

# U.S. PRODUCT LIABILITY

## Overview & Recent Developments



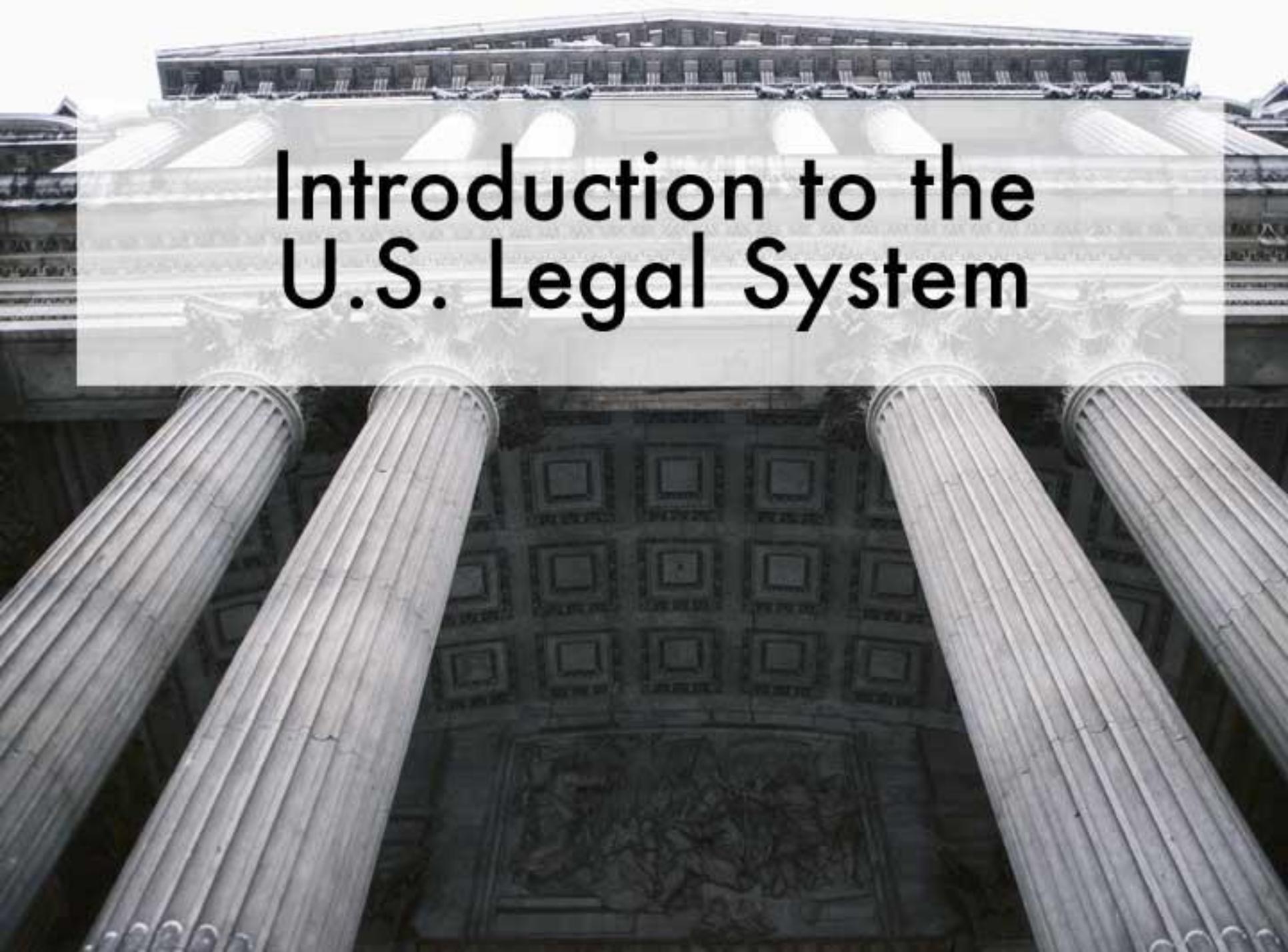
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J. Ryan Hemingway  
May, 2005

**Products liability litigation is increasingly threatening the financial stability of companies and even whole industries.**

**Likewise, many companies that previously were not the targets of products liability claims are now in the line of fire.**

**With the enormous stakes in mass torts liabilities and the many coverage outcomes depending on choice of forum and choice of law , it is imperative that an insurer be able to move quickly to recognize and to protect its rights.**



# Introduction to the U.S. Legal System

# The U.S. Legal System

## State Law

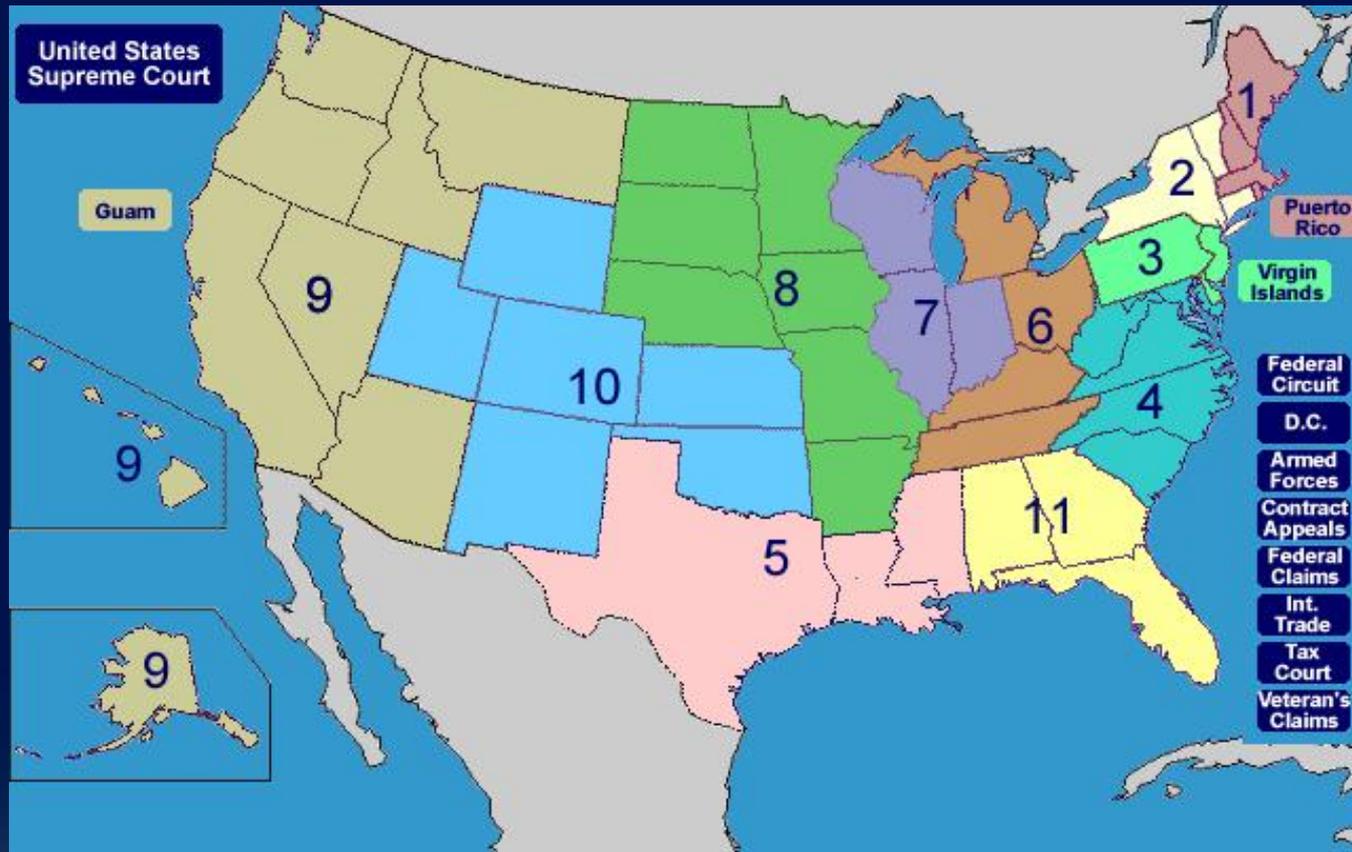
- 50 Sovereign States
- Statutes
- Case Law
- Administrative Law

## Federal Law

- Multiple Territories
- Statutes
- Case Law
- Administrative Law
- International Treaties

The rules can be quite different state by state.

# U.S. Federal Circuits



# Product Liability In The U.S.

- One of the most active markets in the legal industry.
- Filings have nearly doubled in the past four years.
- U.S. distributors of foreign products are requiring that foreign manufacturers carry high levels of liability insurance.
- U.S. Courts are also fast becoming the forum of choice for victims abroad.

# U.S. Courts Are Often Preferable For Victims

- Broad sweeping theories of liability
- Substantial pre-trial discovery is allowed
- A variety of compensation awards are allowed, including punitive damages
- The “contingency fee” system allows for individuals that lack financial resources to take on large corporations

A photograph of a person rappelling down a dark, textured rock face. The person is wearing a red harness and a white helmet. A bicycle wheel is attached to their gear, and a rope is visible. The background is a clear blue sky. The text "Strict Products Liability" is overlaid on the image in a white box.

# Strict Products Liability

# The Elements

## (California Law)

- That the defendant company was involved in the manufacture or distribution of the product;
- That the product possessed a defect when it left the possession, custody, or control of the defendant company; and
- That the defect in the product was a cause of injury to a person or property.

**Plaintiff does not have to prove that the defendant was negligent!**

# Possible Defendants

(Primary)

- Manufacturers (including component part manufacturers)
- Distributors
- Retailers

**Each may be liable regardless of which entity created the defect.**

# Possible Defendants

(Secondary)

Companies that play an important role in producing or marketing the product.

# **Marketing Theory**

## **(California)**

- 1. Defendant received a direct financial benefit from its activities and from the sale of the product;**
- 2. Defendant's role was important to the business enterprise such that the company's conduct was a necessary factor in bringing the product to the consumer market; and**
- 3. The defendant had a substantial ability to influence the manufacturing or distribution process.**

# When is a product defective?

- Manufacturing defect
- Design defect
- Warning defect

# Manufacturing Defect

A manufacturing defect exists when a product does not conform to the manufacturer's intended design or intended end result.

# Design Defect

(California Law)

When the design of the product fails to meet consumer expectations as to safety or when the risk of danger inherent in the challenged design outweighs the benefits of the design.

# Tests For Design Defect

- Consumer Expectation Test
- Risk-Utility Test

# Consumer Expectation Test

(California Law)

Reserved for those lawsuits in which no expert witness is needed -- the everyday experience of the product user permits a conclusion that the product violated minimum safety assumptions.

# Risk-Utility Test

Takes a closer look at the risks and benefits of the product's design in light of reasonably feasible alternative designs available to the manufacturer when the product was manufactured.

A claim of design defect is usually more serious than one of manufacturing defect because it challenges the specifications for the entire product line.

# Warning Defect

Occurs when a manufacturer has not adequately warned of a particular risk that was known or knowable in light of the prevailing scientific knowledge available at the time of manufacture and distribution of the product.

# When is the product the cause of the injury?

Plaintiff must prove that the defect in the product caused his or her accident, injuries, and damage.



# What damages generally are available?

- Economic damages (bills, loss of earnings, etc.)
- Non-economic damages (pain and suffering, emotional distress)
- Punitive damages (designed to punish the defendant)

# Economic Loss Rule

A plaintiff cannot recover pure economic loss without any claim of personal injury or damages to other property.

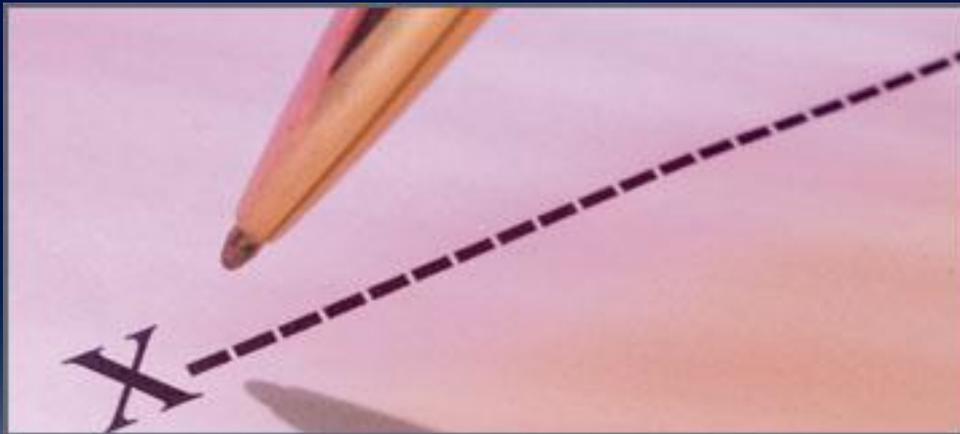
# Negligence

Plaintiff must prove that the defendant acted negligently – that defendant's conduct fell below the standard of care.

# Warranties

A products liability action may be brought under breach of warranty theory:

1. Expressed warranties
2. Implied warranties



# Successor Liability

An entity that takes over another entity's product line or business may be subject to strict product liability for injuries caused by defects in products marketed by the predecessor.

# Component Part Liability

The manufacturer and designer of a component part can be held liable in strict tort liability (and negligence) for a defect in the component that is present when the component leaves the control of the manufacturer and that subsequently causes personal injury and/or property damage.

# Cases Where Component Part Supplier Was Not Held Liable

- No knowledge of ultimate use. These cases typically involve items that have a wide variety of uses, e.g., valves.
- Compliance with assembler's specifications.
- Generally no duty to warn the ultimate consumer.

# Cases Where Component Supplier Was Held Liable

- Where the component part supplier is also the designer of the finished product.
- Where the defendant designs a component that has only one use.
- Where the component has multiple uses, but is dangerous for most all of them.
- Where a component supplier has actual knowledge that the design is excessively dangerous in the finished product.

# Product Recall

## Painkiller Bextra pulled due to risks



**The news:** The blockbuster painkiller Bextra was yanked off the market Thursday, and the government ordered that 19 other popular prescription competitors – from Celebrex to Mobic – carry strong warnings that they, too, may increase the risk of heart attacks and strokes.

**The scope:** Also, the FDA will make over-the-counter non-steroidal anti-inflammatory drugs, or NSAIDs, such as ibuprofen, naproxen and ketoprofen bear stronger reminders to take only low doses for a few days at a time to avoid the same risks of high-dose, long-term use.

**Who's affected:** Anyone with chronic pain.

**Graphic, Q&A and timeline on News 14-15**

- Products sold or distributed in the United States must abide by many governmental codes, rules, and regulations.
- A product which proves defective might subject a manufacturer or distributor to governmental regulations requiring that the product be recalled, remediated (such as retrofitted or modified in some manner), or destroyed.
- Campaigns to recall or remediate a product are expensive and rarely affect more than a fraction of the numbers of products already sold.

- If the recall is inadequate or negligently performed, the manufacturer or distributor might be subject to liability.
- If the manufacturer or distributor who learns of a defect after the product leaves its hands and fails to recall or remediate, the manufacturer and distributor might be liable for ignoring a post-sale duty to warn.

# The Consumer Products Safety Commission

- Jurisdiction over approximately 15,000 types of "consumer products."
- The Commission does not have general jurisdiction over foods, cosmetics, medical devices, firearms and ammunition, boats, motor vehicles, aircraft, or tobacco.

# When is a recall necessary?

If a product is deemed defective, a recall is necessary if the defect is serious enough that it could create a substantial product hazard.



# Key elements to consider in a product recall:

- **Pattern of defect:** e.g., design, composition, content, construction, finish, packaging, or warnings.
- **Distribution:** the number of defective products distributed in commerce.
- **Severity of risk.**

In March 2005, the CPSC levied a *\$4 million penalty* against Graco Children's Products Inc., the largest in CPSC history, for failing to inform the government in a timely manner about more than 12 million products that posed a danger to young children nationwide.

## NEWS from CPSC

### U.S. Consumer Product Safety Commission

Office of Information and Public Affairs

Washington, DC 20207

FOR IMMEDIATE  
RELEASE  
March 30, 2005  
Release #05-144

CPSC Consumer Hotline: (800) 638-2772  
CPSC Media Contacts: Leonardo Alcivar or Scott Wolfson  
(301) 504-7908 or (301) 504-7051

#### *Hamilton Beach/Proctor-Silex Inc. Agrees to Pay \$1.2 Million Civil Penalty*

WASHINGTON, D.C. - The U.S. Consumer Product Safety Commission (CPSC) announced today that Hamilton Beach/Proctor-Silex Inc., (HB/PS) of Glen Allen, Va., has agreed to pay a \$1.2 million civil penalty. The penalty, which has been provisionally accepted by the Commission, settles allegations that *the company failed to report to CPSC in a timely manner* defects with three separate products: countertop toasters, juice extractors, and slow cookers. Under federal law, manufacturers, importers, distributors, and retailers must immediately report information about potentially hazardous products to the Commission.

"Companies who report late to CPSC about incidents or injuries involving their products prevent us from taking action to protect consumers from harm," stated CPSC Chairman Hal Stratton. *"CPSC will not hesitate to enforce the law against those companies who do not report critical safety information in a timely way, but our goal is to have companies work cooperatively with us to keep consumers safe."*

In agreeing to settle this matter, HB/PS denies that it violated the Consumer Product Safety Act by failing to report its countertop toasters, juice extractors, and slow cookers in a timely manner. HB/PS says it continues to improve its methods for satisfying all CPSC reporting requirements.

#### **Countertop Toasters**

CPSC alleged that certain models of HB/PS toasters could remain "on" even after the food in the toaster "popped up." This could set whatever was in the toaster on fire. These toasters were manufactured for HB/PS by Durable Electrical Metal Factory Ltd., of China, from March 1997 to October 1999.

Between 1997 and 1999, HB/PS received about 230 consumer complaints involving toasters that may have failed to turn off and three consumer reports of damage to kitchen cabinets or countertops due to fires. The company also knew of product changes to attempt to correct the problem.

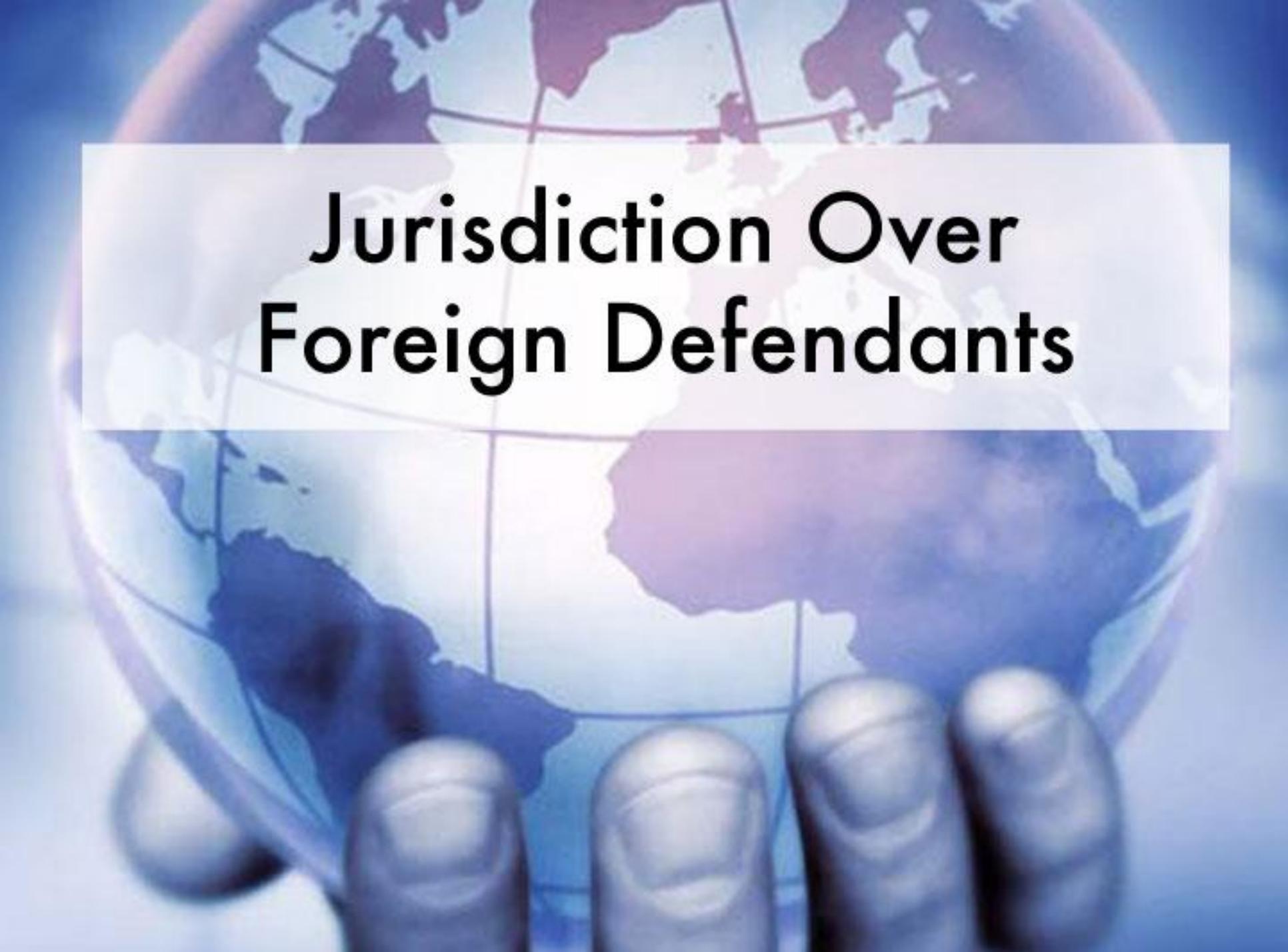
HB/PS reported this product to the Commission in November 1999 and voluntarily recalled 95,000 of its countertop toasters in April 2000. HB/PS offered consumers a replacement toaster.

#### **Juicers**

HB/PS distributed the defective juice extractors between 1992 and October 2001. CPSC alleged that the juicer strainer baskets could break apart, posing a risk to nearby consumers who could be struck by pieces of metal or plastic. Between 1992 and 2001, HB/PS received 59 consumer

# Defenses

- Statute of Limitations
- Misuse
- Assumption of Risk
- Adequate Warning
- Federal Statutory Immunity or Preemption
- State Statutory Immunities
- Product Unavoidably Safe

A hand holding a globe with a world map overlay. The globe is rendered in shades of blue and purple, with the continents in a darker purple. The hand is visible at the bottom, with fingers gripping the globe. The background is a soft, out-of-focus blue.

# Jurisdiction Over Foreign Defendants

**When a corporation *purposefully avails* itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance. .**

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*Asahi Metal Industry Co. Ltd., v. Superior Court of California* (1987) 480 U.S. 102, 110.

Application of these jurisdictional rules in the U.S. is not clear-cut. Questions concerning jurisdiction critically depend on the specific facts of each case.

The U.S. Supreme Court justices are divided on the proper scope of the “stream of commerce” theory for determination of whether a foreign defendant has “purposefully availed” itself of the benefits of a particular forum.

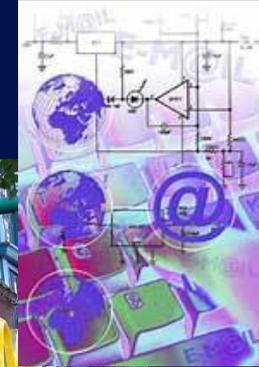
Jurisdiction over a foreign defendant must also be “fair and reasonable,” even apart from the question of the placement of goods in the stream of commerce.

## Courts have considered the following factors in determining “reasonableness:”

- The burden on the defendant;
- The interest of the forum state, i.e., ensuring that safe products are distributed in the forum state, and the consumer’s interest in obtaining relief;
- Conflicts with sovereignty of the foreign state;
- Efficient judicial resolution;
- Convenience and effectiveness of relief for plaintiff;
- Existence of an alternative forum.

# Recent Developments

- Electronics
- Cellular Phones
- Gun Violence Litigation
- McDonald's Obesity Cases
- Video Games, Movies, and Websites
- Taiwanese Jelly Candy Cases



# *DiMare v. Cooper Power Systems*





*Clausen  
Miller* PC



*Clausen  
Miller* PC

# DiMare's Product Defect Contentions

## Design

- Wrong grade of oil
- Pressure relief value was insufficient

## Manufacturing

- Improper winding of internal coils
- Insulation improperly installed

# Key Issues

- **Causation:** Whether the transformer designed and manufactured by Cooper Power Systems caused the fire loss.
- **Damages:** DiMare is claiming \$1 million in property damage and \$13 million in business interruption.

# Jury Verdicts



Jury studies repeatedly show that product liability recoveries are frequently substantial. Moreover, the magnitude and scope of tort products liability claims is steadily increasing.

Insurance coverage, therefore, becomes essential for any company selling, distributing, or marketing products to consumers in the U.S.

## **Autumn Cobb v. Oriental Trading Co., Inc.**

AWARD: \$3,738,995 (Verdict-Plaintiff)

STATE: California

INJURIES: Second and third-degree burns to over 20% of her body; complaints of scarring but had no physical limitations.

## **Gordon Contessa v. Key Material Handling Equipment, Co., Inc., TCM America , Inc., Mitsui Machinery Dist., Inc. and Cascade Corp.**

AWARD: \$2,500,000 (Settlement)

STATE: New York

INJURIES: Crushed fracture of right foot. Plaintiff also claimed that he developed disc bulges.

## **Thomas Mosley v. Reliable Machinery Industrial Co. Ltd.**

**AWARD:** \$2,660,000 (Verdict – Plaintiff)

**STATE:** Indiana

**INJURIES:** Parent suffered from smoke inhalation and cuts sustained while trying to break into kid's room from the outside. His son suffered from smoke inhalation. Wrongful death as well as medical expenses and pain and suffering.

## **Naddour v. CEFLA Group, Stiles Machinery, Inc. Springdell Group, P.C.**

**AWARD:** \$12,500,000 (Verdict-Plaintiff)

**STATE:** Pennsylvania

**INJURIES:** Coma for 23 days. Neuropsychology expert stated that victim is unable to return to employment.

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Miller* PC

# **Kenneth Mink v. Maytag Corporation**

AWARD: \$10,250,000 (Class action settlement)

The parties agreed to a \$10.25 million pretrial settlement, which included \$8.25 million for attorney fees. The remaining \$2 million was allocated for the class's reasonable repair and reimbursement costs. Maytag will pay up to \$500 to each class member who replaced his or her machine. Maytag also agreed to conduct mail and advertising campaigns that will target past purchasers of the front-load machines. All class members will receive a one-year warranty extension, retroactive to the settlement date.

# Adan Ibarra v. L.G. Electronics, Inc.

**AWARD:** \$34,010,000 (Verdict-Plaintiff)

The jury found by the criminal burden of proof, 'beyond a reasonable doubt', that the conduct of LG Electronics amounted to malice and that LG had actual awareness of the extreme degree of risk presented by its product.

The above verdict does not include the confidential punitive damages settlement.

## **Athews v. University Loft Co.**

**Result:** \$175,000 (Verdict)

**STATE:** New Jersey

**INJURIES:** Dislocation of non-dominant shoulder.

## **Sterling Price Stephens v. VF Jeanswear, Inc.**

**AWARD:** \$2,275,000 (Settlement)

**STATE:** California

**INJURIES:** Blindness to right eye. He sought damages for medical expenses, pain and suffering and loss of earning capacity.

# **Griggs v. West-Pac Industries, Tools Exchange, Caterpillar, Inc. and O'Connor's Parts**

**AWARD:** \$58,000,000 (Verdict-Plaintiff). Prior to trial, Griggs settled with Caterpillar Inc. and O'Connor's Parts for a confidential amount. The jury then found for Griggs and awarded him \$3.6 million for past medical costs, \$6.4 million for future medical costs/loss of earnings and earning capacity, \$14 million in past noneconomic damages and \$34 million in future noneconomic damages, which created a total gross verdict of \$58 million.

**STATE:** California

**INJURIES:** Third-degree burns over 75% of plaintiffs body.

**Labar v. Lakewood  
Engineering & Manufacturing**

**AWARD:** \$18,503,300 (Verdict-Plaintiff)

**STATE:** Texas

**INJURIES:** Plaintiff died from asphyxia by carbon monoxide poisoning.

**Camacho v. Whirlpool Corp.**

**AWARD:** \$14,000,000 (Verdict --Plaintiff)

**INJURIES:** Joab Camacho died as a result of the fire cause by the Whirlpool clothes dryer. Damages sought for pain and suffering and emotional distress.

**According to the U.S. Consumer Product Safety Commission, clothes dryers are responsible for 15,500 fires, 10 deaths, 310 injuries and more than \$84.4 million in property damage each year.**

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