

Product Liability

Court Clarifies Personal Jurisdiction Rules

SOME SUITS INVOLVING FOREIGN MANUFACTURERS CAN'T BE FILED IN STATE COURTS

By **LAURA A. TORCHIO** and
JEFFREY J. WHITE

Unlike other areas of the law, the critical moment in products liability cases often takes place before a single document has been produced or a deposition taken. Many cases either gain traction or reach an unceremonious end during the motion to dismiss phase, when concepts such as lack of personal jurisdiction, preemption, and *forum non conveniens* are debated by both sides.

As the global marketplace continues to grow at an exponential rate, courts have been faced with resolving the tension between allowing the plaintiff to choose a forum and the due process concerns that are at stake when a defendant is sued in a jurisdiction where it has limited contacts. In 2011, the U.S. Supreme Court issued two significant decisions that attempt to provide clarity and guidance on one such personal jurisdiction issue, namely, whether a plaintiff can file suit in a state where a foreign manufacturer's products are sold and ultimately cause injury or even

In *McIntyre*, the plaintiff seriously injured his hand at his workplace in New Jersey while operating a machine manufactured by the defendant manufacturer. The defendant was incorporated in and had its operations in England. On the one hand, several facts weighed against the exercise of personal jurisdiction in New Jersey: (1) the defendant did not advertise in New Jersey; (2) it did not have an office there; (3) it did not pay taxes there or own property in the state; and (4) it never sent its employees to New Jersey.

On the other hand, the defendant marketed its products through a distributor located in the United States. Further, its officials attended trade shows in the United States (although never in New Jersey) and up to four of its machines ended up in New Jersey, including the one that was involved in the plaintiff's accident. Based on this fact pattern, the New Jersey Supreme Court held that the state had jurisdiction over the defendant manufacturer because the

Alito concurred in the plurality opinion, agreeing that the facts did not support an exercise of personal jurisdiction by the New Jersey Supreme Court over the defendant. Justice Breyer declined to join the hard-line no-jurisdiction rule established by the plurality. He emphasized that advances in technology may change the rules of personal jurisdiction and, thus, he preferred to wait for a case that presented such facts and confronted the issue of modern technology.

Justice Ruth Bader Ginsburg, joined by Justices Sonia Sotomayor and Elena Kagan dissented, concluding that the plurality opinion went against precedent, in particular the stream of commerce doctrine established in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Foreign Subsidiaries

On the same day as it issued *McIntyre*, the Court also issued another decision that will have lasting impacts on personal jurisdiction over foreign manufacturers. In *Goodyear*, two young boys from North Carolina were killed in a bus accident that occurred in France. The boys' parents brought suit in North Carolina state court, alleging in part that the accident was caused by a defective product manufactured in Turkey by three foreign subsidiaries of Goodyear USA, which were organized and operated in Turkey, France, and Luxembourg.

The three foreign subsidiaries argued that North Carolina lacked the authority to exercise personal jurisdiction over them because (1) they manufacture tires for the European and Asian markets; (2) they do not solicit business in North Carolina; and (3) they do not ship or sell their tires to North Carolina customers. The defendant, Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the court's jurisdiction.

The Court of Appeals of North Carolina held that the state had general personal jurisdiction over the foreign manufacturers because they placed their products in the stream of commerce without limiting the possibility that their products may be sold in North Carolina.

In a unanimous decision, the Supreme Court reversed the decision of the North Carolina court, holding that the stream of commerce doctrine was an inadequate basis for the exercise of general personal jurisdiction over the foreign subsidiaries. The Supreme Court did not abandon the stream of commerce doctrine entirely, as it noted that it may be sufficient to establish specific personal jurisdiction; however, the doctrine was insufficient to demonstrate "purposeful availment" and "continuous and systematic" contacts



Laura A. Torchio



Jeffrey J. White

with the forum state necessary for general personal jurisdiction.

Notably, solely on the grounds that such argument was not timely, the Supreme Court refused to address the respondents' "single enterprise" argument (that is, that the Court should merge Goodyear USA with its foreign subsidiaries, thereby extending its authority to exercise personal jurisdiction over the former to the latter).

Nationwide Distribution

Both *McIntyre* and *Goodyear* protect foreign manufacturers from products liability claims brought in state court where the foreign manufacturer does not specifically market in the forum state nor intends to invoke or benefit from the forum state's laws. As presented in *McIntyre*, at least one way to avoid exposure to U.S. products liability laws is to target the U.S. market generally, such as through a nationwide distributor network.

However, while both *McIntyre* and *Goodyear* establish limitations on a state court's authority to exercise personal jurisdiction over foreign manufacturers in lawsuits involving products liability claims, neither affords absolute protection from U.S. products liability laws. First, it is unclear whether either decision extends protection from lawsuits brought in federal court. Second, as Justice Breyer suggested in *McIntyre*, rules regarding personal jurisdiction may quickly change with the rise of globalization and Internet-based marketing.

Finally, to the extent a foreign manufacturer has a parent company located in the United States, the Supreme Court in *Goodyear* suggested that personal jurisdiction may be extended to foreign subsidiaries if the plaintiff timely argues that the parent and its subsidiaries should be regarded as a single "unitary business," thereby extending the state court's personal jurisdiction over the U.S. parent corporation to the foreign subsidiaries. Accordingly, this aspect of personal jurisdiction remains in flux and will continue to generate a great deal of litigation in products liability cases. ■

Rules regarding personal jurisdiction may quickly change with the rise of globalization and Internet-based marketing.



death to the user. (Note: As referenced in the Supreme Court's decisions and as used throughout this article, a foreign manufacturer refers to a manufacturer not located in the United States).

In each of its decisions — *J. McIntyre Machinery Ltd. v. Nicaastro*, 180 L. Ed. 2d 765 (U.S. 2011) and *Goodyear Dunlop Tires Operations S.A. v. Brown*, 180 L. Ed. 2d 796 (U.S. 2011) — the Supreme Court reaffirmed that a state court may only exercise personal jurisdiction over a foreign manufacturer if the manufacturer "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." In doing so, the Supreme Court rejected the "stream of commerce" doctrine, which allows a plaintiff to file suit in a state if the foreign manufacturer knew or reasonably should have known that its products would ultimately be sold in a particular state.

defendant "knew or reasonably should have known" that its products could have been distributed and sold in any of the 50 states and because it failed to take reasonable steps to prevent the distribution of its products in New Jersey.

The Supreme Court reversed the New Jersey Supreme Court decision. In a plurality opinion, Justice Anthony Kennedy emphasized that the exercise of personal jurisdiction requires some act by the defendant that is purposefully directed at the forum state and something more than placing its product in the stream of commerce to establish a substantial connection between the defendant and the forum state. Thus, while the foreign manufacturer may have targeted the United States as a whole, Justice Kennedy concluded that it did not specifically target New Jersey so as to subject itself to personal jurisdiction.

Justice Stephen Breyer and Justice Samuel

Laura Torchio is a member of Robinson & Cole's Business Litigation Section. Her practice includes a range of complex commercial litigation matters in state and federal court, with a particular focus on products liability litigation. Jeff White is a member of the firm's Appellate Practice Team. He has successively argued appeals before the Connecticut Supreme and Appellate Courts and has also handled appeals in several other federal and state appellate courts. His trial practice focuses on products liability litigation.



Present A Corporation's Human Face At Trial

TO COMBAT ANTI-BUSINESS BIAS, DEFENSE SHOULD FOCUS ON EMPLOYEES

By **DANIEL K. WEBB** and
J. DAVID REICH

In order to represent a large corporation successfully in a civil trial, counsel needs to put a human face on the entity. Critical to this process is the identification of employees who will be effective fact witnesses, selection from among them of an appropriate corporate representative to sit at counsel table, and witness preparation that takes into account special challenges facing corporate witnesses. These efforts by counsel to personalize the corporation and its actions are important for several reasons.

Jurors often understand their role to be dispensers of justice. They will not give you a verdict unless their sense of justice requires it. But it is difficult to tap into their sense of justice on behalf of a distant, faceless entity with a market capitalization of \$25 billion. If a corporation's defense is based largely on the trial testimony of paid expert witnesses who have no stake in the outcome of the case and excerpts from business

executives' deposition testimony read by counsel to the jury as a sedative, a verdict against the company is more likely. A company often has a fighting chance only when jurors start to view it as a group of individuals with whom the jurors can identify.

So, for example, in defending a products liability case, counsel should consider using one of the engineers or chemists who designed the product as the corporate representative sitting at counsel table. In order to return a verdict against the corporation, the jurors will have to look this hard-working employee in the eye and say that what he did was wrong, which is more difficult than judging an abstract entity.

Testimony from corporate employees is also important in combating prejudice. Most available research confirms what many business leaders suspect: Civil juries treat corporate defendants less favorably than individual defendants, both in determining liability and in awarding damages.

Civil juries also expect more of large corporations than of small businesses. The extent of

prejudice may vary depending on specific circumstances, such as whether the corporation employs people in the community and has a good reputation or whether the claims involve serious personal injury or fraud instead of commercial harm (a failed business venture, for example) or negligence, but at least some jurors will always come to court with bias against a large corporate litigant.

The debate among scholars over whether this bias is due to an anti-business prejudice, a "deep pockets" approach or an expectation of a higher degree of care from a corporation matters little to the attorney representing a corporation at trial. Regardless of the reasons for the bias, it is critical to get jurors to focus instead on the facts and the law and to honor their oaths to be fair.

Admirable Characteristics

Bring to the courtroom real people from the corporation who said and heard the things that are critical to the case. Have them explain how they do their jobs. In effect transform the

dispute to one among individuals. Attempt, through this testimony, to imbue the corporation with admirable characteristics of the people who work for it. If you are successful, your adversary's attempts to build a case based on bias and stereotypes will likely backfire: Jurors will resent her attempt to gain a verdict based on the theory that this case is just another example of corporate greed and indifference.

What are the qualities of an effective corporate representative? Of effective company fact witnesses?

Jurors look to corporate representatives for both knowledge and accountability. It is thus far better for a corporate representative to be chosen from those employees who will be designated as fact witnesses at trial. The representative should sit through the entire trial if possible and not leave for phone calls and meetings. (The representative is exempt from the rule on witnesses and thus can sit at counsel table throughout the trial.) He

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also needs to be able to dedicate sufficient time to preparing to testify. The representative's demeanor should reflect confidence in the case. He should be a senior enough employee to convey that the company takes the case seriously and is accountable for its actions. At the same time, the representative should be "hands on" enough to have detailed knowledge of at least some of the events at issue in order to avoid appearing as a token. Because your adversary may be able to call your corporate representative as an adverse witness in her case, the representative must be able to handle hostile examination effectively as well.

More generally, because any witness from the company becomes its face at the trial, it is particularly important that jurors be able to identify with each witness: someone who shows up at work every day and actually designs products that consumers use or negotiates output contracts with natural gas companies or manages the bank loan that is the subject of the lender liability suit. The witness should be effective in explaining things: If she has a background in speaking to professional associations or making presentations at employee training seminars, so much the better. Above all, the witness should project honesty and trustworthiness.

It is a rare representative or witness who excels in all categories. Fortunately, a corporation is permitted to pick its trial representative and will often have a choice among several alternatives. Although the politics of selecting a corporate representative can be challenging, outside counsel needs to have a relationship with his client such that he can give his candid opinion regarding which employees will be most effective. An outside jury consultant can be particularly helpful in navigating any difficult waters here.

Identifying effective corporate witnesses gets you only part way home. Witness preparation, especially for cross-examination, is also critical. In our experience, the drill here is the same as with other witnesses, with a few exceptions.

Often the more senior a corporate witness is, the greater is the number of attorneys involved in preparing her. This is understandable, but can be counterproductive if advice to the witness winds up being contradictory, or so detailed that comprehension and retention are difficult. It is preferable to use a limited number of attorneys and to iron out as many differences as possible among them in advance of the witness preparation sessions.

Because a corporate witness testifies as a representative of the company, his level of seniority raises unique challenges on cross-examination,

regardless of whether he wears boots or loafers. Lower-level employees may lack personal knowledge of the bigger issues in the case (for example, whether a product's design incorporates a certain type of technology), and senior employees may lack knowledge of the details of day-to-day operations (e.g., how a particular part is manufactured).

'I Don't Recall'

A skilled adversary can drive this point home through a long list of detailed questions to which the witness responds "I don't know" or "I don't recall," making it appear that the company's left hand doesn't know what the right is doing or that the company is attempting to hide the ball, even when it is unreasonable to expect the witness to know or remember the details. Part of the problem is that jurors often have unreasonable expectations of what details senior officers should know about their company.

One simple and direct way for a corporate witness to avoid repeatedly answering "I don't know" to such questions is to state first what he does generally know, and then explain why he is not familiar with a particular detail. Counsel also should see to it that senior executives set aside sufficient time to prepare to testify. If documents are missing without a good explanation or no employee can remember who did some-

thing, the corporate entity itself will likely stand out as the target.

A third challenge in corporate witness preparation concerns the testimony's scope. Expert witnesses are an important part of complex trials. However, in our view, their role should be minimized. An expert is rarely the right storyteller and should never be a company's spokesman at trial. If possible, corporate witnesses, not an expert, should explain how the company sells its goods and how it has been wronged.

If your corporate client is the plaintiff, avoid putting the damages expert on as the last witness. Instead, put a corporate witness on who can put a human face on the damages numbers by, for example, describing the impact on the company's employees of the defendant's actions. The jury — and, with luck, your client — will thank you for it. ■

Dan K. Webb, a partner at Winston & Strawn, and J. David Reich, a partner at Reich & Paolella, concentrate on civil, regulatory and white-collar cases. Webb, Winston's chairman, previously served as the U.S. attorney for the Northern District of Illinois. Reich, who is based in New York, previously served as an assistant U.S. attorney for the District of New Jersey.



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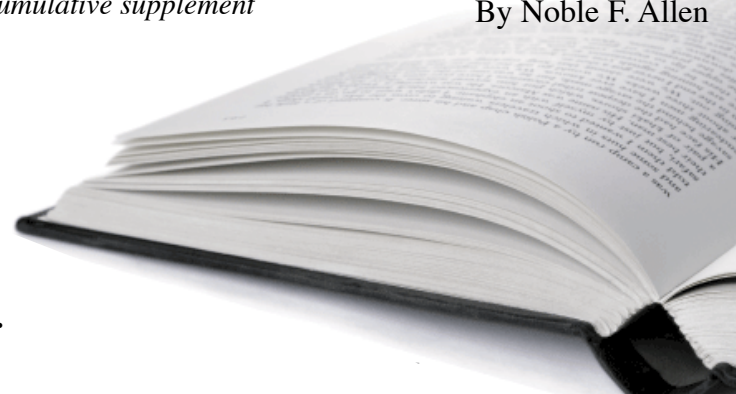
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