



Litigation/Consumer Products Liability

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Proposed Legislation May Make It Easier to Sue Foreign Manufacturers In the United States

On August 6, 2009, the Foreign Manufacturer Legal Accountability Act of 2009 (S. 1606) was introduced into the United States Senate.¹ Although the bill remains a long way from becoming law, it may draw support from those in Congress increasingly concerned about safety issues arising from products manufactured overseas, particularly those manufactured in China. Although much of the concern focuses on China, it would be inconsistent with U.S. international trade obligations to single out China for special treatment, so the bill in fact addresses *all* foreign manufacturers. Therefore, if passed, the bill will substantially alter the risk of litigation facing *all* foreign manufacturers currently beyond the reach of U.S. courts. This client briefing reviews the proposed legislation, places it into context, and considers its potential impact.

Sen. Sheldon Whitehouse (D-RI), along with Sen. Jeff Sessions (R-AL) and Sen. Richard Durbin (D-IL), introduced the legislation, giving it bipartisan support. Following the proposal of the Sunshine in Litigation Act of 2009² and the Obama Administration's recent memorandum on preemption,³ the Act appears to be part of broader pro-plaintiff program by Congress and the White House. The plaintiff's bar has already endorsed the bill through its lobbying arm, the American Association for Justice.

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The Foreign Manufacturer Legal Accountability Act would lower two hurdles to bringing suit against foreign manufacturers in the United States. First, the Act would simplify service of process by requiring every manufacturer to have an "agent" located in at least one state where the manufacturer does business that would accept service of process for any civil and regulatory claims. Second, and more significantly, the Act would subject the manufacturer to the jurisdiction of state and federal courts in the U.S., where it might previously have been beyond such jurisdiction.

¹ See Foreign Manufacturers Legal Accountability Act of 2009, available at <http://thomas.loc.gov/cgi-bin/query/?c111:S.1606>.

² This bill is also pending before the Senate (S. 537) and the House of Representatives (H.R. 1508). See Sunshine in Litigation Act of 2009, available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.537.IS> and <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1508.IH>, respectively. This legislation would prohibit a court from entering a protective order under Federal Rule of Civil Procedure 26(c) unless it first makes findings of fact that (1) the information to be restricted is not "relevant to the protection of public health or safety"; or (2) if it is relevant, that the public interest in the disclosure of "potential health or safety hazards is outweighed by a specific and substantial interest" in maintaining the confidentiality of the information, and the proposed protective order is not broader than is necessary to protect the privacy interest asserted.

³ On May 20, 2009, President Obama issued a Memorandum to the heads of Executive Departments and Agencies discussing preemption. See Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (May 20, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption. In that Memorandum, the President indicated that there are unspecified federal regulations containing preemption provisions that lack "sufficient basis under applicable legal principles." This Memorandum signals his Administration's intent to preserve traditional state powers by construing preemption claims very strictly, affording plaintiffs broader latitude to pursue state law claims.

Service of Process Would Be Simplified

Bringing suit against foreign manufacturers today often requires service of the defendant manufacturer abroad. This can be a cumbersome, costly, and time-consuming process, requiring compliance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, more commonly called the Hague Service Convention, or with another international agreement. If, as is often the case, the defendant's home country is not a party to the Hague Service Convention or other relevant treaty, then recognition of service documents is left to the discretion of the courts in the defendant's home country. By simplifying service of process, the Act would reduce the transaction costs and other burdens placed upon U.S. plaintiffs associated with international service of process.

Personal Jurisdiction Would Be Guaranteed

Under current law, a foreign manufacturer must purposefully avail itself of the privilege of conducting activities within a state to be subject to personal jurisdiction within that state. See *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 110-12 (1987). Some states continue to follow the U.S. Supreme Court's holding in *Asahi*, finding that merely placing a product into the stream of commerce, by itself, is insufficient to establish personal jurisdiction over a foreign manufacturer. But others find personal jurisdiction if a product is merely swept into their forum after being placed into the stream of commerce elsewhere, if the manufacturer had knowledge that the product would be sent to the other state or there is evidence that substantial profits were derived from sales there.

The Act would substantially change the law in those jurisdictions requiring purposeful availment, subjecting a foreign manufacturer to suit in at least the state where it has established its registered agent. Foreign manufacturers would no longer be able to avoid litigation in the United States by confining their operations overseas. The Act would not, however, subject a foreign manufacturer to suit nationwide. Therefore, a foreign manufacturer could designate an agent for service in a state with laws more favorable to manufacturers, such as Michigan, which has enacted tort reforms that limit the determination of damage awards and limit the liability of manufacturers and sellers of motor vehicles and other products.

Costs to Defendant Manufacturers Would Increase

In making it easier for plaintiffs to bring actions against foreign manufacturers, the Act would subject manufacturers to increased litigation costs. First, by lowering the procedural bar of serving process against foreign manufacturers, the Act would increase the number of nuisance suits in pursuit of settlement, publicity or both. As a result, the costs of disposing of these cases would rise.

Second, those meritorious cases that proceed to discovery would be especially costly for foreign manufacturers to defend given the challenges of conducting discovery abroad. Plaintiffs could force foreign manufacturers to produce from abroad documents for inspection or individuals for depositions at substantial cost.

Manufacturers Failing to Comply Would Be Barred

Those manufacturers failing to comply with the Act's requirements would be prohibited from importing covered products (or component parts that will be used in the United States to manufacture such products). The Act charges the Department of Homeland Security with the task of prescribing regulations to enforce this penalty, so the specifics of any bar are unknown. However, it is clear that being barred from the U.S. market, even for a short period of time, could have devastating effects on a manufacturer.

Only Certain Products and Manufacturers Would Be Affected

Only manufacturers of certain products imported into the United States would be affected by the Act. The Act expressly covers only products regulated by the Consumer Product Safety Commission ("CPSC"), the Food and Drug Administration ("FDA"), and the Environmental Protection Agency ("EPA"). Examples of such "covered products" include children's products, consumer electronics, medical devices, and pesticides. Some agencies already require foreign manufacturers to have a U.S. registered agent for service of administrative or judicial notices or processes, like the National Highway Traffic Safety Administration ("NHTSA"). Finally, the Act would not apply to manufacturers that produce covered products below a threshold value or quantity established by the head of the applicable agency. However, these supposed "limitations" provide little comfort, given that the covered products represent the majority of U.S. imports. Furthermore, there is often substantial ambiguity about whether products are regulated by a particular agency.

Domestic Manufacturers May Ultimately Suffer

The Foreign Manufacturers Legal Accountability Act may have unintended consequences for domestic manufacturers as well. If passed, the Act would likely lead other countries to enact similar laws in retaliation. This would subject U.S. companies to an increased threat of litigation in foreign courts that presently do not have jurisdiction over U.S. companies.

For all of these reasons, U.S. and foreign companies should carefully follow the progress of this proposed legislation and express any concerns that they may have to relevant decision makers in Congress.

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