

## PRODUCTS LIABILITY

# Chinese-Made Goods

In 2007, 69% of recalls carried out by U.S. companies involved products that were manufactured in China or that contained Chinese-made components. The recalls ranged across all types of consumer products, from toys and pet food to toothpaste. In the consumer class actions that inevitably followed, many U.S. manufacturers sought to join their Chinese suppliers. Much of the commentary surrounding this litigation has focused on the strategies Chinese companies have used or can use to frustrate U.S. companies pursuing indemnity or contribution lawsuits. But this is not the whole story. Indeed, a topic that has largely been ignored is the potential for global litigation, in which U.S. companies may seek to initiate litigation or the enforcement of judgments in jurisdictions other than the United States and China.

Suing foreign companies is always more difficult than suing domestic ones. But, in defending these lawsuits, Chinese companies are able to employ litigation strategies that are particularly effective because of the perception of many U.S. companies that their only options are to litigate in the United States or China.

**Michael J. Lyle** and **David A. Hickerson** are partners in the Washington office of New York-based Weil, Gotshal & Manges. Jonathan E. Carr and Eric C. Lyttle, associates at the firm, provided assistance with this article.

By **Michael J. Lyle**  
and **David A. Hickerson**



One strategy is for a Chinese company to challenge personal jurisdiction. This may be successful because it is far from obvious that a U.S. court will find personal jurisdiction, given that many Chinese companies conduct business exclusively in China and never on American soil. Indeed, the U.S. Supreme Court in *Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102 (1987), explained that the exercise of personal jurisdiction depends on notions of due process, including foreseeability, purposeful availment and reasonableness. Many courts have used this analysis to hold that due process would not support calling a company that does business exclusively in China into a U.S. court.

### Bringing a case in China is fraught with difficulties

Litigating in China may avoid these personal jurisdiction problems, but while

the situation is improving, this approach still is fraught with difficulties. For example, some perceive Chinese law as limiting the ability to compel evidence production and placing obstacles in the enforcement of injunctions and seizure of assets. Also, some Chinese courts have had difficulty in enforcing their rulings, and this may create disadvantages for U.S. companies seeking recourse in China.

Even assuming that personal jurisdiction could be established, a second strategy for a Chinese company is simply to take a default judgment. While a prevailing party may collect damages by attaching assets or securing money judgment liens on property, including lands, tenements, goods and chattels, many Chinese companies have no assets in the United States upon which collection could be made. Moreover, no agreement exists between the U.S. and China with respect to the enforcement of judgments, so attempting to enforce a U.S. judgment in China has proven futile. Because of these factors, the goal of the strategy is to force the U.S. company to litigate in a forum more favorable to the Chinese company—ideally, China.

Under this strategy, a Chinese company may choose to litigate the merits and, at any stage of the litigation, elect to take a default judgment. Since U.S. companies perceive that their only options are to litigate in the United States or China, a Chinese company knows that it can first try to win on the merits, but later default and force the U.S. company to try to enforce

