

PERSONAL JURISDICTION AFTER GOODYEAR AND MCINTYRE ONE STEP FORWARD; ONE STEP BACKWARD?

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1. INTRODUCTION

The 2011 Supreme Court decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) and *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) created expectations of a restrained approach to the exercise of personal jurisdiction by state and federal trial courts. The decisions seemed to be an attempt to reign in state and federal district courts which were trending to an expansive application of previous Supreme Court decisions using confusing and expansive analyses to extend personal jurisdiction over both non-U.S. affiliates of U.S. based companies and non-U.S. based manufacturers. While neither *Goodyear* nor *McIntyre* erased all concerns, they did raise hopes in the world wide business community. These hopes have been dashed by a number of inconsistent trial court and appellate decisions which confound predictability and further complicate the environment surveyed by businesses contemplating transactions or expansion in the United States.

Issued the same day, the Supreme Court decisions in *Goodyear* and *McIntyre* provided guidelines for manufacturers concerned about the prospect of defending their products in United States courts. The Supreme Court's instruction in *Goodyear* concerning

* Managing Partner, Philadelphia, DLA Piper LLP (US). This essay begins with a paper presented by me after the decisions in *Goodyear* and *McIntyre* to the Defense Research Institute on April 13, 2012, which served as a basis for discussion at a workshop and panel conducted the same day. In addition, I discussed the paper at a workshop and panel conducted by the Product Liability Advisory Council on October 7, 2011. I substantially revised and updated the essay to reflect the efforts of courts interpreting *Goodyear* and *McIntyre*. As the law evolves, I will continue to revise and update the essay and will likely publish future versions and participate in workshops as interest requires. I wish to thank Associates Matthew A. Goldberg and Michael E. Bushey, Jr. for helpful comments on an earlier draft of this essay and their tireless efforts on behalf of clients located outside of the United States of America.

the exercise of 'general jurisdiction,' an extension of jurisdiction not dependent on the action arising from the supply of a product to the forum state, set relatively solid, well defined boundaries. The Supreme Court's guidance in *McIntyre*, however, concerning the exercise of 'specific jurisdiction,' an extension of jurisdiction arising from a manufacturer's product allegedly causing injury in the forum state, consisted of a plurality and two other opinions. While the sum of the parts justified conservative expectation decisions, the lack of consistency across the parts provided an excuse for some courts to continue an expansive application of the previous Supreme Court decisions.

It is important to understand that from the perspective of a business executive predictability is paramount. The fact that both U.S. and non-U.S. based companies need to consider jurisdiction from state to state, and not with respect to the United States as a whole, complicates forecasting. Neither *Goodyear* nor *McIntyre* touch upon claims arising from federal law or claims which implicate a federal statute that authorizes nationwide service of process.¹ In those instances, a court may determine it is appropriate to analyze the defendant's jurisdictionally significant contacts with the United States as a whole, rather than limiting the analysis to the forum state. Similarly, neither case impacts the jurisdictional analysis or theory used in a minority of states using 'long-arm' statutes that restrict a court's ability to exercise power over a foreign defendant to anything less than the fullest extent permitted by the Fourteenth Amendment. *Goodyear* and *McIntyre* did, however, raise the expectation that in tort cases, there might be more uniformity in the exercise of jurisdiction by state and federal courts.

In *Goodyear*, a unanimous Supreme Court rejected the 'stream-of-commerce' test for general personal jurisdiction. In *McIntyre*, four justices of the Supreme Court arguably took a previously announced plurality requirement of 'stream of commerce plus' for the exercise of jurisdiction to 'stream of commerce, plus, plus,' requiring the demonstration of a 'manifest intent' of the manufacturer to subject itself to the jurisdiction of the court.

¹ See FED. R. CIV. P. 4(k)(2) ("For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.").

Writing for a four-Justice plurality, Justice Kennedy expressly rejected the view that a manufacturer is subject to a forum's jurisdiction simply because it placed its goods into the 'stream of commerce,' knowing or having reason to know those goods will be carried to the forum.² Justice Kennedy emphasized that "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures."³ In other words, a "defendant's transmission of goods permits the exercise of jurisdiction *only* where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."⁴

Unfortunately, while Justices Breyer and Alito concurred, they chose to rely on existing precedent and the particular facts of *McIntyre*. They offered that it was "unwise to announce a rule of broad applicability without full consideration of the modern-day consequences" and did not find such "relevant contemporary commercial circumstances" were presented in the matter.⁵ They determined the case could have been decided simply by "adhering to . . . precedents" and that it did not present the opportunity to issue "broad pronouncements that refashion basic jurisdictional rules."⁶

The current situations in two neighboring states, California and Oregon, provide ample evidence of the lack of direction provided by *McIntyre*. In *Dow v. Superior Court*, 202 Cal. App. 4th 170 (2011), the Court of Appeals for the Second Appellate District, relying on the majority's decision in *McIntyre*, held that California courts could not exercise personal jurisdiction over a foreign manufacturer based on a stream of commerce analysis, where the company did not directly ship, sell or advertise its products within the state. In contrast, the Oregon Supreme Court determined it was not bound by the decision but rather only the narrow holding of the concurrence. It then determined that a Taiwanese

² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

³ *Id.* at 2791; *see also id.* at 2785, 2788 (describing the limits of the stream-of-commerce metaphor).

⁴ *Id.* at 2788 (emphasis added); *see also id.* at 2789 ("[I]t is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.").

⁵ *Id.* at 2791, 2794 (Breyer, J., concurring).

⁶ *Id.* at 2792-93 (Breyer, J., concurring).

component part manufacturer was subject to personal jurisdiction in Oregon even though it had no direct contact with the state.⁷ The Court determined that the volume of final product containing the component sold in Oregon by another manufacturer during a two-year period – over 1,100 units – established sufficient contacts in the state for the Oregon court to exercise personal jurisdiction over the company.

Nevertheless, with the caution that the analysis is very much factually dependent, the following paragraphs provide a summary analysis and simplified list of criteria for evaluating a particular entity's risk of jurisdiction in general, risk of jurisdiction flowing from a specific incident and, finally, the risk of jurisdiction as a consequence of its dealings with affiliates, particularly subsidiaries.

2. PERSONAL JURISDICTION GENERALLY

Personal jurisdiction is the “power of a court over the person of a defendant in contrast to the jurisdiction of a court over a defendant's property[.]”⁸ Grounded in due process concerns derived from the Fourteenth Amendment to the United States Constitution, the determination of whether a court in the United States can exercise personal jurisdiction over a foreign corporate defendant focuses on whether that “defendant has certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”⁹

A plaintiff will usually attempt to establish a defendant's ‘minimum contacts’ with the forum state (i.e., the state in which the litigation was brought and/or is pending) through a theory of either general or specific jurisdiction. Plainly stated, general jurisdiction exists if the foreign defendant conducts a “continuous and systematic”¹⁰ part of its general business within the forum state, while specific jurisdiction exists when the defendant has purposely directed its activities at residents of the forum and the

⁷ *Willemsen v. Invacare Corp.*, 282 P.3d 867, 874-75 (2012).

⁸ BLACK'S LAW DICTIONARY 1144 (6th ed. 1990).

⁹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (internal quotations omitted) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹⁰ *Goodyear*, 131 S. Ct. at 2851 (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

litigation results from alleged injuries that “aris[e] out of” or are “related to” those activities.¹¹

A plaintiff may also attempt to establish ‘minimum contacts’ by asking the court to impute the jurisdictionally significant contacts of another corporate entity to the foreign defendant. In the context of the foreign-parent/U.S.-subsidiary relationship, the plaintiff will ask the court to pierce the corporate veil between the two entities and/or treat them as alter egos for purposes of determining personal jurisdiction. Similarly, separate from a jurisdictional question, a plaintiff may seek to pierce the corporate veil in the forum in which a judgment is obtained or the forum in which the parent resides once a judgment is obtained. A more detailed discussion of these theories appears below, along with a brief analysis of how each theory is implicated by alternate facts.

3. GENERAL JURISDICTION

An exercise of general jurisdiction is proper when the defendant’s “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”¹² Though “the commission of certain ‘single or occasional acts’ in a State may be sufficient to render a corporation answerable in that State with respect to those acts,” such contacts may not extend a court’s jurisdiction “to matters unrelated to the forum connections.”¹³ In other words, the general jurisdiction inquiry focuses on whether a foreign “corporate defendant’s in-state contacts [are] sufficiently ‘continuous and systematic’ to justify the exercise of general jurisdiction over claims unrelated to those contacts.”¹⁴

As stated by one federal court of appeals, “a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.”¹⁵ Because of these implications, the standard for establishing the kind of “continuous and systematic” contacts necessary for general

¹¹ *McIntyre*, 131 S. Ct. at 2788.

¹² *Goodyear*, 131 S. Ct. at 2853 (quoting *International Shoe*, 326 U.S. at 318).

¹³ *Id.*

¹⁴ *Id.* at 2854 (quoting *International Shoe*, 326 U.S. at 317).

¹⁵ *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).

jurisdiction has been described as, among other things, "exacting,"¹⁶ "fairly high,"¹⁷ and "difficult."¹⁸ Although no precise test exists, the defendant's contacts with the forum must "approximate physical presence."¹⁹ Accordingly, a court evaluating a theory of general jurisdiction will consider certain facts including, but not limited to, whether the corporate defendant:

Is incorporated in the forum state

Is licensed or authorized to do business in the forum state

Has a place of business in the forum state

Owns, rents, or leases real estate in the forum state

Has contracted with any party located in the forum state

Maintains an office in the forum state

Pays taxes in the forum state

Has a registered agent for service of process in the forum state

Has consented to be sued in the forum state

Has a bank account(s) in the forum state

Has a sales force or employees in the forum state

Maintains its corporate records in the forum state

It is important to understand that these factors would only be relevant to litigation commenced in the state in which the analysis is made. For instance, an entity's strong ties with Oregon are irrelevant to a jurisdictional analysis by a court in Iowa. Likewise, the fact that a manufacturer consented to jurisdiction in Indiana, and/or has a place of business in Indiana, would be irrelevant to

¹⁶ *Id.*

¹⁷ *Shea v. Bonutti Research, Inc.*, No. 2:10-CV-615, 2011 WL 53473, at *12 (S.D. Ohio Jan. 7, 2011) (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)).

¹⁸ *Shea*, 2011 WL 53473 at *12 (quoting *S. Sys., Inc. v. Torrid Oven, Ltd.*, 58 F.Supp. 2d 843, 848 (W.D. Tenn. 1999)).

¹⁹ *Schwarzenegger*, 374 F.3d at 801 (quoting *Bancroft & Masters*, 223 F.3d at 1086).

an analysis of personal jurisdiction if the manufacturer was sued in New York.

4. SPECIFIC JURISDICTION

Specific jurisdiction focuses on whether (1) the foreign defendant “purposefully avail[ed]” itself of the privilege of doing business in the forum state, and (2) the plaintiff’s claims arose from or are related to those activities.²⁰ In other words, to establish specific jurisdiction, the plaintiff must show that the corporate defendant purposefully directed its business activities at residents of the forum state and that the litigation arises from injuries related to those activities.²¹ When making this determination, the district court examines the relationship among the forum, the defendant, and the litigation.²² In product liability cases, plaintiffs often attempt to establish specific jurisdiction based on a ‘stream of commerce’ theory. The argument is that “placing goods into the stream of commerce ‘with the expectation that they will be purchased by consumers within the forum State’ may indicate purposeful availment.”²³ This argument is topically attractive, particularly in the case of a manufacturer in the business of making thousands or even hundreds of thousands of products, which are then shipped and sold all over the world. After all, why should such a manufacturer ‘escape responsibility’ when it ‘knew or should have known’ the product would eventually wind its way to a consuming public in a prosperous country?

As described in the introduction, the boundaries of this theory are still subject to debate. Though courts should not determine jurisdiction simply because the product leaves the loading dock of the manufacturer and ‘floats’ down a river, across an ocean and up

²⁰ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011) (alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (explaining the origin and application of specific jurisdiction doctrine since *International Shoe*, 326 U.S. 310 (1945)).

²¹ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (illuminating the ‘purposeful availment’ requirement).

²² See *Mellon Bank (E.) PSFS, Nat’l Assoc. v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992) (noting the importance of considering various relationships “in order to determine whether ‘the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there’”) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

²³ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (quoting *World-Wide Volkswagen*, 444 U.S. at 298).

another river, the fact is that large numbers of product provide the sort of temptation that some courts can't resist.²⁴ In *King*, the court stated: "Here, GM Canada, the entity who built certain vehicles for GM Corporation to distribute specifically in the United States, including Alabama, cannot genuinely maintain that it does not serve the Alabama market. Stated differently, if not Alabama, what market does GM Canada serve?"²⁵

The plurality in *McIntyre* would hold that it is not enough to demonstrate an intent to serve the U.S. market generally. In the plurality's words, "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."²⁶ To put it another way, the plurality would require the proponent of jurisdiction to demonstrate more than "the defendant might have predicted that its goods will reach the forum State."²⁷ Even the more narrowly drawn concurring opinion explicitly rejects the notion that "a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'"²⁸ The failure of the court to reach a strong consensus, or at least a majority, nevertheless made it possible for courts to interpret the consequences of placing products in the stream of commerce liberally.

Although the decisions are not consistent from state to state, entities seeking to avoid the risk of jurisdiction need to account for factors which might support a court's decision to exercise specific jurisdiction over a product manufacturer, seller, or distributor. They include, but are not limited to, whether the corporate defendant:

Sells its products directly to customers or consumers in the forum state

Designs products specifically addressing the needs of customers or consumers in the forum state

²⁴ See *Willemsen v. Invacare Corp.*, 282 P.3d 867 (2012).; see also *King v. Gen. Motors Corp.*, No. 5:11-CV-2269-AK, 2012 WL 1340066 (N.D. Ala. Apr. 18, 2012).

²⁵ *King*, 2012 WL 1340066 at *8.

²⁶ *McIntyre*, 131 S. Ct. at 2789.

²⁷ *Id.* at 2788.

²⁸ *Id.* at 2793.

2013]

PERSONAL JURISDICTION

819

Controls the distribution of products into the forum state

Has established or maintained channels for providing advice regarding its products specifically for consumers in the forum state's market

Has conducted marketing efforts specifically directed to the forum state market

Designs, manufactures, or tests its products in the forum state

Has entered into any contracts with residents of the forum state that are implicated by the litigation

For example, it is fairly easy to understand that where a manufacturer makes substantial and expensive products outside the United States and sells thousands of them directly to customers located in a particular state, the manufacturer would find itself 'hailed' into court by a court in the state to which it sent products. The analysis clouds where the products are shipped to one state but end up being distributed to others. At one end of the spectrum, it is less likely a court will extend jurisdiction where a completely separate entity takes ownership of the product and sells the product through its distribution channels to a retailer or end user. At the other end of the spectrum, a court is likely to extend jurisdiction where the manufacturer ships its products to a subsidiary that has not purchased the products or contracted with the retailer or end user, and then directs their delivery to retailers and/or users in other states.

The risk of jurisdiction is not limited to mass producers. A court is more likely to extend jurisdiction over a limited production manufacturer that makes products 'per order,' particularly to meet an exacting design required by a particular purchaser in the proposed forum state. Another example is a situation where the manufacturer assists a customer in designing the end product in which its component is installed. While *McIntyre* involved limited distribution (one product is indeed extremely limited) but strong indications of McIntyre's desire the product be sold in every state in the United States, the fact that the Supreme Court did not exercise jurisdiction was based more on the consideration of a lack of 'manifest intent' that the product would end up in New Jersey rather than the limited nature of the distribution.

5. ALTER EGO/PIERCING THE CORPORATE VEIL

Neither *Goodyear* nor *McIntyre* addressed, and therefore did not limit or expand existing case law, permitting a plaintiff to establish jurisdiction over a corporate defendant through an affiliate in certain limited situations. When a basis for personal jurisdiction over a foreign corporate parent cannot be established based on its direct contacts with the forum state, the plaintiff will often ask the court to impute the jurisdictionally significant contacts of a U.S. subsidiary to the parent. In essence, this amounts to a request that the particular court ignores the corporate separateness (or “pierce the corporate veil”) of the parent and subsidiary and treat them as “alter ego[s],” or one entity, for purposes of determining personal jurisdiction.²⁹ Generally stated, under the alter ego analysis, “a non-resident parent corporation is amenable to suit in the forum state if the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction.”³⁰ In other words, an alter ego analysis examines the corporate structure of and the relationship between the companies, and usually turns on whether the parent exercises excessive ‘domination and control’ over the subsidiary. While the factors used to make this determination vary state-by-state, the sharpest focus tends to be on whether the subsidiary is adequately capitalized, and whether the corporations observe corporate formalities, and whether they avoid overlap of corporate records, functions or personnel. Overall, affiliates should avoid the following factors:

Commingling or mixing of funds and other assets of the entities

The failure to segregate funds of the separate entities

The diversion of corporate funds or assets to other than corporate uses

²⁹ See *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008) (citing courts that have endorsed the use of alter-ego theory to establish corporate jurisdiction).

³⁰ *Id.* (quoting *Danton v. Innovative Gaming Corp.*, 246 F. Supp.2d 64, 72 (D. Me. 2003)).

2013]

PERSONAL JURISDICTION

821

The parent's treatment of the assets of the subsidiary as its own

The failure to issue stock or to obtain authority to issue stock

The parent's holding out that it is liable for the debts of the subsidiary

The failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities

The failure to maintain other legal formalities, such as the holding of meetings or approval of major actions

Confusingly similar names among the entities

Identical ownership in both entities

Same directors and officers in both entities

Same individuals responsible for the supervision and management of the day-to-day activities of both entities

The parent's approval of the day-to-day transactions of the subsidiary

The use of the same office or business location by both entities

The employment of the same employees and/or attorney by both entities

The failure to adequately capitalize the subsidiary

The absence of separate assets in the subsidiary

The use of a subsidiary as a mere shell, instrumentality or conduit of the parent

The concealment and misrepresentation of the identity of the responsible ownership, management and financial interests in the entities, or the concealment of business activities

The failure to maintain arm's length relationships among related entities

The use of the subsidiary to procure labor, services or merchandise for the parent

The diversion of assets from the subsidiary by or to the parent

The manipulation of assets and liabilities between the entities so as to concentrate the assets in the parent and the liabilities in the subsidiary

The contracting by a subsidiary with a third-party with the intent to avoid performance of the contract by use of the subsidiary as a shield against liability

The use of the subsidiary as a subterfuge for illegal transactions

The formation and use of a subsidiary to transfer to it the existing liabilities of the parent

It is not necessary for all of the foregoing factors to be present before a court will treat two companies as alter egos. Likewise, one factor standing alone is usually insufficient. Nevertheless, the more factors that are present, the more likely it is that a court will exercise jurisdiction over the parent based on the relevant contacts of a subsidiary. Moreover, as the factors demonstrate, piercing the corporate veil is a fact-dependent inquiry, making it difficult to accurately predict whether a court will exercise jurisdiction under this theory in any particular case.

6. CONCLUSION

Courts continue to apply inconsistent approaches to the exercise of personal jurisdiction over manufacturers placing products in the 'stream of commerce' despite the conservatism expressed in *Goodyear* and *McIntyre*. Predicting consequences will continue to prove difficult, and the Supreme Court may need to revisit the issue.