AMERICAN PRODUCT LIABILITY:

“GOOD NEWS FOR BUSINESS!”
RECENT TRENDS AND DEVELOPMENTS

A GUIDE FOR FOREIGN COMPANIES

BY

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I. INTRODUCTION

The Purpose of this Guide

**Question:** What is the single greatest concern of foreign companies doing business in the USA or contemplating it? **Answer:** U.S. product liability. In particular, they are concerned about the potential for exorbitant damage awards for personal injury that their product, component or part may cause. Their trepidations have been fueled largely by media reports of such cases, including some bizarre ones.

In the opinion of this practicing American lawyer, these concerns are typically exaggerated, blown out of proportion, and do not reflect the realities. American product liability judgments awarding exorbitant damages ---including ones that seem to impose liability for no good reason----are very rare. These rarities are, however, fodder for the media.

Just as important if not more so, there is a recent, major trend under way to reform the American product liability legal regime. The trend is likely to continue and extend its reach. These developments are definitely pro-business and quite significant, for manufacturers, sellers and others in the chain of bringing products and goods to the market. That includes foreign ones, their US subsidiaries and joint venture entities. The trend could possibly in relatively short order reach the proportions of a “product liability law revolution”. Arguably it already has.

A number of other important facts and factors cast light on the true realities of the US product liability risk

This Guide explains and summarizes what has already occurred, what is likely to occur, and the implications for business, in particular, manufacturers and sellers of and others in the distribution chain. It also describes several other pro-business developments and factors. It demonstrates that particularly for foreign enterprises, the US product liability scenario is not the scary boogieman depicted by the media. And, it points out that foreign businesses can adopt certain measures to further their reduce their risk. Taken together, the US product liability risk will be quite manageable for most companies.

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Caveat: The present Guide is not intended as a substitute for the advice of competent legal or other advisors in connection with any particular matter or issue, and should not be used as such. While the writer has made efforts to be accurate in his factual statements contained in this Guide, he does not make any representation or warranty in this regard. Opinions and predictions expressed herein are the writer’s own.

II. SOME AMERICAN LEGAL TERMINOLOGY

A Few Informal Definitions and Explanations

Certain American legal terms are used in this Guide that the reader, in particular, the foreign reader without a background in U.S. law, may not comprehend. We offer below layman’s definitions and explanations of some of them, not in alphabetical order.

“tort” = a civil wrong. More particularly, it is a wrongful causing of damage for which a civil action can be brought, such as for monetary damages.

“plaintiff” = a party that initiates a lawsuit raising one or more claims, typically, in the product liability context, for damages.

“defendant” = a party that the plaintiff is suing.

“class action” = in the product liability context, a civil lawsuit in which plaintiffs who claim have sustained injury from the same product or article join together in one suit against the same defendant(s). The plaintiffs will often be from several or even many different US states. The size of the plaintiff class can vary considerably from case to case.

“economic damages” = for example, medical expenses, lost wages or earnings, property damages and lost profits that an allegedly injured plaintiff might seek to recover.

“noneconomic damages” = for example, damages for pain and suffering, emotional distress and loss of companionship that an allegedly injured plaintiff might seek to recover.

“compensatory damages” = both economic damages and noneconomic damages.

“punitive damages” = damages that a plaintiff may seek to recover from one or more defendants whose conduct causing the plaintiff’s injury was and/or is reprehensible. Reprehensible would mean intentional and malicious, or in wanton and/or reckless disregard for the rights of others. U.S. state laws will vary somewhat as to the description of the type of conduct that can justify an award of punitive damages. It is well beyond negligence, and in most cases, even beyond gross negligence. Punitive damages are intended to punish such a wrongdoer and to deter the wrongdoer’s continued or future conduct of that nature. The overwhelming majority of product liability cases in the USA will be decided, in the first instance, by a jury (not a judge). The jury will decide if damages should be awarded and their amount, including punitive damages if plaintiff seeks them. Judges exercise a review and control function over jury damage awards.
Awarded punitive damages go to the plaintiff, except that some laws require a percentage be paid to the state or some state fund.

**More About Punitive Damages**

1. The standards that a plaintiff has to meet are quite high for an award of punitive damages.

2. Punitive damage awards are pretty rare birds.

A study by the Rand Institute for Civil Justice states that from 1984 - 1995, punitive damages were awarded in less than four percent (4%) of civil verdicts in 15 U.S. jurisdictions. A recent US Justice Department study points out that punitive damages are awarded in only three percent (3%) of civil cases; while another report puts the figure at 2% of all civil cases. These studies involve civil cases of all different kinds, only a minority of which were product liability cases, so that the percentages are even lower if only product liability cases were considered.

According to a recently published article by a practicing lawyer-Harvard Law School lecturer on trial practice:

- juries award punitive damages in approximately 1% of all product liability lawsuits;
- of the product liability lawsuits won in court by plaintiffs in which punitive damages are claimed, they are awarded in only about 2.2%;
- only a handful of punitive damage awards have exceeded 3 times the compensatory damages;
- “...the likelihood that punitive damages will be awarded in product liability cases is small.” That is because companies will either have acted properly or because their actions will not meet the “reprehensibility” level legally required for punitive damages.1

Just because the plaintiff makes a claim for punitive damages doesn’t mean it will be awarded any!

3. Also, quite often, excessive punitive damage awards determined by juries are reduced very significantly or are tossed out altogether by the court when contested, for example, on appeal. Many times, the threat or filing of an appeal leads to a settlement for an amount far less than the total damage amount awarded by the jury.

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4. As will be seen, quite a few U.S. states, in reform legislation, have limited or “capped” the amount of punitive damages that can be awarded. It is likely that more states will follow suit. Moreover, the US Supreme Court (highest court of the land), has very recently struck down excessive punitive damages awards as being arbitrary, irrational and even unconstitutional; and set some punitive damage guidelines for lower courts. Federal and state courts throughout the USA are affected by these decisions.

Punitive damages can, in a rare case where awarded, be a “big ticket item”. However, if a company that produces a product, component, or part does not act maliciously, fraudulently, recklessly, or the like in connection with the design, manufacture, quality control, warnings of known or suspected dangers, instructions for use, distribution, and post-delivery control of the item, its risk of a punitive damage award is small. The same is true for a non-manufacturing seller of such an article or another party in the chain of distribution unless that party acts reprehensibly. Covering up a known or suspected risk or not recalling a batch of articles known or suspected to be defective are examples of potentially reprehensible conduct.

As remarked above, these legislative reforms are major and pro-business. They reduce materially the product liability risks for manufacturers and sellers of goods. They also make US states that adopt significant reforms a more attractive place to invest and do business generally.

Before the adoption of the January, 2005 reform legislation, Mississippi courts were reputed to be a veritable haven for exorbitant civil damage awards. In 2004, that State lost out in its attempt to bring in a new US$800 million Toyota assembly plant, in large measure due to that situation. A Toyota Motor North America senior vice president reportedly wrote to Mississippi Governor Barbour in April, 2004 that “the litigation climate in Mississippi is unfavorable. Reform of Mississippi’s tort system would, in my opinion, substantially improve the State’s prospects in attracting new economic development.”

Ohio’s sweeping new legislation “removes big obstacles for small business owners who want to operate successfully”, was the reaction of a small Ohio company’s president. Governor Taft reportedly said after signing the new law: “For nearly two years I have been listening to the concerns of business leaders and economic development groups from across the state, so I know well the negative effects of lawsuit abuse. I am proud we succeeded in delivering a meaningful solution for them.”

The Texas reforms have been good for business and consumers. A National Center for Policy Analysis report first points out that Texas’ civil justice system had been unpredictable and risky---the increasing cost of defending against civil lawsuits for alleged harms and the excessive punitive damages awarded raised the cost of living and doing business there. The 1995 reform legislation, continues the report, have brought about “significant economic gains”, a positive impact on the overall economy and substantially improved the creation of permanent jobs in the State.

The most important election year 2004 campaign promise made by present Missouri Governor Matt Blunt was pushing through pro-business tort (including product liability) reform legislation. In late March, 2005, Missouri enacted such a law.
Also at the end of March, 2005, South Carolina joined the parade and passed a significant tort reform legislation applicable to product liability.

III. U.S. PRODUCT LIABILITY REFORM LEGISLATION AT THE STATE LEVEL

Overview

Several US states have, between roughly 2003 and March, 2005, passed new legislation reforming their “tort” systems, particularly as to product liability lawsuits. Other states have enacted such reforms earlier. Those laws substantially restrict, limit and control product liability lawsuits, damages that can be awarded, and contain a number of other important features favorable to manufacturers, sellers and others in the distribution chain. The most recent of these major reforms, at this writing, were in South Carolina and Missouri in March, 2005, Georgia in February, 2005, Ohio in January, 2005, Mississippi in 2004, and Texas in 2003.

This trend appears likely to continue. States that have not passed recent reform legislation applicable to product liability appear poised to do so; and some states that have recently done so could enact further reforms. Two likely candidates are Florida and West Virginia, though there are and likely will be others.

Republican controlled state legislatures and governorships in a large number of states account for part of the trend, although some Democratic state lawmakers and governors support it at least to a degree. After pushing through restrictions on litigation in 2004, Mississippi Governor Haley Barbour, the former chairman of the Republican National Committee, went on a multi-state “tort tour” urging other governors to do the same. Another major impetus is President Bush, who has placed federal tort reform legislation high on his second term agenda. The spearhead of federal and many state tort reform measures is medical practice, due to high insurance costs and a plethora of malpractice lawsuits against doctors, dentists, hospitals and others in the industry. Some states have already “bundled” together medical malpractice and other civil litigation reform, like product liability. Others may do the same.

While varying from state to state, some of the major features of the product liability reform legislation already passed are:

- placing a cap (a maximum limit) on noneconomic damages;
- placing a cap on as well as imposing stricter criteria and controls for the award of punitive damages;
- tightening product liability legal principles, e.g., what plaintiff must prove, and articulating certain available defenses to manufacturers and others;
- limiting or excluding joint and several liability among defendants;
- establishing or reducing time limits for initiating lawsuits;
• restricting lawsuits that non-residents of the particular US state can bring in that state;
  and restricting the particular court within the state in which the suit can be brought;
• imposing penalties on parties (and their legal counsel) for bringing “frivolous” lawsuits.

The legislated caps on noneconomic and punitive damages do not mean that the
maximum will be awarded. On the contrary, they may well exercise a downward influence
on juries.

**Detailed Summary of State Reform Legislation on Product Liability**

**Appendix A** contains a detailed summary of the reform legislation enacted by 23 U.S.
states applicable to product liability cases.

With few exceptions, up to now at least, product liability law is “state law”. Even where a
product liability case is brought in a U.S. federal court, the pertinent state product liability law
will be applied.

**IV. US FEDERAL TORT REFORM LEGISLATION**

**President Bush’s Agenda**

As stated earlier, President Bush has been pushing for federal tort legislation to remedy
some of the claimed abuses. His media focus has been mainly on abuses in “medical
malpractice” lawsuits. However, his Administration is aiming at reforms of product liability and
other civil damage litigation as well. They have already succeeded in part (see next subsection).

**Federal “Class Action” Reform Legislation**

This was one item on the President’s reform list. In February, 2005, a new federal law
was enacted regarding “class action” lawsuits, including those of the product liability variety. The
law is expected to have a significant impact on cases involving claims of defective products,
pharmaceuticals and motor vehicles being two examples. As explained earlier, a “class action” in
the product liability setting is a lawsuit in which plaintiffs—very often from several or even
many different US states—claiming to have sustained injuries from the same product or article,
join together in one civil damage action against the same defendant(s).

The new law prohibits state courts from hearing many kinds of class action cases that
they have previously accepted, requiring their transfer to federal courts. More specifically, it bars
state courts from considering class actions involving claims of over US $5 million and having a
member of the plaintiff class in a US state different from the defendant’s home state. Experts say
that the new legislation will prevent many class actions cases from being brought at all because
federal judges are constrained by certain higher court precedents from hearing large class actions involving the laws of different US states. Business groups supporting the legislation claim it was necessary to reduce frivolous litigation (meaning lawsuits without any real merit), and to prevent the unfair practice of plaintiff lawyers’ shopping for state courts historically favorable to plaintiffs. Certain plaintiff-inclined state courts have become famous for provoking large settlements with little for class members and big fees for the trial lawyers that filed the cases.

This new legislation aside, a number of state courts around the USA have been taking a tougher line on frivolous and forum-shopping interstate class actions, resulting in dismissals.

**Future Federal Reform Legislation**

President Bush and his supporters have additional tort reform legislation on their agenda. One measure would address perceived abuses in asbestos litigation.

Other reforms being pushed would:

- limit noneconomic damages, for example, moral damages such as “pain and suffering”----a potentially significant damage element. Presently, he is talking about a $250,000 limit on such damages;

- put limits on punitive damages that can be awarded (no specific numbers have been put forth);

- let defendants pay damages in installments over a time period rather than in one lump sum;

President Bush faces considerable obstacles to getting this sort of federal reform legislation passed by Congress, Still, barring any radical change, the political climate seems relatively favorable for its passage during his second term. What any new federal laws will cover (e.g., only “medical practice” or also product liability and similar cases) and what the specific “reforms” will be, remain to be seen. Another issue, assuming such federal reform legislation is passed extending to product liability, is how it will affect the state legislation----for example, will it “preempt” it in whole or in part?

V. **LIKELY CONSEQUENCES OF PRODUCT LIABILITY REFORM**

The present and contemplated future product liability reform legislation at the US state level coupled with other factors mentioned above--even without more federal legislation in this area--is likely to lead, over time, to

- a material reduction in the number of product liability lawsuits filed in the USA;
• significantly lower damage awards and out-of-court settlements of cases;
• less in the way of frivolous, or outrageous, or seemingly unjustified court decisions;
• premium cost reduction for US product liability insurance; and more insurance companies inside and outside the USA offering it.
• increased US trade and investment, including by foreign companies.

These may even occur as a fallout effect in US states that do not adopt reform legislation.

VI. OTHER PRO-BUSINESS US PRODUCT LIABILITY TRENDS AND DEVELOPMENTS

Defense that US Court Does Not Have “Personal Jurisdiction” Over the Non-Resident Defendant

A non-resident of a particular US state in which it is sued (whether in a state or federal court), may in many cases have either a winning defense or at least a solid legal argument that the court can not rule-----that it did not have “personal jurisdiction” over the non-resident. The non-resident can be a company or individual located in another country, or in another U.S. state.

In recent years, due to certain key U.S. Supreme Court decisions, the criteria for U.S. courts exercising “personal jurisdiction” over non-resident defendants have tightened. That applies to product liability cases.

Quite often, the first line of defense for a non-resident defendant in a product liability case is to challenge the jurisdiction of the American court over it. Since plaintiffs’ lawyers normally do not want to engage in a long and tedious battle, including possible appeals, over jurisdiction, the result can be either to not bring the lawsuit against the non-resident, or to reach an out-of-court settlement at some point relatively favorable to the non-resident. That does not mean that such a defense will be available to all non-residents or that it will always succeed. Rather, it means it may--and quite frequently will be-- available to raise, and may succeed either in court, or to provoke a better settlement, or by making the plaintiff not sue the non-resident in the first place. It is, therefore, a potential “reducer” of the product liability risk.

Explaining this argument/defense of no “personal jurisdiction” over the non-resident defendant is no easy task, because it is complicated----even for lawyers.
The Concept: The main issue will tend to revolve around whether the non-resident has “sufficient contacts” with the US state in which the lawsuit is brought to justify the exercise by one of its federal or state courts of “personal jurisdiction” over the non-resident. “Personal jurisdiction” means the power of that court to subject the non-resident to its rulings and decisions, based on the applicable legal norms—and whether or not, legally, it has that power. Thus, for a non-resident company or individual, the issue will be whether enough contact with that US state exist for that purpose. Typically, if the only contact the non-resident has with that state is that one of its products or components finds its way into that state through some third party other a distributor located in that state, and the volume of sales and promotion to and in that particular state by the non-resident is minimal or zero, a solid argument for no “personal jurisdiction” exists. This is not the only situation that will permit a cogent argument/defense of this type.

For those wishing a more detailed explanation, in layman’s language, of the criteria for “personal jurisdiction” over non-resident defendants and the argument that the non-resident defendant can often raise, see Exhibit B. That Exhibit also contains a fairly recent real-life case study.

Suing “Managers” Personally for Product Liability Damages

The reader may wonder whether under American law an allegedly injured plaintiff can sue personally a company “manager” for product liability damages. By manager, I mean an officer, director, or employee of the company.

The general rule is yes, if the manager actively participated in, authorized or directed the unlawful act; or knew (or perhaps, should have known) of some dangerous or hazardous situation or condition under his/her control or supervision could injury someone and failed to take appropriate action to avoid the harm.

However, the good news is:

1. Managers are rarely sued in product liability cases. This writer-lawyer has researched the case law in this area and found very few product liability or similar cases in which a manager has been personally sued.
2. Personal liability of a manager is not easy to prove. Barring some conspiracy or malicious, intentional or reckless conduct by a manager, the plaintiff is likely to have, in most cases, a difficult task in proving the manager’s negligence.
3. If the manager resides outside or the USA or even outside of the US state in which the lawsuit is brought, the manager may not be subject to the personal jurisdiction of the court, or may at least have a good argument to that effect. See the preceding subsection.
More information on this subject is available in this writer’s publication “American Product Liability: Can Company Managers and Executives Be Held Personally Liable: a Guide for the Foreign Business Person”.

“Piercing the Corporate Veil” to Hold Company Owner Personally Liable

Certain types of legal entities, whether American or foreign, have the feature of “limited liability” for their owners (shareholders, ownership interest holders). In US law, these entities are the “corporation” and the “limited liability company”. Generally speaking, that liability is limited to the amount of capital that the owner contributed to the entity (capital contribution). An owner is of such an entity is not normally personally liable for its debts.

Courts throughout the USA will, on occasion, “pierce the veil” of limited liability to hold the owner or owners of the entity personally liable. There are several different theories in US law that courts use to decide whether to disregard the separate legal person/limited liability status of an entity. Among the many factors a court will take into account is if the entity has been wrongfully used to perpetrate a fraud or serious injustice, is manifestly undercapitalized, and has not been maintained and operated as a legal person separate and distinct from its owner(s). The particular factors and the weight given to each will vary from state to state.

The good news is that
- U.S. courts are reluctant to “pierce the veil”; this occurs in the minority of cases.
- one can hardly find a US court decision where the owner of a non-US legal entity offering limited liability to its owner has been found personally liable by such veil piercing. That does not mean that a US court will not do so. But it will likely be hesitant, particularly there are material differences between what is required of the foreign entity under its laws and a U.S. corporation or LLC.
- the lack of personal jurisdiction argument may be available in a particular case.
- importantly, with proper legal advice and guidance, foreign companies and their US subsidiaries or affiliates can adopt certain measures to reduce the risk of “veil piercing.

Less Product Liability Trials; and Plaintiffs Lose them Much More Than They Win

According to a very recent report of the US Justice Department:
The number of tort cases concluded in U.S. federal district courts dropped from around 3,600 in 1985 to less than 800 in the year 2003—a decline of about 80%. Nine out of ten (90%) of these judgments involved product liability, motor vehicle accidents, marine torts and medical malpractice. Among the stated reasons for the dramatic fall were the growing use of arbitration and mediation and the increased complexity and costs inherent in taking a case to trial.

Plaintiffs won only 34% of the product liability cases completed by trial in the U.S. federal district courts during the period 2002 – 2003. Of those, plaintiffs won more often in non-jury cases, where the judge decided (a jury decided about 71% of the tort trials, a judge about 29%, during that period).

The estimated median damage award in product liability cases decided in U.S. federal courts during 2002 – 2003 was $350,000.


**How Foreigners Are Treated in US Courts: They Win More Than They Lose**

A common conception held by foreigners is that will fare badly before American judges and juries, due to anti-foreigner bias, favoritism toward the American adversary, xenophobia and the like.

A recent, detailed study appearing in the prestigious Harvard Law Review does not support that conclusion. In fact, it found that in civil cases in US federal courts, including product liability cases, foreign defendants (and foreign plaintiffs) won their lawsuits more often than their American counterparts. Though the study did not survey U.S. state courts due to lack of comparable data, the study’s authors suspect that the state court data would reveal similar results.

It also points out cases against foreigners are characterized by big demands, but not big awards. American plaintiffs frequently inflate their claims with an aim to intimidate foreigner defendants; and that they themselves appear to be under the generally mistaken notion that xenophobia will influence the jury or judge.

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VII. FOREIGN COURTS MIGHT NOT ENFORCE OR MIGHT REDUCE THE US JUDGMENT

A product liability judgment rendered by a US court against a foreign defendant might not be enforceable in the foreign country where the defendant has its place of business, domicile or the like; or the foreign country in which it has assets on which the plaintiff would like to levy. Or, a court in such a country may only enforce the American judgment in part; or may reduce the amount of damages, e.g., punitive damages awarded by the US court because it finds them excessive or for some other reason.

To deal with this subject in detail, country by country, would take many pages. That is not possible in this Guide.

It can safely be said that in some countries, a court presented with the enforcement of a US product liability judgment:

- will deny enforcement because courts of that country will not enforce any US court judgments whatsoever;
- will not enforce punitive damages awarded by a US court (e.g., jury) or will do so only under limited circumstances, or will reduce what they find to be an excessive amount (possibly also regarding excessive moral damages);
- will refuse enforcement in some instances because, using its own criteria (not that of the US court) it will find that the US court have a proper legal basis for exercising its jurisdiction over the foreign defendant; or that the defendant was not properly served with the US legal process, and in a timely manner;
- will decline enforcement because the US court decision did not state the reasoning for its damage awards (which is normally the case for US jury awards);
- will decline enforcement of the US judgment, in whole or in part, for some other reason or reasons.

The number of foreign countries in which one or more of the above points will apply is considerable.

In many instances, the foreign defendant will have good legal arguments against the
enforcement of the US product judgments leaving aside whether in court they will win the day. Those good arguments, which party eventually seeking enforcement and its counsel will know about, sooner or later, one way or the other, may lead to a out-of-court settlement reasonably favorable to the foreign defendant.

Taking only one example, Germany, existing case law on enforcement of US product liability judgments and other legal norms would seem to provide cogent arguments against enforcement of many US product liability damages judgments. The arguments would focus on the list above, though there may be others.

**VIII. MEASURES COMPANIES CAN ADOPT TO REDUCE THE US PRODUCT LIABILITY RISK**

As important as the trends and developments described in this Guide are, that is not the end of the story.

There are a number of things that companies can, and should consider doing, to further reduce their potential American product liability exposure, and that of their managers and owners.

They run the gamut from, by way of example only:

- considering the purchase of product liability insurance for the US market and its scope of coverage;
- potentially beneficial company structures;
- establishing and maintaining certain internal procedures, policies and record keeping;
- provisions that might be placed in contracts with contract manufacturers, distributors, sales agents, joint venture partners and the like;
- provisions that might be placed in the company’s own “General Terms of Sale”;
- establishing correct response procedures to potential or actual product liability claims;
- periodic legal audits.
Competent American legal counsel can assist in presenting, selecting, developing and implementing the appropriate measures for a particular company.

Such measures can not only reduce the “American” product liability risk, but the worldwide risk for a company, its managers and owners.

A discussion of what a foreign company’s (or its US subsidiary’s) strategy and tactics might be if hit with a US product liability lawsuit or the threat of one, is beyond the scope of this Guide. On that subject we will mention only these few points. If you are contacted by a plaintiff (actual or potential) or the plaintiff’s lawyer regarding an actual or potential US products liability lawsuit against you, do not reply, orally or in writing. Rather, you should contact immediately an experienced US lawyer who will advise you what to do. Sometimes, your US lawyer will prepare a reply for you to make. Not infrequently, the lawyer for the potential plaintiff will send and request that you sign and return a document by which you waive service of legal process or allow service of legal process to be made upon you by a simplified route (e.g., mail). Unless your US lawyer otherwise instructs, you should not comply with the request, for normally, the plaintiff, in order to effect valid service of process against you, will have to go through a tedious, formal procedure that can take several months. The fact that the plaintiff may have filed a Complaint in a particular American court does not mean that the court can proceed with the case against you, the foreign party. As one important element of obtaining “personal jurisdiction” over you, the plaintiff must effect a valid service of process and file proof of that with the court.

APPENDIX I

SUMMARY OF STATE TORT REFORM LEGISLATION APPLICABLE TO PRODUCT LIABILITY CASES AND CLAIMS

Note: The States are presently alphabetically, thus do not reflect in their order the those that have enacted the strongest or most recent reforms
Alabama

- **Punitive Damages Reform**

  In physical injury cases: punitive damage awards are capped at the greater of 3 times the awarded compensatory damages or US$1.5 million.

  In most non-physical injury cases: punitive damage awards are capped at the greater of 3 times the awarded compensatory damages or US$500,000, except against businesses with a net worth of less than US$2 million, capped at the greater of US$50,000 or 10% of business’ net worth up to US$200,000 maximum.

  Provides for indexing of punitive damages caps at 3-year intervals.

  Prohibits joint and several liability among defendants for punitive damages, except for wrongful death actions, actions for intentional infliction of physical harm, and class actions.

- **Venue Reform**

  Enacted rules to restrict “forum shopping” suits against companies.

  (1999 reform legislation)

Alaska

- **Punitive Damages Reform**

  Caps punitive damage awards in most cases to the greater of 3 times the compensatory damages awarded, or $500,000. Where the defendant’s unlawful action is motivated by financial gain, the cap is the greater of 4 times the compensatory damages awarded or $7 million.

  For a punitive damage award, plaintiff must show by “clear and convincing” evidence standard that a defendant acted with “reckless indifference”, or engaged in “outrageous” conduct.

  Requires a separate judicial proceeding for the determination of punitive damages awards.

- **Noneconomic Damages Reform**
Caps noneconomic damages awards for most single injuries or deaths to greater of $400,000 or the injured person’s life expectancy in years times $8,000. However, in cases of permanent physical impairment or severe disfigurement, the cap is the greater of $1 million or the person’s life expectancy in years times $25,000.

- **Comparative Negligence; Joint and Several Liability**

  Applies a comparative allocation of fault between parties and non-parties. Prohibits imposition of joint and several liability for damages.

- **Time Limit Reform**

  Requires lawsuit to be brought within 10 years (with some exceptions and nuances).

  *(mainly 1997 reform legislation)*

**Arkansas**

- **Punitive Damages Reform**

  Punitive damages are capped at the greater of US$250,000 or 3 times the compensatory damages, not to exceed US$1 million.

  Requires separate proceeding to determine punitive damages.

  Raised burden of proof standard for imposing punitive damages to “clear and convincing evidence” of actual fraud, malice or willful conduct.

- **Joint and Several Liability Reform**

  A defendant found 1% - 10% at fault is responsible for that percentage of the awarded damages. A defendant found 11% - 50% at fault can be assessed an additional 10%, and a defendant found 50% - 99% at fault, an additional 20%, in each case if a co-defendant is unable to pay its share of the awarded damages.

- **Venue Reform:**

  Limits permissible venue of Arkansas courts to judicial district in which the wrongful act occurred, the plaintiff resides or the defendant resides.

  *(2003 reform legislation)*

**Connecticut**
• Limits punitive damages in product liability cases to maximum of 2 times the amount of compensatory damages awarded.

• Bars defendants’ joint and several liability for noneconomic damages, except where a co-defendant’s share of the awarded damages is uncollectible.

(1986-1987 reform legislation)

Colorado

• Punitive damages reform

Punitive damages cannot exceed the amount awarded for compensatory damages.

But if misconduct continues during trial court can increase a punitive damage award to 3 times the award for compensatory damages

For punitive damages, plaintiff must prove “beyond a reasonable doubt” that a defendant’s action was willful or wanton.

Court can reduce or eliminate a punitive damage award if deterring of future misconduct can be attained without the award.

• Noneconomic Damages Reform

Limits the award of noneconomic damages to maximum US$250,000 except if court, by “clear and convincing” evidence” finds justification for larger award not to exceed US$500,000.

Limits noneconomic damages in breach of contract (including product warranty) claims by stipulating that such damages can be recovered only if the contract in question specifically permits it.

• Innocent Non-Manufacturing Seller Reform

Prohibits product liability actions against parties who were not the manufacturer of the product.

• Defenses Reform
Prevents product liability action from being brought if the plaintiff improperly used the product, or if the product provided proper warning or instruction, which, if heeded, would have prevented the injury, death or property damage.

- **Joint and Several Liability Reform**

Bars joint and several liability regarding all damages awards except where wrongdoers consciously acted in concert to commit the wrong.

- **Early Settlement Offer Reform**

Requires the plaintiff to pay the defendant’s legal fees and costs if plaintiff rejects a defendant settlement offer, proceeds to litigation, and recovers a smaller judgment than the rejected settlement offer.

- **Obesity Litigation Reform**

Manufacturers, distributors, sellers (and others) of food or an association of them cannot be liable for claims based on weight gain or the like caused by the long-term consumption of food, unless the claim is based on violating federal or state branding or labeling norms and the injury caused by the violation.


**Florida**

- **Punitive Damages Reform**

Limits punitive damages to the greater of 3 times the amount of compensatory damages awarded, or US$500,000. Where, however, defendant’s wrongful conduct was motivated by an unreasonable financial gain or the likelihood of injury was known to defendant, the punitive damage limit is the greater of 4 times the compensatory damage awarded, or US$2 million.

Requires the plaintiff to prove by clear and convincing evidence that a defendant’s wrongful conduct was intentional or grossly negligent.

Legislation also deals with circumstances when an employer is liable for punitive damages as result of its employee’s conduct.
• **Time Limit Reform**

Product liability lawsuit must be initiated within 12 years for products with a useful life of 10 or less unless specific warranty provides for a useful life longer than 12 years. Special longer rule exists for airplanes and vessels used commercially.

Above time limits are not applicable to, among other things, case involving latent defects claims, and cases where the manufacturers, via its officers, directors and managers, took positive steps to conceal a known defect in the product.

• **Joint and Several Liability Reforms**

Florida legislation limits or excludes joint and several liability based whether or not the plaintiff is at fault at all and the percentage of fault a particular defendant is determined to have.

• **Negligent Hiring Presumption**

By law, defendant-employer is given rebuttable presumption of no negligence in the hiring employees.

(1999 reform legislation)

**Georgia**

• **Punitive Damages Reform**

Limits liability for punitive damages to a maximum of US$250,000 unless the plaintiff proves that the defendant acted with a specific intent to cause harm. Plaintiff must prove entitlement to punitive damages by “clear and convincing” evidence.

• **Joint and Several Liability Reform**

The 2005 reforms eliminated defendants’ joint and several liability in all tort cases, making juries decide for what percentage of the fault multiple defendants should be liable. Until then, joint and several liability was barred only in certain cases where the plaintiff was shown to be partially at fault.

**Obesity Litigation Reform**
Manufacturers, sellers and certain others involved with the food products are exempted from liability from the long-term consumption of food, unless the claim is based on a material violation of federal or state adulteration or misbranding norms or certain other violations of federal or state law.

- **Venue Reform**

  Georgia courts can decline to hear civil (e.g., product liability) cases brought by Georgia non-residents taking account where the claim arose; the location of witnesses; the parties’ residences; whether the plaintiff is trying to get around another state’s time limit for starting the lawsuit; and whether generally a Georgia court is/is not a convenient forum of the action.

- **Encouragement of Out-of-Court Settlements**

  The 2005 reforms require one litigation side to pay the other side’s attorneys’ fees if the former rejects a reasonable out-of-court settlement offer presented by the latter.

- **Frivolous Lawsuits**

  Juries can decide that a law suit is frivolous (lacking in any real substance and merit) and, if so, make the losing side pay the other side’s attorneys’ fees.

  

**Idaho**

- **Punitive Damages Reform**

  Limits punitive damages awards to greater of US$250,000 or 3 times the amount of compensatory damages awarded.

  For a punitive damage award, plaintiff must prove by a preponderance of the evidence that a defendant’s conduct was oppressive, fraudulent, wanton, malicious or outrageous.

- **Noneconomic Damages Reform**

  Capped in personal injury cases at maximum US$250,000.

- **Obesity Legislation Reform**
Similar to Colorado and Georgia legislation-----see above.

- **Joint and Several Liability Reform**
  
  Bars joint and several liability among defendants regarding all damages. Exceptions include medical and pharmaceutical products and so-called “intentional torts”.

  (Primarily 2003-2004 reform legislation, some earlier).

**Indiana**

- **Punitive Damages Reform**
  
  Limits punitive damages to greater of 3 times the amount of compensatory damages awarded or US$50,000.

- **Non-Manufacturing Seller Defense Reform**
  
  Product liability claims based on “strict liability” can be made only against the manufacturer of the product.

- **Product Liability Norm Reform**
  
  Established a rebuttable presumption that a product is not defective if
  
  1. its manufacturer complied with recognized “state of the art” safety guidelines; or
  2. its manufacturer complied with a U.S. government standard.

- **Joint and Several Liability Reform**
  
  Bars joint and several liability in product liability cases.

  (1995 reform legislation)

**Iowa**

- **No Failure to Warn Liability for Generally Known Risks; Proper Warnings/Instructions**
  
  Reform legislation states that:

  a manufacturer, seller, designer, supplier of specifications, assembler or distributor incurs no liability for failure to warn regarding risks and
risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users; and

a product that is reasonably safe for use if bearing or accompanied by a reasonable and visible warning or instruction and the warning or instruction is followed, will not be considered defective or unreasonably dangerous based on failure to warn or instruct.

Issues of whether risk or risk-avoidance measure was obvious or generally known, or whether the warning or instruction is reasonable and is visible, are decided by trier of fact (normally, a jury).

(2004 reform legislation)

**Maryland**

- **Noneconomic Damage Reform**

  Noneconomic damage awards capped at maximum of US$500,000, except that in wrongful death actions with 2 or more beneficiaries, the cap is US$700,000.

  (1986 and 1994 reform legislation)

**Michigan**

- Award of non-economic damages in product liability cases not involving death or loss of vital bodily function limited to US$280,000; and where involving one or the other, to a maximum of US$500,000.

- Bars defendants’ joint and several liability in product liability cases.

- Provides statutory defenses to product liability claims including adherence to government standards, including FDA (Food & Drug Administration) norms, and defenses available to innocent non-manufacturing sellers.

- Provides venue control in product liability cases.


**Minnesota**

- **Punitive Damages Reform**
To obtain punitive damages, plaintiff must prove, by clear and convincing evidence standard, that a defendant acted with deliberate disregard for the rights of others.

At defendant’s request, determination of punitive damages award must be made in a separate proceeding.

Trial and appeal judges have power to review all punitive damage awards.

Plaintiff cannot claim punitive damages in original Complaint; rather, plaintiff can do so only by amending pleadings after first convincing the Judge that there is reasonable basis (prima facie showing) for making the claim.

- **Noneconomic Damages Reform**

  Noneconomic damages (for emotional distress, embarrassment or loss of companionship) limited to maximum of US$400,000.

- **Contributory Negligence Reform**

  Contributory fault and damage apportionment based thereon expanded to economic loss claims.

- **Joint and Several Liability Reform**

  No joint and several liability for defendants determined to be less than 50% at fault.


**Mississippi**

- **Punitive Damages Reform**

  Maximum amounts of punitive damages modified and lowered, so that limits are as follows:
  
  ---US$20 million for a defendant with a net worth of more than US$1 billion;
  
  ---US$15 million for a defendant with a net worth of over US$750 million but not more than US$1 billion;
  
  ---US$5 million for a defendant with a net worth of over US$500 million but not more than US$750 million;
  
  ---US$3.75 million for a defendant with a net worth of over US$100 million but not more than US$500 million;
---US$2.5 million for a defendant with a net worth of over $50 million but not more than US$100 million;
---2 % of the defendant’s net worth if the defendant has a net worth of US$50 million or less.

Plaintiff must prove entitlement to punitive damage award by “clear and convincing” evidence.
Legislation establishes pertinent factors for jury to consider in determining punitive damages.
Entitlement to punitive damages must be made in a separate judicial proceeding.

- **Noneconomic Damages Reform**

Limits noneconomic damages (which includes physical disfigurement) to US$1 million maximum.

- **Time Limit Reform**

Time for commencing product liability lawsuits reduced to 3 years.
If case cannot be brought in another state or state because time limit for starting suit has expired there, it cannot be brought in Mississippi.

- **Innocent Non-Manufacturer Seller Reform**

Immunizes from liability a product seller, other than its manufacturer, unless the non-manufacturer seller had substantial control over the harm causing feature of the product, the damage was caused by the seller’s alteration or modification of the product, the seller had actual knowledge of the condition at the time the product was sold, or the seller gave an express warranty regarding the feature of the product that caused the plaintiff’s harm.

- **Liability Principles Reform**

Product containing an inherently dangerous characteristic is not defective if the characteristic cannot be eliminated without reducing substantially the product’s usefulness or desirability, and the characteristic is one recognizable by an ordinary person with ordinary knowledge common in the community.
Manufacturer or seller will not be liable for failure to warn of a product’s dangerous condition if it was not known when the product left the manufacturer’s or seller’s control.

Manufacturer or seller has no duty to warn of an open and obvious risk.

A plaintiff that knowingly and voluntarily subjected him/herself to a dangerous product condition cannot recover damages resulting from that condition.

Unless, at the time of manufacture, there was a practical, economically feasible design alternative, a properly functioning product is not defective in design.

- **Joint and Several Liability Reform**

  Bars joint and several liability; and states that defendants have no liability for any fault allocated to an immune wrongdoer or one whose liability is limited by law.

- **Venue Reform**

  Reform legislation limits significantly the ability of out-of-state plaintiffs to sue in the Mississippi courts (so-called “venue shopping”), requiring, essentially, that lawsuits can only be brought in a Mississippi county where the corporate defendant has its principle place of business, or the county where a substantial event causing the injury incurred, or in the county of the plaintiff’s residence. Requires the trial court to dismiss the claim if it would be more properly decided in another state.

  (Primarily 2004 reform legislation)

**Missouri**

- **Punitive Damages Reform**

  Limits maximum punitive damages award to the greater of 5 times the net damage award against the particular defendant (excluding punitive damages) or US$500,000.

  Any party can demand a bifurcated (2 stage) proceeding. In the first state, the jury determines whether there is liability for compensatory damages and against what defendant(s), and if so, the amount; and whether punitive damages should be imposed on any defendant. If the jury determines punitive damages should be imposed on one or more defendants, then in the second proceeding, the jury decides the amount.
• **Venue Reform**

New rules seek to prevent plaintiff lawyers from selecting those Missouri courts in which to sue that have shown themselves to be pro-plaintiff and inclined toward large awards and to foster large out-of-court settlements (“forum shopping”).

• **Joint and Several Liability Reform**

With very few exceptions, no joint and several liability for defendants that are found to be less than 51% at fault. If a defendant is found to 51% or more at fault, then he/she/it is liable for 100% of the judgment amount. However, for punitive damages, defendants are individually (severally) liable, not jointly, for the amount awarded against them.

(2005 reform legislation)

**New Jersey**

• **Punitive Damages Reform**

Limits maximum punitive damages award to the greater of 5 times the compensatory damages awarded or US$350,000.

To obtain punitive damages, plaintiff must prove by “clear and convincing” evidence that a defendant acted with actual malice or wanton and willful disregard for the rights of others.

The determination of punitive damage awards is made in a separate judicial proceeding.

Compliance with FDA standards (regarding a product subject thereto) is a defense against a punitive damages claim.

• **No Strict Liability for Non-Manufacturer Seller; Other Non-Liability Circumstances**

Strict liability does not apply to such sellers. Also establishes numerous circumstances under which the manufacturer and seller are not liable.

• **Joint and Several Liability Reform**

No joint and several liability for damages among defendants held to be under 60% at fault.

(1987 and 1995 reform legislation)
North Carolina

- **Punitive Damages Reform**

  Punitive damages awards are limited to the greater of 3 times the award of compensatory damages or US$250,000.

  For a punitive damages award, plaintiff must prove by “clear and convincing evidence” that the defendant was liable for compensatory damages and acted with fraud, malice, willful or wanton conduct.

  At the defendant’s request, the determination of punitive damages will be in a separate proceeding.

- **Reform Rejecting “Strict Liability”**

  North Carolina does not permit product liability claims based on “strict liability”.

- **Defenses Reform**

  North Carolina law provides certain defenses to product liability claims based on the plaintiff having “assumed the risk”.

  (1995 reform legislation)

North Dakota

- **Punitive Damages Reform**

  Caps the maximum award of punitive damages at the greater of 2 times the compensatory damages awarded or $250,000.

  Prohibits punitive damage awards when a manufacturer proves it complied with government standards.
To be able to make a claim for punitive damages, a plaintiff must first convince the court by a preponderance of the evidence standard that a defendant acted oppressively, fraudulently, or with actual malice. A plaintiff must then prove entitlement to punitive damages (oppression, fraud, or actual malice) by a “clear and convincing evidence” standard.

- **Government Standards Defense**

  Compliance with government norms and standards will normally be an available defense.


**Ohio**

- **Punitive Damages Reform**

  Limits punitive damages:
  - recoverable from “large employers”---- to 2 times the compensatory damages awarded;
  - recoverable from “small employers” or individuals---- to the lesser of 2 times the compensatory damages awarded, or 10% of the employer’s or individual’s net worth, or US$350,000.

  “Small employer” means, for a manufacturer, one employing not over 500 employees on a permanent full-time basis; and for a non-manufacturer, 100 such employees. “Large employer” means one above the limits for a “small employer”.

  Permits unlimited punitive damage awards only if a particular defendant acted purposely or knowingly in the commission of a felony (a serious crime) if such mental state is a legal element of the felony.

  To obtain punitive damages, the plaintiff must prove by “clear and convincing” evidence that plaintiff sustained “actual damages” because the defendant acted with malice or aggravated or egregious fraud (eliminating from prior legislation the “oppression” or “insult”).

  Manufacturers of prescription drugs and medical devices cannot be liable for punitive damages if they were produced and labeled in accord with U.S. FDA (Food & Drug Administration) norms, licenses or approvals, except if plaintiff proves the manufacturer defrauded the FDA. Subject to certain conditions, a similar exception exists for over-the-counter drugs.
For manufacturers and sellers of products other than drugs and medical devices, a similar rule as just above exists for complying with government agency norms, approvals and licenses.

• **Noneconomic Damage Reform (Damages for Pain and Suffering, Emotional Distress, Loss of Companionship)**

  Limited, for “non-catastrophic injuries”, to the greater of US$250,000 or 3 times the amount of economic damages awarded up to a maximum of US$350,000 per plaintiff and US$500,000 per occurrence. A “non-catastrophic” injury is one not involving permanent and substantial deformities or permanent physical functional injuries preventing the plaintiff from caring for himself and performing life-sustaining activities, wrongful death, etc.

  A judicial procedure exists for review and possible reduction of noneconomic damages.

• **Time Limit Reform**

  Sets 10 year time limit for initiating product liability lawsuit against manufacturer and supplier; and a construction related claims, likewise a 10 year limit beginning from the substantial completion of the construction project.

  Bars a potential plaintiff was suing in Ohio if in the plaintiff’s own state, the time limit for starting the lawsuit has expired.

• **Design Defect Claim Reforms**

  Tightens the legal standards for plaintiffs making design defect claims.

• **Obesity Claim Reforms**

  Grants immunity to food manufacturers, sellers and others from damage actions claims based on food or beverage consumption causing a person’s weight gain or obesity.

• **Trial Stage Procedures Reform**

  Other pro-business provisions applicable to the trial stage of an Ohio lawsuit have been enacted.
(2005 reform legislation).

**Oklahoma**

- **Punitive Damages Reform**
  
  If jury finds by “clear and convincing” evidence that defendant
  ---- acted in reckless disregard of the rights others, punitive
  damages are capped at the greater of US$100,000 or the
  amount of actual damages awarded,
  ---- acted intentionally and with malice, the punitive damage
  cap is the greater of US$500,000, or 2 times the actual
  damages awarded, or the increased financial benefit derived
  by the defendant (or insurer) from the injurious conduct.

  These limits do not apply if the jury decides, beyond a reasonable doubt, that
  the defendant’s conduct was intentional and malicious, and threatened human
  life.

- **Joint and Several Liability Reform**
  
  Joint and several liability imposable only on a co-defendant that is more than 50% at
  fault; except, that if any defendant is found to act willfully and wantonly or in reckless
  disregard to the rights of others all defendants can be held jointly and severally liable. But
  applies only when the plaintiff is found to have no % of fault.

  (1995 and 2004 reform legislation)

**South Carolina**

- **Joint and Several Liability Reform; Apportionment of Fault Among Defendants**
2005 reforms eliminate joint and several liability for undivided economic and noneconomic damages in tort (including product liability) cases caused by more than one defendant, for a defendant found to be less than 50% at fault as compared with the total determined fault (100%). If particular defendant’s percentage of fault is between 1% - 49%, it is liable for that % of those undivided damages.

Trier of fact (normally, a jury) applies “comparative negligence” rules. It determines the % of fault of each defendant held liable for the undivided damages, and the % of fault of the plaintiff (if any).

The above does not apply to a particular defendant whose conduct was willful, wanton, reckless, intentional, grossly negligent or involved the use, sale or possession of alcohol or drugs.

- **“Frivolous” Lawsuits, Claims, Arguments**

  2005 reforms impose strict standards and penalties, particularly on lawyers, for filing frivolous lawsuits, filing a frivolous pleading, motion or document with the court, making a frivolous defense, or taking any such action merely to harass or injure the other party or merely to cause delay.

- **Venue Rules**

  2005 reforms (i) tighten rules as to the South Carolina county in which the lawsuit can be brought; and (ii) indirectly, make it more difficult to bring the suit in South Carolina unless there is a very direct connection to that State, e.g., the most substantial part of the alleged wrongful conduct occurred there; or the plaintiff resided or had its principal place of business there at the time its claim arose; or the defendant company had its principal place of business there when the claim arose.

  Note: Plaintiff lawyers frequently “shop” for a particular court within the State (e.g., South Carolina) or in some other U.S. state that historically has been particularly favorable to plaintiffs and to large damage awards. The venue reforms are designed to combat that. For example, the American Tort Reform Association described South Carolina’s Greenwood County as a “judicial hellhole” in 2004, meaning one overly “pro-plaintiff” and thus, one to which plaintiff lawyers gravitated.

- **Review of Insurers’ Premium Reductions**

  South Carolina’s Dept. of Insurance will review annual statements of liability insurers to determine the savings (e.g., premium reductions) from decreased litigation and claims paid resulting from the 2005 reform legislation.
• **Punitive Damages**

  Plaintiff must prove entitlement to them by “clear and convincing evidence”.

  (mainly 2005 reform legislation)

**Texas**

• **Punitive Damages Reform**

  Limits punitive damages awards to greater of US$200,000, or 2 times the award of economic damages plus noneconomic damages but up to a maximum of US$750,000.

  Requires plaintiff to prove by “clear and convincing” proof that defendant acted with malice or the conscious indifference to the rights, safety or welfare of others.

  Requires unanimous vote of jury to award punitive damages; and that the Judge instruct the jury in advance that unanimity is required.

• **Time limit Reform**

  Product liability suit must be initiated within 15 years. In latent defect cases, plaintiff must have been exposed within 15 years from product’s sale and must show symptoms more than 15 years after the sale.

• **Liability and Defenses Reform**

  For most design defect claims, plaintiff must prove there was an economically and technologically feasible safer alternative design available at the time of manufacturing.

  By law, manufacturers and sellers of inherently unsafe products that are known to be unsafe are given a defense.

  If product meets mandatory government standards or was approved or licensed by the FDA, there is a rebuttable presumption that it is not defective.

• **Innocent Non-Manufacturing Seller Defense Reform**

  Prohibits lawsuit against non-manufacturing sellers other than in special circumstances, e.g., if the particular seller participated in the design of the product.
or knew of the defect at the time of the product’s sale.

- **Contributory Negligence Reform**

  Recovery of damages against a manufacturer, distributor or retailer of a product is barred if the plaintiff is 60% or more responsible for his own injuries.

- **Joint and Several Liability Reform**

  Unless the particular defendant is 50% or more responsible for the plaintiff’s damage, its damage liability is limited to the assessed percentage of its fault.

- **Inconvenient Forum Reform; Venue Reform**

  Requires Texas courts to decline to hear case if there is better forum for the suit; and allows Texas courts to decline to hear a personal injury or wrongful death case that arose outside of Texas.

  Rules on proper venue have been tightened.

- **Settlement Offers & Attorneys’ Fees Reform**

  If a defendant makes a settlement offer that plaintiff rejects and plaintiff does not obtain a judgment for at least 80% of the offered amount, plaintiff must pay the attorneys’ fees and costs incurred by the defendant after the rejection. If plaintiff makes a settlement offer that defendant rejects, and the damage award exceeds 120% of the rejected offer, the defendant must pay the attorneys’ fees and costs incurred by the plaintiff after the rejection. However, the fees and costs so shifted cannot exceed the sum of the noneconomic damages, punitive damages and 50% of economic damages awarded.

  (Above reforms enacted mainly in 2003, some in 1995 and earlier).

**Virginia**

- **Punitive Damages Reform**

  Limits punitive damages awards to maximum of US$350,000.

- **Joint and Several Liability Reform**

  Bars imposition of joint and several liability for damages.

- **Joint and Several Liability Reform**

  Joint and several liability can be imposed where defendant is more than 50% at fault, and where a defendant acted willfully and wantonly or with reckless disregard for the rights of others and no fault is attributed to plaintiff.

(1995 and 2004 reform legislation)

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**EXHIBIT B**

**LAYMAN’S EXPLANATION OF ARGUMENT/DEFENSE OF NO “PERSONAL JURISDICTION” OVER NON-RESIDENT DEFENDANT:**

WILL A U.S. COURT HAVE PERSONAL JURISDICTION OVER THE NON-RESIDENT MANUFACTURER, EXPORTER, PRODUCT DESIGNER, OR LICENSOR OF THE PRODUCT OR COMPONENT?
Will a U.S. court be legally competent to decide and render a damage award in a product liability lawsuit, against a non-resident of its state? Or will that party at least have at its disposal cogent legal arguments to challenge the U.S. court's exercise of “personal jurisdiction” over it? The answer: in many instances the court located in a U.S. state in which the allegedly injured party sues will not have personal jurisdiction over a person or firm not resident in that state. Or, at least the "non-resident" will have a good legal argument to that effect in many situations. That is a major point, one of critical importance to American and non-U.S. companies and individuals alike. Many companies and even lawyers are not fully aware of the law in this area.

Of course, it depends on the particular facts and circumstances. In some cases the "non-resident" of the U.S. state where suit is brought may have sound, legal arguments to challenge the U.S. court's jurisdiction and may succeed in such challenge. In other cases, it will have only relatively weak arguments and its challenge to the U.S. court's jurisdiction will probably fail. The main issue will tend to revolve around whether the "non-resident" has "sufficient contacts" with the U.S. state in which the law suit is brought to justify the exercise by a court of that U.S. state of personal jurisdiction over it. "Non-resident” does not mean only companies having their operations solely outside of the U.S.A. ---"foreign" companies and individuals operating in their home country. It also encompasses American companies and individuals who are not residents of the particular U.S. state in which the product liability lawsuit has been or may be brought.

The "Old" Rule: "Stream of Commerce" Theory

Until fairly recently, the legal rule seemed to be, stated very generally and without nuances: if a "non-resident" of the U.S. state concerned, including a non-U.S. company operating from outside the U.S.A., puts its products, parts or components into the "stream of commerce" with the reasonable "expectation" some would be purchased or used by people in the U.S. state where the law suit is brought, the courts of that U.S. state will have personal jurisdiction over the non-U.S. party, even if that party has no other contacts with the U.S. state concerned. Plus, certain other criteria would have to be met. Under the "stream of commerce" theory the "expectation" that the article might well be purchased or used by people in the particular U.S. state is usually interpreted rather broadly against the non-resident. party. Let’s call this the "Stream of Commerce Theory".

The Currently, Generally Accepted Rule: One or More Material Acts of the Non-Resident “Purposefully Directed” at the US State Concerned

U.S. Supreme Court rulings, and a number of federal and state court decisions around the USA tend to require more than a mere "expectation" or "awareness" that the product, component or part might enter the U.S. forum state through the "stream of commerce". This line of court decisions--now the generally accepted one-- looks for action of the non-resident
defendant purposefully directed toward the US state in which the lawsuit is brought (the U.S. forum state). Examples might be: (i) designing the product for the US forum state's market; (ii) advertising in the US forum state; (iii) establishing channels for providing information, advice or servicing to customers in the US forum state; (iv) marketing the products through a distributor or sales agent which has the U.S. forum state as a part of its contractual territory (in other words, creating, controlling or employing the distribution system that brought the product to the US forum state); having an office, employees, agents or property in the U.S. forum state. We will hereafter refer to this theory as the "Purposeful Connection With the State Theory". This is purposely oversimplified.

Technically, assuming the particular state’s jurisdiction (long arm) statute is broad enough to permit it to decide the case, there are two yardsticks (standards) which the court will normally apply: (i) is the non-resident defendant's contact with the state quite substantial (for example, it has an office in the state, it is registered to do business in that state, it has one or more employees stationed in that state)--that is the "general jurisdiction standard". If met, the court will have personal jurisdiction over the non-resident. If that is not met then the court applies the "purposefully connected" test along with certain other factors (the “special jurisdiction standard”). If neither is met, then the non-resident is dismissed from the case.

This writer-practicing lawyer has worked on a number of cases of this sort, most involving companies located outside of the U.S.A. One involved a foreign (non-U.S.) manufacturer/seller (the client), where the lawsuit was brought in the State of Colorado. That case is discussed below. When reading the case study, bear in mind the "Stream of Commerce Theory" and the "Purposeful Connection With the State Theory".

Case Study

A foreign (non-U.S.) manufacturer of metal benches for public seating in parks, shopping malls etc. (hereafter "FM") had been selling its benches for over 20 years only to one U.S. company distributor located in Massachusetts, U.S.A. (hereafter "MassCo"), which in turn resold them to its, MassCo's, customers in different parts of the U.S.A. There was never a written contract between FM and MassCo by which FM appointed MassCo its exclusive or non-exclusive distributor for the U.S.A. or any part thereof, or which otherwise defined their relationship.

MassCo resold a certain number of FM's benches to a company located in the State of Colorado (hereafter "ColoCo"), and ColoCo installed them in a Colorado shopping mall. Mr. Jones, the plaintiff ("Jones") claimed to sustain severe bodily injury and other economic damage when, allegedly, Jones sat on one of the benches and it collapsed.

Jones sued three parties for damages in a Colorado State court: MassCo, ColoCo; and FM, the foreign (non-U.S.) manufacturer which sold the bench in question to MassCo.
Although FM had a certain level of product liability insurance covering U.S. claims, FM and its insurer decided to challenge the jurisdiction of the Colorado court over FM. FM and its insurer engaged the writer's firm.

The main problem posed for our firm was to convince the Colorado court not to apply the "Stream of Commerce Theory" explained above. That theory had been proclaimed and applied by the U.S. Supreme Court in several decisions until about 1984. Many state and federal courts applied that theory in product liability cases. In particular, the Colorado Supreme Court adopted the Stream of Commerce Theory in the rather well known Michelin case. It was rather clear that by application of the Stream of Commerce Theory, the Colorado court in our case would decide that it had jurisdiction over FM to render a decision vis-a-vis FM on Jones' product liability claims. Our main task was to persuade the Colorado court

--- to not apply the "Stream of Commerce Theory" but rather, to apply the "Purposeful Connection With the State Theory"; and
--- to prove that FM did not have the necessary "purposeful connection" with the State of Colorado to justify the Colorado court's exercise of personal jurisdiction over FM.

We argued before the Colorado court that the Purposeful Connection With the State Theory applies, and that by its application, the court did not have personal jurisdiction over FM to render a decision regarding FM's liability to Jones. We stressed:
1. FM did not have and does not presently have an office, employees, agents, bank accounts or other connection with the State of Colorado;

2. FM never had and does not presently have any channels for providing regular advice or service to customers in Colorado;

3. FM never designed or adapted its metal benches (or any other product) specially for the State of Colorado market;

4. FM never advertised any of its products, including its benches, in Colorado;

5. at the time the metal bench in question was manufactured or sold to MassCo, at the time of Jones' "accident", and at the time Jones sued FM, FM did not have an exclusive or non-exclusive distributor or agent which had, as its territory, the USA or the State of Colorado itself. Specifically, that there never was nor is there, at the relevant times, any contract between FM and MassCo. We argued that MassCo was always only an occasional purchaser from FM of the benches, which MassCo resold to whomever and wherever MassCo desired; that MassCo did its own advertising and promotion of the benches in the USA; and that MassCo had its own customers and channels of distribution in the USA. We also emphasized that FM had always delivered its benches directly to MassCo in Massachusetts. And that FM never had knowledge of MassCo's customers or its distribution and sales network. From the foregoing, we concluded that FM did not create, control or employ a system of distribution that introduced the particular bench into the State of Colorado allegedly causing Jones' damages.

Jones' lawyers replied forcefully in its well-researched and formulated reply papers and in oral argument 1. the "Stream of Commerce Theory" applies; 2. by its application, the Colorado court has jurisdiction over FM. Their argument, in a nutshell, was, that when FM sold and delivered the bench in question to MassCo, it was foreseeable that MassCo would resell it to someone who or which might cause it to be installed in Colorado, considering that MassCo sold and delivered FM's benches into many areas of the USA. Accordingly, concluded Jones' counsel, the Colorado court can and should exercise personal jurisdiction over FM.

The Colorado court decided that it did not have personal jurisdiction over FM. In other words, FM won the case on the question of personal jurisdiction ---the Colorado court would not decide the issue of FM's liability to Jones. The court based its decision mainly on the "Purposeful Connection With the State Theory" (without specifically mentioning the Theory), concluding that FM did not have the requisite "purposeful connection with the State of Colorado".
But Jones did not give up. Jones' counsel thereafter filed with the same court two successive motions for reconsideration of the decision based on alleged new evidence. The Colorado court rejected both motions. Thus, FM escaped the clutches of the Colorado court. Jones did not attempt to appeal to a higher court.

The reader should not conclude from this case study that every American court would arrive at the same conclusion under similar facts and circumstances. Nor should he or she conclude that under somewhat different facts, an American court would necessarily reach a similar conclusion even applying the “Purposeful Connection” Theory.

The main point is that at least potentially, certain “non-resident” manufacturers, sellers, product designers, licensors, etc. will have at their disposal a legal theory (the "Purposeful Connection With the State Theory") with which they may be able to challenge the jurisdiction of U.S. courts.

Most American lawyers representing plaintiffs in product liability cases work on a contingency fee basis — they receive their fees based on the amount recovered by way of judgment or settlement. Those lawyers normally do not want a difficult and time-consuming, preliminary legal battle about whether the court has jurisdiction over a foreign (non-U.S.) or even, sometimes, out-of-state, American defendant, unless their client's damage claim is quite large. Especially when there are other American defendants easily reachable (like MassCo and ColoCo in the above case study) that have "deep pockets" and/or sufficient product liability insurance to cover the damages. We were surprised that Jones' lawyers were willing to spend so much time and effort in their attempt to sue FM.

Even if a foreign company has a U.S. subsidiary or affiliate, it might be able to take advantage of the Purposeful Connection With the State Theory. If the subsidiary or affiliate is located totally outside of the state where the lawsuit is or will be brought, it is a non-resident of that state, and, depending on factors mentioned above, it may be that neither the foreign company nor its subsidiary or affiliate will be subject to the legal grasp of that state in a product liability case.

Challenging the jurisdiction of a U.S. court, as above, requires considerable legal and factual input, and may not be inexpensive in terms of legal fees. If one loses at the lower court level on the jurisdictional issue, one might decide to apply for reconsideration at the same lower court level or appeal. You may win on consideration or appeal; or, when the plaintiff sees you have applied or appealed, a reasonable settlement of the case may result.
APPENDIX C

LIST OF OTHER FREE PUBLICATIONS RELATING TO THE USA AVAILABLE FROM THE WRITER

(Except as noted, the Author of these publications is the co-author of this Guide, Aaron N. Wise)


Doing Business in the USA: A Bullet Point Guide for Foreign Companies (available for particular foreign companies, per country, and in several different languages)

A Foreign Business Person’s Guide to American Law – Business Practices - Taxation (available for particular foreign companies, per country)

General Terms of Sale for Exports to the USA, the Western Hemisphere Generally, and Worldwide: A Guide for the Foreign (Non-US) Exporter


Purchase and Leasing of Real Property in the United States
The author is David Berkey, Esq., Partner of Gallet Dreyer & Berkey, LLP, New York City, the same law firm as Mr. Wise.