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The U.S. Supreme Court Narrows the Jurisdictional Reach of U.S. Courts in Products-Liability Litigation

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The Supreme Court's Two Recent Decisions Could Significantly Limit the Exposure of Foreign Corporations to Products-Liability Suits

In two highly anticipated decisions, the U.S. Supreme Court both clarified and reshaped how the law of personal jurisdiction applies to foreign corporations selling their products to customers in the United States. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, No. 10-76 (June 27, 2011), the Supreme Court reaffirmed that foreign companies are not subject to state courts' general jurisdiction — the power to decide claims unrelated to a company's activities in a state — unless the company's contacts with the state were "continuous and systematic." Specifically, the Court held that a foreign corporation's placement of goods in the stream of interstate commerce alone cannot support general jurisdiction in a state where those goods end up being sold. In *J. McIntyre Machinery, Ltd. v. Nicastro*, No. 09-1343 (June 27, 2011), the Supreme Court imposed limits on a state court's specific jurisdiction — the power to decide claims related to activities occurring within or affecting the state. The majority of the justices concluded that a foreign corporation's targeting of the U.S. market as a whole for sales of its products through an independent distributor would not permit a state to exercise specific jurisdiction over the corporation unless it had also targeted that specific state.

Taken together, *Goodyear* and *Nicastro* suggest that foreign corporate defendants (and, possibly, even out-of-state U.S. corporate defendants, who are considered "foreign" from the perspective of state sovereignty) may be able to avoid state court jurisdiction — and thereby limit their products-liability exposure — by strategically structuring their sales activity in the United States.

Background

Goodyear and *Nicastro* came to the Supreme Court from the state courts of North Carolina and New Jersey, respectively. *Goodyear* resulted from a bus accident in France in which two North Carolina teenagers died. Attributing the accident to a defective tire manufactured in Turkey by a foreign subsidiary of The Goodyear Tire and Rubber Company ("Goodyear"), the boys' parents brought suit in a North Carolina state court against Goodyear and three of its foreign subsidiaries, which operated in Turkey, France, and Luxembourg. Goodyear's subsidiaries contested jurisdiction on the grounds that they conduct no business in North Carolina, do not design, manufacture, or advertise their products in that state, and neither solicit business in North Carolina nor sell their tires to North Carolina customers.

The North Carolina state courts, however, refused to dismiss the claims against Goodyear's foreign subsidiaries on the grounds that some of the tires manufactured by these subsidiaries — though not the type of tire involved in the accident — were distributed within North Carolina by other Goodyear affiliates. The North Carolina intermediate appellate court then found general jurisdiction over defendants because they "placed their tires 'in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.'"[1] The state court opined that defendants' tires reached North Carolina through a "highly-organized distribution process" that involved other Goodyear subsidiaries, and that defendants "made 'no attempt to keep these tires from reaching the North Carolina market.'"[2]

In *Nicastro*, an employee of a scrapmetal company sued J. McIntyre Machinery, Ltd. ("J. McIntyre"), a company incorporated and operating in the United Kingdom, for an injury he sustained while operating the company's metal-shearing machine. The accident occurred at a plant in New Jersey. J. McIntyre neither markets its machines in, nor ships them to, New Jersey. Rather, J. McIntyre sells its machines to U.S. customers exclusively through an independent distributor, and J. McIntyre did not direct or control the distributor's actions. J. McIntyre officials attended annual scrap recycling industry conventions alongside the distributor in order to advertise their machines, but these conventions never took place in New Jersey. Indeed, no more than four (and, possibly, only one) of J. McIntyre's machines ended up in New Jersey.

Based on these facts, J. McIntyre moved to dismiss the lawsuit for lack of personal jurisdiction. The New Jersey Supreme Court, however, held that jurisdiction was proper "because the injury occurred in New Jersey; because [J. McIntyre] knew or reasonably should have known 'that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states'; and because [J. McIntyre] failed to 'take some reasonable step to prevent the distribution of its products in [New Jersey].'"[3]

The Supreme Court's Decisions

The Supreme Court reversed both state court decisions. The Court's opinion in *Goodyear* was unanimous, while the decision in *Nicastro* was fractured, with no single opinion commanding the majority of the Court. In each case, however, a majority of the justices signaled an intent to limit the state courts' jurisdictional reach with respect to foreign corporations.

In *Goodyear*, a unanimous Court held that the connection between Goodyear's foreign subsidiaries and North Carolina was too attenuated to justify the exercise of general jurisdiction. The Court explained that a foreign (or, indeed, any out-of-state) corporate defendant's in-state contacts must be "sufficiently 'continuous and systematic' to justify the exercise of general jurisdiction over claims unrelated to those contacts."[4] The Court then roundly rejected the North Carolina state court's rationale that, by placing their tires in the interstate "stream of commerce," Goodyear's foreign subsidiaries have submitted to North Carolina's general jurisdiction. The Court explained that a flow of a manufacturer's products into the forum state may support a finding of *specific* jurisdiction, which may be found when an out-of-state defendant's activities caused an injury within the forum.[5] But, the Court emphasized, the mere placement of products into the stream of interstate commerce cannot support a finding of *general* jurisdiction, which subjects a foreign defendant to a suit unconnected to the company's activities within the forum state.[6] The sporadic tire sales in North Carolina made by Goodyear's foreign subsidiaries through intermediaries did not constitute the requisite "continuous and systematic general business contacts" required to sustain general jurisdiction.[7] The Supreme Court therefore rejected the North Carolina court's "sprawling view of general jurisdiction," under which "any

substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed."[8]

In contrast to the unanimity displayed in *Goodyear*, the Court's decision in *Nicastro* produced three separate opinions, with no single opinion garnering the majority of the Court. Speaking for a plurality of four justices, Justice Kennedy sought to articulate fairly stringent restrictions on a state court's authority to claim specific jurisdiction over a foreign corporate defendant. The plurality reaffirmed that a foreign corporation's "placing goods into the stream of commerce 'with the expectation that they will be purchased by consumers within the forum State'" may justify that state's exercise of specific jurisdiction over the corporation.[9] But the plurality emphasized that an out-of-state corporation's "transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum."[10] By contrast, "it is not enough that the defendant might have predicted that its goods will reach the forum State."[11] The plurality therefore rejected foreseeability as to where the defendant company's products may end up as the criterion for determining jurisdiction. The plurality also stressed that, because personal jurisdiction is forum-specific, a foreign company that targets the overall U.S. market would nevertheless not be subject to the jurisdiction of any particular state if the corporation did not target or concentrate on that particular state.[12] In line with these principles, the plurality concluded that, while J. McIntyre's actions may reveal an intent to serve the U.S. market, J. McIntyre did not engage in any activities in New Jersey and therefore was not subject to jurisdiction of the New Jersey state courts.[13]

Justice Breyer, joined by Justice Alito, concurred in the judgment, but on narrower grounds. The concurring justices agreed that J. McIntyre lacked sufficient contacts with New Jersey to support that state's assertion of jurisdiction. In their view, a foreign company's single isolated sale of a product in the forum state, made through an independent distributor, is insufficient for that state to assert jurisdiction, even if the sale was accompanied by a general effort to promote sales of the company's products in the United States.[14] Furthermore, the two concurring justices agreed with the plurality that jurisdiction in a products-liability action may not be premised merely on the foreign corporation's knowledge or awareness that, through a nationwide distribution system, its products might be sold in a particular state.[15] Justices Breyer and Alito, however, left open the question of whether a particular state could exercise jurisdiction where that state constituted a particularly high segment of the market for the company's products, or where an out-of-state company targets the entire world by selling its products through Internet-based marketing or an Internet-based intermediary.[16]

Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented. In their view, by targeting the nationwide U.S. market for its products, J. McIntyre "availed itself of the market of all States in which its products were sold by its exclusive distributor."[17] The dissent rejected the plurality's position that a company's efforts to sell its products nationwide are not relevant to the jurisdictional inquiry, given that such marketing arrangements are common in today's commercial world.[18] The dissent lamented that, under the approach adopted by the other six justices, a foreign manufacturer can now avoid state court jurisdiction, except perhaps in states where its products are sold in sizeable quantities.[19]

Potential Ramifications and Recommendations

The Supreme Court's decisions in *Goodyear* and *Nicastro* will have important implications for foreign companies that face potential exposure to products-liability suits in the United States. In the wake of these decisions, foreign corporations should consider carefully whether to structure their sales activity in the United States so as to limit the number of U.S. states in which they may be expected to defend against products-liability lawsuits.

Goodyear confirmed that a foreign corporation will not subject itself to a particular state's general jurisdiction unless the company's business activity in that state is "continuous and systematic." While the Court's prior decisions had already foreshadowed this result, *Goodyear* clarified that a foreign company's mere placement of its product into the stream of interstate commerce will not subject the company to a state's general jurisdiction.

The decision in *Nicastro* is more consequential, because the Court has now signaled that a foreign company could also avoid a state's specific jurisdiction, even though the injury to the plaintiff occurred within the state. Under the rationale adopted by the majority of the justices, a foreign manufacturer could protect itself against products-liability suits in state courts by conducting all of its sales in the U.S. through an independent nationwide distributor. Indeed, a foreign company might even be able to conduct its sales activity through a corporate subsidiary, as long as the subsidiary acts independently and its distribution strategy is not controlled by the foreign parent corporation. Moreover, the foreign company can still target the overall U.S. market and can even participate in its distributor's general marketing effort, provided that such effort does not target specifically any individual state.

Most importantly, the majority of the Supreme Court has repudiated the "foreseeability" approach to determining whether an exercise of specific jurisdiction is warranted. This approach commanded four votes in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987), and has since been expressly adopted by some federal circuit courts.[20] Under this view, a foreign company's placement of its product into the "stream of commerce" could serve as a sufficient basis for an exercise of specific jurisdiction by a particular state, so long as the company could have foreseen that its product would end up in that state. As the dissent in *Nicastro* argued, J. McIntyre could have foreseen that its products would end up in New Jersey because New Jersey was the fourth-largest destination for manufactured goods imported into the United States and the largest scrap metal market.[21]

Because *Nicastro* is a fractured opinion, it invites many questions that will be decided in future litigation. Even in the face of this uncertainty, a foreign corporation engaged in substantial exports to the United States may wish to consider measures that may limit its exposure to products-liability suits. These measures should be considered in conjunction with other business factors bearing on a company's overall strategic decision as to how to structure its sales activity in the United States, and the cost and feasibility of these measures should be taken into account. *Nicastro* suggests that the following actions may minimize a foreign company's litigation exposure:

- using an independent nationwide distributor for all of the company's sales in the United States;
- avoiding any business activity that targets or concentrates on a particular state;
- focusing the company's marketing effort on nationwide U.S. marketing, avoiding any "special state-related design, advertising, advice, marketing, or anything else" for its products destined for the United States;[22] and
- considering carefully any marketing or sales activities connected to states that constituted a particularly high segment of the market for the company's products, or to states whose courts are notoriously unfavorable for tort defendants (such as Illinois, California, West Virginia, and Louisiana).

These factors are not exclusive, and so would not guarantee immunity from products-liability claims. The concurrence in *Nicastro* expressly left open a number of questions, such as whether substantial sales to a particular state create the requisite nexus, even in the absence of direct targeting.[23] Most notably, Justices Breyer and Alito reserved the question of whether a foreign company's direct Internet-based marketing of its products to consumers in the United States could lead to an inference that the company knew the advertisements would be viewed by consumers in a particular state.[24] The concurring justices also emphasized that their conclusions were limited to the factual record before them, and declined to make general pronouncement about jurisdictional rules.[25] Plaintiffs in products-liability litigation will likely seek to limit *Nicastro*'s applicability to its specific factual scenario and to exploit issues left open by the concurrence. Moreover, in the wake of *Nicastro*, plaintiffs may seek to pursue products-liability claims against a foreign company's U.S. distributors, leading such distributors to seek advanced indemnity arrangements.

The structuring of U.S. operations is a complex question, and there are many business, legal, and tax factors that must be considered.[26] But especially for companies that compete in product segments that are vulnerable to products-liability and related tort suits, the Supreme Court's guidance in *Goodyear* and *Nicastro* should be closely evaluated.

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[1] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___ (2011), No. 10-76, slip op. at 5 (June 27, 2011) (quoting *Brown v. Meter*, 681 S.E.2d 382, 394 (N.C. 2009)).

[2] *Id.* at 5 (quoting *Brown*, 681 S.E.2d at 393-94).

[3] *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. ___ (2011), No. 09-1343, slip op. at 3-4 (June 27, 2011) (plurality op.) (quoting *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575, 592 (N.J. 2010)).

[4] *Goodyear*, slip op. at 8-9 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

[5] *Id.* at 10-11.

[6] *Id.* at 11.

[7] *Id.* at 12 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984)) (internal quotation marks omitted).

[8] *Id.* at 12-13.

[9] *J. McIntyre Machinery*, slip op. at 6 (plurality op.) (quoting *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 298 (1980)).

[10] *Id.* at 7 (plurality op.).

[11] *Id.* (plurality op.).

[12] *Id.* at 9 (plurality op.).

[13] *Id.* at 11-12 (plurality op.).

[14] *J. McIntyre Machinery*, No. 09-1343, slip op. at 2 (Breyer, J., concurring in the judgment).

[15] *Id.* at 5 (Breyer, J., concurring in the judgment).

[16] *Id.* at 3-4 (Breyer, J., concurring in the judgment).

[17] *J. McIntyre Machinery*, No. 09-1343, slip op. at 13-14 (Ginsburg, J., dissenting).

[18] *Id.* at 10, 14 (Ginsburg, J., dissenting).

[19] *Id.* at 1 (Ginsburg, J., dissenting).

[20] *See, e.g.*, *Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610, 613-15 (8th Cir.1994) (adopting a position consistent with that of Justice Brennan in *Asahi*); *Ruston Gas Turbines, Inc. v. Donaldson Company*, 9 F.3d 415, 420 (5th Cir.1993) (same).

[21] *J. McIntyre Machinery*, No. 09-1343, slip op. at 3, 10 n.6, 14 (Ginsburg, J., dissenting).

[22] *Id.*, slip op. at 3 (Breyer, J., concurring in the judgment).

[23] *Id.* at 3-4 (Breyer, J., concurring in the judgment); *see also id.*, slip op. at 1 (Ginsburg, J., dissenting).

[24] *Id.* at 4 (Breyer, J., concurring in the judgment).

[25] *Id.* at 3-4 (Breyer, J., concurring in the judgment).

[26] When structuring U.S. operations from a tax perspective a careful analysis of all the facts and circumstances of such operations and the parties involved is required. Whether a foreign company will be subject to U.S. net income tax on its imports into the United States will depend on the extent of its U.S. business activities. For example, under certain circumstances, the business activities of an independent distributor could be attributed to a foreign company and result in the imposition of U.S. tax on such company. U.S. tax treaties, if available, may offer some relief.