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GENERAL JURISDICTION OVER FOREIGN MANUFACTURERS

Prepared by

Daniel Q. Harrington

Member, Subrogation and Recovery

Cozen O'Connor | P: 215.665.2126 | F: 215.665.2013 | dharrington@cozen.com

Philip T. Carroll

Member, Subrogation and Recovery

Cozen O'Connor | P: 312.382.3147 | F: 312.382.8910 | pcarroll@cozen.com

Elliott R. Feldman, Chair
National & International
Subrogation & Recovery Department
Cozen O'Connor
P: 215.665.2071 | F: 215.701.2071
efeldman@cozen.com

Kevin J. Hughes, Vice-Chair
National & International
Subrogation & Recovery Department
Cozen O'Connor
P: 215.665.2739 | F: 215.701.2439
khughes@cozen.com



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A DOOR CLOSSES, A WINDOW REMAINS (SLIGHTLY) OPEN: THE AGENCY THEORY OF GENERAL JURISDICTION

In our increasingly globalized economy, there is a growing need to establish jurisdiction in U.S. courts over foreign manufacturers of defective products. Recent legal developments will, in some cases, make that task more daunting.

Back in 1987, in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, the justices of the U.S. Supreme Court issued multiple, conflicting answers to the question regarding the degree of “contact” a foreign manufacturer must have with a given state in order to properly be subjected to the jurisdiction of the courts of that state, consistent with the requirements of the Due Process Clause of the U.S. Constitution. Because none of the opinions in *Asahi* were adopted by a majority of the justices, confusion reigned on this topic over the ensuing 24 years. Amidst that confusion, a number of state and lower federal courts concluded that a foreign manufacturer that utilizes a domestic distributor to market the manufacturer’s products throughout the United States can fairly be subject to jurisdiction in any of those states where the product causes injury. See, e.g., *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998); *In Re: Perrier Bottled Water Litigation*, 754 F. Supp. 264, 267 (D. Conn. 1999); *Tobin v. Astra Pharmaceuticals*, 993 F.2d 528, 542-545 (6th Cir. 1993); *Smith v. Intex Recreation Corp.*, 755 F.Supp. 712, 716 (M.D. La. 1991); *Abel v. Montgomery Ward & Co.*, 798 F. Supp. 322, 326-327 (E.D. Va. 1992); *Warren v. Honda Motor Co., Ltd.*, 669 F. Supp. 365, 370 (D. Utah 1987); *Fogle v. Ramsey Winch Co.*, 774 F. Supp. 19, 22 (D.D.C. 1991); *Hawes v. Honda Motor Co., Ltd.*, 738 F. Supp. 1247, 1251 (E.D. Ark. 1990); *DeMoss v. City Market, Inc.*, 762 F. Supp. 913, 919 (D. Utah 1991); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980). The following is a typical statement of the rationale behind such a conclusion:

A manufacturer’s awareness of the distribution system, through which it receives economic and legal benefits, justifies subjecting the manufacturer to the jurisdiction of every forum within its distributors’ market area ... Accordingly, a manufacturer that knows its products are distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it would be subject to the jurisdiction of every state.

Charles Gendler & Co. v. Telecom Equipment Corp., 102 N.J. 460, 508 A.2d 1127, 1138 (1986).

In *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780, 2011 U.S. Lexis 4800, decided June 27, 2011, a majority of the justices of the Supreme Court snuffed out the above argument for exercising jurisdiction over foreign manufacturers in U.S. courts. In *McIntyre*, the plaintiff had filed suit in New Jersey, where he had been injured by a scrap metal shearing machine manufactured by McIntyre, a U.K. corporation. McIntyre sold its machinery in the United States exclusively through an Ohio-based distributor, and sought to serve the entire U.S. market. McIntyre’s U.K. personnel traveled to the United States to promote the sale of its products at trade shows, although no McIntyre personnel had traveled to New Jersey (the number one market in the United States for scrap metal processing, according to the *McIntyre* dissent) as part of this marketing effort. As many as four McIntyre machines had found their way into New Jersey, including the machine that had injured the plaintiff, Nicastro.

Consistent with its holding in *Gendler v. Telecom*, quoted above, the New Jersey Supreme Court held that the fact that McIntyre had a distributor that served a nationwide market, including New Jersey, and the fact that one of McIntyre’s products had found its way into and caused injury in the state was sufficient to permit a New Jersey court to exercise jurisdiction over McIntyre for the injury claimed. However, six of the nine U.S. Supreme Court justices (a four member plurality and two concurring justices) disagreed, so McIntyre got off, “scot free.”

The impact of *McIntyre* will be most acutely felt in those cases where the retailer and other intermediaries in the chain of distribution are bankrupt, out of business, uninsured or underinsured, or where such middlemen have been immunized from liability, typically by dint of “tort reform” legislation. Further, many domestic manufacturers will inevitably argue that the reasoning of *McIntyre* should also protect them from suit in states where their products are sold exclusively through out-of-state distributors.

The rationale of the plurality opinion in *McIntyre*, to which only four justices subscribed, could logically lead to a bizarre scenario in which a foreign manufacturer which utilizes a nationwide distribution network might have ample jurisdictional contacts with the United States as a whole, but not with any one of our individual states.

Apparently, the four justices who signed on to the plurality opinion would require a defendant to engage in conduct that was specifically “targeted” at the forum state. This should mean that a five member majority of the Court, consisting of the three dissenters and two concurring justices (the concurrence comprising an odd pairing of liberal-leaning Justice Breyer and normally staunchly conservative Justice Alito) would require something less than “targeted” conduct, although it is now clear that something more than a domestic distributor serving a region which includes the forum would be required in order to establish jurisdiction, at least in the absence of facts supporting the “agency” argument discussed below. The parameters of what “more” is now required in order to exercise jurisdiction over a foreign manufacturer will have to be developed through lower court decisions, pending the next pronouncement by the Supreme Court.

The Supreme Court issued a second decision regarding jurisdictional issues on June 27, 2011, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2011 U.S. Lexis 4801, that is unlikely to have a similarly profound impact upon future litigants. In *Goodyear*, a unanimous court held that the parents of two boys who were killed in France, allegedly as a result of a defective tire manufactured in Turkey by a Turkish subsidiary of Goodyear, could not sue the Turkish subsidiary, and other European Goodyear subsidiaries involved in the tire’s chain of distribution, in North Carolina where the parents resided. While the Turkish and other foreign Goodyear subsidiaries’ tires were manufactured and marketed to serve the European and Asian markets, the plaintiffs had based their jurisdictional argument upon the fact that a small percentage of the foreign subsidiaries’ tires had been distributed within North Carolina by other Goodyear U.S.A. affiliates, typically in response to custom orders to equip specialized vehicles. Of course, none of the tires distributed in North Carolina played any role in the fatal accident in France and, moreover, the specific type of tire that was involved in the French accident had never been distributed in North Carolina. Nevertheless, the North Carolina trial and appellate courts had concluded that the fact that the “stream of commerce” had caused certain of the European subsidiaries’ tires to end up in North Carolina justified the exercise of jurisdiction over those foreign subsidiaries in a case involving an accident which did not occur in the state, and which did not involve any of the subsidiaries’ products that had been distributed in the state.

The fact that the *Goodyear* decision was unanimous, and was authored by Justice Ginsburg, perhaps the most liberal justice on the Court, is a signal that the decision will not break new ground in jurisdictional jurisprudence. The decision instead seems to represent a rare, recent example of the Court accepting a case, not to resolve a rift among lower courts, or to interject itself into a festering political dispute, or to make broad policy statements, but rather simply to right a wrong and do justice in a specific case. The North Carolina Court of Appeals decision under review was abysmally off-base, at least in terms of its reasoning, if not its outcome.

The most interesting aspect of the Goodyear decision is probably the brief, concluding section in which the Court declined to address, on procedural grounds, the plaintiffs’ apparent eleventh-hour argument that Goodyear U.S.A.’s jurisdictional contacts with North Carolina – which the parent corporation had conceded were sufficient to subject it to general jurisdiction in the state – should be imputed to Goodyear’s foreign subsidiaries. The Court cited, in passing, a law review article suggesting that the standard for such an argument was comparable to the standard for “piercing the corporate veil” under an “alter ego” theory, but eschewed any consideration of the argument, since it had not been timely raised in the lower courts.

Those who have attempted to pierce the corporate veil in order to pursue an alter ego theory of imputed corporate liability can attest that it usually presents a difficult, and most often insurmountable, challenge. Foreign manufacturers know enough to maintain the minimal corporate formalities between themselves and their subsidiaries that are required to avoid imputed liability. Also, by definition, the alter ego theory is available only when the foreign and domestic corporations are under common ownership.

However, a recent 9th Circuit decision discusses an alternative means of attempting to impute the jurisdictional “contacts” of a domestic distributor to a foreign manufacturer, that does not present the same legal hurdles as the alter ego theory. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir., May 18, 2011). *Bauman* did not involve a product liability claim but, rather, torture, kidnapping, illegal detention and murders that were allegedly visited upon employees of Daimler Chrysler Argentina (DCA) following a 1970’s military coup in Argentina. The plaintiffs alleged that DCA facilitated these human rights violations as a means of suppressing labor unrest, and sought to

impose liability upon the parent corporation (known, at the time the litigation commenced, as DaimlerChrysler AG (DCAG)), in a lawsuit filed in California.

As was the case with the *Goodyear* plaintiffs' attempt to exercise jurisdiction over Goodyear's foreign subsidiaries in North Carolina, the argument for a California court to exercise jurisdiction over DCAG in the *Bauman* case was necessarily based upon "general" rather than "specific" jurisdiction, because any jurisdictional contacts DCAG had with California were unrelated to the alleged acts of terror and oppression in Argentina that gave rise to the plaintiffs' claims. It was undisputed that DCAG, itself, had insufficient contact with California to support a California court's exercise of general jurisdiction over it. On the other hand, Mercedes-Benz, U.S.A. (MBUSA), DCAG's wholly-owned subsidiary, and the exclusive wholesale distributor of Mercedes-Benz automobiles in the United States, indisputably had sufficient contact with California to support the exercise of general jurisdiction over it. The 9th Circuit relied upon existing case law to conclude that MBUSA's contacts could be imputed to DCAG under an "agency" theory, rather than an alter ego theory. The standard applied by the court for imputing the domestic distributor's jurisdictional contacts to the parent corporation required "that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a *representative* to perform them, the corporation's own officials would undertake to perform substantially similar services." 644 F.3d at 920. (emphasis in original).

The court noted that this was a less demanding standard than that required to pierce the corporate veil under an alter ego theory of imputed corporate liability. Particularly in a post-*McIntyre* world, the beauty of this argument for those seeking to assert jurisdiction over foreign manufacturers is that any foreign manufacturer that wants to serve the U.S. marketplace, and does not wish to assign its own employees to that task (and thereby establish direct jurisdictional contacts, at least in major U.S. markets), must either rely upon corporate affiliates, or upon independent contractors, to establish a distribution network in the United States. Significantly, in *Bauman*, DCAG's predecessors had, until 1964, relied upon independent distributors to market Mercedes-Benz automobiles in the United States. Therefore, the fact that DCAG later relied upon a subsidiary for that task does not undermine the argument that an independent distributor's jurisdictional contacts should similarly be imputed to the foreign manufacturer. As stated in *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 423 9th Cir. 1977): "It is clear that whether the alleged general agent was a subsidiary of the principal or independently owned is irrelevant". (While not specifically embracing an "agency" theory, there are a number of cases suggesting that a domestic subsidiary's jurisdictional "contacts" with the forum may, in some circumstances, be imputed to the foreign parent, without the necessity of establishing an "alter ego" relationship between the parent and subsidiary. A number of these cases are discussed in *In Re: Telectronics Pacing Systems, Inc.*, 953 F. Supp. 909 (S.D. Ohio 1997)).

The *Bauman* decision also notes that imputation of the domestic distributor's jurisdictional contacts to the foreign manufacturer "requires the plaintiffs to show an element of control, albeit not as much control as is required to satisfy the 'alter ego' test." *Bauman, supra*, 2011 W.L. 1879210, *8. However, the court's inquiry focused upon the manufacturer's right to control the distributor, rather than whether it actually exercised that control.

The "agency" theory is not a panacea, however. The factual discussion in the *McIntyre v. Nicastro* case, for example, suggests that McIntyre's U.S. distributor likely would not have been subject to general jurisdiction in New Jersey, the state where the underlying accident occurred and where the litigation was pending. While the distributor would have been subject to general jurisdiction in its home state of Ohio, it is not clear that Ohio courts would have imputed the distributor's jurisdictional contacts to *McIntyre* itself. (The agency theory was discussed as a potentially viable basis for exercise of jurisdiction over a nonresident defendant in *Priess v. Fisherfolk*, 535 F. Supp. 1271, 1279 (S.D. Ohio 1982)). Nevertheless, since the *McIntyre* decision has clearly narrowed the options available to litigants seeking to pursue claims against foreign manufacturers in U.S. courts, the agency argument may sometimes turn out to be the only potentially viable alternative.

In summary, it is important to apply the above criteria in order to determine whether there is jurisdiction in the United States against a multinational or foreign manufacturer of a product which results in a loss, whether in the United States or elsewhere. If proceedings can be initiated in the United States, there frequently are advantages in view of the broad rights of discovery and accelerated trial assignment process generally associated with the U.S. legal system.

However, in the event that the U.S. courts exercise jurisdiction over a non-U.S. defendant, then Cozen O'Connor can handle the action on your behalf in the jurisdiction where the loss occurred. We accomplish this through our attorneys based in London who are licensed in England and Wales, our attorneys based in Toronto who are licensed throughout Canada, our other foreign licensed attorneys including China, Germany, and Mexico, and through association with our network of corresponding counsel in foreign jurisdictions.

National and International Subrogation & Recovery Department

DIRECTORY OF OFFICES & CONTACT ATTORNEYS

ELLIOTT R. FELDMAN, CHAIR

1900 Market Street | Philadelphia, PA 19103

P: 800.523.2900 or 215.665.2071

C: 610.504.4323 | F: 215.701.2071 | efeldman@cozen.com

KEVIN J. HUGHES, VICE CHAIR

1900 Market Street | Philadelphia, PA 19103

P: 800.523.2900 or 215.665.2739

C: 610.420.4342 | F: 215.701.2439 | khughes@cozen.com



**COZEN
O'CONNOR**
www.cozen.com

24/7 After-Hours Hotline: 1-800-523-2900

ATLANTIC REGIONAL OFFICES

Kevin J. Hughes

P: 215.665.2739 | C: 610.420.6912

F: 215.701.2439 | khughes@cozen.com

1900 Market Street
Philadelphia, PA 19103

200 Four Falls Corporate Center, Suite 400
West Conshohocken, PA 19428

Chase Manhattan Centre
1201 North Market Street, Suite 1400
Wilmington, DE 19801

1627 I Street NW, Suite 1100
Washington, DC 20006

457 Haddonfield Road, Suite 300
PO Box 5459
Cherry Hill, NJ 08002-2220

MIDWEST REGIONAL OFFICE

James I. Tarman, Jr.

P: 312.382.3132 | C: 773.680.0824

F: 312.706.9732 | jtarman@cozen.com

Anthony J. Morrone

P: 312.382.3163 | C: 312.735.6674

F: 312.706.9763 | amorrone@cozen.com

333 West Wacker Drive, Suite 1900
Chicago, IL 60606-1293

NORTHEAST REGIONAL OFFICE

John B. Galligan

P: 212.908.1276 | C: 203.912.9359

F: 866.263.1335 | jgalligan@cozen.com

45 Broadway Atrium, 16th Floor
New York, NY 10006

NORTHWEST REGIONAL OFFICE

Mark S. Anderson

P: 206.224.1247 | C: 206.390.8907

F: 206.621.8783 | manderson@cozen.com

1201 Third Avenue, Suite 5200
Seattle, WA 98101

ROCKY MOUNTAIN REGIONAL OFFICES

Brad W. Breslau

P: 720.479.3920 | C: 303.748.5916

F: 866.765.8613 | bbreslau@cozen.com

707 17th Street, Suite 3100
Denver, CO 80202

Harvey Fruman

P: 505.820.3346 | C: 505.980.3155

F: 505.820.3347 | hfruman@cozen.com

850 Old Santa Trail
Santa Fe, NM 87505

SOUTH CENTRAL REGIONAL OFFICES

Stephen M. Halbeisen

P: 214.462.3005 | C: 214.794.3792

F: 866.433.3990 | shalbeisen@cozen.com

Comerica Bank Tower
1717 Main Street, Suite 3400
Dallas, TX 75201

Jason S. Schulze

P: 832.214.3916 | C: 832.483.3034

F: 832.214.3905 | jschulze@cozen.com

One Houston Center
1221 McKinney Street, Suite 2900
Houston, TX 77010

SOUTHEAST REGIONAL OFFICES

Peter F. Asmer, Jr.

P: 704.376.3400 | C: 704.491.7472

F: 704.334.3352 | pasmer@cozen.com

One Wachovia Center, Suite 2100
301 South College Street
Charlotte, NC 28202

Joshua Ross Goodman

P: 305.704.5940 | C: 704.650.3947

F: 866.248.2897 | jgoodman@cozen.com

Wachovia Financial Center
200 South Biscayne Boulevard, Suite 4410
Miami, FL 33131

Jefferson C. McConaughy

P: 404.572.2000 | C: 404.386.4432

F: 404.572.2199 | jmcconnaughy@cozen.com

SunTrust Plaza, Suite 2200
303 Peachtree Street, NE
Atlanta, GA 30308

WEST REGIONAL OFFICES

Thomas M. Regan

P: 619.234.170 | C: 619.520.5376

F: 619.234.7831 | tregan@cozen.com

501 West Broadway, Suite 1610
San Diego, CA 92101

Howard D. Maycon

P: 213.892.7900 | C: 310.780.6663

F: 866.537.7528 | hmaycon@cozen.com

601 S. Figueroa Street, Suite 3700
Los Angeles, CA 90017

AFFILIATED COMPANIES

National Subrogation Services, LLC

Sherri Kaufman

skaufman@nationalsubrogation.com

Jerry Nolan

jnolan@nationalsubrogation.com

P: 877.983.3600 | F: 516.949.3621
350 Jericho Turnpike, Suite 310
Jericho, NY 11753

INTERNATIONAL OFFICES

United Kingdom/Europe

Simon David Jones

P: +44 (0)20 7864 2000

C: +44 (0)7899 905315

F: +44 (0) 20 7864 2013

sdjones@cozen.com

9th Floor, Fountain House
130 Fenchurch Street
London EC3M 5DJ

Winfried F. Schmitz

German Mobile: +49 171 1215282

wschmitz@cozen.com

Canada

Raj K. Datt

P: 416.361.3200 | C: 647.808.4894

F: 866.867.7612 | rdatt@cozen.com

Pamela D. Pengelley

P: 416.361.3200 | F: 416.361.1405

ppengelley@cozen.com

1 Queen Street East, Suite 1920
Toronto, Canada M5C 2W5

Asia

Meixian Li

China Mobile: 138.114.45614

mli@cozen.com

Central/South America, Caribbean and Mexico

Blanca Quintero

P: 619.234.1700, Ext. 1815 | F: 866.715.0534

bquintero@cozen.com

501 West Broadway, Suite 1610
San Diego, CA 92101

Marcos Hazan-Cohen

P: 214.462.3029 | F: 866.765.8610

mhcohen@cozen.com

Comerica Bank Tower
1717 Main Street, Suite 3400
Dallas, TX 75201

Maritime Subrogation Services

Mika Hallakorpi

P: 866.913.0013

mhallakorpi@maritimesubro.com

45 Broadway, 16th Floor
New York, NY 10006-3792