

Tainted and Defective: Now What? An Overview of Chinese Product Litigation[†]

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I. INTRODUCTION

Recently, there have been an increasing number of news articles, lawsuits, and concerns regarding the importation of defective or unsafe Chinese products into the United States. From defective drywall to dangerous tires, and hazardous electrical products, the message of these stories has been the same: “*Caveat Emptor*” – let the buyer beware. Even so warned, consumers and businesses injured as a result of these products have initiated a myriad of lawsuits against everyone from local retailers to Chinese producers. This article explores the products and the legal issues that have arisen as a result of the influx of tainted and defective Chinese goods in the United States.

II. THE PRODUCTS

Standing at the forefront of protection for American citizens against dangerous products is the United States’ Consumer Product Safety Commission (“CPSC”). Since 1972, the CPSC has been charged with protecting the public against unreasonable risks of injury associated with consumer products, assisting consumers in evaluating the comparative safety of consumer products, and promoting research into the causes and prevention of product-related injuries.¹ Due to the increasing number of recalls for consumer products manufactured in China, the CPSC adopted the China Program, which has two essential goals: (1) “to engage officials from the People’s Republic of China in a cooperative dialogue and . . . reduce the risk of injury to American consumers from Chinese imports” and (2) “to educate Chinese manufacturers . . . in strategies to improve the safety of Chinese consumer product exports and increase the rate of compliance of such products with CPSC’s mandatory rules and applicable voluntary industry standards.”² However, defective Chinese products are still making it into the United States at an

[†] Submitted by the authors on behalf of the FDCC Toxic Tort and Environmental Law Section.

¹ 15 U.S.C. § 2051(b)(1)-(4) (2006).

² U.S. Consumer Product Safety Commission, *International Consumer Product Safety Program, 2007 China Program Plan* (2007), <http://www.cpsc.gov/BUSINFO/intl/china07.pdf>.

It is also important to note that on August 14, 2008, President George W. Bush signed the Consumer Products Safety Improvement Act of 2008, which enacts sweeping changes to consumer protection law in the United States. See Consumer Products Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016. Title I of the Act, dealing with children’s product safety, treats lead as a banned hazardous substance and establishes strict limits on the total lead content by weight for any part of any product. Title I covers everything from electronic

alarming rate. In April 2009 alone, the CPSC issued a recall for twenty-one products made in China, with hazards including burning, shock, fire, strangulation, choking, bursting, laceration, bruising, and collapsing.³

While the list of defective Chinese products may be long and varied, the following provides an introduction to the products most widely reported as defective.

A. Drywall

Consumers from at least thirty-seven states and the District of Columbia have reported health issues or metal corrosion problems in their homes allegedly related to drywall imported from China.⁴ To date, the CPSC has received about 3,000 reports from consumers who believe they have experienced drywall-related problems.⁵ The majority of reports have come from residents of Florida, but a significant number have also originated from Louisiana, Mississippi, Alabama, and Virginia.⁶

The CPSC is currently investigating the scope of the drywall problem as well as the scientific relationship between the drywall and consumers' health and safety concerns. Drywall will be discussed in depth in Section III, below.

B. Toys

China produces approximately 80% of the world's toys.⁷ Large toy companies such as Mattel have issued major recalls for certain Chinese manufactured toys because the paint on the toys contains excessive levels of lead.⁸ If ingested, lead can pose a health hazard to children.⁹ According to *The New York Times*, China manufactured over two million total units recalled for safety reasons in the United States in 2007, including the following:

- Barbie accessories

devices to children's books. Further, it provides for mandatory third-party testing of certain children's products, stricter labeling requirements, enhanced mandatory toy safety standards, and a requirement to utilize permanent, distinguishing marks for tracking purposes. Finally, Title I places a strict ban on the sale of children's products that contain concentrations of more than 1% of specified phthalates. Title II of the Act creates an attempt to reform the CPSC. Title II includes such features as enhanced recall authority, increased penalties, enforcement by states' Attorneys General, and protection for whistleblowers. Though many manufacturers, distributors, and retailers are now affected, the full impact of these changes is not yet understood.

³ U.S. Consumer Product Safety Commission, April 2009 Recalls and Product Safety News (2009), <http://www.cpsc.gov/cpscpub/prerel/prerelapr09.html>.

⁴ U.S. Consumer Product Safety Commission, Drywall Information Center, <http://www.cpsc.gov/info/drywall/index.html> (last visited May 4, 2010).

⁵ U.S. Consumer Product Safety Commission, Where has Problem Drywall been Reported?, <http://www.cpsc.gov/info/drywall/where.html> (last visited May 4, 2010).

⁶ *Id.*

⁷ Simon Osborne, *China: In Numbers*, THE INDEPENDENT, May 10, 2008, available at <http://www.independent.co.uk/news/world/asia/china-in-numbers-823666.html>.

⁸ Louise Story, *Lead Paint Prompts Mattel to Recall 967,000 Toys*, N. Y. TIMES, August 2, 2007, available at <http://www.nytimes.com/2007/08/02/business/02toy.html>; David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N. Y. TIMES, August 14, 2007, available at <http://www.nytimes.com/2007/08/14/business/15toys-web.html>.

⁹ David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N. Y. TIMES, August 14, 2007, available at <http://www.nytimes.com/2007/08/14/business/15toys-web.html>.

- Polly Pocket toys
- Doggie Day Care toys
- Batman toys
- “Sarge” vehicles from Mattel's "Cars" product line
- Fisher-Price character toys, including Elmo from Sesame Street and Dora the Explorer
- Thomas and Friends toy railway sets¹⁰

The *Times* stated that in cases involving recalled Chinese toys, there is evidence that Chinese manufacturers intentionally added inexpensive or illegal substances to save money.¹¹ While the U.S., Europe, and even China prohibit the use of the cheaper lead-based paint in toys, some Chinese companies contend that lead-based paint is preferred because it offers “richer colors, is easier to apply and easier to dry,” which is why the companies continue to use lead-based paint in their manufacturing processes.¹²

C. Tires

The National Highway Traffic Safety Administration (“NHTSA”) regulates all vehicles and vehicle components, including tires. In June 2007, NHTSA ordered a recall of 450,000 defective Chinese radial tires for pickup trucks, sport utility vehicles, and vans.¹³ Foreign Tire Sales, which distributed the tires under the brand names Westlake, Telluride, Compass, and YKS, notified officials that its Chinese manufacturer had stopped including gum strips, a safety feature that holds the tire together and prevents it from separating.¹⁴ The faulty tires are believed to have caused a car accident in Pennsylvania in August 2006 that killed two people.¹⁵ However, the manufacturer of the tires, Hangshou Zhongee, suggested that the recall might be an effort by foreign competitors to disrupt the company’s exports to the U.S.¹⁶

Chinese tires have also been involved in recalls for faulty tire valve stems. In May 2008, NHTSA opened an investigation after a Florida man died in a car accident that resulted from a cracked Dill TR-413 valve stem in his SUV’s right rear tire.¹⁷ The valve stem was manufactured by Shanghai Baolong Industries in China for Dill Air Control Products of Oxford, North Carolina.¹⁸ Dill informed NHTSA that as many as 30 million of the suspected valve stems were distributed in the North American market.¹⁹ Cracks in valve stems can cause tires to lose air

¹⁰ Louise Story, *Lead Paint Prompts Mattel to Recall 967,000 Toys*, N. Y. TIMES, August 2, 2007, available at <http://www.nytimes.com/2007/08/02/business/02toy.html>; David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N. Y. TIMES, August 14, 2007, available at <http://www.nytimes.com/2007/08/14/business/15toys-web.html>.

¹¹ David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N. Y. TIMES, August 14, 2007, available at <http://www.nytimes.com/2007/08/14/business/15toys-web.html>.

¹² *Id.*

¹³ David Barboza, *Chinese Company Denies Tire Defect*, N. Y. TIMES, June 27, 2007, available at <http://www.nytimes.com/2007/06/27/business/worldbusiness/27tires.html>.

¹⁴ *Id.*

¹⁵ Xiyun Yang, *Regulators Tell Importer to Recall 450,000 Defective Chinese Tires*, WASH. POST, June 27, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062602089.html>.

¹⁶ *Id.*

¹⁷ Consumer Reports, *Warning Issued on Faulty Tire Valve Stems Following Rollover Crash* (June 17, 2008), <http://blogs.consumerreports.org/safety/2008/06/tire-valve-stem.html>.

¹⁸ *Id.*

¹⁹ *Id.*

quickly, which, at highway speeds, can result in tire failure and loss of control over the vehicle.²⁰ This risk led one U.S. distributor, Tech International, to issue a recall of six million of the Chinese valve stems.²¹ However, according to Sean Kane, president of Safety Research and Strategies, despite the recall, consumers will have a hard time recognizing whether they have any of the defective valve stems on their tires.²² He noted that “[once] they are out of the box and on a vehicle there is no tracking for these products so you can’t notify owners.”²³

D. *Electrical Products*

Today, 59% of electrical products used in the U.S. are manufactured in other countries, particularly China.²⁴ In 2007, the acting Chairman of the CPSC noted that the CPSC is “very concerned about unsafe electrical products.”²⁵ In April and early May 2009 alone, the CPSC issued seven recalls, totaling nearly 900,000 units, for electrical products manufactured in China. Some of these products and the hazards associated therewith include the following:²⁶

- Atico Signature Gourmet 12-Cup and Kitchen Gourmet 10-cup Programmable Coffeemakers sold at Walgreens. These coffeemakers can ignite due to an electrical failure, posing a fire hazard.
- Insignia 26-inch Flat-Panel LCD televisions sold at Best Buy. The television’s power supply can fail, posing a fire and burn hazard to consumers.
- Wagner Spray Tech Paint Sprayers sold at major home centers. The on/off switch can be dislodged from the casing, resulting in exposure to electrical connections, which can pose an electrical shock hazard.
- Great American Popcorn Company Popcorn Machines sold online. The heating element of the popcorn machine’s warming deck can remain on after being switched off, posing a burn hazard to users.
- Haier America’s Toaster Oven/Broilers sold at mass merchandisers and specialty retailers. Electrical connections in the toaster oven/broilers can become loose, posing electrical shock and burn hazards.
- Senseo One-Cup Coffeemakers sold at Wal-Mart, Target, and Safeway. An electrical fault and the build-up of calcium from hard or medium water can cause the boiler to burst, which poses a burn hazard.
- Stanley and Solarwide Industrial Stud Sensors sold at home improvement stores. The stud sensor can fail to calibrate properly and detect AC electrical wires behind the wall, posing a shock hazard to the user.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ U.S. CONSUMER PRODUCT SAFETY COMMISSION, 2009 PERFORMANCE BUDGET REQUEST (2008), <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2009plan.pdf>.

²⁵ U.S. Consumer Product Safety Commission, *May is National Electrical Safety Month: CPSC Warns of Dangerous Counterfeit Electrical Products*, May 9, 2007, <http://www.cpsc.gov/cpscpub/prerel/prhtml07/07185.html>.

²⁶ U.S. Consumer Product Safety Commission, April 2009 Recalls and Product Safety News (2009), <http://www.cpsc.gov/cpscpub/prerel/prerelapr09.html>; U.S. Consumer Product Safety Commission, May 2009 Recalls and Product Safety News (2009), <http://www.cpsc.gov/cpscpub/prerel/prerelmay09.html>.

In addition to malfunctioning products, counterfeit electrical products, many of which are made in China, are currently making their way into U.S. markets.²⁷ These products are not tested for compliance with the relevant safety standards.²⁸ In recent years, the CPSC has recalled more than one million counterfeit electrical products, including circuit breakers that did not trip when overloaded, cell phone batteries without a safety device to prevent overcharging, and extension cords with mislabeled or undersized wiring that overheated.²⁹ These defects can cause fires, explosions, shocks, and electrocutions.³⁰

The CPSC is undertaking a number of measures to identify and stop the flow of counterfeit electrical products into the United States. It is actively working with the Chinese government, the Customs and Border Protection Division in the Department of Homeland Security, and legitimate Chinese manufacturers, as well as certifying testing laboratories, all in an effort to reduce the number of unsafe products exported to the United States.³¹

E. Food and Hygiene Products

The U.S. Food and Drug Administration (“FDA”) has the power to regulate and ensure the quality and safety of food, drugs, cosmetics, medical devices, biologics, and veterinary products. China has recently become one of the world's top agricultural exporters, so Chinese food products are present in most American homes.³² With the rise in the number of Chinese products in American homes, the FDA, like the CPSC, has been issuing an increasing number of recalls for Chinese food products. The more notable recalls include the following:

- Melamine Contamination in Infant Formula.³³ Throughout 2007 and 2008, the FDA monitored reports that melamine and melamine-related compounds were found in infant formula made in China. Melamine is a man-made substance and is not approved to be added directly to food in the United States. Since no Chinese infant formula manufacturers have fulfilled the requirements necessary to sell infant formula in the U.S., there is currently no known threat of melamine-contaminated formula to American consumers. However, melamine is a serious concern; the FDA has advised citizens not to consume twenty-seven other food products sold in America due to possible melamine contamination.
- Melamine-Contaminated Pet Food.³⁴ On March 15, 2007, the FDA reported that certain pet foods were sickening and killing dogs and cats. The FDA found melamine contaminants in pet food imported into the United States from China.

²⁷ U.S. Consumer Product Safety Commission, *May is National Electrical Safety Month: CPSC Warns of Dangerous Counterfeit Electrical Products*, May 9, 2007, <http://www.cpsc.gov/cpscpub/prerel/prhtml07/07185.html>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Jennifer Pifer, *Avoiding Chinese Food Products Nearly Impossible*, July 26, 2007, <http://www.cnn.com/2007/LIVING/wayoflife/07/26/china.products/index.html>.

³³ U.S. Food and Drug Administration, *Melamine Contamination in China*, January 5, 2009, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm179005.htm>.

³⁴ U.S. Food and Drug Administration, *Melamine Pet Food Recall of 2007*, April 30, 2009, <http://www.fda.gov/oc/opacom/hottopics/petfood.html>.

The FDA issued a recall of pet food, including popular brands like Del Monte Pet Products, Hill's Pet Nutrition, Menu Foods, Nestle Purina PetCare Company, P&G Pet Care, and Sunshine Mills. On February 6, 2008, as a result of the FDA and USDA's comprehensive investigation, the FDA announced that a federal grand jury had indicted two Chinese nationals and their businesses, along with a U.S. company, its president, and its chief executive officer, for the roles they played in a scheme to import products contaminated with melamine into the United States.

- Diethylene Glycol Contaminated Toothpaste.³⁵ In 2007, reports of contaminated Chinese toothpaste found in several countries, including Panama, led the FDA to begin testing Chinese toothpaste and dental products that were imported into the United States. The toothpaste was allegedly contaminated with diethylene glycol ("DEG"), a poisonous chemical that is used in antifreeze as a solvent. During the FDA's testing, it found levels of DEG as high as 3-4% in Chinese manufactured toothpastes and subsequently warned consumers to avoid using any toothpaste labeled as "made in China." The products tested were located at retail stores and were not labeled as containing DEG. The FDA identified brands of toothpaste containing DEG to include Cooldent Fluoride, Spearmint, and ICE flavors; Everfresh Toothpaste; Superdent Toothpaste; Clean Rite Toothpaste; Oralmax Extreme; and DentaPro.

III.

THE PRODUCTS: A FOCUS ON DRYWALL

A significant amount of attention has been given to the problems associated with drywall imported from China. Drywall is made by pressing the mineral gypsum between thick pieces of paperboard.³⁶ However, synthetic gypsum can be made by processing the residue produced by coal-burning power plants.³⁷ Before the period from 2004 to 2006, most drywall used in U.S. construction was manufactured in the United States.³⁸ However, drywall from China was imported in large quantities from 2004 to 2006 due to the shortage caused by the building boom resulting from Hurricanes Katrina and Wilma.³⁹ Once Chinese drywall started to be installed, consumers reported having problems such as a "rotten egg" smell in their homes, health issues including irritated and itchy eyes and skin, difficulty in breathing, persistent cough, bloody noses, runny noses, recurrent headaches, sinus infections and asthma attacks, blackened and corroded metal components in their homes, and the need to frequently replace components in air conditioning units.⁴⁰

³⁵ U.S. Food and Drug Administration, *FDA Advises Consumers to Avoid Toothpaste From China Containing Harmful Chemical*, June 1, 2007,

<http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2007/ucm108927.htm>.

³⁶ Tim Padgett, *Is Drywall the Next Chinese Import Scandal?*, TIME, March 23, 2009, available at <http://www.time.com/time/printout/0,8816,1887059,00.html>.

³⁷ See Julie Schmit, *Drywall From China Blamed For Problems In Homes*, USA TODAY, Mar. 16, 2009, available at http://www.usatoday.com/money/economy/housing/2009-03-16-chinese-drywall-sulfur_N.htm.

³⁸ See Padgett, *supra* note 36.

³⁹ See Schmit, *supra* note 37.

⁴⁰ See *id.*

The company named in a majority of the lawsuits involving Chinese drywall is Knauf Plasterboard Tianjin Company of China (“Knauf”). According to Knauf, it first received complaints about its imported Chinese drywall in 2006.⁴¹ Knauf conducted an internal investigation and determined that the drywall causing these complaints smelled like the drywall made from natural gypsum in China.⁴² Knauf determined that the drywall manufactured from one particular Chinese mine contained iron disulfide, a naturally occurring mineral with a distinct odor.⁴³ As a result, Knauf stopped using gypsum from that particular mine.⁴⁴

Nonetheless, the Florida Department of Health eventually retained Unified Engineering (“Unified”) to test and analyze samples of U.S. and imported Chinese drywall collected from homes in Florida.⁴⁵ The tests demonstrated that the drywall samples from China contained trace levels of strontium sulfide. Strontium sulfide has the odor of hydrogen sulfide, or rotten eggs, in warm, moist air.⁴⁶ The report also indicated that the U.S.-made drywall contained only trace levels of organic materials, while the Chinese drywall samples contained more than 5% organic materials.⁴⁷ However, Unified could not determine whether the presence of either strontium sulfide or the organic materials contributed to the “rotten egg” smell.⁴⁸ Unified’s analysis determined that there were three compounds present in the drywall that could cause a detectable odor: hydrogen sulfide, carbonyl sulfide and carbon disulfide. It did not determine, however, which compound ultimately caused the odor.⁴⁹ Unified did conclude that the presence of sulfur in the moist atmosphere inside Florida homes can create a corrosive environment.⁵⁰ As a result, metals such as copper can corrode, which causes home components such as air conditioners, copper wiring, and copper pipes to degrade and possibly fail.⁵¹

The damage caused by the release of these volatile gases from Chinese drywall seems to form the basis for several causes of action. First and foremost, the mere fact that a consumer’s home contains imported Chinese drywall can cause the home’s value to decrease. Second, plaintiffs could make breach of warranty claims (such as breach of express warranty and breach of implied warranty) based upon the manufacture, distribution, sale, and installation of imported Chinese drywall. Another potential claim may exist for fraud or misrepresentation. However, this claim will raise the issue of just how much information the manufacturers, sellers, distributors, and installers of the imported drywall knew about the existence of any problems caused by the drywall. But, as Knauf admitted that it had knowledge in 2006 about problems with its drywall, the possibility for such a claim may exist. Finally, other claims that may be alleged as a result of imported Chinese drywall include unjust enrichment, breach of contract, and nuisance (due to the “rotten egg” smell). Plaintiffs could also claim incidental damages for repairs to appliances and other household items damaged by the gases released from the drywall,

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See UNIFIED ENGINEERING, INC., FIRST REPORT ON FLORIDA DRYWALL SAMPLES, (2009), <http://www.doh.state.fl.us/environment/community/indoor-air/fldrywallfirstreport.zip>.

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.* at 4-5.

⁵⁰ *Id.*

⁵¹ *Id.*

the cost of removing the imported drywall from their homes, and the expenses for temporary housing and relocation incurred while repairs to their home repairs are completed.

To date, there is no evidence that any long-term health problems are caused from exposure to the relatively low levels of gases released by the imported drywall.⁵² While the first wave of lawsuits has focused on claims with reasonably quantifiable and measurable elements of damage, future Chinese drywall lawsuits could be based on the potential dangerous effects of prolonged exposure to Chinese drywall and any illnesses that may be associated with such exposure, but only if a connection between the two can be proven. The claims in these future lawsuits could include intentional or negligent infliction of emotional distress for fear of future injury and loss of enjoyment of life, all of which could result in more significant damages.

Finally, the recent wave of lawsuits resulting from defective Chinese imports could result in increased regulation of the entire U.S. drywall industry. Florida Congressmen Robert Wexler and Mario Diaz-Balart proposed a bill that would require the CPSC to study imported Chinese drywall and enact an interim ban on drywall that contains organic compounds in concentrations higher than 5%.⁵³ The bill also would require the CPSC to determine whether it should promulgate consumer safety standards to regulate the composition of the materials used in drywall.⁵⁴ If the legislation is adopted, it remains to be seen how it would affect Chinese drywall lawsuits in Florida or other states.

IV.

SPECIFIC CLAIMS ALLEGED IN CHINESE PRODUCT LITIGATION

Consumer claims involving Chinese products are generally based on negligence, strict liability, and breach of warranty. There also seems to be an increasing number of class action cases based on state consumer protection laws that are being filed in conjunction with, or in place of, traditional personal injury class actions.⁵⁵ This trend is likely due to the difficulty in certifying class actions based on actual injury.⁵⁶ This new method for achieving class certification will result in plaintiffs seeking recovery for purely economic injuries.

Some specific claims in recent class actions generally reflect the type of claims available for defective Chinese products:

- Claims in New Jersey Federal Court for a class action suit involving defective tires included breach of implied warranty, unjust enrichment, and violation of the New Jersey Consumer Fraud Act.⁵⁷
- Claims in a California class action for tainted pet food included violations of California's consumer legal remedies and violations of the laws of the People's Republic of China.⁵⁸

⁵² See Schmit, *supra* note 37.

⁵³ See H.R. 1977 11th Cong. (1st Session 2009)

⁵⁴ *Id.*

⁵⁵ Amanda Bronstad, *A New Use For Consumer Class Actions: Usurping Personal Injury Claims*, 29 NAT'L L.J. (July 9, 2007).

⁵⁶ *Id.*

⁵⁷ *McCulley v. Hanzghou Zhongce Rubber Co.*, Case No. 1:07-CV-02993 (D.N.J.).

⁵⁸ *Quintana v. Binzhou Futian Biological Technology Co., Ltd.*, Case No. CGC-07-465924 (San Francisco Super. Ct.). This case was subsequently transferred to the Monterey County Superior Court, Case No.

- Claims in *In re Pet Food Products Liability Litigation*, involving tainted pet food, included emotional distress to owners, medical monitoring for animals, misconduct in announcing a recall, unjust enrichment, and punitive damages.⁵⁹
- Claims for lead paint in toys sought recovery based on state deceptive and unfair trade practice law, breach of implied warranty, strict liability, and unjust enrichment.⁶⁰

Finally, prisoners have filed claims under section 1983, alleging that they became ill after using toothpaste and deodorant manufactured in China.⁶¹ In *Palermo v. White*, a prisoner sued the Supervisor of Corrections, alleging that he was provided toothpaste that was not approved by the FDA or ADA.⁶² The court in *Palermo* clarified that prisoners have no constitutional right to FDA- or ADA-approved toothpaste, and therefore, a section 1983 claim based on such allegations is not valid. However, in order to save the plaintiff's complaint, the court construed the complaint to plead an endangerment claim; as the safety and security of all prisoners is protected by the Constitution, the court allowed the section 1983 claim to proceed under that theory.⁶³

Though a majority of suits relating to Chinese products involve civil law, not all suits are so confined; many state Attorneys General have begun to sue manufacturers and sellers for knowingly manufacturing or selling defective products. For example, the California and New York Attorneys General sued toy manufacturers and sellers for knowingly manufacturing or selling toys with illegal and dangerous levels of lead in the paint.⁶⁴

V.

ATTEMPTING TO MAKE CHINESE COMPANIES PAY

A. Overview

Although the past few years have seen an increase in the number of defective Chinese products entering the American stream of commerce, the issues preventing a consumer or business from holding a Chinese company accountable are not new ones. Issues that arise in such international litigation include *in personam* jurisdiction, *forum non conveniens*, application of traditional U.S. tort law, and choice of law issues. The ability to hail an international defendant into the U.S. court system is difficult enough, and enforcing a judgment is often impossible. Further, the option of suing in China is rarely considered.⁶⁵

GNM91334,

<http://webaccess.sftc.org/Scripts/Magic94/mgrqispi94.dll?APPNAME=IJS&PRGNAME=ROA22&ARGUMENTS=-ACGC07465924> (last visited May 13, 2010).

⁵⁹ *In re Pet Food Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 94603 (D.N.J. 2008).

⁶⁰ *Shoukry v. Fisher-Price, Inc.*, Case No. 07-CV-7182 (S.D.N.Y.).

⁶¹ *Palermo v. White*, No. 08-CV-126-JL, 2008 WL 4224301, *2 (D.N.H. Sept. 5, 2008); *Smith v. Ozmint*, No. 07-3644-PMD-BM, 2009 WL 1883200, *1 (D.S.C. April 23, 2008).

⁶² *Palermo v. White*, No. 08-CV-126-JL, 2008 WL 4224301, *2 (D.N.H. Sept. 5, 2008).

⁶³ *Id.* at *6. See also *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 190 (1989) (discussing a prisoner's constitutional right to safety).

⁶⁴ LEWIS BASS, *PRODS. LIAB.: DESIGN AND MANUFACTURING DEFECTS* § 2:46.21 (2d ed. 2009).

⁶⁵ See Roger Parloff, *China's Newest Export: Lawsuits*, FORTUNE MAGAZINE, July 5, 2007, available at http://money.cnn.com/2007/07/05/news/international/chinese_lawsuits.fortune/index.htm.

Facing a difficult road to recovery when suing a Chinese manufacturer, the injured consumer will often look to U.S. companies for an easier recovery.⁶⁶

Suits by the average consumer against these American companies are found in state courts, federal courts, and Multidistrict Litigation, as individual claims and class action claims. Coupled with lawsuits by consumers seeking recourse, the increase in administrative and regulatory actions has put American companies on the offensive. However, seeking indemnification from a Chinese manufacturer is a long shot. Thus, American companies often rely on international dispute resolution in attempt to recoup costs associated with defective products.⁶⁷

B. Relief from American Companies

There is “little history of successful enforcement of U.S. judgments against Chinese manufacturers.”⁶⁸ Although the option of suing in China is technically possible, it is costly, inconvenient, and unlikely to result in a favorable outcome.

Product liability claims in China are based on any one of three grounds: (1) strict liability, (2) fault-based tort liability, and (3) contractual liability.⁶⁹ While these legal theories exist, the reality is that the “Chinese courts do not have an independent judiciary that can make decisions separate from Communist Party influence.”⁷⁰ Further, the Chinese judicial system includes very little pre-trial discovery (no depositions or procedure for document disclosure), no jury, and a severe limitation on punitive damages.⁷¹ These realities lead to corruption in the Chinese judicial system; however, many are hoping with China’s booming economy there will be more legal training, independence, and accountability for its judiciary system.

As of today though, a U.S. consumer’s ability to sue “up the chain of distribution” has essentially made American companies insurers for their Chinese manufacturing counterparts. Obtaining jurisdiction over a local retailer or distributor is the simplest method for a consumer to find recourse. Reaching further up the chain of production, a consumer can use a state’s long-arm statute to obtain jurisdiction over larger national companies that sell a plethora of Chinese products in almost every jurisdiction in the country.

However, despite the reach of a state’s long-arm statute, recourse against smaller importers or wholesalers that do business outside a consumer’s place of residence may prove more difficult. Many wholesalers who import products from Chinese companies sell to

⁶⁶ See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §1 Liability of Commercial Seller or Distributor for Harm Caused by Defective Products (1998).

⁶⁷ See Joseph T. McLaughlin, et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 Am. Rev. Int’l Arb. 133, 141 (2005) (There are three viable options for obtaining an arbitration award that would be enforceable in China. The first option for enforceable arbitration is the China International Economic and Trade Arbitration Committee. The second option is arbitrating in the Hong Kong International Arbitration Committee. The third option is arbitrating pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or more commonly known as “New York Convention.”).

⁶⁸ Daniel J. Herling, *The New China Syndrome: How to Litigate Tainted Chinese Imports Cases*, November 11, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005558356>.

⁶⁹ *Id.*

⁷⁰ Robert Marquand, *New For China’s Courts: Trained Judges, Standard Rules*, CHRISTIAN SCIENCE MONITOR, Aug. 16, 2001, available at <http://www.csmonitor.com/2001/0816/p1s3-woap.html>.

⁷¹ Herling, *supra* note 68.

national distributors without any knowledge of where a product will eventually end up. For example, in *China Products Northwest v. D.J. Broesamle Company*, an appeals court in Florida upheld the dismissal of a complaint against an import/export company that had its principal place of business in New York.⁷² The court found the import/export company did not have constitutionally sufficient minimum contacts with Florida to subject the company to the court's jurisdiction.⁷³ Although the company imported the defective product from China, the company stated it had no specific knowledge of where the product went once it arrived in the U.S.⁷⁴ The court concluded that each "personal jurisdiction case depends on its own particular facts, but the focus is upon the extent to which the defendant has purposely availed itself of the privilege of conducting activities within the forum state and the extent to which subjecting the defendant to jurisdiction is fair and reasonable."⁷⁵

However, *China Products* notwithstanding, American companies still face significant liability: a recent Massachusetts state court decision is garnering much attention for finding jurisdiction over an American company that did not manufacture a defective product, but instead engaged in a joint-venture with a Chinese company where the American company provided technical know-how, and the Chinese company produced elevators in China.⁷⁶ In *Lou v. Otis Elevator Company*, Kevin Lou was severely injured on an escalator while in China.⁷⁷ He filed claims in Massachusetts against Otis Elevator under U.S. and Chinese laws. Lou alleged that although Otis did not manufacture the escalator, under both Chinese law and the "apparent-manufacture" doctrine in Massachusetts, Otis should be held accountable as the manufacturer. Otis's motion for summary judgment was denied, and the case eventually went to trial with the jury returning a verdict of \$3,295,327.46.⁷⁸ Otis appealed the verdict, but its motions for a judgment notwithstanding the verdict and a new trial were denied.⁷⁹ *Lou* not only highlights the scope of liability an American company may face, but also the creativity plaintiffs are starting to assert in their claims.

C. Class Action Litigation

Although, as discussed above, claims against Chinese companies are not the norm, at least two recent class action suits are trying to change that norm by bringing claims against Chinese entities in U.S. courts.

The first class action suit was filed in New Jersey Federal Court and involves allegedly defective truck and van tires. In *McCulley v. Hanzghou Zhongce Rubber Co.*, the plaintiff is attempting to use U.S. law to obtain jurisdiction over the Chinese manufacturer.⁸⁰ The plaintiff asserted breach of implied warranty, unjust enrichment, and violation of the

⁷² *China Prods. Nw., Inc. v. D.J. Broesamle Co.*, 535 So.2d 619 (Fla. App. 1988).

⁷³ *Id.* at 622.

⁷⁴ *Id.* at 621.

⁷⁵ *Id.* at 622. See also *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

⁷⁶ *Lou v. Otis Elevator Co.*, No. 010267A, 2002 WL 1558370, *1 (Mass. Super. June 5, 2002)

⁷⁷ *Id.*

⁷⁸ *Lou v. Otis Elevator Co.*, No. WOCV2001-00267D, 2007 WL 4940718 (Mass. Super. Dec. 24, 2007) (Trial Order).

⁷⁹ *Lou v. Otis Elevator Co.*, No. 200100267A, 2008 WL 2097380, *3 (Mass Super. Mar. 28, 2008).

⁸⁰ *McCulley v. Hanzghou Zhongce Rubber Co.*, Case No. 1:07-CV-02993 (D. N.J.).

New Jersey Consumer Fraud Act claims against the Chinese manufacturer and several U.S. importers and distributors.

A second class action suit involves a California state court case for tainted dog and cat food. It is the first of the "dog food" class actions to assert a claim against the Chinese supplier.⁸¹ In *Quintana v. Binzhou Futian Biological Technology*, the plaintiffs are attempting to use Chinese law to gain jurisdiction over the Chinese manufacturer of the tainted pet food.⁸² Quintana has alleged that defendant Binzhou Futian violated Chapters 2 and 7 of the Laws of the People's Republic of China on the Protection of the Rights and Interests of Consumers.⁸³

Many are looking to the outcomes of these cases as a barometer for the future success of plaintiffs who hail Chinese defendants into court, and for how American courts will apply Chinese law.⁸⁴

D. Multidistrict Litigation

As some recent suits involving certain defective Chinese products have become so numerous, the United States Judicial Panel on Multidistrict Litigation ("MDL Panel") has assigned them to various Multidistrict Litigation ("MDL") courts. The MDL Panel was created by Congress in 1968 and tasked with (1) determining whether civil actions pending in different federal districts involve one or more common questions of fact, such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) selecting the judge or judges and court assigned to conduct such proceedings.⁸⁵ This transfer or "centralization" process helps to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, counsel, and the judiciary.

Some of the current MDL for defective Chinese products include the following: (1) *In re Heparin Products Liability Litigation*, MDL-1953 in the Northern District of Ohio for Heparin; (2) *In re Mattel, Inc., Toy Lead Paint Products Liability Litigation*, MDL-1897, in the Central District of California for lead paint in toys; (3) *In re RC2 Corporation Toy Lead Paint Products Liability Litigation*, MDL-1893, in the Northern District of Illinois for lead paint in toys; and (4) *In re Pet Food Products Liability Litigation*, MDL-1850, in the District of New Jersey for pet food products.⁸⁶ Two plaintiffs have also filed a motion with the MDL Panel to consolidate all the defective drywall cases in the Southern District of Florida.

⁸¹ Herling, *supra* note 68.

⁸² *Quintana v. Binzhou Futian Biological Technology Co., Ltd.*, Case No. C07-465924 (San Francisco Super. Ct.). This case was subsequently transferred to the Monterey County Superior Court, Case No. GNM91334. <http://webaccess.sftc.org/Scripts/Magic94/mgrqispi94.dll?APPNAME=IJS&PRGNAME=ROA22&ARGUMENTS=-ACGC07465924> (last visited May 13, 2010).

⁸³ Herling, *supra* note 68.

⁸⁴ *Id.*

⁸⁵ 28 U.S.C. §1407 (2006).

⁸⁶ United States Judicial Panel on Multidistrict Litigation, Docket Information – Products Liability, http://www.jpml.uscourts.gov/Docket_Information/docket_information.html (last visited March 30, 2010).

VI.
FURTHER AMERICAN EXPOSURE: ADMINISTRATIVE ACTIONS
AND THE ALIEN TORT CLAIMS ACT (“ATCA”)

Though claims by consumers, and the occasional state attorney general, are numerous, they represent only one portion of the liability faced by American companies involved with defective Chinese products. Pressure by the American consumer has resulted in an increased number of administrative actions against importers, distributors, and retailers of such products. The FDA, CPSC, and NHTSA can hold importers responsible for violating various consumer safety acts by requiring a recall of the defective product. A recall can be very detrimental to a company. In one recent case, an importer of defective tires will likely face bankruptcy as the result a recall.⁸⁷ Foreign Tire Sales (“FTS”) is a family-owned business operating out of Union, New Jersey and is likely to file bankruptcy after being required to recall 450,000 Chinese-made tires, at a projected cost to FTS of \$90 million.⁸⁸ As previously discussed, the odds of an American company obtaining indemnification from the Chinese manufacturer are not good. Thus, while FTS has sued the Chinese tire manufacturer in New Jersey Federal Court alleging a violation of an agreement under the Hague convention, it has yet to receive a response.⁸⁹ However, even if FTS does receive a response, the Chinese company will likely move to dismiss for lack of personal jurisdiction, or simply ignore any judgment entered against it.

In addition to administrative agency enforcement, the Alien Tort Claims Act (“ATCA”) is another possible avenue for plaintiffs to obtain jurisdiction over American and foreign manufacturing defendants.⁹⁰ ATCA permits aliens to file suit for violations of customary international law in United States’ courts; while “customary international law” has traditionally dealt with topics such as “terrorism, crimes against humanity, environmental damage, war crimes, [and] torture,” one author has argued that given the transformations of global manufacturing and distribution, products causing death or serious injury should be included in the list.⁹¹ As a result of third-world growth, “[product] manufacture is being increasingly outsourced to environments lacking local regulation by the host government and the capability to conduct surprise inspections or the ability to ensure adequate quality control. The failure to monitor the outsourced facilities has led to death and serious injury.”⁹² As the “distribution of such products touches the joint concern of the entire civilized world” the author argues, “the manufacture and distribution of such products constitutes a violation of international law and should be cognizable under the ATCA.”⁹³ If such a claim were permitted under ATCA, an alien plaintiff could sue an American company and its foreign outsource partner in an American court; if the foreign company did not respond, the American company would be left footing any judgment for the plaintiff. While not yet a cognizable claim under ATCA, the ability for an alien plaintiff injured by a product outside of the U.S. to hold an

⁸⁷ Parloff, *supra* note 65.

⁸⁸ *Id.*

⁸⁹ Parloff, *supra* note 65.

⁹⁰ Joel Slawotsky, *Liability for Defective Chinese Products Under the Alien Tort Claims Act*, 7 WASH. U. GLOBAL STUD. L. REV. 519 (2008).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

American company accountable is a powerful option for plaintiffs, and worrisome possibility for American manufacturers.

With so much potential exposure, many companies may second guess the prospect of “going cheap” by working with Chinese products or companies. However, the attraction of cheap labor and materials will likely continue to lure American companies to China. Thus, there are some general precautions an American business should take before entering into a contract with a Chinese manufacturer/seller, which include the following:

- Determine if the seller will allow the buyer to have more control over the production process (*e.g.* independent inspections of the facility, audits, in-process testing and inspection) and include such provisions in the business contract
- Include a detailed arbitration clause and an indemnification clause in any contract
- Make sure any applicable insurance policies include recall coverage
- Require the Chinese supplier to obtain product liability insurance in the U.S.
- Make sure the manufacturer includes a warranty that the product will conform to the desired specifications
- Agree that the seller will certify composition and quality of parts and materials
- Ensure that every detail of a product’s design is clear; conformity with U.S. or international standards should be included.⁹⁴

VII.

THE EFFECT OF CHINESE PRODUCTS ON ATTORNEYS AND LAW FIRMS

Despite the negative aspects, Chinese product defects have provided work for attorneys in a number of practice areas; however, the practice area with the most obvious connection to this issue is products liability. Litigators who specialize in products liability have been retained to represent entities all along the chain of distribution, from the manufacturer to the retail seller.⁹⁵

However, the business created by Chinese products litigation is not limited to products liability practitioners; skilled international litigators will likely also see increased demand due to greater activity in foreign courts. A skilled international litigator is essential because many Chinese companies conduct business exclusively in China, and obtaining personal jurisdiction over a Chinese defendant can be difficult. Further, a skilled international litigator is also helpful because filing lawsuits against Chinese companies in America may involve satisfying a judgment obtained against a Chinese company that likely has few, if any, assets in the United States.⁹⁶ Such opportunities will increase the need for attorneys with experience in domestic and international law, as well as formal litigation and alternative dispute resolution.

Furthermore, because American plaintiffs are facing increased difficulty in pursuing Chinese defendants directly, many are seeking proceeds from insurance policies to soften the blow of a large loss. Consequently, Chinese product defect claims have created a second level of litigation relating to whether there is insurance coverage for insured companies who make, distribute, or sell defective Chinese products. For instance, in *Ace American Insurance Company v. RC2 Corporation*, the plaintiff insurance company sought a declaratory judgment that it was not obligated to defend or indemnify the defendants, its insureds, from tort litigation arising out

⁹⁴ Parloff, *supra* note 65.

⁹⁵ See *e.g.*, *In re Mattel*, 588 F. Supp. 2d 1111 (C.D. Cal. 2008).

⁹⁶ See Michael J. Lyle & David A. Hickerson, *Chinese-Made Goods*, 30 NAT’L L.J. (Feb. 18, 2008).

of the defendants' sale of Chinese toys containing lead paint.⁹⁷ The court held that exposure to lead paint by consumers constituted "bodily injury" under the insurance policy, which resulted in coverage for the insureds.⁹⁸

Other issues that may arise in insurance coverage disputes include the information insureds tell their insurers about the source of the goods they are importing, distributing, or selling; whether subsidiary companies are covered under the insurance policies; and whether domestic companies are considered to be in joint ventures with Chinese suppliers.⁹⁹ As more claims are made due to defective Chinese products, insurance companies will likely seek to exclude coverage based on the insured's failure to disclose the details about the product manufacturers.¹⁰⁰ Insurers may argue that the product defects did not result from negligence, but rather resulted from intentional actions, which typically excludes coverage.¹⁰¹

Various law firms have taken advantage of the defective Chinese product epidemic by tailoring their marketing and services to clients embroiled in those issues. On the plaintiff's side, personal injury firms across the country have set up websites and hotlines for injured parties to call for a consultation. On the defense side, at least one international law firm has established an entire group of attorneys specializing in Chinese product cases; the firm of McDermott, Will & Emory took advantage of having a Shanghai office and set up a Chinese Products practice group.¹⁰² The group offers services in all aspects of Chinese product litigation, including handling FDA issues, product recalls, contract reviews, and international dispute resolution.¹⁰³

Issues relating to Chinese products span a range of legal practice areas, from product liability litigation to administrative law, and from international dispute resolution to insurance defense. As these issues become more prevalent, more large defense firms – particularly those with an international presence – will likely begin marketing a broad range of services, in effect offering "one-stop shopping" for clients with Chinese product problems.

VIII.

CONCLUSION

The recent surge in defective Chinese products has implicated everyday products from toothpaste to pet food and has created the necessity for American consumers and American companies alike to take precautions when importing or buying Chinese-manufactured products, and search for creative ways to obtain relief if an injury results from such a product. This new field of law has already created a legal market for Chinese product litigation, a market that will surely continue to grow. However, the influx of defective Chinese products is not good business for everyone: the increase in injuries from Chinese products, coupled with the difficulty in obtaining a judgment against Chinese manufacturers has increased the amount of litigation action against American wholesalers, importers, distributors, and retailers. The number of current and potential lawsuits combined with the increased regulatory response by American governmental

⁹⁷ *Ace Am. Ins. Co. v. RC2 Corp.*, 568 F. Supp. 2d 946 (N.D. Ill. 2008).

⁹⁸ *Id.* at 955-56.

⁹⁹ Sean P. Wajert, *More Made in China Products Liability Litigation*, MASS TORT DEFENSE, Feb. 19, 2009, <http://www.masstortdefense.com/2009/02/articles/more-made-in-china-products-liability-litigation/>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² McDermott, Will & Emery, <http://www.mwe.com> (Follow "Client Services" hyperlink; then follow "International" hyperlink; then follow "Chinese Products" hyperlink) (last visited March 17, 2009).

¹⁰³ *Id.*

agencies will put a strain on American companies trying to outsource their production. However, given the present increases in outsourcing and globalization, the recent increases in international product litigation will likely continue; it is a trend American companies should guard against and be wary of, as they develop business models for the future.