



The Orrick Library presents:

Navigating Mass Torts and Product Liability (MTPL) Litigation in the U.S. Legal System





Litigation Challenges for Japanese MTPL Defendants in the U.S.

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Overview

- Challenges of U.S. Courts
- Specialized and Aggressive Plaintiff's Bar and Contingency Fees
- Jury Trials
- Pretrial Discovery
- Personal Jurisdiction
- U.S.-Based Subsidiaries
- Venue and *Forum Non Conveniens*
- Punitive Damages
- Joint and Several Liability
- Forum Shopping
- U.S. Product Liability Law
- Types of Claims
- Class Actions and Multidistrict Litigation
- Rise of "No Injury" Class Actions
- The Role of Science in the Courtroom



Challenges of U.S. Courts

- Navigating the unfamiliar, complicated terrain of the U.S. legal system
 - Language and cultural barriers
 - Potential jury bias
 - Lengthy and potentially expensive process
 - Discovery
 - Defense costs
 - Potential for appeal



Specialized and Aggressive Plaintiff's Bar and Contingency Fees

- U.S. litigation often driven by well-funded plaintiff's attorneys with seemingly unlimited resources
 - \$52.6 million annually spent in keyword advertising¹
- Plaintiff's attorneys are motivated by the prospect of extracting large monetary payments from defendants through contingency fees
- Contingency fee arrangements have become a standard practice in the U.S., particularly in product liability cases
- Attorneys' fees are calculated as a percentage of the client's recovery

¹ Institute for Legal Reform, January 2011



Jury Trials

- U.S. employs a jury system for civil trials
- Six to twelve people selected from the local population, under the supervision of a U.S. judge
- Typically lay persons and are often uneducated
- Sympathetic to plaintiffs alleging personal injury or property damage
- Juries may also be less sympathetic to non-U.S. defendants



Pretrial Discovery

- **Japan:**

- Informal approach
- Evidence produced at trial
- Judge controls exchange of evidence
- Parties cannot compel production
- No jury trials

- **United States:**

- Extensive formalized pretrial discovery
 - Interrogatories, Requests for Production, Requests for Admission and Depositions
- Evidence produced before trial
- Parties exchange evidence
- Discovery motions
- Jury trials



Personal Jurisdiction:

Can a Japanese company be sued in the U.S.?

- Threshold question
- “Minimum contacts”
 - “traditional notions of fair play and substantial justice”
 - even if a Japanese defendant has no U.S. office or assets – sales, contracts, transactions or isolated visits to the U.S. may suffice to confer jurisdiction over a Japanese corporation
 - as a general rule, a forum’s exercise of jurisdiction over a foreign defendant requires some act by which the defendant “purposefully avails” itself of the protections of a forum state



Personal Jurisdiction:

Can a Japanese company be sued in the U.S.?

- Activities giving rise to personal jurisdiction because they may establish defendant's "purposeful availment" of forum state
 - Commission of some act within the forum
 - Contracting for the provision of goods or services within the forum
 - Maintaining a place of business, employees or bank accounts in the forum
 - Ownership of property in the forum
 - Achieving high number of product sales in the forum



Personal Jurisdiction:

Can a Japanese company be sued in the U.S.?

- Activities giving rise to personal jurisdiction because they may establish defendant's "purposeful availment" of forum state
 - Directly (i.e. without a U.S. distributor) selling or shipping product to forum customers
 - Designing, manufacturing or advertising products within the forum
 - Using state-specific packaging or product warnings
 - Targeted marketing by the foreign manufacturer of forum-specific customers



Jurisdiction Over Foreign Manufacturers

- U.S. Supreme Court decision in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)
 - Split decision declining to expand jurisdictional reach of U.S. courts over foreign manufacturers, even though products may end up in U.S.
- U.S. Supreme Court decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011)
 - Held that foreign subsidiaries were not subject to general jurisdiction in U.S. state



Personal Jurisdiction:

Can a Japanese company be sued in the U.S.?

- Florida state court upheld jurisdiction over a Chinese drywall manufacturer.
 - *Lennar Homes LLC et al. v. Knauf Gips KG et al.*, No. 09 Civ. 07901 (Fla. Miami-Dade Ct. Aug. 31, 2012) (Foreign defendant had sufficient business dealings and contacts to satisfy jurisdictional requirement).
- *In re Chinese Manufactured Drywall Products Liab. Litig.*, MDL 2047, 2012 WL 3815669 (E.D. La. Sept. 4, 2012) (“While [foreign defendant] has no physical contacts with the forum, it did possess contacts which demonstrate it purposefully directed its activities at the forum such that it reasonably could anticipate being haled into court there.”).
- *Yanmar Co., Ltd. v. Slater*, 2012 WL 309599 (Ark. Feb. 2, 2012) (reversing jury award of \$2.5 million finding that Japan-based defendant tractor manufacturer lacked sufficient contacts with Arkansas for the court to exercise personal jurisdiction over it and that its U.S.-based subsidiary owed no duty to decedent/purchaser).



Personal Jurisdiction:

Can a Japanese company be sued in the U.S.?

- Internet implications
 - Knowing and repeated transmission of computer files over the internet
 - Interactive Web sites
 - Passive Web sites
- *Illinois v. Hemi Group LLC*, 622 F.3d 754, 760 (7th Cir. 2010) (“Here, we affirm the district court's conclusion that [defendant] is subject to personal jurisdiction in Illinois, not merely because it operated several ‘interactive’ websites, but because [defendant] had sufficient voluntary contacts with the state of Illinois.”).



Personal Jurisdiction: Veil Piercing Factors

- Typically involves parent's responsibility for its subsidiaries
 - Shared officers and directors
 - Dependent on related company for sales and profits from its subsidiary
 - Whether the subsidiary places orders with the foreign parent upon receiving U.S. orders
 - Substantial loans to the subsidiary
 - Shared bank accounts
 - Gross undercapitalization