



How to do Business in the United States of America

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&

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Riga, Latvia



Strategic alliances and choices as to how a Latvian company can enter the U.S. market

Joseph J. Dehner





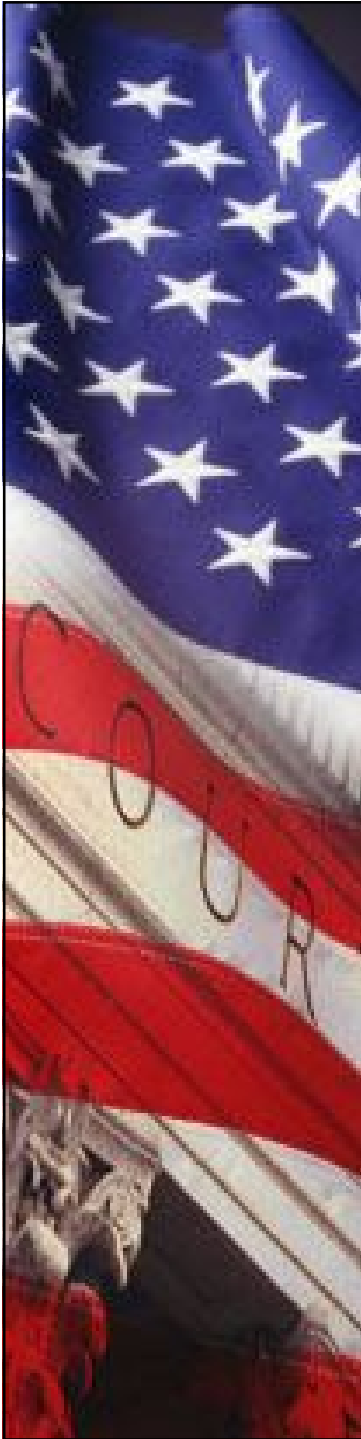
Structures to consider

- Direct Sales
- Branch/subsidiary
- Agent
- Distributor
- License
- Joint venture, including co-production, joint R&D
- Acquisition s - minority or control
- Component Parts Supply Agreement



Factors to consider

- Market Access
- Know-how/information benefits
- Degree of operational control
- Protection of technology
- Simplicity
- Flexibility
- Capital cost/profitability
- Other factors



Strategic Alliances

Structure and Factors considered

- Chart
- Quickest entry method is acquisition of existing company with sales channels and customers



USA

- Largest single market in the world
- Complex, highly specialized
- Multi-region
- Changing rapidly
- Multi-segmented market
- Substantial web-based growth

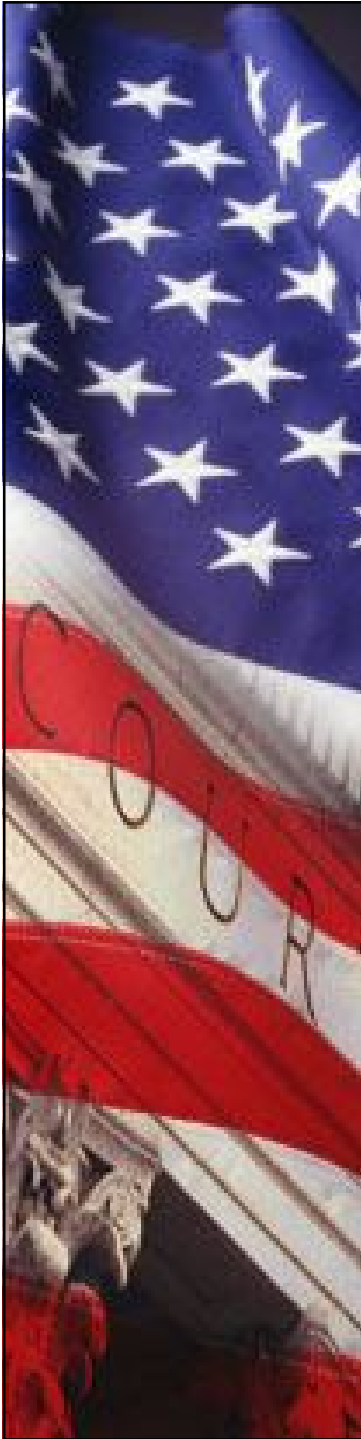




Strategic Alliances

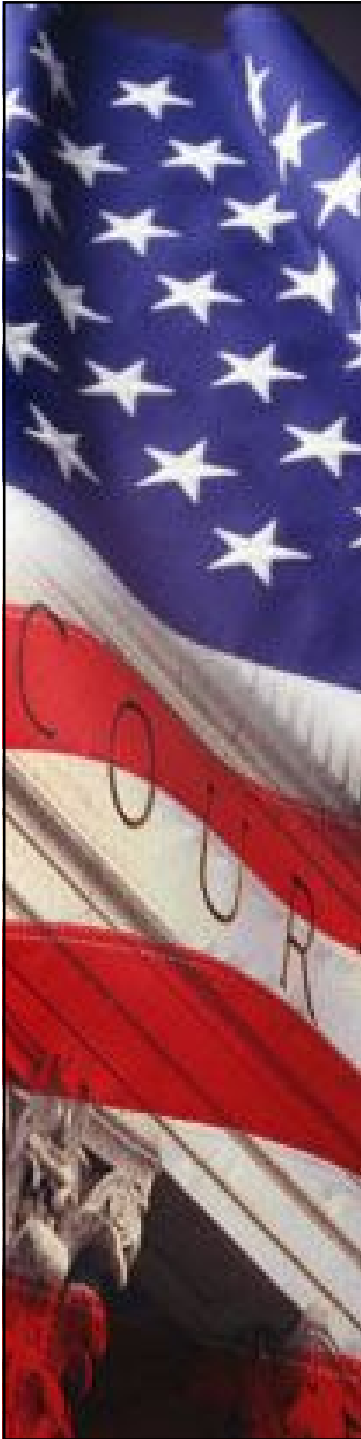
Structure and Factors considered

- For example: consider a distributor agreement (See handout)
 - Market access is potentially high depending on distributor's identity and efforts
 - Know-how/information sharing is good
 - Degree of operational control is moderate
 - Protection of technology is very good
 - It requires a simple contractual arrangement
 - Has good flexibility depending on the agreement
 - Capital cost is low and profitability is high
 - Cannot control resale price.



What does U.S. litigation cost, optimistically and in worst case scenario

Susan Grogan Faller



THE U.S. LEGAL SYSTEM HAS:

- **Contingent fees for plaintiffs' lawyers**
- **Class actions**
- **Cases brought by employees and former employees**
- **Discovery – time-consuming and expensive depositions, interrogatories, and requests for documents, electronic data and things**

THE U.S. LEGAL SYSTEM HAS:

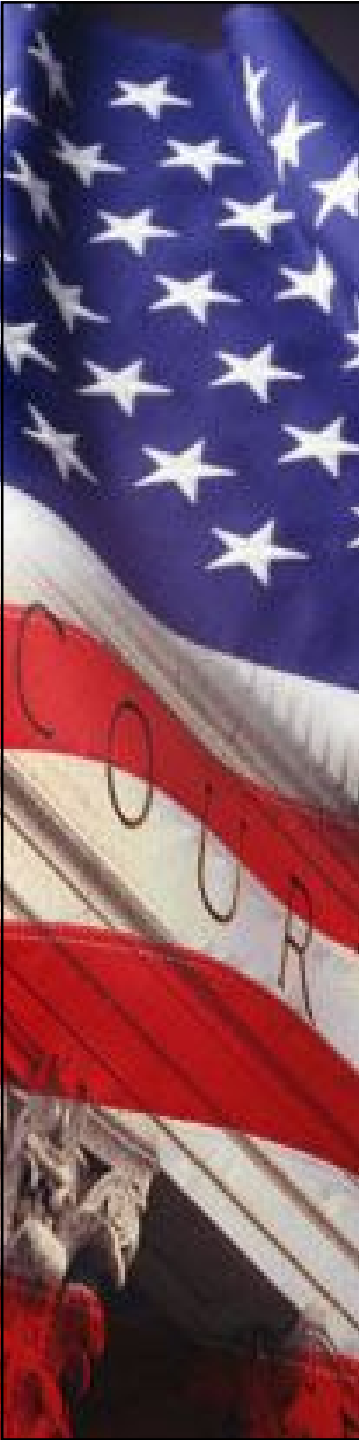
- **Punitive damages \$\$\$**
- **No loser-pays rule**



THE U.S. LEGAL SYSTEM HAS:

- **COMMON-LAW / CASE MADE LAW**
(English system)
- **Juries**



- 
- **Over 90% of U.S. Civil cases settle before trial**
 - **Cases can also be decided on motion**
 - **So less than 5% of civil cases go to trial**





- **Financial costs are significant and there is also a cost in time and distraction from business.**
- **Cases often take 2 to 4 years to go to trial.**
- **If a decision is appealed, it may take one or more years before the case is resolved.**
 - **Every case can be appealed at least once.**

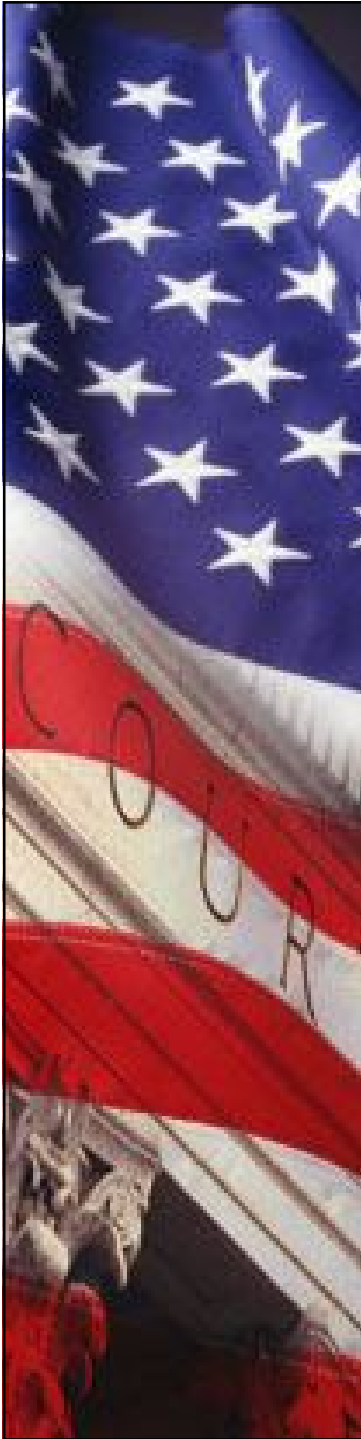




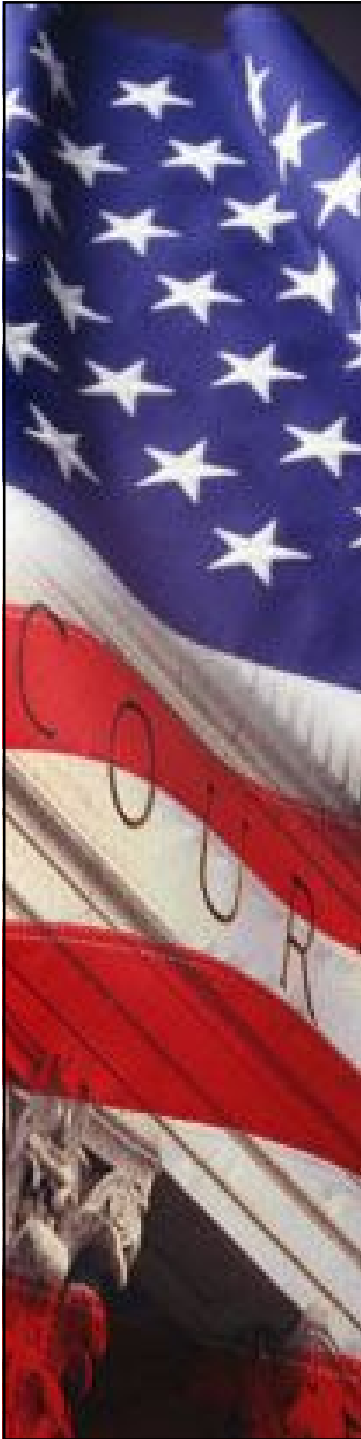
Statistic for high and low end litigation costs



- **Average litigation costs (of retaining outside counsel) were \$140 million in 2008, an increase of 112 percent from \$66 million in 2000.**
- **The U.S. tort system cost \$260 billion in 2004.**
- **The U.S. had a 2.2% ratio of tort costs to GDP, compared with**
 - **Germany (1.1%),**
 - **Japan (0.8%)**
 - **U.K. (0.7%).**



Tactical and strategic considerations of bringing a lawsuit as compared with being sued, including cost and other practical considerations, as well as differences in control of litigation factors



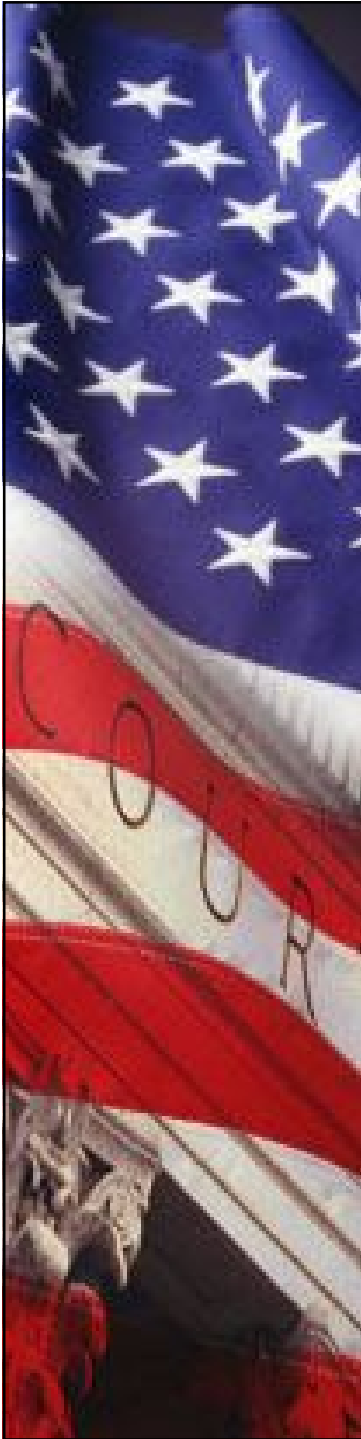
What to do if a Complaint is properly served or you want to sue?

You must proceed in accordance with the rules of the jurisdiction, and the rules in state courts vary from state to state.

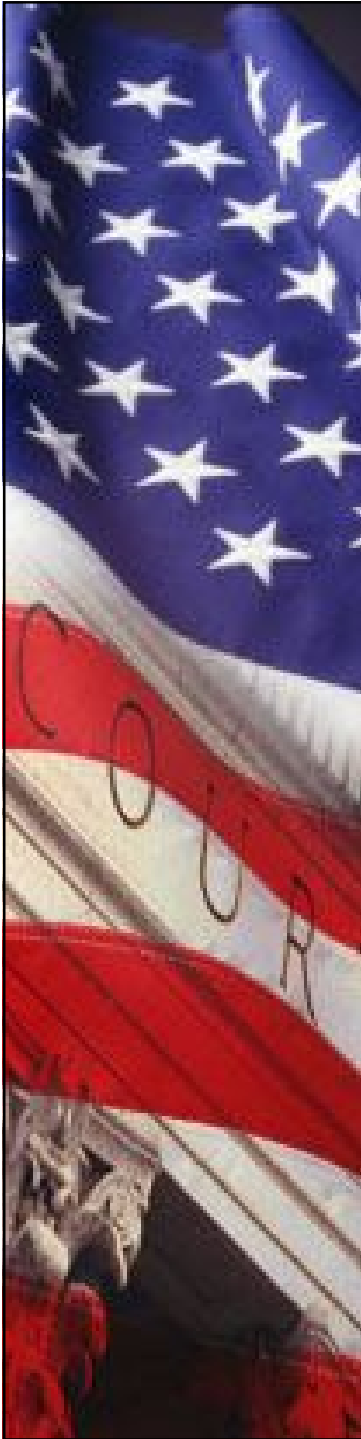


Suing vs Being Sued:

- Control of Jurisdiction and Convenience to Lawyers and Witnesses
 - Change of venue
 - “Home Court” advantage?
 - Knowledge is power (unless you are not liked)
 - Big verdicts are more common in some areas (E.g. Texas and California)
- Commercial Courts
- Removal to Federal Court
- Judge Shopping
- Remand
- Cost Variations
 - Court fees themselves do not vary much
 - The judge in charge may make quite a difference



U.S. discovery procedures really raise the cost and place cost containment out of any easy control, when a case is actually in court

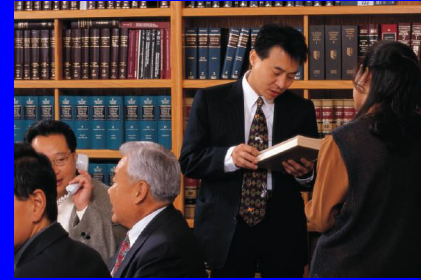


- **In 2008, discovery costs were as high as \$2.4 million and the average discovery cost was well in excess of \$600,000.**
- **Alternative Fee Arrangements for law firms are becoming more popular in the U.S.**
 - **But not for unpredictable major litigation**

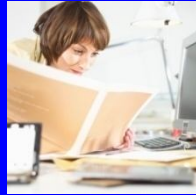


- **Time demands on the Company**

- **Conferring with counsel**



- **Reviewing Pleadings**



- **Gathering Documents**



- **Preparing for and attending depositions**



- **Preparing for and attending trial**

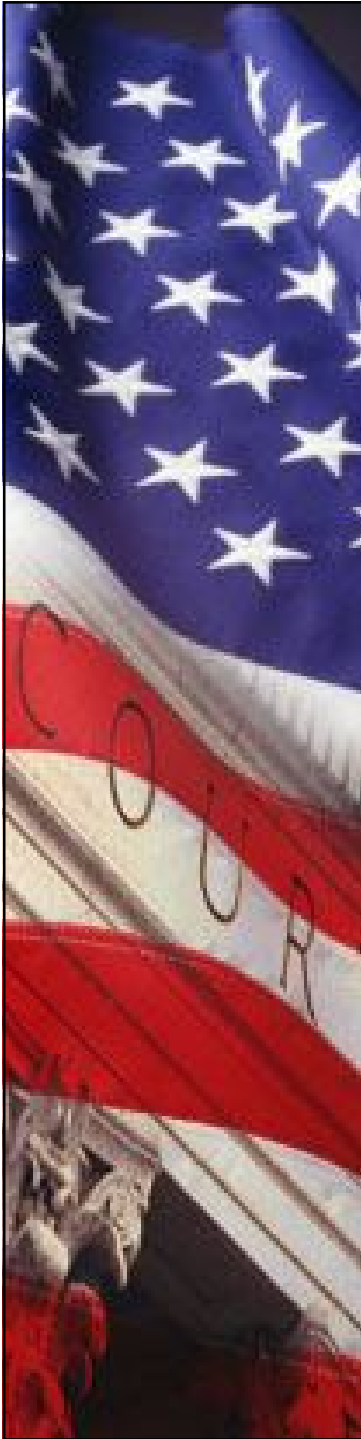




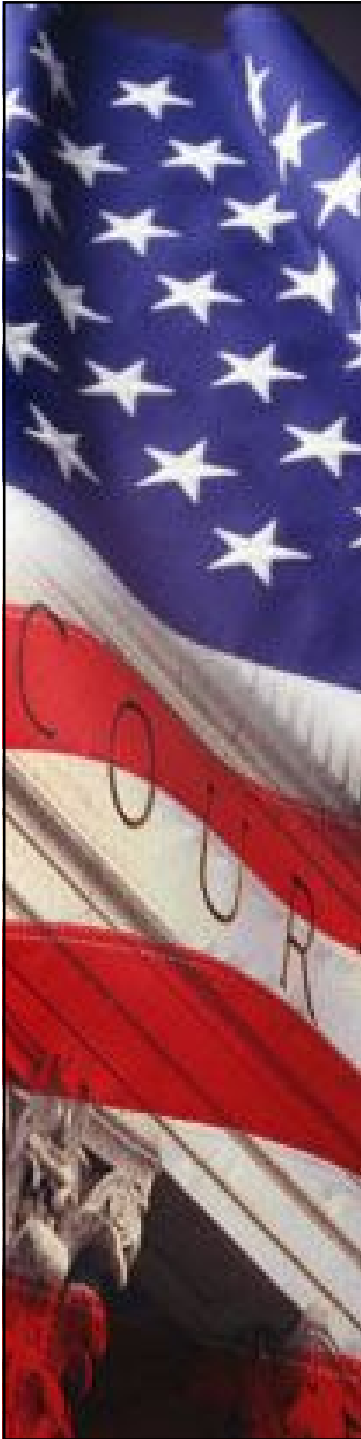
**Jury trials are more expensive
than trials to the court**



- **Cost of litigation through Trial, including attorney time, experts, documents, etc., often approaches \$150,000 to \$250,000**
- **May be much higher**
 - \$100,000 per month
 - Cases costing millions
 - Some large companies spend millions annually on litigation
- **High jury verdicts can destroy a company**



Differences in litigation costs for product liability cases as compared to other litigation



Product strict liability cases often render high verdicts.

“From 1996 to 2003, the average size of jury verdicts in accident cases doubled to more than \$1.2 million.* From 1992 to 2005, the median damage award in state courts in the nation’s 75 most populous counties increased from \$154,000 to \$749,000.** In 2004 the median jury award in product liability cases was \$1.8 million***.”

Victoria Sherrow, **Product Liability**, page 57 (2010)

*Catherine Crier, *The Case Against Lawyers: How the Lawyers, Politicians, and Bureaucrats Have Turned the Law Into an Instrument of Tyranny and What We As Citizens Have to Do About It*. New York: Random House, 2003, p. 81.

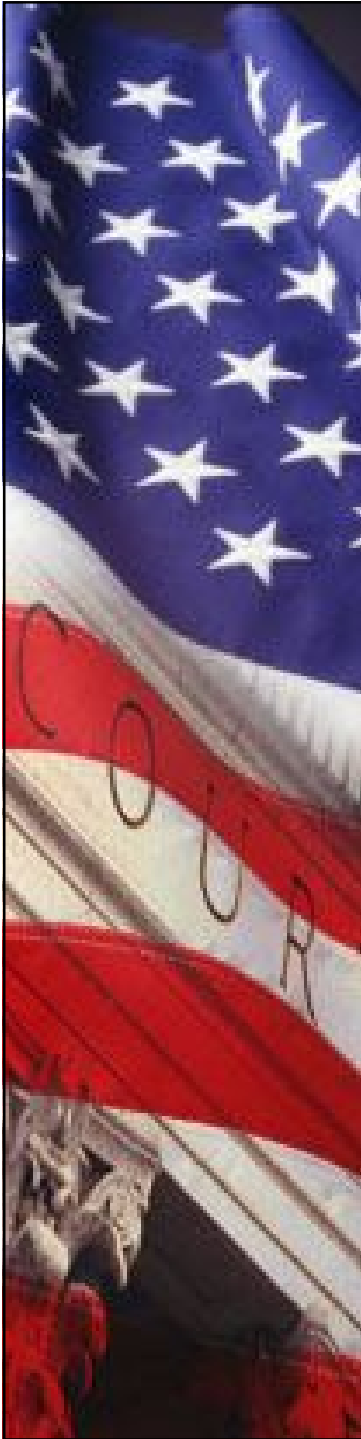
**Lynn Langton and Thomas H. Cohen, “Civil Bench and Jury Trials in State Courts, 2005.” U.S. Department of Justice, Bureau of Justice Statistics, 2008, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05/pdf>.

***National Small Business Association, “Product Liability Reform: Issue Brief,” http://www.nsba.biz/docs/product_liability_reform.pdf.



“Higher damage awards mean higher insurance premiums. The American Tort Reform Association (ATRA) notes that product liability insurance premiums have risen at twice the rate of inflation in recent years.”* *id*, page 57.

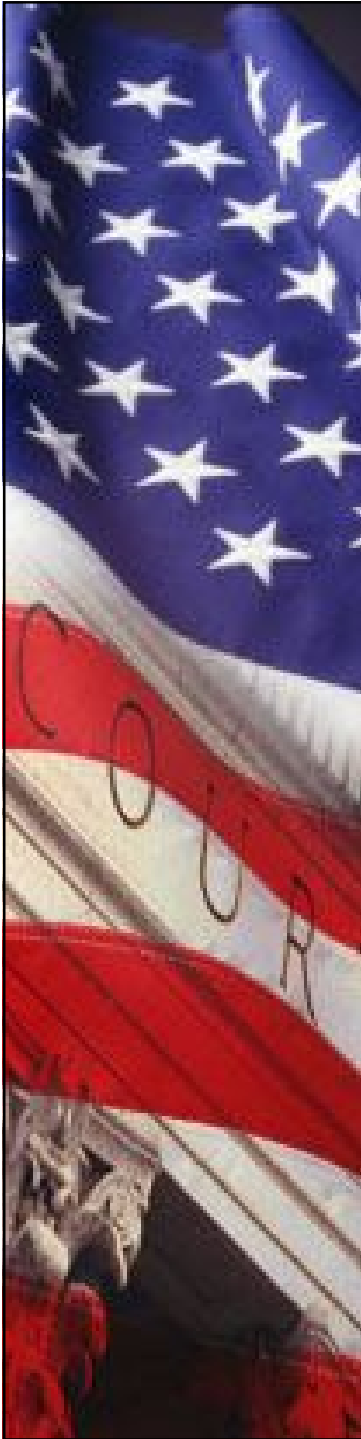
*American Tort Reform Association (ATRA). “Product Liability Reform: Issue Brief,” <http://www.atra.org/issues/index.php?issue=7341>.



“ Statistics show that product liability cases are less common than people think. One study published by the Rand Corporation found that only about 10 percent of the people injured by a product file a claim for compensation.* From 1992 to 2005, the number of product liability trials in state courts in the nation’s 70 most populous counties declined from 657 to 225.”** *id, pages 72-73.*

*Ralph Nader, *The Ralph Nader Reader*. New York: Seven Stories Press, 2000, p. 281.

** Langton and Cohen, “Civil Bench and Jury Trials in State Courts, 2005.”



“The National Center for State Courts (NCSC) found that from 1996 to 2000, the number of tort cases fell from 320,976 cases to 260,745 cases in 16 states.* When the NCSC looked at activities in 35 states, it saw a decline of 4 percent from 1992 to 2002. (The total population in these states is about 77 percent of the U.S. population as a whole.) Moreover, the number of tort cases filed *per capita* also had declined, going from 230 per 100,000 residents in 1975 to 212 per 100,000 in 2000.**”
id, page 73.

* National Center for State Courts (NCSC), “Court Statistics Project,” 2007,
http://www.ncsonline.org/D_Research/csp/CSP_Main_Page.html.

** Ibid.




Negligence cases, as opposed to strict liability cases, may add administrative costs. First it must be determined whether the defendant was negligent. In a strict liability case, only causation of plaintiff's injuries must be proved. Strict liability cases are often faster and efficient. *id, page 75.*

“The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such product on the market rather than by the injured persons who are powerless to protect themselves.” *id page 79*, quoting Justice Traynor in *Greenman v. Yuba Power Products, Inc*, 59 Cal.2d 57 (1963).



**Patent cases are often the
most expensive.**

A vertical strip of the American flag is positioned on the left side of the slide, showing the stars and stripes. The rest of the slide has a solid blue background.

Patent infringement litigation where \$1 million to \$25 million is at issue can range on average in total cost from over \$1,000,000 to over \$3,000,000, depending upon the US location.

Patent infringement litigation where over \$25 million is at issue can range on average in total cost from over \$4,000,000 to over \$7,000,000, depending upon the US location.

* American Intellectual Property Law Association 2011 Report



Trademark infringement litigation where \$1 million to \$25 million is at issue can range on average in total cost from over \$600,000 to almost \$2,000,000, depending upon the US location.

Trademark infringement litigation where over \$25 million is at issue can range on average in total cost from over \$900,000 to over \$3,500,000, depending upon the US location.

* American Intellectual Property Law Association 2011 Report

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Copyright infringement litigation where \$1 million to \$25 million is at issue can range on average in total cost from over \$600,000 to almost \$3,000,000, depending upon the US location.

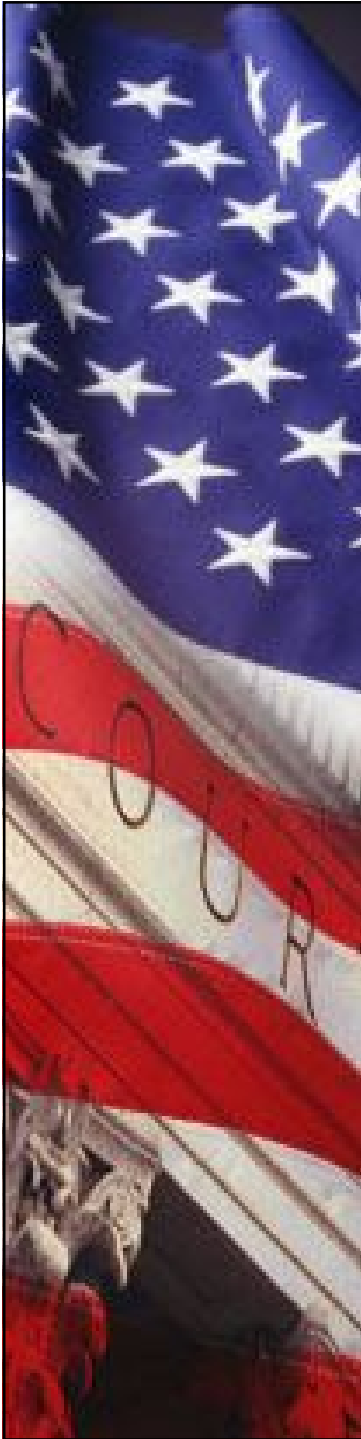
Copyright infringement litigation where over \$25 million is at issue can range on average in total cost from over \$400,000 to over \$5,000,000, depending upon the US location.

* American Intellectual Property Law Association 2011 Report

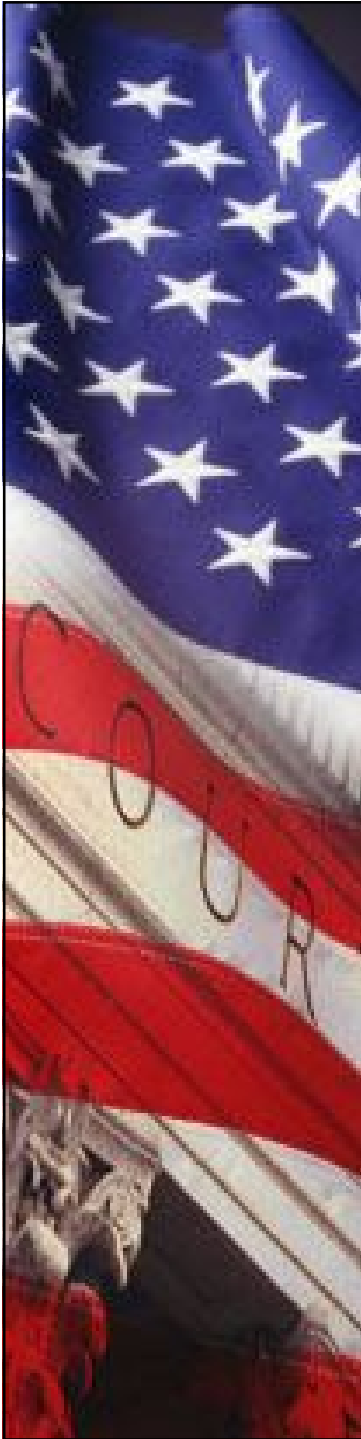


Moral of the story:

- Do what you can to prevent unnecessary legal expense
- An ounce of prevention is worth a pound of cure



Insurance



- Variables
 - Amount of Coverage
 - Defense costs
 - Damages
 - Premiums
 - Deductible
 - Choice of Counsel
 - Panel Counsel
 - Specialized Expertise
- Your history impacts your rates
- Uninsured Risks
 - Insurance is not available for all lawsuits
- Reservation of rights
- Bad faith



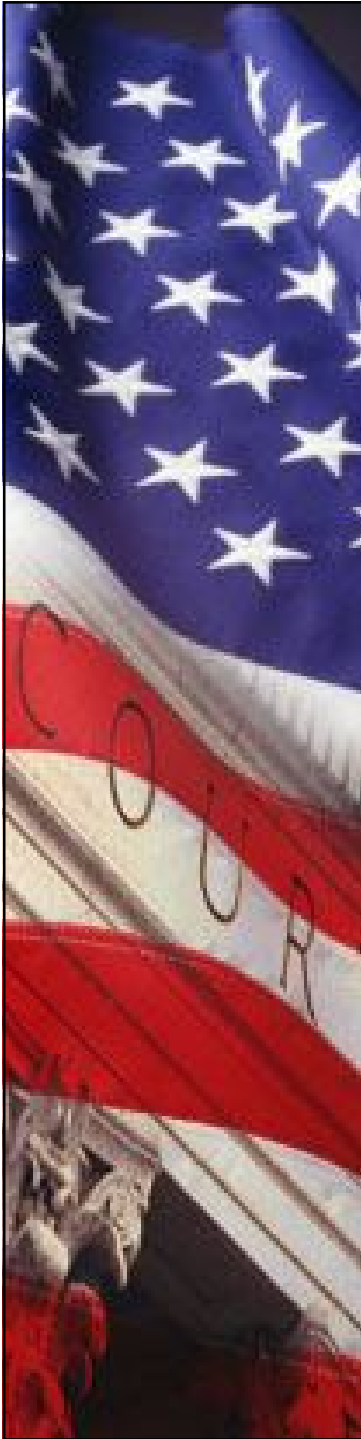
**Contractual arbitration
clauses
(requiring arbitration)**



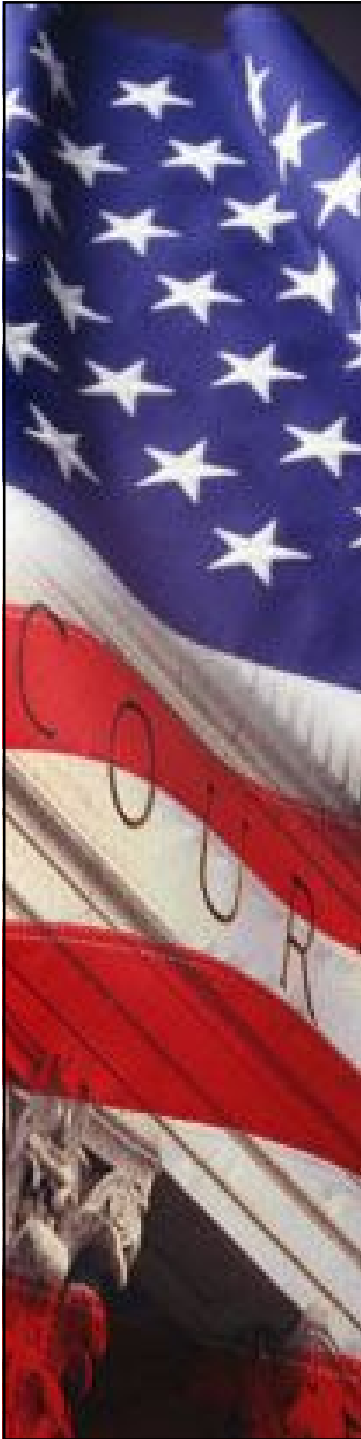
- Arbitration may cost half the price of litigation – or less
- There is no appeal from an arbitration, which saves time and money
- In some circumstances, arbitration awards can be challenged in court



Voluntary arbitration or mediation



- Voluntary Alternative Dispute Resolution is becoming increasingly popular
 - Less Money Spent
 - Less Time Spent
- In a Mediation, both sides have to agree with the resolution



Protecting your assets from the beginning in the way that you set up a US operation, structure the entity, choose locations

Joseph J. Dehner



Plan from the start:

- Brand and other IP
- Form and Location
 - Personnel
 - Sales strategy
 - Tax planning
 - Financing



Brand and other IP

- **Brand management**
 - Trademarks
 - Quality of product/service
 - Brand/Company image
- **Intellectual Property**
 - Trademarks
 - Trade secrets
 - Patents
 - Talent



Form of entity

- Subsidiary: not a branch (avoid permanent establishment of home company)
- LLC vs. Corporation
- Holding Company (avoid personal ownership of US assets) – tax driven



Location

- Business plan the key
- “Delaware” and coast myths
- Major state/local tax differences
- Federal incentives:
 - National treatment, so program oriented
 - EB5 Treaty investor
- Local incentives:
 - Highly competitive, changing
 - Generally # of jobs based
 - Negotiate before committing



US Personnel

- Immigrant visas – varied, changing
- US laws apply to non-US citizens working in USA
- Written agreement not required (except for unions)
- Anti-discrimination rules
- General freedom of contract (state funds-unemployment, worker injuries)



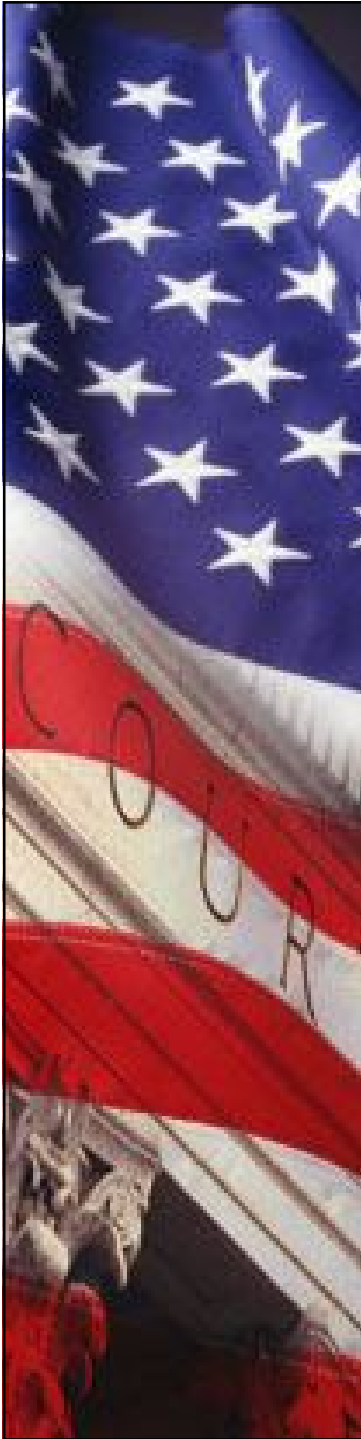
Federal, state and local statutes falls into four main categories:

Labor relations laws

- National Labor Relations Act, Taft-Hartley Act,
- state “right to work” laws
- Minimum wage, family leave

Labor standards laws

- Fair Labor Standards Act, Occupational Safety and Health Act
- State laws also regulate minimum wage, overtime, child labor, occupational safety and health ,

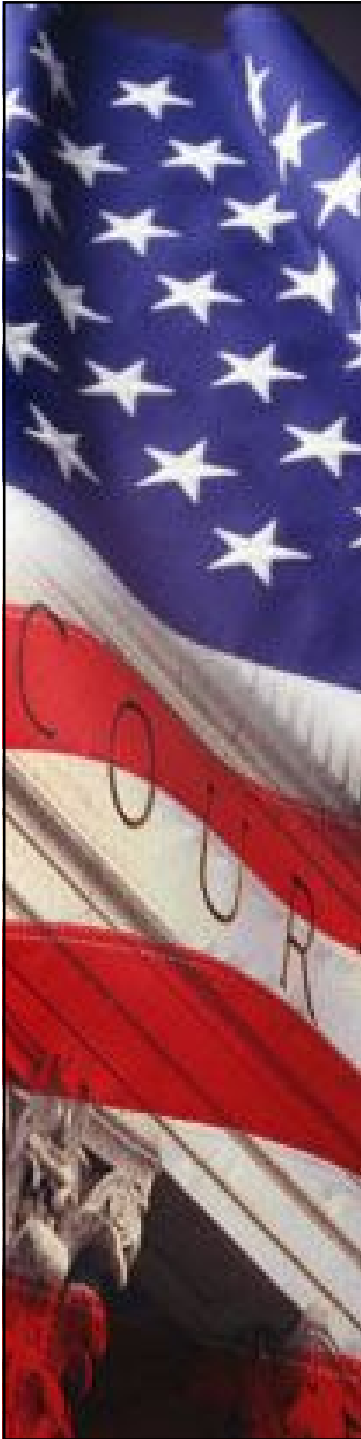


Non-discrimination laws

- Title VII - Civil Rights Act of 1964
- Pregnancy Discrimination Act - Title VII,
- Equal Pay Act
- Americans with Disabilities Act – reasonable accommodation needed
- Age Discrimination in Employment Act of 1967
- Genetic Information Nondiscrimination Act of 2008

Employee benefit laws

- Employee Retirement Income Security Act (ERISA)
- Consolidated Omnibus Budget Reform Act (COBRA)
- Family and Medical Leave Act



Many federal laws have state counterparts – some more burdensome than federal

- Handbooks commonly used
- Tailor policies to state and local requirements, practices



Sales Strategy

- Price Discrimination – Robinson-Patman Act
- Fewer “per se” competition rules
- UCC vs. Continental European practice - “Battle of Forms”
- Web systems to get agreement
- Forms/writings are critical



Tax Planning

- Holding Company – tax/treasury efficiency, withholding tax
- Transfer pricing – documentation key
- State/local taxes substantially differ
- Expat and personnel tax planning

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Financing

- Capital driven by tax, accounting
- Parent guaranty – driven by banking, tax
- Availability of local lending
- National treatment – no favoritism or discrimination

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Raising Capital

- Public markets – expensive, accesses large capital pools
- Accredited investor – relatively inexpensive
- Crowd funding – 2012 JOBS Act
- New techniques – e.g., Kickstarter



Crowd Funding

- Pools efforts of individuals to support efforts of others – generally by internet
- 2012 JOBS Act – rules to be issued by year end – will make start-up funding easier, cheaper



New Techniques

- Kickstarter – “Kickstarter is a platform where certain users (“Project Creators”) run campaigns to fund creative projects by offering rewards to raise money from other users (“Backers”).”
- www.kickstarter.com

Questions?

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