Tort Laws Hobble U.S. Business Abroad

By DOUGLAS J. BESHRERO AND PETER REUTER

As Congress and the administration begin serious action on a trade bill, they should take preventive action to remove a major barrier on the nation's future trade: the imposition of U.S. levels of tort liability on U.S. firms doing business abroad. This liability, which is based on U.S. goods and services produced either in the U.S. or overseas, and further weakens the U.S.'s international competitive position. Unlike other trade issues, this one can be solved easily and without antagonizing our trading partners.

The Bhopal victims' attempt to get U.S. courts to accept jurisdiction over their claims against Union Carbide is well known. But Bhopal is merely the prototypical example, although admittedly the largest, of a growing class of cases. Numerous aircraft and drug companies, for example, have been sued in this country for products sold and, in some instances, even manufactured and licensed abroad. Foreign plaintiffs are, of course, attracted to U.S. courts because the U.S. tort system is, by far, the world's most generous.

Briefly, tort liability in the U.S. is greater than it is in other countries for five reasons: (1) U.S. substantive rules (such as strict liability in manufacturing); (2) U.S. procedural rules (such as those concerning discovery and class actions) facilitate litigation against defendants; (3) U.S. measures of damages (such as those for pain and suffering and punitive damages) increase massively in proportion to U.S. judgments; (4) U.S. workers value human life and suffering more highly than do those in other countries, and (5) contingent fee arrangements, illegal elsewhere, are the rule here, allowing plaintiffs' lawyers to advance the costs of litigation.

Higher Awards

Whether foreign claims should be tried in the U.S. is decided under the legal doctrine of forum non conveniens. Is it more convenient, given the amount of documentation needed for trial, to hear the case in the U.S. or in the country where the injuries occurred? A recent study of 770 tort actions considered is the adequacy of the plaintiff's remedy in the foreign court, often weighed in comparison with U.S. levels of liability. Significantly, the impact on U.S. trade is not one of the factors that the Supreme Court has instructed federal courts to consider in deciding forum issues.

The majority of claims by foreign plaintiffs are ultimately dismissed. But "majority" and "ultimately" are important qualifications. Those that aren't dismissed result in awards many times higher than would have been obtained in the country of injury. And "ultimately" means that it can take years of litigation, often up to the U.S. Supreme Court, before the case is thrown out. Tort litigators know that uncertainty and the "settlement value" of a claim is an important aspect of the case, and they seek to be foreclosed from filing.

Although the Bhopal claims in U.S. courts would unleash a torrent of claims against U.S. firms, but even if the case is dismissed, it has already signaled to the plaintiff's bar that there is a large overseas market to be developed. Union Carbide is already offering to pay all damages from $500 million, more than 10 times what the claims would have been worth if brought in India. It would be at the cost of millions. For some products, such as a bar of soap, the degree of risk is quite small, and the concomitant risk in price trivial. But for several other products, the risk considered. But for several other products, the risk is enormous. For example, if a woman using an American-made contraceptive killed a child, the result would be the further loss of overseas markets.

Legislation is needed to limit the availability of punitive damages and contingent fees to what would be available in the nation where the injury occurred.

establish the Asian offices of the Legal Clinic of Melvin Belli and Friends. While Michelle Marvin's case was ultimately dismissed, it led to a parallel investigation of the U.S. system. Most of them would like to see U.S. business exercise the same degree of solvency as others as they do. Americans don't want to export dangerous products and manufacturing processes that exploit the unprotected citizens of other countries. Reflecting this idealism, Reps. Stephen Solarz (D., N.Y.) and Don Bonker (D., Wash.) have introduced a bill to impose U.S. Environmental Protection Agency and Occupational Health and Safety Administration requirements on U.S. firms overseas.

This high-minded attitude ignores two unpleasant realities of the international marketplace. High levels of liability inexorably raise the cost of goods and services, and a number of malpractice awards have raised the cost of doctors' insurance and, hence, of medical care. The U.S.'s wealth may enable it to absorb high levels of liability for business conducted in this country. But placing the same levels of liability on American businesses abroad is a very different matter. It handicaps U.S. firms as they compete with businesses of other countries, and they do not carry similarly expensive liabilities. The U.S. can't make its competitors assume these liabilities, and the result will be the further loss of overseas markets.

Fears of being sued in the U.S. is already causing problems for U.S. exporters. For example, McDonnell Douglas was forced to include the cost of possible U.S. levels of liability in the price of planes sold to the People's Republic of China. The PRC officials pointed out that there was no such liability in China. The company expected, albeit not likely in China, it was possible for its citizens and foreign nationals to sue in the U.S. if they are injured on the Airbus. But European salesmen for the Airbus do not carry a similar burden.

Applicable to All

Legislation should be passed limiting the availability of both punitive damages and contingent fees to the same degree as they would be available in the country where the injury occurred. If punitive damages and contingent fees are important to the citizens of other nations, their governments should make them available against all firms—not just U.S. firms that can be sued in U.S. courts. This approach should involve some form of equal footing with their competitors.

Congress should impose these reciprocal limitations on state as well as federal courts. Foreign claims can be brought in state courts, some of which, like California's, are much more liberal than federal courts in accepting such cases. Under current law, federal courts have the exclusive jurisdiction over foreign actions. The Bhopal law of the most liberal state becomes, in effect, the law of the nation, applicable to all large U.S. firms. Such legislation would clearly intrude on state tort law, an area the federal government has been reluctant to enter. But Congress has ample authority to do so under its commerce and foreign-policy powers. The Bhopal law is clearly show that the use of U.S. courts—whether federal or state—to sue U.S. firms is a matter of major concern. The U.S. is a matter of major concern. The U.S. is to maintain its position in the competitive world environment, it must develop legal rules that facilitate the free—and fair—exchange of goods and investments.

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