

Executive COUNSEL

THE MAGAZINE FOR THE GENERAL COUNSEL, CEO & CFO

The E-Discovery Puzzle

E-DISCOVERY

The 7th Circuit
Pilot Program

Preventing a Cost
Cascade

Trends for 2012

State of the Art:
Relevance Ranking

INTELLECTUAL PROPERTY

IP and IT Asset
Management

Fielding the
America Invents Act



NEXT ISSUE:

Search Waivers
White Paper

MOLOLAMKEN
Local Jurisdiction over Foreign Companies
By Martin V. Totaro and Robert K. Kry

Local Jurisdiction over Foreign Companies

Partial Clarification from Two Supreme Court Decisions

By Martin V. Totaro and Robert K. Kry



Supreme Court decisions often have a large impact on the business community without receiving much press, especially when the case involves a technical or procedural issue, so it comes as no surprise that two of the most important cases from last term received relatively little publicity. Both involved the scope of personal jurisdiction over foreign

companies – that is, when a foreign company can be sued in a particular forum chosen by the plaintiff.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court addressed whether a foreign company whose products wind up in the forum state may be sued on claims unrelated to those products. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court addressed whether

such a company may be sued on claims related to the products, when the company itself was never present in the forum state.

Those two issues could affect virtually any corporation – including both foreign companies sued in the United States and U.S. companies sued in states other than where they are headquartered or incorporated – and they should be on the radar of corporate executives and counsel alike.

PERSONAL JURISDICTION OVERVIEW

The Due Process Clause of the U.S. Constitution prohibits a court from adjudicating claims against an out-of-state defendant unless it has personal jurisdiction over the defendant.

In these cases, the Court distinguishes between two types of personal jurisdiction, general and specific. There is general jurisdiction when a company's contacts with the state are so "continuous and systematic" that the company may be sued there regardless of the nature of the claim. Specific jurisdiction requires less extensive contacts with the forum state, but it allows the court to adjudicate controversies relating only to those contacts. The Goodyear decision concerned general jurisdiction, while McIntyre concerned specific jurisdiction.

In Goodyear, two young soccer players from North Carolina were riding a bus on the way to a French airport, about to board a plane home, when their bus overturned and they were killed. The boys' parents sued Goodyear USA and three of its subsidiaries for wrongful death in North Carolina state court, alleging that the crash was caused by a defective Goodyear tire manufactured and sold by the subsidiaries.

The state court exercised jurisdiction over Goodyear USA, which had plants in North Carolina and was registered to do business there, and regularly engaged in commercial activity there. The plaintiffs also argued that the subsidiaries could be sued in North Carolina because a small percentage of their tires ended up in North Carolina, although they did not

include the type of tire involved in the bus crash.

Goodyear USA did not contest personal jurisdiction, but the subsidiaries did. The state court acknowledged that the subsidiaries were not subject to specific jurisdiction in North Carolina because the parents' claims were not connected to any activities by the subsidiaries there. A variety of factors, moreover, weighed against general jurisdiction: (1) The subsidiaries were not registered to do business in North Carolina; (2) the subsidiaries had no place of business, employees, or bank accounts in North Carolina; (3) the subsidiaries did not design, manufacture, or advertise their products in North Carolina; (4) the subsidiaries did not sell or ship tires to North Carolina; and (5) the subsidiaries did not solicit business in North Carolina.

The state court nonetheless concluded that it had general jurisdiction because the subsidiaries had placed their tires in the "stream of commerce," and some of those tires ended up in North Carolina.

The Supreme Court unanimously rejected that theory. Typically, it noted, courts invoke the "stream of commerce" in asserting specific jurisdiction over a defendant that placed a

that ended up in the United States, but the plaintiffs' claims had nothing to do with those tires. The Court accordingly reversed the state-court judgment.

In McIntyre, an employee of a scrap-metal company was injured in New Jersey while operating a metal-shearing machine. The employee filed a product liability suit in New Jersey state court against the machine's English manufacturer. The plaintiff argued that the manufacturer was subject to specific jurisdiction for multiple reasons. The company used a distributor to sell its machines in the United States. Company officials attended annual conventions in the United States to advertise its machines (although the conventions took place in states other than New Jersey).

Finally, although the English manufacturer neither advertised in New Jersey nor sent its products there, a small number of the machines—including the machine that injured the plaintiff—ended up in the state.

The state court concluded that it had jurisdiction. The court applied its interpretation of the stream-of-commerce theory and held that jurisdiction was proper because the English manufacturer knew or should have known that "its products are distributed through a nationwide distribution sys-

A foreign company will not be subject to general jurisdiction simply because it placed products in a stream of commerce that ended up in the state.

product in the stream of commerce that eventually caused harm inside the forum state. But that theory could not support general jurisdiction over claims unrelated to those products. Goodyear's subsidiary had sold tires

tem that might lead to those products being sold in any of the fifty states."

Six members of the Supreme Court rejected that theory, but they were unable to agree on a rationale. Justice Kennedy, Chief Justice Roberts, and Jus-



Martin V. Totaro is an associate at MoloLamken LLP. He practices in all aspects of appellate litigation in the federal courts of appeals and the U.S. Supreme Court, and at the trial level with motions practice and issue analysis. He has represented business associations, individual criminal defendants, veterans, as well as corporations in a variety of industries.
mtotaro@mololamken.com

tices Scalia and Thomas concluded that the defendant could not be sued in New Jersey because it had not engaged in any activities in New Jersey that revealed “an intent to invoke or benefit from the protection of its laws.”

The defendant’s marketing and sales efforts, for example, were directed at the United States generally rather than New Jersey specifically. The defendant had no office in New Jersey. It paid no taxes there. It did not advertise there. And it never sent any employees there. As a result, the plurality concluded, the company could not be subject to personal jurisdiction in the state.

Justice Breyer, in an opinion joined by Justice Alito, concurred in the judgment on narrower grounds. Justice Breyer agreed with the plurality that the mere fact that the plaintiff was injured in the forum state is insufficient. But he did not agree that a defendant must have direct contact with the forum state to subject itself to specific jurisdiction. He did not elaborate on what a company might do short of targeting the forum that would establish specific jurisdiction. He did, however, pose several hypotheticals – such as a company that sold products on the internet and shipped them to a forum state using an intermediary like Amazon.com – that he left to be resolved in future cases.

THE TAKEAWAY

The Supreme Court’s unanimous decision in *Goodyear* provides the business community with clear guidance. A state may exercise general jurisdiction over a foreign company, or a U.S. company based in another state, only in the narrowest of circumstances. A foreign company will not be subject to general jurisdiction simply because it placed products in a stream of commerce that ended up in the state.

For all the certainty provided by *Goodyear*, however, the Supreme Court’s fractured decision in *McIntyre* leaves the rules governing specific jurisdiction unpredictable.

If the plurality in *McIntyre* had been a majority, those rules would be much clearer. To be subject to jurisdiction, a defendant would have to carry on activities in, or engage in conduct purposefully directed at, the forum state. It would make no difference that a defendant’s products eventually made their way into that state through the stream of commerce.

Because the Court lacked a majority opinion, however, companies must operate in a shadow of uncertainty with regard to specific jurisdiction. There is no bright-line rule that allows a company to know when it is subject to specific jurisdiction based on its sales in a particular state. Rather, a company must face national or regional marketplaces knowing that it might be subject to jurisdiction in a state if enough of its products end up there.

Just where that tipping point is remains unclear. As Justice Breyer noted, there are numerous types of transactions involving a wide range of products sold to a wide range of consumers that *McIntyre* left unaddressed. Does specific jurisdiction exist in the customer’s home state if the customer purchases a product over the internet from his home computer? What if the transaction is mediated by a third party like Amazon.com? And what if the company markets its products through pop-up advertisements?

McIntyre left those and many other questions unresolved. Until the Court revisits the issue, companies will have little guidance about whether products they place in the stream of commerce could subject them to jurisdiction wherever they wind up. ■



Robert K. Kry is a partner at MoloLamken LLP. His practice focuses on appellate litigation and assisting clients with motions practice and issue analysis at the trial level. He represents clients before the United States Supreme Court, the federal courts of appeals, and other federal and state courts in variety of subject areas, including constitutional law, business litigation, securities fraud, criminal law and intellectual property.
rkry@mololamken.com

Reprinted with permission from Executive Counsel, Feb/Mar 2012. On the Web at www.executivecounsel.info.
© EXECUTIVE COUNSEL. All Rights Reserved. Foster Printing Service: 866-879-9144, www.marketingreprints.com.