

LITIGATION UPDATE: FOREIGN DEFENDANTS MAY ENCOUNTER ADDITIONAL BURDENS WHEN CHALLENGING “PERSONAL JURISDICTION”

“Even if a foreign defendant does not have continuous and systematic contact with the forum state, such as retaining offices, employees, or a corporate presence in the forum state, it may still face personal jurisdiction in a United States court,” says Orrick partner Laurie Strauch Weiss, head of the Mass Torts and Product Liability Practice.

On October 19, 2011, the U.S. District Court for the District of Maryland ordered an evidentiary hearing for a Taiwanese corporate defendant. The goal of the hearing was to determine whether the foreign defendant had sufficient contacts with the State of Maryland to enable the Court to exercise “personal jurisdiction” over the defendant. This decision to order a Court hearing on the issue adds a new element of risk and potential legal liability for foreign defendants to consider when doing business in the United States.

HOW DOES PERSONAL JURISDICTION AFFECT FOREIGN DEFENDANTS GENERALLY?

Constitutional Due Process in the United States allows a court to exercise jurisdiction over a foreign defendant provided: (1) the foreign defendant has “minimum contacts” with the forum state; and (2) the exercise of jurisdiction over the foreign defendant does not “offend notions of fair play and substantial justice.” Even if a foreign defendant does not have continuous and systematic contacts with the forum state (such as retaining offices, employees, or a corporate presence in the forum state), it may still face personal jurisdiction in a United States court. A court may exercise jurisdiction over a foreign defendant that has taken advantage of conducting activities in the forum state, and therefore, has invoked the benefits and protections of the forum state’s laws. This is known as purposeful availment.

In June 2011, the U.S. Supreme Court attempted to clear up the confusion surrounding the legal standard for personal jurisdiction over foreign companies whose products are sold in the United States. The case examined whether a foreign manufacturer’s contact with the forum state was sufficient where its contacts were based on the distribution of its products by a third-party distributor (*J. McIntyre Machinery, Ltd. v. Nicastro*). However, the only clear direction from the *McIntyre* case is that the Supreme Court rejected the “foreseeability” standard as to personal jurisdiction, meaning whether the defendant could have known, knew or even expected their products to reach the forum state. The Supreme Court did not clearly resolve what contacts might be sufficient to show purposeful availment of a forum state’s “benefits and protections” in the context of national or global marketing.

The lack of clarity resulting from *McIntyre* has created a situation where a court’s interpretation of purposeful availment could vary depending upon the location of the court.

HOW DOES THE RECENT *WINDSOR* CASE AFFECT FOREIGN DEFENDANTS?

In short, *Windsor v. Spinner Industry, Co., Ltd.* gave the plaintiffs a second chance to prove personal jurisdiction and required an evidentiary hearing.

The U.S. District Court for the District of Maryland ordered that an evidentiary hearing be scheduled to determine what contacts a Taiwanese corporate defendant had with the State of Maryland. Due to the injury that the plaintiffs' toddler son sustained when the front wheel of his bicycle dislodged, the plaintiffs brought a products liability lawsuit against several defendants. The defendants included Joy Industrial Company, a Taiwanese corporation that designed and manufactured bicycle components. More specifically, the component known as the "quick release skewer" was the alleged defective component that caused the bicycle accident. Joy sold its products to third-party distributors who marketed them in every state in the United States; however, Joy had no direct contacts with the State of Maryland.

Joy moved to dismiss all claims against it for lack of personal jurisdiction. Under the Federal Rules of Civil Procedure, a defendant may move to dismiss claims before being required to file any responsive pleadings. Generally, a foreign defendant may challenge personal jurisdiction through filing motions and does not need to be concerned with the prospect of being hauled into court for evidentiary hearings at such an early stage in the case.

With respect to Joy, the district court framed the issue as follows: *Can a state exercise personal jurisdiction over a foreign corporate manufacturer when the only connection rests on the third-party distributor selling its products in that state?* The court determined that the plaintiffs had failed to prove in their legal motion papers that the court could exercise personal jurisdiction over Joy. However, instead of outright granting Joy's motion to dismiss, the district court gave the plaintiffs a second chance to prove that Joy's contacts with the State of Maryland were such that the court could exercise personal jurisdiction over Joy. The court allowed an evidentiary hearing at which all interested parties could present arguments and testimony on the issue of the foreign defendant Joy's contacts directed to the State of Maryland.

WHAT DOES THIS DECISION MEAN FOR FOREIGN DEFENDANTS IN FUTURE CASES?

Although the district court ultimately found in Joy's favor after an evidentiary hearing on November 29, 2011, this case provides instruction to foreign defendants for several potential reasons.

- Foreign defendants should be aware that some courts may be more lenient than others. Each court could potentially approach this issue differently, particularly because of the confusion surrounding what constitutes purposeful availment in the global markets. This means that some courts have different thresholds for determining what constitutes sufficient contact with the forum state and when a state can exercise personal jurisdiction over a foreign defendant.
- Challenging personal jurisdiction through dispositive motions alone may not be sufficient for a foreign defendant to have a claim against it dismissed. Foreign defendants may need to further engage in a case by preparing for evidentiary hearings at which both evidence and argument is presented to challenge personal jurisdiction.
- From a general perspective, foreign defendants should be aware that the U.S. Supreme Court decision in *McIntyre* is in many ways limited in its applicability to cases that have a similar factual scenario. Foreign defendants should look toward the law developing

post-*McIntyre* in the jurisdiction where a case is pending for guidance in challenging personal jurisdiction.

We welcome the opportunity to discuss this Litigation Update further with you. For additional information please contact Xiang Wang (xiangwang@orrick.com) or Laurie Strauch Weiss (lstrauchweiss@orrick.com).

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