



2015 CLM Annual Conference
Palm Desert

TENDERS INVOLVING FOREIGN MANUFACTURERS AND THEIR INSURERS

Presenters: Anthony Cempel, *West Bend Mutual Insurance Company*
Eugene LaFlamme, *McCoy Leavitt Laskey LLC*
Christopher Tribble, *McGuireWoods LLP*
Harry Veldhuis, *Great American Insurance Group*

HYPOTHETICAL/CASE STUDIES

- **US entity imports/distributes bicycle frames made in China. Weld fails during use in S. America and suit is brought in US against distributor. The manufacturer's Chinese insurer declines tender despite distributor's Additional Insured status.**
- **US entity markets and sells masonry product manufactured outside the US. During construction of a commercial building, a fire ensued from an alleged defect in the product. The GC makes claim for both the PD and cost to remove remaining product.**
- **US entity imports/distributes pedestal fans made in Taiwan. Fan alleged to be source of fire resulting in infant death. Suit filed against both manufacturer and distributor, but Plaintiff unable or unwilling to locate and attempt to gain jurisdiction on manufacturer who alleges not to have any insurance.**

Key issues for consideration:

- **Contracts between the parties – any input into design or specifications?**
- **Contacts**
 - Ongoing business relationships?
 - Contacts with jurisdiction
- **Certificate of Insurance**
 - Policy Language
 - Limits – defense inside or outside limits
- **Additional Insured status**

BASIC JURISDICTIONAL CONSIDERATIONS

Jurisdiction requires that the non-resident have “certain minimum contacts...such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington* (1945)

Two types of jurisdiction:

- Specific Jurisdiction – “Case-specific jurisdiction”
 - Focuses on the relationship between the defendant’s conduct that is at issue in the lawsuit, and the forum state.
- General Jurisdiction – “All purpose jurisdiction”
 - Focuses on the defendant’s contacts with the forum state, unrelated to the conduct at issue in the lawsuit.

SPECIFIC JURISDICTION TEST

Available for disputes that “arise out of or are connected with the [defendant’s] activities within the state.” *International Shoe*

Defendant must “purposely avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla* (1958)

Relationship between the activities and the forum State must arise “out of contacts the defendant *himself* creates with the forum state.” *Burger King Corp. v. Rudzewicz* (1985)

SPECIFIC JURISDICTION – OVERVIEW OF *MCINTYRE* PRODUCTS LIABILITY CASE

***J. McIntyre Machinery, Ltd. v. Nicastro* (2011)**

- Plaintiff Nicastro injured hand in NJ while using a metal shearing machine manufactured by defendant J. McIntyre Machinery, a British company.
- The machine was manufactured in England and sold into New Jersey through McIntyre’s U.S. distributor.
- NJ Sup. Ct. held that exercise of specific jurisdiction was proper because McIntyre knew or should have known that its products are distributed throughout the U.S. and failed to take reasonable steps to prevent distribution in NJ.
- The Sup. Ct. reversed 6-3, but the decision generated a plurality opinion that did not clarify the scope of the “stream of commerce” theory.

SPECIFIC JURISDICTION – THREE OPINIONS FROM *MCINTYRE*

J. McIntyre Machinery, Ltd. v. Nicaastro (cont.)

- Plurality opinion: Jurisdiction requires the defendant to “purposefully avail itself” of the privilege of conducting activities in the forum State. The “stream of commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures.”
- Concurring opinion: Cautioned against pronouncement of a “rule of broad applicability without full consideration of the modern-day consequences” of globalization and commerce.
- Dissenting opinion: It was “fair and reasonable” to require an international seller to defend at the place its products cause injury.

GENERAL JURISDICTION TEST

Are a corporate defendant’s contacts with the forum state so “continuous and systematic” as to render it essentially “at home” in the forum state? *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011)

- Two recent and significant U.S. Supreme Court decisions addressed jurisdiction involving foreign corporations: *Goodyear* and *Daimler AG v. Bauman* (2014)

GENERAL JURISDICTION

(1) *Goodyear Dunlop Tires Operations, S.A. v. Brown*

Issue Presented: Are foreign subsidiaries of a U.S. parent corporation subject to suit in state court on claims unrelated to any activities by the subsidiaries in the forum State?

- Two teenagers from NC die in bus accident near Paris. Parents allege that accident resulted from a defective tire manufactured in Turkey by a foreign subsidiary of Goodyear.
- NC appeals court held that general jurisdiction existed under a “stream of commerce” theory because some tires made abroad by Goodyear subsidiaries reached NC.
- Sup. Ct. reversed in a 9-0 decision, holding that such a “limited” connection was an inadequate basis to exercise general jurisdiction.

(2) *Daimler AG v. Bauman* (2014)

- Argentine Plaintiffs sought to sue Daimler AG (a German company) in California based on contacts of Daimler AG’s wholly owned subsidiary, for activities that took place entirely in Argentina.

- Court did not decide whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary.
- But, Court suggested that an agency theory is unlikely to provide a basis for exercising general jurisdiction over foreign corporations.

TAKEAWAYS – STREAM OF COMMERCE THEORY

- *Goodyear* noted that the “stream of commerce” theory has been invoked frequently in lower court decisions permitting jurisdiction in products liability cases. Holdings in *Goodyear* and *McIntyre* indicate that the “stream of commerce-plus” theory requires more than foreseeability:
 - It cannot be used to support a finding of general jurisdiction: while the flow of a manufacturer's products into a jurisdiction may bolster a specific jurisdiction argument, those ties do not warrant a finding of general jurisdiction.
 - Specific jurisdiction is not assumed simply because the foreign corporation sells to the U.S. market through a distributor and the product causes injury.
 - The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant targeted the forum State; “as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”

SPECIFIC JURISDICTION OVER FOREIGN MANUFACTURERS IN PRODUCTS LIABILITY AND COMMERCIAL CASES

Key factors in finding specific jurisdiction over foreign manufacturers:

- Existence of distribution or sales agreements to sell products within the forum State.
- A regular course of sales of defendant's products in the forum State.
- Specific “targeting” of the forum for sales (as compared to general targeting of the U.S. market).
- More than a *de minimus* amount of the defendant's products in the forum state.

USE OF GENERAL JURISDICTION OVER FOREIGN MANUFACTURERS

General jurisdiction will be a difficult basis to seek jurisdiction over a foreign manufacturer:

- *Daimler AG* – The general jurisdiction test “calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.”

Sup. Ct. did not “foreclose the possibility that in an exceptional case a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”

PRACTICAL STEPS TO ADDRESS FOREIGN JURISDICTION ISSUES

- If multiple venues have jurisdiction over a case, assess which ones provide the best opportunity to obtain jurisdiction over a foreign defendant.
- Identify the wholesaler or retailer of the product which may be subject to jurisdiction.
- If the product is a component part (i.e. battery pack) of a larger product whose manufacturer is subject to jurisdiction, file suit against the overall product manufacturer.
- Identify any insurers of the product that may be subject to jurisdiction. This is especially true in direct action states.

Risk Transfer involving tender to Foreign Manufacturer or their carrier

A US based entity imports and distributes a bicycle manufactured overseas and then sells the bicycle to retailers who sell to the final consumer. The importer is a vendor of the manufacturer’s product.

An individual purchases a bicycle and while riding same, a weld in the frame fails causing the individual to fall and sustain bodily injury. Suit is filed against only the importer who tenders the claim to the manufacturer and their insurance carrier based on the indemnification language in the purchase order and status as an additional insured under a Vendor’s endorsement in the manufacturer’s policy.

The carrier denies the tender and refuses to defend or indemnify the importer based on a provision in the policy that excludes coverage for Vendors if the loss results from any “physical change in the form of the product made intentionally by the Vendor”. The inference is that the vendor somehow specified the type of welding process and that influence the structural integrity of the weld.

The vendor challenged the denial, but the manufacturer’s insurance carrier refused to change their position. Accordingly, the vendor filed a 3rd Party Complaint against the manufacturer and a separate suit against the manufacturer’s insurance carrier for declaration of coverage, breach of contract and violation of insurance fair conduct.

It gets interesting once the court grants jurisdiction over both

Risk Transfer involving tender to Foreign Manufacturer or their carrier

A US based entity markets and sells a masonry product that is manufactured outside the US.

The product is used as part of construction in a commercial building in the US. During the construction process, a fire ensues resulting in damage to the structure. The entities product is alleged to have a manufacturing defect that potentially could result in fire.

The projects general contractor presents a claim to the entity for the fire damage as well as the cost to remove the installed product from the remainder of the structure.

The actual manufacturer of the product was out of business at the time of the product installation and subsequent fire.

Risk Transfer involving tender to Foreign Manufacturer or their carrier

A US based entity imports and distributes pedestal fans that are manufactured overseas and sells to retailers who sell to the final consumer. There are no contracts between the manufacturer and claims not to have any insurance. All of the contacts between the manufacturer and the importer/distributor are within the State of CA with all products coming through the Port of Los Angeles.

A family allegedly purchases two fans from a retailer located in the State of NY and claims that one of the two fans started fire late one evening which resulted in the death of their infant and psychological injuries to the parents.

The plaintiff attorney researches the product and names the foreign manufacturer, the importer/distributor and retailer in the lawsuit, but fails to follow through on efforts to gain jurisdiction over and serve the manufacturer based on limited information and the belief that the manufacturer is out of business. The importer/distributor continues to do business with the manufacturer.

Efforts are underway to identify other points of contact the manufacturer may have had in the State of NY through the Customs and Border Protection division of the Department of Homeland Security which requires the use of a commercial information service to search records by exporter or importer.

If it can be established that the manufacturer has other contacts within the State of NY, personal jurisdiction may be permitted and allow for the application of apportionment versus joint & several liability should the fan be determined to be the cause of the loss.