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Court Urged To Limit State Court Jurisdiction Over Foreign Defendants

(Novo Nordisk A/S v. Lukas-Werner, No. 13-214)

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to review (and ultimately overturn) an Oregon state court decision that permits plaintiffs' lawyers to file lawsuits against foreign corporations with no physical presence in the State, even though the plaintiff can obtain complete relief by filing suit against the corporation's American subsidiary that does have a substantial presence in the State.

In a brief filed in *Novo Nordisk A/S v. Lukas-Werner*, WLF argued that the Due Process Clause of the Fourteenth Amendment bars a State from exercising jurisdiction over out-of-state defendants when doing so offends "traditional notions of fair play and substantial justice." WLF argued that plaintiffs alleging injury are afforded "substantial justice" when they are permitted to seek all available relief from a solvent American-based corporation. Under those circumstances, it is inconsistent with "traditional notions of fair play and substantial justice" to permit the plaintiff also to sue the corporation's foreign parent when the parent has minimal contacts with this country and its potential liability is wholly derivative of that of the subsidiary, WLF argued.

"There is an obvious reason why plaintiffs' attorneys often sue both an American company and its foreign parent corporation: they realize that doing so increases settlement pressure. Suing both corporations increases both the money and the executive man-hours that the defendant must devote to the lawsuit—thereby increasing the likelihood that the defendant will feel forced to settle the lawsuit without regard to its underlying merits," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Such gamesmanship is not consistent with traditional notions of fair play and substantial justice," Samp said.

The case involves an Oregon personal injury suit that seeks recovery of damages from Novo Nordisk A/S (NN A/S) for injuries alleged suffered by the plaintiff after four years of treatment with a prescription hormone therapy medicine manufactured in Denmark by NN A/S. NN A/S conducts no business in Oregon. All of its U.S. affairs (including all interaction with the Food and Drug Administration) are conducted by Novo Nordisk, Inc. (NNI), an indirect and independently operated subsidiary. The plaintiff has asserted identical claims against both NN A/S and NNI and has not suggested any scenario under which she might recover damages from NN A/S and not from NNI.

The trial court nonetheless denied NN A/S's motion to dismiss for lack of personal jurisdiction, holding that NN A/S was subject to suit in Oregon because even though NN A/S conducts no business in Oregon, it reasonably could have foreseen that products it placed into the stream of commerce would end up in Oregon.

In its brief urging the Supreme Court to grant review, WLF argued that Oregon's assertion of jurisdiction over NN A/S violates NN A/S's due process rights. The Court's well established due process test in this area provides that a State may authorize its courts to exercise person jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*.

WLF noted that even if a foreign corporation is found to have the requisite "minimum contacts" with the forum State, a court must also undertake a "fairness" analysis to determine whether assertion of jurisdiction would offend "traditional notions of fair play and substantial justice." Even if the Oregon courts were correct that the shipment (by others) of a small number of NN A/S products into Oregon was sufficient to establish "minimum" contacts, WLF argued that "substantial justice" would not be served if, under the facts of this case, the Oregon courts were permitted to exercise jurisdiction over both NN A/S and NNI. WLF acknowledged that Oregon has a strong interest in providing a forum in which its consumers can seek a redress of their grievances. But that interest can be fully vindicated by permitting a suit against NNI without also permitting a suit against a foreign parent corporation with, at most, *minimal* contacts with the State, WLF argued.

WLF stated that the Supreme Court has repeatedly cautioned U.S. courts against too freely asserting jurisdiction over foreign corporations and has noted the "unique burdens" placed on one "who must defend oneself in a foreign legal system."

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation. WLF filed its brief on behalf of itself and the International Association of Defense Council.

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.