability in the first place is by establishing a proper quality control system.

A manufacturer must have the best possible quality control system if it is to survive in today's product liability environment in the United States. The investment in a strong and well devised quality control system can prevent injuries that can result in millions of dollars in losses in the future. The law throughout the United States finds that it is the manufacturer that is in the "best position" to know of potential problems in its products and how to limit them. Manufacturers have extensive obligations to foresee possible dangers, even as they relate to bystanders and other third parties.

A good quality control system coupled with adequate record keeping is essential in the defense of any product liability lawsuit. Moreover, it may, and often does, reduce insurance costs for the manufacturer.

## **C. THE DEFENSE OF THE FOREIGN MANUFACTURER**

Virtually every manufacturer in the United States has been, or will be, confronted with litigation against as a result of its products. The manner in which such claims are handled, especially initially, have a tremendous impact on the defense of the manufacturer in a U.S. court. A good products liability claims handling program must be responsive to the needs of the manufacturer. The program must recognize that the protection of the good will and reputation of the overseas manufacturer is frequently more important than mere financial protection. The manufacturer thus requires a claims handling organization that is responsive to its requirements and one that thoroughly understands the law of products liability.

A good products liability claims handling program should aggressively pursue the defense of claims with prompt and thorough investigation, regular communication with the manufacturer as to all aspects of the claim, and a constant effort to keep claimants on the defensive rather than the offensive.

It is important that manufacturers realize, however, that although their insurance policy covers defense costs and liability, they are responsible for responding to discovery demanded during the litigation. A sloppy, inadequate response will surely result in a poor products liability defense. Defense counsel must be willing to learn the product, establish a clear picture of the plaintiff's specific allegations, develop the technical staff to provide expert evidence, and provide input on how the case as a whole can be defended. A "team approach" must be fostered between the manufacturer and its outside counsel. It is important that at the outset of every claim, defense counsel meet with the manufacturer and review the product that is involved. The review of the product should involve a study of the entire manufacturing process, including the supply of the product's materials, its component parts, its assembly, testing programs, packaging, and distribution.

Defense counsel should also review with the manufacturer problems encountered in the past with the same product. It should be determined whether payments have been made under the manufacturer's warranty program and ascertain whether other similar lawsuits have been filed or are currently pending. As part of this review, it must be determined who within the company can be considered to be an expert on the product (or component part) that is involved in the particular claim. Such expert can give defense counsel a deeper insight into the nature of the claim that is being defended.

It is also important that the manufacturer utilize one law firm in the United States, experienced in defending product liability lawsuits, to coordinate the defense of all product liability claims against the manufacturer in the United States. This law firm, known as "coordinating counsel" or "national counsel," can assist the manufacturer in identifying and retaining appropriate local counsel to assist in the defense of claims in particular jurisdictions. In addition, and most importantly, this law firm can help the manufacturer ensure that the defense theories asserted by the company in various similar lawsuits across the United States are consistent. This is critically important when the manufacturer responds to discovery demands in the various lawsuits. The plaintiffs' bar in the United States is adept at identifying

inconsistent positions taken by manufacturers in separate but similar lawsuits. While different approaches may need to be considered for lawsuits in different states that have different laws, consideration must be given to the consequences of those approaches in “the big picture” and “grand scheme” of things. If the proverbial left hand does not know what the right hand is doing, the consequences can be devastating in the defense of product liability lawsuits. A single, lead law firm retained by the manufacturer or seller to coordinate all product liability defense matters should prevent such mistakes and make the defense of the various lawsuits more efficient, reducing exposure to adverse judgments and the costs and fees necessary to litigate the cases.<sup>1</sup>

The following are a number of suggestions that will assist a manufacturer in the defense of its products liability litigation:

- (1) Understand the nature of our legal system;
- (2) Secure the participation of its corporate personnel;
- (3) Establish a product quality task force with direct access to top management;
- (4) Foster and strengthen quality control wherever possible;
- (5) Keep current, careful records as to production and distribution;
- (6) Seek to avoid litigation through cooperation and pre-litigation counseling with its U.S. attorneys;
- (7) Be current with government and industry standards and law of product liabilities; and
- (8) Become active in the field of legislative reform programs.

The importance of keeping detailed records cannot be emphasized enough. Often a manufacturer obtains materials and components from vendors, and then sells the assembled product through a variety of distributors. When a defect is claimed in the product, a manufacturer may successfully claim product misidentification, misuse or alteration only when it can be proven by documentary evidence. Such documents concerning the design of the actual product, its serial numbers, the product’s appearance at the time of manufacture, and the identity of the component parts manufacturers are critical.

Observing basic precautions in the design, manufacture, packaging and labeling and advertising of a product can help circumscribe the potential for liability. As products liability claims can be quite complex, each requires careful preparation, investigation and, ultimately, expert testimony.

As seen, products liability law varies from state to state, and certain federal laws are also applicable. In view of the variance in the law throughout the United States, it is important that defense counsel tailor the uniform claims handling and litigation techniques to each individual manufacturer and claim. A uniform approach to claims handling is, however, extremely important, in that such approach would avoid inconsistent and contradictory defense strategies from case to case. For instance, it could be especially problematic to give answers to interrogatories propounded by plaintiff which are different in two cases involving the same product. This could conceivably happen if different counsel were defending the manufacturers without centralized supervision.

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<sup>1</sup> For instance, the lead defense law firm will be in a position to recognize patterns in discovery and responding to certain motions made by plaintiffs in certain types of product liability actions. The lead law firm can utilize defense work that has been used successfully in the past to avoid “reinventing the wheel” each time, substantially reducing fees and costs in the litigation for the manufacturer.

The role of supervising claims and defense counsel, therefore, includes:

- (1) Aggressively and successfully defending the manufacturers;
- (2) Achievement of uniformity of defense through close supervision of local counsel;
- (3) Coordination of all pleadings, answers to interrogatories and other discovery proceedings to avoid inadvertent contradictions;
- (4) Assembly at one time and in one place of all background information regarding the product so that it can be made available to local counsel without costly repetition of effort;
- (5) Achievement of uniform preparation of witnesses and experts for trial;
- (6) Development of a centralized bank of information concerning the product, cases pertinent to the issue and pleadings, interrogatories in related cases;
- (7) Development of a medical brief bank where needed;
- (8) If there are repetitive claims, counsel may determine that a meeting of all local counsel is desirable to achieve the strongest defense team and the exchange of information and techniques. This also gives the manufacturer the efficiency of centralized claims handling, as well as the centralized supply of information. Where other trial counsel is employed<sup>2</sup>, supervisory counsel will be responsible for the supplying of information to and the supervision of local counsel. They maintain close liaison between trial counsel and the manufacturer.

Finally, an important factor in any products liability program is the control of expenses. A national claims handling approach avoids much duplication of work and uses people and materials on the most efficient and cost-saving basis. Centralized control typically results in better and more uniform reserves and settlements. As soon as a claim is received, it is analyzed for content and assigned with instructions for handling to the appropriate staff personnel. The expense factor is also controlled in this manner. It is by these means that all cases submitted to supervisory claims and defense counsel are handled in an efficient and thoroughly professional manner. The manufacturer is thereby provided with a defense that not only focuses on the issues of the particular case but also is given serious consideration to its overall needs and place in the industry.

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<sup>2</sup> For instance, after consulting with local counsel, it may be decided that special trial counsel be utilized in a particular case because of jury concerns.

## Conclusion

Identifying and retaining experienced U.S. products liability defense counsel is critical for the foreign manufacturer or distributor that sells or ships its products to the United States for use. This guide should provide the basic framework of the issues that a foreign manufacturer should consider when it learns that it has been, or is likely to be, sued in connection with its products in the United States. This guide should assist the foreign manufacturer or distributor formulate the right initial questions under such circumstances and prepare a cogent and efficient plan of action in dealing with the issues.

The editor of this guide, as well as many other in his national law firm, are experienced in defending large and prominent manufacturers in product liability actions in the United States. The editor of this guide is available to answer any questions that you may have. He may be reached by email at [westerlind.james@arentfox.com](mailto:westerlind.james@arentfox.com); telephone at (212) 457-5462; and fax at (212) 484-3990. He is located in Arent Fox's New York Office.

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## ARENT FOX'S PRODUCT LIABILITY DEFENSE LAWYERS

Arent Fox LLP's product liability defense lawyers include the following individuals:

**Jerry Abeles:** Jerry Abeles is an experienced litigator, who has provided counsel in various product liability matters. For example, he has represented a German sports car manufacturer in various defect suits; a Korean automobile manufacturer in lawsuits and government investigations regarding allegedly defective seatbelts; a nationally-known water treatment and filtration system supplier in defect suits involving personal injuries and property damage claims; an autoclave manufacturer in product liability suit by repairman who nearly lost an arm; and a furniture manufacturer in suits involving defective file cabinets, among others.

**Debra Albin-Riley:** Debra Albin-Riley has tried several products liability cases throughout the country, including matters in California, Illinois and Texas. She is currently representing a major oil company and a California hospital in products liability and toxic tort matters, both pending in the state courts in California. Debra works extensively with expert witnesses in developing case strategy and preparing for expert discovery and testimony at trial.

**Randall Brater:** Randy Brater is a partner in the Commercial and Intellectual Property Litigation groups at Arent Fox. His practice involves litigating matters in both state and federal courts, from preliminary injunctions to motions practice to jury and bench trials, as well as arbitrations and mediation. With respect to products liability matters, he has experience defending matters involving alleged construction defects, mold claims, product defects, matters involving purported asbestos exposure, and wrongful death claims.

**Karen Ellis Carr:** Karen Carr is a senior litigation associate concentrating her practice on commercial litigation and arbitration. She has handled cases in a broad range of subject matters, including those arising in the areas of products liability, contract, intellectual property, business torts, real estate, environmental, construction, and other business and commercial dispute contexts. Karen also provides regulatory counseling and advice to clients before USDA, CPSC, FDA, and other state and federal regulatory agencies.

**Lynn Fiorentino:** Lynn Fiorentino has defended a semiconductor manufacturer against allegations of toxic exposure to arsenic and methanol used in the manufacturing process in an action brought by the child of an employee of the company claiming in utero exposure. In addition, she has defended the "Big Three" auto makers in the U.S. in product liability cases based on alleged exposure to asbestos-containing component parts such as brake linings, clutch linings, mufflers, and gasket materials.

**R.C. Harlan:** R.C. Harlan has represented multi-national manufacturers in products liability actions in both state and federal courts throughout the U.S. He has extensive experience handling multi-district litigation in federal court, as well as coordinated proceedings in state courts, for both pharmaceutical and medical device manufacturers. Many of these matters involve product recall-related litigation, and required the nationwide coordination of several thousand lawsuits involving the same device or drug.

**James Hulme:** James Hulme is the former Chairperson of Arent Fox's Litigation and Dispute Resolution Department and firm's Intellectual Property Litigation Practice Group. He has more than 34 years of experience in handling jury and bench cases involving product liability and other claims. Mr. Hulme has represented manufacturers and distributors in various products liability and toxic tort claims in numerous jurisdictions in the U.S. He has handled Magnuson-Moss Warranty act class actions, consumer fraud class actions, products liability class actions and various federal class actions such as claims under the federal statutes regulating ATM machines in a number of jurisdictions, including DC, Maryland, Virginia, Florida, New York, Alabama and California. He has as lead counsel represented both plaintiffs and defendants in a variety of products liability, environmental, and toxic tort litigations.

**Stewart Manela:** Stewart S. Manela served for more than 20 years as the Practice Group Leader of the Labor and Employment Law Practice of Arent Fox. He has specialized in the field of employment, labor,

workers' compensation, occupational safety, civil rights, and litigation for over 35 years. Mr. Manela has represented insurance carriers and self-insured employers in workers' compensation matters before the District of Columbia Department of Employment Services, the Virginia Workers' Compensation Commission, the Maryland Workers' Compensation Commission, as well as the workers' compensation agencies and courts of those states and in other jurisdictions. He has litigated important issues under the District of Columbia Worker's Compensation Act, including several involving his representation of professional sports teams.

**Donald McLean:** Donald C. McLean is Co-Manager of Arent Fox's Litigation Department and practices in its Complex Litigation Practice Group. He began his legal career as a federal prosecutor with the United States Department of Justice and, since joining Arent Fox in 1987, has been involved in a wide variety of civil litigation in state and federal courts across the United States and in numerous matters decided by arbitration. Mr. McLean's work in the products liability area has included his representation of several major manufacturers of vehicle parts (based both in the United States and overseas) in actions involving claims of personal injury from exposure to asbestos. He has served as national coordinating counsel for two of those manufacturers in thousands of asbestos-related cases filed in numerous state and federal courts.

**Jacques Smith:** Head of the litigation department in the Washington, DC office of Arent Fox, Jacques is one of the leading civil False Claims Act practitioners in the country. His clients encompass all branches of health care, including big pharma, large hospitals, and medical suppliers. His unique background includes, acting as a trial judge for the Navy for five years (two of those years as Chief Judge), and he was recently elevated to the appellate bench on the Navy Marine Corps Court of Criminal Appeals—a distinguished honor few have achieved.

**Ralph Taylor:** Ralph Taylor practices in Arent Fox's complex litigation and intellectual property practice groups. He has more than 35 years of experience in complex commercial, construction, antitrust and product liability litigation before numerous state and federal courts, administrative agencies, and domestic and international arbitration tribunals. His practice also includes litigation risk-management counseling and general counseling on alternative dispute resolution options and agreements. His product liability experience includes the following:

- Won dismissal in 2011, after years of state and federal court litigation, of a defendant client from 10 separate, but nearly identical, product liability cases brought against multiple defendants in the same court. The plaintiffs in each case allege they suffered brain cancer as a result of exposure to cell phone emissions. See, e.g., *Murray v. Motorola, Inc., et al.*, Case No. 8479-01 (DC Superior Court).
- Currently defending a cell phone manufacturer in six product liability cases closely related to *Murray v. Motorola*.
- Obtained dismissal of a defendant client golf car manufacturer from personal injury claims alleging defective design and manufacture of a golf car accessory.

**Gary Wolensky:** Gary Wolensky has tried more than 100 lawsuits to verdict. He typically handles high stakes product liability cases and class actions in the medical device, pharmaceutical, automotive, heavy equipment, consumer goods, motorcycle, ATV, and amusement park industries to name a few. Mr. Wolensky also provides counseling and advice and handles regulatory matters for clients in front of the CPSC, FDA, NHTSA and the FTC.

**James Westerlind:** Mr. Westerlind has defended a number of large and prominent tire manufacturers in product liability actions involving tire blow-outs where the plaintiffs pursued theories of design, manufacturing and warning defects. He has also defended one of the largest national retail chains in the U.S. in a product liability lawsuit. In each of these cases, the plaintiffs sought damages in the millions of dollars for alleged bodily injuries, property damage and/or wrongful death. Mr. Westerlind was successful in obtaining favorable results for the companies that he defended in each instance.

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