

A Publication of the
Products Liability
Practice Group

Spring/Summer 2013



Dear Clients & Friends,



We are pleased to present you with the Spring/Summer 2013 Edition of the Reminger Product Liability Group Newsletter.

Our practice group members have been busy trying a number of cases for various clients with great success, as evidenced by the entries in our Results section of the newsletter.

We also want to share with you an article published by two of our practice group members on the topic of personal jurisdiction. It has been published in a leading national magazine and received a coveted Burton Award. We hope that you find this article informative.

Did you know that we expanded our reach beyond Ohio and Kentucky by opening an office in the State of Indiana last fall? We now have a number of attorneys, licensed in Indiana, experienced in handling Product Liability cases.

Because we are able to service your needs throughout Ohio, Kentucky and Indiana, we have provided summaries of pertinent legal principles that are relevant to Product Liability cases for each state. We hope that you find these tables useful.

As always, we are thankful for our relationships with our clients and for the opportunities that you have provided in allowing us to represent your legal interests.

We look forward to continuing those relationships and hope that you enjoy learning a little bit more about our firm and practice group. Should you have any questions or need to discuss any matters, we look forward to hearing from you and working with you in the future. All the best for a happy and healthy summer season, and we look forward to speaking with you soon.

Sincerely,

Products Liability Practice Group Co-Chairs
Michael Gilbride and Robert Yallech

PRODUCTS LIABILITY RESULTS

Over the past several months, Reminger attorneys have been busy trying cases and defending their clients against claims arising out of product liability/breach of warranty. Here are a few of the notable matters that Reminger attorneys have handled:



DEFENSE VERDICT

Reminger attorneys obtained a defense verdict on behalf of an RV manufacturer in Fayette County, Kentucky. The matter involved the defense of a personal injury and property damage claim resulting from a fire. The plaintiff claimed that a defective design and inadequate warnings caused the RV to catch fire and burn to the ground. Reminger attorneys successfully argued that the product was safe and that the consumer had ignored appropriate warnings. A jury of twelve agreed.



FAVORABLE OUTCOME

In November of last year, Reminger attorneys defended an automobile manufacturer in the defense of claims arising out of Lemon Law/breach of warranty. At issue was whether the product was defective and whether the vehicle qualified as a lemon. The case was tried in Franklin County (Columbus, Ohio). The attorneys were able to prevail on the Lemon Law claim and the breach of express warranty claim. However, given the repair history, some amount of money was awarded to the Plaintiff on the Magnuson-Moss Warranty Act claim. However, our attorneys were successful in arguing to the Court that due to the history of settlement negotiations, that the Plaintiff's attorneys should not be awarded the full amount of attorney fees. The Court agreed and, in the end, awarded the Plaintiff \$5,000 in fees, which was a fraction of the amount originally sought by Plaintiff's counsel.

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DEFENSE VERDICT

In February of this year, Reminger attorneys defended an automobile manufacturer against claims arising out of Lemon Law, breach of warranty and Magnuson-Moss Warranty Act. The case was tried in Summit County (Akron, Ohio). At issue was whether a clutch replacement should have been covered under the warranty and whether the vehicle qualified as a lemon or there was a breach of warranty claim. Reminger attorneys were successful and obtained an 8 - 0 verdict in favor of their client on all claims.



DEFENSE VERDICT

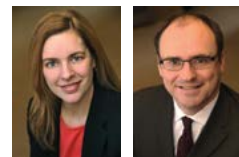
In April of 2013, Reminger attorneys defended an automobile manufacturer against claims arising out of Lemon Law, breach of warranty and violations of the Consumer Sales Practices Act. The case took place in Montgomery County (Dayton, Ohio). Reminger attorneys were successful in getting the CSPA claim dismissed via directed verdict. The Lemon Law and breach of warranty claims went to the jury. The jury returned verdicts in favor of Reminger's client on all counts.



SUCCESSFUL SUMMARY JUDGMENT/AFFIRMED ON APPEAL

Reminger attorneys were successful in obtaining a summary judgment in favor of their client, a supplier/distributor, in a products liability action. The Reminger attorneys argued that Plaintiff's allegation in the Complaint that the manufacturer was not subject to judicial process was insufficient to withstand a motion for summary judgment. Additionally, Reminger counsel were able to successfully argue that the inclusion of the client's name as distributor on the limited warranty material did not rise to the level of marketing the product under the distributor's own label or trade name pursuant to Ohio Rev. Code §2307.78(B)(7). In so ruling, the Court ruled that the term "judicial process" as it appears in the statute is not readily defined and, therefore, judicial process is akin to personal jurisdiction.

ZIPPO & THE IMPACT OF INTERNET ACTIVITY ON PERSONAL JURISDICTION



By Laurie Avery & W. Bradford Longbrake

Historically the business model for most consumer product manufacturers utilized a network of owned or independent distributors and/or retailers, which marketed and sold their products to consumers in various targeted locations. Under this model, the geographic limitations of personal jurisdiction remained largely clearcut. Courts have, for many years, addressed the need for the law to evolve in meeting the challenge to these traditional geographic rules raised by the impact of technology in shrinking the marketplace. More than fifty years ago the United States Supreme Court noted, "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar

increase." *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). Courts have attempted to address the increased access to broader geographic markets via radio, television, telephone and fax. Faced with these advances, the United States Supreme Court observed that jurisdiction could no longer be avoided "merely because the defendant did not physically enter the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 426, 476 (1985). A business could not rely on the argument that it had "no boots on the ground".

None of these prior technological changes created such a rapid and fundamental shift in the scope of interactions between manufacturers and consumers as the proliferation of the internet based marketplace. Internet technology increased the sources of product information and purchasing options exponentially. In a matter of years, an internet presence has

changed from a competitive advantage to a commercial necessity. Consumers now expect - if not demand- access to product information and/or on-line sales directly through websites. The use of the internet for advertising and on-line sales has almost universally been embraced by consumer product manufacturers. The reduction in advertising costs is significant. Direct sales transactions are easy and quick. These online sales provide the manufacturer or supplier with an opportunity to directly engage consumers to obtain valuable demographic information, solicit feedback, offer technical support, and market for potential future sales. Indeed, in the last decade alone, e-commerce sales in the United States have increased almost tenfold. U.S. Census Bureau, Retail Indicators Branch (Revised August 15, 2008); <http://www.census.gov>.

A natural consequence of a presence on the internet is the entry of companies to a

nationwide, if not international, advertising and sales program. The change in scope to a national market, via the internet, carries with it the potential for specific personal jurisdiction to a level not previously contemplated. The cost associated with defending product failure or defect claims in distant courts requires a measured evaluation of those costs when considering the consequences of internet marketing and sales. In addressing the new scope of an electronic marketplace new tools are being crafted to assist in the application of traditional principles of due process protections in the analysis of personal jurisdiction.

Personal Jurisdiction Overview

Our Federal Constitution has established due process limits upon the authority of local judicial bodies to regulate disputes involving persons and entities who are not residents of the geographic reach of State Courts. State Constitutions and "long arm" statutes have almost uniformly extended the rights of their home courts to the maximum extent permitted by the 14th Amendment due process protections. Personal jurisdiction has developed under two parallel schemes, "specific" and "general". Specific personal jurisdiction involves an examination of contacts with the forum which are directly related to the claims at issue before the court. This traditionally required a finding of "minium contacts". *International Shoe Co. v. Washington* 326 U.S. 310 (1945). General jurisdiction requires an increased presence and involvement with a given forum, but carries with it the substantial burden that the defendant can be sued for any claim whether or not it is related to or occurred within that forum. The test for general personal jurisdiction is the existence of "continuous and systematic" contacts. *Helicopteros Nacionales de Columbia, S.A. v. Hall* 466 U.S. 408 (1984). These limits are meant to be predictable to defendants so they can tailor their conduct accordingly. It is the foreseeability as to the impact a defendant's behavior has upon the jurisdictional analysis which serves to protect due process principles. See *World-Wide Volkswagen Corp. V. Woodson*, 444 U.S. 286 (1980). The focus of this article will be limited to a discussion of specific jurisdiction unless noted otherwise.

The Background of the "Zippo Test"

State and Federal Courts across the nation have been called upon to consider the extent to which internet-based activity impacts the traditional analysis of personal jurisdiction. As one commentator observed, "[a]mong the exciting opportunities offered by the internet is the chance to be hailed into court in another state." Haig, 2 N.Y.Prac., Com. Litig. in New York State Courts (2d Ed.) Section 2:28. Since its publication, the opinion in *Zippo* has been a focal point in the discussion of personal jurisdiction based on internet activity. Many Courts have accepted its sliding scale test, while others have rejected it. However, it remains critical to the analysis of jurisdictional issues and must be considered when evaluating whether internet conduct is likely to create a basis for specific jurisdiction in a given forum.

Although not the first Court faced with the analysis of specific personal jurisdiction related to an internet presence, *Zippo* did mark one of the first efforts to catalogue prior decisions and move toward a specialized scheme based directly on the scope and type of the internet presence, rather than continuing the application of traditional principles without modifications for the new technology. The analysis resulted in the *Zippo* Court's "sliding scale" based upon particular characteristics of a company's internet presence. The sliding scale is designed to serve as a framework to guide future decisions. The goal was to facilitate consistency, not only amongst internet-based cases, but also when viewed in conjunction with more traditional evaluations. "Different results should not be reached simply because business is conducted over the internet". *Zippo* at 1124. The *Zippo* Court did not create a new substantive test, but sought to create a tool for applying principles of personal jurisdiction to a new technology in a manner consistent with traditional measures of due process.

Zippo's Web Business Categories

The *Zippo* Court defined three categories of websites and internet activity based upon what it described as the amount of interaction between the website owner and the consumer. It then developed a "sliding scale" to provide a loose framework for determining the likelihood that personal jurisdiction could be constitutionally

exercised over the owner of a website. At one end of the spectrum, *Zippo* placed "passive websites". These websites do little more than display and convey information. They can be closely analogized to broadcast advertising which crosses state lines via television and radio. The Court explained that the operation of websites, in and of themselves, is not grounds for the exercise of personal jurisdiction. This is entirely consistent with prior decisions addressing the impact of television and radio advertisements that crossed state lines.

At the other end of the scale is what is labeled "active internet conduct". This constitutes a company's conduct in systematically conducting business over the internet in a manner which allows it to engage in a variety of activities described as the knowing and repeated electronic transmission of files and information from outside a forum to people and entities within the forum. The *Zippo* Court asserted that personal jurisdiction is proper over defendants who pursue this "active" model of contact with residents inside a forum. It appears this category contemplates an ongoing interaction between the defendant and a forum resident. It does not encompass one time sales transactions.

Zippo identifies what it describes as "interactive websites" in the middle of the sliding scale. This level of internet presence is where the defendant exchanges information with a forum located host computer, including completing specific individual transactions. According to the Court, "the exercise of jurisdiction [over a defendant operating an interactive site] is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website." As with most sliding scale tests, the two extremes provide easy answers, while the grey realm in the middle envelopes the majority of scenarios and provides much less certainty.

Competing Approaches Or Not?

Following the *Zippo* decision, courts have taken varied approaches to the analysis of internet conduct in evaluating Personal Jurisdiction. Some courts have chosen to utilize the *Zippo* sliding scale framework. In *Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 758-

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59 (7th Cir. 2010), the court reiterated dislike for the *Zippo* test and stated the following:

We wish to point out that we have done the entire minimum contacts analysis without resorting to the sliding scale approach first developed in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa.1997). This was not by mistake. Although several other circuits have explicitly adopted the sliding scale approach, [citations omitted] our court has expressly declined to do so. In *Tamburo*, we said that we were hesitant “to fashion a special jurisdictional test for Internet-based cases.” *Id.* ... *Zippo’s* sliding scale was always just short-hand for determining whether a defendant had established sufficient minimum contacts with a forum to justify exercising personal jurisdiction over him in the forum state. But we think that the traditional due process inquiry described earlier is not so difficult to apply to cases involving Internet contacts that courts need some sort of easier-to-apply categorical test.

In *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 431 (7th Cir. 2010), the Court again declines to adopt the *Zippo* test and states this in a footnote.

Other Courts have continued to apply traditional principles without use of this specialized tool. In *Johnson v. Arden*, 614 F.3d 785, (8th Cir. 2010), the court used the *Zippo* test to determine that they lacked jurisdiction over a defendant. The court found that the defendant did not purposely direct her internet activities toward the state of Missouri because her postings on a website were only interactive and the postings were not directed at the state, but instead toward specific people who happened to live in Missouri. *Id.* at 796. Further, the defendant’s website was not used for conducting business in the state. *Id.* at 797. While the stated tests may differ, it appears the results may not be as divergent as the language of opinions might suggest. The factual data utilized for these determinations are generally consistent, and the issues to be considered are not substantially different from the past.

Courts which have adopted the logic and rationale of *Zippo* have modified the traditional language of the specific personal jurisdiction analysis to address the electronic marketplace. For example, the Court in *ALS Scan Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707

(4th Cir. 2002), rephrased the traditional test to reflect electronic communication as the activity at issue. The ALS Court identified the three part test for specific jurisdiction as: 1) direction of electronic activity into the state; 2) the electronic activity manifests an intent to engage in business or other interactions in the state; and, 3) the activity creates a potential cause of action by a resident in the state. *Id.* at 714.

Even Courts which reject the idea of *Zippo’s* specialized test do acknowledge the interactivity of internet based conduct as one factual focus for application of the traditional tests. In *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227 (5th Cir. 2012), the court states in a footnote that internet-based jurisdictional claims must continue to be evaluated on a case-by-case basis, focusing on the nature and quality of online and offline contacts to demonstrate the requisite purposeful conduct that establishes personal jurisdiction. In contrast while the Court in *Hy Cite Corp v. BadBusinessBureau.com, LLC*, 297 F.Supp.2d 1154 (W.D. Wisc 2004), acknowledged the sliding scale test of *Zippo*, it declined to apply it on the basis that traditional tests were sufficient to analyze the “minimum contacts” created by internet activity. See also, *Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746, (E.D. Mich 2000). Although it rejected the sliding scale test of *Zippo*, the Hy Cite Court acknowledged the interactivity of web based conduct “may be one component of a determination whether a defendant has availed itself purposefully of the benefits or privileges of the forum state”. *Id.* at 1161. Hy Cite criticized *Zippo*, however, for the rigidity of its sliding scale test. For example, the Court discussed how a passive website could be aimed at forum residents. These types of cases generally arise from website activity posting allegations or comments about forum residents. See, *Panavision International, LP v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998); *Rios v. Ferguson*, 978 A.2d 592 (CT 2008). Numerous Courts have found that such internet “attacks” create “minimum contacts”, thereby justifying personal jurisdiction in the state of the “victim”. In contrast, interactive websites may be utilized in a manner which fails to demonstrate intent to interact with forum residents. *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000). In this scenario, a website may be

specifically designed to enable the defendant to conduct business, but it may not ordinarily seek to conduct business with forum residents as a matter of course. Although a large number of forum residents may have access to the interactive website, the fact that they cannot utilize it to transact business prevents a finding of specific personal jurisdiction.

Frankly, application of either a *Zippo* based test or the traditional approach is likely to reach a similar result. If used in the spirit of the *Zippo* opinion, the sliding scale is not meant to be arbitrary in application. This is true for specific personal jurisdiction even on the extremes of the scale. Either approach provides good guidance for activity on the extremes, which diminishes as one approaches the middle ground of conduct. This is to be expected. The more important benefit is that either approach, applied to similar facts, should result in the same outcome and thereby allows some predictability without regard to which test controls in a particular jurisdiction.

Passive is usually safe.

The *Zippo* Court specifically held the maintenance of a website limited to offering information to browsers was insufficient to create specific jurisdiction. This holding has been almost universally embraced either directly or, through similar reasoning, when applying traditional jurisdiction principles without the *Zippo* test. Such application is entirely consistent with treatment of “pre-internet” advertising cases. Advertising directed into a forum did not traditionally rise to the level of minimum contacts sufficient to establish personal jurisdiction. *Boschetto v. Hansing*; 593 F.3d 1011 at FN4, (9th Cir 2008). Some jurisdictions have analogized computer based communications to similar rulings, finding receipt of telephone calls from forum residents failed to create minimum contacts. *Howard v. Missouri Bone And Joint Center, Inc.*, 869 N.E.2d 207, 212 (IL 5th Dist. 2007). There is authority holding that a website which provides e-mail, telephone, or fax contact information to prospective consumers does not reach the level of interactivity with residents of a forum at any higher level than “passive” activity defined by the *Zippo* sliding scale. *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999). Although this result

adopted, and relied upon *Zippo*, it is really an extension of prior rulings about advertising to the new medium of an internet website. While there is scholarly debate as to whether or not *Zippo* is needed, its application is not a revolutionary approach to the old standards. Instead, it is more akin to a modernization of the language used in describing the scope of the contacts.

As with most rules, there is an exception. Here, the exception is broad, but easily defined. The exception to this general rule is where the content of the internet posting is itself the source of the cause of action. This is most common in cases of defamatory or threatening internet postings. *Wagner v. Miskin*, 660 N.W.2d 593 (N.D. 2003). However, other courts have taken a more conservative view and found no personal jurisdiction exists in these situations. *Wisconsin Investment Board v. Schraeder*, 2004 WL 1146448 (Wis.Cir.).

Active is not usually safe.

The third category on the *Zippo* sliding scale is active business over the internet. This should not be misinterpreted as active internet sales. A close reading of *Zippo* defines the level of interactivity via the internet as involving the “knowing and repeated transmission of computer files over the internet”. *Zippo* at 1124. This type of behavior is discussed in *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), and is what the *Zippo* Court cited as an example of this category. In *CompuServ*, the Court found minimal contacts with Ohio where a Texas resident contracted with an Ohio company to utilize its servers to distribute shareware. Mr. Patterson uploaded thirty-two master software files onto the Ohio servers via the internet. Presumably other internet users could then access his shareware and download it from the servers. The 6th Circuit found this activity constituted sufficient contact with Ohio to support a finding of specific personal jurisdiction for a declaratory judgment lawsuit filed by CompuServ. The third category of *Zippo* has at times been labeled “active websites”, but that is not accurate. The example given is an ongoing relationship to transmit data over the internet into Ohio, where it was stored by an Ohio company pursuant to a contractual relationship. Likewise, the facts at issue in

Zippo demonstrate the need for something more than isolated individual internet sales to reach the level of this third category.

“No one can assure any company the interactive nature of its internet presence, once it reaches the level of consummating direct sales to consumers, will not create specific personal jurisdiction.”

Grey is Grey.

As with most sliding scale tests, the vast area in the middle lacks certainty. The *Zippo* framework is most helpful when the internet presence at issue falls neatly into either extreme of the spectrum. *Dagesse v. Plant Hotel N.V.*, 113 F.Supp.2d 211, 224 (D. New Hampshire 2000). This lack of certainty for most internet based activity is particularly problematic in the area of personal jurisdiction where the fundamental principle of due process is to enable a non-resident to reasonably predict whether or not its contacts with a forum expose it to being haled into court there. *World Wide Volkswagen* at 297. Unfortunately, *Zippo* has done little to improve predictability for the majority of situations involving internet activity. The broadly defined middle category of “interactive” internet transactions in *Zippo* remains the subject of judicial discretion in the application of multiple relevant factors to malleable standards of fairness and substantial justice. Where almost by definition a defendant is before a court in the plaintiff’s home jurisdiction, confidence in these softly defined principles is understandably low.

No one can assure any company the interactive nature of its internet presence, once it reaches the level of consummating direct sales to consumers, will not create specific personal jurisdiction. Assuming a customer makes her purchase via a website, the nexus of the relation between the

transaction and the cause of action arising from some issue relating to the product has usually been established. The only remaining issue is whether the consumer can convince a court this internet sale, along with the other connections the defendant has with the forum, are sufficient to demonstrate purposeful availment to the benefits and protections of doing business in her forum. If it is accepted that close or “judgment” calls go to the “home” team, a company must either be prepared to accept the distant forum, or to have developed a plan and supporting evidence to rebut the consumer’s arguments.

Practical Thoughts on Opposing Specific Personal Jurisdiction.

As with all things, there must be a balance. It should be understood the primary goal of the commercial enterprise is to be profitable. Profitability requires efficiency. There are significant benefits, however, to expenditure of resources designed to control or limit risk. Herein lies the tension between “doing business” and protecting that business from unnecessary exposure. If a particular market is viewed as a profitable target, the plan should not be avoidance of “minimal contacts” as a risk management goal. That is counter-intuitive to the business goal of growth. Instead, embrace the new market and plan ahead by searching out competent local counsel. Personal jurisdiction concerns need managed for less desirable markets or for markets into which a company is not yet prepared to expand. The avoidance of specific personal jurisdiction relating to these truly incidental sales or transactions should be the goal.

Although a plaintiff bears the burden of proof on jurisdictional issues, without evidence the defendant’s position can become untenable. Recall that there are provisions for pre-jurisdictional discovery. Rare is the court in a plaintiff’s home forum which will find fault with his efforts to establish specific personal jurisdiction over a defendant which is unable to respond with specific data as to its forum contacts. A defendant’s lack of responsive data will undermine even the most legitimate arguments against jurisdiction. It is inefficient and costly to develop information needed to respond to jurisdictional inquiries separately for each individual case. There are

some obvious components to a defense against specific personal jurisdiction and they can most efficiently be gathered on an ongoing basis during the regular course of business.

Foremost, counsel should have accurate information regarding the web based presence of their client. Counsel should follow up on this information by personally browsing and interacting with all aspects of the website. If the client maintains consumer product registration data, it should be reviewed; particularly if it is sortable by state. If this information has not been maintained historically, it should be considered on prospective basis. Cross referencing this information with overall sales data of the company can be used to demonstrate the limited percentage of business within a given forum; \$20,000 of sales may sound like a lot to a local Judge until it is demonstrated to be a tiny fraction of nationwide sales. If the only advertisement medium likely to reach the forum is passive internet traffic from forum residents, the absence of advertising directed into the forum should be documented. This can be particularly effective if evidence can be developed to demonstrate active marketing efforts and expenditures in other states. Create the image of how the defendant acts when it is truly “availing” itself to a forum in an effort to demonstrate it has not sought to develop the same level of contacts with this forum. Much of this data is likely maintained

for other business purposes. For example, yearly compilations of sales results or product registrations sorted by state, and marketing expenditure records organized by state can prove invaluable. When this type of data is gathered on an annual basis, the process can serve multiple business purposes beyond preparing a readily available resource to defend against specific personal jurisdiction. The best practice is to identify existing sources of business data and co-opt it. These materials should be prepared and maintained for easy use in responding to claims of specific personal jurisdiction in forums that are not the target of business efforts.

Conclusion

As technology has enhanced access to geographically distant markets, the traditional framework controlling determinations of specific personal jurisdiction have remained constant. The Court in *Zippo* has developed specialized applications for evaluating the impact of internet based activity as justification for exercise of jurisdiction over a defendant. This sliding scale categorization of internet activity must be considered in conjunction with more traditional tests of due process to guide companies in risk management strategies to limit exposure to jurisdiction in unintended forums. Definitive information regarding a defendant’s internet activities is now essential to evaluating jurisdictional issues. The

information relied upon should begin with, but not be limited to a description of the internet presence. Under *Zippo*, this is the first step in evaluating the impact of internet-based conduct. Unless this conduct can be easily identified as belonging at either extreme of the sliding scale, a court will proceed to an analysis and balancing governed by traditional jurisdictional principles. In order to effectively oppose personal jurisdiction, data should be gathered to demonstrate the impact of the internet presence on transactions involving residents in a specific forum. A risk management strategy of identifying data maintained for other business purposes and adapting it for use in addressing jurisdictional challenges is the most efficient practice. Completing this data review on a periodic basis avoids wasteful repetition and provides the opportunity to periodically review the data to assist in predicting the likelihood of a given forum exercising jurisdiction before claims are even made. It is this ability of a defendant to predict the impact of its conduct upon jurisdiction in a given forum that is the fundamental goal of due process protections. Performing these evaluations only after a claim is made, effectively surrenders the advanced planning component of these protections.

Modified version of article, originally printed in For the Defense In-House Defense Counsel Quarterly, by the Defense Research Institute- April 2010

OHIO PRODUCT LIABILITY LAW

DEFENSES	APPLICABILITY/ANALYSIS
Statute of Limitations	2 years from date of personal injury
Statute of Repose	10 years after dates of delivery
Contributory Fault	Yes
Assumption of Risk	Yes
Misuse of Product	Yes
Alteration of Product	Yes
Unavoidably Unsafe Product	Yes
Economic Loss Rule Applicable	Yes
Market Share Liability	No
Expert Testimony Required	Yes (for design defect claims)
Caps on Damages	Yes (depending on nature of injury)
Strict Liability against Supplier	Yes (if manufacturer not subject to service)

KENTUCKY PRODUCT LIABILITY LAW

DEFENSES	APPLICABILITY/ANALYSIS
Statute of Limitations	1 year
Statute of Repose	No; rebuttable presumption of non-defectiveness if the injury occurs more than 5 years from date of sale to the first consumer, or more than 8 years after the date of manufacture
Contributory Fault	No, comparative fault
Assumption of Risk	No, considered part of comparative fault
Misuse of Product	Yes
Alteration of Product	Yes
Unavoidably Unsafe Product	Yes
Economic Loss Rule Applicable	Yes
Market Share Liability	No
Expert Testimony Required	Yes, where issues are outside the common knowledge
Caps on Damages	No
Strict Liability against Supplier	Yes, if manufacturer not subject to the court’s jurisdiction

INDIANA PRODUCT LIABILITY LAW

DEFENSES	APPLICABILITY/ANALYSIS
Statute of Limitations	2 years from date of injury
Statute of Repose	10 years after date of delivery
Contributory Fault	No. Comparative fault only. (Ind. Code § 34-20-8-1). No joint liability. (Ind. Code § 34-20-7-1).
Assumption of Risk	Yes
Misuse of Product	Yes
Alteration of Product	Yes
Unavoidably Unsafe Product	Yes. A product which cannot be made safe for its reasonably expectable use is not defective when properly manufactured, sold, handled, and packaged. (Ind Code § 34-20-4-4)
Economic Loss Rule Applicable	Yes
Market Share Liability	No
Expert Testimony Required	Yes
Caps on Damages	No
Strict Liability Against Supplier	No, unless they are the principal distributor or seller closest to the manufacturer if the manufacturer and all other “upstream” intermediate sellers are not subject to the court’s jurisdiction, (Ind. Code § 34-20-2-4) or a “seller” considered a “manufacturer” under (Ind. Code § 34-6-2-77)(knowledge of defect, alters product, owns or owned by manufacturer, etc.)

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