Product Liability Issues- Made in China, sued in America

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The past few months have witnessed a storm of recalls in the United States of products manufactured in China, ranging from pet foods which have threatened to wipe out the pet food industry, unsafe tyres, and even hazardous toys which has badly affected Mattel, one of the world's largest and most venerable toy manufacturers. The toy recall crisis alone threatens to put a severe damper on toy makers and retailers' traditional holiday cheer with the Christmas buying season just around the corner, as parents become fearful of purchasing gifts which might be harmful for their children.

Needless to say, products bearing the logo ‘Made in China’ are fast becoming radioactive to many American consumers- a reputation which may not be deserved. This storm threatens all companies, and not just those from America, who make their products in investor-friendly and cost-effective China, raising serious doubts as to the viability of continuing to keep their production facilities in that country. After all, unsafe products should never be made, much less sold to an unsuspecting public. However, it also raises serious questions as to the business practices and ethics of those companies, rather than the fact of their shifting production facilities to China and other low-cost labour-intensive jurisdictions- is it worth it to forgo quality control in order to keep prices low and adhere to tight schedules, when lives are at stake? Don’t blame China alone- after all, people used to laugh at products made in Japan and South Korea, but not any more.

Bringing on the lawsuits
Smelling blood in the water, America's product liability lawyers are already on the warpath, rolling out the lawsuits against U.S. companies that distribute the products to American consumers, as lurid tales of unsafe and counterfeit imports from China continue to steal the headlines.

Among the most publicized cases involved the recall of 450,000 Chinese-made tyres. Foreign Tire Sales, a distributor of tyres made by Hangzhou Zhongce Rubber, was named in a wrongful death case filed in a New Jersey federal court after one of its ‘Made in China’ tyres allegedly caused an accident that killed two people. In turn, Foreign Tire Sales has sued its Chinese supplier. Both companies say they are not at fault.

Lawyers have also gone after U.S. companies such as Del Monte, which sold pet treats made with tainted Chinese ingredients. Del Monte, which issued a voluntary recall, has yet to respond to the suit.

Meanwhile, the Washington (D.C.) firm of Cohen, Milstein, Hausfeld & Toll is weighing litigation against Western distributors of Chinese-made counterfeit glycerin that found its way into cold medicine, killing hundreds of children in Panama and elsewhere. "Do people along the chain have responsibility for knowing where key ingredients are coming from? The answer you're going to find in an era of globalization is 'Yes,’’ says Cohen Milstein’s Michael Hausfeld.

Despite a wave of business-friendly legal reforms in recent years, companies can be held liable in most states in the U.S. even if they unwittingly sell a dangerous product. "All you have to show is that the product was defective,” says William Ruskin, a defense litigator with Epstein, Becker & Green in New York. "It's no defense to say, 'We didn't know.'” Under product-liability law, one company often can be held 100% liable for all damages awarded to all consumers, regardless of its market share or the amount of tainted product it might have sold.
According to Don Mays, Senior Director of Product Safety and Consumer Sciences for ConsumerReports.org who testified at the Senate Judiciary Committee on unsafe products in 2006, "the number of Chinese-made products that are being recalled in the U.S. has doubled in the last five years, helping to drive the total number of recalls in the United States to an annual record of 467 (in 2005). Chinese-made products account for 60 percent of all consumer-product recalls, and 100 percent of all 24 kinds of toys recalled so far (in 2006). Even China’s own government auditing agency found that 20 percent of the toys made and sold in China had safety hazards.

As consumer products companies continue to move their manufacturing from the U.S. to contract factories overseas, we shouldn't be surprised by an increase in recalls of foreign-made goods; in some ways, it's simply a reflection of the growth of such products in the overall market. And we've rated many products made in China and other developing countries as highly as those produced domestically. Still, we need to keep unsafe goods from crossing our borders and hold manufacturers more accountable for producing unsafe goods in the first place."

Clash of Laws
The tyre recall case highlights the difficulties that can be expected as governments and courts deal with cross border consumer-safety issues. In this case, the result could be a collision between two very different legal systems: the common law U.S. approach to product liability, and Communist China’s state-directed judiciary.

Chinese tyre makers have been expanding rapidly- Hangzhou Zhongce made 10 million tyres last year. However, China has no recall system in place to deal with possible safety defects, according to industry officials. Instead, the makers can be sued by individuals for specific accident claims. According to Patrick Long, an attorney in California who specialises in defending companies in product-liability cases, there can be difficulty in enforcing judgments in China- beyond legal issues, cases often boil down to the willingness of Chinese officials to seize assets of local corporations.

But what is product liability?
Products liability has been defined as the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries products caused by those products. In the United States, the claims most commonly associated with product liability are negligence, strict liability, breach of warranty, and various consumer protection claims. The majority of product liability laws are determined at the state level and vary widely from state to state. Each type of product liability claim requires different elements to be proven to present a successful claim.

Products Liability and Negligence
U.S. products liability claims are usually based on one or more of the following causes of action, namely (a) design defect, (b) manufacturing defect and (c) a failure to warn. The claims may succeed even when products were used incorrectly by the consumer, as long as the incorrect use was foreseeable by the manufacturer (or other party in the "supply chain").

In general, products liability claims are based not on negligence, but rather on strict liability. Under the theory of strict liability, a manufacturer is held liable regardless of whether it acted negligently. It allows recovery for an injured customer who might be in a difficult position to prove what a manufacturer did or did not do in its design or manufacturing process. It is presumed that a manufacturer with its deep pockets is better situated to absorb the cost of liability and would consider such expense in setting the price for its products.

Deadly Toys?
Almost 80% the world's toys are manufactured in China. Fisher-Price and parent company Mattel announced the recall of 83 types of toys, including such popular character dolls as Big Bird, Elmo, Dora the Explorer, Diego and others, because the paint used on the dolls contains excessive amounts of lead. According to the Oklahoma Poison Control Center, under current Federal regulations products for children that have more than .06 percent lead are subject to recall.

According to Randy Badillo, senior specialist and clinical supervisor with the Oklahoma Poison Control Center, “(p)oisoning from lead usually comes from multiple exposures over time. Children can develop such symptoms as weight loss, weakness and vomiting. They also can suffer from anemia and even display slight behavioral changes, potentially affecting social interactions in the classroom. Lead toxicity can lead to permanent brain damage and kidney injury. Especially at risk are children under the age of six.” Small wonder then that the news of high lead content in China-made toys has caused such an uproar- the very lives of America’s future, its children, are at stake!
The Year of the Recall
Toy retailers are worried recalls will translate into lost sales as Christmas approaches. "This has been the year of the recall," said Joann Kennedy, marketing communications executive at Tomax, a retail inventory management company. According to her, recalls pose a huge logistical and financial problem for retailers in the form of a loss in customer loyalty and an increase in labour. "For Christmas, what I see happening is, we may have a growing national aversion to manufacturing off-shore in the consumers' eyes. I think that merchants may be changing their plans for assortments, and local boutiques that carry ‘Made in the U.S.A.’ products may be considered a safer choice by consumers," she said.

Lessons learned
These cases should serve as a sobering reminder to Malaysian manufacturing companies exporting outside of the country, especially to highly-litigious jurisdictions such as the United States, and that they should be aware of any and all product liability issues involved in trading with foreign countries, including the cost of recall and managing public perception and media exposure of any product liability issues. Better to be safe than sorry, and a company that is honest enough to admit that its products are unsafe enough to justify a costly recall will in the short term suffer some losses, but gain immeasurable goodwill from costumers impressed by their honesty and concern for the safety of consumers.

References: Business Week
Associated Press
Wikipedia
ConsumerProducts.org