

Can I File Suit in The U.S. Against A Foreign Entity, And If So, Is It Worth It? An Analysis of Personal Jurisdiction and Enforcement of Judgments Against Foreign Entities

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Have you encountered some of these loss scenarios: Your expert has identified the cause of a loss in the United States, but the manufacturer of the failed product is overseas? Or, you have a loss that occurred overseas, but the foreign defendant has ties to the United States?

Your initial reaction may have been that trying to recover against a foreign entity is too daunting of a task to tackle. If so, the discussion below should be encouraging. In many instances, if you can establish personal jurisdiction in the United States, then the judgment you obtain in the United States may be enforceable overseas in the defendant's country where it has assets.

Can I File Suit in The U.S. Against A Foreign Entity? The Personal Jurisdiction Issue

Before filing suit you must first determine if a court in the United States will have personal jurisdiction over the foreign entity. The answer depends on whether the cause of action arose out of the defendant's contact with the forum state.

Loss Occurred Inside The Forum State – Specific

Jurisdiction and "Minimum" Contacts. If the cause of action arose out of the defendant's contact with the forum state, then the easier specific jurisdiction test is applied. *Helicopteros v. Hall*, 466 U.S. 408, 414-15 (1984). To establish specific jurisdiction over the foreign defendant, a standard referred to as "minimum contacts" must be satisfied. *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-16 (1987). This requires not only defendant's awareness that the product will reach the forum state (state where the loss occurred and you are filing suit), but also additional conduct of the defendant to purposefully avail itself of the forum market. In order to determine if the foreign defendant has sufficient

minimum contacts with the forum state, the following types of information should be obtained:

- Does the defendant regularly ship products to the forum state or is this an isolated incident?
- Does the defendant have any offices/employees in the forum state?
- Does the defendant have any licenses to do business in the forum state?
- Does the defendant maintain any bank accounts or have any property in the forum state?
- Was the defendant required to pay taxes in the forum state?
- Does the defendant advertise in the forum state?
- Was the defendant aware that the product or goods shipped would reach the forum state, or were they unilaterally sent here by someone other than the defendant?
- Where did the transaction/contract between the insured and defendant take place?

The more of these questions that can be answered "yes," the more likely a court will find that sufficient minimum contacts with the forum state exists.

Loss Occurred Outside Forum State – General Jurisdiction And Substantial Contacts.

While minimum contacts are sufficient to establish specific jurisdiction, the more stringent general jurisdiction is required if the cause of action did not result out of defendant's contacts with the forum (i.e. if the loss did not occur in the state in which you are filing suit). General jurisdiction requires contacts that are not "minimal," but "substantial ... continuous and systematic." *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); see

also Helicopteros, 466 U.S. at 414-415. If general jurisdiction exists in a state then the defendant can be sued in that state for virtually any claim, even if the claim is unrelated to the defendant's contacts with the forum state. This would include losses that took place outside the United States if the defendant has substantial contacts with the forum state. To determine if sufficient contacts exist, the same minimum contact questions above should be asked, but you will need to establish a higher level of contacts with the forum state. Note that the mere presence of a subsidiary corporation in the forum state is insufficient to establish general jurisdiction, although it will be a factor in favor of it.

Waiver. Even if personal jurisdiction does not exist against a foreign defendant, if the defendant answers the complaint or makes an appearance in the case without first asserting a lack of personal jurisdiction as a defense, then the defendant likely waives the lack of personal jurisdiction defense.

Congressional Involvement – “Foreign Manufacturers Legal Accountability Act”

While the minimum/substantial contacts tests are the current standards for establishing jurisdiction over the foreign defendant, Congress is looking to make it easier for plaintiffs to both serve foreign defendants and obtain jurisdiction over them in a U.S. court. The bill, currently under review by Congress and expected to pass, requires foreign manufacturers of products/goods shipped to the United States to establish an agent in at least one U.S. state to accept service of process on behalf of the manufacturer. In addition, the bill requires that the foreign manufacturer consent to personal jurisdiction in the state or federal courts of the state in which the registered agent is located. Congress's attempt to create personal jurisdiction over foreign manufacturers by statute is arguably inconsistent with the Due Process Clause of the Constitution from which our current personal jurisdiction standard was born. However, Congress did wisely include a provision that the state in which the registered agent is located be a state “with a substantial connection to the importation, distribution, or sale of the products of such foreign manufacturer or producer.” This allows for the argument that the foreign manufacturer is conceding to sufficient minimum contacts with the state in which the registered agent is located because the foreign manufacturer is picking the state it has sufficient contacts with to be the location for the agent. It is likely that the Supreme Court will

eventually get involved in the issue. But if the current bill is passed and upheld by the Supreme Court we can expect the floodgates to open against foreign manufacturers since personal jurisdiction would be automatically established in the state in which the foreign manufacturer's registered agent for service of process is located.

Is It Worth It? Collectability Issues

Having completed your analysis of whether personal jurisdiction exists in the United States against the foreign defendant, the question must still be asked – is it worth it? The following issues need to be considered:

Enforcement of Judgments. Does the foreign defendant have sufficient assets to satisfy any judgment obtained? An investigation into the available assets of the foreign defendant is critical. If you do obtain a judgment in the United States against a foreign entity, can you enforce that judgment overseas where the defendant is located and likely has most of its assets? The answer depends on how the judgment was obtained and whether the country where the defendant is located has reciprocity with the United States. In the context of judgments, reciprocity (also referred to as comity) is the enforceability of a judgment in one country from a court in another country. Reciprocity rules differ for each country. While some countries will not enforce U.S. judgments at all, others do provide vehicles for enforcement. Some examples include:

- Hague Convention Countries - Hague Conventions on Foreign Judgments, Choice of Law, and Choice of Court are available at http://www.hcch.net/index_en.php?act=conventions.listing. The United States, Mexico, and European Union are signatories to the Convention on Choice of Court which recognizes foreign judgments if they were obtained pursuant to an agreement between the parties that a particular country's court system hear any disputes arising out of the contract. Otherwise the Conventions on Foreign Judgments and Choice of Law have yet to be adopted by the United States.
- Non-Hague Convention Countries. Whether a non-Hague Convention country will recognize a foreign judgment depends on whether the facts surrounding the judgment complied with the reciprocity requirements of the particular country. Some European countries, for example, have favorable reciprocity rules and will often recognize a

judgment if 1) the defendant was properly served, 2) the court where the judgment was obtained had jurisdiction over the defendant, and 3) if the losing party had the opportunity to be heard.

Even if a country does not have reciprocity for U.S. judgments you should not be immediately deterred from filing suit. Many countries will, in the alternative to full reciprocity, recognize U.S. judgments as evidence in their own hearing on the merits. As a result, if you obtained a judgment in the United States, you may only need a brief overseas hearing (through local counsel) to prove your case, rather than enduring the cost of a full trial. Moreover, even absent reciprocity, many companies do not want a record of a U.S. judgment against them for fear of creating a poor image of them in the United States in the event they wish to do future business here. As a result, if you can establish personal jurisdiction it may be worth filing suit to put pressure on the foreign defendant to settle or have a judgment on record against them in the United States, reciprocity or not.

Filing Suit Abroad

While the preference is to file suit in the United States against foreign defendants – more favorable judicial system for plaintiffs, broader discovery available, less expensive – there will be instances where the personal jurisdiction and/or collectability analysis above results in the better option being filing suit overseas. Cozen O'Connor is currently handling subrogation cases in more than 50 international jurisdictions. We are positioned to evaluate whether suit can be filed in the United States, or in the alternative, overseas with the assistance of local counsel in that country.

Additional Discussion Re: Litigating Against Foreign Entities – subrogationandrecoverylawblog.com

Cases against overseas defendants should be evaluated on a case-by-case basis to determine if reciprocity exists and to evaluate the particular laws on enforcing foreign judgments in the defendant's country. For additional discussion re: litigating against foreign entities, including ways to serve foreign manufacturers in the United States through their subsidiaries, please visit the subrogationandrecoverylawblog.com.