

Modern Chinese Manufacturers

Surviving and Flourishing in the U.S. Market

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Introduction

The past three years were difficult, but important, years for Chinese manufacturers whose products are sold in the United States of America (“U.S.”). While much of the focus was on lead, small parts, and magnets in children’s toys, major product recalls also occurred in electrical components, clothing, and food products. Potential hazards hidden within consumer goods imported from China have gained the attention and concern of the American public, which in turn has created political pressure on the U.S. Congress and the U.S. Consumer Product Safety Commission (“CPSC”). The immediate result was the Consumer Product Safety Improvement Act (“CPSIA”), which was hurriedly passed by Congress and signed into law by President Bush on August 14, 2008.

The new regulatory requirements on children’s products contained within the CPSIA, including bans on lead above minuscule quantities and bans on certain phthalates, as well as new independent testing and manufacturer certification mandates, have caused global manufacturers to reconsider selling products in the U.S. For example, Selecta, a German manufacturer of whimsical wooden cars and characters, decided to pull out of the U.S. market for this holiday season because of uncertainties surrounding the CPSIA, even though its products do not contain lead or toxic varnishes. Similarly, unless bicycle manufacturers receive an exemption, technically the lead commonly used on a tire valve stem would make it illegal to sell bicycles to children.

While care needs to be taken to make certain that products sold throughout the world are safe, choosing to bypass the U.S. market is both short-sighted and unnecessary. The keys are to create a culture of safety within the Chinese manufacturer, and to understand the requirements of U.S. product liability law and regulation and act accordingly.

U.S. Product Liability Law

Over the space of approximately 40 years, U.S. state and federal courts have developed a number of theories that

subject global manufacturers to potential liability, no matter where those manufacturers are located physically. Therefore, Chinese manufacturers need to understand that every product they make – be it heavy machinery for industrial use, a consumer product for home use, or a component part which is incorporated into a larger product, such as a vehicle or an electrical appliance – is subject to a potential product liability suit in the U.S. if the product is found to be “defective”; that is, not suitable for the purpose intended. And that statement is true, regardless of whether the product is regulated or not.

Moreover, due to the U.S. long-arm jurisdiction statutes, a manufacturer located in Shanghai or Changzhou can be sued halfway around the world, even though no one employed by that company ever set foot in New York, California, or Illinois, or any other part of the U.S. This can occur if a U.S. court determines that the company producing the product in question was a “knowing manufacturer” or “knowing seller”; that is, the seller or manufacturer of the product or component part knew that the product was intended to be purchased by consumers in the U.S. In effect, the manufacturer/seller/exporter is deemed to be introducing its product into U.S. commerce, where it must answer to the laws applicable there.

Once suit is brought in the U.S. and jurisdiction over the foreign manufacturer is established pursuant to a long-arm statute, then substantial damages may be awarded by a jury of 6-12 persons selected at random from the local community. The jury of ordinary citizens listens to the evidence presented including any defenses, considers the trial judge’s instructions on the applicable law, and determines if the claimant is entitled to recover money damages, and, if so, the amount of those damages.

Primary Defenses

Since the members of the jury are not likely to be familiar with engineering or design concepts associated with the products at issue in the case, the manufacturer would seem to be at a profound disadvantage and subject to the benefit of perfect

hindsight and second-guessing by non-experts, who may be heavily influenced not by the merits of the product, but instead by their emotional reaction to the claimant’s physical or financial condition. However, with an understanding of the U.S. legal process and retention of sophisticated defense counsel – someone who knows the particular jurisdiction, who can identify the best witnesses who can help the jury understand the technical and scientific issues, and who can develop the necessary evidence to establish one of the many important and complete defenses – a Chinese manufacturer can successfully defend its products in U.S. courts.

For example, the injured party, or plaintiff, has the burden of establishing (i) that the product is defective and (ii) that the defect caused the plaintiff’s injuries. Proof of a defect almost always requires qualified expert testimony to help the court and the jury to understand the technical issues behind the question of the existence of a defect. In many cases, it may be hard for a plaintiff to find a suitable expert able or willing to testify to a “defect.” Moreover, there are procedural and evidentiary opportunities available to a manufacturer that can be used to eliminate or limit an expert’s testimony. For example, successful use of a Daubert challenge can result in a court order excluding plaintiff’s expert witness from testifying. Moreover, the identification, selection, and preparation of highly qualified experts by the manufacturer’s counsel can neutralize or overcome contrary testimony by the plaintiff’s expert and persuade the jury that there is no defect in the product.

By demonstrating to the jury, through cross-examination and affirmative evidence, that the plaintiff misused the product, assumed an obvious and known risk, failed to supervise a child-user, or that a third-party was responsible for the accident, the manufacturer can prevent the plaintiff from proving that any alleged defect in its product caused his or her injuries or damages. In certain industrial or commercial settings, additional defenses such as the sophisticated user, learned intermediary, and government contractor may be available to the manufacturer.

To cite to one example, our firm was able to obtain a unanimous defense verdict in a plaintiff-friendly jurisdiction in a hotly contested trial involving the manufacturer of a forklift. Despite facing a plaintiff who suffered horrific damages which he claimed were in excess of 14 Million Dollars, the jury found no defect in the forklift. We were able to obtain a defense verdict by demonstrating through the plaintiff’s own testimony, cross-examination of the plaintiff’s expert witness, and testimony of the manufacturer’s expert witness that the plaintiff failed to operate the forklift in a safe manner, causing it to tip over and rendering him a quadriplegic. Based on the evidence presented, the jury concluded that the forklift was not defective.

Thus, a Chinese manufacturer should never assume that product liability suits in the U.S. are not defensible. They certainly are, even in jurisdictions that are commonly thought to be favorable to plaintiffs. That said, product liability claims should never be taken lightly and with a proper defense and keen appreciation for the risks, the challenges of these suits can be effectively managed.

Preventative Measures

Whether the alleged defect is a manufacturing problem, a design error, or the introduction of a contaminant into a food product (e.g., melamine), the best defense is prevention. By instituting a top-to-bottom culture of safety within the company, a Chinese manufacturer can prevent an event that would trigger a lawsuit in U.S. courts. It can do this by:

- ◆ instituting and practicing safety-oriented engineering and design principles;
- ◆ developing comprehensive product testing and inspection procedures;
- ◆ incorporating well-placed, complete, and explanatory operating instructions and warning labels on or with the product;
- ◆ exceeding the highest government and industry standards and regulations;
- ◆ remaining current with state-of-the-art technology and

safety standards;

- ◆ participating in industry associations devoted to the safe manufacture, distribution and sale of products in commerce;
- ◆ educating and training its employees in a culture of safety; and
- ◆ by creating and using top-of-the-line quality control procedures.

The manufacturer can further protect itself from monetary exposure by purchasing adequate product liability insurance from a reputable global insurance company. That insurance should cover the cost of discovery, counsel fees, expert fees, pre-trial and trial costs, appeal costs, and any adverse monetary judgment.

Product Recalls

The space limitations of this article do not permit a complete discussion of product recalls. Moreover, this is a topic best discussed directly with counsel within the framework of a particular product and that product’s signature risks. In general, however, a prudent Chinese manufacturer will want to plan in advance for the possibility of a large-scale product recall, whether that recall is made voluntarily by the manufacturer to prevent possible injury or brand dilution or is mandated by a government agency such as the CPSC. In either event, the product recall should be seen as a positive action intended to reduce, if not eliminate, product liability exposure and governmental sanction. Such planning should include:

- ◆ a multi-disciplinary product recall team;
- ◆ product tracking procedures;
- ◆ customer/user notification procedures;
- ◆ clear, concise public communications; and
- ◆ possible product recall insurance.

A comprehensive product recall plan may then be reviewed, followed, and adjusted as necessary when an actual product recall is required. The recall team, with input from outside legal counsel, can investigate product complaints and failures

to determine what went wrong and to devise a commendable fix, as appropriate under the circumstances. The parameters of the recall, as well as the fix, may have to be negotiated with a government agency. Moreover, it is helpful to document the steps taken in the recall and to track all related costs under a separate accounting number. If needed, follow-up recall notices should be issued in a manner designed to reach as many users as possible, thereby preventing injury.

Chinese manufacturers should also understand that compliance with a CPSC product recall does not necessarily relieve them from possible product liability suits brought by persons who are injured by the product that is recalled. See *In Re: Mattel Inc. Toy Lead Paint Products Liability Litigation*, LEXISNEXIS MEALEY’S LITIG. REP.: CLASS ACTIONS, Dec. 18, 2008, at 35-37 (class action for medical monitoring may proceed); *California v. Mattel Inc., et al.*, LEXISNEXIS MEALEY’S PERS. INJ. REP., Dec. 19, 2008, at 3-4 (\$1 million settlement to fund public health initiatives to treat childhood lead poisoning).

Conclusion

In a short time, China has become the crucible for the world, and especially so for the United States. Because of such rapid growth, a number of Chinese manufacturers may not fully appreciate the requirements of American law – both in terms of product liability civil suits brought in U.S. courts, as well as the regulatory requirements of U.S. government agencies such as the CPSC, the Food and Drug Administration, and the Department of Transportation. As they grow in size and stature, Chinese manufacturers should not hesitate to accept their global responsibilities, in the U.S. and elsewhere. Instead, they should embrace those obligations by establishing a company culture that strives to make desirable and safe products, standing behind the products they make, and enlisting the assistance of the finest legal counsel to guide and to protect them through the maze of U.S. regulation and litigation. In the process, the world will become a safer place and Chinese manufacturers will prosper. ●