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TOXIC TOYS AND DANGEROUS DRYWALL: HOLDING FOREIGN MANUFACTURERS LIABLE FOR DEFECTIVE PRODUCTS—THE FUND CONCEPT

INTRODUCTION

The mid-decade building boom coupled with post-Hurricane Katrina reconstruction led to a nationwide drywall shortage in the United States in 2005 and 2006, forcing builders to turn to imports.¹ Prior to 2005, drywall imports from China were negligible; however, since 2006, the United States has imported more than 550 million pounds of drywall from China because it is “abundant and cheap.”² This Chinese-made drywall has proven to be defective, and, as a result, thousands of U.S. citizens have sustained economic damage to their homes and incurred health problems.³ The drywall emits hydrogen sulfide gas, which produces a rotten-egg odor, corrodes metal, and destroys electronic equipment.⁴ In addition, American consumers have reported various physical ailments, such as breathing difficulties, persistent coughs, bloody noses, recurrent headaches, and asthma attacks.⁵

Chinese drywall presents one of the largest and most complex defective product conundrums the U.S. government has ever encountered.⁶ Thus far, the U.S. Consumer Product Safety Commission (“CPSC”), the government agency responsible for protecting the public from injury or death from consumer

¹ Jason Hanna, *Chinese-Made Drywall Ruining Homes, Owners Say*, CNN (Mar. 18, 2009), http://articles.cnn.com/2009-03-18/us/chinese.drywall_1_chinese-made-drywall-homeowners-appliances. According to the Consumer Product Safety Commission, shipping records show the United States has imported 6.5 million sheets of Chinese-made drywall since December 2005. Aaron Kessler & Joaquin Sapien, *SPECIAL REPORT: Federal Failure on Chinese Drywall*, HERALD-TRIB. (Dec. 14, 2010, 6:45 PM), <http://www.heraldtribune.com/article/20101214/ARTICLE/101219891>.

² Brian Skoloff, *Cheap Chinese Drywall Causing Another Round of Nightmares*, WASH. POST (Oct. 17, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/16/AR2009101600082.html>; accord Tim Padgett, *Is Drywall the Next Chinese Import Scandal?*, TIME (Mar. 23, 2009), <http://www.time.com/time/nation/article/0,8599,1887059,00.html>.

³ Skoloff, *supra* note 2.

⁴ Andrew Martin, *Drywall Flaws: Owners Gain Limited Relief*, N.Y. TIMES (Sept. 17, 2010), <http://www.nytimes.com/2010/09/18/business/18drywall.html>.

⁵ *Drywall Information Center*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/info/drywall/where.html> (last visited Feb. 20, 2012).

⁶ Kessler & Sapien, *supra* note 1. The cost of repairing an average-size house (replacing all the drywall, the wiring, and the air-conditioning system) is about \$100,000. *Id.*

products, has received more than 3,805 complaints about the drywall and believes thousands of others have failed to report the problem.⁷ Approximately 5,600 homeowners have filed suits, but because the current legal system makes it virtually impossible for U.S. plaintiffs to sue Chinese manufacturers, legal redress is limited or nonexistent for the majority of these consumers.⁸ Three primary procedural hurdles—personal jurisdiction, service of process, and enforcement of the judgment—prevent suits against Chinese manufacturers.⁹ While injured consumers may bring suit in the United States against importers, distributors, and sellers of the defective drywall,¹⁰ many of these potential defendants are out of business, bankrupt, or possess insufficient assets to satisfy a judgment. As a result, many consumers are left with no one to sue and thus no compensation for the harm they incurred.

Chinese manufacturers have successfully argued that U.S. courts do not have jurisdiction over them.¹¹ Virginia Senator Mark Warner, whose office is helping Virginia drywall victims negotiate with their home mortgage lenders, remarked, “[Foreign manufacturers] can avoid liability and there’s almost nothing we can do about it right now.”¹² Injured consumers are left to seek legal recourse in the United States or go uncompensated. As a result, many homeowners affected by faulty Chinese drywall are facing foreclosure and bankruptcy.¹³ Pamela Gilbert, a former executive director of the CPSC during the Clinton Administration, noted, “Our current consumer protection laws don’t adequately address product liability in a globalized economy And these problems are only going to get worse in the future.”¹⁴ The U.S. Supreme Court has also recognized the shortcomings and difficulties present in this area of the law, and in late 2010 the Court granted certiorari in two cases, *J.*

⁷ *Drywall Information Center*, *supra* note 5; Martin, *supra* note 4. “A database compiled by the Herald-Tribune and ProPublica shows that at least 6,944 homeowners are seeking help for problems created by contaminated drywall.” Kessler & Sapien, *supra* note 1.

⁸ Martin, *supra* note 4. One company, Knauf Plasterboard Tianjin, a Chinese–German joint venture, has begun settlement negotiations with homeowners. *Id.*

⁹ *Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Judiciary Comm.*, 111th Cong. 4 (2009) (statement of Louise Ellen Teitz, Professor of Law, Roger Williams University School of Law) [hereinafter *Hearing—Leveling the Playing Field*].

¹⁰ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

¹¹ Martin, *supra* note 4.

¹² Kessler & Sapien, *supra* note 1.

¹³ Monsurat Adebajo, *Gov’t Failing To Deal with Bad Drywall*, CBS NEWS (Dec. 15, 2010, 3:06 PM), http://www.cbsnews.com/8301-31727_162-20025776-10391695.html.

¹⁴ Kessler & Sapien, *supra* note 1.

*McIntyre Machinery, Ltd. v. Nicastrò*¹⁵ and *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹⁶ concerning jurisdiction in U.S. courts over foreign manufacturers in the context of a globalized society.¹⁷

The two cases, *J. McIntyre* and *Goodyear*, deal with the stream of commerce theory of personal jurisdiction as it pertains to specific and general jurisdiction, respectively.¹⁸ On January 11, 2011, the Court heard oral argument in both cases.¹⁹ The Court revisited the requirements under the Due Process Clause of the Fourteenth Amendment for state courts to assert personal jurisdiction over foreign defendants.²⁰ On the last day of its 2010–2011 term, the Court issued opinions in the two cases. In *J. McIntyre*, the Court addressed whether the state of New Jersey could exercise jurisdiction over a foreign (English) manufacturer when the plaintiff was injured by the defendant's product in New Jersey.²¹ The Court issued a fractured 4-2-3 decision, holding that the manufacturer was not subject to personal jurisdiction in the state of New Jersey because it had not engaged in conduct purposefully directed at New Jersey.²² In *Goodyear*, the Court addressed whether foreign subsidiaries of a U.S. parent corporation are amenable to suit in state court based on claims that are unrelated to any activity of the subsidiaries in the forum state.²³ The Court reached a unanimous decision, reversing the North Carolina Court of Appeals' ruling that the foreign Goodyear subsidiaries were subject to North Carolina's general jurisdiction because some of the defendant's tires had reached the state through the stream of commerce.²⁴ The unanimous ruling in

¹⁵ *J. McIntyre Mach., Ltd. v. Nicastrò*, 131 S. Ct. 2780 (2011).

¹⁶ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

¹⁷ Peter Trooboff, *The Global Reach of U.S. Personal Jurisdiction*, NAT'L L.J., Dec. 13, 2010, available at <http://www.cov.com/files/Publication/39e9f9b2-f78f-4328-af70-e7786215eba4/Presentation/PublicationAttachment/eb4ee708-e070-4ac3-b867-eb28d5b0ccdb/The%20Global%20Reach%20of%20U.S.%20Personal%20Jurisdiction.pdf>.

¹⁸ Mark R. Vespole, *Stream of Commerce in the 21st Century: McIntyre and Goodyear: Potential Ramifications of U.S. Supreme Court Decision on NJ and NC Long Arm Jurisdiction Statutes*, LEXISNEXISCOMMUNITIES LITIG. RESOURCE COMMUNITY (Dec. 13, 2010, 3:50 PM), <https://www.lexisnexis.com/COMMUNITY/LITIGATIONRESOURCECENTER/blogs/litigationcommentary/archive/2010/12/17/potential-ramifications-of-supreme-court-decision-on-n-j-n-c-long-arm-jurisdiction-statutes.aspx>.

¹⁹ Allison Torres Burtka, *Supreme Court Takes On States' Jurisdiction over Foreign Manufacturers*, AM. ASS'N FOR JUST. (Jan. 20, 2011), <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/14246.htm>.

²⁰ *Id.*

²¹ *J. McIntyre Mach., Ltd. v. Nicastrò*, 131 S. Ct. 2780, 2785 (2011).

²² *Id.* at 2791.

²³ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

²⁴ *Id.* at 2851. The Court reiterated the standard for general jurisdiction, noting that "a court may assert general jurisdiction over foreign corporations . . . when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.*

Goodyear made it clear that introducing goods into the stream of commerce in a state was an insufficient basis for a court to exercise general jurisdiction over foreign subsidiaries when the accident occurred elsewhere.²⁵ However, the divided ruling in *J. McIntyre* failed to announce a standard for determining when foreign firms are subject to specific jurisdiction in U.S. court, thereby virtually ensuring that the justices will consider the issue again.²⁶ Although the Court's holdings addressed key jurisdictional questions, neither case addressed enforcing U.S. judgments against foreign manufacturers. Absent a mechanism for enforcement, U.S. consumers will likely be unable to collect on judgments.

Attempt at revision in this area of the law has not been limited to the judiciary. The Foreign Manufacturers Legal Accountability Act of 2010 ("2010 Act") was introduced in the U.S. House of Representatives in February 2010, aiming to combat the lack of jurisdiction over foreign manufacturers.²⁷ The 2010 Act died in committee, and was reintroduced in December 2011 as the Foreign Manufacturers Legal Accountability Act of 2011 ("2011 Act").²⁸ As the 2011 Act is in the early stages of the legislative process at the time of this writing,²⁹ this Comment considers the language and implications of both bills, as well as the legislative and public responses to the 2010 bill. The 2010 and 2011 Acts, both initiated by Ohio Democrat Betty Sutton in response to the toxic Chinese-made drywall debacle, would require foreign manufacture to appoint a registered agent in the United States to accept service of process on behalf of the manufacturer.³⁰ By accepting service of process, the manufacturer would thereby consent to personal jurisdiction in the state in which the appointed agent is located.³¹ The bills propose a solution to jurisdictional and

²⁵ Kimberly Atkins, *Court Creates Confusion on Foreign Product Liability Suits*, LEGALNEWS.COM (July 21, 2011), <http://www.legalnews.com/detroit/1016629>.

²⁶ *Id.*

²⁷ Kessler & Sapien, *supra* note 1; *Bill Summary & Status 111th Congress (2009–2010) H.R.4678*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04678:/home/LegislativeData.php?n=BSS;c=111> (last visited Feb. 20, 2012).

²⁸ *H.R. 4678 (111th): Foreign Manufacturers Legal Accountability Act of 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/hr4678> (last visited Mar. 20, 2012) [hereinafter *H.R. 4678: Govtrack*]; *Bill Summary & Status 112th Congress (2011–2012) H.R. 3646*, LIBR. OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:/temp/~bdZY4R:/home/LegislativeData.php?n=BSS;c=112> (last visited Mar. 20, 2012).

²⁹ *H.R. 3646: Foreign Manufacturers Legal Accountability Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr3646> (last visited Mar. 23, 2012).

³⁰ Foreign Manufacturers Legal Accountability Act of 2011, H.R. 3646, 112th Cong. (2011); Foreign Manufacturers Legal Accountability Act of 2010, H.R. 4678, 111th Cong. (2010).

³¹ H.R. 3646 § 3(c)(1); H.R. 4678 § 3(c)(1).

service of process issues, but, like the Supreme Court cases, fail to address enforcement of U.S. court judgments overseas.

Presently, U.S. consumers who have been injured by a Chinese-made product and are unable to bring suit against a responsible party in the United States will not be compensated for their injury. In this regard, the U.S. legal system has failed to provide adequate protection for U.S. consumers.³² Additionally, the U.S. government currently lacks any obligation to reimburse consumers for the harm they have incurred.³³ This Comment proposes creation of a fund for injured consumers, thereby alleviating the undue burden on these individuals. Chinese manufacturers responsible for producing defective products that have injured U.S. consumers would be required to contribute to the fund before continuing to export their products to the United States. The fund would be distributed solely to compensate injured consumers.

This Comment argues that current U.S. law fails to provide an adequate mechanism to ensure U.S. consumers are economically compensated for injuries sustained by Chinese-made products. Part I explores the history of the United States–China trade relationship and highlights China’s position as the world’s leading exporter. It delves into the multitude of reasons Chinese products are poorly made and examines why, despite quality problems, the United States continues to import from China. Part II outlines the procedural hurdles in place for suing a Chinese manufacturer and examines why U.S. law has failed to hold manufacturers liable for their faulty products. Part III advocates for the creation of a fund that would serve dual purposes: deterring Chinese manufacturers from releasing defective products in the United States and compensating victims.

I. BACKGROUND

Trade relations between the United States and China commenced in the early days of U.S. independence, and, since the turn of the twenty-first century, China has blossomed into the United States’ primary trade partner and has

³² This failure provides a multi-billion dollar windfall for the Chinese because manufacturers avoid accident costs in the pricing of their manufactured goods. Manufacturers can evade U.S. lawsuits; therefore, they forego both the cost of prevention and the cost of liability associated with faulty products. *See* Elizabeth Ann Hunt, Comment, *Made in China: Who Bears the Loss and Why?*, 27 PENN ST. INT’L L. REV. 915, 918–19 (2009).

³³ Kessler & Sapien, *supra* note 1.

earned the title “manufacturer to the world.”³⁴ Although the United States benefits economically from cheap products manufactured in China, some of these products pose a risk of shoddy manufacturing and have led to injuries and product recalls in the United States.³⁵ A combination of political and economic factors has led to production of defective Chinese products, and both the United States and China are to blame.

A. *History of United States–China Trade Relations*

The United States–China trade relationship, although somewhat marred by poorly made Chinese goods, is historically and economically significant. The United States was China’s leading trade partner at the end of World War II; however, the trade relationship between the two countries dissipated following the founding of the People’s Republic of China in 1949.³⁶ In the wake of President Richard Nixon’s momentous visit to China in 1972, trade between the two nations was renewed.³⁷ On July 6, 1979, the United States and China signed the Agreement on Trade Relations, formally establishing diplomatic ties.³⁸

In 1980, the United States restored China’s Most-Favored Nation status (now Normal Trade Relations) guaranteeing China the same trading opportunities accorded to all other favored nations.³⁹ In 2000, the United States granted China Permanent Normal Trade Relations (“PNTR”).⁴⁰ Paul Midler, a consultant and middleman for Chinese factories and U.S. companies, recounts the PNTR debate in the U.S. Congress:

[T]here was a chance for the United States to hold out for political and economic reform in China, but the opportunity was lost. Improved structural conditions made possible then might have more appropriately set the stage for stability going forward. Instead,

³⁴ *China’s Economic Growth: The Next Wave*, COMMITTEE FOR ECON. DEV. AUSTRALIA (Nov. 10, 2010), http://www.ceda.com.au/research-and-policy/current-topics/ace/2010/11/10/china_parkinson; Jiawen Yang, *Sino–U.S. Trade Relations*, GW CENTER FOR STUDY GLOBALIZATION (Jan. 2004), <http://globalgrn.files.wordpress.com/2009/08/sino-us-trade-relations.pdf>.

³⁵ Kessler & Sapien, *supra* note 1.

³⁶ Yang, *supra* note 34, at 1. By 1951, trade between the United States and China had come to a halt. *Id.*

³⁷ *Id.*

³⁸ Agreement on Trade Relations Between the United States of America and the People’s Republic of China, U.S.–P.R.C., July 7, 1979, 31 U.S.T. 4651.

³⁹ China’s Most-Favored Nation status had previously been suspended in 1951. VLADIMIR N. PREGELJ, CONG. RES. SERV., MOST-FAVORED-NATION STATUS OF THE PEOPLE’S REPUBLIC OF CHINA 1 (2001), available at <http://www.au.af.mil/au/awc/awcgate/crs/r130225.pdf>.

⁴⁰ Yang, *supra* note 34, at 2.

American politicians and business leaders rushed headlong into greater levels of interdependency with China, a nation whose reliability is questionable.⁴¹

The United States opted to open the door to unrestricted trade with China before China was sufficiently mature.⁴² Prior to 2000, the U.S. Congress had to review and renew China's Most-Favored Nation status on an annual basis.⁴³ However, once the United States granted PNTR, the status was permanent and unarguable, and the United States surrendered significant leverage over China.⁴⁴ During the PNTR debate, politicians advocating for free trade with China never suggested that the "American public would be involved in any sort of trade-off."⁴⁵ There was an assumption that China would become easier to work with as it rose to prosperity; however, the manufacturer–importer relationship has proven the opposite to be true.⁴⁶

China became a member of the World Trade Organization ("WTO") in 2001,⁴⁷ and since that time, trade has consistently grown between the United States and China.⁴⁸ In 2001, the United States imported \$102.3 billion of consumer products from China.⁴⁹ By 2009, that number had risen to \$296.4 billion.⁵⁰ Today, the United States is China's top export destination,⁵¹ meaning U.S. consumers are at a higher risk of encountering defective Chinese-made products than other countries.

⁴¹ PAUL MIDLER, *POORLY MADE IN CHINA: AN INSIDER'S ACCOUNT OF THE TACTICS BEHIND CHINA'S PRODUCTION GAME 240* (2009).

⁴² *See id.* Midler believes that this decision was motivated by U.S. greed—that U.S. politicians were unable to overcome the lure of cheaply made goods from China. *Id.*

⁴³ Yang, *supra* note 34, at 2.

⁴⁴ *Id.* Congress no longer conducted an annual review of "China's activities regarding unfair trade practices, human rights and national security." Jim Burns, *Congressmen Work on Bill Revoking PNTR for China*, CNSNEWS.COM (July 7, 2008), <http://www.cnsnews.com/node/10184>. Under the WTO, the United States retains the right to protect its national security interests, which include the revocation of PNTR if necessary. Furthermore, Congress can choose to revoke PNTR at any time "if circumstances warrant and Congress is willing to forego WTO benefits." Press Release, Office of the Press Sec'y, White House, Fact Sheet on Benefits of PNTR for American Workers (May 12, 2000), *available at* <http://archives.clintonpresidentialcenter.org/?u=051200-fact-sheet-on-benefits-of-pntr-for-american-workers.htm>.

⁴⁵ MIDLER, *supra* note 41, at 198.

⁴⁶ *Id.* at 240.

⁴⁷ *China Officially Joins WTO*, CNNWORLD (Nov. 10, 2001), http://articles.cnn.com/2001-11-10/world/china.WTO_1_wto-meeting-wto-director-general-mike-moore-world-trade-organization.

⁴⁸ *US—China Trade Statistics and China's World Trade Statistics*, US—CHINA BUS. COUNCIL, <http://www.uschina.org/statistics/tradetable.html> (last visited Mar. 3, 2012).

⁴⁹ *Id.*

⁵⁰ *Id.* tbl.1.

⁵¹ *Id.* tbl.8.

B. China: Manufacturer to the World

In early 2010, China overtook Germany to become the world's largest exporter and now accounts for almost ten percent of total world exports.⁵² In the second quarter of 2010, China passed Japan to become the world's second-largest economy behind the United States.⁵³ These statistics evidence China's rapid economic ascendance⁵⁴ and solidify its position as a global economic superpower.⁵⁵ China's export industry has been a "powerful engine of growth" that thrives due to its ability to produce cheap products.⁵⁶ Alexandra Harney, an expert on Asian business, argues that no single country has ever "yielded such visible price declines on such a wide range of goods."⁵⁷ For example, China has been able to short-circuit the traditional timeline of consumer electronic manufacturing.⁵⁸ Wilf Corrigan, the chairman and CEO of LSI Logic, an American company making video players for the Chinese market, noted that when new technology is released, it traditionally takes two years for the technology to be sold below its initial price and five to seven years for it to reach the mass market at a substantially lower price.⁵⁹ However, China's low labor costs, vast consumer population, and competition among manufacturers have allowed the Chinese to produce sophisticated, low-priced electronics much faster than what was traditionally possible.⁶⁰

Harney compares China's ability to undercut prices to a second industrial revolution: "Since the start of the new millennium, China has come to dominate global manufacturing in a way almost inconceivable before its rise. The prices it offers have been so low . . . they have become known simply as the China price."⁶¹ U.S. consumers, who have become aware of and accustomed to "the China price," demand these lower prices, and American

⁵² Press Release, World Trade Org., Trade To Expand by 9.5% in 2010 After a Dismal 2009, WTO Reports (Mar. 26, 2010), available at http://www.wto.org/english/news_e/pres10_e/pr598_e.htm.

⁵³ David Barboza, *China Overtakes Japan To Become No. 2 Economy*, N.Y. TIMES, Aug. 16, 2010, at B1.

⁵⁴ In 2005, China's gross domestic product was approximately half of Japan's. *Id.*

⁵⁵ *Id.*; *India's Surprising Economic Miracle*, ECONOMIST, Oct. 2nd–8th 2010, at 11 (stating that China's rapid, sustained growth has lifted hundreds of millions of Chinese out of poverty).

⁵⁶ ALEXANDRA HARNEY, THE CHINA PRICE 8 (2008); see also *Stoking Protectionism*, ECONOMIST (Aug. 16, 2007), <http://www.economist.com/node/9657177>.

⁵⁷ HARNEY, *supra* note 56, at 3.

⁵⁸ Ted C. Fishman, *The Chinese Century*, N.Y. TIMES, July 4, 2004, § 6 (Magazine), at 31.

⁵⁹ *Id.*

⁶⁰ *Id.* Even when new features are added, prices continue to drop. *Id.*

⁶¹ HARNEY, *supra* note 56, at 2.

businesses are under pressure to match “the China price” to retain their customers and remain competitive.⁶²

“The China price” is possible partially because China possesses the world’s largest manufacturing workforce.⁶³ China has a manufacturing workforce of 104 million; this is roughly twice the combined workforces of the United States, Canada, Japan, France, Germany, Italy, and the United Kingdom.⁶⁴ While China does not possess the cheapest workforce in the world, it has become the world’s workshop because its workers are reliable, capable, and disciplined.⁶⁵ Chinese workers are motivated by the nation’s twin virtues of patriotism and hard work.⁶⁶ Sometimes this means working twelve- to eighteen-hour days, seven days a week, in unsafe labor conditions.⁶⁷ Mao Zedong, who believed China’s wealth lay in its abundant population, is credited with mobilizing Chinese labor as an alternative to machinery.⁶⁸ Today, the use of highly skilled workers who cost only a few hundred dollars a month (as opposed to multi-million dollar machines) allows a company such as Wanfeng Automotive, located outside Shanghai, to sell its handmade luxury version of the American Jeep for merely \$8,000 to \$10,000.⁶⁹ China has been able to successfully alter the competitive landscape of the global marketplace by employing people in place of machines.⁷⁰

In addition to the abundance and relatively low cost of labor, startup costs for U.S. companies in China are minimal.⁷¹ Chinese manufacturers offer U.S. companies enticing incentives to initiate a business relationship.⁷² Competition among Chinese factories is fierce, and manufacturers “ben[d] over backwards” to attract foreign clients and “to make it seem as though doing business with

⁶² Fishman, *supra* note 58, at 46; *India’s Surprising Economic Miracle*, *supra* note 55 (“[I]f your supply chain for manufactured goods does not pass through China your shareholders will demand to know why.”).

⁶³ HARNEY, *supra* note 56, at 8.

⁶⁴ *Id.*

⁶⁵ Fishman, *supra* note 58, at 28.

⁶⁶ *Id.* Undisciplined or undermotivated workers are easily replaced with other poor, unemployed Chinese workers anxious for work. *Id.*

⁶⁷ *See, e.g.*, HARNEY, *supra* note 56, at 108 (describing the working conditions of an undocumented migrant working in a plastic bag factory in China). Factory wages along China’s east coast can be \$120 to \$160 a month, and half of that in inland China. Fishman, *supra* note 58, at 28.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See* MIDLER, *supra* note 41, at 20–21.

⁷² *Id.*

them [is] a breeze.”⁷³ Chinese manufacturers can take a company’s product sample and move it into production quickly and for a competitive price.⁷⁴ Ten years ago, Wanfeng Automotive was “hammering out motorcycle wheels by hand in a Chinese garage”; only a few years later it was the top seller of aluminum alloy motorcycle wheels in China, and later in Asia.⁷⁵ One of the key factors driving Chinese competitiveness is the ability of Chinese workers to adapt to the production of new products.

A more troubling reason that “the China price” is possible stems from demands from U.S. consumers and companies for cheap goods coupled with China’s willingness to cut costs and skip safety measures.⁷⁶ U.S. suppliers experience pressure from their customers to relocate production to China or to use Chinese subcontractors in their production lines.⁷⁷ Companies like Walmart, which insists on “Every Day Low Prices,”⁷⁸ epitomize U.S. consumers’ appetite for cheap products. American consumers “once preferred to see the MADE IN USA tag, but there [was] another shift in the marketplace. Somewhere along the line, made in China began to sound like a bargain.”⁷⁹ Economists estimate that cheap products from China save the average American household \$500 a year.⁸⁰ This statistic, however, fails to take into account certain unquantifiable risk factors, primarily that the products may be defective or dangerous.⁸¹ One commenter has argued, “United States consumers cannot reasonably be expected to consider the costs of melamine and lead paint, or a skipped safety measure, if they are completely unaware and unadvised.”⁸² Midler poses the question: “How much [is] it worth to know that the products you purchased were lead- or melamine free?”⁸³ Quality control issues that accompany Chinese-made products are passed along to U.S. consumers, along with the cheap prices.

⁷³ *Id.* at 20.

⁷⁴ *Id.* at 20–21.

⁷⁵ Fishman, *supra* note 58, at 28.

⁷⁶ HARNEY, *supra* note 56, at 35; MIDLER, *supra* note 41, at 166.

⁷⁷ Fishman, *supra* note 58, at 46.

⁷⁸ *About Us*, WALMART CORP., <http://walmartstores.com/AboutUs/7606.aspx> (last visited Mar. 4, 2012).

⁷⁹ MIDLER, *supra* note 41, at 172.

⁸⁰ Fishman, *supra* note 58.

⁸¹ MIDLER, *supra* note 41, at 197.

⁸² Hunt, *supra* note 32, at 918. Melamine is an industrial chemical. *Id.* at 916 n.10.

⁸³ MIDLER, *supra* note 41, at 197.

Finally, China's low prices are possible partly because they fail to reflect the potential accident costs posed by their goods.⁸⁴ Judge Richard Posner's accident reduction theory suggests actors will forego preventative measures when the cost of accidents, and therefore the cost of liability, is less than the cost of prevention.⁸⁵ Chinese manufacturers can evade economic and legal liability; therefore, they have no financial incentive to install preventative measures. As a result, the price of their goods fails to account for products liability risks.⁸⁶ By evading liability, Chinese manufacturers have created a quality problem and asked U.S. importers, distributors, and retailers to assume all the associated legal and economic risks.⁸⁷

C. *Why Chinese Products Are Poorly Made*

"The China price" is economically alluring, but the lack of legal liability dissuades Chinese manufacturers from focusing on safety, resulting in poorly made products. The United States and China share the blame for the creation of a cost-cutting culture that has led to the production of defective products manufactured in China. While China is responsible for actually producing the goods, the United States is guilty of continually demanding and consuming such substandard products. There are three primary reasons poorly made Chinese products are abundant. First, Chinese governmental oversight is deficient. The Chinese government has failed to provide a workable structure to implement product safety laws, and its response to product safety incidents is dismal.⁸⁸ Second, Chinese manufacturers embrace unsafe cost-cutting measures to increase their profit margins.⁸⁹ Finally, Chinese manufacturers are firmly entrenched in global supply chains; China has emerged as the world's leading supplier for many consumer goods, and its prices are unmatched.⁹⁰

⁸⁴ Hunt, *supra* note 32, at 918–19.

⁸⁵ Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

⁸⁶ Hunt, *supra* note 32, at 918–19.

⁸⁷ *China's Toxic Toymaker*, ECONOMIST, Aug. 18th–24th 2007, at 58 ("No doubt many importers will examine their supply chains more carefully, if only for fear that they will be sued by customers who have bought poisonous furniture or explosive mobile telephones, and shunned by others who hear about such fiascos.").

⁸⁸ HARNEY, *supra* note 56, at 256–57; *The Poison Spreads*, ECONOMIST, Sept. 27th–Oct. 3rd 2008, at 77–78.

⁸⁹ *Shoddy Work: Why So Many Chinese Products Are Born To Be Bad*, ECONOMIST, May 16th–22nd 2009, at 89 [hereinafter *Shoddy Work*].

⁹⁰ *Stoking Protectionism*, *supra* note 56.

1. *Deficient Chinese Governmental Oversight*

The rapid economic and social development in China has “outpaced the development of government institutions.”⁹¹ As a result, the Chinese government has failed to provide a workable framework to implement product safety. Adding to the problem, enforcement of the law in China is riddled with corruption.⁹² Although the Chinese government drafts policy, it has traditionally delegated enforcement to local governments.⁹³ The local officials parse the government’s policies and decide which policies to enforce and the appropriate degree of enforcement.⁹⁴ This form of governance results in patchy implementation of rules and regulations regarding product quality.⁹⁵ In the 1980s and 1990s, the planned economy in China failed to create a sufficient number of jobs, and the Communist Party turned to private industry to employ the remaining workers.⁹⁶ Those who provided the necessary jobs earned political clout with government officials, and these unhealthy links between government and business persist today.⁹⁷ Consequently, manufacturers with close relationships to the Communist Party, especially those who are able to attract foreign investors, often enjoy a free pass when it comes to enforcement of safety regulations.⁹⁸

Chinese government officials are notorious for accepting bribes from manufacturers to approve their products without undergoing the legally mandated testing processes.⁹⁹ In 2007, China executed Zheng Xiaoyu, the former head of China’s State Food and Drug Administration, for taking bribes and approving fake medicines.¹⁰⁰ Following the Xiaoyu scandal, the General Administration of Quality Supervision, Inspection and Quarantine, a Chinese government agency, surveyed a range of Chinese food and consumer products and found that almost one-fifth were substandard.¹⁰¹ Lax standards and inconsistent enforcement in China allow defective products to leave the

⁹¹ HARNEY, *supra* note 56, at 256.

⁹² See *Stoking Protectionism*, *supra* note 56.

⁹³ HARNEY, *supra* note 56, at 257.

⁹⁴ *Id.*

⁹⁵ *Stoking Protectionism*, *supra* note 56.

⁹⁶ MIDLER, *supra* note 41, at 234.

⁹⁷ *Id.*; *Stoking Protectionism*, *supra* note 56.

⁹⁸ MIDLER, *supra* note 41, at 234–35; *The Poison Spreads*, *supra* note 88.

⁹⁹ *China Food Safety Head Executed*, BBC (July 10, 2007, 11:36 AM), <http://news.bbc.co.uk/2/hi/6286698.stm>.

¹⁰⁰ *Stoking Protectionism*, *supra* note 56.

¹⁰¹ *Id.*

country, bound for the U.S. market. Not only do Chinese government officials fail to appropriately monitor production, but they also fail to protect consumers when dangerous products are released into the market.

China is infamous for denying allegations of product inferiority. In 2007, U.S. toy company Mattel, the world's largest toymaker, recalled millions of Chinese-made toys due to lead paint and dangerous magnets.¹⁰² As the Mattel recalls unfolded, China issued a series of denials and claimed the "product-safety issue ha[d] been whipped out of proportion by the foreign media."¹⁰³ Similarly, pets in the United States started dying in 2007 because of Chinese-made pet food contaminated by melamine, an industrial chemical that is harmful if swallowed.¹⁰⁴ In response, Chinese officials issued emphatic denials claiming, "[t]he poisoning of American pets has nothing to do with China."¹⁰⁵ In September 2008, six children died and more than 300,000 became ill in China due to tainted milk powder.¹⁰⁶ Evidence reveals that the Chinese government began filtering out information on the internet about tainted milk in December 2007 in an effort to protect China's reputation during the year preceding the Beijing Olympics.¹⁰⁷ Toward the end of September 2008, as the problem grew to massive proportions, the Chinese government's response changed "seemingly overnight, from suppression to intervention."¹⁰⁸ Although the Chinese government had an opportunity to suppress the milk powder scandal in 2007 by issuing an early warning, it chose to hide the problem until it became a national crisis.

¹⁰² Jyoti Thottam, *Why Mattel Apologized to China*, TIME (Sept. 21, 2007), <http://www.time.com/time/business/article/0,8599,1664428,00.html>. Chinese-made toys were manufactured with strong magnets, which if swallowed in multiples could rip through a young child's intestines. *Id.* In August 2007, Zhang Shuang, who owned a factory that made Mattel toys, hanged himself following Mattel's massive recalls in the summer of 2007. *China's Toxic Toymaker*, *supra* note 87.

¹⁰³ *Stoking Protectionism*, *supra* note 56.

¹⁰⁴ Kate Pickert, *Brief History of Melamine*, TIME (Sept. 17, 2008), <http://www.time.com/time/health/article/0,8599,1841757,00.html>.

¹⁰⁵ *See China's Food Safety: A New Plan To Improve Standards of Food and Drugs*, ECONOMIST (June 12, 2007), <http://www.economist.com/node/9325404>. After denying responsibility for the contaminated pet food, the Chinese mounted a "counter-attack noting that food contamination occurred both within the US and with US exports to China." *Id.* Later, Chinese officials released a five-year food-and-drug safety plan, which called for increased inspections of food exports and a more sophisticated procedure for recalling faulty products. *Id.*

¹⁰⁶ *China Executed Two over Tainted Milk Powder Scandal*, BBC (Nov. 24, 2009, 12:03 AM), <http://news.bbc.co.uk/2/hi/8375638.stm>.

¹⁰⁷ *The Poison Spreads*, *supra* note 88.

¹⁰⁸ *Id.*

China's initial reaction of denying responsibility for product safety issues gives way to draconian punishment when the problems become undeniable.¹⁰⁹ As previously discussed, China executed Zheng Xiaoyu, former head of the State Food and Drug Administration, for accepting bribes and approving substandard products.¹¹⁰ China's reaction to the tainted milk powder scandal was similarly severe. The government executed two people and sentenced nineteen others to prison terms.¹¹¹ The Chinese government could alleviate harm to consumers at home and abroad by simply identifying, acknowledging, and alerting consumers to the potentially hazardous goods produced by Chinese manufacturers. However, instead of issuing early warnings, the government historically denies responsibility until numerous consumers have sustained significant injuries.

2. *Product Degradation: Quality Fade, Subcontracting, and Third-Party Auditing*

The Chinese government fails to provide top-down leadership and enforcement relating to product safety, but Chinese manufacturers are equally responsible for the production of substandard products. "Quality fade," or "incremental degradation of a product over time," is to blame for many poorly made Chinese products.¹¹² Chinese manufacturers lure U.S. importers into relationships, offering speed of production, the convenience of manufacturing in a single location, and low prices.¹¹³ Midler describes the process thus: "Typically, the importer negotiates pricing in advance of any order; then throughout the production process the [manufacturer] looks for savings at every step."¹¹⁴ Initially, the manufacturer will generate a product that matches the importer's specifications.¹¹⁵ After initial shipments, the manufacturer will resort to cost-cutting techniques, some of which are unsavory and dangerous: "Packaging is cheapened, chemical formulations altered, sanitary standards curtailed, and on and on, in a series of continual product debasements."¹¹⁶ Chinese manufacturers thereby transform "profitless contracts into lucrative relationships" by devaluing the manufacturing process and passing off the

¹⁰⁹ *Id.*

¹¹⁰ See *supra* text accompanying note 100.

¹¹¹ *China Executed Two over Tainted Milk Powder Scandal*, *supra* note 106.

¹¹² MIDLER, *supra* note 41, at 96.

¹¹³ *Id.* at 20.

¹¹⁴ *Id.* at 83.

¹¹⁵ *Shoddy Work*, *supra* note 89.

¹¹⁶ *Id.*

increased product risk to the importer, and eventually to the consumer who discovers the product's flaws.¹¹⁷

Subcontracting, which can cut costs and accelerate production, is a common practice in China.¹¹⁸ One auditor of Chinese factories estimates that ninety-nine percent of factories in China have a "shadow" factory, an off-site manufacturing building that helps to meet the customer's demands.¹¹⁹ U.S. customers, who typically demand to work directly with the factory owners, often have no knowledge of these "shadow" factories, which add an additional level to an already complicated supply chain and make products particularly difficult to trace.¹²⁰ As a result, the source of a dangerous product often cannot be identified.¹²¹ Midler notes, "You can't control for quality that you can't see. . . . Anything you are trying to monitor, you can't monitor if the product is being made somewhere else."¹²² When U.S. companies take production to China, they surrender the ability to oversee each step of the manufacturing process, and monitoring subcontracting from abroad is extremely difficult. Even reputable companies that carefully monitor their supply chains and emphasize product quality, like Mattel, can still fall victim to the dangers of subcontracting.¹²³ Mattel CEO Bob Eckert blamed the 2007 lead paint toy recall on a subcontractor who used paint from a non-authorized third-party supplier, in violation of Mattel's policies.¹²⁴ Unless U.S. companies can successfully monitor their suppliers' subcontractors, there is no guarantee of where, how, or to what standards the products are made.¹²⁵

The United States, aware of "quality fade" and subcontracting, has implemented third-party auditing in an attempt to combat substandard production in China.¹²⁶ In theory, auditing is a logical way to monitor Chinese manufacturers. In practice, however, audits fail to provide the necessary oversight.¹²⁷ The moment U.S. importers suspect a Chinese manufacturer is

¹¹⁷ *Id.*

¹¹⁸ HARNEY, *supra* note 56, at 46.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 47 (quoting Paul Midler) (internal quotation marks omitted).

¹²² *Id.*

¹²³ *Stoking Protectionism, supra* note 56; *China's Toxic Toymaker, supra* note 87.

¹²⁴ Thottam, *supra* note 102. One of Mattel's contract manufacturers allegedly engaged the subcontractor. *Stoking Protectionism, supra* note 56.

¹²⁵ HARNEY, *supra* note 56, at 47.

¹²⁶ See Dexter Roberts & Pete Engardio, *Secrets, Lies, and Sweatshops*, BUSINESSWEEK, Nov. 27, 2006, at 50.

¹²⁷ *Id.*

cutting corners, the importers typically implement an audit.¹²⁸ Unfortunately, these inspections are often “more form than function.”¹²⁹ Corruption within the auditing industry is widespread and bribes make a mockery of the process.¹³⁰ Many auditors in China have no qualifications and factory managers routinely offer auditors money under the table so the auditor will give the factory a positive review.¹³¹ U.S. companies are not merely innocent players unknowingly subjected to China’s faulty auditing practices. Some U.S. companies who hire auditors tell the inspectors candidly that the inspection is simply a gesture.¹³² U.S. companies want to appear as though they take product control seriously, yet do not want the inspectors to audit too strictly or report too many problems.¹³³ If problems can go undetected by consumers, companies prefer not to know about substandard products.¹³⁴ U.S. companies buy from China in order to save money and satiate demand for cheaper products.¹³⁵ This constant pressure to produce cheap goods incentivizes Chinese manufacturers to break the law to comply with demand. As a result, U.S. companies are caught between the desire to evade costly and disruptive hitches in their manufacturing processes and the fear of being responsible for producing a dangerous product.¹³⁶

3. *China’s Economic Edge and Resulting Quality Control Issues*

Chinese manufacturers get away with “quality fade”¹³⁷ and questionable subcontracting practices because they occupy a key place in Western supply chains and have positioned themselves as the leading suppliers for many goods.¹³⁸ Even when U.S. companies are unhappy about the product quality from China, alternative manufacturing sources are limited and China’s low prices are unmatched.¹³⁹ The economic benefits of manufacturing in China are

¹²⁸ *Shoddy Work*, *supra* note 89.

¹²⁹ *Id.*

¹³⁰ HARNEY, *supra* note 56, at 210–11.

¹³¹ *Id.* at 209–211.

¹³² *Id.* at 227.

¹³³ *Id.*

¹³⁴ *Shoddy Work*, *supra* note 89.

¹³⁵ HARNEY, *supra* note 56, at 227.

¹³⁶ *Shoddy Work*, *supra* note 89.

¹³⁷ *Id.*

¹³⁸ *Stoking Protectionism*, *supra* note 56. Seventy to eighty percent of the toys sold in the United States are made in China. Eric S. Lipton & David Barboza, *As More Toys Are Recalled, Trail Ends in China*, N.Y. TIMES (June 19, 2007), <http://www.nytimes.com/2007/06/19/business/worldbusiness/19toys.html>.

¹³⁹ *Stoking Protectionism*, *supra* note 56.

so significant that importers are forced to deal with potential product quality drawbacks.¹⁴⁰ Although Mattel recalled millions of Chinese-made toys in 2007, incurring economic and reputational damage, the company continues to outsource its manufacturing to China.¹⁴¹ Jyoti Thottam notes, “Mattel needs China just as much as China needs Mattel, and it cannot afford to jeopardize its relationship with the country that produces 65% of its toys.”¹⁴² While U.S. companies may become more selective about which manufacturers they choose to work with, it is “unlikely there [will] be a large shift out of Chinese products.”¹⁴³ China has firmly entrenched itself in U.S. manufacturing supply chains and the mutual economic benefits indicate that the United States will remain China’s primary export market as China further expands its manufacturing prowess.

China is still developing as a country and is arguably going through the same quality cycle that Japan endured in its post-World War II development and that the United States encountered during the nineteenth-century manufacturing boom.¹⁴⁴ Economists acknowledge that every developing economy undergoes quality issues and substandard products.¹⁴⁵ China is maturing in front of the entire developed world and is subjected to more scrutiny than either Japan or the United States suffered.¹⁴⁶ However, China’s quality control issues differ from those of Japan and the United States due to the type and the extent of quality manipulation involved.¹⁴⁷ China is not simply working out the kinks in its manufacturing process or merely cutting corners; Chinese manufacturers are intentionally manipulating the quality of the product to bypass third-party quality assurance tests and “slip one past the inspectors.”¹⁴⁸ Chinese manufacturers are not only shortcutting the production process in an attempt to save money, but are also deliberately substituting inferior products in such a way that their clients cannot detect the change.¹⁴⁹ Although experts on Chinese production predicted relationships with Chinese

¹⁴⁰ MIDLER, *supra* note 41, at 62.

¹⁴¹ Thottam, *supra* note 102.

¹⁴² *Id.*

¹⁴³ *Stoking Protectionism*, *supra* note 56.

¹⁴⁴ *Shoddy Work*, *supra* note 89.

¹⁴⁵ MIDLER, *supra* note 41, at 197–98.

¹⁴⁶ *Shoddy Work*, *supra* note 89.

¹⁴⁷ MIDLER, *supra* note 41, at 198.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

manufacturers would mature over time, factory owners have continued to deceive U.S. customers and repeatedly push quality control limits.¹⁵⁰

Recent product recalls and safety scares in the United States involving Chinese-made products have highlighted the fact that U.S. consumers are paying for the lack of knowledge and accountability regarding the manufacturing process in China.¹⁵¹ In 2007 alone, the CPSC recalled 473 different products; more than eighty percent were imported and seventy-four percent of those imports came from China.¹⁵² Among these recalled products were Chinese-made pet food, toothpaste, seafood products, tires, and toys.¹⁵³ In August of the same year, Mattel recalled 19 million Chinese-made toys that were coated with excessive amounts of lead paint and contained unsafe magnets.¹⁵⁴ Most recently, in 2009, the CPSC identified defective drywall made in China as problematic.¹⁵⁵ Flaws in the United States and China regarding oversight and accountability in the manufacturing industry mean “the primary source of discovery will come in the worst possible way—by consumers who buy Chinese products, only to discover their flaws themselves.”¹⁵⁶ While it may not be feasible to completely insulate U.S. consumers from flawed Chinese products, consumers should, at the very least, be able to turn to legal recourse for compensation if injured by such products.

II. CURRENT STATE OF THE LAW AND PROPOSED LEGISLATION

Dangerous Chinese-made products enter the U.S. stream of commerce and injure consumers; however, U.S. victims are unable to sue the foreign manufacturer responsible for production. There are three primary procedural hurdles for plaintiffs attempting to collect on a U.S. judgment against a Chinese manufacturer: (1) personal jurisdiction, (2) service of process, and (3)

¹⁵⁰ *Id.* at 199.

¹⁵¹ HARNEY, *supra* note 56, at 185.

¹⁵² Memorandum from the Subcomm. on Commerce, Trade, and Consumer Prot. Staff to Members of the Subcomm. on Commerce, Trade, and Consumer Prot. 1–2 (June 11, 2010), available at <http://democrats.energycommerce.house.gov/documents/20100612/Briefing.Memo.ctcp.06.16.2010.pdf>.

¹⁵³ Kayla Webley, *List of Problem Chinese Imports Grows*, NPR (July 10, 2007), <http://www.npr.org/templates/story/story.php?storyId=11656278>.

¹⁵⁴ Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent from China*, N.Y. TIMES (Aug. 15, 2007), <http://query.nytimes.com/gst/fullpage.html?res=950CEEDB153FF936A2575BC0A9619C8B63&scp=2&sq=Mattel%20toy%20recall&st=cse>. Sixty-three of the magnetized toys recalled were made in China, but recalled due to errors in Mattel design specifications. *Id.*

¹⁵⁵ *Drywall Information Center*, *supra* note 5.

¹⁵⁶ *Shoddy Work*, *supra* note 89, at 90.

enforcement of the judgment. These procedural obstacles are discussed in turn. The U.S. Congress has noted the law's shortcomings in the area of foreign manufacturer liability and, in response to the numerous recalls of Chinese products in 2007, passed the Consumer Product Safety Improvement Act of 2008 ("2008 Act").¹⁵⁷ The 2008 Act focuses on improving product safety in the United States,¹⁵⁸ but fails to hold foreign manufacturers liable for releasing dangerous products in the U.S. stream of commerce. In an attempt to remedy the shortcomings present in the 2008 Act, Ohio Representative Betty Sutton introduced the Foreign Manufacturers Legal Accountability Act of 2010 in the U.S. House of Representatives in February 2010; when the 2010 Act died in committee, Sutton reintroduced the bill in December 2011.¹⁵⁹ These proposed items of legislation address personal jurisdiction and service of process as they relate to foreign manufacturers, but fall short of providing a workable method for enforcing U.S. judgments abroad.¹⁶⁰

A. *Personal Jurisdiction*

Foreign manufacturer liability, although an unsettled area of the law, is not a new legal issue. In 1987 the Supreme Court decided *Asahi Metal Industry Co. v. Superior Court*, a distinguished products liability case involving a Japanese defendant.¹⁶¹ The Court held that, to sue a foreign company in U.S. court, the plaintiff must prove the defendant established minimum contacts in the forum state such that the suit does not violate "traditional notions of fair play and substantial justice."¹⁶² The Court's decision set forth a two-pronged analysis for garnering jurisdiction: (1) the defendant's purposeful minimum contacts with the forum state, and (2) the fairness of subjecting the defendant to personal jurisdiction in the forum state.¹⁶³ Under the fairness prong, the Court assessed a number of factors, including the burden a foreign company faces in having to defend a suit in the United States.¹⁶⁴ The Court held that, based on the facts of the case, it was unreasonable for California to assert

¹⁵⁷ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016; Russell T. Gips, Comment, *From China with Lead: The Hasty Reform of the Consumer Product Safety Commission*, 46 HOUS. L. REV. 545, 548 (2009).

¹⁵⁸ See *infra* pp. 346–48, which discuss the 2008 Act.

¹⁵⁹ See *supra* notes 27–28 and accompanying text.

¹⁶⁰ H.R. 3646, 112th Cong. §§ 3(a), 3(c)(1) (2011); H.R. 4678, 111th Cong. §§ 3(a), 3(c)(1) (2010).

¹⁶¹ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

¹⁶² *Id.* at 113–16.

¹⁶³ *Hearing—Leveling the Playing Field*, *supra* note 9.

¹⁶⁴ *Asahi*, 480 U.S. at 113.

jurisdiction over the foreign defendant.¹⁶⁵ The Court failed to announce a majority opinion under the purposeful availment prong, and the split decision produced a confusing set of competing theories regarding what degree of purposeful contact is required to satisfy due process.¹⁶⁶

Justice O'Connor's plurality opinion states that merely placing a product in the stream of commerce is insufficient to constitute purposeful contact.¹⁶⁷ O'Connor's opinion, often referred to as the "stream-of-commerce plus" test, requires the foreign manufacturer to actively engage with the forum state.¹⁶⁸ Unfortunately, this high burden has protected Chinese manufacturers from lawsuits.¹⁶⁹ Justice Brennan's plurality opinion rejected O'Connor's stream of commerce theory and advocated for a standard based on the foreign defendant's "awareness" that the product might end up in the forum state: "As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."¹⁷⁰ Lower courts have been severely divided over the application of the *Asahi* stream of commerce test.¹⁷¹

Although the jurisdictional threshold in domestic consumer products cases is traditionally very low, in *Asahi* the Supreme Court "embraced an arguably higher standard where the defendant is a foreign party."¹⁷² The complex minimum contacts analysis and the Court's failure to articulate a purposeful

¹⁶⁵ *Id.* at 116.

¹⁶⁶ Raymond L. Mariani, *U.S. Supreme Court To Revisit Personal Jurisdiction over Foreign Manufacturers*, NIXON PEABODY (Nov. 16, 2010), http://www.nixonpeabody.com/linked_media/publications/Products_Alert_11_16_2010.pdf.

¹⁶⁷ *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality). In contrast, Justice Brennan rejected the part of Justice O'Connor's opinion that required conduct in addition to placing the product in the stream of commerce. *Id.* at 117 (Brennan, J., plurality). Brennan argued that as long as the defendant is aware that the final product is being marketed in the forum state, jurisdiction comports with the Due Process Clause. *Id.*

¹⁶⁸ *E.g.*, *Nicastro v. McIntyre Mach. Am.*, 987 A.2d 575, 586 (N.J. 2010).

¹⁶⁹ One commentator has argued that Justice O'Connor's opinion in *Asahi* "has made it virtually impossible for an injured plaintiff to sue a component parts manufacturer in any state or country other than its place of domicile or the state or country where delivery of the component part is made to a product assembler." Christine M. Wiseman, *Reconstructing the Citadel: The Advent of Jurisdictional Privity*, 54 OHIO ST. L.J. 403, 404 (1993).

¹⁷⁰ *Asahi*, 480 U.S. at 117.

¹⁷¹ GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 139 (3d ed. 1996); Robert C. Neff, *After Asahi: Forging a New Personal Jurisdiction Standard*, MARTINDALE.COM (May 24, 2010), http://www.martindale.com/products-liability-law/article_Wilson-Elser-Moskowitz-Edelman-Dicker_1032600.htm. Some lower courts have created their own hybrid of the O'Connor and Brennan theories regarding the stream of commerce test. *Id.*

¹⁷² Jacques Delisle & Elizabeth Trujillo, *Consumer Protection in Transnational Contexts*, 58 AM. J. COMP. L. 135, 138 (2010).

availability requirement has allowed foreign defendants to escape jurisdiction and thus liability for dangerous and defective products sold in the United States. Most Chinese companies strategically structure their businesses using independent importers and distributors in an effort to reduce their exposure to lawsuits.¹⁷³ Chinese manufacturers argue that they do not purposefully conduct business in the forum state, leaving legal liability on the shoulders of the U.S. importers, distributors, and retailers. Chinese manufacturers enjoy economic benefits from the sale of their products in the United States, but are insulated from the legal and economic ramifications created when their products cause harm. Globalization and the resulting international marketplace have called into question the effectiveness of the *Asahi* jurisdictional test. The Supreme Court, agreeing this issue was ripe for discussion, granted certiorari in two cases addressing jurisdiction over foreign manufacturers in the context of a global economy.¹⁷⁴

On June 27, 2011, the Supreme Court issued decisions in two cases that had the potential to vastly expand the scope of products liability suits in U.S. state courts against foreign manufacturers.¹⁷⁵ Unfortunately, the outcomes of both cases will likely bar future products liability lawsuits against foreign manufacturers who have little or no contact with the forum state.¹⁷⁶ Both cases raised questions regarding when U.S. courts, in accordance with the Fourteenth Amendment Due Process Clause, may hear claims arising from injuries sustained by products manufactured and placed in the stream of commerce by multinational corporations.¹⁷⁷ In *J. McIntyre Machinery, Ltd. v. Nicastro*, the question presented was whether the state of New Jersey may exercise in personam jurisdiction¹⁷⁸ over a foreign manufacturer when the manufacturer targets the U.S. market in general for the sale of the product.¹⁷⁹ J. McIntyre, a company incorporated in the United Kingdom, manufactured machinery and

¹⁷³ Hearing—Leveling the Playing Field, *supra* note 9, at 4.

¹⁷⁴ Sean Wajert, *Supreme Court Grants Cert in Important Personal Jurisdiction Cases*, MASS TORT DEF. (Oct. 7, 2010), <http://www.masstortdefense.com/2010/10/articles/supreme-court-grants-cert-in-important-personal-jurisdiction-cases>.

¹⁷⁵ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

¹⁷⁶ Eric C. Strain, *Personal Jurisdiction: Is No News from the Supreme Court Good News for Foreign Product Manufacturers?*, NIXON PEABODY (June 30, 2011), http://www.nixonpeabody.com/linked_media/publications/Products_Alert_06_30_2011.pdf.

¹⁷⁷ Trooboff, *supra* note 17.

¹⁷⁸ A court has in personam, or specific, jurisdiction over a non-resident defendant if the claim arises out of the defendant's contacts with the forum state. RICHARD D. FREER, *CIVIL PROCEDURE* 40–41 (2d ed. 2009).

¹⁷⁹ Mariani, *supra* note 166.

used a U.S. distributor (based in Ohio) to sell its products in the United States.¹⁸⁰ J. McIntyre never sold its machines to buyers in the United States beyond its U.S. distributor, never marketed goods in New Jersey, and never shipped goods directly to New Jersey.¹⁸¹ No more than four of J. McIntyre's machines ended up in New Jersey.¹⁸² J. McIntyre officials did attend annual conventions in the United States for the scrap metal recycling industry; however, none of these conventions took place in New Jersey.¹⁸³ An employee of a New Jersey scrap metal company lost four fingers as a result of an accident involving a metal-cutting machine manufactured by J. McIntyre.¹⁸⁴ The employee, a resident of New Jersey, brought a products liability action against J. McIntyre in New Jersey state court.¹⁸⁵ J. McIntyre argued, consistent with *Asahi*, that the state cannot assert personal jurisdiction when the product causing harm entered the state through the stream of commerce unless the foreign entity purposefully availed itself to the benefits of the forum state.¹⁸⁶

The New Jersey Supreme Court issued an opinion, characterized as an “unprecedented expansion of personal jurisdiction,”¹⁸⁷ in which the divided court held that when a foreign manufacturer places an allegedly defective product in the stream of commerce that targets the U.S. market and a New Jersey consumer purchases that product, the manufacturer is subject to personal jurisdiction in New Jersey.¹⁸⁸ The court conducted an extensive analysis of *Asahi* in the context of a globalized economy and ultimately applied a stream of commerce test that comported with Justice Brennan's “awareness” standard in *Asahi*.¹⁸⁹ The court found it significant that “our nation is a global economy driven by startling advances in the transportation of products and people.”¹⁹⁰ The court recognized the impact of globalization, and its holding reflects a shift in the law to account for the dramatic changes in

¹⁸⁰ *Nicastro v. McIntyre Mach. Am.*, 987 A.2d 575, 579 (N.J. 2010).

¹⁸¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Nicastro*, 987 A.2d at 577.

¹⁸⁵ *Id.* at 577–78.

¹⁸⁶ Alexandra B. Cunningham, *United States Supreme Court To Address “Stream-of-Commerce Theory” as Basis for Personal Jurisdiction over Foreign Manufacturers*, MARTINDALE.COM (Nov. 11, 2010), http://www.martindale.com/products-liability-law/article_Hunton-Williams-LLP_1182918.htm.

¹⁸⁷ *Id.*

¹⁸⁸ *Nicastro*, 987 A.2d at 592.

¹⁸⁹ *Id.* at 589.

¹⁹⁰ *Id.* at 582.

international commerce—reflecting the new reality of a contemporary global economy.

The U.S. Supreme Court reversed the New Jersey Supreme Court and held 6-3 that personal jurisdiction did not exist in this particular products liability case. However, there was no majority opinion on the applicable rule of law to be applied in similar situations.¹⁹¹ The Court held that no stream of commerce doctrine can displace the general rule, which requires that a manufacturer is subject to jurisdiction only if it purposefully avails itself of the privileges of conducting activities within the forum state.¹⁹² In this case, J. McIntyre did not have a single contact with New Jersey other than the fact that the product in question ended up there; therefore, the Court reasoned, it had not purposefully availed itself of the New Jersey market.¹⁹³ Justice Kennedy, writing for a plurality of four justices, adhered to O'Connor's concurrence in *Asahi*, in which she wrote that placement of a product into the stream of commerce, on its own, does not constitute purposeful action by the defendant directed toward the forum state.¹⁹⁴ Applying this standard, Kennedy opined that jurisdiction over J. McIntyre was improper because, while J. McIntyre may have intended to serve the U.S. market generally, there was no evidence of any actions leading to purposeful availment of the New Jersey market specifically.¹⁹⁵

Justice Breyer, joined by Justice Alito, filed a concurrence in which he agreed with the ruling, but argued it was “unwise to announce a rule of broad applicability” at this time, given that the case failed to address recent advances in commerce and communication.¹⁹⁶ Breyer relied on precedent and felt that the case should be decided narrowly and limited to its facts.¹⁹⁷ He found this particular case an unsuitable vehicle for making extensive pronouncements that “refashion basic jurisdictional rules.”¹⁹⁸ Although Breyer declined to overturn

¹⁹¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (Kennedy, J., plurality); John Maley, *Editorial: Personal Jurisdiction Theories Still Evolving*, IND. LAW. (Aug. 3, 2011), <http://www.theindianalawyer.com/article/print?articleId=26858>.

¹⁹² *J. McIntyre*, 131 S. Ct. at 2785 (Kennedy, J., plurality).

¹⁹³ *Id.* at 2790.

¹⁹⁴ *Id.* at 2792 (Breyer, J., concurring). Kennedy disagreed with Justice Brennan's opinion in *Asahi*, which argued that jurisdiction can be based simply on placing a product into the stream of commerce, so long as the defendant is aware that the product is being marketed in the forum state and “the possibility of a lawsuit there cannot come as a surprise.” *Id.* at 2789 (Kennedy, J., plurality).

¹⁹⁵ *Id.* at 2790–91 (Kennedy, J., plurality).

¹⁹⁶ *Id.* at 2791 (Breyer, J., concurring).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*; see also Esther H. Lim, *No Personal Jurisdiction Exists over a Foreign Party Because Simply Placing Goods in the Stream of Commerce, Without More, Is Not an Act Purposefully Directed to the Forum*

Asahi at this opportunity, he acknowledged that the global economy might require a reexamination of the Court's precedents.¹⁹⁹

Justice Ginsburg, joined by two other justices, strongly disagreed with the fractured majority.²⁰⁰ Ginsburg felt J. McIntyre's goal was to "simply sell as much as it can, wherever it can."²⁰¹ She opined that jurisdiction could be properly exercised over J. McIntyre based on the manufacturer's efforts to distribute products in the United States generally.²⁰² Ginsburg wrote, "McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, purposefully availed itself of the United States market nationwide McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor."²⁰³ Ginsburg feared that "the Court's decision would allow foreign manufacturers to insulate themselves from products liability litigation in the U.S. by engaging a U.S. distributor to ship its goods throughout the U.S. market."²⁰⁴ She warned that the Court's decision might prevent U.S. states from protecting their citizens from defective products.²⁰⁵

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court addressed whether a foreign corporation is subject to general jurisdiction when the particular product at issue did not enter the forum state, but other similar products did.²⁰⁶ In 2004, two thirteen-year-old boys from North Carolina died in a bus accident outside of Paris, France.²⁰⁷ The complaint alleged that a flawed Goodyear tire caused the incident.²⁰⁸ The administrators of the boys' estates brought suit against Goodyear subsidiaries, located abroad, in North

State, FINNEGAN (July 2011), http://www.finnegan.com/files/upload/Newsletters/Last_Month_at_the_Federal_Circuit/2011/July/FCN_Jul11_4.html.

¹⁹⁹ Beth S. Rose & Charles J. Falletta, *U.S. Supreme Court Reversed New Jersey's Exercise of Personal Jurisdiction over Foreign Manufacturer*, NAT'L L. REV. (Aug. 5, 2011), <http://www.natlawreview.com/article/us-supreme-court-reverses-new-jersey-s-exercise-personal-jurisdiction-over-foreign-manufac-2>.

²⁰⁰ *J. McIntyre*, 131 S. Ct. at 2794–2804 (Ginsburg, J., dissenting).

²⁰¹ *Id.* at 2794.

²⁰² *Id.* at 2801.

²⁰³ *Id.* (internal quotation marks omitted).

²⁰⁴ Rose & Falletta, *supra* note 199.

²⁰⁵ *Id.*

²⁰⁶ Mariani, *supra* note 166.

²⁰⁷ *Brown v. Meter*, 681 S.E.2d 382, 384 (N.C. Ct. App. 2009).

²⁰⁸ *Id.*

Carolina state court.²⁰⁹ The suit claimed Goodyear tires were defectively manufactured and subsequently caused the accident.²¹⁰

The dispute in this case did not arise from Goodyear's contacts with North Carolina.²¹¹ The tires in question were manufactured overseas and the accident occurred in France. Therefore, general rather than specific jurisdiction was at issue. General jurisdiction is permissible when the defendant's contacts with the state are unrelated to the cause of action, but the defendant's activities with the state are sufficiently "continuous and systematic" to permit jurisdiction over the defendant.²¹² The North Carolina Court of Appeals found jurisdiction was permissible over Goodyear subsidiaries that were located abroad and that manufactured tires for sale in the United States.²¹³ The court acknowledged the defendants operated a continuous and highly organized U.S.-based sales and distribution network.²¹⁴ Goodyear subsidiaries manufactured thousands of tires that were distributed in North Carolina.²¹⁵ The court held jurisdiction was proper because the foreign subsidiaries could have reasonably expected to be sued in North Carolina court based on their continuous sale of tires in the United States.²¹⁶

The U.S. Supreme Court reversed the judgment of the North Carolina Court of Appeals.²¹⁷ In a unanimous decision, the Court held that the three foreign subsidiaries of Goodyear were not subject to personal jurisdiction in North Carolina state court.²¹⁸ Justice Ginsburg, writing for the Court, stated that general jurisdiction could not be based on the fact that some of the tires Goodyear subsidiaries manufactured abroad entered North Carolina through the stream of commerce.²¹⁹ She explained that such a tenuous connection with the state did not establish the requisite "continuous and systematic" affiliation that would allow North Carolina to exercise general jurisdiction.²²⁰ Ginsburg explained that "flow of a manufacturer's products into the forum . . . may

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 387.

²¹² *Id.* at 388 (quoting *Skinner v. Preferred Credit*, 361 N.C. 114, 122 (2006)).

²¹³ *Id.* at 395.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 394.

²¹⁷ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2858 (2011).

²¹⁸ *Id.* at 2857.

²¹⁹ *Id.* at 2855–56.

²²⁰ *Id.* at 2856.

bolster an affiliation germane to *specific* jurisdiction . . . but ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.”²²¹

Almost twenty-five years after its decision in *Asahi*, the Supreme Court had the opportunity to revisit the decision and to amend or overrule the judgment, which is now inadequate because it fails to protect U.S. consumers from defective foreign-made products sold in the United States. The Court clarified the general jurisdiction standard in *Goodyear* but punted when it came time to issue a framework for specific jurisdiction in *J. McIntyre*.²²² The stream of commerce theory “remains unsettled at best” after *J. McIntyre*,²²³ and the fractured opinion virtually ensures there will be future decisions from the Court on this issue as both federal and state courts wrestle with the impact of globalized commerce on products liability lawsuits.²²⁴ Unfortunately, the Court missed an opportunity to issue a definitive statement on questions regarding the jurisdictional reach of U.S. courts in products liability cases and the ramifications of the split decision in *Asahi* remain virtually unaltered.²²⁵ The Court declined to expand the jurisdictional reach of state courts based on a foreign defendant’s nationwide contacts; therefore, it will be more difficult for plaintiffs to succeed on a pure stream of commerce theory against foreign manufacturers.²²⁶ Raising the bar for personal jurisdiction will undoubtedly hurt U.S. consumers who are injured by products manufactured abroad and sold in the United States.²²⁷ Thomas L. Gowen, a partner at the Locks Law Firm in Philadelphia, commented on the decisions: “Basically the Supreme Court has given corporations a roadmap for avoiding responsibility.”²²⁸ The Court has allowed foreign manufacturers to insulate themselves by using middlemen in their distribution chains and by targeting the U.S. market while claiming they have no knowledge of precisely where their products will be sold.

²²¹ *Id.* at 2855 (emphasis in original).

²²² See Atkins, *supra* note 25.

²²³ Maley, *supra* note 191.

²²⁴ John C. Maloney & Florice E. Pressman, *The Supreme Court Protects Foreign Manufacturers in the Stream of Global Commerce*, MARTINDALE.COM (July 20, 2011), http://www.martindale.com/products-liability-law/article_Day-Pitney-LLP_1316130.htm.

²²⁵ Strain, *supra* note 176.

²²⁶ *Id.*

²²⁷ Atkins, *supra* note 25.

²²⁸ *Id.*

B. Service of Process

Personal jurisdiction is merely the first procedural hurdle a plaintiff must overcome in a suit against a foreign manufacturer. Once a plaintiff has garnered personal jurisdiction over the defendant, the plaintiff must properly serve the defendant, thereby providing notification of the charge.²²⁹ The United States and China have not executed a bilateral treaty governing service of process; therefore, the Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters²³⁰ governs.²³¹ Article 2 of the convention requires each contracting state to designate a Central Authority, which will undertake to receive requests for service.²³² Under Article 5, “[t]he Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency.”²³³ A U.S. plaintiff bears the cost of having the Central Authority in China serve notice as well as the cost of translating the document from English to Chinese, which often amounts to thousands of dollars.²³⁴ Due to complex supply chains and collusion between government and factory owners, Chinese authorities often fail to serve process or cannot locate the accused company because it has dissolved or changed ownership.²³⁵ The lack of a registered agent for service of process in the United States is problematic and encourages plaintiffs to sue U.S. defendants when such an option is available.²³⁶

²²⁹ FREER, *supra* note 178, at 40–41; *see also* *Hearing—Leveling the Playing Field*, *supra* note 9, at 4.

²³⁰ Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163.

²³¹ Daniel Griswold & Sallie James, *Consumer Safety Bill Could Boomerang Against U.S. Manufacturers*, FREE TRADE BULL., Sept. 28, 2010, at 1, available at http://www.cato.org/pub_display.php?pub_id=12174. The United States ratified the convention in 1969. BORN, *supra* note 171, at 797. China became a member in 1991. *Id.*

²³² Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *supra* note 228, art. 5.

²³³ *Id.*

²³⁴ *Hearing—Leveling the Playing Field*, *supra* note 9, at 4.

²³⁵ Dan Harris, *Chinese Drywall Litigation and Why Seizing Assets Is Very Different from Seizing Ships*, CHINA L. BLOG (Feb. 28, 2010), http://www.chinalawblog.com/2010/02/chinese_drywall_and_the_halfas.html.

²³⁶ *See* *Hearing on H.R. 4678, the “Foreign Manufacturers Legal Accountability Act” Before the H. Subcomm. on Commerce, Trade, and Consumer Prot.*, 111th Cong. 2 (2010) [hereinafter *Hearing—H.R. 4678*] (statement of Jeremy Baskin, Import Surveillance Division, Office of Compliance, U.S. Consumer Product Safety Commission).

C. Enforcement

Enforcement of a U.S. judgment in China is the most formidable obstacle an injured U.S. consumer faces. Even if plaintiffs can garner jurisdiction over the manufacturer and properly serve the company, the judgment is meaningless until the injured consumer receives financial compensation. Although a plaintiff could enforce the judgment if a Chinese company had assets in the United States, or in another country that generally enforces U.S. judgments, Chinese manufacturers rarely have assets outside of China.²³⁷ Article 267 of the Chinese Civil Procedure Law mandates the existence of a treaty or de facto reciprocity to enforce a foreign judgment in China—neither exists between the United States and China.²³⁸

Because no such United States–China treaty exists, the only potential enforcement mechanism at present is reciprocity.²³⁹ Reciprocity is based on the theory that if the United States is willing to enforce Chinese judgments, China would be willing to enforce U.S. judgments.²⁴⁰ In 2009, the Central District of California upheld a judgment against Robinson Helicopters, issued by a Chinese court, under California’s Uniform Money Judgments Recognition Act.²⁴¹ Although enforcement of a single Chinese judgment does not create reciprocity, the United States has demonstrated that it will enforce Chinese decisions that are “final, conclusive, and enforceable.”²⁴² China has yet to reciprocate.²⁴³ Granting greater recognition to Chinese judgments in the United

²³⁷ *Hearing—Leveling the Playing Field*, *supra* note 9, at 4.

²³⁸ Donald C. Clarke, *The Enforcement of United States Court Judgments in China: A Research Note 1–2* (George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 236, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943922.

²³⁹ *Id.* at 2–3.

²⁴⁰ *See* Di Er Bai Liu Shi Wu Tiao (第二百六十五条) [Civil Procedure Law of the People’s Republic of China, Article 265], (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective April 9, 1991), available at P.R.C. LAWS, <http://www.lawinfochina.com/display.aspx?id=6459&lib=law>. Under PRC Law, “[i]f a legally effective judgment or ruling made by a foreign court seeks the recognition and enforcement of a people’s court of the People’s Republic of China, . . . the foreign court may, according to the provisions of the international treaties concluded or acceded to by the People’s Republic of China or based on the principle of reciprocity, request the recognition and enforcement of a people’s court.” *Id.*

²⁴¹ *Hubei Gezhouba Sanlian Indus. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187 (C.D. Cal. July 22, 2009).

²⁴² *Id.* at *5. A civil suit for recognition of a foreign judgment may be heard under federal law if the foreign judgment is “final, conclusive and enforceable.” *Id.*

²⁴³ *See* Zhang Shouzhi et al., *Forum Shopping for Dispute Resolution*, KING & WOOD, <http://www.kingandwood.com/article.aspx?id=Forum-Shopping-for-Dispute-Resolution-Hurdles-and-Solutions&language=en> (last visited Mar. 10, 2012). Chinese courts do not presume China has reciprocal interests with other countries, and China has not acceded to any multilateral treaties that allow it to mutually recognize and enforce court judgments rendered in other countries. *Id.* “In short, if there is no applicable bilateral treaty

States would not require courts in China to offer the same recognition to American decisions.²⁴⁴ Reciprocity is built on mutual respect for each other's legal systems and a desire to nurture and protect the relationship between the two countries. Such an understanding does not yet exist between China and the United States.²⁴⁵

Under U.S. customs law, the U.S. importer of record (the owner or purchaser of the goods) is charged with the legal responsibility of ensuring goods enter the United States in compliance with all federal laws.²⁴⁶ U.S. products liability law has expanded liability to encompass not only manufacturers, but distributors and sellers as well.²⁴⁷ A consumer injured by a defective product in the United States can bring suit against anyone in the supply chain—from the manufacturer to the importer or retailer. Due to the procedural mechanisms presently in place, a U.S. plaintiff would save time and money bringing suit against a domestic defendant rather than a Chinese manufacturer.²⁴⁸ Furthermore, the plaintiff is considerably more likely to receive economic compensation in a domestic suit, given the fact that China has never before enforced a U.S. judgment.²⁴⁹

The United States is presently grappling with the law's procedural shortcomings regarding protection for consumers who are injured by foreign-made products. The fact that the U.S. Supreme Court granted certiorari in two cases in this area indicates the severity of the law's imperfections. Unfortunately, effective economic compensation for injured U.S. consumers remains elusive. Even if jurisdiction and service of process are possible, no solution currently exists regarding enforcement of the judgment. A fund designated to reimburse injured U.S. consumers would circumvent the law's inability to force China to honor U.S. judgments. Manufacturers responsible for dangerous exports would be required to contribute to the fund,²⁵⁰ thereby

providing mutual recognition and enforcement of judgments between the forum state and China, judgments rendered in the forum state will not be recognized and enforced by Chinese courts." *Id.*

²⁴⁴ Harris, *supra* note 235.

²⁴⁵ Eric Stone, the former director of the CPSC Legal Division, Office of Compliance and Field Operations, notes that "[w]e are not yet at a point in our international jurisprudence where each country is willing to participate in another's legal processes." Kessler & Sapien, *supra* note 1.

²⁴⁶ 19 U.S.C. § 1484(a) (2006).

²⁴⁷ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, *supra* note 10, § 1.

²⁴⁸ *Hearing—Leveling the Playing Field*, *supra* note 9, at 4.

²⁴⁹ See Shouzhi et al., *supra* note 243.

²⁵⁰ If a manufacturer produced a product that injured a U.S. citizen and failed to compensate the victim, the manufacturer would be required to contribute to the fund as a condition of continuing to export to the United States.

providing the economic incentive that the law lacks to incite Chinese manufacturers to monitor the quality and safety of their products. At the same time, the fund would provide a mechanism for injured consumers to enjoy the monetary compensation they deserve. Procedural amendments like those the Supreme Court considered in *J. McIntyre* and *Goodyear* should be welcomed, but will not alone resolve the law's shortcomings.

Efforts to amend foreign manufacturer liability law in the United States have not been limited to judicial activism. The U.S. Congress has attempted to address liability of foreign manufacturers through legislative action. A combination of government agency regulations and Congressional legislation demonstrates the ongoing significance of the issue. Unfortunately, such legislative efforts have been largely ineffective.

D. Consumer Product Safety Improvement Act of 2008

On August 14, 2008, in response to the massive recalls of Chinese products in 2007, the U.S. Congress passed the Consumer Product Safety Improvement Act of 2008 ("CPSIA").²⁵¹ The bill was a bipartisan effort enacted to protect U.S. consumers from defective products.²⁵² The 2008 Act modified the Consumer Product Safety Act, which Congress passed in 1972 as a response to the lack of nationwide comprehensive consumer product safety regulation.²⁵³ The Consumer Product Safety Act created the CPSC, an independent government agency "charged with protecting the public from unreasonable risks of injury or death from thousands of types of consumer products under the agency's jurisdiction."²⁵⁴ The Consumer Product Safety Act grants the CPSC the power to set mandatory product safety standards, ban dangerous products from the marketplace, order product recalls, and levy fines against violators.²⁵⁵ Despite the CPSC's enforcement powers, in 2007 it was

²⁵¹ Gips, *supra* note 157, at 568–69; Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

²⁵² Eileen Flaherty, Note, *Safety First: The Consumer Product Safety Improvement Act of 2008*, 21 LOY. CONSUMER L. REV. 372, 384 (2009).

²⁵³ Gips, *supra* note 157, at 549.

²⁵⁴ CPSC Overview, U.S. CONSUMER PROTECTION SAFETY COMMISSION, <http://www.cpsc.gov/about/about.html> (last visited Mar. 20, 2010).

²⁵⁵ CHARLES W. LAMB ET AL., *MARKETING* 113 (10th ed. 2009).

understaffed, underfunded, and charged with regulating an ever-increasing number of imported goods.²⁵⁶

The 2007 product recalls exposed the shortcomings of the U.S. product safety system and made it clear U.S. consumer safety laws needed reform.²⁵⁷ The CPSIA, which focuses on improving product safety, requires toys and infant products to be tested before they are sold, and mandates permissible limits for lead.²⁵⁸ The CPSIA protects whistleblowers, increases CPSC resources, and increases the civil and criminal penalties the CPSC can assess against violators.²⁵⁹ The CPSIA also created the first comprehensive, publicly accessible consumer complaint database, which identifies and updates information regarding hazardous products.²⁶⁰

One obstacle the CPSIA fails to address adequately is the challenge posed by the sheer number of products the United States imports. The United States Customs and Border Patrol (“CBP”) is charged with safeguarding U.S. borders and facilitating the flow of trade, which includes ensuring that goods arriving in the United States are safe for consumer consumption.²⁶¹ On a typical day the CBP processes 70,900 truck, rail, and sea containers at 326 ports of entry.²⁶² Following the enactment of the CPSIA, the CPSC partnered with the CBP staff to leverage joint resources and increase inspection of products entering the United States.²⁶³ The CBP and CPSC executed a Memorandum of Understanding allowing CPSC inspectors to target suspect shipments before they arrive and intercept potentially hazardous goods prior to entering the U.S. stream of commerce.²⁶⁴

²⁵⁶ *Id.* “From 1998 to 2007, the value of consumer products imported into the United States increased over 100 percent.” *Hearing—H.R. 4678, supra* note 236 (statement of Jeremy Baskin, Import Surveillance Division, Office of Compliance, U.S. Consumer Product Safety Commission).

²⁵⁷ *Hearing—H.R. 4678, supra* note 236 (statement of Ami V. Gadhia, Policy Counsel, Consumers Union).

²⁵⁸ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, §§ 101–102, 122 Stat. 3016, 3017–28.

²⁵⁹ *Id.* § 217. A civil penalty of \$100,000 is imposed for each violation of the CPSIA and a maximum of \$15 million for any related series of violations. A maximum five-year sentence will be imposed for knowingly and willfully violating consumer product safety laws. *Id.*

²⁶⁰ *Id.* § 212.

²⁶¹ See *CBP Mission Statement and Core Values*, CBP.GOV (Feb. 17, 2009), <http://www.cbp.gov/xp/cgov/about/mission/guardians.xml>.

²⁶² U.S. CUSTOMS & BORDER PROT., SNAPSHOT: A SUMMARY OF CBP FACTS AND FIGURES 1 (2007), available at http://www.phpintl.com/PDF%20Files/cbp_snapshot_final.pdf.

²⁶³ *Hearing—H.R. 4678, supra* note 236 (statement of Jeremy Baskin, Import Surveillance Division, Office of Compliance, U.S. Consumer Product Safety Commission).

²⁶⁴ *Id.*

In 2007, at the port of Los Angeles, which receives 15 million truck-sized containers a year, a single CPSC inspector would spot-check incoming shipments two or three days a week.²⁶⁵ While CBP agents help inspect imports, they are often looking for counterfeit goods, not necessarily products that fail to comply with safety standards.²⁶⁶ The number of port inspectors the agency has implemented since the CPSIA is negligible,²⁶⁷ exemplifying that post-CPSIA, budget and personnel remain inadequate to ensure the safety of imported products. Today, the vast majority of imported cargo enters the United States without being screened.²⁶⁸ Despite efforts to the contrary, defective Chinese-made products will elude border protection and enter into the U.S. stream of commerce. Consumers should be able to rely on U.S. law to provide a remedy for injuries resulting from these defective products.

The CPSIA's most significant shortcoming is its failure to address how to hold foreign manufacturers liable for introducing dangerous products into the U.S. marketplace. In her testimony before the House Subcommittee on Energy, Trade, and Consumer Protection, Ami Gadhia, policy counsel for the Consumers Union, acknowledged the CPSIA has "made great strides in improving product safety," but noted that the law "does not address bringing foreign manufacturers into our civil justice system."²⁶⁹ Gadhia argued, "American consumers must be able to hold manufacturers accountable when they are harmed—no matter where the products are made."²⁷⁰ Gadhia's testimony was offered in support of the Foreign Manufacturers Legal Accountability Act of 2010.²⁷¹ Although the 2010 Act expired with its Congressional session, Gadhia's testimony successfully highlighted the loopholes and deficiencies of the CPSIA.²⁷² The CPSIA lacks a mechanism to punish manufacturers; therefore, manufacturers lack the incentive to comply with U.S. product safety laws.

²⁶⁵ Eric Lipton, *Safety Agency Faces Scrutiny amid Changes*, N.Y. TIMES, Sept. 2, 2007, at A1.

²⁶⁶ *Id.*

²⁶⁷ *Hearing—H.R. 4678*, *supra* note 236 (statement of Jeremy Baskin, Import Surveillance Division, Office of Compliance, U.S. Consumer Product Safety Commission).

²⁶⁸ *See* Lipton, *supra* note 265.

²⁶⁹ *Hearing—H.R. 4678*, *supra* note 236 (statement of Ami V. Gadhia, Policy Counsel, Consumers Union).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *See id.*

E. Foreign Manufacturers Legal Accountability Acts of 2010 and 2011

The CPSIA's failure to enforce penalties against foreign manufacturers has left the door open for additional legislation in this area of the law. In response to concerns about Chinese-made products, particularly defective drywall, Ohio Democrat Betty Sutton introduced the Foreign Manufacturers Legal Accountability Act of 2010 in the U.S. House of Representatives in February 2010.²⁷³ Sutton's position is that "the current system makes it difficult to sue shadowy companies that export toxic drywall, faulty infant cribs or children's toys containing lead paint. . . . We cannot allow foreign manufacturers to continue to undercut U.S. manufacturers by disregarding the safety of their products, thereby endangering our consumers and costing us jobs."²⁷⁴ The 2010 Act was approved in July 2010 by the House Energy and Commerce Committee, but died in committee.²⁷⁵ The bill was reintroduced as the Foreign Manufacturers Legal Accountability Act of 2011 in December 2011; the 2011 Act is in committee as of this writing.²⁷⁶

The 2011 Act would require foreign manufacturers who export products to the U.S. market to establish a registered agent in the United States authorized to accept service of process against the manufacturer.²⁷⁷ By registering an agent, the foreign manufacturer would thereby consent to jurisdiction of the state and federal courts of the state in which the agent is located for any civil or regulatory proceedings.²⁷⁸ If a foreign manufacturer fails to designate a registered agent in the United States, the 2011 Act would ban the importation of any goods produced by the manufacturer.²⁷⁹ The proposed legislation would apply to "covered products" regulated by federal agencies.²⁸⁰ Section 2(3) of

²⁷³ H.R. 4678, 111th Cong. (2010).

²⁷⁴ Ian Swanson, *Import Ban Bill Has Manufacturers Worried*, HILL (Sept. 13, 2010, 5:00 AM), <http://thehill.com/business-a-lobbying/118257-import-ban-bill-has-manufacturers-worried>.

²⁷⁵ See *supra* notes 28–29 and accompanying text.

²⁷⁶ See *supra* notes 28–29 and accompanying text.

²⁷⁷ H.R. 3646, 112th Cong. §§ 3(a), 3(c)(1) (2011); see also Daniel Griswold, *Chinese Drywall Maker Held Accountable Without Congressional Meddling*, CATO LIBERTY (Oct. 15, 2010, 2:37 PM), <http://www.cato-at-liberty.org/chinese-drywall-maker-held-accountable-without-congressional-meddling> (discussing the 2010 Act). The agent must be registered in a state with "substantial connection to the importation, distribution, or sale of the products of the foreign manufacturer or producer" such that the minimum contacts test is satisfied and service is appropriate. H.R. 3646 § 3(a)(2)(A). A 2009 companion bill in the Senate, sponsored by Senator Sheldon Whitehouse, died following introduction. *S. 1606: Foreign Manufacturers Legal Accountability Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bill?bill=s111-1606> (last visited Mar. 20, 2012).

²⁷⁸ H.R. 3646 § 3(c).

²⁷⁹ *Id.* § 4(a).

²⁸⁰ *Id.* § 3(c).

the 2011 Act defines the term “covered product,” which includes drugs and cosmetics, biological products, consumer products, chemical substances, and pesticides.²⁸¹

The impetus behind the 2010 and 2011 Acts stems from the failure of previous legislation to ensure compensation from foreign manufacturers for U.S. consumers who are injured by defective foreign-made products.²⁸² The Chinese drywall debacle has bolstered the belief that U.S. consumers “damaged by faulty products, whether made abroad or domestically, should be able to seek compensation through the courts.”²⁸³ By making consent to jurisdiction and service of process a condition of importing products into the United States,²⁸⁴ the 2011 Act, if passed, would eliminate two of the procedural hurdles presently in place. However, the 2011 Act’s fatal flaw is its failure to address enforcement, the third and most important procedural hurdle. Daniel Griswold, the director of the Center for Trade Policy Studies at the Cato Institute and Sallie James, a trade policy analyst at the Cato Institute, noted in regards to the 2010 Act:

Requiring foreign companies like the Chinese drywall producer to designate a legal representative in the United States would not guarantee collection of damages from the producer. . . . Merely having a designated agent in the United States would not guarantee access to the resources of the original manufacturer to pay for the damages ultimately awarded in a court case.²⁸⁵

Enactment of the 2011 Act is unlikely to incentivize Chinese manufacturers to enforce U.S. court judgments. Manufacturers will likely appoint a “fall man” to accept service of process in the United States and subsequently refuse enforcement. The 2011 Act is a unilateral action on behalf of the United States and, as previously discussed, China is under no legal obligation to acknowledge or enforce U.S. judgments.²⁸⁶

²⁸¹ *Id.*

²⁸² See Press Release, Am. Ass’n for Just., Legislation Would Aid Consumers in Holding Foreign Manufacturers Accountable for Dangerous Products (Aug. 7, 2009), available at <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/10192.htm>.

²⁸³ Griswold & James, *supra* note 231.

²⁸⁴ H.R. 3646 § 3(a).

²⁸⁵ Griswold & James, *supra* note 231.

²⁸⁶ See *supra* text accompanying notes 238–44.

Critics of the 2010 and 2011 Acts describe the legislation as protectionist.²⁸⁷ Canadian Ambassador Gary Doer argued, in regards to the 2010 Act, that the legislation would have given an unfair trade advantage to U.S. firms, who are not required to appoint an agent, thereby violating the World Trade Organization and North American Free Trade Agreement Rules.²⁸⁸ Small and mid-sized businesses that are unable to afford hiring an agent in the United States would be cut out of the U.S. market by the 2011 Act's passage.²⁸⁹ In a letter written to Speaker of the House Nancy Pelosi, Doer argued that the 2010 Act, then still in committee, would have added another logistical and administrative requirement, thereby interfering with trade across the border.²⁹⁰ Treaties between the United States and Canada allow U.S. plaintiffs to bring suit against Canadian manufacturers and Canadian courts routinely enforce American court judgments where jurisdiction and due process is proper.²⁹¹ The intent of the 2010 and 2011 Acts is to make jurisdiction and service of process over foreign manufacturers easier for U.S. plaintiffs.²⁹² Because neither jurisdiction nor service of process over Canadian manufacturers is problematic, the 2011 Act, as applied to Canada, would be redundant and would impose additional procedural constraints to maintain current levels of trade between the two nations.

Criticisms of the 2010 Act were not limited to cries of protectionism.²⁹³ The proposed law, opponents argued, might have encouraged similar retaliatory legislation from other countries, which would have a negative impact on U.S. exporters.²⁹⁴ Additionally, costly registration requirements in the event of the 2011 Act's passage could force some foreign manufacturers to exit the market, thereby limiting options for U.S. consumers.²⁹⁵ While the 2011 Act, if passed, will apply equally to all U.S. trading partners, the enhanced

²⁸⁷ See Tom Ramstack, *Foreign Countries Upset About "Protectionist" U.S. Trade Bill*, DAILY HR TIPS.COM (Sept. 21, 2010), <http://www.dailyhrtips.com/2010/09/21/foreign-countries-upset-about-protectionist-u-s-trade-bill>.

²⁸⁸ *Id.* U.S. sponsors argued that the 2010 Act fell under the exception to WTO fair trade rules that protect life and health. *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² See *supra* text accompanying notes 231–37.

²⁹³ Andrew Mayeda, *U.S. Bill "Badly Crafted," Trade Minister Says*, EDMONTON J. (Sept. 24, 2010), <http://www2.canada.com/edmontonjournal/news/business/story.html?id=21fe7957-61b4-40aa-a175-9f28db18a78a>.

²⁹⁴ Griswold & James, *supra* note 231.

²⁹⁵ *Id.*; *Hearing—H.R. 4678, supra* note 236 (statement of Marianne Rowden, President & CEO, American Association of Exporters and Importers).

restrictions appear to specifically target Chinese manufacturers. Such targeted legislation runs the risk of escalating chronic bilateral trade frictions between the United States and China.²⁹⁶

Pritam Banerjee, the Head of Trade and International Policy at the Confederation of Indian Industry, felt the 2010 Act was unnecessary supplemental legislation designed to satisfy protectionist supporters.²⁹⁷ Banerjee argued the CPSIA “already provides more than adequate protection to the U.S. consumer by requiring producers to test and verify that products entering the United States conform to U.S. standards before they are imported into the country.”²⁹⁸ As previously discussed, budget and personnel issues, and the sheer number of U.S. imports, mean most imported cargo enters the United States without inspection.²⁹⁹ As a result, U.S. consumers who purchase flawed Chinese-made products are typically the first to discover the defects in the products.³⁰⁰

Other critics of the 2010 Act argued that the existing legal system, which allows plaintiffs to bring suit against U.S. importers, distributors, and retailers, works reasonably well and provides adequate compensation for U.S. consumers.³⁰¹ As previously discussed, this framework shields Chinese manufacturers from liability and shifts the entire cost of legal responsibility to U.S. players in the supply chain.³⁰² Simply augmenting the legal penalties imposed against domestic partners of foreign producers lets China off the hook and allows the Chinese to benefit economically from exports to the United States without internalizing any costs of harm.³⁰³ Additionally, the current system fails to protect consumers who are unable to sue U.S. parties. The creation of a fund would protect those consumers and work to close the loophole in the existing framework.

Products liability ensures “that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market

²⁹⁶ Delisle & Trujillo, *supra* note 172, at 162.

²⁹⁷ Pritam Banerjee, *The Foreign Manufacturers Liability and Accountability Act: A Major Concern for Indian Exporters to the US*, WORLD COM. REV., http://worldcommercereview.com/publications/article_pdf/294 (last visited Mar. 3, 2012).

²⁹⁸ *Id.*

²⁹⁹ See *supra* text accompanying notes 266–69.

³⁰⁰ *Shoddy Work*, *supra* note 89.

³⁰¹ See Griswold & James, *supra* note 231.

³⁰² See *supra* text accompanying notes 84–87.

³⁰³ See Kenneth A. Bamberger & Andrew T. Guzman, *Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade*, 96 CALIF. L. REV. 1405, 1410 (2008).

rather than by injured persons who are powerless to protect themselves.”³⁰⁴ Under the present system, if U.S. consumers are harmed by a defective Chinese-made product and are unable to sue a party in the United States, they are left without legal recourse.³⁰⁵ An innocent U.S. consumer who unknowingly buys a house constructed with defective Chinese-made drywall will receive no legal or economic compensation from the manufacturer responsible for the faulty product.³⁰⁶ The problem the 2010 and 2011 Acts were designed to address is real; however, the proposed legislation alone is not the answer. As discussed in reference to the relevant Supreme Court cases, *J. McIntyre* and *Goodyear*, expanded jurisdiction and service of process will be of little significance if China refuses to recognize U.S. judgments.³⁰⁷ The 2011 Act fails to provide an adequate mechanism for ensuring reimbursement for consumers who have been injured by foreign manufacturers. Like those of the judiciary, legislative attempts to combat liability of foreign manufacturers have fallen short of protecting injured consumers. The fund concept is a solution that bypasses the legal obstructions and delves into the heart of the problem—economic compensation.

III. THE UNITED STATES AND CHINA MOVING FORWARD—IMPOSING LIABILITY ON CHINESE MANUFACTURERS

Persistent debate among legal scholars and advocates regarding the ideal solution for holding foreign manufacturers liable for faulty products highlights the ongoing uncertainty inherent in this area of the law.³⁰⁸ The fund concept is a practical framework that aims to ensure availability of economic compensation for the injured consumer; however, it is not the only possible solution. One resolution to the current legal dilemma would be for the United States and China to execute a bilateral treaty mandating the enforcement of each other’s products liability judgments.³⁰⁹ A bilateral treaty would be specific to the unique relationship the United States and China enjoy, and the

³⁰⁴ *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963).

³⁰⁵ See *supra* text accompanying notes 8–10.

³⁰⁶ The manufacturer is directly responsible for production and therefore is arguably the party most responsible for product quality issues.

³⁰⁷ *Experts Predict Passage of the Foreign Manufacturers Legal Accountability Act of 2010: What Does This Law Mean to U.S. Importers and Exporters?*, KATTEN (July 21, 2010), <http://www.kattenlaw.com/experts-predict-passage-of-foreign-manufacturers-legal-accountability-act>.

³⁰⁸ See Clarke, *supra* note 238, at 2–3.

³⁰⁹ Donald C. Clarke argues a treaty is the only ground upon which a Chinese court would enforce a U.S. judgment. *Id.* at 2–3.

two countries could negotiate and tailor the terms to best reflect their needs and concerns. Such a treaty should command specific penalties, likely economic, if either the United States or China failed to enforce a legitimate judgment from the other nation. Political activist and four-time Green Party presidential candidate Ralph Nader is a longtime advocate of a consumer protection treaty with China.³¹⁰ In addition to calling for increased access to Chinese factories and testing laboratories, Nader argues a United States–China treaty must subject Chinese companies who do business in the United States to U.S. tort and contract laws.³¹¹ Although a bilateral treaty is an attractive solution, it is unlikely China will consent to such an agreement. Chinese manufacturers are benefitting financially from their poorly made products, and most manufacturers are able to evade all economic and legal liability associated with their goods.³¹² Meanwhile, the Chinese export industry and economy continue to grow.³¹³ China has insufficient motivation to voluntarily subject its manufacturers to legal liability in the United States. As a result, the United States needs to focus on a workable solution that offers protection for U.S. consumers. The creation of a consumer settlement fund may be the answer for which the United States has been searching.

A. *The Fund Concept*

The end goal of this Comment’s legal analysis is to ensure economic compensation for injured U.S. consumers. In the absence of a bilateral treaty, the United States cannot force Chinese courts to recognize and enforce U.S. judgments. Therefore, the United States must look for alternative ways to make an injured consumer whole. The United States should create a consumer settlement fund, modeled after Superfund: an environmental program created by the Comprehensive Environment Response, Compensation, and Liability Act (“CERCLA”) of 1980 to address hazardous waste sites.³¹⁴ CERCLA was enacted following the discovery of toxic waste dumps in the 1970s and allows the Environmental Protection Agency to seek out responsible parties and compel them to perform cleanups or reimburse the government for such

³¹⁰ Ralph Nader, *Weak-Kneed in China*, COUNTERPUNCH (Nov. 25, 2009), <http://www.counterpunch.org/nader11252009.html>.

³¹¹ *Id.*

³¹² Hunt, *supra* note 32, at 919.

³¹³ See *supra* text accompanying notes 48–50.

³¹⁴ Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9675 (2006); see also *Basic Information: What Is Superfund?*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/superfund/about.htm> (last visited Mar. 3, 2010).

cleanups.³¹⁵ When multiple parties are responsible for the contamination, each participant is required to pay.³¹⁶ Like Superfund, the consumer settlement fund would enforce penalties against parties responsible for injuring U.S. consumers. The primary target of the fund would be the foreign manufacturers directly responsible for producing faulty products.

The fund concept would also draw inspiration from the September 11, 2001 Victim Compensation Fund (“VCF”) and the British Petroleum (“BP”) Gulf Coast Claims Fund (“BP Fund”).³¹⁷ The theory behind the VCF and BP Fund was to persuade people to accept payments for their losses up front, in lieu of engaging in long, costly, and uncertain lawsuits.³¹⁸ Following the terrorist attacks of September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act.³¹⁹ The act combined U.S. Treasury revenues and charitable donations to create the VCF.³²⁰ The VCF’s goal was to provide economic compensation for all the victims of the September 11, 2001 terrorist attacks.³²¹ Victims were narrowly defined. Claims could only be brought by or on behalf of those who were on one of the hijacked flights or who were physically present at the World Trade Center or Pentagon sites within twelve hours of the attack, and who suffered physical injury, requiring medical help, within a designated time period.³²² While participation in the VCF was optional, if injured parties claimed compensation from the VCF, they waived the right to bring suit in court.³²³ The legislation placed strict time regulations on filing claims.³²⁴ Once a claim was filed against the VCF, it had to be determined within 120 days of filing and payment received within twenty days

³¹⁵ *Basic Information: What Is Superfund?*, *supra* note 314.

³¹⁶ Lawrence Hurley, *Lawyers Still Cleaning Up over Superfund Sites*, N.Y. TIMES (Jan. 3, 2011), <http://www.nytimes.com/gwire/2011/01/03/03greenwire-lawyers-still-cleaning-up-over-superfund-sites-92748.html>.

³¹⁷ See Michael Cooper, *Two Funds, Same Goal: Compensate*, N.Y. TIMES, Aug. 22, 2010, at A14. Commenter James C. Harris, who advocates for adoption of a comprehensive social insurance system, acknowledges 9/11 was an “unprecedented horror” but argues the extraordinary background circumstance should not limit the fund model in application. James C. Harris, Comment, *Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-Style Comprehensive Social Insurance Plan in the United States*, 100 NW. U. L. REV. 1367, 1370 (2006).

³¹⁸ Cooper, *supra* note 317.

³¹⁹ Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2006).

³²⁰ Harris, *supra* note 317, at 1369.

³²¹ *Id.*

³²² James R. Copland, *Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform 20* (Jan. 13, 2005) (working paper, Center For Legal Policy at the Manhattan Institute), available at http://www.manhattan-institute.org/pdf/clpwp_01-13-05.pdf.

³²³ Harris, *supra* note 317, at 1376.

³²⁴ Copland, *supra* note 322, at 24.

of determination.³²⁵ Attorney General John Ashcroft appointed Kenneth Feinberg, a Washington lawyer, as the VCF's special master.³²⁶ Feinberg possessed enormous power and discretion to interpret and apply the law as it applied to fund payouts.³²⁷ Feinberg's compensation decisions were final; no judicial review was permitted.³²⁸

Overall, the September 11 VCF was highly successful; ninety-seven percent of all eligible claimants received compensation from the fund and total awards were near \$7 billion.³²⁹ Although claimants gave up substantial litigation rights, the high percentage rate for participation in the VCF suggests that under the right circumstances, claimants will opt into a fund approach to seek closure on their claims, despite the risk of receiving less compensation than they might in a jury trial.³³⁰ The VCF relieved the vagueness and inconsistency inherent in jury determinations and spared claimants years of discovery, litigation, and appellate processes as well as the transaction costs associated with litigation.³³¹ The VCF was created under unique and extreme circumstances, but it is a good injury compensation model and its application should not be limited to disaster scenarios.

The Deepwater Horizon Spill in the Gulf of Mexico in April 2010 prompted the creation of the BP Fund—a \$20-billion escrow account dedicated to compensating victims of the oil spill.³³² This fund originated on June 16, 2010, following an agreement between BP and President Barack Obama stipulating the basic terms of the \$20-billion account.³³³ Unlike the VCF, which relied partially on charitable donations, BP is the sole contributor to the account.³³⁴ President Obama appointed Kenneth Feinberg, special master of the VCF, to administer the BP Fund.³³⁵ Since the creation of the fund, Feinberg

³²⁵ Harris, *supra* note 317, at 1377.

³²⁶ Neil King, Jr., *Feinberg Ramps Up \$20 Billion Compensation Fund*, WALL ST. J., June 21, 2010, at A1.

³²⁷ Copland, *supra* note 322, at 20.

³²⁸ *Id.*

³²⁹ Harris, *supra* note 317, at 1379.

³³⁰ Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1344 (2004).

³³¹ *Id.* at 1345.

³³² *About the \$20 Billion Dollar BP Fund for Oil Spill Victims*, BP FUND (July 21, 2010), <http://www.thebpfund.com> [hereinafter *About the BP Fund*].

³³³ *Id.*

³³⁴ See Kimberly Kindy, *Overseer of BP's Gulf Spill Claims Fund Gets His Hands Dirty*, WASH. POST, Oct. 20, 2010, at A6.

³³⁵ *Id.*

has tried to maintain separation from both BP and the Obama Administration and has implemented independent and neutral policies regarding the claims.³³⁶ Under the BP Fund, claimants can get emergency payments for six months without giving up their rights to sue.³³⁷ However, claimants who decide to opt in for consideration of a final payment do waive their litigation rights.³³⁸ While administration of the BP Fund is ongoing,³³⁹ thus far the fund has received more than 490,000 claims and has paid out approximately \$3.5 billion to 170,000 claimants.³⁴⁰ Superfund, the VCF, and the BP Fund were enacted under varying circumstances and their structures and goals somewhat differ. However, each serves as a useful framework upon which to model a consumer settlement fund.

The first step in setting up a consumer settlement fund would be to enact the fund. On December 11, 1980, the U.S. Congress passed CERCLA, which created a tax on the chemical and petroleum industries and provided federal authority to respond to dangerous substances that threaten public health or the environment.³⁴¹ The money collected from the tax goes into a trust fund, Superfund, for cleaning up hazardous waste sites.³⁴² Similarly, on September 22, 2001, the U.S. Congress enacted the Air Transportation Safety and System Stabilization Act, which created the September 11 VCF.³⁴³ Like Superfund and the VCF, the consumer settlement fund should be enacted through legislation. Support for the proposed fund would likely come from both Democrats and Republicans. While U.S. lawmakers understand and appreciate the importance of the United States–China trade relationship, in today’s tough economy, both Democrats and Republicans are under pressure to support any bill that protects U.S. companies.³⁴⁴ Domestic producers, who have a legal presence in the United States and thus can be sued for faulty products, are currently at a

³³⁶ *About the BP Fund*, *supra* note 332.

³³⁷ *Oil Fund Administrator: Come to Me, Not Court*, CBS NEWS (July 19, 2010), <http://www.cbsnews.com/stories/2010/07/19/national/main6692221.shtml>.

³³⁸ *Id.*

³³⁹ Kenneth Feinberg has incurred criticism from claimants unhappy with their compensation. *BP Claims Czar Continues Gulf Tour amid Complaints*, HUFFINGTON POST (Jan. 11, 2011, 5:31 AM), <http://www.huffingtonpost.com/huff-wires/20110111/us-gulf-oil-spill-claims>; Troy King, Opinion, *Fund Chief Can’t Be Trusted*, USA TODAY (Jan. 28, 2010, 8:30 PM), http://www.usatoday.com/news/opinion/editorials/2010-12-29-editorial29_ST1_N.htm.

³⁴⁰ Moira Herbst, *BP Fund, Feinberg Face Lawsuits by Claimants*, REUTERS, Feb. 28, 2011, available at <http://af.reuters.com/article/energyOilNews/idAFN2826927720110228>.

³⁴¹ *Basic Information: What Is Superfund?*, *supra* note 314.

³⁴² *Id.*

³⁴³ *See supra* text accompanying note 319.

³⁴⁴ Kessler & Sapien, *supra* note 1.

competitive disadvantage against foreign manufacturers, who can escape liability.³⁴⁵ Furthermore, neither party would want American voters to think it was protecting Chinese manufacturers who were dumping defective products, such as toxic drywall, in the United States.³⁴⁶

After the consumer settlement fund is enacted, management of the fund must be determined. While CERCLA grants the Environmental Protection Agency the power to conduct cleanups of toxic waste sites and compels contribution from responsible parties, the proposed legislation should create a new and independent entity charged with development and administration of the consumer settlement fund. The CPSC, with its knowledge and experience in the products liability arena, seems like the logical agency to undertake this responsibility. However, the agency is already overburdened, understaffed, and underfunded.³⁴⁷ A newly created independent body would be better able to receive and analyze claims from U.S. plaintiffs related specifically to foreign manufacturers. In this way, the consumer settlement fund would mimic the VCF and the BP Fund. Both funds employed an independent unit to collect, analyze, and process claims.³⁴⁸ Unlike the VCF and the BP Fund, which were each created in response to a single devastating event,³⁴⁹ the consumer settlement fund would address the ongoing problem of U.S. consumers injured by foreign-made products. The VCF, which terminated operations on June 15, 2004,³⁵⁰ and the BP Fund were both enacted as temporary mechanisms to resolve a defined set of claims.³⁵¹ The consumer settlement fund, on the other hand, would be a more permanent institution.

The theory behind the consumer settlement fund would be to grant the compensation and deterrence that the U.S. law fails to provide. CERCLA provides a framework for “remediation and liability for releases of hazardous materials that pose a risk to human health and the environment.”³⁵² Similarly, the consumer settlement fund would provide a mechanism that serves dual purposes: compensating U.S. consumers and deterring foreign manufacturers from releasing dangerous products into the U.S. market. Compensation would

³⁴⁵ See Griswold & James, *supra* note 231, at 1.

³⁴⁶ Kessler & Sapien, *supra* note 1.

³⁴⁷ See *supra* text accompanying notes 256, 266–67.

³⁴⁸ See *supra* text accompanying notes 326, 336.

³⁴⁹ See *supra* text accompanying notes 319, 332.

³⁵⁰ Copland, *supra* note 322, at 20 n.123.

³⁵¹ See Harris, *supra* note 317, at 1378 (stating the VCF required claims to be filed within a two-year period); *About the BP Fund*, *supra* note 332.

³⁵² Gregory Mandel, *Nanotechnology Governance*, 59 ALA. L. REV. 1323, 1356 (2008).

be charged to an institutional arbiter. While the VCF and BP Fund employed Kenneth Feinberg as administrator,³⁵³ the consumer settlement fund, a more enduring entity, should grant power to the institution, not an individual. With durability in mind, the proposed fund should set up a permanent claims court. The court would hear a victim's defective product claim, determine liability, assess any damages, and, if appropriate, award a proportionate monetary remedy as a distribution from the fund. Unlike the VCF,³⁵⁴ a traditional appeals process would be available.

The fund would provide an alternative to engaging in a fruitless lawsuit against a foreign manufacturer. A consumer who is injured by foreign-made products should be able to bring his claim to the consumer settlement fund's claims court before engaging in litigation.³⁵⁵ If the arbiter accepts the claim and awards a payout from the fund, the claimant should be barred from suing in court.³⁵⁶ An injured consumer should not be able to recover twice for a single action. However, if the arbiter rejects the claim or the claimant does not receive a payout, the claimant should be allowed to pursue litigation in court. Similarly, if the claimant brings a lawsuit and receives economic compensation, they should be barred from receiving a payout from the fund. If the claimant brings suit in court and loses or is unable to collect on their judgment (because the defendant is insolvent or a foreign manufacturer), they should be allowed to bring their claim to the fund's claims court. The purpose of the fund is not to discourage claimants from bringing lawsuits, but to provide economic compensation for an injury where a lawsuit would fail to do so.

In addition to adjudicating claims, the consumer settlement fund would determine when a foreign manufacturer would be required to contribute to the fund. Under CERCLA, liability arises when a party releases a "hazardous substance," as defined by the Environmental Protection Agency, into the environment.³⁵⁷ Under the consumer settlement fund, liability would arise when a foreign manufacturer produces a defective product that injures a

³⁵³ See *supra* text accompanying notes 326, 336.

³⁵⁴ See *supra* text accompanying note 328.

³⁵⁵ This framework does not necessarily let responsible U.S. parties (importers, distributors, or sellers) off the hook. While some claimants will opt into the fund, others will choose to pursue traditional litigation, hoping for increased jury verdicts in court.

³⁵⁶ If a claimant opts into either the VCF or BP Fund, they are barred from pursuing a separate claim in court. See *supra* text accompanying notes 325, 338.

³⁵⁷ Mandel, *supra* note 352, at 1356.

consumer in the United States. If the manufacturer refuses to compensate the consumer, the United States should flag the manufacturer. The responsible manufacturer must contribute a designated sum of money to the settlement fund if they wish to continue to export products to the United States.³⁵⁸ Once a foreign manufacturer has injured a U.S. consumer, the United States must demand the money up front as a “fee” for doing business in the United States.³⁵⁹

The threshold question under CERCLA for determining liability is whether the substance in question is “hazardous.”³⁶⁰ Under the consumer settlement fund, three initial questions would arise: (1) whether a consumer was “injured,” (2) whether the product was defective, and (3) where the product was manufactured. In response to the first question, injury should not be limited solely to those *physically* hurt by Chinese products. Rather, the definition of injury should be broad enough to encompass those individuals who have sustained *economic* injury. For example, homeowners who have suffered depreciation on their homes due to Chinese-made drywall should be eligible for reimbursement. Secondly, the claimant must prove the product was defective—that it was flawed or that it malfunctioned. Finally, the injured consumer must prove a foreign manufacturer produced the injurious product. Identifying the responsible manufacturer may pose substantial difficulties. This is addressed in the next Subpart of this Comment. Once a claimant has satisfied these three initial questions, the claim could proceed and the arbiter would determine causation and damages.

While compensation is the primary aim of the consumer settlement fund, deterrence is a secondary goal and an essential component of the proposed framework. Deterrence would occur in two forms: economic and reputational. Economic deterrence is necessary because the price of Chinese products sold in the United States fails to reflect potential accident costs.³⁶¹ Chinese manufacturers are currently able to avoid liability for their defective products; therefore, manufacturers lack the economic incentive to install preventative

³⁵⁸ The proposed framework will not be able to compensate consumers who have been injured prior to the creation of the fund by defective foreign-made products. Rather, it is a prospective solution that aims to provide a compensation model for consumers in the future.

³⁵⁹ China’s refusal to indemnify injured U.S. consumers epitomizes why the United States needs to demand the money up front as a “fee” for doing business in the United States.

³⁶⁰ See Mandel, *supra* note 352, at 1356.

³⁶¹ Hunt, *supra* note 32, at 919.

safety measures.³⁶² Requiring manufacturers to contribute to a fund if they injure a consumer would force the manufacturer to internalize the cost of a faulty product. The requisite contribution, as determined by the fund's administrators, should fully compensate the injured consumer and provide a deterrent effect.³⁶³ To create effective deterrence, the penalty must be significant enough to dissuade the manufacturer from distributing defective or dangerous products in the U.S. market. Furthermore, naming the responsible party would be injurious to the manufacturer's reputation in the United States and would reflect poorly on the U.S. company associated with the manufacturer. Competition among Chinese manufacturers for partnerships with American companies is ferocious³⁶⁴ and U.S. firms are less likely to partner with a Chinese manufacturer who is notorious for producing dangerous products.

B. Challenges and Limitations Associated with the Fund Concept

There would be a number of challenges associated with the implementation of a consumer settlement fund. The primary hurdle would remain the ability to identify the responsible foreign manufacturer. As previously discussed, long, complex, and shifting supply chains often make identification of the responsible party extremely difficult.³⁶⁵ U.S. companies who outsource their manufacturing to China *must* be able to identify the manufacturer with whom they have a business or contractual relationship. If the U.S. company cannot identify the manufacturer responsible for producing the product at issue, the company itself will be required to make the requisite contribution to the fund. This model encourages U.S. companies to ensure, to the best of their ability, that the manufacturer with whom they contract is identifiable and safety-conscious. If Chinese manufacturers fail to step up and take the blame for their faulty products, thereby leaving the U.S. companies to take the hit, U.S. firms will likely terminate the relationship and the manufacturer will be excluded from the U.S. market. The best way to foster the relationship between Chinese manufacturers and U.S. companies is to urge the U.S. parties to disclose the details and requirements of the fund before initiating the business relationship. Ideally, the two parties would sign a contract, and the Chinese manufacturer

³⁶² *See id.*

³⁶³ One of Congress' goals in enacting CERCLA was to provide a deterrent to "irresponsible hazardous-material management." L. De-Wayne Layfield, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 TEX. L. REV. 1237, 1241 (1990).

³⁶⁴ *See supra* text accompanying note 71.

³⁶⁵ *See supra* text accompanying note 118–21.

would agree to make the requisite contribution if an injury occurs. If the Chinese manufacturer knows it will have to pay into the fund for a defective product accident, the manufacturer will have the incentive to cooperate with product safety requirements before production even begins.

A related issue is deciding how far down the foreign manufacturing chain the United States should seek compensation. While primary manufacturers who contract with the United States should have to contribute to the fund, for subcontractor, or “shadow” factories, liability is less clear. U.S. companies often do not have knowledge of the manufacturer’s use of shadow factories or subcontractors. This problem arose in the 2007 Mattel toy recalls, which Mattel CEO Bob Eckert blamed on a subcontractor who used paint from a non-authorized third-party supplier.³⁶⁶ The best way to resolve this issue is to place liability squarely on the shoulders of the foreign manufacturer who directly contracts with the U.S. company. If the manufacturer chooses to outsource production to other factories, they will remain liable for quality issues that result from the delegation.

Providing notice to the foreign manufacturer could remain a procedural roadblock under the proposed fund. If a manufacturer’s product injures a U.S. consumer and the manufacturer is held liable, the consumer settlement fund would demand compensation as a condition of exporting to the United States. The fund would be charged with providing notice to the manufacturer detailing the contribution requirements. However, as previously discussed, Chinese manufacturers often evade notice or cannot be located.³⁶⁷ If the foreign manufacturer fails to respond to the contribution notice, the onus would be placed on the contracting U.S. party to contact the manufacturer. If the U.S. party fails, it will assume the contribution requirement. This structure provides yet another incentive for U.S. parties to contract with responsible foreign manufacturers.

Finally, the fund must comport with WTO rules and regulations.³⁶⁸ WTO rules mandate that any requirement placed on products from one WTO

³⁶⁶ See Thottam, *supra* note 100. One of Mattel’s contract manufacturers allegedly engaged the subcontractor. *Stoking Protectionism*, *supra* note 56.

³⁶⁷ See *supra* text accompanying note 235.

³⁶⁸ The WTO is the international organization charged with regulating trade relationships. *About the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Feb. 17, 2012).

member must apply equally to all members.³⁶⁹ Therefore, the United States cannot single out Chinese manufacturers for contribution and must apply the requirement universally. Furthermore, under the WTO, import-restricting measures designed to protect public health and safety are permissible; however, they must have an “adequate scientific foundation and may impose only limited and non-discriminatory restrictions on trade.”³⁷⁰ There must be proof that a manufacturer has created a defective product, and contribution to the fund should only be required until a manufacturer’s safety record is deemed adequate.

Although there would be potential problems associated with the consumer settlement fund concept, the benefits would far outweigh the costs. Most importantly, the fund would reimburse U.S. victims for injuries sustained from defective foreign-made products. U.S. plaintiffs are unable to enforce judgments against Chinese manufacturers; therefore, unless they can collect on judgments against U.S. parties, their injuries will remain uncompensated. Additionally, the potential for an economic penalty would induce foreign manufacturers to comply with product safety laws and would provide an incentive for U.S. parties to contract with responsible and safety conscious manufacturers.

CONCLUSION

U.S. law is currently grappling with its inability to require foreign manufacturers to compensate U.S. consumers who are injured by defective foreign-made products. Personal jurisdiction, service of process, and enforcement of the judgment remain the three primary procedural hurdles a U.S. plaintiff must overcome before successfully bringing suit against a foreign manufacturer. The two Supreme Court cases, *J. McIntyre Machinery, Ltd. v. Nicastro* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, and the proposed congressional legislation, the Foreign Manufacturers Legal Accountability Act of 2011, prove the shortcomings in the legal system are pressing and significant. Unfortunately, neither the Supreme Court cases nor the proposed Congressional legislation solves the most pressing of the procedural hurdles—enforcement of a U.S. judgment overseas.

³⁶⁹ *Services: Rules for Growth and Investment*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (last visited Feb. 17, 2012).

³⁷⁰ Delisle & Trujillo, *supra* note 172, at 162.

While amendments and alternations to the law through judicial and legislative activity should be welcomed, the United States should not sit by passively and wait for change. The United States must affirmatively act to protect its citizens from harm imposed by foreign manufacturers. The toxic drywall is simply the latest in a series of defective products from China. China's unbeatable prices and paramount position in global manufacturing chains indicate Chinese-made products will remain dominant in the United States. Resource shortages at the U.S. border guarantee defective Chinese-made products will continue to enter the United States. U.S. consumers cannot be fully insulated from such products; however, they should be legally protected from the consequences posed by these dangerous goods.

The creation of a consumer settlement fund not only provides the economic compensation the law cannot ensure, but it also encourages the formation of responsible and accountable partnerships between U.S. companies and Chinese manufacturers. The fund would be unable to force foreign manufacturers to comply with U.S. law directly, but would penalize the U.S. contracting party if the manufacturer failed to provide the requisite compensation. U.S. parties, knowing they would be liable if the manufacturer failed to uphold their requirements under the fund, would have the incentive to contract with reliable manufacturers who comport with product safety standards. Innocent U.S. victims should not be penalized because U.S. law has failed to garner economic compensation from foreign manufacturers. The consumer settlement fund would succeed where the U.S. law has failed—in providing economic relief for U.S. consumers injured by defective foreign-made products.

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