

## When can international manufacturers be sued in the US?



**BY SARAH CROFT**  
partner,  
Shook, Hardy  
& Bacon  
International  
LLP

ANY MANUFACTURERS EXPORTING products directly into the US accept the litigious culture as a commercial fact of life. In fact, some manufacturers make a conscious decision not to sell into the US for that very reason. But manufacturers outside the US are still at risk of litigation if the products they make end up there, whether by distribution by others or as a component in another product.

In this article, Sarah Croft, of Shook, Hardy & Bacon International LLP, examines two recent decisions from the highest court in the US, reaffirming that non-US manufacturers cannot be sued in a state court unless their commercial conduct has a link to that state.

The consequence of the ruling in the cases of *Goodyear Dunlop Tires Operations SA et al v Brown* [2011] and *J McIntyre Machinery Ltd v Nicastrò* [2011], the first in nearly 25 years on personal jurisdiction, is that the focus of the courts should be on the commercial conduct of the companies, rather than, for example, whether the ultimate location of a product is foreseeable. The decisions also re-emphasise the constitutional rationale for the rules on jurisdiction and redraw definitional boundaries that had become blurred.

### BACKGROUND

If a US court is to exercise authority over a defendant, US federal and state courts must have personal jurisdiction over that defendant. There are two types of personal jurisdiction.

General personal jurisdiction or 'all purpose' jurisdiction exists for any and all claims if the defendant has continuous, substantial and systematic contact with the jurisdiction, ie if the defendant is essentially 'at home' in the state. An example would be having an office in that state or actively carrying on business there.

Specific personal jurisdiction: for this 'case specific' jurisdiction to exist there is no need for the continuous and systematic contact, only that there are specific links between the claim at issue and the jurisdiction. An example would be a car accident that occurs

when the defendant is driving in the forum state.

The issue of jurisdiction over out of state defendants was last before the Supreme Court almost 25 years ago in the *Asahi Metal* case (*Asahi Metal Industry Co v Superior Court of Cal, Solano Cty*, [1987]). This case, which coined the legal phrase 'stream of commerce', produced no majority opinion on what was the rationale underpinning the question of jurisdiction. According to four of the nine justices, if a manufacturer was aware a final product was being marketed in, or, put in the 'stream of commerce' of, a particular state, this was enough to meet personal jurisdiction requirements and for the manufacturer to be subject to lawsuits there. At the same time, another four justices considered that more was needed than just foresight, finding that a 'substantial connection' must exist between the out-of-state defendant and the forum state, as well as 'an action by the defendant, purposefully directed toward the forum state.

It is perhaps no surprise that subsequently courts have struggled to apply these differing opinions, reaching over the years somewhat conflicting decisions on whether the state courts have jurisdiction over foreign manufacturers or not.

In its 2010 October term, the US Supreme Court was asked to rule on two appeals, *Goodyear Dunlop Tires Operations SA et al v Brown* and *J McIntyre Machinery Ltd v Nicastrò*, which would re-address the question of the jurisdictional reach of the US state courts. On 27 June 2011, the US Supreme Court reversed both decisions, holding that the exercise of personal jurisdiction over foreign manufacturers in these cases would be inconsistent with the provisions in the US Constitution as to due process.

### GOODYEAR DUNLOP TIRES OPERATIONS SA ET AL v BROWN

Goodyear arose out of a 2004 Paris bus accident in which two boys from North Carolina died. The parents (as administrators of the boys' estates) attributed the accident to a defective tyre made in Turkey by a subsidiary of Goodyear. The estates sought wrongful death damages in a North Carolina state court naming Goodyear USA (an

**'The focus of the courts should be on the commercial conduct of the companies, rather than whether the ultimate location of a product is foreseeable.'**

Ohio-based corporation) and three of its subsidiaries, operating in Turkey, France and Luxembourg, as the defendants.

Goodyear USA had plants and did business in North Carolina and did not contest the jurisdiction of the state court over it. The foreign Goodyear subsidiaries, which were not registered to do business in North Carolina, did argue, however, that the state court lacked jurisdiction over them. The state trial and appellate courts found that the subsidiaries were not subject to specific jurisdiction because neither the accident nor the manufacture took place in North Carolina. Both also held, however, that the foreign Goodyear subsidiaries were subject to general jurisdiction in North Carolina because the tyres, despite being designed primarily for European and Asian markets, had reached North Carolina through the 'stream of commerce'; and that this was enough to give the state court authority to adjudicate the claim.

#### **J MCINTYRE MACHINERY LTD v NICASTRO**

In the second case, a New Jersey scrap metal company employee was injured in 2001 while using a shear machine. A UK company, J McIntyre Machinery Ltd, manufactured the machine in 1995 and sold the machine to its Ohio distributor, which then sold it to the company in New Jersey. J McIntyre had never advertised in New Jersey or sent goods there but a claim was brought in the state court against the UK company and the distributor. The New Jersey trial judge dismissed the case for lack of personal jurisdiction but, in an extensive judgment, the New Jersey Court of Appeal reversed the first instance decision. Also relying on the 'stream of commerce' doctrine, it held that J McIntyre could be sued in New Jersey because it had targeted the whole US market with its distribution network and so would have known, or should reasonably have known, that its product might eventually reach consumers in New Jersey.

#### **SUPREME COURT DECISIONS**

The US Supreme Court reversed both *Goodyear* and *J McIntyre*. In doing so, in *Goodyear*, it clearly distinguished between the two types of personal

jurisdiction which, it emphasised, must not be combined when courts are addressing these issues.

In *Goodyear*, the Supreme Court unanimously agreed that general personal jurisdiction was not established on the facts because the contact by the foreign corporations with the state fell far short of the 'continuous and systematic' affiliation necessary. A small percentage of the manufacturer's tyres were distributed in North Carolina by other Goodyear USA affiliates. The court found, however, that this level of economic activity was insufficient, either as a matter of 'continuous and systematic' contact or as a matter of constitutional due process, for the courts to exercise general jurisdiction over the foreign subsidiaries because the sporadic sales through intermediaries were not related to the cause of action.

The court re-stated that in the case of out-of-state defendants, personal jurisdiction must satisfy the basic constitutional requirement that a defendant has certain 'minimum contacts' with the forum state such that the suit does not 'offend traditional notions of fair play and substantial justice' (*International Shoe Co v Washington*, [1945]).

On the issue of the flow of a manufacturer's products into the forum through the stream of commerce, the Supreme Court said that this may be relevant when considering specific personal jurisdiction but it was not relevant when looking at general personal jurisdiction. The trial court in *Goodyear* should not have merged these two concepts or the criteria for fulfilling each of them.

In *J McIntyre*, a divided Supreme Court held the allegations that the product entered the 'stream of commerce' were insufficient to establish specific jurisdiction over the UK manufacturer. While the company held a patent for the machine in question and directed the distributor with regard to US advertising and sales, the court ruled that the test for establishing specific personal jurisdiction is 'purposeful availment' of the protections of that particular state.

In other words, the company must be actively operating in the state it is being sued in, rather than just targeting the whole of the US. Since the company had never engaged in any activities in New Jersey that would reveal intent to invoke or benefit from the protection of the state's law, the court found no such 'purposeful availment' and, therefore, the New Jersey state court had no specific personal jurisdiction over the UK company. Again, the court referred to due process doctrine and held that only purposeful availment allows a finding of jurisdiction consistent with notions of 'fair play and substantial justice'.

The decision in *J McIntyre*, unlike *Goodyear*, was split. Though two of the justices agreed with the decision on the facts, they rejected the majority's reasoning. As this was not a case involving modern sales methods, however, (for example selling via a website), they were reluctant to address contemporary stream of commerce issues as the case could be decided by using existing court precedents.

#### **SUMMARY**

Despite the split in *J McIntyre*, these decisions reaffirm that non-US manufacturers cannot be sued in a state court unless their commercial conduct has a link to that state. Further, that the focus of the courts should be on the commercial conduct of the companies rather than, for example, whether the ultimate location of a product is foreseeable.

Sarah Croft, partner,  
Shook, Hardy & Bacon International LLP  
Email: [scroft@shb.com](mailto:scroft@shb.com)

*Asahi Metal Industry Co v Superior Court of Cal, Solano Cty, 480 US 102 [1987]*

*Goodyear Dunlop Tires Operations SA et al v Brown, US, No. 10-76 [2011]*

*International Shoe Co v Washington, 326 US 310 [1945]*

*J McIntyre Machinery Ltd v Nicastro US, No 09-1343 [2011]*