

# White Paper

## Defective Foreign Products in the the United

States:

### Issues and Discussion

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## Major Premise

There is no mystery regarding the flood of dangerous and even deadly consumer products manufactured abroad and sold in the United States. Foreign manufacturers are not naïve. They understand the effect of state and federal laws that limit or eliminate tort liability, known, oddly enough, as tort reform. They understand the difficulty of securing a product liability judgment against a domestic wholesaler or manufacturer – and they understand that as foreign producers, they are not only shielded by tort reform but also protected by the complex web of laws, policies, and practices that make it difficult if not impossible to sue successfully foreign manufacturers in domestic courts. Stripped of the incentive value the tort system provided, it should come as no surprise that domestic consumers have been exposed to tens of millions of defective products produced by foreign suppliers.

## Table of Contents

1. Foreign Defective Goods in the Domestic Market: Summer 2008
  - a. Products for Use by Infants and Children
  - b. Products for General Use
2. Limiting and Eliminating Liability
3. Select “Reforms” That Reduce Incentives for Safer Products
  - a. Joint and Several Liability
  - b. Strict Liability
  - c. Statutes of Repose
  - d. Retailer Liability
4. Marginalization of the Consumer Product Safety Commission and the Food and Drug Administration
  - a. Consumer Product Safety Commission
  - b. Food and Drug Administration
5. Issues and Obstacles to the Imposition of Liability on Foreign Manufacturers
  - a. Jurisdictional Issues in Holding Foreign Manufacturers Accountable
  - b. Recent Cases Where Personal Jurisdiction Failed
  - c. Recent Cases Where Personal Jurisdiction was Found
6. Personal Jurisdiction Based on an Aggregate of National Contacts
  - a. Service of Process and Enforcement of Judgments
  - b. Discovery
  - c. Blocking Statutes
  - d. Enforcement of Judgments
7. Next Steps
  - a. Judicial Action
  - b. Legislative Action
  - c. Bonds and Consent
    - i. Bond Requirement
    - ii. Consent or Party Autonomy
    - iii. World Trade Organization
8. Conclusion

## Appendices

### Appendix A

Quotes: A Meaningful Product Liability System Produces Incentives for Safer and More Efficient Products

### Appendix B

Quotes: Original sources beyond the text of the White Paper for Asahi

### Appendix C

Quotes: Commerce Clause, Contracts Clause, Single Transaction, and Enforcement of Judgments

### Appendix D

Exemplars of Media Sources and CPSC Recalls of Products from China Since the Fall, 2007 Congressional Inquiry

## 1. Foreign Defective Goods in the Domestic Market: Summer 2008<sup>1</sup>

Over the last decade, foreign manufacturers have exported into the United States many millions of dangerous and potentially deadly products. In the last year, there has been extensive media attention to the problem (well over 1000 articles in the mainstream press), a spate of recall notices from the Consumer Product Safety Commission (“CPSC”), and a number of congressional hearings, all focused on lessening the flow of defective goods from outside the United States. At the outset, we sought to determine if these measures have had a beneficial effect. Unfortunately, we can discern no meaningful decline in the number of defective goods entering the United States.<sup>2</sup>

To get a sense of the problem, we set out below some of the recalls documented by the CPSC, *limiting our list to just June and July of 2008*. We divided the products into those designed for infants and children and those designed for use by the general population.

### a. Products for Use by Infants and Children

Daiso children’s jewelry manufactured in China was recalled because of excessive levels of lead. Wendy Bellissimo Hidden Hills Collection Cribs manufactured in China were recalled because of a crib-slat strangling hazard. Mini Chef Complete Toy Kitchens manufactured in Thailand were recalled because of a choking hazard. MindWare’s Animal Tracking Explorer Kit manufactured in China was recalled because it failed to warn of the presence of chemical calcium hydroxide. The Adventure Play Set manufactured in China was recalled because of weak chains that led to breaking and injury.

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<sup>1</sup> The author is grateful to the Robert L. Habush Endowment for its generous support of this project.

<sup>2</sup> See, Appendix D, and <http://www.cpsc.gov/cpsc/pub/prerel/prerel.html>, visited October 22, 2008.

Camouflage Pajama Sets manufactured in Vietnam were recalled because of excessive levels of lead. Playsafe Spinning Quad Merry-Go-Rounds manufactured in China were recalled due to an unsafe seating design. "Hip Charm" Key manufactured in China was recalled because of excessive levels of lead. This marked the second time this item had been recalled in 2008. Jardine Cribs manufactured in China and Vietnam were recalled after 42 reported incidents of children's heads becoming stuck in the crib. Cadence-Lea and Trio-Lea Girl's Sandals manufactured in China were recalled because of a choking hazard. 2nd Nature Built to Grow Cribs manufactured in Slovenia were recalled because of a strangulation hazard. "Thunder Wolf" Remote Controlled Indoor Helicopters manufactured in China were recalled because of battery problems that could lead to fire. Jackets from Coolibar manufactured in China were recalled because of a risk of strangulation.

Taggies™ Sleep'n Play Infant Garments manufactured in China were recalled because of a choking hazard. "It's a Girl Thing" Bracelets manufactured in China were recalled because of excessive levels of lead. LaJolla Boat Bed and Pirates of the Caribbean Twin Trundle Beds manufactured in China were recalled because of a strangulation hazard to children. Children's Necklaces with Ballet Shoes Charms manufactured in China were recalled because of excessive levels of lead. Children's Charm Craft Kits manufactured in China were recalled because of excessive levels of lead. "Faded Glory" Lip Gloss manufactured in China was recalled because of excessive levels of lead.

It's My Binky's Personalized Pacifier made in Malaysia were recalled because of a documented infant choking hazard. Bright Starts Ring Rattles manufactured in China were recalled because of reported choking incidents. Classic Horseshoe Magnets manufactured in China were recalled because of excessive levels of lead. U-shaped Magnets Bar Magnets, Magnet Sets and Magnet Needle Sets manufactured in China were recalled because of excessive levels of lead.

#### b. Products for General Use

The Topsy-Turvy Deluxe Tomato Planters manufactured in China were recalled because the product was unstable. More than 100 injuries have been reported thus far. SoundStation2W Wireless Conference Phones manufactured in China were recalled due to a fire risk. "Remy" shag rugs manufactured in India were recalled because of a fire risk. HP Fax 1010

and 1010xi Machines manufactured in China were recalled because of burn and fire risks. Shopko and Boscov TV stands manufactured in China were recalled because they failed to meet federal stability standards.

Dirt Devil Vacuums Power Brush Attachment Tools manufactured in China were recalled because plastic pieces inside the vacuum could break off, be dangerously jettisoned, and cause lacerations (140 product failure reports; 12 injuries). Santorini Chairs manufactured in Taiwan were recalled because of faulty welding resulting in the chair collapsing. Pro Taper Clamp Kits manufactured in Taiwan were recalled because of design hazards. Arctic Cat All-Terrain Vehicles manufactured in Taiwan were recalled because the speed control mechanism was defective. All-Terrain Vehicles from KYMCO and Kawasaki both manufactured in Taiwan were recalled because of a design defect that could result in loss of control of the vehicle.

Paintball Gun Remote Line Adapters from Real Action Paintball manufactured in China were recalled when it was learned that overtightening could cause an explosion. SLA90 Youth All-Terrain Vehicles manufactured in China were recalled because they lacked front brakes, a manual fuel shut-off, and proper padding. Amsterdam Bicycles manufactured in Taiwan were recalled because poor alignment may cause the chain to derail, causing a risk of falling.

Infra-Red Sauna Rooms manufactured in China were recalled because of an overheating hazard. Bosch Hammer Drills manufactured in Malaysia were recalled because the drill can operate while in the “off” position. Crafters Square Hot Melt Mini Glue Guns manufactured in China were recalled because of a fire risk. Bench Scale Adapters manufactured in China were recalled because of a fire hazard. And finally, Cuddly Comfort Pillows manufactured in China were recalled because the pillows contain small metal fragments that can cause abrasions and cuts.

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Consumers exposed to the above products are both at risk and without reliable remedies against the foreign designers and manufacturers named above. How could it be that so many dangerous and defective foreign products find their way into the homes of American consumers? What challenges and obstacles do injured consumers face as they search for remedies? What follows is a discussion of these questions.

## 2. Limiting and Eliminating Liability

Though the products listed above have been recalled, millions remain in the stream of commerce – and still more enter the market every day. One reason defective products continue to be imported and distributed is the success of tort reform. Incentives for product safety are diluted or lost when manufacturers know there are caps on pain and suffering, limits on punitive damages, and, in many states, no strict liability or joint and several liability. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L. J. 1263 (2004); Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005). As such, foreign manufacturers suffer few consequences from exporting popular and profitable products that are also inexpensive, untested, and deadly.<sup>3</sup>

Tort actions both provide a remedy to injured consumers and serve as a disincentive to produce unsafe products. Tort reform frustrates a fundamental goal of the civil liability: corrective justice. It is counterintuitive to assert that the imposition of sanctions performs no deterrent function. *But see* Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1601 (1997); M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1056 (1998); Victor E. Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688 (2001); and the American Tort Reform Association's web site on the need to limit tort liability (<http://www.atra.org/issues/index.php?issue=7341>, last visited Oct. 21, 2008).

This argument ignores the legion of instances where lawsuits deterred negligent behavior and forced the adoption of important safety features. As White House journalist Helen Thomas noted, “[n]othing gets [corporations’] attention like writing a big check to an injured customer.” Helen Thomas, *Whose Side Are You On, Mr. President?*, HEARST NEWSPAPERS, Jan. 3, 2003. This statement was in an article reporting on an \$8.8 million judgment that persuaded Johnson & Johnson to put

<sup>3</sup> Portions of this text are derived from Popper, *Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Consumer Goods*, PRODUCT SAFETY & LIABILITY REPORTER, Vol. 36, No. 9, p. 219 (2008).

enhanced warnings on bottles of Tylenol, a multi-million dollar jury verdict that stopped Eli Lilly from selling a dangerous drug, and a \$10 million punitive damage award that compelled Playtex to withdraw from the market tampons that were associated with toxic shock.

The principle that product liability deters is so obvious that it is rarely the subject of commentators and courts. “Although there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law... deters.” WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (Harvard University Press) (1987).

Notwithstanding our conclusion that tort liability has a positive effect on the quality of goods and services, we sought to review the limited empirical and theoretical data in the field.<sup>4</sup> Several scholars have attempted to determine how the prospect of liability influences manufacturers. See Sandra F. Gavin, “Stealth Tort Reform,” 42 VAL. U. L. REV. 431, 437-38 (2008); George Eads & Peter Reuter, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* (Rand Corp.) (1983); Nathan Weber, *PRODUCT LIABILITY: THE CORPORATE RESPONSE* 15 (Conference Board) (1987); E. Patrick McGuire, *THE IMPACT OF PRODUCT LIABILITY* 18-19 (Conference Board) (1988); Egon Zehnder Int’l, *The Litigious Society: Is It Hampering Creativity, Innovation, and Our Ability to Compete?*, 2, 3 CORP. ISSUES MONITOR 1, 1 (1987). This literature suggests that the threat of liability, though not the sole reason behind safety and innovation, plays an important role in assuring that companies produce safe products. Sandra F. Gavin, *Stealth Tort Reform*, 42 VAL. U. L. REV. 431, 437-38 (2008).

Citing a study by The Conference Board in 1987 and 1988, one article notes that one-third of the corporate CEO’s interviewed acknowledged that, “despite a self-interest in tort reform . . . they had improved the safety of their products [because of tort liability.]” Robert S. Peck, Richard Marshall & Kenneth D. Kranz, *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 443 (2000). Professor Gary T.

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<sup>4</sup> The research for this White Paper covered a number of months. I was fortunate to work with a number of talented students at the law school including Dana Gillenbach, Robert Barna, Jamie Ziegenfuss, and Julie Yeagle. Hence, references are made to our collaborative work in the third person. I am, however, the author of this work and the responsibility for all conclusions – and errors – is mine. A.F.P.

Schwartz drew a similar conclusion: “Among 232 major corporations, about twenty-two percent had ‘[c]hanged manufacturing or operating procedures’ on account of products liability” and “about thirty-two percent had ‘[i]mproved [the] safety design of a product.’” Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 408-09 (1994). See Nathan Weber, PRODUCT LIABILITY: THE CORPORATE RESPONSE 15 (Conference Board) (1987). The Conference Board survey also asked corporations to distinguish between “actual” and “anticipated” liability experience. “In response to ‘actual’ [liability] experience, thirty-five percent of companies had ‘[i]mproved safety products,’ thirty-three percent had ‘[r]edesigned product[s],’ and twenty-one percent had improved warnings.” E. Patrick McGuire, THE IMPACT OF PRODUCT LIABILITY 18-19 (Conference Board) (1988); Schwartz, 408-409.

Industry surveys, including the Conference Board study noted above, are helpful in assessing the deterrent effect of tort law. This impact is part of our national discourse

Pressure from consumer groups and the risk of tort liability have been powerful factors influencing automobile manufacturers to improve the safety of their products. See John D. Graham, *Product Liability and Motor Vehicle Safety*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 120, 181 (Peter W. Huber & Robert E. Litan eds., 1991); see also Schwartz, *supra*.

United States District Court Judge Patrick F. Kelly noted that the efforts of the plaintiffs’ lawyers in the Playtex litigation “literally changed an industry.” *O’Gilvie v. International Playtex, Inc.*, 609 F.Supp. 817, 820 (D. Kan. 1985). Without the external pressure of the civil justice system, manufacturers are unlikely to engage in costly self-regulation. Professors Zollers, Hurd, and Shears put it succinctly:

It is now clear that safety sells, and astute product sellers respond to that demand. However, the market, especially the market for consumer goods, is too disparate to send a consistent safety message. The legal environment must back up market forces to assure that the manufacturers and product sellers understand that the goal to be achieved is safe products. . . . It is clear that the risk of potential liability captures the attention of business and draws a response. Significant reductions in liability are likely to be met with

corresponding lapses in diligence even if market forces and the regulatory environment remain the same.

Frances E. Zollers, Sandra N. Hurd & Peter Shears, *Looking Backwards, Looking Forward, Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1047 (2000).

We understand the argument that nothing regulates like an effective open market. We also understand that in the world of product safety, during the time it takes for a market to self-correct, there may well be thousands of injuries and deaths. That is not now – nor has it ever been – an acceptable price to pay. Market theory has limits. – and product safety is a prime example of such a limit.

### 3. Select “Reforms” That Reduce Incentives for Safer Products

Despite the deterrent effect of the tort system, thirty years ago tort reformers took up residence in the Nation’s Capital and state houses, insisting that tort actions are “bad for business” and “bad for society,” and that they “undermine the notion of personal responsibility.” (The American Tort Reform Association (“ATRA”) at a Glance, <http://www.atra.org/about/>, last visited Oct. 20, 2008).

In an effort to “make the system fairer for everyone,” those pursuing tort reform pushed hard to abolish strict liability, relieve component part manufacturers of liability, cap non-economic losses, create arbitrary timeframes in which injured persons could file claims, ratchet up standards of proof for scientific evidence, abolish joint and several liability, abolish or grossly limit punitive damages, and neuter the Consumer Product Safety Commission (“CPSC”). With singular determination, they sought to dismantle a system that generates a tough, market-based force that compels the production of safer and more efficient products.

State legislatures and occasional congressional committees gave in to these requests, congratulating themselves that they were leveling the playing field and interjecting sanity into a system gone mad. The press, enticed by the prospect of being free of punitive damages when they defame someone into reputational oblivion, joined the hunt, backing these initiatives.

In the feeding frenzy that resulted, there were casualties. All of the “reforms” mentioned above, in one form or another, have been adopted in different states, and some became federal law. In so doing, the vital market pressure, the corrective justice force, and the incentives that a strong, well-developed civil liability system furnishes, were diluted or lost. Consider the following four “reforms.”

a. Joint and Several Liability

Had a number of states not abolished joint and several liability, a prize of tort reformers, the question of accountability for foreign manufacturers would be of far less consequence. In those states that retain joint and several liability, retailers, distributors, or wholesalers who place a product into the stream of commerce bear full responsibility for harms resulting from a manufacturer’s (domestic or foreign) failure to either exercise due care or conform with industry standards. In the absence of joint and several liability, retailers and distributors bear the responsibility only for the harm they cause, and only to the extent that they cause it. *Compare* Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J.L. & POL’Y 119 (2007) (joint and several liability is both just and essential to protect those adversely affected by various defective products), *and* Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437 (2007) (arguing that joint and several liability with a right of contribution is a fair and appropriate system for allocating responsibility), *with* Philip K. Howard, *A Remedy Without a Wrong*, 115 YALE L.J. POCKET PART 30, 1396 (2006) (arguing that joint and several liability produces inefficient and unfair results), *and* Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645, (2006) (asserting that beneficial free market forces are thwarted by doctrines such as joint and several liability).

b. Strict Liability

In a jurisdiction that recognizes strict liability, plaintiffs must establish three things: (1) the product was sold in a “defective condition, unreasonably dangerous to user or consumer,” (2) causation, and (3) damages. Under this scheme, plaintiffs are not saddled with the burdensome task of proving negligence. The public policy reason for adopting strict liability is obvious: injured consumers should not be required to master the technology of an industry in order to show where

specific acts of negligence occurred and how the manufacturer could have made a safer product.

Many states have abolished strict liability and now require plaintiffs to show a “reasonable alternative design.” This change, which reflects the position taken in the RESTATEMENT (THIRD) OF TORTS, makes it significantly more difficult for plaintiffs to seek redress when they are injured by defective products. Compare Robert A. Prentice & Mark E. Roszkowski, *“Tort Reform” and the Liability “Revolution”*: *Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 258 (1991-92), with Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779 (2007); See also Alan Caknanm, *Strict Liability and the Liberal-Justice Theory of Torts*, 38 N.M.L. REV. 95 (2008) (offering a “metatheory” of torts that encompasses a two-step strict liability formulation).

### c. Statutes of Repose

Proponents of tort reform have sought to impose statutes of repose in most states and have pursued a national statute of repose in Congress. Rather than using the date on which a consumer discovers an injury to commence the statute of limitations, a statute of repose sets a time limit based on the date the product was placed into the stream of commerce. If one learns she has been harmed by a product years after the product’s use (a common phenomenon for many cancer-causing agents), but after the period of repose has run, she is barred from bringing a claim, regardless of the fault of the producers and sellers of the product. See generally David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1 (2005); Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627 (1985); Michael M. Martin, *A Statute of Repose for Product Liability Claims*, 50 FORDHAM L. REV. 745 (1982); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981).

Since statutes of repose destroy an injured party’s access to the courts, the constitutionality of these restrictions has been litigated often over the last 25 years. Compare *Keleman v. Rimrock*, 542 A.2d 720, 725 (Conn. 1988) (statute of repose is consistent with equal protection), and *Olsen v. J.A. Freeman Co.*, 791 P.2d 1285, 1296 (Idaho 1990) (statute of repose not unconstitutional), with *Kennedy v. Cumberland Eng’g. Co., Inc.*, 471 A.2d

195, 198 (R.I. 1984) (statute of repose denied access to the courts and was unconstitutional), and *Lankford v. Sullivan, et al.*, 416 So. 2d 996, 1004 (Ala. 1982) (statute of repose was unconstitutional), and Patrick E. Sullivan, *Note, Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150, 163 (1983).

#### d. Retailer Liability

Among the many casualties of tort reform, however, one of the most troubling has been the removal of accountability of retailers who sell defective goods. In the past, liability was imposed on retailers because they place goods into the stream of commerce and profit from the sale of those goods. Retailers were held liable for good reason: Retailers have the most direct opportunity to communicate with consumers, highlighting warnings or problems with the product, the last and best opportunity to test a product if it appears to be problematic, and every incentive to make sure the goods they sell are safe and effective. Perhaps more importantly, large retailers have an enormous impact on the design and quality of goods.

When it comes to ensuring the quality of consumer goods, no individual consumer or consumer organization carries the power of retailers. If a large retail chain decides a product can be the basis for civil liability, they will cease to sell that product. Further, unless they suffer from some form of corporate masochism, they will communicate with the manufacturer and place pressure on the manufacturer or designer to improve the quality and integrity of that product. The fact is, without successful retailers, manufacturers cannot function. They are vital to the stream of commerce.

Retailers are also an enormously powerful political constituency. Over the last quarter century, they have managed to convince a number of state legislatures and a number of congressional committees that they are an endangered species and entitled to special protection under our tort system. See Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1035 (2003) (“[O]ne who is in the distributive chain but did not create the defect should not be liable for that defect. . . .”).

The problem with foreign manufacturers and the lack of easy accountability can be seen, at least in a limited context, as a problem of retailers. Take for example *France v. Harley Davidson*. That case holds, among other things, that under the applicable Utah common law, “no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant.” No. 2:06-CV-00961 TS, 2007 U.S. Dist. Lexis 44213, at \*4-5 (D. Utah, June 18, 2007). This means no joint and several liability. Further, when a party is determined to be a passive retailer, there is no strict liability under Utah law for design or manufacturing defects. *Id.* at \*5 (citing *Sanns v. Butterfield Ford*, 94 P.3d 301, 307 (Utah App. 2004)).

A passive retailer is an entity that does not participate directly in packaging, labeling, or design of a particular product and has no knowledge of any design or manufacturing defects. *See generally*, *Kladivo v. Sportsstugg, Inc.*, No. 06-4924 (JRT/RLE), 2008 U.S. Dist. LEXIS 67267, at \*8-9 (D. Minn. Sept. 2, 2008); *Harley-Davidson, supra*, \*5-6 (concluding that defendants were passive retailers because they did not participate in any design, testing, manufacturing, assembly, or warnings in association with the defective product); *Dakota, Missouri Valley & Western R.R. v. JMA Rail Prods. Co.*, No. 1:06-cv-002, 2006 U.S. Dist. LEXIS 56567, at \*7-8 (D.N.D. Aug. 9, 2006) (discussing dismissal, under North Dakota Century Code, of claims against a non-manufacturing seller who does not exercise significant control over the design or manufacture of the product, provide instructions or warnings to the manufacturer concerning the alleged defect, have actual knowledge of the defect, or create the defect). A number of domestic retailers who do not participate in the design of products they sell will lay claim to the label “passive retailer.” By virtue of tort reform, they will not be liable.

One is hard pressed to understand the obsession of tort reformers to protect retailers. Frankly, they already have fairly comprehensive coverage by virtue of indemnification agreements common in the sale of goods in the U.S. For example, the RESTATEMENT (SECOND) OF TORTS, at § 886 b, comment h, suggests that a supplier of a defective good ought to indemnify retailers if the retailer was not engaged in the direct design, development, or labeling of the particular product in question.

Given the difficulty of suing successfully foreign manufacturers (discussed *infra*), retailers may be all that plaintiffs have, but under the

current tort-reformed system, retailers are a very unsatisfying target for profoundly injured plaintiffs.

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In addition to having an injurious effect on consumers, the above changes in the U.S legal system have harmed the competitiveness of American producers and sellers. Foreign manufactures can set their prices lower because “they do not face equal prospects of punitive damages levies” and can disregard “the collectibility of U.S. products liability judgments.” George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U. L. REV. 115, 148 (1993).

Moreover, there are glaring discrepancies in product liability insurance rates between American and foreign manufactures. American manufacturers and product sellers can expect to pay insurance rates that can be twenty times higher than those in Europe. See Alvin B. Rubins, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 436 (1986) (“While this rate differential is due in part to the greater protection accorded American consumers, it is also partly attributable to the uncertainty and higher operational expenses in our tort litigation system, and the prospect of punitive damages awards.”). Foreign manufacturers’ ability to sell products at lower prices affords these manufacturers a considerable competitive advantage in U.S. markets. *Id.*

In sum, while the tort system continues to provide relief for certain injured consumers, it has been diluted as a result of tort reform. That dilution is not lost on foreign manufacturers. If a producer is not subject to liability, the incentive to optimize product quality is reduced.

#### 4. Marginalization of the Consumer Product Safety Commission and the Food and Drug Administration

##### a. Consumer Product Safety Commission

Beyond the tort system, there is an expectation that when products fail, the CPSC will hold accountable those responsible for the failure. Unfortunately, there are good reasons to doubt that the CPSC has been or will be a powerful agent for accountability and consumer protection. While recently passed legislation has provided the CPSC with much-

needed funding and authority, the evidence does not suggest that the agency is making headway.

Up until a few months ago, the entire operating budget of the agency was \$62 million, a sum one-tenth the annual advertising budget of Wal-Mart. If Congress intended the CPSC to protect the American public from unsafe products, communicate with the public regarding a broad range of product risks, define and analyze substantial product hazards, test products and make recommendations regarding their safety and efficacy, one would think that Congress would spend more than is spent on advertising in approximately one month by Wal-Mart.

Evidence of the insufficient reach and effectiveness of the agency is not hard to find. For example, in August of 2007, Mattel announced the recall of over 400,000 toy cars, but not because CPSC noticed lead paint on the toys. Rather, one of Mattel's European retail partners noticed the hazard. Barboza, *Mattel Recalls 19 Million Toys Sent From China*, THE NEW YORK TIMES, Aug. 15, 2007, at p. 1.

The statutory structure of the CPSC is not inherently problematic. The CPSC has the power to ban products that constitute substantial product hazards. It has extensive communication capacity, were it to exercise that ability. Further, unlike courts, the statutes pertaining to the CPSC allow for accountability for manufacturers, wholesalers, retailers, and distributors. Were the agency functional, this force might be of consequence. Unfortunately, while the agency is many things, fully functional it is not. To be clear, it is not that the CPSC has failed to attract some of the finest personnel in government. There are terrific scientists, lawyers, and policy analysts at the CPSC. However, with a shoe-string budget (until recently) and related political problems, even those of great talent and capacity will not be able to achieve the clear legislative mandate of the agency.

An unfortunate constraint of the CPSC is that, while "the agency welcomes 'credible outside information about possible product safety hazards,'" it must "verify that information and take action based on CPSC investigations and not those done independently." Joseph S. Enoch, *Toys Safer than Ever, Toy Makers Claim*, CONSUMERAFFAIRS.COM, Feb. 20, 2008, [http://www.consumeraffairs.com/news04/2008/02/toy\\_safety\\_nyc.html](http://www.consumeraffairs.com/news04/2008/02/toy_safety_nyc.html)

(quoting CPSC spokeswoman Julie Vallese). A demonstration of this inefficiency is evident in the recall of Hip Charm key chains sold by Wal-Mart and manufactured in China. See Truman Lewis, *Safety Agency Waits 16 months to Recall Lead-Laden Key Chains*, CONSUMERAFFAIRS.COM, April 27, 2008, [http://www.consumeraffairs.com/news04/2008/04/cpsc\\_lead.html](http://www.consumeraffairs.com/news04/2008/04/cpsc_lead.html).

Chemistry professor Jeffrey Weidenhamer of Ashland University tested the metal key chains and prepared a study, publishing the results in *Chemosphere*. In December 2006, he alerted the CPSC of “more than 70 items with excessive lead content.” *Id.*

While around 20 of these items were recalled by CPSC, the Hip Charm key chain was not, “even though [Weidenhamer’s] tests found more than 80 percent lead by weight in several of the charms, much higher than the usual standard of .06 percent. . . . Despite Weidenhamer’s warnings, his credentials and his previous safety alerts, the CPSC took no action on his warning [until] . . . a public-health nurse in Illinois reported that she found a 9 month-old girl mouthing her mother’s key chain.” *Id.*

Congress sought to cure this type of inefficiency through legislation that almost doubles CPSC’s budget and directs the agency to issue regulations and guidelines to enhance its consumer protection function. However, recent economic problems could mean that the most critical part of the bill – increased funding – may not be directly forthcoming. Annys Shin, *Bailout May Delay Funds for New Law*, THE WASHINGTON POST, Sept. 25, 2008, at D1.

#### b. Food and Drug Administration

Like the CPSC, the record of the Food and Drug Administration (“FDA”) is problematic when it comes to regulating foreign manufacturers, particularly those in China. Ten years ago the agency acknowledged it had limited knowledge of the quality of ingredients and products manufactured in China and conceded that its foreign drug inspection program needed improvement. GAO, *Food and Drug Needed in the Administration: Improvements Foreign Drug Inspection Program*, GAO/HEHS-98-21 (Washington, D.C.: Mar. 17, 1998). Last year, the General Accounting Office (“GAO”) uncovered significant weaknesses in FDA’s foreign drug inspection program. GAO, *Preliminary Findings Suggest Weaknesses in FDA’s Program for Inspecting Foreign Drug Manufacturers*, GAO-08-224T (Nov. 1, 2007).

Though the FDA performs over 200 foreign drug manufacturing inspections per year, many go unexamined. The unsanitary workshop in China responsible for manufacturing tainted heparin is one notable example. See Walt Bogdanich, *Blood Thinner Might Be Tied to More Deaths*, THE NEW YORK TIMES, Feb. 29, 2008. What makes the lack of inspections by FDA most troubling is the sheer volume of drugs manufactured by foreign manufacturers. By some estimates, 80% of the ingredients in U.S. pharmaceuticals come from outside the United States.

Even if the FDA was capable of inspecting every foreign manufacturing facility, however, American consumers remain vulnerable. Federal regulation alone provides insufficient protection for the consumer.

#### 5. Issues and Obstacles to the Imposition of Liability on Foreign Manufacturers

Assuming that tort reform has not destroyed entirely the ability of injured consumers to seek justice in our courts, the main question to address is jurisdictional: Under what circumstances do state and federal courts have *in personam* jurisdiction over foreign manufacturers? For a number of reasons, states have a strong interest in providing a forum for residents harmed by products manufactured abroad.

First, an individual citizen injured by a defective product will have a far more difficult time moving to a different forum (particularly one 12,000 miles from home) than would a well-financed, transnational corporation. Second, witnesses and evidence regarding the harm, including medical testimony, might be extraordinarily difficult to assemble in a forum outside the United States. Finally, if a domestic court grants a motion to dismiss a case on a *forum non conveniens* basis, the likely outcome is that the U.S. plaintiff will fail to find a court outside of the United States to hear the claim. *Gonzalez v. Chrysler*, 301 F.3d 377, 383, note 9 (5th Cir. 2002) (citing David Robertson, *Forum non Conveniens in America and England: A Rather Fantastic Fiction*, 103 L. Q. REV. 398, 418-419 (1987)); *In re Crash off Long Island, New York*, 65 F. Supp. 2d 207, 217 (S.D. N.Y. 1999). Despite these arguments in favor of providing a forum for citizens harmed by defective goods produced abroad, it is difficult to sue a foreign manufacturer and even more difficult to collect a judgment, assuming a domestic court opens its doors to the plaintiff.

a. Jurisdictional Issues in Holding Foreign Manufacturers Accountable

Foreign manufacturers are subject to the jurisdiction of domestic courts only when the plaintiff can establish that the defendant has “purposefully established ‘minimum contacts’ in the forum State.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1984). Further, a court must determine that the assertion of jurisdiction is consistent with our notions of fair play and substantial justice, fundamental fairness, and reasonability. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). For this assessment, courts take into account the burden on the defendant, the interests of the forum state, the plaintiff’s interest in obtaining relief, the efficient resolution of the controversy, and the interests of the various states in securing fundamental state policies. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987).

Based on *Burger King*, the more substantial the activity of the defendant in the United States, the more directed or purposeful the activity of the defendant is vis-a-vis the forum state, the more the defendant’s activity suggests that it is “purposefully availing” itself of the rights and obligations the forum state provides, the more likely that the manufacturer will become a party to a civil product liability claim. Of course, if the foreign defendant is doing business in the state, i.e., is physically present, there is not much of an issue. *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). However, there is a real and important difference between the physical presence of the defendant’s business enterprise and the simple foreseeable presence of a product the defendant sells in the state. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

At the heart of the challenge to determining personal jurisdiction over a foreign defendant is *Asahi Metal Industry v. Superior Court of California*, 480 U.S. 102 (1987). The plurality opinion written by Justice O’Connor requires minimum contacts that are “something more” than the “mere act of placing the product into the stream” of commerce. *Id.* at 111-112. In order to establish a substantial connection with the forum state, the defendant needs to place a product into the “stream of commerce” in the state and engage in purposeful activity in the state, such as advertising, marketing, or designing a product for the forum state. *Id.* at 112.

In his concurrence, Justice Brennan proposed a more simplified stream of commerce theory, writing that the “minimum contacts” test is satisfied if the defendant was aware of its product’s entry into the forum state through the ordinary distribution channels. *Id.* at 117.

With this split of opinion, *Asahi* did little to help lower courts analyze jurisdictional issues. As such, recent decisions regarding minimum contacts are varied and confused, and it is difficult to identify any distinctive trends among the courts.

Some courts have ignored *Asahi*’s opinions and have relied on the Court’s earlier opinions endorsing the stream of commerce analysis. Others have distinguish *Asahi* based on its international character or its facts. . . . Many courts simply acknowledge *Asahi*’s ambiguity concerning the validity of the stream of commerce theory, the decision’s lack of a majority opinion, and its potential inconsistency with the particular forum court’s earlier decisions. Sean K. Hornbeck, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1420-1422 (1996).

We are not the first to puzzle over both Fifth and Fourteenth Amendment Due Process problems associated with jurisdictional reach over foreign defendants. See Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT’L L. 121, 139-40 (1997). While most commentators find the lack of clarity in *Asahi* a stumbling block for state courts, in a recent law review article, Professor Austen L. Parrish contends that while the Supreme Court has not accepted *de jure* the “aggregate of national contacts” formulation, *for federal courts applying federal statutes* it has become part of domestic jurisprudence *de facto*.

Without any guidance, lower courts have been ill-equipped to decide whether jurisdiction exists over foreigners; lower courts reveal deep confusion over what exact standard to apply. . . . [A] federal court may exercise personal jurisdiction over a foreign defendant based on an aggregation of contacts with the United States as a whole, rather than based on the defendant’s contacts with the state in which the court sits. Although the Supreme Court has never directly addressed its constitutionality, courts will often permit a “national contacts” approach when dealing with foreign defendants. Austen L. Parrish, *Sovereignty*,

*Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 21 (2006) [footnotes omitted].

The use of national contacts, however, requires a “federal statute which permits the service of process beyond the boundaries of the forum state. . . .” *Go-Video, Inc. v. Akai-Electric*, 885 F.2d 1406, 1414 (9th Cir. 1989). This approach is also supported by Federal Rule of Civil Procedure 4(k)(2) providing a jurisdictional base “when no State exists with jurisdiction over defendant. . . .” The use of “national contacts” is also supported in *SEC v. Carrillo*, 115 F.3d 1540, 1543-44 (11th Cir. 1997) but only where there is “a federal statute authorizing nationwide or worldwide service of process. . . .” These cases are not applicable to the vast majority of product liability cases filed in state courts based on state common law or state statutes. However, the cases and scholarship often draw useful parallels between state and federal cases and Fifth and Fourteenth Amendment Due Process arguments.

Since neither the Supreme Court nor the Congress has resolved decisively the legitimacy of the “aggregate of national contacts” approach to jurisdiction for personal injury cases where there is no federal statute, we felt it important to review representative case law in the field, breaking down the cases into those that follow the more restrictive or comprehensive minimum contacts requirements set out in Justice O’Connor’s plurality and those that follow the more open-ended approach set out by Justice Brennan.

To start, this is primarily a Due Process question pertaining to jurisdiction of state courts (or federal courts hearing a case based on diversity) and frequently a matter of assessing the constitutionality of a state’s long-arm statute. The Due Process clauses in the Fifth and Fourteenth Amendments are identical in relevant part, but for this preliminary analysis, we focused on (1) limits for federal courts in federal question cases based on the Fifth Amendment, and (2) limits on the assertion of power of state courts based on the Fourteenth Amendment. The limitations we assessed pertained to (1) service of process and personal jurisdiction (referred to as minimum contacts), and (2) the fundamental fairness of the contemplated legal proceeding, given the location of the witness, the nature of the evidence, and the domicile of the parties to the proceeding (referred to as fair play, substantial justice, and reasonability).

Were a product liability case brought based on a federal statute that permitted nationwide service of process, “the Fourteenth Amendment Due Process . . . does not apply. Rather, the Fifth Amendment Due Process Clause applies. However, the analysis created under the Fourteenth Amendment to apply to states has been applied to the federal system under the Fifth Amendment.” Benjamin Rolf, *Note: The ‘Ends of Justice’ Revised: How to Interpret RICO’s Procedural Provision, 18 U.S.C. § 1965*, 80 NOTRE DAME L. REV. 1225, 1254-1255 (2005).

Congress can resolve service of process issues by statute – but that does not resolve the reasonability obligations the Fifth Amendment (not Fourteenth Amendment) imposes. It is not unusual for parties to confuse this distinction. For example, in *United States v. Davis*, C.A. No. 90-484, 1998 U.S. Dist. LEXIS 4550 (D. R.I. 1998), the court noted that the lawyers on both sides of a dispute had “leapt headlong” into a Fourteenth Amendment critique of fair play and substantial justice when a Fifth Amendment assessment was required.

For the reasonability calculus, one approach is to look at the policies underlying the statutes, the interests of the state(s) involved, the ease of litigating a claim, and fundamental fairness. However, “Congress's decision to allow national service of process is given deference, and it is rare for a forum to be so burdensome that it will trigger due process fairness problems.” Rolf at 1256.

Even when a federal statute provides a nationwide solution for service of process and, ostensibly, jurisdiction, the Court “has never defined the limitations of due process protection under the Fifth Amendment for personal jurisdictional purposes, [relying instead on] the due process protections of the 14th amendment.” Terry Park, *Comment: National vs. Forum Contacts: Does ERISA’s Nationwide Service of Process Automatically Constitute Federal Personal Jurisdiction?*, 32 SW. U. L. REV. 527, 541 (2003). That said, when “foreign” means not just out-of-state but non-U.S. defendants, both Fifth and Fourteen Amendment assessments “might require a court to consider sovereign interests other than those of the forum state. . . .” Tracy O. Appleton, *Note: The Line Between Liberty and Union: Exercising Personal Jurisdiction Over Officials From Other States*, 107 COLUM. L. REV. 1944, 1953 (2007).

Along the same lines, if a diversity case in federal court is based purely on state law, the “Due Process Clause [of] the Fourteenth Amendment

applies, and the minimum contacts analysis looks to a defendant's contacts with the forum state. . . .” and that means working with the uncertainty of *Asahi*, even for *in personam* jurisdiction. *Id.*

For federal question cases, there are “new wrinkles” including the most basic (and still unanswered) question: “Does personal jurisdiction turn on the defendant's contacts to the forum state in which the court sits or to the nation as a whole?” Appleton at 1954.

Federal statutes that leave unanswered the matter of nationwide jurisdiction create almost as many questions as state cases based on state law since “the Supreme Court has expressly declined to determine whether a defendant's aggregate national contacts are in any way relevant in a federal question case when there is no provision for nationwide service of process.” *AutoScribe Corp. v. Goldman & Steinberg*, 33 U.S.P.Q.2D (BNA) 1758 (1995), 1995 U.S. App. LEXIS 2848 (citing *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987)).

In the absence of a federal statute providing “nationwide contacts” *in personam* jurisdiction and on which a substantive claim can be based, the above considerations form the backdrop for the more difficult question pertaining to state tort law: What happens when *Asahi* is the primary analytical vehicle for determining service of process, *in personam* jurisdiction, fair play, and substantial justice considerations?

#### b. Recent Cases Where Personal Jurisdiction Failed

In determining whether a foreign defendant has “continuous and systematic” business contacts with the forum a number of states have forged their own path. For example, the court in *Vermeulen v. Renault* paid particular attention to whether a foreign producer conducts regular meetings in the United States designed to promote wide distribution of their products. 985 F.2d 1534 (11th Cir. 1993). This articulation of “minimum contacts” does not bode well for domestic plaintiffs since many foreign manufacturers neither have offices nor conduct meetings in the U.S.

In *Cupp v. Alberto-Culver U.S.A., Inc.*, an antitrust case, it was determined that a French cosmetics manufacturer was not subject to the personal jurisdiction of a federal court in Tennessee. 308 F. Supp. 2d 873 (W.D. Tenn. 2004). The court noted an absence of continuous and

systematic contacts in the United States, a lack of offices or facilities, and the absence of similar indicia of presence, such as paying taxes, holding board of directors meetings, leasing or owning property, or having a bank account in the United States. *Id.* at 878. Similarly, in *Envirotech Pumpsystems v. Sterling Fluid Sys. AG*, the court refused to exercise personal jurisdiction over the foreign defendants because neither defendant had an officer, agent, or property in Utah. No. 2:99CV814K, 2000 U.S. Dist. LEXIS 16942, at \*14 (D. Utah Nov. 16, 2000). Furthermore, the defendants' U.S. distributors never sold any products in Utah with the defendants' knowledge. *Id.*

In *Zombeck v. Amada Co.*, plaintiff's fingers were crushed and required amputation after they were caught in a hydraulic press brake manufactured by defendant Amada Corporation, a Japanese company. No. 06-953, 2007 U.S. Dist. LEXIS 84563 (W.D. Pa. Nov. 15, 2007). The plaintiff argued that defendant's maintenance of a website that was accessible by Pennsylvania residents served as purposeful availment. *Id.* at 13. In rejecting this argument, the court noted that the website merely provided lists of products and descriptions, but offered no opportunity for customers to purchase said items. The court therefore concluded that the defendant did not actively solicit business in Pennsylvania. *Id.* at 15-18.

In *Affatato v. HAZET-Werk*, the plaintiff sustained a head injury after a spring clamp he was attempting to install "popped" and struck him. No. 01-CV-4345, 2003 U.S. Dist. LEXIS 21067 (E.D. Pa. Nov. 19, 2003). The plaintiff contended that HAZET had sufficient minimum contacts with Pennsylvania because HAZET placed the spring in the "stream of commerce" by selling it to Mercedes Benz Germany, who then distributed the device to Mercedes Benz USA, who then distributed the spring to one of its authorized dealers in Pennsylvania. The court considered this contact with Pennsylvania to be too attenuated: "Any HAZET products that end up in Pennsylvania arrive as a result of the actions of third-party distributors over which HAZET has no control. The unilateral activities of third-parties cannot constitute a basis for jurisdiction over HAZET." *Id.* at 11-12.

In *Pierce v. Hayward*, a plaintiff was seriously injured when a pool filter "violently exploded in his face" while he was performing maintenance work. No. 05-5322, 2006 U.S. Dist. LEXIS 81393 (E.D. Pa. Nov. 6, 2006). The manufacturer of the filter was located in Ontario, California. The plaintiff contended that the defendant manufacturer carried on a

continuous and systematic part of its business in Pennsylvania by purchasing raw materials from Pennsylvanian vendors and by maintaining an interactive website. *Id.* at 12. The defendant's purchases from the forum, however, were not related to the plaintiff's cause of action, and therefore the court refused to exercise jurisdiction on this basis. *Id.* at 13. The court also found the existence of a website to be insufficient to establish minimum contacts because the website was not "highly interactive" because "no transaction, purchase or sale" could be consummated by means of the site. *Id.* at 21.

In *Burnshire Development v. Cliffs Reduced Iron, in personam* jurisdiction was denied even though the plaintiff showed that the defendant entered the forum state and set up a data room to house corporate documents and set a date for a closing. No. 06-cv-00210-BNB, 2006 U.S. App. LEXIS 21889, at \*2 (6th Cir. Aug. 23, 2006). Similarly, the Tenth Circuit refused to exercise jurisdiction over a Dutch company in *TH Agric. & Nutrition, LLC v. Ace European Group Ltd.*, even though the foreign defendant provided insurance coverage in the forum state as part of worldwide coverage. 488 F.3d 1282, 1285 (10th Cir. 2007).

Adherence to the *Asahi* plurality is also common at the state level. For example, in *Vargas v. Hong Jin Crown Corp.*, the plaintiff sustained a severe head injury in a motorcycle accident. 636 N.W.2d 291 (Mich. App. 2001). Plaintiff alleged that the injuries were exacerbated by the defective nature of the helmet he was wearing which was produced by Hong Jin, a Korean manufacturer. The helmet in question was sold regularly throughout the state. The court concluded, however, that the state had insufficient minimum contacts to ensure a fair trial because Hong Jin did not manufacture or promote its products in the state of Michigan, nor does it have an officer, agent, or representative in the state, nor does it own or possess property in the state.

This rationale for denying jurisdiction seems equitable until one realizes that the defendant's helmets were manufactured with the purpose of being sold in the United States, and that it was perfectly foreseeable that they would be sold in Michigan. The store in which the helmets were sold, Specter's Cycles, sells Hong Jin helmets regularly and is located in Owosso, Michigan. Despite this, the court focused on the fact that the products were imported into the United States to a distributor in Wisconsin, not Michigan, and that they were disseminated from the distributor to Michigan.

This is but a small sample of U.S. courts that find the requirements in *Asahi* a significant obstacle to the exercise of jurisdiction over foreign manufacturers. Justice O'Connor's plurality opinion commands a level of "purposeful availment" of the specific rights and entitlements in the forum state, a requirement that cannot be met in many instances where the product is manufactured abroad and then imported by the United States. Consequently, even when it is foreseeable that a foreign manufacturer's products will enter the stream of commerce in the United States, generate a profit for the manufacturer, and cause harm, foreign manufacturers stand a good chance of avoiding responsibility.

### c. Recent Cases Where Personal Jurisdiction Was Found

Not all courts have required the type of intimate contact with the forum state suggested in Justice O'Connor's plurality. In one recent case, a court construed purposeful availment to encompass knowledge of the distribution system connected with the forum state. In *Nicastro v. McIntyre Machinery America, Ltd.*, the court found that "[i]n today's complex business world, foreign manufacturers rarely deliver products directly to consumers in the United States. . . . Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products." 399 N.J.Super. 539, 544 (App.Div. 2008). The court went on to hold that personal jurisdiction is established when a foreign manufacturer is aware of the distributive system. "It makes no difference whether the manufacturer had actual or constructive knowledge of the distribution system. A manufacturer that should have known . . . purposefully avails itself of the benefits of the forum's laws." *Id* at 545. See *Benitez-Allende v. Alcan Alumino do Brazil*, 857 F.2d 26, 30 (1st Cir. 1988) (holding a "business may not shield itself from suit by a careful but formalistic structuring of its business dealings").

The challenge to jurisdiction over a foreign corporation often boils down to whether the defendant did anything more than "set a product adrift in the international stream of commerce." *Clune v. Alimac Elevator* 233 F.3d 538 (8th Cir. 2000). A number of cases suggest that using an exclusive distributor to reach all fifty states constitutes purposeful availment.

In *Barone v. Rich Brothers Fireworks*, the court dealt with a manufacturer who had no office, agent, distributor, did no advertising in the state, and did not send its products directly into the state, but was nonetheless subject to personal jurisdiction since the manufacturer had nine distributors in six states, one of which was the forum state. 25 F.3d 610, 613 (8th Cir. 1994). When the manufacturer claimed that it did not realize its products entered the forum state, the court said “such ignorance defies reason and could aptly be labeled as ‘willful.’” *Id.* at 613. The *Barone* court found that when the manufacturer reaps the benefits of a distribution network, it cannot thereafter deny the forum court’s jurisdiction. *Id.* at 615.

In *Ruiz de Moina v. Merritt & Furman Ins. Agency, Inc.*, the court evaluated the factors from *Asahi* and concluded that so long as the foreign defendant has a “fair warning” that a particular activity may be subject to the jurisdiction of a domestic court, the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. 207 F.3d 1351, 1356 (11th Cir. 2000).

In some cases it is the sheer magnitude of the sale of a product that seems to be most important to the court. For example, in *Jones & Pointe v. Boto Co.*, the fact that the defendant, a foreign manufacturer, sold \$1.1 billion of artificial Christmas trees and derived a significant revenue stream therefrom, played a role in convincing the court that it would be reasonable and fair to defend the product liability claim in the United States. 498 F. Supp. 2d 822, 829 (E.D. Pa. 2007). The *Boto* court paid attention to the presence of an Internet website that describes the products that Boto manufactures and allows consumers to retrieve information about the products they have purchased. *Id.* at 829. The court found that because residents of the state of Virginia could access the website and secure further information pertinent to their needs, the requirement for minimum contact was established. *Id.* The *Boto* court also held that “in this age of [the North American Free Trade Agreement] and GATT [the General Agreement on Tariffs and Trade] one can expect further globalization of commerce, and it is only reasonable that companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states.” *Id.* at 831 (citing *Barone v. Rich Brothers Fireworks*, 25 F.3d 610, 615 (8th Cir. 1994)).

In *Bou-matic, LLC v. Ollimac Dairy, Inc.*, a plaintiff sought to secure jurisdiction over the manufacturer of a robotic milking system produced in the United Kingdom and The Netherlands. No. 1:05-cv-0203, 2006 U.S. Dist. Lexis 14543 (D. Cal., Mar. 15, 2006). The defendant argued that assertion of jurisdiction would conflict with national sovereignty since the defendants were Dutch and British entities. *Id.* at \*15-16. In addition, the defendants argued that the *Asahi* plurality prohibited the assertion of jurisdiction where a plaintiff shows only that it was foreseeable that the defendant's product would find its way into the foreign state's stream of commerce. In disagreeing with the defendant, the court determined that the purposeful availment test was met because the defendant had an agent in the state in which jurisdiction was sought and had designed the product for sale in that state. *Id.* at \*12. Where the defendant is knowingly present and the contacts are more than random or fortuitous, the court indicated that the question becomes one of reasonability, i.e., would the assertion of jurisdiction offend notions of due process.

Judging reasonability, the *Bou-matic* court relied on seven factors: 1) the extent of purposeful interjection; 2) the burden on the defendant to defend the suit in the chosen forum; 3) the extent of conflict with the sovereignty of the defendant's state; 4) the foreign state's interest in the dispute; 5) the most efficient forum for judicial resolution of the dispute; 6) the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; 7) the existence of an alternative forum. *Id.* at \*13. The court also noted that one must look broadly to the connections the manufacturer has with the United States, not just to the forum state, and that where a distributor has extensive and continuing contacts with the U.S. market, a foreign defendant should expect to be brought into U.S. courts. *Id.* at 16.

In *Ely Lilly & Co. v. Sicor Pharms.*, the court analyzed the extent to which two activities – having regular and consistent contacts with customers and advertising in national trade journals – would provide a sufficient basis for personal jurisdiction. No. 1:06-cv-238-SEB-JMS, 2007 U.S. Dist. LEXIS 31657 (D. Ind., April 27, 2007). The defendant argued that since it sold through an independent, out-of-state wholesaler rather than engaging in direct sales, it was not subject to the jurisdiction of the Indiana courts. *Id.* at \*4. The court disagreed, finding that rather than insulating a company, the presence of a “middleman” shows that a company has “purposefully availed itself of the forum state by generating . . . commercial activity within the state.” *Id.* at \*21.

In *State of Ohio ex rel Attorney General Marc Dann v. Grand Tobacco*, the Ohio court found that the use of an independent distributor is rarely the basis for limiting or prohibiting the exercise of jurisdiction. 871 N.E. 2d 1255 (Ohio App. 2007). The court held that if a foreign manufacturer knows that its products are being sold in the United States, cultivates its market there by taking into account U.S. standards in design and manufacture, and benefits from U.S. sales, a mere “paper transfer” to an independent distributor is an insufficient basis to prevent the exercise of jurisdiction. *Id.* at 1263.

Along similar lines, an Illinois court held, in *Saia v. Scripto-Tokai Corp.* that it would be “fundamentally unfair” to allow a foreign manufacturer to insulate himself from the jurisdiction of the court solely by the use of a distributor. 366 Ill. App. 3rd 419, 425 (Ill.App. 2006). The *Saia* court found that the use of a subsidiary to introduce a product into a state market may alone be sufficient to exercise jurisdiction over a foreign corporation that designs a product negligently. *Id.* at 420.

*Saia* is a case about the tragic death of a three-year-old child caused by a fire started when a defectively-designed “Aim-N-Flame” lighter malfunctioned. *Saia* relies on the “stream of commerce” argument associated with Justice Brennan’s opinion in *Asahi*. All that is required, the *Saia* court said, was that the defendant engage in some action or conduct that invoked the benefits and protection of the law of the forum. *Id.* at 424. The court found that selling a product in a state gives the manufacturer certain benefits from the laws of the state and that any inconvenience the defendant might suffer in having to defend a case in the state is offset by the need of protecting the citizens affected adversely by the product. *Id.* at 425.

The *Saia* case is of interest since the defendant in question, Tokai, is a foreign component part manufacturer of the lighter in question. Parts were shipped from Japan to Mexico where they were assembled and then packaged and transferred to K-Mart and presumably other distributors. While Tokai argued that it was not benefiting directly from those sales, the court disagreed, finding that the profits obtained from the manufacture and sale of its products were sufficient to support the assertion of jurisdiction in the state. *Id.* at 700.

The above brief review of jurisdictional challenges does not lead to any obvious conclusion. One cannot generalize that foreign manufacturers will or will not be subject to the jurisdiction of domestic courts. From an economic standpoint, the presence of so many defective and dangerous products in the United States suggests that foreign manufacturers are willing to bet that they will be able to escape liability.

#### 6. Personal Jurisdiction Based on an Aggregate of National Contacts

In a famous footnote, the *Asahi* plurality raised but did not resolve whether a defendant's national contacts may suffice for purposes of finding minimum contacts:

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. *Asahi*, 480 U.S. at 113, note 1. See *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 293-295 (3rd Cir. 1985); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 283 (3rd Cir. 1981); see also Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987); Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 127-145 (1983).

Aside from *Asahi*, the Court has not returned to the “aggregate of national contacts” phraseology. Only one other Supreme Court decision has even used the term “national contacts” in reference to a quasi-jurisdictional matter. In *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007), a case involving a Malaysian company suing a Chinese importer for fraudulent misrepresentation, the Court acknowledged that “limited discovery might reveal that Sinochem’s national contacts sufficed to establish personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2).” Further, even assuming *Sinochem* provides precedential support for “national contacts” as a basis for personal jurisdiction, it would be limited to a federal cause of action – and the vast majority of product liability cases are state cases, not federal.

Under the Commerce Clause, Congress has the apparent authority to incorporate the term “aggregate of national contacts” into Title 28 of the U.S. Code for cases brought in federal court involving a federal question. *See, e.g., The Employers’ Liability Cases*, 207 U.S. 463, 495-496 (1907). Whether Congress can affect the jurisdiction of state courts, however, is a different matter raising federalism issues. *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001); Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI-KENT L. REV. 431 (1992).

Even if Congress were to accept the challenge set out in the *Asahi* footnote and enact a law that embodies the “aggregate of national contacts,” a number of practical challenges would still await the plaintiff. In particular, the plaintiff would need to ensure that the foreign defendant was properly served, have access to meaningful discovery, overcome blocking statutes, and, if successful at trial, enforce the judgment. These challenges are addressed below.

a. Service of Process and Enforcement of Judgments

The first step in analyzing service of process abroad is to examine the statutory requirements. While states have their own individual requirements, state laws may be preempted by the Hague Convention on Service of Process Abroad. *See* Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond The International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT’L L.J. 239, 257 (2004) (“[C]ourts have held that service involving foreign parties must comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and have refused to recognize and enforce non-complying judgments.”). The Convention applies when the defendant has no domestic agent or authorized person to receive process.

Correspondence of fully translated documents through the mail to the “Central Authority” of a foreign country is the primary method of service of process under the Convention. *See* Yvonne A. Tamayo, *Sometimes the Postman Doesn’t Ring at All: Service of Process by Mail to a Post Office Box Abroad*, 13 WILLAMETTE J. INT’L L. & DISP. RESOL. 269, 273 (2005); *Hague Convention on the Service of Process Abroad: An Overview*, 37 RES GESTAE 420 (1994).

Due to uncertainty in service of process and lack of guidance from the Supreme Court in such cases, most practitioners must “exercise caution and avoid reliance on service by mail under the Hague Convention.” Jeffrey A. Fuisz, & Carly Henek, *Recent Developments in the Service of Process Abroad*, 38 INT’L LAW 320, 321 (2002).

#### b. Discovery

While U.S. courts are a convenient forum for victims of defective products residing in the United States, the case against the defendant must be imported. Essential data required to substantiate the plaintiff’s case – such as information regarding design processes, testing data, and company witnesses – is likely to be located outside of the United States and therefore difficult to obtain.

One cannot assume that the discovery process used in the United States is readily available when the named defendant is a foreign entity. Countries outside of the United States have not been particularly receptive to discovery orders issued by U.S. courts. Preliminarily, most foreign courts will reject any request for information if it is needed to establish *in personam* jurisdiction. This denial limits product liability litigation to cases where minimum contacts can be established by evidence and information available in the United States.

#### c. Blocking Statutes

The difficulty securing cooperation with foreign countries is compounded by the presence of “blocking statutes” that explicitly prohibit foreign courts from implementing U.S. discovery orders. Efforts have been made to facilitate the exchange of documents when a blocking statute is in place. While the Hague Convention on Service of Process Abroad for Judicial and Extrajudicial documents was designed to provide a predictable methodology for discovery abroad, the process is time-consuming and requires the participation of the Office of the United States Marshal as well as translation of all discovery requests into the language of the country where process is to be served. The methodologies established by the Hague Convention have not been uniformly successful, prompting the Supreme Court to hold that The Hague Convention “is not the exclusive means for obtaining discovery from a foreign entity.” *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 539 (1987).

#### d. Enforcement of Judgments

Another practical problem faced by plaintiffs suing foreign entities is the difficulty of enforcing judgments on parties outside the United States. Assuming a party is served, there is a high probability that the foreign nation will not enforce the judgment. See Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond The International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 257 (2004). At the present time, there are no treaties or agreements that readily allow for the enforcement of a U.S. judgment outside of the United States. *Enforcement of Judgments*, U.S. State Department, [HTTP://travel.state.gov/law/info/judicial/judicial\\_691.html](http://travel.state.gov/law/info/judicial/judicial_691.html) (last visited Nov. 15, 2007).

### 7. Next Steps

#### a. Judicial Action

The lack of uniformity in post-*Asahi* cases is strong evidence of the range of options for resolution by judicial action. Those courts that follow the minimum contacts reasoning set forth by Justice Brennan in *Asahi* have resolved the matter in favor of allowing extraterritorial reach. They have not, however, solved the practical problems related to service of process, discovery, or enforcement of judgments. Those issues are beyond the juridical competence of state and federal courts and require legislative and executive action.

Courts that follow Justice O'Connor's opinion and find that the minimum contacts test require more than the foreseeable presence of a product in the stream of commerce of a state will continue to be unfriendly fora for plaintiffs injured by products produced abroad. The remedial options will be limited, for the most part, to securing relief from domestic wholesalers and retailers.

If a consumer is injured by a product and the contention is that the item was defectively designed and neither the wholesaler nor the retailer designed the product, given the imperative of some tort reform initiatives, recovery can be quite difficult. In the absence of joint and several liability and in the presence of both indemnification and rules that limit liability to the percentage of harm a defendant actually causes, the challenges are

obvious, particularly if the unavailable manufacturer (a) controls most of the evidence regarding design development and production, (b) controls the testing and labeling data, and (c) has significant resources.

Consider the scenario where a foreign manufacturer exports through small and underinsured importers and retailers. In that case, the injured consumer is likely to be undercompensated or not provided any relief – unless the manufacturer can be “haled” into court, which is at least possible if a court elects to follow Justice Brennan’s opinion in *Asahi*. As the text of the *Asahi* footnote makes clear, however, the invitation to move to an aggregate of national contacts was to Congress, not courts.

One option for courts is to reconceptualize product liability cases as “single transactions” and treat all the parties on one side of a transaction as one entity. From the perspective of an injured consumer, the disaggregation of parties on the defense side does not comport with commercial reality. The consumer relies on assurances of product quality made through the presentation of the product and through the information found in labels and warnings. Often, both presentation and product labels and warnings are the responsibility of the manufacturer. The product may be sold by a domestic retailer, but the “voice” that speaks to the consumer is the manufacturer. Thus, imposing responsibility when that “voice” misrepresents the safety and quality of the product is consistent with the most basic notions of our civil justice system.

While state and federal district courts will continue to question the lack of a mandate in *Asahi*, it bears noting that this is not about finding a rationale for the imposition of liability. Manufacturers of defective goods that harm innocent consumers have breached a duty of care – and that is the foundation for civil liability in every state (or federal court, where appropriate).

This is not even a debate about the curious nature of the term “defect” or the sleight-of-hand engaged in by the American Law Institute when it displaced the strict liability language from Section 402(a) of the RESTATEMENT OF TORTS, SECOND, with the more demanding, negligence-like “reasonable alternative design” requirement in the RESTATEMENT OF TORTS, THIRD. If a product contains more lead than our statutes and regulations permit, is designed in a way that causes foreseeable harm or death to infants and children, regularly malfunctions, expels dangerous metal shards, flips at normal speeds, dismembers, decapitates, and

immolates, the issue of defect – or even liability – is hardly on the table. The problem is one of transnational jurisdiction, the law of imports, of globalization, and of the inherent powers and limits of U.S. courts to deal with the world in which we currently live.

Imports are hardly something new – one need not study much history to realize that transnational sales of goods and services date back to the very beginning of recorded history. Trading routes were the pathways by which civilization expanded, and the rules of trading routes were crystal clear. Sellers were only as good as their word – their very survival depended on the trust they established with their purchasers. We should expect no less from those with whom we trade today.

Parenthetically, if it seems this analogy is inexact because ancient traders were governed by the responsibility imposed on purchasers known (somewhat erroneously) as *caveat emptor*, think again. First, the history of trade with consumers, unlike commercial transactions, was not bound by *caveat emptor*. Second, the principal has been completely repudiated in the United States for transactions between commercial sellers and ordinary consumers.

We should not protect sellers who defraud ordinary consumers – anywhere, in any court. We should not protect foreign sellers of defective goods who profit in domestic markets. The perverse incentives this model creates are obvious, and the consequences were everywhere we looked in preparing this paper. When the foods we (and our pets) eat, the clothes we wear, the appliances we use, the vehicles we drive, the jewelry and clothing we give our children, and the cribs in which our infants sleep are dangerous and deadly – and our courts cannot exercise the power to impose accountability – it is time to rethink *Asahi*. We estimate that at least 50,000,000 consumer products were sold in the last year that were (a) produced abroad, and (b) defective. The idea that this does not implicate commerce for purposes of the Commerce Clause or that these goods are outside the juridical competence of state and federal courts is deeply disturbing.

#### b. Legislative Action

During the preparation of this paper, a number of bills that would resolve the jurisdictional issues discussed above were considered favorably by various congressional committees and seemed on the brink of

adoption. As of the end of October 2008, however, none have become law. One of the most promising that cleared the House Judiciary Committee in May 2008 read, in relevant part, as follows:

(a) Service of process on a citizen or subject of a foreign state in any action that is brought in a Federal court against that citizen or subject of a foreign state, for injury that was sustained in the United States and that relates to the purchase or use of a product, or component thereof, that is manufactured outside the United States by the citizen or subject may be served on the citizen or subject wherever the citizen or subject resides, is found, has an agent, or transacts business, is sufficient to establish jurisdiction over the person of that citizen or subject if the citizen or subject--

(1) knew or reasonably should have known that the product or component would be imported for sale or use in the United States; and

(2) had sufficient aggregate contacts with the United States, whether or not such contacts occurred in the place where the injury occurred.

(b) Definitions- As used in this subsection--

(1) an 'agent' of a citizen or subject of a foreign state who manufactures a product or component includes an importer, distributor, wholesaler, or other commercial entity who conducts business with the citizen or subject for the purpose of selling, or incorporating into another product for sale, in the United States the product or component;

(2) a citizen or subject of a foreign state 'transacts business' in a place if a product or component manufactured by that citizen or subject is sold in that place, whether directly by the citizen or subject, or through an intermediary, subsidiary, affiliate, or partner of the citizen or subject. . . .

This language would resolve the *Asahi* issues – but there are two problems. First, the bill has not yet been adopted. Second, there are two constitutional components to the *in personam* jurisdiction analysis: minimum contacts and reasonability/fair play requirements. There is at least some question whether Congress can modify the minimum contacts or reasonability requirements (both emanating from the Due Process Clause) below the level set by the Supreme Court. However, given the nature of the invitation to Congress in the *Asahi* footnote, Congress should not hesitate to pass – and the President should not hesitate to sign – a bill similar to the text above.

Other legislative initiatives have surfaced to address the problem of defective goods from foreign manufacturers. This past spring, Representative Peter Visclosky of Indiana, Chairman of the House Appropriations Energy and Water Development Subcommittee, announced that he was supporting the “The Food and Product Safety Act,” a bill designed to require importers of goods to secure bonding prior to introducing their products into the United States. An expansive companion bill sponsored by Senators Sherrod Brown of Ohio and Robert Casey of Pennsylvania would require U.S. Customs and Border Protection to monitor all imports and to assess whether insurance or other assets exist to cover injuries that result from design or manufacturing defects. That same legislation would give the Secretary of Agriculture and the FDA recall authority over defective food or drugs, and give Homeland Security responsibility to oversee and evaluate these measures.

At the state level, in Michigan, Governor Granholm supported a bill proposed by State Representative Andrew Coulouris and State Senator Roger N. Kahn that bans the sale of children’s toys with high levels of lead paint. Barrie Barber, *Kahn Targets Toxic Toys*, SAGINAW NEWS, Dec.15, 2007. Similarly, legislators in Connecticut recently proposed the Children’s Product Safety Act that would ban the sale of recalled goods. Filvio Cativa, *Tracking recalls: Whose Job*, HARTFORD COURANT, Jan. 25, 2008, at B9.

#### c. Bonds and Consent

Two of the more interesting ideas that could be implemented through legislation would require foreign manufacturers to (1) post a bond, and/or (2) consent to the jurisdiction of state courts.

i. Bond Requirement. As a condition of doing business in the United States, foreign producers of consumer goods could be asked to post a bond. The purpose of a bond would be to ensure that importers have enough money or insurance to pay for damages their products might cause, and to compel importers to take extra effort to ensure the quality of the goods they bring into the U.S. Should a foreign manufacturer fail to secure a bond, the distributing wholesaler or retailer would bear responsibility for securing that protection.

ii. Consent or Party Autonomy. Another possible condition of doing business in the U.S. would be to require foreign manufacturers to consent to the jurisdiction of the state courts in which their products are distributed. Consent to jurisdiction could be modeled on the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30164, which requires foreign manufacturers to designate a permanent resident of the U.S. as an agent for service of process.

iii. World Trade Organization. The United States is a member of the World Trade Organization (“WTO”). WTO members agree to limit protectionist measures. Accordingly, it is possible that both bonding and compulsory consent would be seen as imposing a requirement on foreign entities that is not imposed on domestic companies.

The WTO implements provisions from the General Agreement on Tariffs and Trade (“GATT”). Article III of GATT (Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194) seeks to prevent protectionism. Assuming a bonding or consent requirement is adopted, the U.S. may have to show that it is not subjecting foreign manufacturers to less favorable treatment, but rather eliminating a bias that exists in their favor. *See* Alvin B. Rubins, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 436 (1986). Since U.S. manufacturers are subject to the jurisdiction of domestic courts, this measure would achieve the same result for foreign manufacturers.

In a WTO challenge, a complaining party could also assert that compulsory bonding or consent impairs open market competition. *See* Report of the Panel, United States – Taxes on Petroleum and Certain Imported Substances, ¶5.1.9, L/6175 (June 17, 1987), GATT B.I.S.D. (34th Supp.) 136 (1988). One response would be to argue that the provisions are needed to “protect human, animal or plant life or health,” an exception permitted under Chapter XX(b) of GATT (1994). Other provisions permit the imposition of supplemental trade requirements if a country can show it has a compelling interest. *See* Appellate Body Report, European Communities – Measure Affecting Asbestos and Asbestos-Containing Products, ¶162, WT/DS135/AB/R (April 5, 2001).

## 8. Conclusion

If foreign manufacturers continue to be outside the jurisdictional reach of domestic courts, it is inevitable that plaintiffs will be left without

recourse. Foreign manufacturers who sell goods to be purchased and used in the United States ought to bear responsibility when those products fail, much the same as U.S. manufacturers. Among other things, it is simply unfair to U.S. manufacturers to bear full responsibility for product failures when their foreign competitors can be relieved of liability solely based on the fact that they are located outside the United States.

Foreign manufacturers transgress the most basic product liability duties of care imposed on every domestic manufacturer: to exercise reasonable care in designing, manufacturing, labeling, and warning. Thousands of recalls send an unequivocal message. Yet foreign manufacturers are in a preferred position. They are both shielded by domestic tort reform and protected by complex and uncertain constitutional, common law, and statutory doctrines that produce the curious jurisdictional puzzle set out in this paper. And yet, their risk of liability is nominal at best.

With respect for and appreciation of the Constitution, laws, precedent, and numerous prudential, political, and diplomatic policies, our courts have imposed limits on jurisdiction over foreign entities. Even if *in personam* jurisdiction is found, our political and diplomatic practices have made it difficult, if not impossible, to proceed with discovery, trial, and collection of judgments in court.

Likewise, Congress has limits on the extent to which it can correct the problem. While we do not see a Commerce Clause issue, there is both the matter of the Supreme Court's decision in *Asahi* and the constraints imposed by various multilateral agreements including the GATT. Since it is the province of the Court, not the Congress, to declare the meaning of the Due Process Clause as it applies to the nature of "minimum contacts" and "reasonability and fair play," and since the closest we have to that declaration is Justice O'Connor's plurality opinion in *Asahi*, it is fair to ask if Congress can set a level below the threshold set out in the plurality opinion.

While we agree with many commentators that the *Asahi* footnote sounds like a veiled invitation to Congress, one fair reading of the text would suggest that all the Court said was that it was not passing judgment on whether Congress could use an aggregate of national contacts to suffice for minimum contacts. Congress must also navigate the anti-protectionist waters of GATT and similar agreements if it is to deal directly with the

challenges the problem presents – and that requires collaboration with the executive branch.

The other problem with congressional resolution of the jurisdictional puzzle lies in the simple reality that most tort cases begin and end in state court. Even putting aside “states rights” and federalism politics, there are real limits on the extent to which Congress can dictate to state courts the nature of their extraterritorial reach. By amending Title 28 and changing the Federal Rules of Civil Procedure, Congress can only create an option for a state to expand its jurisdictional reach, not an obligation.

Assuming Congress or the courts find a legal and juridical foundation to resolve the jurisdictional question, the practicalities of domestic litigation involving foreign manufacturers must be confronted. Domestic lawyers must master the transnational and comparative lawyering skills required to proceed against foreign defendants. It is possible to cobble together a workable case theory and litigation plan deep within the web of agreements and conventions that range from Uruguay to NAFTA to WTO to GATT to the Hague and beyond. To penetrate this complex field, domestic comparativists, domestic international lawyers, and foreign partners must be identified and made part of any litigation team. Generalizations about “foreign entities” must be set aside in favor of country-by-country assessments. Access to foreign courts and reliance on foreign bureaucracies for assistance in product liability cases cannot be the exception – it must be the norm.

If we continue to be in denial about globalization, foreign manufacturers will continue to benefit from the sale of dangerous and deadly goods in domestic markets without being accountable.

This is, in the end, a problem for domestic tort lawyers – representing both victims, retailers, and wholesalers. Domestic plaintiffs and defendants suffer the consequences when their attorneys fail to untangle the maze and bring before the court the entity that actually caused the harm – the foreign manufacturer. Creative use of the multinational agreements mentioned above should be *de rigueur* for personal injury lawyers.

In sum, it is in the best interests of consumers and sellers of goods to pressure Congress to amend Title 28 and confront directly the minimum contacts problem.

It is likewise in the best interests of consumers and sellers of goods to assert the right to proceed against foreign manufacturers in both state and federal courts. Justice Brennan established a simple road map – courts should be urged to follow it.

The executive must be included in this discourse as well. The current set of agreements and conventions, particularly the Hague Convention, create almost as many problems as they resolve. Blocking statutes and their progeny are the consequence of a deserved lack of comity: if policy makers want domestic courts to secure relief for consumers injured by foreign goods, we must re-examine the domestic policies and practices that provoke such hostile responses in foreign courts. Isolationist policies and a lack of coherent diplomacy are hardly the recipe for the comity needed to have any reasonable assurance of holding foreign manufacturers accountable.

## Appendix A

### A Meaningful Product Liability System Produces Incentives for Safer and More Efficient Products

David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 430-31 (1993).

1. “The need to provide compensation to injured consumers, through the mechanism of risk-spreading, by means of a third-party accident insurance system imposed on manufacturers by the courts; and the need to improve product safety and restrain the power of manufacturers through rules designed to deter the production of dangerous products.”

Judith P. Swazey, *Prescription Drug Safety and Product Liability*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 291, 297 (Peter W. Huber & Robert E. Litan eds., 1991).

2. “Overall, I think liability has had a deterrent effect for industry with respect to drug safety; safety has been improved as a result of causes of action under negligence.”

Robert S. Peck, Richard Marshall & Kenneth D. Kranz, *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 443 (2000).

3. “[A] survey of risk managers for major corporations by the business-oriented Conference Board . . . ‘found not only significant safety improvements on account of products liability, but also that the negative effects of products liability were not substantial.’”

4. In a “second survey of 2,000 corporate CEO’s, a third of whom, despite a self-interest in tort reform, admitted that they had improved the safety of their products [because of tort liability].”

5. “Primary among [products liability] benefits is the deterrent effect that it has on negligent behavior and unsafe products.”

George Eads & Peter Reuter, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* iii-viii (Rand Corp.) (1983);

6. “Of all the various external social pressures, product liability has the greatest influence on product decisions.”

*Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. REV.* 377, 408-09 (1994). See Nathan Weber, *PRODUCT LIABILITY: THE CORPORATE RESPONSE* 15 (Conference Board) (1987)

7. “Among 232 major corporations, about twenty-two had ‘[c]hanged manufacturing or operating procedures’ on account of products liability, about thirty-two had ‘[i]mproved [the] safety design of a product.’”

E. Patrick McGuire, *THE IMPACT OF PRODUCT LIABILITY* 18-19 (Conference Board) (1988);

8. “In response to ‘actual’ [liability] experience, thirty-five percent of companies had ‘[i]mproved safety products,’ thirty-three percent had ‘[r]edesigned product[s],’ and twenty-one percent had improved warnings.”

Robert L. Habush, *The Insurance “Crisis”: Reality or Myth?: A Plaintiffs’ Lawyer’s Perspective*, 65 *DENV. U. L. REV.* 641, 649-50 (1988).

9. “A trustworthy plaintiffs’ lawyer lists the Drano can, flammable children’ [sic] pajamas, and gas tanks on tractors as examples of products that were desirably redesigned on account of tort liability.”

Edward M. Swartz, *SLAUGHTER BY PRODUCT: WINNING THE PRODUCTS LIABILITY CASE* 115-17 (Kluwer Law Book Publishers 1986) (Supp. 1993).

10. “It is clear that the risk of potential liability captures the attention of business and draws a response. Significant reductions in liability are likely to be met with corresponding lapses in diligence even if market forces and the regulatory environment remain the same.”

Helen Thomas, *Whose Side Are You On, Mr. President?*, HEARST NEWSPAPERS, Jan. 3, 2003.

11. “...some of those lawsuits led to dramatic safety improvements, forced on corporations through jury verdicts. Nothing gets their attention like writing a big check to an injured customer.”

## **II. The Manufacturer is the Proper Focus for Resolving Defective Product Issues**

Frances E. Zollers, Sandra N. Hurd & Peter Shears, *Looking Backwards, Looking Forward, Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1044, 1047 (2000).

12. “[T]he manufacturer continues to be in the best position to design, select suppliers of component parts, test, package, and provide instructions about the product to minimize hazards.”

13. “[T]he market, especially the market for consumer goods, is too disparate to send a consistent safety message. The legal environment must back up market forces to assure that the manufacturers and product sellers understand that the goal to be achieved is safe products.”

Joseph S. Enoch, *Toys Safer than Ever, Toy Makers Claim*, CONSUMERAFFAIRS.COM, Feb. 20, 2008, [http://www.consumeraffairs.com/news04/2008/02/toy\\_safety\\_nyc.html](http://www.consumeraffairs.com/news04/2008/02/toy_safety_nyc.html).

14. “I think since November, it’s given us the opportunity to really go back and do an extensive, thorough safety review process from A to Z on all our product lines, not just the product that had the incident in November.”

15. “[W]e think we’ve only become stronger and we’ll continue to get stronger through everything we’ve done and especially, learned, over the past few months.” Donna Lee MacNeil, senior director of Communications at Spin Master, a Toronto-based company that recalled 4.2 million Aqua Dots that contained date rape drug ingredients.

Beast or Buddha, Industry Specialists Talk, , July 29, 2008, <http://beastorbuddha.com/2008/07/29/talking-with-david-rice-insecure->

software-implications-regulation-vendors-making-change-and-other-things/ (last visited Oct. 28, 2008).

16. “Consumers still purchase software products in droves despite numerous and continuing vulnerabilities. This is hardly incentive for manufacturers to alter current behavior.”

### **III. Manufacturers Cannot be Relied Upon to Effectuate Defective Product Prevention Alone**

Dirk C. Gibson, *The Product Recall Blame Game: Stereotypical Villains & Actual Recall Failure Factors*, in FREIBERGER BEITRAGE ZUR INTERKULTURELLEN UND WIRTSCHAFTSKOMMUNIKATION: A FORUM FOR GENERAL AND INTERCULTURAL BUSINESS COMMUNICATION (Michael B. Hinner, ed.), available at <http://www.unm.edu/~dirkcgib/villains.pdf>.

17. “Corporate executives are sometimes reluctant to order a recall, in light of the potential consequences. On a cost/benefit scale, recalls are thought to be a bad option unless the product is shown repeatedly to cause injury and/or death. Thus, many firms choose to ‘wait out’ a potential defective product, or product liability situation, and see if enough civil litigation is likely to make a recall necessary.”

18. “Recalls are obviously expensive, in terms of both diminished reputations and dollars expended to take back goods, particularly if insurance coverage excludes recall costs,” Jackson and Morgan suggested (1988, 152).

19. “More recently, Rubin estimated that recalls cost companies, on the average, seven per cent of their net worth.” (Felcher and Liberman, 1999, 18).

Helen Thomas, *Whose Side Are You On, Mr. President?*, HEARST NEWSPAPERS, Jan. 3, 2003.

20. “When women using super-absorbent tampons were dying from toxic shock syndrome, the manufacturer -- Playtex -- disregarded studies that showed tampons were at fault. It took a \$10 million verdict to convince Playtex it would be smart to remove the tampons from the market.”

21. “Eli Lilly was selling an arthritis pain-relief drug whose side effects included a fatal kidney-liver ailment. It took a \$6 million jury verdict against the drug company to persuade it to stop selling the medicine.”

22. “Another drug maker -- Johnson & Johnson -- knew that Tylenol turned poisonous when mixed with alcohol but the company did not put warnings on its bottles until a jury socked it with a \$8.8 million judgment.”

*Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 445 (4th Cir. 2001).

23. “DaimlerChrysler acknowledged that it performed no crash tests to determine how the minivan latch would perform in an accident, and during discovery, it acknowledged that ‘the Chrysler latch was noticeably flimsy versus’ the latches of competing minivans that came on the market soon thereafter.”

24. “During this same 1988 time period, DaimlerChrysler internally debated its liftgate latch design’s possible defectiveness but decided not to make any further change. In fact, it fired a safety engineer who had repeatedly advocated making the latch safer.”

25. From [www.injuryanswers.com/news/liability\\_laws.html](http://www.injuryanswers.com/news/liability_laws.html) “It wasn’t until a class action lawsuit was filed against Chrysler and they received pressure by the NTSB, that the company which knew of its latches faulty design, yet didn’t warn consumers, finally redesigned and replaced the defective minivan door latch which had been responsible for 37 deaths and scores of injuries and ejections.”

*Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1389 (4th Cir. 1995) – Language from the court regarding McNeil’s (manufacturer of Tylenol) reckless indifference to the health of its customers.

26. “McNeil instructed its sales representatives to refrain from discussions with physicians about a scholarly article, which outlined the dangers associated with combining acetaminophen with alcohol.”

27. “McNeil sent a letter to pharmacists and hospitals stating that there was no link between liver damage and casual alcohol consumption combined with acetaminophen.”

Alex Berenson, Gardiner Harris, Barry Meier & Andrew Pollack, *Despite Warnings, Drug Giant Took Long Path to Vioxx Recall*, THE NEW YORK TIMES, Nov. 14, 2004, at 1.

28. “Merck decided not to conduct a study solely to determine whether Vioxx might cause heart attacks and strokes - the type of study that outside scientists would repeatedly call for as clinical evidence continued to show cardiovascular risks from the drug.”

29. “The decisions about how to test Vioxx were made in a hothouse environment in which researchers fiercely debated how the question should be pursued, and some even now question whether the drug needed to be withdrawn. It also took place amid a fierce battle between Vioxx and Celebrex in which federal regulators said marketing claims ran ahead of the science”

30. “In Dr. Bhatt's view, the company feared what it might find if it directly examined the dangers of Vioxx, one of Merck's biggest products, with sales last year of \$2.5 billion.”

#### **IV. Products from Foreign Manufacturers Pose Additional Product Liability Difficulties**

George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U.L. REV. 115, 147-148 (1993).

31. “To the extent that foreign manufacturers can discount the collectibility of U.S. products liability judgments, however, their prices can be set commensurately lower. If they do not face equal prospects of punitive damages levies, then they need not invest in excessive levels of safety, as must U.S. manufacturers. In addition, to the extent that other forms of damages are uncollectible or costly to collect, the level of insurance that foreign manufacturers must provide is less, and the price, commensurately less. Obviously, the ability to sell products at lower prices provides a substantial competitive advantage to foreign manufacturers in U.S. markets.”

James M. Davis, *Risks Made in China: Manufacturers Love China Because the Chinese Make Products More Cheaply than About Anyone Else. But the Past 18 Months Have Been Difficult and Expensive for Several U.S. Manufacturers that Have Faced Big Product Recalls*, Jan. 2008, [http://findarticles.com/p/articles/mi\\_m0BJK/is\\_1\\_19/ai\\_n24239640/pg\\_3](http://findarticles.com/p/articles/mi_m0BJK/is_1_19/ai_n24239640/pg_3).

32. “Hangzhou Zhongce [Rubber Co. Ltd.] has admitted to unilaterally deciding to omit the gum strips.”

33. “It is increasingly common for Chinese exporters to create a U.S. subsidiary through which to do business in the United States. At the first sign of trouble--product recall, litigation, allegations of damage from defective products, credit imbalances--these Chinese companies place their U.S. subsidiary into Chapter 7 bankruptcy liquidation or refuse to cooperate with their U.S. customers.”

## **V. Relying Solely on CPSC May Leave Room for Ongoing Defective Products Problems**

Truman Lewis, *Safety Agency Waits 16 months to Recall Lead-Laden Key Chains*, CONSUMERAFFAIRS.COM, April 27, 2008, [http://www.consumeraffairs.com/news04/2008/04/cpsc\\_lead.html](http://www.consumeraffairs.com/news04/2008/04/cpsc_lead.html).

34. “In Feb., consumer groups cited the settlement of a class-action suit against Sears to support their argument that the CPSC moves too slowly to effectively protect consumers from injury.”

35. “The hazard was hardly a shock to the CPSC, which had known of the danger for more than 20 years, according to documents produced during the litigation.”

36. “In December 2006, [Jeffrey Weidenhamer, an Ashland University chemistry professor] notified the CPSC that he had found more than 70 items with excessive lead content.”

37. “Weidenhamer said that about 20 of the items were recalled, but not the Hip Charm key chains -- even though his tests found more than 80

percent lead by weight in several of the charms, much higher than the usual standard of .06 percent...”

38. “Despite Weidenhamer’s warnings, his credentials and his previous safety alerts, the CPSC took no action on his warnings until a public-health nurse in Illinois reported that she found a 9-month-old girl mouthing her mother’s key chains. She had gone to the girl’s home to try to determine why she exhibited high levels of lead in her blood.”

39. “[T]he agency welcomes ‘credible outside information about possible product safety hazards, but we have to verify that information and take action based on CPSC investigations and not those done independently.’” Spokeswoman Julie Vallese of CPSC.

## Appendix B Original Sources Beyond the Text of the White Paper for *Asahi*

### 1. Minimum contacts/ *Asahi*

The stream of commerce doctrine applies minimum contacts analysis in the context of products liability litigation, where a nonresident manufacturer has placed its product into the “stream of commerce” and that product has caused injury. It is not legally clear what actions by a defendant will satisfy the minimum contacts requirement and thus constitute purposeful availment of a forum state by way of the stream of commerce doctrine. The Supreme Court in *World-Wide Volkswagen Corp. v. Woodson* reasoned that the defendant's conduct and connection with the forum must be such that he should “reasonably anticipate being haled into court.” 444 U.S. 286, 297 (1980). Additionally, the Court rejected a straightforward foreseeability test, requiring instead that, to give rise to minimum contacts, the defendant must have knowledge that its product would be purchased or used in a forum state. However, in applying *World-Wide Volkswagen*, the Supreme Court has been unable to agree on one particular formulation of minimum contacts.<sup>5</sup>

“[R]espondents have not demonstrated any action by *Asahi* to purposefully avail itself of the California market. *Asahi* does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. . . . There is no evidence that *Asahi* designed its product in anticipation of sales in California.”<sup>6</sup>

### 2. Reasonableness factors:

“[R]easonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination ‘the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering

<sup>5</sup> Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes*, 96 CAL. L. REV. 731, 737-8 (June 2008).

<sup>6</sup> *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987).

fundamental substantive social policies.’ *World-Wide Volkswagen*, 444 U.S., at 292.<sup>7</sup>

3. Minimum contacts vs. reasonableness of jurisdiction.

”When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.”<sup>8</sup>

“Courts may justify the assertion of jurisdiction on the grounds that alien corporations can purchase insurance, pass on litigation costs to customers, and curtail commercial activities in a forum when the risk and potential cost of litigation is too high. Change of venue motions and forum non conveniens motions also protect alien defendants from being subject to undue burdens by allowing an alternate means to challenge a particular U.S. forum.”<sup>9</sup>

4. National contacts

a. “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.”<sup>10</sup>

b. “[A] federal statute which permits the service of process beyond the boundaries of the forum state [via a nationwide or worldwide service provision] broadens the authorized scope of personal jurisdiction. Under such a statute, ‘the question becomes whether the party has sufficient contacts with the United States, not any particular state.’ 764 F.2d at 1315 (quoting *Nelson v. Quimby Island Reclamation District*, 491 F. Supp. 1364, 1378 (N.D.Cal. 1980)).”<sup>11</sup>

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<sup>7</sup> Id at 113.

<sup>8</sup> Id at 114.

<sup>9</sup> *Schwartz*, 96 CAL. L. REV. 731, 741.

<sup>10</sup> *Asahi*, 480 U.S. at 113.

<sup>11</sup> *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1414 (9th Cir.1989).

5. A legislative option

“HAL 5913 would allow American consumers harmed by an imported product to serve the foreign manufacturer where it resides, is located, has an agent, or transacts business as long as the manufacturer knew or should have known that its product would be imported for sale or used in the United States. Service may occur even if the manufacturer has not had direct contact with the state where the injury occurred.”<sup>12</sup>

6. Minority view on national contacts

“We see no violation of traditional notions of fair play and substantial justice in holding manufacturers of goods destined for America legally responsible if those goods are defective and unreasonably dangerous and cause harm in America.”<sup>13</sup>

7. Minimum contacts – common position:

“As applied to a manufacturer, the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state. The manufacturer's awareness of the distribution system satisfies the requirement that the manufacturer have a reasonable expectation that its products will be purchased in the forum state. It makes no difference whether the manufacturer had actual or constructive knowledge of the distribution system.”<sup>14</sup>

8. Fair play and substantial justice.

“Addressing the second prong of the due process analysis, fair play and substantial justice, the court concluded that Arizona's interest in protecting the health and safety of its residents was a substantial state interest. The accident happened in Arizona, and most witnesses and material evidence was located there. Those important local interests far outweighed any

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<sup>12</sup> *Lawmakers propose bill to subject foreign manufacturers to U.S. justice*, 44 AM. J. TRIAL. ADVOC. 10 (July 1, 2008).

<sup>13</sup> *A. Uberti and C. v. Leonardo*, 181 Ariz. 565, 574 (Ariz. 1995).

<sup>14</sup> *Nicastro v. McIntyre Machinery America, Ltd.*, 399 N.J.Super. 539, 544-5 (2008).

inconvenience to the defendant in having to litigate the case in Arizona. *Ibid.* Accordingly, the exercise of jurisdiction was fair and reasonable.”<sup>15</sup>

“[I]t would behoove the interstate judicial system for the litigation to occur in Alabama (as that is where the alleged injuries occurred); thus, the fourth factor weighs toward finding jurisdiction to be constitutional. *See E.I. DuPont De Nemours & Co. v. Bailey*, 986 S.W.2d 82, 85 (Tex. App.--Beaumont 1999, pet. dismissed w.o.j.) (discussing premise that controversies are most efficiently resolved where witnesses and evidence are likely to be located); see also *Ala. Power Co.*, 448 So. 2d at 329.”<sup>16</sup>

#### 9. Confusing minimum contacts and fair play and substantial justice

“Although Master Paint had few, if any, ordinary business contacts with Arkansas, it had one contact that was sufficient to subject it to the jurisdiction of our courts--it filed a lien in the Garland County Circuit Court on real property located in Arkansas. In doing so, Master Paint invoked the jurisdiction of the State of Arkansas for its own benefit and sought the assistance and protection of our courts and laws in resolving its controversy with Concrete, an Arkansas company. The lien filing also shows that Master Paint purposefully directed its activities at the State of Arkansas and availed itself of the privilege of conducting activities here. *See Burger King Corp., supra; Davis, supra.* Further, because a lien filing is often a prelude to further litigation, *see, e.g., Ark. Code Ann. §§ 18-44-127* (Repl. 2003) (providing that a court shall ascertain by fair trial the amount of indebtedness for which the lien is prosecuted and may render judgment), Master Paint could reasonably anticipate being "haled into court" in Arkansas. *World-Wide Volkswagen Corp., supra.* Under these circumstances, the Garland County Circuit Court's exercise of jurisdiction over Master Paint would not offend traditional notions of fair play and substantial justice, as required by the Due Process Clause of the Fourteenth Amendment. *See Int'l Shoe Co., supra.*”<sup>17</sup>

“The touchstone principle announced by the Court in *International Shoe* was whether assumption of personal jurisdiction over the nonresident defendant was based on ‘minimum contacts’ by the nonresident defendant

<sup>15</sup> *Id.* at 561.

<sup>16</sup> *H. Heller & Co., Inc v. Louisiana-Pacific Corp.*, 209 S.W.3d 844, 855 (Tex. App. 2006).

<sup>17</sup> *Concrete Wallsystems of Arkansas, Inc. v. Master Paint Indus. Coating Corp.*, 233 S.W.3d 157, 160-1 (Ark. App. 2008).

in the forum state which does not offend ‘traditional notions of fair play and substantial justice.’”<sup>18</sup>

#### 10. Congressional expansion of FDA power

“After last year's problems with tainted spinach, peanut butter and imported seafood, Congress and the Bush administration promised to do a lot more to ensure the safety of the nation's food supply. They haven't done nearly enough. Food-safety bills have been moving along far too slowly on Capitol Hill. And the administration is far behind on many of the grand promises made to the public last year with its food protection plan.

The tomato scare did finally nudge the administration into asking for an additional \$125 million for the Food and Drug Administration's underfunded food-safety programs. To do its job, the agency is going to need even more resources -- to hire more inspectors -- and more authority, including to inspect farms. The country also needs a better way to trace exactly where food comes from -- a ‘trace-back system’ -- so that health officials can identify the source of contamination quickly.”<sup>19</sup>

11. “[D]r. David A. Kessler, the F.D.A. commissioner in the Clinton and first Bush administrations, said the agency has the authority to require the industry to trace produce as it travels from ‘farm to table,’ but has lacked ‘the impetus’ to do so. ‘The technology exists to trace the entire chain of a food product,’ Dr. Kessler said. ‘The agency needs to require the industry to put into effect mechanisms to do full trace-back. That regulation could be put in place in months, not years.’ Representative Diana DeGette, Democrat of Colorado, said Congress needed to expand the agency's authority to ‘trace contamination to the source.’ Ms. DeGette has proposed legislation directing the agency to establish a tracing system.”<sup>20</sup>

#### 12. Increased regulatory power/preemption

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<sup>18</sup> *Ganey v. Kawasaki Motors Corp., USA*, 234 S.W.3d 838, 843 (Ark. 2006).

<sup>19</sup> Editorial, *Now It's Tomatoes*. NEW YORK TIMES, June 12, 2008, at pg. 30.

<sup>20</sup> Bina Venkataraman, *As Outbreak Affects 1,000, Experts See Flaws in Law*, NEW YORK TIMES, July 10, 2008, at pg. 13.

“[S]everal judges have sided with manufacturers in upholding federal pre-emption, or the concept that U.S. Food and Drug Administration regulations override state liability claims. . . . ‘The doctrine of pre-emption holds that we can rely on the FDA to keep us safe from dangerous drugs; the FDA will make sure the manufacturer does its job.’”<sup>21</sup>

“[A] relatively small, but increasing, number of state legislatures and courts have assigned defendant conformity with agency regulation more value, and some jurisdictions have even specifically created an express defense. These considerations have restricted manufacturer exposure to liability for selling allegedly defective products..”<sup>22</sup>

### 13. Punitive damages

“Punitive damages can have an even greater deterrent effect on future conduct than civil penalties because punitive damage awards are often significantly larger than civil penalties. In fact, one of the rationales for punitive damages is that regulatory efforts cannot solve all problems. As the court stated in *Grimshaw v. Ford Motor Co.*: ‘Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products.... Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so.’”<sup>23</sup>

### 14. Consumer Product Safety Modernization Act (H.R. 4040) /preemption

(a) Rule With Regard To Preemption.—The provisions of sections 25 and 26 of the consumer Product Safety Act (15 U.S.C. 2074 and 2075, respectively), section 18 of the federal Hazardous Substances Act (15 U.S.C. 1261 note), section 16 of the Flammable Fabrics Act (15 U.S.C. 1203), and section 7 of the Poison Packaging Prevention Act of 1970 (15

<sup>21</sup> Amanda Bronstad, *New Suits Over Recalled Drugs May Target China*, THE NATIONAL LAW JOURNAL, July 24, 2008.

<sup>22</sup> Carl Tobias, *FDA Regulatory Compliance Reconsidered*, 93 CORNELL L. REV. 1003 (July 2008).

<sup>23</sup> Michael D. Axline, *The Limits of Statutory Law and the Wisdom of Common Law*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10268-10276 (2008)

U.S.C. 1476) establishing the extent to which those Acts preempt, limit, or otherwise affect any other Federal, State, or local law, any rule, procedure, or regulation, or any cause of action under State or local law may not be expanded or contracted in scope, or limited, modified or extended in application, by any rule or regulation thereunder, or by reference in any preamble, statement of policy, executive branch statements, or other matter associated with the publication of any such rule or regulation. *In accordance with the provisions of those Acts, the Commission may not construe any such Act as preempting any cause of action under State or local common law or State statutory law regarding damage claims...* Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.<sup>24</sup>

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<sup>24</sup> U.S. House. 110th Congress. "H.R. 4040, Consumer Product Safety Modernization Act." Section 231, pp 146-7, *available at* [http://www.rules.house.gov/110/text/110\\_hr4040cr.pdf](http://www.rules.house.gov/110/text/110_hr4040cr.pdf).

Appendix C – Quotes: Commerce Clause, Contracts Clause, Single Transaction, and Enforcement of Judgements, International Trade Quotes

I. Commerce Clause

a. *Gibbon v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

- i. “If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence...”

b. *U.S. v. Lopez*, 514 U.S. 549 (1995).

c. “The commerce power ‘is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.’” 514 U.S. at 552.

d. “Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. The justification for this formal distinction was rooted in the fear that otherwise ‘there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.’” 514 U.S. at 553.

“*Jones & Laughlin Steel, Darby*, and *Wickard* ushered in an era of [Commerce Clause](#) jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country..” 514 U.S. at 555.

“Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. *See, e. g.*, *Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *Southern R. Co. v. United States*, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, *supra*, at 150 (“For example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)”.)” 514 U.S. at 556.

e. “Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S. at 37, i. e., those activities that substantially affect interstate commerce, *Wirtz*, *supra*, at 196, n. 27.” 514 U.S. at 558.

- f. “We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity “substantially affects” interstate commerce.” 514 U.S. at 559.
- g. “Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.” 514 U.S. at 567.
- h. *Gonzales v. Raich*, 545 U.S. 1 (2005).
- i. “Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce. *See, e.g., Perez*, 402 U.S., at 151, 28 L. Ed. 2d 686, 91 S. Ct. 1357; *Wickard v. Filburn*, 317 U.S. 111, 128-129, 87 L. Ed. 122, 63 S. Ct. 82 (1942).” 545 U.S. at 17.
- i. “In this vein, we have reiterated that when ‘a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.’” E.g., *Lopez*, 514 U.S., at 558, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (emphasis deleted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)). 545 U.S. at 17.
- ii. “In both cases, the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.” 545 U.S. at 19.
- iii. “In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.” 545 U.S. at 22.
- iv. “We concluded that ‘the noneconomic, criminal nature of the conduct at issue was central to our decision’ in *Lopez*, and that our prior cases had identified a clear pattern of analysis: ‘Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.’ 35 *Morrison*, 529 U.S., at 610, 146 L. Ed. 2d 658, 120 S. Ct. 1740.” 545 U.S. at 25.
- v. “Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. ‘Economics’ refers to ‘the production, distribution, and consumption of commodities.’ Webster’s Third New International Dictionary 720 (1966).” 545 U.S. at 26.
- vi. “The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood

that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.” 545 U.S. at 32.

- vii. “Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.” 545 U.S. at 18.

## II. International Trade Quotes

### a. EC – Asbestos

Alvin B. Rubins, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 436 (1986).

- i. “American manufacturers and product sellers generally pay product liability insurance rates twenty times higher than those in Europe. While this rate differential is due in part to the greater protection accorded American consumers, it is also partly attributable to the uncertainty and higher operational expenses in our tort litigation system, and the prospect of punitive damages awards. Foreign producers are generally not subject to these expenses, except those arising from litigation in this country. Higher American expenses are necessarily reflected in the price of American goods, which, in turn, adversely affects the balance of trade.”

b. Arie Reich, *The WTO as a Law-Harmonizing Institution*, 25 U. PA. J. INT'L ECON. L. 321, 354 (2004).

- i. “In contrast, manufacturers operating in jurisdictions with a low standard of liability, such as a regular negligence standard with no compensation for pain and suffering, no punitive damages, and where caps are placed on other compensatory damages, save themselves these costs and may consequently be able to sell their products at lower prices. They may also enjoy another advantage over their competitors in other jurisdictions because they can test their new products in their home markets for potential liability without encountering crippling litigation and liability costs before moving on to foreign markets with higher liability standards.”

## III. Service of Process/Enforcement of Judgments

a. Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond The International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 257 (2004).

- i. “[C]ourts have held that service involving foreign parties must comply with the Hague Convention on the Service Abroad of Judicial and

Extrajudicial Documents in Civil or Commercial Matters, and have refused to recognize and enforce non-complying judgments.”

- b. Jeffrey A. Fuisz & Carly Henek, *Recent Developments in the Service of Process Abroad*, 38 INT'L LAW. 320, 321 (2002).
- i. “One issue that continues to cause disagreement among federal and state courts is whether article 10(a) of the Hague Convention, preserving "the freedom to send judicial documents, by postal channels, directly to persons abroad," authorizes the service of judicial documents by mail, or whether it merely authorizes the mailing of documents other than process.”
- ii. “These recent contrasting views cannot be reconciled, and therefore, absent controlling guidance from the Courts of Appeals or the Supreme Court, this uncertainty requires practitioners to exercise caution and avoid reliance on service by mail under the Hague Convention.”
- c. Bruce Brightwell, *Hague Convention on the Service of Process Abroad: An Overview*, 37 RES GESTAE 420, 420 (1994).
- i. “However, the Convention will apply if the only agent for service is a statutory agent, such as the Indiana Secretary of State. This situation is most likely to arise when a plaintiff files a product liability action against a foreign corporation which made an allegedly defective product but which has no other contacts with the stat. It is precisely this situation which is most likely to create a trap for the unwary lawyer.”

#### IV. Contracts Clause

- a. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).
- i. “Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people.” 290 U.S. at 435 (referring to the contracts clause).
- ii. “With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests.” 290 U.S. at 444.
- b. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 251 (1978).
- i. “This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. Cf. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S., at 445. It did not operate in an area already subject to state regulation at the time the company's contractual

obligations were originally undertaken, but invaded an area never before subject to regulation by the State. Cf. *Veix v. Sixth Ward Building & Loan Assn.*, 310 U.S. 32, 38.”

c. *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 416-17 (1983).

- i. ”To the extent, if any, the Kansas Act impairs ERG's contractual interests, the Kansas Act rests on, and is prompted by, significant and legitimate state interests. Kansas has exercised its police power to protect consumers...”

d. *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548, 559 (1914).

- i. “For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.”

e. *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

- i. “[P]arties by entering into contracts may not estop the legislature from enacting laws intended for the public good.”

f. *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315-16 (1843).

- i. “For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future...Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community.”

V. Statutory altering of Court rulings

a. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

- i. “While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.”

VI. Single Transaction Theory

a. *Summers v. Tice*, 199 P.2d 1, 3-4 (Cal. 1948).

- i. “The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion it among themselves.”
  - b. *Walkovszky v. Carlton*, 223 N.E.2d 6, 8 (N.Y. 1966).
- i. “The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability but, manifestly, the privilege is not without its limits. Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, ‘pierce the corporate veil,’ whenever necessary ‘to prevent fraud or to achieve equity.’”
  - c. *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002).
- i. “The rules as to the liability of a principal for authorized acts, are applicable to unauthorized acts which are apparently authorized.’ Restatement (Second) of Agency § 159.” 305 F.3d at 1245.
- ii. “[A]pparent authority is ‘created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.’ Restatement § 27. ‘Apparent authority is created by the same method as that which creates authority, except that the manifestation of the principal is to the third person rather than to the agent.’” 305 F.3d at 1246.

#### Appendix D Exemplars of Media Sources and CPSC Recalls of Products from China Since the Fall, 2007 Congressional Inquiry

##### Press exemplars:

Editorial, *One Very Scary Jalapeño*, NEW YORK TIMES, July 24, 2008, at pg. 24.

Keith Bradsher, *China Vows Quick Steps After Deaths from Drug*, NEW YORK TIMES, June 4, 2008, at pg. 12.

Ian Austen, *Bottle Maker to Stop Using Plastic Linked to Health Concerns*, NEW YORK TIMES, April 18, 2008, at pg. 1.

Alicia Mundy, *Grassley, Dingell Lead Calls For Overhauling FDA*, WALL STREET JOURNAL, July 30, 2008, at A4.

Melanie Trottman, *Lawmakers Clinch Deal To Overhaul Product Safety*, WALL STREET JOURNAL, July 29, 2008, at A1.

Melanie Trottman, *When Recall Isn't Total: Surge in Imports Challenges Voluntary System*, WALL STREET JOURNAL, July 15, 2008, at A12.

Editorial, *Too Much, Too Late*, WALL STREET JOURNAL, Aug. 1, 2008.

Editorial, *Now It's Tomatoes*, NEW YORK TIMES, June 12, 2008.

Bina Venkataraman, *As Outbreak Affects 1,000, Experts See Flaws in Law*, NEW YORK TIMES, July 10, 2008, at pg. 13.

Amanda Bronstad, *New Suits Over Recalled Drugs May Target China*, THE NATIONAL LAW JOURNAL, July 24, 2008.

*Oh Chute Parachute with Streamer Fireworks Recalled*, July 3, 2008, <http://www.consumeraffairs.com/recalls04/2008/fireworks.html>.

*Wal-Mart Recalls 'Hip Charm' Key Chains*, April 18, 2008, [http://consumeraffairs.com/recalls04/2008/walmart\\_chains.html](http://consumeraffairs.com/recalls04/2008/walmart_chains.html).

From the CPSC web site  
(<http://www.cpsc.gov/cpsc/pub/prerel/prerel.html>):

My Way Corp. Recalls Baby Walkers Due to Stairway Fall Hazard (Oct. 16, 2008)

Fujifilm Recalls Battery Chargers Due to Shock Hazard (Oct. 15, 2008)

Toy Boats Recalled Due to Burn Hazard (Oct. 15, 2008)

Bar Magnets Recalled by Home Science Tools Due to Violation of Lead Paint Standard (Oct. 14, 2008)

Wireless Headset Batteries Recalled by GN Netcom Due to Fire Hazard (Oct. 14, 2008)

Portable Generators Recalled by General Power Products Due to Fire Hazard (Oct. 14, 2008)

Hasbro Inc. Recalls to Repair Nerf Blasters; Child's Skin Can Get Caught in Plunger of the Toy (Oct. 9, 2008)

Rack Room Shoes Recalls Girls' Sandals Due to Choking Hazard (Oct. 8, 2008)

Outdoor Playset Gliders Recalled by Backyard Play Systems Due to Fall Hazard; New Assembly Instructions Provided (Oct. 8, 2008)

Coby Electronics Recalls Rechargeable Batteries Sold with Portable DVD/CD/MP3 Players Due to Fire Hazard (Oct. 8, 2008)

Children's Necklaces, CD and MP3 Players Sold at Limited Too and Justice Stores Recalled by Tween Brands Due to Violation of Lead Paint Standard (Oct. 7, 2008)

Game Chairs Recalled by Brunswick Bowling & Billiards Corp. Due to Fall Hazard (Oct. 7, 2008)

John Jaques & Son Recalls Lawn Dart Games Due to Risk of Puncture (Oct. 2, 2008)

Pottery Barn Recalls Wooden Hammock Stands Due to Fall and Laceration Hazard (Oct. 1, 2008)

Wal-Mart Recalls General Electric Toasters Due to Fire and Shock Hazards (Sept. 30, 2008)

Toy Police Cars Recalled by TCB Imports Due to Violation of Lead Paint Standard (Sept. 25, 2008)

Four-Wheeled Ride-On Vehicles Recalled by Razor USA Due to Throttle Controller Defect (Sept. 25, 2008)

Razor USA Recalls PowerWing Three-Wheeled Scooters Due to Laceration Hazard (Sept. 25, 2008)

TV Stands Recalled By Studio RTA Due to TV Tip-over Hazard (Sept. 24, 2008)

Igloo Products Announces Recall of Coolers Due to Laceration Hazard; Sold Exclusively in West Marine Stores (Sept. 24, 2008)

Jo-Ann Fabric & Craft Stores Recall SmartSpace Chairs Due to Fall Hazard (Sept. 24, 2008)

Gotham Lighting Recalls Compact Fluorescent Recessed Ceiling Lights; Can Fail to Work in an Emergency (Sept. 23, 2008)

Euro-Pro and QVC Recall Deep Fryers Due to Burn Hazard (Sept. 23, 2008)

Harry Potter Bookends Recalled By Giftco Due to Violation of Lead Paint Standard (Sept. 23, 2008)

Wood Abacus Recalled by LTD Commodities LLC Due to Choking Hazard (Sept. 22, 2008)

Hanashop Recalls Counterfeit Power Cords Due to Fire and Shock Hazard; Sold Exclusively on eBay (Sept. 17, 2008)

Simplicity Brand Drop Side Cribs Recalled By Various Retailers Due To Serious Entrapment And Suffocation Hazard To Infants and Toddlers (Sept. 17, 2008)

Regent Sports Recalls Soccer Goal Nets Following Strangulation Death of a Child (Sept. 16, 2008)

Remote-Controlled Helicopter Toys Recalled by Protocol Due to Fire and Burn Hazards (Sept. 10, 2008)

Rugs Sold Exclusively at JC Penney Recalled by JLA Home Due to Fire Hazard (Sept. 11, 2008)

Pendants and Candle Charms Recalled Due to Risk of Lead Exposure (Sept. 3, 2008)

Cordless Screwdrivers Recalled by Menards Due to Fire and Burn Hazards (Sept. 3, 2008)

Worldwise Inc. Recalls Retractable Dog Leashes; Metal Clasp Can Break and Cause Facial and Body Injuries to Dog Owners (Sept. 3, 2008)

Circo Children's Bobbie Socks Recalled Due to Choking Hazard; Sold Exclusively at Target (Sept. 3, 2008)

Rapid Reel Recalls Portable Garden Hose Carts; Tires Can Explode Posing an Injury Hazard (Sept. 2, 2008)

Hooded Sweaters Recalled by Empress Arts; Children Can Strangle on Drawstrings (Sept. 2, 2008)

Bonne Bell Recalls Children's Cosmetics Accessory Bags Due to Risk of Lead Exposure (Aug. 29, 2008)

Children's Hooded Sweatshirts and Jackets with Drawstrings Recalled by Orioxi International Due to Strangulation Hazard (Aug. 28, 2008)

Regal Lager Recalls to Repair Phil & Teds Strollers Due to Laceration Hazard (Aug. 28, 2008)

Countertop Water Dispensers Recalled by Greenway Home Products Due to Fire and Shock Hazards (Aug. 28, 2008)

IMS Recalls Car Chargers Used With Halogen Spotlights Sold at Sears and K-Mart Due to Fire and Burn Hazards (Aug. 26, 2008)

Stroller Activity Bars Recalled by International Playthings Due to Choking Hazard (Aug. 26, 2008)

Coffee Makers Recalled by Sears Due to Fire and Burn Hazards (Aug. 26, 2008)

Power Light Modules Recalled by GCI Technologies Due to Fire and Burn Hazards (Aug. 22, 2008)

Steam Cleaners Recalled by Thane International Due to Burn Hazard (Aug. 20, 2008)

Cervelo SA Recalls Bicycle Forks Due to Fall Hazard (Aug. 20, 2008)

Hobbico Inc. Recalls Batteries Used In Radio-Controlled Helicopters Due to Fire Hazard (Aug. 19, 2008)

Rossignol Recalls Snowboard Bindings Due to Strap Failure (Aug. 13, 2008)

Fisher-Price Recalls Learning Pots and Pans(tm) Toys Due to Choking Hazard (Aug. 7, 2008)

Atico International USA Recalls Personal Blenders Due to Laceration Hazard (Aug. 7, 2008)

Cooper Lighting Recalls Emergency and Exit Lights; Could Fail to Stay Illuminated in an Emergency (Aug. 12, 2008)

Children's Board Skirts Recalled By Chelsea & Scott Ltd. Due to Violation of Lead Paint Standard (Aug. 12, 2008)

Progress Lighting Recalls Indoor Light Fixtures; Lights Can Unexpectedly Fall Posing an Impact Hazard (Aug. 7, 2008)

Fire and Burn Hazards Prompt Recall of Gas Grills Sold at Lowe's Stores (Aug. 7, 2008)

Children's Hooded Sweatshirts with Drawstrings Recalled by Raw Blue Due to Strangulation Hazard (Aug. 6, 2008)

Children's Hooded Sweatshirts with Drawstrings Recalled by Request Jeans Due to Strangulation Hazard (Aug. 6, 2008)

Children's Hooded Jackets with Drawstrings Recalled By Kids with Character Due to Strangulation Hazard (Aug. 6, 2008)

Halogen Work Lights Recalled by Harbor Freight Tools Due to Fire and Shock Hazards (Aug. 5, 2008)

Pacific Science Supplies Recalls Magnets Due to Violation of Lead Paint Standard (July 24, 2008)

Horseshoe Magnets Recalled by Dowling Magnets Due to Violation of Lead Paint Standard (July 24, 2008)

Kids II Recalls Infant Rattles Due to Choking Hazard (July 24, 2008)

Cost Plus Recalls Santorini Chairs Due to Fall Hazard (July 24, 2008)

Remote-Controlled Helicopter Toys Recalled by Innovage Due to Fire and Burn Hazards (July 24, 2008)

Children's Stuffed Toys Recalled By Daiso Due to Choking Hazard (July 25, 2008)

Dirt Devil Vacuum Accessory Tools Recalled Due to Laceration Hazard (July 23, 2008)

Sleep Innovations Recalls Pillows Sold Exclusively at Costco; Metal Fragments Pose Abrasion Hazard (July 22, 2008)

SunL Group Inc. Recalls Youth ATVs Due To Safety Defects (July 17, 2008)

Studio RTA Recalls TV Stands Due to TV Tip-over Hazard (July 17, 2008)

Bench Scale Adapters Recalled by American Weigh Scales Due to Fire Hazard (July 15, 2008)

Lip Gloss and Jewelry Sets Sold Exclusively at Wal-Mart Recalled by F.A.F. Inc. Due to Risk of Lead Exposure (July 10, 2008)

Shoelace and Necklace Children's Charms Recalled by Action Products International Due to Risk of Lead Exposure (July 10, 2008)

Parragon Books Recalls Children's Necklaces Due to Risk of Lead Exposure (July 10, 2008)

Black Cat® Fireworks Recalls Fireworks Due to Injury Hazard (July 3, 2008)

Children's Jewelry Recalled by Bead Bazaar USA Due to Risk of Lead Exposure (July 3, 2008)

Outdoor Canopies Sold Exclusively at BJ's Wholesale Club Recalled by Wanda Technology Due to Fire Hazard (July 3, 2008)

Bayside Furnishings Recalls Youth Bed Toy Chests Sold at Costco After the Death of a 22-Month-Old Child (July 3, 2008)

Fireworks Over America Recalls Fireworks Due to Shock Hazard (July 3, 2008)

RadioShack Recalls Power Supplies Due to Electrocution and Fire Hazards (July 2, 2008)

Redcat Racing Recalls Remote Controlled Toy Vehicles Due to Remote Control Defect (July 1, 2008)

Infant Garments Recalled by Rashti & Rashti Due to Choking Hazard (July 1, 2008)

Children's Jackets and Hoodies with Drawstrings Recalled by Coolibar Inc. Due to Strangulation Hazard (June 27, 2008)

Westminster Inc. Recalls Remote-Controlled Helicopter Toys Due to Risk of Fire (June 26, 2008)

Hewlett-Packard Co. Recalls Fax Machines Due to Fire Hazard (June 27, 2008)

Jardine Cribs Sold by Babies"R"Us Recalled Due to Entrapment and Strangulation Hazard (June 24, 2008)

Nordstrom Recalls Girls' Sandals Due to Choking Hazard (June 24, 2008)

Dollar Tree Recalls Glue Guns Due to Fire Hazard (June 24, 2008)

Wal-Mart Recalls Additional Charm Key Chains Due to Risk of Lead Exposure (June 19, 2008)

Children's Merry-Go-Rounds Sold Exclusively at Toys R Us Recalled by Pacific Cycle Due to Fall Hazard (June 12, 2008)

Children's Overalls Recalled by Sara Lynn Togs Due to Choking Hazard (June 12, 2008)

Sauna By Airwall Recalls Infra-Red Sauna Rooms Due to Fire Hazard (June 12, 2008)

Progress Lighting Recalls Ceiling-Mounted Indoor Light Fixtures; Lights Can Fall Posing an Impact Hazard (June 10, 2008)

Backyard Leisure Recalls Swing Sets Due to Fall Hazard (June 10, 2008)

Children's Animal Tracking Explorer Kit Recalled by MindWare; Contains Chemical That Irritates Skin and Eyes (June 5, 2008)

Bassettbaby Cribs Recalled Due to Entrapment Hazard; Sold Exclusively at Babies "R" Us (June 5, 2008)

Polycom, Inc. Recalls Wireless Conference Phone Batteries Due to Fire Hazard (June 5, 2008)

Log Swings Recalled by Far East Brokers and Consultants Due to Fall Hazard (June 3, 2008)

QVC Recalls Tomato Planters Due to Collapse Hazard (June 4, 2008)

QuinCrafts Children's Jewelry Recalled Due to Risk of Lead Exposure (May 29, 2008)

Remote-Controlled Helicopter Toys Sold Exclusively in Walgreens Recalled Due to Fire and Burn Hazards by TWIE (May 29, 2008)

Kids Station Toys Recalls Little Tikes Toy Cell Phones Due to Choking Hazard (May 28, 2008)

Electric Candle Warmers Recalled by Provo Craft & Novelty Due to Fire Hazard (May 29, 2008)

Children's Hooded Sweatshirts Recalled by Adio Footwear Due to Strangulation Hazard (May 28, 2008)

Batting Helmets Recalled by Rawlings Sporting Goods Due to Violation of Lead Paint Standard (May 27, 2008)

Counterfeit Circuit Breakers Recalled By Specialty Lamp International Due to Fire Hazard (May 27, 2008)

Floppy Friends Horse Toys Recalled by Toy Investments Due to Violation of Lead Paint Standard (May 22, 2008)

Disney Store Recalls Tinker Bell Wands Due to Violation of Lead Paint Standard (May 22, 2008)

Char-Broil Recalls Two-Burner Gas Grills Sold Exclusively at Mills Fleet Farm Stores Due to Fire, Burn Hazard (May 22, 2008)

Disney Store Recalls Pirates of the Caribbean Sleeping Bags Due to Violation of Lead Paint Standard (May 22, 2008)

Douglas Co. Recalls Children's Blankets Due to Strangulation Hazard (May 20, 2008)

"Cricket EZ" Cell Phones Recalled; Audio Problem Interferes with Emergency 911 Calls (May 20, 2008)

The Home Depot Recalls Candle Holders Due to Fire Hazard (May 20, 2008)

K2 Sports Recalls Snowboard Bindings Due to Fall Hazard (May 20, 2008)

Master Toys & Novelties Inc. Recalls Little Rider Toys Due to Violation of Lead Paint Standard (May 20, 2008)

Manhattan Group Recalls Infant Rattles Due to Choking Hazard (May 15, 2008)

Baby Bottle and Food Warmers Recalled by Munchkin Due to Fire Hazard (May 8, 2008)

Fingerhut Recalls Master Craft® Pressure Washers Due to Fire Hazard (May 8, 2008)

Children's Rain Ponchos with Drawstrings Recalled by Daiso Due to Strangulation Hazard (May 12, 2008)

TJ Power Sports Recalls Dune Buggies Due To Ejection Hazard (May 6, 2008)

QVC Recalls Space Heaters Due to Fire Hazard (May 1, 2008)

Rio Brands Recalls High-Boy Beach Chairs Due to Fall Hazard (April 29, 2008)

Nintendo Recalls Lapel Pins Due to Risk of Lead Exposure (April 29, 2008)

Waxcessories Recalls Electric Simmer Pots Due to Risk of Fire and Shock (April 24, 2008)

Fisher Controls International Recalls Gas Regulators for Leak Hazard (April 24, 2008)

Infant Santa Outfits Recalled by Avon Products Due to Choking Hazard; Sold in Puerto Rico and U.S. Virgin Islands (April 24, 2008)

Wal-Mart Recalls Charm Key Chains Due to Risk of Lead Exposure (April 18, 2008)

Push Toys Recalled by Santa's Toy Corp. Due to Violation of Lead Paint Standard (April 16, 2008)

HSN Recalls Power Strips for Charge-It-All Valets Due to Fire and Shock Hazards (April 16, 2008)

Michaels Stores Recalls Seasonal Writing Pens Due to Violation of Lead Paint Standard (April 10, 2008)

Hobby-Lobby Int'l Recalls Battery Chargers Used with Helicopters Due to Fire Hazard (April 14, 2008)

FUNASTIC Recalls Fake Teeth Due To Violation of Lead Paint Standard (April 10, 2008)

OKK Trading Recalls Toy Robots Due to Violation of Lead Paint Standard (April 9, 2008)

Children's Board Book Sets Recalled By Dalmatian Press Due to Choking Hazard (April 8, 2008)

Magnetic Dart Boards Recalled By Henry Gordy Int'l; Ingested Magnets Pose Aspiration and Intestinal Hazards (April 8, 2008)

Plush Insect Toys Recalled by Dollar Tree Stores Due to Choking Hazard (April 7, 2008)

Imaginarium Activity Centers Sold at Toys "R" Us Recalled Due to Choking Hazard (April 3, 2008)

Children's 'Main Street Drag' Sunglasses Recalled by StyleMark Due to Violation of Lead Paint Standard (April 3, 2008)

Children's Hooded Sweatshirts Recalled by Brents-Riordan Inc. Due to Strangulation Hazard (April 2, 2008)

Plush Rocker Toys Recalled By Tek Nek Toys Due to Fall Hazard (Mar. 27, 2008)

Avon Products Recalls Plush Warming Polar Bears Due to Fire and Burn Hazards (Mar. 27, 2008)

Downeast Concepts Inc. Recalls Water Bottles Due to Violation of Lead Paint Standard (Mar. 25, 2008)

Educational Insights Recalls Ring Toss Games Due to Violation of Lead Paint Standard (Mar. 26, 2008)

Hobby Lobby Stores Recalls Easter Egg Containers and Spinning Egg Tops Due to Violation of Lead Paint Standard (Mar. 21, 2008)

Progress Lighting Recalls Ceiling-Mounted Outdoor Light Fixtures; Lights Can Fall Off Mounting and Injure Consumers (Mar. 19, 2008)

WarmlyYours Recalls Rug Warmers Due to Fire Hazard (Mar. 19, 2008)

Toy Puzzle Vehicle Sets Recalled Due to Violation of Lead Paint Standard; Sold Exclusively by QVC (Mar. 20, 2008)

Salton Inc. Recalls Electric Toasters Due to Fire Hazard (Mar. 19, 2008)

Galison/Mudpuppy Recalls Wire Bound Journals and Calendars Due to Violation of Lead Paint Standard (Mar. 18, 2008)

MEGA Brands Recalls Magtastik and Magnetix Jr. Pre-School Magnetic Toys; Ingested Magnets Pose Aspiration and Intestinal Hazards (Mar. 17, 2008)

MEGA Brands Recalls MagnaMan Magnetic Action Figures; Ingested Magnets Pose Aspiration and Intestinal Hazards (Mar. 17, 2008)

Battat Recalls Additional Magnetic Construction Sets; Ingested Magnets Pose Aspiration and Intestinal Hazards (Mar. 13, 2008)

Toy Sundae Sets Sold at Target Recalled by Battat Inc. Due to Choking Hazard (Mar. 13, 2008)

Toy Airplanes, Cars, and Motorcycles Recalled by S.U. Wholesale Due to Violation of Lead Paint Standard (Mar. 12, 2008)

Children's Hooded Sweatshirts Recalled by Urgent Gear Due to Strangulation Hazard; Sold Exclusively at Nordstrom Stores (Mar. 11, 2008)

JCPenney Recalls Cooks Deep Fryers Due to Fire and Burn Hazards (Mar. 11, 2008)

Hamilton Beach Recalls Toasters Due to Fire Hazard (Mar. 6, 2008)

Portable Air Compressors Sold Exclusively at Advance Auto Parts Stores Recalled Due to Fire and Electrical Hazards (Mar. 6, 2008)

QVC and Tristar Recall Electric Grills Due to Fire Hazard; Consumers to Receive New Instructions (Mar. 6, 2008)

Infantino Recalls Infant Rattles Due to Choking Hazard (Mar. 5, 2008)

Girls' Hooded Sweatshirts with Drawstrings Recalled by Rebelette International Due to Strangulation Hazard (Mar. 5, 2008)

LDR Industries Recalls Gas Connectors Due to Fire and Explosion Hazards (Mar. 4, 2008)

Family Dollar Recalls Magnetic Dart Boards; Ingested Magnets Pose Aspiration and Intestinal Hazards (Feb. 22, 2008)

Children's Metal Jewelry Recalled by Pecoware Due to Risk of Lead Exposure (Feb. 22, 2008)

Children's Memory Testing Cards Recalled by Riverside Publishing Due to Violation of Lead Paint Standard (Feb. 22, 2008)

Portable Electric Heaters Recalled by Aloha Housewares Due to Fire Hazard (Feb. 20, 2008)

Spiderman Water Bottles Sold Exclusively at Sears Recalled by Fast Forward Due to Choking Hazard (Feb. 19, 2008)

Cinderella Battery-Powered Toy Cars Recalled by Dumar International USA Due to Fire and Burn Hazards (Feb. 19, 2008)

Mission City Press Recalls Girl's Bracelet Sets Due to Violation of Lead Paint Standard (Feb. 14, 2008)

Bassettbaby Drop-Side Cribs Recalled Due to Entrapment and Strangulation Hazard (Feb. 14, 2008)

Boys' Hooded Sweatshirts with Drawstrings Recalled by Siegfried & Parzifal Due to Strangulation Hazard (Feb. 13, 2008)

Christmas Tree Shops Recalls Tea Light Candles Due to Fire Hazard (Feb. 12, 2008)

Remote-Controlled Helicopter Toys Recalled By Soft Air USA Due to Fire and Burn Hazards (Feb. 12, 2008)

Netshops Recalls Children's Table and Chair Sets Due to Violation of Lead Paint Standard (Feb. 8, 2008)

Trek Recalls Girls Bicycles Due To Frame Failure (Feb. 7, 2008)

Children's Hooded Sweatshirts Recalled by Seventy Two Inc. Due to Strangulation Hazard; Sold Exclusively at Nordstrom Stores (Feb. 6, 2008)

Children's Sketchbooks Recalled by eeBoo Corp. Due to Violation of Lead Paint Standard (Feb. 6, 2008)

Children's Toy Gardening Rakes Recalled by Downeast Concepts; Violates Lead Paint Standard (Feb. 5, 2008)

Campbell Hausfeld Recalls Air Compressors Following Fires (Jan. 31, 2008)

Car Charging Units Made By The Wenzel Co. for LL Bean Air Beds Recalled Due To Injury Hazard (Jan. 31, 2008)

RR Donnelley Recalls Classroom Reading and Math Aids Due to Violation of Lead Paint Standard (Jan. 31, 2008)

Kids II Inc. Recalls Crib Toys Due to Choking Hazard (Jan. 31, 2008)

Glue Guns Recalled by Dollar Tree Stores Due to Fire, Burn and Shock Hazards (Jan. 29, 2008)

Toy Wooden Block and Train Sets Recalled By Christmas Tree Shops Due to Violation of Lead Paint Standard (Jan. 24, 2008)

RR Donnelley Recalls Educational Assessment Blocks Due to Violation of Lead Paint Standard (Jan. 24, 2008)

Battat Recalls Magnetic Construction Sets; Ingested Magnets Pose Aspiration and Intestinal Hazards (Jan. 23, 2008)

Toy Racing Cars Recalled by OKK Trading Due to Violation of Lead Paint Standard (Jan. 23, 2008)

Cranium Cadoo Board Games Recalled Due to Violation of Lead Paint Standard (Jan. 17, 2008)

Pottery Barn Recalls Decorative Candles Due to Fire Hazard (Jan. 17, 2008)

Photo Frames Recalled by The Gift Wrap Company Due to Violation of Lead Paint Standard (Jan. 16, 2008)

Inversion Therapy Tables Recalled by Stamina Products Due to Fall Hazard (Jan. 16, 2008)

Toy Wrestler Figures Recalled by A.A. of America Due to Violation of Lead Paint Standard (Jan. 15, 2008)

Kash N' Gold Recalls Tinker Bell Novelty Lamps Due to Violation of Lead Paint Standard (Jan. 10, 2008)

Shims Bargain Recalls Pacifiers Due to Choking Hazard (Jan. 10, 2008)

Torchiere Lamps Recalled By L G Sourcing Due to Fire Hazard; Lamps Sold Exclusively At Lowe's Stores (Jan. 10, 2008)

Coin Banks Recalled by TJ Promotions Due to Violation of Lead Paint Standard (Jan. 10, 2008)

Intermatic Recalls Digital Timers Due to Electrical Shock Hazard (Jan. 9, 2008)

Pacific Cycle Recalls Children's Trailer Bicycles; Can Detach from Adult Bicycle and Injure Children (Jan. 8, 2008)

Toy Wagons Recalled by Tricam Industries Due to Violation of Lead Paint Standard (Jan. 3, 2008)

North American Breaker Co. Recalls Counterfeit Circuit Breakers Due to Fire Hazard (Dec. 27, 2007)

Tot Tower Blocks Recalled by eeBoo Corp.; Children's Toy Can Pose Choking Hazard (Dec. 27, 2007)

Super Magnet Toys Recalled by MTC Due to Aspiration and Intestinal Hazards (Dec. 21, 2007)

Lenox Recalls Covered Warmer Dishes Due to Fire and Burn Hazards (Dec. 21, 2007)

Christmas Candle Sets Recalled By Specialty Merchandise Corp. Due to Fire Hazard (Dec. 20, 2007)

AAFES Recalls "Soldier Bear" Toys Due to Violation of Lead Paint Standard (Dec. 19, 2007)

Discount School Supply Recalls Measuring Chart Due to Violation of Lead Paint Standard (Dec. 19, 2007)

Stuffer Bear Recalled Due to Choking Hazard; Sold Exclusively at Victoria's Secret Internet site (Dec. 19, 2007)

Full Body Safety Harnesses Recalled by Gorilla Due to Fall Hazard (Dec. 18, 2007)

Bicycle Helmets Recalled by Specialized Due to Failing Helmet Standard (Dec. 18, 2007)

Infantino Recalls Infant Teethers Due to Choking Hazard (Dec. 13, 2007)

AutoZone Recalls Booster Cables Due to Electrical Hazard (Dec. 13, 2007)

Children's Toys Recalled by Dollar Tree Stores Due to Violation of Lead Paint Standard (Dec. 13, 2007)

Codee International Corp. Recalls Children's Jewelry Due to Risk of Lead Exposure (Dec. 13, 2007)

Children's Water Globes Recalled Due to Violation of Lead Paint Standard; Sold Exclusively at Jo-Ann Fabric and Craft Stores (Dec. 13, 2007)

Fishing Games Sold at Grocery Stores Recalled by Far East Brokers Due to Violation of Lead Paint Standard (Dec. 12, 2007)

QVC Recalls Electric Toasters Due to Fire Hazard (Dec. 11, 2007)

Gamenamics Inc. Recalls Air-Powered Hockey Tables Due to Burn Hazard (Dec. 11, 2007)

Fitness Quest Recalls Eclipse Elliptical Trainers Due to Fall Hazard (Dec. 11, 2007)

Children's Sunglasses Recalled by FGX International Due to Violation of Lead Paint Standard (Dec. 7, 2007)

Starbucks Recalls Coffee Mugs Due To Burn Hazard; Product Manufactured by lab921 (Dec. 6, 2007)

The Home Depot Recalls Holiday Figurines Due to Lead Paint Hazard (Dec. 6, 2007)

Boys' Hooded Sweatshirts with Drawstrings Recalled by Scope Apparel Due to Strangulation Hazard (Dec. 6, 2007)

RC2 Recalls Potty Training Seats Due to Violation of Lead Paint Standard (Dec. 6, 2007)

TKS Children's Pants Recalled by Sears; Drawstrings at Waist Pose Entrapment Hazard (Dec. 6, 2007)

Collins International Co. Recalls Oscillating Ceramic Heaters Sold at Menards Retail Stores Due To Fire Hazard (Dec. 6, 2007)

Stokke Announces Recall of Certain Xplory Strollers Due to Front Wheel Detachment (Dec. 11, 2007)

Bell Racing Recalls Collectible Mini Racing Helmets Due to Violation of Lead Paint Standard (Dec. 5, 2007)

Black & Decker Brand Toasters Recalled By applica Consumer Products Inc. Due to Fire Hazard (Dec. 5, 2007)

Icon Health & Fitness Recalls Inversion Benches Due to Fall Hazard (Dec. 5, 2007)

American Greetings Corp. Recalls Confetti Bursts Due to Violation of Lead Paint Standard (Nov. 29, 2007)

Lazy Lounger Chairs and Recliners Sold at Dick's Sporting Goods Recalled for Collapsing Hazard (Nov. 28, 2007)

Reeves International Inc. Recalls Holiday Ornaments Due to Violation of Lead Paint Standard (Nov. 28, 2007)

"Power Bolt" Pitchbacks Sold at Dick's Sporting Goods Recalled Due to Laceration Hazard (Nov. 27, 2007)

Miter Saws Recalled by WMH Tool Group Due to Laceration Hazard (Nov. 27, 2007)

Flashing Pacifiers Recalled By Sailing (U.S.) International Corp. Due to Choking Hazard (Nov. 21, 2007)

Slipcovers Used With Boppy Pillows Recalled Due to Choking Hazard and Risk of Lead Exposure (Nov. 21, 2007)

Children's Pencil Pouches Recalled by Raymond Geddes & Co. Due to Violation of Lead Paint Standard (Nov. 21, 2007)

Children's Metal Jewelry Recalled by Buy-Rite Due to Risk of Lead Exposure (Nov. 21, 2007)

Cherrydale Fundraising Recalls Bracelets Due to Risk of Lead Exposure (Nov. 21, 2007)

Children's Metal Jewelry Recalled by Colossal Jewelry & Accessories Due to Risk of Lead Exposure (Nov. 21, 2007)

La Femme NY Inc. Recalls Children's Necklace and Earring Sets Due to Risk of Lead Exposure (Nov. 21, 2007)

Pure Allure Recalls Metal Jewelry Sold at Michaels Stores Due to Risk of Lead Exposure to Children (Nov. 21, 2007)

Discount School Supply Recalls Paint Brushes Due to Violation of Lead Paint Standard (Nov. 21, 2007)

Cooper Lighting Recalls Fluorescent Shop Lights Due to Electrical Shock Hazard (Nov. 21, 2007)

Metal Jewelry Sold by Family Dollar Stores Recalled Due to Risk of Lead Exposure to Children (Nov. 21, 2007)

Children's Wooden Storage Rack Recalled By Jetmax International Following Child's Death (Nov. 16, 2007)

Hobby Lobby Stores Recalls Halloween-Themed Baskets Due to Violation of Lead Paint Standard (Nov. 16, 2007)

Birch Bark Wrapped Candles Recalled by Roost Due to Fire Hazard (Nov. 15, 2007)

Bon-Ton Recalls Children's Bath Robes Due to Burn Hazard (Nov. 15, 2007)

