

An Article by Peter H. Gunst

Importing Product – The Impact in Court

In his excellent article in this issue, Gerry Cecil emphasizes the need for a reseller of imported product to obtain insurance coverage to protect itself against what could be disastrous product liability claims. A look at how such claims are handled by the courts reinforces the case that a reseller who imports is particularly vulnerable to such claims.

By and large, product liability claims are governed by state law, which varies significantly from jurisdiction to jurisdiction. This is because each state has had to work out its own balance between the interests of injured consumers and the protection of resellers whose only sin was to be caught up in the distribution chain of a product that they had no reason to believe was unsafe. Individual states, having different social and political philosophies, have resolved the balance in different ways.

Despite the differences, there is a recurrent theme. Resellers who purchase from foreign manufacturers are often treated differently from those who deal with domestic manufacturers, particularly if those manufacturers are national, “deep-pocket” entities.

Under Idaho law, for example, a reseller ordinarily is not subject to product liability claims unless (1) the manufacturer is not subject to service of process (*i.e.*, it lacks sufficient

contact with the state to justify requiring it to appear to defend itself), (2) the manufacturer “has been judicially declared insolvent” or (3) the judge determines that “it is highly probable” that the claimant would not be able to enforce a judgment against the manufacturer. The likelihood of these exceptions coming into play is obviously far greater where the reseller acquires product from a foreign manufacturer with limited contact with the state, or from a foreign manufacturer having limited assets, or having assets that are difficult to reach.

Illinois applies a procedure under which a reseller sued on a product liability claim may obtain an immediate, although rescindable, dismissal from litigation by filing an affidavit certifying the identity of the manufacturer of the product that allegedly caused injury. The reseller is subject to being dragged back into the litigation, however, if the manufacturer goes out of business, is not subject to the court’s jurisdiction or would not be able to satisfy a judgment or settlement of the claim. This, too, is far more likely to occur where product is obtained from a distant or undercapitalized manufacturer.

Missouri has a peculiar scheme, which appears only to protect resellers sued in Missouri state courts, but not resellers sued under Missouri law in federal court. This appears to make little sense, but then again that’s the way the law is sometimes. For many examples, see your friendly Internal Revenue Code.

Some states, like Ohio for example, also provide that a reseller remains subject to product liability claims if it sells products manufactured by another under the reseller’s own label or

trade name. This type of potential liability does not turn on the place of origin of manufacture, but should also be kept in mind.

The federal National Traffic and Motor Vehicle Safety Act similarly deems any entity that sells tires under a brand name that it owns to be the manufacturer of the tire. This means, among other things, that it is subject to the duties to remedy non-complying equipment set forth in the Act.

Speaking of the National Traffic and Motor Vehicle Safety Act, it also provides that motor vehicle equipment cannot be imported into the United States unless it is certified as being in compliance with applicable federal safety standards. Failure to comply may result in litigation with the Attorney General.

Finally, there is the issue of indemnification. The laws of many states provide that even if the reseller is held in to defend a product liability claim, it can ultimately seek indemnification from the manufacturer for all of its expenses including attorney's fees. But it may be much more difficult to enforce that right against a foreign company whose assets are more difficult to reach.

These are merely examples of the maze of legislation that may be encountered. The bottom line is that an importer of foreign-manufactured product may, depending upon its supplier, be open to significant additional exposure to product liability claims. This confirms the need identified by Gerry Cecil to secure adequate protection before going down that road.