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RECENT NJ APPELLATE COURT DECISION INDICATIVE OF CONTINUING UNCERTAINTY REGARDING PERSONAL JURISDICTION OVER FOREIGN MANUFACTURERS USING U.S. DISTRIBUTORS

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The past few years have seen the United States Supreme Court issue a number of important decisions on the subject of personal jurisdiction. For example, the Court's decisions in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), stressed that general jurisdiction may be exercised "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 758 n. 11 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)). Many believe that these decisions reflect a purposeful shift by the Supreme Court to narrow the scope of personal jurisdiction, although the Court's decisions do not themselves indicate that they are meant to represent any change in the law. Regardless, there is a discernible trend of lower courts more frequently granting motions challenging personal jurisdiction in the wake of these decisions than they did in the past.

Despite the Supreme Court's recent pronouncements on personal jurisdiction, it has not resolved the question of when an entity can be subjected to personal jurisdiction in a U.S. forum based solely on its placement of a product that ended up causing

injury into the "stream of commerce." The Court most recently addressed this issue in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), which arose out of injuries the plaintiff sustained in New Jersey due to an allegedly defective metal-shearing machine that J. McIntyre Machinery, Ltd. manufactured in England, where it was incorporated and operated.

The Court held that there was no personal jurisdiction over McIntyre in New Jersey despite the fact that (1) a U.S. distributor agreed to sell McIntyre's machines in the U.S., (2) McIntyre officials attended trade shows in the U.S., albeit not in New Jersey, and (3) as many as four McIntyre machines, including the one involved in the incident, ended up in New Jersey. A plurality of the Court (four Justices, one fewer than the five needed for a majority) held that simply placing a product in the stream of commerce would not permit the exercise of specific personal jurisdiction unless the defendant could be said to have targeted the forum; as a general rule, the plurality added, it would not be sufficient that the defendant might have predicted that its goods would reach the forum state.

Unfortunately, the Supreme Court's fragmented decision in *Nicastro*, although it certainly did not

render manufacturers more susceptible to specific personal jurisdiction in the U.S., provides uncertain guidance going forward because the plurality's decision does not constitute the holding of the Court. Rather, a two-justice concurring opinion that decided the case on narrower grounds constitutes the opinion of the Court.

The Court's failure to enunciate a straightforward standard for applying the "stream of commerce" theory in the context of specific personal jurisdiction has left manufacturers and distributors alike in the difficult position of having to guess when and where personal jurisdiction might be exercised under such a theory. The recent decision of the Superior Court of New Jersey, Appellate Division in *Patel v. Karnavati America, LLC, et al.*, No. A-2737-13T4 (N.J. Super. Ct. App. Div. Oct. 9, 2014), which surprised some, if not many, of those following the case, is illustrative of the uncertainty manufacturers and distributors continue to face in planning their business operations in anticipation of jurisdiction issues.

In *Patel*, the court held that New Jersey courts could not exercise personal jurisdiction over Karnavati Engineering, Ltd., an Indian corporation that manufactured a tablet press machine alleged to have caused injury to the plaintiff in New Jersey. In so holding, the court rejected the plaintiff's argument that there was specific personal jurisdiction over Karnavati because it sold a machine—in a foreign country—to a New Jersey corporation with knowledge that the machine was going to be delivered by the distributor for use by another corporation in New Jersey. The court added that there was very little interaction between the Indian manufacturer and the New Jersey corporate buyer, the purchase agreement was structured entirely in India, the machine was not integral to the New Jersey user's business, and the record did not contain evidence of the user in New Jersey closely monitoring the manufacturing process to ensure compatibility with its operations.

The court's analysis leaned heavily on the Supreme Court's plurality decision in *Nicastro*, referring to "a post-*Nicastro* stream of commerce theory," and appeared to rely on it (rather than the concurring opinion) as binding authority. The Appellate Division

also distinguished one of its previous personal jurisdiction decisions, *Cruz v. Robinson Engineering Corp.*, 253 N.J. Super. 66 (N.J. Super. Ct. App. Div. 1992), as part of its reasoning, but it nevertheless chiefly relied on the plurality in *Nicastro*.

While *Patel* provides another example of the trend of courts moving away from liberal application of personal jurisdiction over foreign manufacturers, not all courts share the *Patel* court's view. In *Hatton v. Chrysler Canada, Inc.*, 937 F. Supp. 2d 1356 (M.D. Fla. 2013), for example, a Florida federal court held that it could exercise specific personal jurisdiction over Chrysler Canada under similar circumstances. In *Hatton*, the court found that the exercise of specific personal jurisdiction was proper because "Chrysler Canada assembled the subject Chrysler 300 M for Chrysler United States, which distributes nationally in the United States, and therefore Chrysler Canada invoked the benefits and protections of these states, including Florida." Contrary to the court in *Patel*, the court in *Hatton* expressly noted that the plurality decision of the Supreme Court in *Nicastro* had no effect on the law applicable in Florida federal courts because it did not constitute the opinion of the Court.

In the wake of decisions such as those in *Patel* and *Hatton*, foreign product manufacturers and U.S. distributors are left with the unsettling circumstance that a foreign manufacturer's risk of being subject to U.S. litigation will often depend on the court in which a case is brought, and possibly even the specific judge assigned to handle the case, at least where a manufacturer sells its product outside the U.S. to a distributor that it knows is going to sell that product within the U.S. Accordingly, it is important that manufacturers and distributors consult with counsel before entering into (or continuing with) these types of business ventures.

Foreign manufacturers need to determine, as best as possible, where and to what extent they might be subject to U.S. liability based on their relationship with a U.S. distributor. Distributors will want to obtain the same information, as the extent to which an injured plaintiff looks to the distributor for compensation arising out of injury caused by an allegedly defective product will often depend on

whether the manufacturer is subject to suit in the U.S.

U.S. distributors can protect themselves by ensuring that their contracts with foreign manufacturers include terms that (1) require the manufacturer to indemnify them for liability arising out of a defective product and obtain insurance naming the distributor as an additional insured for these types of claims, and (2) subject the manufacturer to U.S. law and a convenient forum, at least with regard to disputes between the distributor and manufacturer. Distributors also should ensure that they are given the benefit of a vendor's endorsement and insurance rights in any purchase or distribution agreement. Manufacturers, on the other hand, should take care to set up their operations to avoid unanticipated jurisdiction in the U.S., and to protect themselves from claims by injured parties and/or distributors wherever possible. For both manufacturers and distributors, a few hours with their counsel and modest expense prior to entering into a business relationship, can potentially save hundreds of hours of attorney time and millions of dollars of expense/liability after an incident.

The Supreme Court may one day soon be presented with a case that requires it to resolve all remaining ambiguity about the "stream of commerce" theory of specific personal jurisdiction. Until then, those who may be affected must be vigilant in protecting their rights, both during the contracting process, and after an incident occurs and litigation is commenced. ♦

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