Tort Laws Hobble U.S. Business Abroad

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As Congress and the administration begin serious action on a trade bill, they should take preventive action to remove a major burden on the nation's future trade: the imposition of U.S. levels of tort liability on U.S. firms doing business abroad. This liability will raise the price of U.S. goods and services produced either in the U.S. or overseas, and further weaken 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, though 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 manyfold the amount of a potential judgment; (4) U.S. juries value human life and suffering more highly than do those in other countries, and (5) contingent-fee arrangements, illegal everywhere else in the world, allow 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 witnesses and documents needed for trial, to hear the case in the U.S. or in the country where the injuries occurred? A recently added consideration 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 delay raise the "settlement value" of a claim. That is why the cases continue to be filed.

Hearing 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 has already offered a settlement of $200 million, more than 10 times what the claims would have been worth if brought in India. But the plaintiffs seem to be holding out for a billion dollars.

Just as *Marvin vs. Marvin* spawned palimony law, so the Bhopal cases could establish the Asian offices of the Legal Clinic of Melvin Belli and Friends. While Michelle Marvin's claim was ultimately dismissed, palimony became installed as a permanent feature of U.S. law.

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.

Many Americans will welcome this higher level of corporate accountability. Most of them would like to see U.S. business exercise the same degree of solicitude toward other peoples as toward them. 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.

Such high-minded attitudes ignore two unpleasant realities of the international marketplace. High levels of liability inexorably raise the cost of goods and services, just as enormous 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 business conducted outside U.S. borders is a very different matter. It handicaps U.S. firms as they compete against those of other nations—which 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.

Fear of being sued in the U.S. is already causing problems for U.S. exporters. For example, McDonnell Douglas Corp. 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 explained that, although such a suit might not be likely in China, it was possible for its citizens and foreign nationals to sue in the U.S. The sale was made, at the higher price, but European salesmen for the Airbus do not carry a similar burden.

Products differ, of course, in the amount of damage they can cause and, thus, in the amount their price must be raised to provide for potential lawsuits. For some products, such as a bar of soap, the degree of risk is quite small, and the concomitant rise in price trivial. But for other products, incorporating the cost of liability can be enough to lose substantial market share. According to Milton Copulos, who is collecting data on the subject for the Heritage Foundation, "for many key goods in the economy, such as certain machine tools, liability costs can comprise as much as 15% of the retail price."

Other countries do not want, and cannot afford, U.S. levels of liability. It is another expression of the well-known American ideological imperialism to expect other nations to want not only U.S. technology but also all the legal protections that Americans have put in place for themselves, including strict liability in manufacturing, liberal recovery for pain and suffering, broadly defined consequential damages, and unrestricted punitive damages. That these are luxuries that Americans have acquired only recently, along with videocassette recorders and personal computers, is a matter of indifference.

Even if the U.S.'s trade competitors were willing to adopt the U.S.'s high level of liability, it is doubtful that Third World peoples would want to buy it, embedded in exports and investments. It is a fact they tolerate lower product and workplace safety than Americans do because they value economic development more highly than safety—just as the U.S. once did.

This threat to the U.S.'s trade position is easily removed. American interests can be protected without closing U.S. courts to foreigners bringing actions against U.S. firms, and without making major changes in U.S. tort law. The law already recognizes the dangers of forum shopping and seeks to deter it by applying the "substantive" law of the country in which the tort occurred. However, the two strongest attractions of litigation in U.S. courts are punitive damages and contingent fees. Punitive damages make the potential award (or settlement) large enough to be worth the extra cost of trying the case in the U.S. (as well as the risk that the case will be dismissed on *forum non conveniens* grounds). Contingent fees make it legal for American lawyers to get a sufficient share of the spoils for them to risk the costs of pursuing the case in the U.S. These attractions are available even when foreign substantive law is applied, because most U.S. jurisdictions consider these two rules to be "procedural."

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 would put U.S. businesses on 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, liberal rules of state-court jurisdiction, most large U.S. firms can be sued in almost any state (because jurisdiction can be based on minimal business contacts having nothing to do with the claim before the court). This is why Union Carbide can be sued in California for what happened in Bhopal. The forum 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 claims clearly show that the use of U.S. courts—whether federal or state—to sue U.S. firms is a matter of major national concern. If 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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