Testimony of

Louise Ellen Teitz

May 19, 2009

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 , 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 Committee 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. 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 we call personal jurisdiction. Then after filing, the party must inform the defendant of the lawsuit and its contents, or as we say, 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 as we say 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. In addition, there is an obvious 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. 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." Even when the defendant is a foreign individual or entity, state boundaries are generally the measuring unit. This standard is generally broken up 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.

The Supreme Court's most recent case concerning a product in the stream of commerce, Asahi Metal Industry Co. v. Superior Court, from 1987 which involved a foreign component part manufacturer, 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. Asahi provided significant help to foreign defendants in arguing that it was unfair to have 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." 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 commerce minimum contacts aspect. Yet the result was inadvertently to encourage foreign manufacturers to challenge the assertion of personal jurisdiction in many cases.

While lower federal courts and many state courts have found 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 not as solicitous of a Rhode Island defendant who might have to defend in California as they are of a Mexican defendant who might be sued in a court 3000 miles closer to home than our Rhode Island defendant but where the Mexican defendant would be required to cope with a foreign legal system and 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 the 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 aggregated, a foreign manufacturer with minimal but insufficient contacts with multiple states, may not be able to be sued in the US at all. 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.

Alternatively, a federal statute that required consent to jurisdiction (as well as designation of an agent for service) for foreign manufacturers importing certain types of products into the US could also reduce the uncertainty that 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 that model of the plane "ultimately are sold in the United States. " 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 part 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 both state and federal courts. 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, 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, to which Mexico subscribes, 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 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, either through judicial or diplomatic channels.

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 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 for enforcement of 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 are viewed as the sole prerogative of the sovereign.

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 at 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 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, thereby avoiding 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.

III. Enforcement of US Judgments Abroad

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, although I hope that the Senate will ratify in the near future a multilateral agreement on enforcing judgments in the limited context of choice of court or choice of forum clauses. That means that a foreign country is under no legal obligation to recognize a US civil judgment. In contrast, the US generally recognizes and enforces here foreign judgments. The reality is that we have a trade imbalance, in that we import and enforce most incoming foreign judgments 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 compensatory awards that include significant amounts for pain and suffering. 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 or to make sure the potential foreign defendant has assets in the US or at least debtors to it in the US.

One final comment I might make is that I would hope that this Committee 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 will adopt similar legislation in their own countries that may make it harder for US manufacturers exporting their products overseas.