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Expanding State Court Jurisdiction Over Foreign Car Manufacturers: Crose v. Volkswagenwerk Aktiengesellschaft

In recent years the worldwide distribution network of major car manufacturers has posed serious jurisdictional problems for federal and state courts. With the advent of long-arm statutes, the problem has in part been alleviated when the injury caused by a negligently manufactured car occurrs within the jurisdiction where suit is brought.[1] Jurisdictional problems still exist, though, for the plaintiff who files a complaint in a jurisdiction seeking to recover damages from a foreign manufacturer for an injury which occurred outside the jurisdiction. In dealing with such claims, courts have reached different results in determining whether in personam jurisdiction over the manufacturer can be established.[2]

One approach, adopted by the Washington Supreme Court in *Crose v. Volkswagenwerk Aktienqesellschaft,*[3] is to find the auto manufacturer present in the forum state under the traditional "doing business" statute, and thus amenable to suit. The critical issue in *Crose* was whether the requirement that a corporation do business within a state is fulfilled by the presence of a "well-organized, fully-integrated worldwide chain of distribution" of that corporation's product within the state. If so the defendant corporation would be subject to the jurisdiction of that court on a claim for damages arising out of an injury which occurred wholly outside the forum state, and service of process could be effected on an independent dealer. In answering in the affirmative, the court not only greatly expanded the bounds of its jurisdiction, but also raised serious questions about the concepts of agency, corporate identity and the extraterritorial reach of state courts.

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[1] Long-arm statutes generally provide for jurisdiction when the tort involved occurred within the state. Typical is the Washington statute, which submits a person "to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:... (b) The commission of a tortious act within the state." WASH. REV. CODE § 4.28.185 (1) (1962).

[2] *Cf.* Delagi v. Volkswagenwerk AG of Wolfsburg, Germany, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972). *See also* Lynch v. Volkswagen of America, Inc., 322 F. Supp. 1286 (D. Minn. 1970); Ritter v. Volkswagen Werk GMBH, 322 F. Supp. 569 (D. Minn. 1970).

[3] 88 Wash. 2d 50, 558 P.2d 764 (1977).

The plaintiffs in *Crose*, a husband and wife, brought a products liability suit naming Volkswagen-Germany, Volkswagen-America, and the Oregon regional distributor, Riviera Motors, as defendants. The complaint stated that the plaintiff had been injured while a passenger in an allegedly defective VW microbus. The accident occurred in California, and the vehicle belonged to a California resident. Service of process was effected at the home office of each named defendant, and also in Washington on C.T. Corporation System, a registered agent of Riviera Motors. Pursuant to a motion for summary judgment, the distributor, Riviera Motors, was dismissed on the grounds that it did not sell or service the vehicle at issue. The remaining defendants moved to dismiss the complaint for lack of jurisdiction and also to quash the service of process. These motions, as well as one for summary judgment, were denied by the lower court, and certiorari was granted for this appeal.

The Supreme Court of Washington affirmed the lower court's finding of jurisdiction, which had been based on the Washington statute governing service of summons on a foreign corporation doing business in the state.[4] That statute provides that valid service can be made on any "agent, cashier, or secretary" of the foreign corporation. The court held that the local dealer was sufficiently connected with the defendant to meet one of those criteria. The court provided a mixture of policy and factual reasons for its decision. As in many cases involving foreign corporations, the court was concerned that its citizens have ready access to a convenient forum, and not be required to bring suit in a foreign district.[5] The court explained that it was entirely foreseeable that injuries resulting from use of Volkswagenwerk products would occur in Washington, therefore the corporation should have been on notice that it might be sued in that state.[6] Finally, the court observed that the distribution scheme of Volkswagen products created significant and continuous economic benefits for the defendant and allowed it tight control over the distributor (and indirectly over the dealer) within the forum state, and thus it should not be a source of immunity for Volkswagenwerk.[7]

The court found that the requirement that the defendant-manufacturer be present in the state was satisfied by the presence of C.T. Motors, an agent of a subsidiary. The court distinguished its hold-

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[4] "The summons shall be served by delivering a copy thereof, as follows: . . .
If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof." WASH. REV. CODE § 4.28.080(10) (1962).

[5] *See, e.g.*, Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

[6] Crose, 88 Wash. 2d at _____, 558 P.2d at 768.

[7] *Id.* at _____, 558 P.2d at 767.

ing in *Crose* from that in *State v. Northwest Magnesite Company*[8] by relying on the "economic reality" of the distribution scheme rather than on an assessment of the parent corporation's control over the subsidiary.[9] In *Northwest Magnesite,* the court stated that, generally, service on a parent corporation could not be accomplished by serving an agent of a subsidiary in which the parent corporation owned a controlling interest,[10] unless the parent corporation controlled the internal affairs of the subsidiary to such an extent as to preclude the existence of separate corporate identities. This is the rule first promulgated in the opinion written by Justice Brandeis in *Cannon Manufacturing Co. v. Cudahy Packing Co.*[11] *Cannon* established that a corporation will not be deemed to be present in a forum simply because it has a wholly-owned subsidiary there. The parent corporation must also fully control the operations of the subsidiary.[12] In *Northwest Magnesite,* the Washington Supreme Court followed *Cannon*, and concluded that, "whether the courts will disregard the corporate form is ultimately a question of whether there is good faith and honesty in the use of corporate privileges for legitimate ends."[13] In *Sommer v. Yakima Motor Coach Co.*,[14] cited by the *Northwest Magnesite* court, the court said that two corporations "are not to be adjudged as one, in legal effect, unless their property rights and interests are so closely commingled and related as to render it apparent that they are intended to function as one, and to regard them as separate would aid in the consummation of a fraud or wrong upon others."[15]

Against this background, it is important to contrast how the *Crose* court viewed the relationships between the parties. The court first established that Riviera Motors, the dismissed defendant, was present in the state through the dealings of its authorized dealer C.T. Motors. The court next said that VW-America was also present because of its extensive contractual control over Riviera.[16] The trial court had held that VW-Germany and VW-America occupied the same position in relation to the plaintiffs because the stock ownership and interlocking directorates connected the two corporations as one. Since this issue was held not to have been properly raised on appeal, the Washington Supreme Court did not consider it.[17] Thus the finding of jurisdiction over VW-

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[8] 28 Wash. 2d 1, 182 P.2d 643 (1947).

[9] 88 Wash. 2d at _____, 558 P.2d at 767.

[10] 28 Wash. 2d at _____, 182 P.2d at 664.

[11] 267 U.S. 333 (1925).

[12] *Id.* at 336.

[13] 28 Wash. 2d at _____, 182 P.2d at 664.

[14] 174 Wash. 638, 26 P.2d 92 (1933).

[15] *Id.* at 654, 26 P.2d at 98.

[16] For example, there could be no change in the executives of Riviera or in its ownership without prior written consent by VW-America. Prior written approval of all dealerships and dealer agreements was also required, and Riviera used VW's uniform accounting and bookkeeping procedures. 88 Wash. 2d at _____, 558 P.2d at 766.

[17] *Id.* at _____, 558 P.2d at 766.

Germany followed directly from the finding of jurisdiction over VW-America.

By concentrating on the economic realities of the distribution scheme, including the fact that each level of the corporate structure realized a profit by the close integration of the parts, the court in effect sidestepped the entire corporate separateness issue which might have prevented a finding of jurisdiction. The court relied on the distribution scheme in large part because of the decision rendered in *Buckeye Boiler Co. v. Superior Court of Los Angeles County.*[18] In that case, a tank manufactured by Buckeye exploded in California, injuring the plaintiff. Although the defendant manufacturer clearly had not sold the tank within the state, the court upheld jurisdiction. Its rationale was that if a manufacturer should know that its products will eventually be resold within a certain state, it should be held to have, in effect, availed itself of that state's market.[19]

In upholding service of process on C.T. Motors, the court distinguished its holding in *State ex rel. Western Canadian Greyhound Lines v. Superior Court for King County.*[20] In that case, the court maintained that the question of what type of agent could be served with process was entirely separate from any consideration of what constituted doing business within the state. Effective service of process instead depended on the discretion or responsibility vested in the agent in his dealings as a representative of the parent corporation.[21]

The court also referred to *Fiat Motor Co. v. Alabama Imported Cars Inc.*[22] Fiat, a New York corporation with its principal place of business in New York City, imported Fiats which it then sold to its wholesale distributor, Roosevelt Motors. A Fiat dealer brought suit against Roosevelt and Fiat as co-defendants alleging that the defendants, through their close relationship, denied the plaintiff's franchise the good faith treatment required by the Dealer's Act.[23] Judge Warren Burger affirmed the lower court's ruling that Fiat was subject to service in the District of Columbia because it had extensive and continuing contractual relations with Roosevelt Motors, which was located there.[24]

There are several significant factual differences between *Fiat Motors* and the *Crose* case, however. Roosevelt operated in the jurisdiction where the suit was brought, whereas Riviera Motors did not. In *Fiat Motors,* the cause of action was in essence founded on the very relation-

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[18] 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).
[19] *Id.* at 904, 458 P.2d at 64, 80 Cal. Rptr. at 121.
[20] 26 Wash. 2d 740, 175 P.2d 640 (1946).
[21] *Id.* at 747, 175 P.2d at 649.
[22] 292 F.2d 745 (D.C. Cir. 1961).
[23] *Id.* at 747.
[24] *Id.*

ship of the two defendants.[25] Finally, the statute upon which jurisdiction was based was much broader than that which the Washington courts cited in the *Crose* decision,[26] because effective service could be made on "the person conducting" the foreign corporation's business, without a showing of agency.

The difficulty of defining agency is only one of the long-standing problems courts have encountered in finding jurisdiction over foreign corporations. The problem is avoided where a corporation has designated a local process agent,[27] but where it has not, the courts in this century have had difficulty deciding when a corporation should be subject to suit in a state. Since the corporate entity functions without regard to state boundaries, the problem has centered on formulating standards to determine exactly when a corporation is considered within a state and thereby subject to service of process.[28] Courts have traditionally attempted to strike a balance between the desire to provide local residents with a convenient forum and the necessity of observing constitutional due process.

One rationale for establishing jurisdiction has been the "implied consent" theory. According to this theory the corporation, by doing business in the forum state under the protection of the state's laws, has, in effect, consented to be sued on any cause of action arising in the state. Since a state had the power to exclude a corporation, the fact that it did not, coupled with the presence of the corporation's authorized agents, gave the state jurisdiction over the corporation.[29] The inherent limitations in this doctrine, which required the presence of authorized agents within the state, induced the courts to devise another approach.

To supplement the weakness of the "implied consent" theory,[30] the courts next formulated the "presence" theory, which held that a corporation was deemed to be present in any state where it conducted business. The early cases suggested a quantitative appraoch in defining presence, considering only the amount of business activity without expressly considering the hardship forced on the defendant or the actual need for adjudication within that state.[31] In *Rich v. Chicago, B & O Railway Co.*,[32] the Supreme Court of Washington, required for proper ser-

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[25] The Automobile Dealer's Franchise Act, 15 U.S.C. §§ 1221-1225 (1976) requires that all dealings between auto manufacturers and dealers be conducted in good faith.

[26] D.C. Code § 13-334(a) (1973) provides that "in an action against a foreign corporation doing business in the District, process may be served on the agent of the corporation or person conducting its business...."

[27] G. HORNSTEIN, CORPORATION LAW AND PRACTICE § 584 (1959) [hereinafter cited as HORNSTEIN].

[28] *Id.*

[29] Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 578-79 (1958).

[30] *Id.* at 582-84.

[31] *Developments in the Law – State-Court Jurisdiction*, 73 HARV. L. REV. 909, 923 (1960).

[32] 34 Wash. 14, 74 P. 1008 (1904).

vice of process that 1) a substantial part of the corporation's ordinary business be within the state, 2) that the business be continuous rather than casual or occasional and 3) that the business could give rise to a cause of action by a resident plaintiff.[33]

Subsequent decisions of the courts followed basically this same line until the mid-1940's, when the U.S. Supreme Court, in a landmark decision, established what is still the contemporary standard for obtaining in personam jurisdiction over foreign corporations. In *International Shoe Co. v. Washington*[34] the Court upheld service on an out-of-state corporation whose only local activity was the solicitation of business through local salesmen who were paid on a commission basis. Significantly the Court recognized that the obligation being sued on arose from the defendant corporation's local activity.[35] The theories of implied consent and presence were both found inadequate, and the Supreme Court formulated a new doctrine:

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimal contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.[36]

The two basic criteria established by the court were that the activity of the corporation be continuous and systematic and that the liability being sued on arise from such activity.[37] Whereas the old theories were based on quantum of presence, the new approach relied on a common sense assessment of the circumstances of each case.[38] The Court's opinion further warned that jurisdiction might also be justified in circumstances where only one of the two enumerated conditions was present.

Subsequent to the decision in *International Shoe,* the Supreme Court rendered two decisions which helped refine the holding in that case. In the first, *McGee v. International Life Insurance Co.,*[39] the Court upheld jurisdiction of a California court over a Texas insurance company, whose only contact with the state had been the sale of one insurance policy. The Court attributed a clearly discernible trend toward expanding the acceptable reach of state jurisdiction over foreign corporations to fundamental changes in the national economy. It noted that concurrent improvements in travel and communications had made it less burdensome on a defendant to be sued in a state where he engaged in economic activity.

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[33] *Id.* at 17, 74 P. at 1008-09.

[34] 326 U.S. 310 (1945).

[35] HORNSTEIN, *supra* note 27, § 584.

[36] 326 U.S. at 316 (1945).

[37] *Id.* at 318.

[38] *Developments in the Law, supra* note 31, at 923.

[39] 355 U.S. 220 (1957).

The following year, writing for the majority in *Hanson v. Denckla*,[40] Chief Justice Warren noted the decision in *McGee* but was firm in stating that it would be a mistake to assume that the trend toward expanding state jurisdiction would eventually result in the demise of all restrictions on the state courts' extension of personal jurisdiction over foreign individuals. Regardless of the ease with which a defendant could present a defense in another state, the required prerequisite of minimal contacts would have to be met before in personam jurisdiction would be extended.[41]

Against this background, the *Crose* case presents two very significant issues. First, can a foreign corporation be deemed to be doing business in a state by the presence of an independent dealer who markets the manufacturer's products within the state? Second, is the limited presence of the foreign manufacturer, which is established by the presence of a dealership of the product involved, a sufficient "minimum contact" to allow the state court to exercise in personam jurisdiction over a cause of action arising wholly outside the forum?

Two significant New York decisions are helpful in answering the first question. In *Frummer v. Hilton Hotels International, Inc.*,[42] the plaintiff, a New York resident, filed suit in New York to recover for a personal injury resulting from his fall in a bathtub in a London hotel. The court reasoned that Hilton (U.K.), the corporation operating the hotel in question, was present in New York because of the activities conducted there on its behalf by its agent, the Hilton Reservation Service. The Service performed all of the business that Hilton (U.K.) would have done if its own officials had been present in New York.[43] The court recognized that litigation in a foreign forum might be burdensome or inconvenient for a defendant company, but casually dismissed this possibility as the price to be demanded of those who engage in international trade. In elaborating on this idea, the court stressed that when the foreign activities of a corporation are as energetic as those of Hilton (U.K.), the corporation receives considerable benefits from such foreign business, and therefore may not complain about the burden.

A similar question of jurisdiction over a foreign corporation based on the presence of a representative of the corporation within the forum state arose again less than six months after *Frummer* in *Gelfand v. Tanner Motors Tours Ltd.*[44] Plaintiffs, New York residents, brought suit in New York against the defendant tour company for an accident which occurred in Arizona. The defendant corporation had contracted with a

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[40] 357 U.S. 235 (1958).

[41] *Id.* at 251.

[42] 19 N.Y.2d 533, 227 N.E.2d 851, N.Y.S.2d 41 (1967).

[43] *Id.* at 537, 227 N.E.2d at 853-54, 281 N.Y.S.2d at 44.

[44] 385 F.2d 116 (2d Cir. 1967).

New York firm for the latter to promote the sale of tickets for the tour on which the plaintiffs were injured. Relying on the language in *Frummer* that "the Service does all the business which the defendant corporation would do were it here by its own officials," the court upheld jurisdiction even though the plaintiffs had not bought their tickets from the agent. The court held that the foreign corporation was doing business in New York in the traditional sense because its New York representative provided services beyond mere solicitation, and these services were essential to the operation of the foreign corporation.[45] To support its holding, the court discussed the large percentage of business which was generated for the defendant corporation by the presence of the representative in New York. Importantly, the court concluded by saying that it had decided only the question of whether New York was a permissible forum, not whether it was the appropriate one.[46]

In order to answer the second question concerning sufficiency of contacts to maintain in personam jurisdiction over a foreign corporation for a claim arising wholly outside the forum, the recent Supreme Court decision in *Shaffer v. Heitner*[47] must be analyzed. In *Shaffer*, the Court extended the minimum contacts test of *International Shoe* to in rem and quasi in rem actions and ruled that the mere presence of property owned by the defendant within the forum was not conclusive on the question of jurisdiction, if the property was unrelated to the cause of action. This is a significant caveat to the traditional rule of *Pennoyer v. Neff*,[48] which established that jurisdiction could only be based on the presence of the individual or his property within the forum. If there is a requirement that the property present within the jurisdiction be related to the cause of action, it could be argued by analogy that the presence of the person, or the corporation, within the forum must also be related to the cause of action. Thus, one can question whether the type of very limited presence proven by a representative's conducting business in the forum is sufficient.

In *Crose*, the car in which the plaintiff was injured was purchased and delivered outside the forum, and the accident occurred outside the forum. Even accepting, arguendo, that VW-Germany is present in the state because of the presence of dealerships of its product, should this type of limited presence, unrelated to the cause of action, be sufficient to establish in personam jurisdiction? The court expressly adopted the reasoning of *Buckeye Boiler* to support its determination that the distribution scheme was sufficient underpinning for a finding of jurisdiction. It is important to note, however, that the cause of action in *Buckeye Boiler*

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[45] *Id.* at 121.

[46] *Id.*

[47] 433 U.S. 186 (1977).

[48] 95 U.S. 714 (1877).

arose from an injury within the forum, and jurisdiction was obtained under a long-arm statute.[49]

In addition to due process considerations there are also serious policy questions in upholding jurisdiction over VW-Germany. For instance, in holding foreign corporations amenable to suit in distant forums because of the presence of a representative, state and federal courts should realize that extensions of jurisdiction in this area may in turn be used against U.S. corporations operating overseas. If diversified corporations operating in the international setting will not be allowed to segregate their assets and apportion their liability, the attractiveness of investing capital or of conducting overseas operations is greatly reduced.[50]

Aside from the potential effect of the *Crose* decision on international business, it is equally important to realize the two major problems it presents for the local forum. First is the problem of forum shopping as discussed by Judge Breitel in his dissent in *Frummer*. Under the rationale of *Frummer* and *Crose*, it becomes more likely that nonresidents will be able to file tort actions in the state of their choice, provided the corporation has a representative there, regardless of where the cause of action arises. Second, *Buckeye Boiler* held that California should have jurisdiction because the preponderance of the evidence and witnesses were located there. In *Crose*, neither the car, the driver, nor the site of the accident were in Washington, the site of the trial. Beyond any consideration of convenience to either party should be a consideration of the efficacy of conducting a trial when all of the evidence involved in the accident and the key witnesses are located outside the forum state. This is a significant factor in any trial, but one the court apparently ignored.

The Washington Supreme Court justified its upholding of jurisdiction over the foreign defendant by emphasizing the importance of providing resident plaintiffs with an accessible forum. However, the substantial lack of evidence within the jurisdiction, as well as the due process questions raised by *Shaffer*, make it questionable whether the Washington court will be followed in the future. The simple desire of providing an accessible forum cannot override the important due process issues involved. The holding in *Crose*, then, may represent an untenable expansion of state court power.

— ISAAC NOYES NORTHUP, JR.

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[49] 71 Cal. 2d at 896, 458 P.2d at 60, 80 Cal. Rptr. at 116.
[50] 19 N.Y.2d at 546, 227 N.E.2d at 859, 281 N.Y.S.2d at 52.
[51] 71 Cal. 2d at 906, 458 P.2d at 67, 80 Cal. Rptr. at 123.