

CLIENT ALERT

United States Supreme Court Declines To Expand U.S. Jurisdictional Reach Over Foreign Manufacturers Including Foreign Subsidiaries Of U.S. Companies

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On June 27, 2011, the U.S. Supreme Court issued two opinions in which it declined to expand the jurisdictional reach of U.S. courts over foreign manufacturers, including foreign subsidiaries of U.S. companies whose products may end up in the U.S. While the foreign manufacturers prevailed in these two cases, the Supreme Court's opinions leave unsettled a number of questions for companies that manufacture products outside of the U.S.

J. McIntyre Machinery, Ltd. v. Nicaastro, 564 U.S. ___, 2011 U.S. LEXIS 4800 (No. 09-1343, June 27, 2011)

In a split decision, the Court in *McIntyre* reversed a New Jersey Supreme Court decision, holding that the New Jersey court did not have **specific** jurisdiction over a UK manufacturer whose industrial product was allegedly involved in a workplace accident in New Jersey. The product was manufactured in the UK and sold in the U.S. by an independent distributor based in Ohio.

Key points in the plurality opinion written by Justice Kennedy and joined by Chief Justice Roberts and Justices Thomas and Scalia include:

- A nationwide distribution system in the U.S. will not subject a foreign manufacturer to jurisdiction in a particular state;
- Foreseeability or awareness of where a product might end up is insufficient to establish jurisdiction – rather "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment";
- Rejection of Justice Brennan's opinion in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1986) and the adoption of Justice O'Connor's "stream of commerce plus" analysis – specific jurisdiction requires that a defendant must do more than simply place its product into the stream of commerce;
- Specific jurisdiction requires purposeful availment of conducting activities within a particular state; and
- Specific jurisdiction will exist where a foreign manufacturer targets or concentrates on a particular state.

In a concurring opinion, Justice Breyer, joined by Justice Alito, agreed with the decision of the plurality, but disagreed with the reasoning. This could weaken the plurality's opinion as a strong precedent. Justice Breyer's opinion queries how the standards set by the plurality would apply in circumstances where:

- Foreign companies sell products through the internet;
- Foreign companies use internet intermediaries, such as online retailers like Amazon.com, for internet sales and shipments; or
- Foreign companies market products through advertisements that the manufacturer knows will be viewed in a specific forum.

While these questions remain unanswered, Justice Breyer did agree that the decision to reverse the New Jersey Supreme Court was correct, noting that while larger companies may be able to procure insurance for burdensome litigation, it would be "fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States."

Justice Ginsburg, in a strong dissent joined by Justices Sotomayor and Kagan, voiced concern with a manufacturer avoiding suit through the use of a distributor in the U.S. In discussing the issue of state sovereignty, Justice Ginsburg opined that "the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim." Indeed, Justice Ginsburg compared the fairness to the parties of litigating in New Jersey, noting that the defense of a lawsuit in New Jersey is a reasonable cost for a foreign defendant of transacting business internationally as compared to the burden on an injured plaintiff to bring suit in the UK for an injury sustained in New Jersey while using the defendant's product.

Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. __, 2011 U.S. LEXIS 4801 (No.10-76, June 27, 2011)

The Court in *Goodyear* decided the question of whether foreign subsidiaries of a U.S. parent corporation would be amenable to suit in a state on claims which were unrelated to activities of the subsidiaries in the state under a theory of **general** jurisdiction, which is based more broadly on whether the defendant has established "continuous and systematic" ties with the forum state.

In *Goodyear*, a unanimous decision written by Justice Ginsberg, the Court reversed a North Carolina Court of Appeals decision, concluding that a North Carolina court did not have general jurisdiction over foreign subsidiaries of a U.S. company that manufactured tires in Turkey that were allegedly involved in a bus accident in France in which two North Carolina residents were killed. The foreign subsidiaries were not registered to do business in North Carolina, had no bank accounts in the state and did not ship tires to North Carolina. The Court found the small amount of the foreign subsidiaries' product that was distributed in North Carolina by affiliates of the parent corporation insufficient to meet the regular contact requirement necessary for jurisdiction in a U.S. state.

Key points of the opinion included:

- Distinguishing between specific and general jurisdiction, and stressing that these two theories of jurisdiction should not be blended or confused;
- Reaffirmation of prior U.S. Supreme Court decisions *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) and *Perkins v. Benguet Consol. Mining Co.* 342 U.S. 437 (1952);
- Recognition that foreign subsidiaries are not subject to general jurisdiction in North Carolina, as they were "in no sense at home in North Carolina"; and
- Recognition that foreign subsidiaries attenuated connections to North Carolina fell "far short of the 'the continuous and systematic general business contacts'" necessary for general jurisdiction.

The Court did not address the single enterprise theory of consolidating the ties of the U.S. parent corporation and its foreign subsidiaries – "piercing the corporate veil for jurisdictional purposes" – because it had not been properly presented in the lower courts.

What Do These Decisions Mean for Foreign Manufacturers?

Many issues were not resolved by the *McIntyre* or *Goodyear* decisions, and uncertainties remain:

- Will lower courts follow the Court's plurality opinion that the more stringent "stream of commerce plus" rule in *Asahi* governs?
- Do the decisions have the potential to create a jurisdictional loophole for foreign manufacturers who use distributors in the U.S. to avoid U.S. products liability law?
- Will foreign manufacturers be able to successfully argue that they should be shielded from specific jurisdiction in states where the manufacturer has directed no intentional conduct toward the forum state, such as marketing goods in, shipping to, or advertising in that state?
- How will courts treat jurisdictional issues involving internet sales by foreign parties, including the use of interactive websites?
- Will states be able to exert jurisdiction over foreign subsidiaries of U.S. corporations by piercing the corporate veil for jurisdictional purposes?
- What is the potential liability exposure of distributors and retailers that sell foreign products in the U.S.?
- How do these decisions impact manufacturers of component parts?
- Will the decisions prompt the U. S. Congress to move forward with legislation conferring jurisdiction for foreign manufacturers who manufacture unsafe foreign products? How will such legislation affect foreign manufacturers?

The *McIntyre* and *Goodyear* decisions have not dramatically changed the legal landscape for foreign manufacturers and foreign subsidiaries of U.S. companies whose products are sold in the U.S. Given the increasingly global economy, the high number of foreign products being imported into the U.S., and a heightened focus on product safety, claimants will no doubt continue to try to hold foreign manufacturers accountable for defective products that are marketed or sold in the U.S.

Crowell & Moring will continue to track developments in this area and advise companies on products liability risks in the U.S.

For more information about these cases and a summary of the January 2011 Supreme Court oral arguments in *McIntyre* and *Goodyear*, please click [here](#). To access the *McIntyre* opinion, please click [here](#). To access the *Goodyear* opinion, please click [here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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