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Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

Controlling Your Destiny and Playing in Your Home Court:

How Personal Jurisdiction, Venue, Choice of Forum, and Choice of Law Can Minimize Your Product Liability Risk

I. Personal Jurisdiction[1]

a. Stretching Liability Boundaries and Bringing Passive Defendants to Center Stage

i. Imputed Liability – Foreign Manufacturing and the Domestic Supplier

Domestic companies, often one of many links in the distribution chain between the foreign manufacturer and the customer, are very often named as defendants in product liability actions regardless of the scope of their involvement with the product. Many state statutes provide for "imputed" product liability when a foreign manufacturer is not subject to the state's jurisdiction. The domestic supplier steps into the shoes of the foreign manufacturer, providing a plaintiff with a U.S. defendant. Counsel for domestic product suppliers should analyze the supplier/manufacturer relationship carefully to determine if it is feasible to prove that the court can assert jurisdiction over the foreign entity.

ii. The Role of State Law – Why Jurisdiction Matters

Although the U.S. supplier entity may have only had a passive role in the product's distribution, it may be the easiest entity in the distribution chain to serve with process. A typical state imputed liability statute provides that a product seller, other than a manufacturer, has the liability of a manufacturer if there is not a solvent manufacturer who could be liable to the claimant and is subject to service of process under the laws of that state. States with such laws include Idaho, Indiana, Iowa, Kansas, Minnesota New

[1] Adapted from "Expansion of Liability to the Border and Beyond: Tracking Foreign Manufacturers to Obviate Liability" Eric Zalud and Clare R. Taft, *For the Defense*, December 2008.

Jersey, North Carolina, Ohio, Texas, Tennessee and Washington. The Model Uniform Product Liability Act (MUPLA) has also been adopted, in whole or in part, in many states.

iii. Thy Enemy's Enemy…

A plaintiff's attempt to find a potentially liable defendant often tenuously connects the injury to the domestic supplier, which encourages extreme extension of product liability law. The plaintiff may ask a court to expand product liability law to its outer limits, pinning blame on relatively uninvolved suppliers, rather than on the more realistically foreign, tortious manufacturers. In many situations, plaintiff's counsel will *willfully ignore* the foreign manufacturer in order to focus on a domestic defendant and avoid the procedural quagmire of locating and serving a foreign entity. As a result, defense counsel for a supplier find it in his or her client's best interest to help locate the foreign manufacturer, thereby allowing the domestic supplier to be dismissed from the litigation (see below). In many situations, a supplier's defense counsel finds his or her client's interest coterminous with the plaintiff's interest: to strive to add another viable defendant that can be served – the manufacturer.

iv. Canadian Perspective

Under Canadian Law, product liability can stem from the negligence of the designer, manufacturer, distributor, and advertiser. Anyone involved in the process of getting the good from the manufacturer to the consumer is potentially liable where that good is defective.

Although a distributer has no control over the manufacture of the products, their negligence could still result in a consumer's injury. A distributor has a positive duty of care to the consumer and liability depends on their role in distributing, promoting, and advertising the product, the location and reputation of the manufacturer, and whether the product could have been tested. Distributers are generally not held to as high a standard as manufacturers.

Distributors must examine all products they distribute if they are aware of any potential problems with the product. Where there is no reason to be aware or where the distributor is not aware of any potential problems, the distributor is likely not to be held liable for any defect. A distributor may be held liable where there is careless handling of a product such that it causes injury to a consumer. A distributor may also be found liable where they recommend the use of a product for a purpose not recommended by that product, mislead in their advertisements, or where there is reliance on the distributors advice and instruction regarding a product with a defect.

b. The Edge of the Envelope: Enhanced Role in Physical Product Distribution May Invoke Supplier Liability

i. Product Seller or Travel Agent?

A domestic supplier that considers itself merely a "travel agent" for goods is not immune from being named as a defendant in product liability litigation. In a 2006 case out of Idaho, the plaintiff sought to hold a freight forwarder liable under the imputed liability section of the Idaho Product Liability Act (see above), which is modeled on MUPLA. The domestic entity named argued that it was not a product seller as defined in the Idaho Code:

> any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products.

Instead, the defendants claimed they were "travel agents for cargo" and that they made shipping arrangements and otherwise had no substantial contact with the product.

ii. The Distribution Chain - Warehousing and Assembly

MUPLA's definition of product sellers, and the definition adopted by many states, is extremely broad and can arguably subject suppliers to liability no matter how remote or limited their connection to the product. It is incumbent on the domestic supplier to examine and analyze whether the foreign manufacturer can be hauled into a domestic court, bypassing imputed liability statutes. Physically handling a product or a product's packaging in these cases may enhance potential liability of not only distributors, but those involved in transporting, packaging or warehousing a product. Often, warehouse companies assemble products from overseas that are shipped in "ready to assemble" packaging for retail display and further shipping. Enhanced warehousing and assembly operations could lead to allegations of supplier liability under pertinent statues.

c. Vigilance to Corporate Structure: U.S. Subsidiary Rarely Insulates Foreign Manufacturer

i. "Random and Fortuitous" – Long-arm Statutes and Obtaining Personal Jurisdiction Over Foreign Manufacturers

Typically, the rigorous "stream of commerce" analysis cannot be circumvented to avoid jurisdiction. However, on very rare occasions, a foreign manufacturer operates outside the reach of a state's long-arm statute. In Tennessee, consumers brought a product liability claim over an allegedly defective ladder sold by Home Depot, manufactured and designed by a German company and distributed by its U.S. subsidiary. The claim was brought under the Tennessee imputed liability statute[2].

Home Depot, whose goals coincided with those of the plaintiff for this purpose, argued that the German manufacturer was subject to personal jurisdiction and thus a product liability claim could properly be maintained against Home Depot. The foreign manufacturer was found to have not purposefully availed itself to personal jurisdiction, to have had no physical contact with the state, and to have not purposefully directed its product toward commerce in the state. This outcome, however, is rare.

ii. Parent versus Child – Domestic Subsidiaries

In the Home Depot case, above, the foreign manufacturer also escaped liability via its connection to its U.S. subsidiary. The Sixth Circuit found that the domestic subsidiary was a separate company and thus their connection was not adequate to provide a presence that wasn't "too random, fortuitous, and attenuated for a finding of purposeful of availment [to personal jurisdiction]."

d. Making the Plaintiff Work: Requirements of Diligent Service Efforts

i. Plaintiff's Burden, of Lack Thereof, to Show Lack of Jurisdiction

[2] See Tennessee Code §29-28-106(b): "No product liability action … shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer … unless the manufacturer of the product or part in question shall not be subject to service of process in the state of Tennessee or service cannot be secured by the long-arm statutes of Tennessee …"

The extent of the Plaintiff's burden to show a lack of jurisdiction varies from state to state. In Texas, courts place the onus on the plaintiff to establish that the manufacturer is beyond the court's jurisdiction, alleviating some of the burden on the supplier to establish the manufacturers contacts with the forum. In a 2008 Texas case, the defendant domestic supplier was unable to prevail on summary judgment because the plaintiff created an issue of fact regarding whether the foreign manufacturer was subject to the Texas court's jurisdiction.

Other states lessen the burden on the plaintiff by directly addressing the issue in their long-arm statutes[3]. In Ohio, consistent and regular contact with the state is sufficient to meet the statutory requirements for exerting personal jurisdiction when. Ohio Courts have found that it is irrelevant that a product was manufactured overseas if the foreign manufacturer does business on regular basis in the state. Courts will consider factors such as the amount and value of the products sold in the state, even if the foreign corporation maintained neither agents or representatives in Ohio.

ii. May I Go Now? – Dismissal of a Passive Supplier After Manufacturer is Served

Once the foreign manufacturer has been identified and located, domestic suppliers will be eager to extricate themselves from litigation as soon as possible. The process and timing of dismissal varies from state to state. In Minnesota, the seller-exception statute sets forth a specific procedure that must be followAed before a "passive supplier" can be dismissed. First, the plaintiff must have filed a complaint against the actual manufacturer. Second, the manufacturer must have answered the complaint or otherwise responded. So long as the supplier did not have an active role in creating the defect or actual knowledge of the defect, they are free to seek dismissal. Due diligence is required of both the supplier-defendant and plaintiff, in identifying and obtaining jurisdiction over the manufacturer, respectively. In bad news for suppliers in Minnesota, plaintiffs have the option to reinstate claims against the supplier at any time that the injured party cannot maintain an action against the manufacturer because the manufacturer no longer exists, is insolvent or is not subject to jurisdiction.

Dismissal is not nearly so difficult in Iowa, where the courts have found that the prerequisites for dismissal, that the supplier prove that the actual manufacturer is subject to Iowa court jurisdiction and has not been declared insolvent, are separate and independent requirements. Unfortunately, such an interpretation is rare in the U.S. and courts will generally require both prerequisites be met in order to allow a supplier to be dismissed from the litigation.

e. If It Walks Like a Duck…Packaging, Puffery and Apparent Manufacturing

i. Apparent Manufacturer Doctrine

The Apparent Manufacturer Doctrine operates to impose liability in some jurisdictions, where a trademark licensor may be held liable by virtue of its substantial participation in design, manufacture or distribution of a product and its role in placing dangerous or defective products in the stream of commerce. When a product is manufactured in a foreign country, liability cases often involved comprehensive and detailed scrutiny of the product's packaging for representations of origin and

[3] Example: Ohio Revised Code §2307.382(A) (*emphasis added*)

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state; (2) Contracting to supply services or goods in this state; (3) Causing tortious injury by an act or omission in this state; (4) Causing tortious injury in this state by an act or omission outside this state *if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state*….

manufacturer identification indicia. Consequently, it is important to preserve samples of all packaging for the product for the pertinent manufacturing era. If the supplier defendant emblazons its logo, name and representation pervasively on the packaging and in the product literature with little or no reference to the foreign manufacturer, that supplier risks being found an "apparent manufacturer," and it risks retention as a defendant. Generic product packaging increases the likelihood that a supplier will avoid liability.

ii. Logos, Ads, and Warranties, Oh My!

The Apparent Manufacturer Doctrine comes into play when domestic branding is applied to products that manufactured by foreign entities. In a North Carolina case, gas heater branded under the name "Empire Corcho" allegedly caused a devastating house fire. The heater was manufactured by a Spanish company with a sale and licensing agreement, patent, trademark and technical assistance agreement and repair and modification subcontracting agreement with Empire. Furthermore, Empire had the exclusive right to sell the heaters in the U.S. Empire asserted a "sealed container defense" to liability – claiming that the heaters were merely received from the manufacturer and passed along with no opportunity to inspect or handle the product. While the parties did not dispute that Empire acquired the heaters in sealed containers, the plaintiff contended that the North Carolina statutory exception for express warranty applied to vitiate the supplier exclusion. Empire had advertised that the heaters were "America's most complete line of reliable, economical gas heating appliances." However, the North Carolina Court of Appeals found that under the UCC, a statement purporting to be merely the seller's opinion or commendation of the goods does *not* create a warranty. Unfortunately for Empire, their advertisements and packaging, while perhaps not enough to create a warranty, neglected to disclose the actual manufacturer of the product and nowhere was the foreign manufacturer identified by name. As a result, there existed a genuine issue of material fact as to whether Empire was the "apparent manufacturer" of the heaters and therefore open to liability.

iii. Trademark Licensors, the Lanham Act and Comparative Fault

Where a distributor may escape liability, a trademark licensor may not be so fortunate. An Indiana case from 2004 involved a claim arising from an allegedly faulty umbrella which was offered as a gift with purchase of a Guess brand product. The umbrella bore the Guess logo. The Indiana Supreme Court held that trademark licensors have an ongoing duty to "detect and prevent" defective products and responsibility for defective products that enter the state's stream of commerce. The Court concluded that liability should be apportioned according to the theories of comparative fault. In many cases, courts analyze the goods themselves, interjecting principles of trademark and Lanham Act jurisprudence. With a sterling brand, a licensor will take great effort to protect its name, increasing the likelihood that the entity will remain in a product liability action following dispositive motions. In these situations, underlying contractual agreements between licensor and licensee and distributor may protect the licensor contractually from liability.

II. Improper Venue (Forum Non Conveniens)

a. Using FNC to combat "Forum Shopping" in Canada

Where a party demonstrates a "real and substantial connection" to a certain forum, the court still has discretion, under forum non conveniens ("FNC"), to decline asserting jurisdiction where a more suitable forum is present. The onus lies with the party disputing jurisdiction to raise this principle and demonstrate that an alternative forum should be preferred.

Amchem Products Inc v British Columbia Worker's Compensation Board ("Amchem")[4] stated that the test to strike a claim based on FNC is where "there is another forum that is clearly more appropriate than the domestic forum" and in a better position to dispose of the litigation fairly and efficiently. In addition to raising FNC, a party can effectively defend against "forum shopping" by applying for an anti-suit injunction or defensive declaratory action.

Anti-suit injunctions are where a defendant obtains a mandatory order from the court in one jurisdiction requiring the plaintiff to discontinue proceedings in another jurisdiction. These are most commonly granted where a foreign court has improperly assumed jurisdiction over a matter that is better handled by the domestic court. This type of injunction should only be granted where the foreign court has departed from Canada's FNC test such that it justifies refusing to respect its assumption of jurisdiction.

The second strategic option is to apply for defensive declaratory action. This is implemented where an action is commenced in two jurisdictions which are equally qualified to hear a matter. A defendant applies for a declaration from the local court stating that the defendant is not liable to the respondent plaintiff.

b. American Perspective

The common law doctrine of forum non conveniens provides litigants with an opportunity to challenge the convenience of the forum in which a trial is brought and to move the trial to a more convenient forum. The doctrine confers on defendants protection from litigating in an inconvenient forum.

Forum non conveniens is a federal common law doctrine that also allows for dismissal of a suit upon motion of the defendant when, although the court has subject matter jurisdiction, personal jurisdiction, and proper venue, trying the action elsewhere would "best serve the convenience of the parties and the ends of justice." [5] The Supreme Court has recognized that, because plaintiffs are provided with a choice of forum by statute, a plaintiff may be "under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." [6]

In *Gulf Oil Corp,* the Supreme Court outlined the factors of the balancing test for making forum non conveniens determinations. First, the moving defendant has the initial burden of showing the existence of an alternative forum adequate and available for all parties.[7] Second, the defendant must show that private and public interest factors weigh heavily against litigation in the present forum and in favor of another forum.[8] Private interest factors are those affecting the convenience of the litigants while public interest factors are those affecting the convenience of the court.[9] The Supreme Court has described private interest factors as: (a) relative ease of access to sources of proof; (b) availability of compulsory process for attendance of unwilling witnesses; (c) cost of obtaining attendance of willing witnesses; (d) possibility of view of premises, if view would be appropriate to the action; and (e) all other practical problems that make trial of a case easy, expeditious and inexpensive.[10]

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[4] In order to determine the appropriate jurisdiction, the Amchem court set out the following factors that must be weighed: (i) the connection between the plaintiff's claim and the forum, (ii) the connection between the defendant and the forum, (iii) unfairness to the defendant by choosing the forum, (iv) unfairness to the plaintiff in not choosing the forum, (v) the location of key witnesses and evidence, (vi) any issues of comity, (vii) any contractual provisions specifying the applicable forum, (viii) the avoidance of a multiplicity of proceedings, and (ix) whether declining jurisdiction would deprive the plaintiff of legitimate judicial advantage available in the domestic court. FNC is a discretionary decision and as such, the weight given each factor is dependent on the circumstances surrounding the case at hand.

[5] *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 527 (1947).

[6] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

[7] *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1164 (5th Cir. 1987).

[8] *Id*. at 1164.

[9] *Gulf Oil Corp.*, 330 U.S. at 508-9.

[10] *Id*. at 508.

Public interest factors include: (a) administrative difficulties flowing from court congestion; (b) "local interest" in having localized controversies decided at home; (c) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (d) avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and (e) unfairness of burdening citizens in an unrelated forum with jury duty.[11]

The "balancing of conveniences" approach as stated by the Supreme Court is flexible and does not emphasize any one factor.[12] The forum non conveniens test is applied in all federal court cases regardless of whether the subject matter is governed by state or federal law.[13]

III. Choice of Law and Choice of Forum Clauses

a. Choice of Forum

Under Canadian law, a forum selection clause[14] will be enforced except in cases where the party seeking to avoid the clause can establish a strong reason why it should not be applied. The court will look at a number of factors when making its determination.[15]

b. Choice of Law

Often, Choice of law clauses dictate which law the forum should apply in resolving a dispute. Parties are generally free to dictate the law to resolve a dispute so long as there is a real connection between the transaction and the chosen law. In Canada, the courts will often respect the operation of governing law clauses so long as they are: (i) bona fide, (ii) legal, and (iii) not contrary to public policy. A court will not permit a choice of law where its purpose is to evade relevant laws, commit fraud or duress, or act in bad faith.

For tort disputes, the place where the tort was committed, locus delicti, is deemed the proper jurisdiction. For contract disputes, where the contract was formed, locus contractus, and its corollary, the law of the place the contract concluded, lex loci contractus, are deemed the proper jurisdictions. Where no express choice of law is made, the court will attempt to ascertain whether there was an implied choice of law made by the parties. Where an accident occurs in a foreign jurisdiction, the courts will only apply foreign law if a party specifically pleads is application. Otherwise, the court will apply its jurisdiction's law. Practical Considerations When Drafting Choice of Forum and Choice of Law Clauses.

c. Practical Considerations When Drafting Choice of Forum and Choice of Law Clauses

When drafting choice of forum and choice of law clauses, the following must first be considered:

- Are there substantial differences in the substantive law, rights conferred, and remedies awarded in the different jurisdictions?

[11] *Id.*
[12] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981).
[13] *Air Crash*, 821 F.2d at 1154.
[14] These clauses may: (i) make reference to a specific court in a jurisdiction agreed upon by the parties, (ii) make reference to specific form of dispute resolution, or (iii) make reference to both.
[15] These factors include: (i) what jurisdiction the evidence is located, (ii) the degree of connection between the parties and each of the alternative jurisdictions, (iii) whether there are material differences in the laws of each jurisdiction, (iv) whether the choice of law is merely an attempt to gain a procedural advantage, and (v) whether the parties would suffer prejudice by having to bring action in a foreign jurisdiction.

- When a party obtains a remedy is it possible and convenient to enforce the remedy in a foreign jurisdiction? Can you enforce your court order against the foreign party?
- What are the differences in procedural requirements between the jurisdictions?
- Is one jurisdiction more likely to award a specific remedy over another?

The wording in these clauses must be precise to ensure that exclusive jurisdiction to a particular forum and set of laws is conferred. Ambiguity in the wording risks another forum assuming concurrent jurisdiction. Lastly, the drafter must consider what parties the clause will encompass and whether the clause is mandatory or permissive.

IV. Advantages and Disadvantages of Litigating Product Liability in Canada vs. the United States

Forum shopping is present in many product liability cases as parties try to bring action in jurisdictions they can expect to receive favourable treatment. Some of the major differences in Canadian and American law influencing which jurisdiction to bring action are outlined below.

a. Liability in Canada:

i. No strict liability

Product liability in Canada is restricted to negligence, breach of contract, and breach of statutory obligations. The absence of strict liability could be seen as a benefit to defendants of product liability. Canadian courts have resisted adopting no-fault liability for product defects. In Phillips et al v Ford Motor Co of Canada Ltd et al, the court affirmed that in product liability cases, there is no imposed liability on manufacturers, distributers, or repairers.

ii. Negligence

The standard of care in product liability cases is the duty to take reasonable care. Liability can arise as a result of manufacturing defects, product defects, and a failure to warn. The plaintiff has the burden of establishing that the product was defective and that the defendant failed to meet their obligation to take reasonable care. There is also an obligation to customers that they will be warned of any dangers that are known. There are a number of common defences to product liability in Canada a defendant may rely on.

iii. Contract

Contractual obligations arise when a product is sold. If the agreement of sale of goods contains provisions stating that the equipment in question will execute to certain standards. The manufacturer and distributer could be held liable where it does not. In product liability, a party can only bring a claim where they are privy to that contract.

iv. Statutory Liability

Lastly, there are implied warranties under the Sale of Goods Act in Ontario and other statutory obligations that may be breached. Specifically, there are provisions which state that goods will be fit for a particular use and are of "merchantable quality."

b. Damages:

In Canada, the courts do not generally award punitive damages in product liability cases stating that punitive damages are an exceptional and rare remedy that should be used cautiously. In addition, the courts have placed a cap of $340,000 on all general damages for non-pecuniary loss in personal injury cases regardless of the extent of the injury. There is no cap on either punitive or general damages in the United States. As such, a defendant to product liability would be more inclined to have the case heard in Canada to avoid excessive damages.

c. Legislation:

The Canadian Federal Government has imposed on manufacturers, importers, and sellers a duty to report product defects and incidents that have caused or may cause serious injury to potential consumers. This imposes a higher standard of disclosure in Canada than in the United States. As such, a defendant in Canada could potentially be more susceptible to allegations of product defect and failure to warn.

d. Procedural Issues:

In the United States, many civil actions are tried before both a judge and jury. In Canada, most actions are tried before a judge alone. Whether a dispute is heard by a jury or judge alone could influence a party's decision regarding what jurisdiction to bring its claim in. In addition, judges must provide written reasons whereas juries do not. This could significantly affect whether to appeal a case.

With regard to pre-trial examinations for discovery, in Canada, the plaintiff can examine only a single party. As a result, the defendant's discovery costs remain low. In the United States, the plaintiff is permitted to examine multiple parties. This could lead to a substantial increase in costs and legal fees.

e. Costs:

The Canadian costs regime states that unsuccessful litigants may be ordered to reimburse the successful party for a fraction of its legal fees. This could be a disincentive to some parties to bring action. In the United States, the unsuccessful party is not required to pay the successful party's legal fees.

V. CASE STUDY

In this case study, S, the plaintiff, has alleged that she has contracted breast cancer as a result of consuming estrogen pills produced by the defendant, W, a pharmaceutical company. W is an American corporation and S is a resident of British Columbia, Canada. S developed cancer as a result of taking W's drug in combination with another drug. The plaintiff purchased and used the drug in British Columbia. S used the drug for 8 years. The drug is manufactured in the United States. S has brought action against W pursuant to consumer protection legislation and in tort.

S alleges that the pills produced by W have limited efficacy and are unsafe, stating that the risk of using these pills greatly exceeds their benefit. S asserts two causes of action. The first is in tort for negligence. The second is a statutory cause of action for deceptive acts and practices pursuant to the Trade Practices Act. She alleges that W was negligent in its manufacturing, testing, marketing, labeling, distribution, promotion, and sale of the pills as they failed to warn of the dangers associated with taking such medication.

W has taken the position that the British Columbia court lacks territorial competence over W pursuant to the Court Jurisdiction and Proceedings Transfer Act and that there is no real and substantial connection between British Columbia and the facts upon which the proceeding is based. S is of the

position that there is a real and substantial connection between the subject matter of this litigation and British Columbia.

a. Questions:

1. What is the proper forum to hear this dispute? What jurisdiction's law should apply?
2. What recourse in conflict of laws does the defendant have?
3. Who are the potential defendants in this product liability action? What types of action could be brought?
4. What potential defenses to product liability do the defendants have?
5. What are the benefits to the defendant if this action is brought in Canada instead of the United States?