

Casualty Matters


 International

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A New Era or Just a Respite? U.S. Supreme Court Stops Jurisdiction Over Foreign Manufacturers From Spiraling Out of Control (for Now)

– Discussion of the U.S. Supreme Court’s Decisions
*J. McIntyre Machinery, Ltd. v. Nicastro*¹ and *Goodyear
Dunlop Tires Operations, S.A. v. Brown*² of June 27, 2011 –

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When it comes to product defects, non-U.S. manufacturers, too, must constantly fear being sued for damages in a U.S. court. This is a true nightmare for many companies, as court proceedings in the U.S. are time-consuming and, due to pre-trial discovery and high compensation amounts, significantly more expensive than proceedings before domestic courts.³ This is all the more unsettling as many U.S. states have, over the years, continued to weaken the requirements for establishing their jurisdiction over foreign manufacturers. It is becoming more and more common for them to apply the stream-of-commerce doctrine, according to which jurisdiction over foreign manufacturers can be established by virtue of the mere fact that a product finds its way into a U.S. state through the stream of commerce.⁴ In two anxiously awaited judgments, the U.S. Supreme Court has now rejected the application of this doctrine and, in so doing, stopped jurisdiction over foreign manufacturers from spiraling out of control, at least for now.⁵

About This Newsletter

Gen Re’s *Casualty Matters International* reviews new liability developments.

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In the following, we will first provide a short overview of the previous legal situation before addressing the two judgments. We will then briefly outline the impact of the new legal situation on the litigation risk faced by foreign manufacturers as well as anticipated future developments.

1 Previous Legal Situation

1.1 Jurisdiction Over Foreign Manufacturers

Each U.S. state determines its own jurisdiction requirements for actions against foreign manufacturers. Its scope of discretion is limited by the United States Constitution, namely by the due process clause in the Fourteenth Amendment: According to it, the establishment of jurisdiction must be consistent with the traditional notions of fair play and substantial justice.⁶ For this reason, certain minimum contacts between the foreign manufacturer and the forum state must be established in order to justify the jurisdiction of its courts.⁷ Examples of such contacts are the sale and advertising of products in the relevant state.

1.2 The Stream-of-Commerce Doctrine

The increasing importance of global trade led to the evolution of the stream-of-commerce doctrine in the 1970s, which first received support from the U.S. Supreme Court in its *World-Wide Volkswagen* judgment in 1980.⁸ Stream of commerce refers to the path of a product from the manufacturer through distributors to the consumer. According to this doctrine, a court can establish its jurisdiction over a foreign manufacturer by virtue of the mere fact that a product of that manufacturer finds its way into a U.S. state through the stream of commerce. The background of this development was that products sold in the U.S. increasingly stemmed from foreign – and not from U.S. – manufacturers.⁹ In order to make it easier for U.S. consumers to pursue product liability claims, new ways of suing foreign manufacturers in U.S. courts were sought. For foreign manufacturers, however, this means an incalculable litigation risk in the U.S. For instance, the owner of a small farm in Germany, Italy or any other foreign country who sells his products to a wholesaler would have to be prepared for the possibility that he could be sued for damages in any U.S. state without ever leaving his own village.¹⁰

As far back as 1987 several U.S. Supreme Court Justices tried to restrict the stream-of-commerce doctrine in its *Asahi Metal Industry Company, Ltd. v. Superior Court of California* decision¹¹. This judgment concerned a Japanese valve manufacturer that had sold a defective valve to a Taiwanese inner tube manufacturer which, in turn, supplied the U.S. market. A motorcyclist had a serious accident due to the defective inner tube and sued the Taiwanese manufacturer in a California state court. The manufacturer then served third-party notice on its Japanese supplier Asahi Metal Industries. In this dispute between the Taiwanese manufacturer and the Japanese supplier, the U.S. Supreme Court found

that the due process clause required more than the manufacturer merely being aware that, through the stream of commerce, its product could end up in a far-away jurisdiction, namely that the manufacturer specifically targeted its activities at the U.S. state in order to invoke the benefits and protections of its laws.¹² At that time, however, the U.S. Supreme Court could not find a majority for or against the stream-of-commerce doctrine. Since then there has been uncertainty in the U.S. about whether the stream-of-commerce doctrine is applicable or not. Many U.S. states were still using this doctrine until quite recently.

2 Trend Reversal in the U.S. Supreme Court

After 24 years the U.S. Supreme Court recently handed down two new judgments on jurisdiction over foreign manufacturers. Observers were anxious to see whether the Court would finally resolve the uncertainty that had been triggered by the *Asahi Metal Industry* judgment.¹³

2.1 The *McIntyre v. Nicastro* Case

The *McIntyre v. Nicastro* case¹⁴ concerns a product manufactured outside the U.S. that caused an injury in a U.S. state. The U.S. citizen Nicastro severely injured his hand while using a machine in New Jersey. He then sued the English manufacturer J. McIntyre Machinery, Ltd. (McIntyre) for damages in a New Jersey state court. There was no business contact at all between New Jersey and McIntyre; in particular, McIntyre did not have any offices or other property in New Jersey, nor did the company advertise its products there. McIntyre sold its machines through an independent distributor that operated in the entire U.S. market. Four machines had ended up in New Jersey, including the one with which Nicastro injured himself. The New Jersey Supreme Court based its jurisdiction on the contention that the foreign manufacturer McIntyre should have known that its machines were being distributed through a nationwide distribution system that could result in its products being sold in any of the 50 U.S. states, including New Jersey.

2.2 The *Goodyear v. Brown* Case

The *Goodyear v. Brown* case¹⁵ concerns a product that was manufactured and sold outside of the U.S. – and that caused damage outside the U.S. Two adolescents from North Carolina were killed in a bus accident in France. The parents of the youths blamed the accident on tire failure and filed a lawsuit against the Luxembourg manufacturer Goodyear Dunlop Tires Operations, S.A. (Goodyear Luxembourg), a subsidiary of the American Goodyear Tire and Rubber Company (Goodyear USA), in a North Carolina state court. Goodyear Luxembourg itself did not have any contact with the U.S. market. The tires manufactured and sold by it differed – both in size and construction – from those manufactured for the U.S. market. Only 0.1% of the tires ended up in the North Carolina market as a result of custom orders through Goodyear USA. The North Carolina Court of Appeals based its jurisdiction

on the contention that some of the tires manufactured by Goodyear Luxemburg had reached North Carolina through the stream of commerce. The Court of Appeals claimed that this was sufficient for suing Goodyear Luxemburg in the U.S. state, even though the relevant events had occurred outside the U.S.

2.3 The Decisions of the U.S. Supreme Court

In both cases the manufacturers successfully filed an appeal before the U.S. Supreme Court against the state courts' judgments. The U.S. Supreme Court found that the ties of the two foreign manufacturers, Goodyear Luxemburg and McIntyre, with the forum states were not sufficient to establish jurisdiction. In both decisions the stream-of-commerce doctrine is rejected as being too expansive.

In the McIntyre v. Nicastro case, four Justices stated that jurisdiction over a foreign manufacturer requires that this manufacturer has purposefully targeted its activities at the forum state in order to invoke that state's benefits and protections. According to these Justices, this can be assumed, for example, if the manufacturer advertises in the forum state, ships its products there, or otherwise targets the market.¹⁶ On the other hand, the Justices maintained that – as a general principle – it is not sufficient if the manufacturer could have foreseen that its products might end up in this state. They also added that establishing jurisdiction requires a separate assessment for each state. The Justices asserted that, even though McIntyre had targeted the U.S. market as a whole, the courts in New Jersey lacked jurisdiction over the manufacturer since New Jersey had not been purposefully targeted.

Although two Justices ultimately agreed with this in a concurring opinion, they did not want to stipulate any strict rules for establishing jurisdiction over foreign manufacturers. They asked, for example, how one should then assess the purposeful targeting of specific markets in electronic commerce, where the products can be targeted at the whole world. They asserted that it would be better to evaluate the individual case based on the manufacturer's specific activities and individual circumstances.

The three female Justices on the U.S. Supreme Court (including Justices Sotomayor and Kagan nominated by President Obama) did not agree with the conclusion. In their opinion, McIntyre purposefully targeted its activities at the state of New Jersey, too. According to them, a manufacturer that distributes its products internationally wants to sell them everywhere and therefore invokes the benefits and protections of every state. By selling its machines through a distributor that supplied the U.S. market as a whole, McIntyre also targeted its activities at commercial relations with New Jersey. Interestingly, the dissenting opinion also referred to Article 5(3) of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Council Reg (EC) 44/2001). According to this provision, a person

can be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.¹⁷ According to the dissenting opinion, the majority opinion in the U.S. Supreme Court puts American plaintiffs at a disadvantage compared to plaintiffs in the European Union, for example. This comparison is flawed, however, since Article 5(3) Council Reg (EC) 44/2001 requires that the defendant be domiciled in the territory of a Member State.

On the other hand, in the Goodyear v. Brown case, in which the damage occurred outside the U.S., the opinion of the U.S. Supreme Court was unanimous, i.e., with nine votes to zero the U.S. Supreme Court held that in cases in which the damage occurs outside the U.S., only continuous and systematic affiliations of the manufacturer with the forum state can render the manufacturer susceptible to being sued in that state.¹⁸ Interestingly, this decision was authored by Justice Ginsburg, who also wrote the dissenting opinion in the McIntyre v. Nicastro case. This shows how much the decision depends on the facts of the specific case.

3 Analysis of the Decisions: Impact on Foreign Manufacturers

For now, foreign manufacturers can breathe a sigh of relief: The U.S. Supreme Court is making it more difficult for U.S. courts to subject foreign manufacturers to their jurisdiction.¹⁹ According to the Court, placing products into the stream of commerce outside the U.S. – even if such products end up in the U.S. – is not a sufficient basis for establishing jurisdiction; more is needed. However, the Justices have not been able to agree on just what such additional elements should be.

This much is clear: If the damage occurs outside of the U.S., such as in the Goodyear v. Brown case, enduring relations between the manufacturer and the forum state are necessary to establish jurisdiction. The U.S. Supreme Court requires continuous and systematic contacts. This includes setting up offices, employing staff and actively selling and advertising products.²⁰

Things are different, however, if the damage occurs in a U.S. state. The Court has now made it clear that merely placing products into the stream of commerce does not constitute sufficient contact. Thus, if individual products end up in a U.S. state – without the manufacturer having targeted its own activities at this result – this is not sufficient to establish jurisdiction in this state, according to the new case law. However, which activities of the manufacturer are regarded as sufficient is still unclear.

4 Practical Advice

There are certain measures that manufacturers can take to reduce the likelihood of being sued in the U.S.²¹ If the jurisdiction of a particular U.S. state or the entire U.S. is to be avoided, one should avoid any direct business contact with this region. This includes, in particular, the posting of employees, mailing of advertising brochures

or other marketing measures, contract negotiations and the offer of advice or other information regarding one's own products. In addition, the products should be sold through independent distributors. If manufacturers want to take more caution to avoid the jurisdiction of certain states, they can expressly exclude engaging in business there. With regard to electronic commerce, a company could explicitly state that its online offering does not apply in certain regions.

5 Outlook

The American Association for Justice (AAJ),²² which supported the plaintiffs in the two cases before the U.S. Supreme Court, is critical of the Court's decisions.²³ According to the AAJ, it is important for the protection of U.S. citizens that foreign manufacturers be held accountable for their defective products in the U.S. It contends that Congress must act quickly to re-establish legal certainty in the global marketplace. This gives a boost to proposed legislation that was brought before the Senate some time ago and that is intended to make it easier for U.S. plaintiffs to hold foreign manufacturers liable.²⁴ Among other things, this legislation recommends stipulating that foreign manufacturers must purchase import licenses. This push by the AAJ should be taken seriously and its influence on the U.S. Senate should not be underestimated. If this law were to materialize, it would have drastic financial effects on expanding companies. Therefore, further developments should be closely monitored by exporting companies and their advocacy groups.²⁵

Endnotes

- 1 J. McIntyre Machinery, Ltd. v. Nicastro, Docket No. 09-1343, 546 U.S. ___ (2011).
- 2 Goodyear Dunlop Tires Operations, S.A. v. Brown, Docket No. 10-76, 546 U.S. ___ (2011).
- 3 See Wilske/Fox, *The So-Called 'Judicial Hellholes' in U.S. Jurisdictions and Possible Means to Avoid Them*, *Dispute Resolution International* 2008, 235-254 (237).
- 4 See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); Rose/Falletta, "Stream-of-Commerce" – New Jersey Courts' Personal Jurisdiction Over Foreign Manufacturers in the Contemporary Global Economy, *The National Law Review*, April 2, 2010, <http://www.natlawreview.com/article/stream-commerce-new-jersey-courts-personal-jurisdiction-over-foreign-manufacturers-contempor>.
- 5 Childress, *The United States Supreme Court to Take a Fresh Look at Personal Jurisdiction*, September 28, 2010, <http://conflictoflaws.net/2010/the-united-states-supreme-court-to-take-a-fresh-look-at-personal-jurisdiction/>.
- 6 Original wording: "traditional notions of fair play and substantial justice", established case law, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
- 7 See on personal jurisdiction in general: Schack, *Einführung in das US-amerikanische Zivilprozessrecht [Introduction to the U.S. Law of Civil Procedure]*, 3rd ed. 2003, 24 et seq.
- 8 See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); Rose/Falletta, "Stream-of-Commerce" – New Jersey Courts' Personal Jurisdiction Over Foreign Manufacturers in the Contemporary Global Economy, *The National Law Review*, April 2, 2010, <http://www.natlawreview.com/article/stream-commerce-new-jersey-courts-personal-jurisdiction-over-foreign-manufacturers-contempor>.
- 9 See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).
- 10 See the similar example of the majority opinion of the U.S. Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro*, Docket No. 09-1343, 546 U.S. ___ (2011), *Slip Opinion*, p. 10.
- 11 *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987).
- 12 Original wording: "some act by which the defendant purposefully avail[s] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws", *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 105 (1987).
- 13 Childress, *The United States Supreme Court to Take a Fresh Look at Personal Jurisdiction*, September 28, 2010, <http://conflictoflaws.net/2010/the-united-states-supreme-court-to-take-a-fresh-look-at-personal-jurisdiction/>; Burtka, *Supreme Court takes on states' jurisdiction over foreign manufacturers*, January 20, 2011, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/14246.html>.
- 14 J. McIntyre Machinery, Ltd. v. Nicastro, Docket No. 09-1343, 546 U.S. ___ (2011).
- 15 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, Docket No. 10-76, 546 U.S. ___ (2011).
- 16 J. McIntyre Machinery, Ltd. v. Nicastro, Docket No. 09-1343, 546 U.S. ___ (2011), *Slip Opinion*, pp. 11-12; see Bickford, *Opinion analysis: No jurisdiction over foreign companies*, June 30, 2011, <http://www.scotusblog.com/?p=123567>.
- 17 J. McIntyre Machinery, Ltd. v. Nicastro, Docket No. 09-1343, 546 U.S. ___ (2011), Ginsburg J., *Dissenting, Slip Opinion*, pp. 17.
- 18 Original wording: "affiliations with the State are so continuous and systematic as to render them essentially at home in the forum state", *Goodyear Dunlop Tires Operations, S.A. v. Brown*, Docket No. 10-76, 546 U.S. ___ (2011), *Slip Opinion*, p. 2.
- 19 Fisher, *One-Two, The Court Backs International Shoe*, June 27, 2011, <http://www.forbes.com/sites/danielfisher/2011/06/27/one-two-the-court-backs-international-shoe>.
- 20 *Ibid.*
- 21 In detail on this: Wilske/Fox, *The So-Called "Judicial Hellholes" in U.S. Jurisdictions and Possible Means to Avoid Them*, *Dispute Resolution International* 2008, 235-254 (237).
- 22 The AAJ (former name: Association of Trial Lawyers of America) is the association of American plaintiff trial lawyers.
- 23 SCOTUS Ruling in *McIntyre v. Nicastro* Adds Obstacles to Holding Foreign Corporations Accountable in the U.S., *The American Association for Justice*, June 27, 2011, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/16166.htm>.
- 24 Fisher, *One-Two, The Court Backs International Shoe*, June 27, 2011, <http://www.forbes.com/sites/danielfisher/2011/06/27/one-two-the-court-backs-international-shoe>.
- 25 In detail on this proposed legislation: Wilske/Grillitsch, *Gesetzesvorhaben zur Erleichterung der Verfolgung von Produkthaftungsansprüchen gegenüber ausländischen Herstellern [Legislative project for facilitating the prosecution of product liability claims against foreign manufacturers]*, *PHI – Haftpflicht international* 2009, 154-156.



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