Testimony of

Victor E. Schwartz, Esq.

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On behalf of the U.S. Chamber Institute for Legal Reform
and the U.S. Chamber of Commerce

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

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

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

My background for addressing these issues includes practical experience as both a plaintiff and defense lawyer. I am a former law professor and law school dean, and co-author the leading torts casebook in the United States, Prosser, Wade & Schwartz's Cases and Materials (11th ed. 2005). In addition, I have authored the leading texts on multi-state litigation and comparative negligence.
While I have the privilege to testify today on behalf of the U.S. Chamber of Commerce and its Institute for Legal Reform, the views expressed are my own in light of my experience with these important topics.

Background

All domestic and major foreign manufacturers who do business in the United States, such as large foreign-based auto manufacturers, are subject to our legal system. Their products are priced accordingly. If they sell a considerable amount of their products in other countries where there is less liability exposure than in the United States, then they may be able to reduce their costs. Nevertheless, if one of their products proves defective and injures a person in this country, they are subject to liability here and the costs associated with such liability. The interesting impact of this phenomenon, though, is that some foreign-based companies may be able to inappropriately avoid these costs and reduce their prices accordingly. This places those companies who are subject to the full effects of the U.S. legal system at a competitive disadvantage because their competitors are avoiding this "tort tax."

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

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

The Concept

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

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

Establishing Jurisdiction Over Foreign Manufacturers

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

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

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

Justice O'Connor's Dicta Suggests an Approach

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

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

We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.
Id. at 113 (emphasis in original).

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

Questions and Concerns

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

For example, several specific provisions of the draft legislation presented in the House last year raised substantial concerns that need to be addressed to ensure that the bill does not have unintended adverse consequences on the federal judiciary or domestic litigants, that it falls within the bounds of the Constitution, and that it is consistent with our international treaty obligations.

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

Such expansive jurisdiction could burden the U.S. judicial system and its ability to promptly handle the cases of American citizens.

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

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

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

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

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

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

In addition, the House's draft bill provided that the "law of the State where the injury occurred shall govern all issues concerning liability and damages." (emphasis added). Thus, it would appear that if a product manufactured outside of the United States forms the basis of jurisdiction (even if the claim is not related to a product defect, as discussed above), any other issue involved in the suit will be subject to the law of the place of injury. Such language appears to subject any domestic entity that is pulled into the lawsuit to the law of that same state even if common law choice of law rules or a contract between the parties would otherwise require application of another state's law. Such a result must be avoided.

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

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

Conclusion

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

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