

**SUPREME COURT OF WISCONSIN**

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DAVID RASMUSSEN and LISA A. LINDSAY,

Plaintiffs-Appellants-Petitioners,

v.

GENERAL MOTORS CORPORATION, GENERAL MOTORS OF CANADA, LTD., FORD MOTOR COMPANY, FORD MOTOR COMPANY OF CANADA, LTD., TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES USA, INC., TOYOTA CANADA, INC., HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR COMPANY, INC., HONDA CANADA, INC., DAIMLER CHRYSLER, DAIMLER CHRYSLER CANADA, INC., MERCEDES BENZ CANADA, INC., NISSAN NORTH AMERICA, INC., NISSAN CANADA, INC., BMW OF NORTH AMERICA, INC., BMW CANADA, NATIONAL AUTOMOBILE DEALERS ASSOCIATION and CANADIAN AUTOMOBILE DEALERS ASSOCIATION,

Defendants,

NISSAN MOTOR CO., LIMITED,

Defendant-Respondent.

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**AMICUS CURIAE BRIEF OF ASSOCIATION OF  
INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AND  
ORGANIZATION FOR INTERNATIONAL INVESTMENT  
IN SUPPORT OF DEFENDANT-RESPONDENT**

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Court of Appeals, District 4, Appeal No. 2007AP35  
Milwaukee Circuit Court Case No. 2003CV8337

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## **INTERESTS OF *AMICI CURIAE***

The Association of International Automobile Manufacturers, Inc. (“AIAM”) is a non-profit trade association that represents, *inter alia*, certain U.S. motor-vehicle manufacturing and distribution subsidiaries of international motor-vehicle companies. AIAM’s mission is to protect and promote the interests of its members and their suppliers in the United States. International automakers have invested over \$43 billion in U.S.-based production facilities; have a combined domestic production capacity of 4.2 million vehicles; directly employ over 80,000 Americans; and generate almost 600,000 U.S. jobs through dealerships and suppliers nationwide. AIAM’s members have extensive assets and operations in the United States. They account for 40 percent of all passenger cars and light trucks sold annually in this country. A list of AIAM’s members may be found at [http://www.aiam.org/public/aiam/about/our\\_members.aspx](http://www.aiam.org/public/aiam/about/our_members.aspx).

The Organization for International Investment (“OFII”) is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government. OFII is charged with promoting the legal and policy interests of its members, which have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment. OFII’s member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations

across this country, as well as many others. OFII's goal is to make the United States an increasingly attractive location for companies headquartered outside the country to conduct more business and employ more Americans within our borders. OFII has more than 150 members. A list is available at <http://www.ofii.org/mission/membership-list.html>.

Manufacturing today is an international business. *Amici's* members are subsidiaries of global companies that design, manufacture, and sell products all over the world. These business activities often give rise to litigation in which a plaintiff names a foreign manufacturer as a defendant despite the fact that the manufacturer itself has no contacts with the forum related to the plaintiff's cause of action. In this case, for example, plaintiffs contend that a parent corporation may be subject to general personal jurisdiction under Wis. Stat. § 801.05(1)(d) based solely on the acts of its wholly owned subsidiary under an "agency" theory.

*Amici* submit this brief to provide the Court with an industry perspective on the issues raised by this appeal and to explain how the invocation of general jurisdiction under such circumstances would erode the presumption of corporate separateness and disrupt the myriad of business arrangements that companies operating in the global marketplace use to bring their products to the consumer.

## ARGUMENT

Specific personal jurisdiction is jurisdiction to adjudicate claims arising from the defendant's purposeful contacts with the forum state. General personal jurisdiction, on the other hand, does not depend on a connection between the defendant's conduct within the forum state and the specific cause of action in the suit. The sole basis for personal jurisdiction at issue in this appeal is general jurisdiction, purportedly under Wis. Stat. § 801.05(1)(d). Because general jurisdiction confers authority over a defendant for the resolution of any and all disputes, regardless of how, if at all, those disputes are connected to the defendant's conduct in the forum, the circumstances and relationships giving rise to general jurisdiction should be carefully circumscribed.

Plaintiffs' proposed "agency" theory of general jurisdiction is wrong as a legal matter, because it would erode the bedrock principle that the actions of separate corporate entities are not attributable to each other in the absence of circumstances that would warrant piercing the corporate veil (*e.g.*, when one entity is deemed the "alter ego" of the other). It would also create significant and disturbing legal uncertainty for multinational corporations making fundamental decisions about where and how to do business. The theory should accordingly be rejected.

**A. The Principle Of Corporate Separateness Precludes Contacts Between A Subsidiary Of The Defendant And The Forum From Being Used As A Basis For Asserting General Jurisdiction Over The Non-Resident Parent.**

The forum contacts considered for purposes of *general* jurisdiction must be the defendant's *own* contacts, not the contacts of a subsidiary. Only when there are extraordinary circumstances that would warrant piercing the corporate veil may the activities of the subsidiary be deemed to be those of the parent under Wis. Stat. § 801.05(1)(d). The existence of a traditional principal-agent relationship between the parent and the subsidiary does not suffice. Although it is true that corporations must act through agents, this principle *at most* secures *specific* jurisdiction over a parent for claims arising out of the forum contacts that are performed on the parent's behalf by the subsidiary as its agent.

1. "That the 'legal fiction' of a corporation is not one to be lightly disregarded remains the law in Wisconsin as well as in most other jurisdictions." *Consumer's Co-op. of Walworth County v. Olsen*, 142 Wis. 2d 465, 474, 419 N.W.2d 211, 213 (1988). This "respect for corporate distinctions" is a "bedrock principle" of law "deeply ingrained in our economic and legal systems." *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). Thus, "[b]y legal fiction the corporation is a separate entity and is treated as such under all ordinary circumstances." *Consumer's Co-op.*, 142 Wis. 2d at 474, 419 N.W.2d at 213. Its "acts are treated as those of the

corporation alone,” not those of its owners, unless the facts “justify piercing the corporate veil.” *See id.* at 483-84 & n.5, 419 N.W.2d at 217-18 & n.5 (internal quotation marks omitted).

As this Court has emphasized, the standard for piercing the corporate veil is a stringent one. A corporation’s “separate existence” will be disregarded only upon a showing that it is a mere “instrumentality” or “alter ego,” so completely “dominat[ed]” that it has “no separate mind, will or existence of its own.” *Id.* at 483-84; 419 N.W.2d at 217-18. “[T]he standard for determining that a natural person is the agent of another differs from”—and is less stringent than—“the standard for attribution of the actions of a corporation to another entity,” the latter being governed by “the ‘alter ego’ or ‘piercing the corporate veil’” doctrine. *Doe v. Holy See*, 557 F.3d 1066, 1080 (9th Cir. 2009).

Thus, only when a parent “controls its subsidiaries” to such a great extent should “the separate corporate identity of the subsidiaries \*\*\* be disregarded.” *Cemetery Servs., Inc. v. Wis. Dep’t of Regulation & Licensing*, 221 Wis. 2d 817, 826, 586 N.W.2d 191, 196 (Ct. App. 1998). An “unusual exercise of control” is necessary, lest “the parent \*\*\* be liable for the acts of its subsidiary in all cases.” Phillip I. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 6.06.1 (1st ed. 1987).

There is widespread judicial recognition that the rule of corporate separateness applies with equal force to the issue of personal jurisdiction. “[W]here the subsidiary is operated as a distinct corporation, the subsidiary’s contacts with the forum cannot be imputed to the parent for jurisdictional purposes.” 18 William Meade Fletcher, *Fletcher Cyclopedic of the Law of Corporations* § 8640.50 (2007). The U.S. Supreme Court has long recognized that “jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant’s contacts with the forum State must be assessed individually.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). Under Wisconsin law, too, “[t]he mere existence of a parent-subsidiary relationship between two corporations is not sufficient to provide a court with jurisdiction.” *Conservatorship of Prom v. Sumitomo Rubber Indus.*, 224 Wis. 2d 743, 760, 592 N.W.2d 657, 665 (Ct. App. 1999).

Application of the doctrine of corporate separateness to questions of general jurisdiction makes perfect sense. Because the activities of a subsidiary do not automatically translate into liability for the parent corporation, those same activities should not as a matter of course be attributable to the parent for purposes of general jurisdiction. Similar interests are at stake in both circumstances: to permit businesses “to structure their primary conduct with some minimum assurance” as to the

circumstances under which they will be subject to suit. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

2. Plaintiffs point out that corporations, being artificial persons, necessarily must act through agents. *See* Pet. Br. 15; Reply Br. 4, 6 n.4. *Amici* have no quarrel with this abstract proposition, or the truism that a parent corporation (as principal) may be held liable for the act of its agent, when the agent commits a wrong within the scope of the authority conferred by the parent. *Candee v. Egan*, 84 Wis. 2d 348, 368-69, 267 N.W.2d 890, 900 (1978). When a plaintiff thereby injured decides to bring suit, *specific* jurisdiction may well lie against the parent corporation, if the cause of action arises out of *the very activities or transactions* carried out in the forum “on behalf of” the principal by its agent. *See* Wis. Stat. §§ 801.03(1), 801.05(4)(a).

But none of this has any bearing on whether *all* of the forum contacts of a subsidiary can be attributed to the parent corporation for purposes of *general* jurisdiction based solely on the existence of an ordinary principal-agent relationship between the parent and the subsidiary. The principle of corporate separateness compels that this question be answered in the negative.

“[S]o long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other.” *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir.

1983). The degree of control that inheres in an ordinary principal-agent relationship between parent and wholly owned subsidiary is insufficient to warrant piercing the corporate veil and overcoming the rule of corporate separateness. Rather, “to fuse a parent company and its subsidiary for purposes of personal jurisdiction, it must be proved that the parent is the alter ego of the subsidiary.” 1 Fletcher, *supra*, § 43.70. Put another way, “the contacts of [the subsidiary should] be imputed to the [parent]” only when “the appearance of separateness is actually a sham.” 16 James Wm. Moore, *Moore’s Federal Practice* § 108.42[3][b][iv] (3d ed. 1997).

Even the courts that have found general jurisdiction with apparent reference to agency concepts require a showing that is practically indistinguishable from the piercing-the-corporate-veil standard articulated by this Court. For example, one court suggested that if “the subsidiaries were acting as [the parent’s] agent in the sense of conducting [the parent’s] business rather than their own business, the parent could be sued.” *IDS Life Ins. v. SunAmerica Life Ins.*, 136 F.3d 537, 541 (7th Cir. 1998). Yet the same court recognized that “[p]arents of wholly owned subsidiaries necessarily control, direct, and supervise [their] subsidiaries to some extent,” and went on to affirm the parent’s dismissal for lack of personal jurisdiction, since the subsidiaries “conduct[ed] their own businesses.” *Id.* at 540-41. When a subsidiary lacks any independent existence or is so dominated by its parent to the point that its “activities as an agent \*\*\*

amount to doing business of the parent,” rather than conducting business of its own, *Curtis Publ’g Co. v. Cassel*, 302 F.2d 132, 137 (10th Cir. 1962), there will be a substantial case for piercing the corporate veil. Under such circumstances, the subsidiary has “no separate mind, will or existence of its own,” and the corporate separateness of parent and subsidiary should not be respected. *See Consumer’s Co-op.*, 142 Wis. 2d at 484, 419 N.W.2d at 217-18; Resp. Br. 28 n.11.

Whatever the verbal formulation, courts require more than an ordinary principal-agent relationship to attribute the acts of a subsidiary to its parent when determining whether the parent has contacts with the forum sufficient for general jurisdiction. When there are no exceptional considerations that would warrant piercing the corporate veil, courts should uphold the “respect for corporate distinctions,” *see Bestfoods*, 524 U.S. at 62, and assess the parent’s “contacts with the forum State \*\*\* individually,” *Keeton*, 465 U.S. at 781 n.13.

There is in this case no basis for asserting general jurisdiction over respondent because plaintiffs have “abandoned [their] argument \*\*\* based on piercing the corporate veil.” A.App. 7 n.3.

**B. Plaintiffs’ Proposed “Agency” Theory Of General Jurisdiction Would, If Accepted, Increase Legal Uncertainty And Adversely Affect Foreign Investment In Wisconsin.**

In addition to being legally erroneous, plaintiffs’ position would have severely negative consequences. Their proposed rule would greatly expand the circumstances in which a Wisconsin court could exercise general jurisdiction over a foreign parent and adjudicate any cause of action against it, even one wholly unrelated to the work performed in Wisconsin on its behalf by the subsidiary. It therefore would make it far more difficult for corporations to structure their operations in a way that would enable them to predict where they will—and will not—be amenable to suit. Providing this “degree of predictability” is both essential under the Due Process Clause, *World-Wide Volkswagen*, 444 U.S. at 297, and critical to maintaining a legal environment that is attractive to foreign investment.

Today the United States is the largest beneficiary of foreign direct investment in the world. United Nations Conference on Trade and Development, *World Investment Report 2010* at 4, available at [http://www.unctad.org/en/docs/wir2010\\_en.pdf](http://www.unctad.org/en/docs/wir2010_en.pdf). This investment from abroad is an essential element of the U.S. economy, creating millions of jobs and providing needed financing for growth. In Wisconsin alone, foreign investment totaled \$14.5 billion and supported an estimated 82,000 jobs in 2007. See Johns Hopkins University Center for Transatlantic Relations, *The*

*Transatlantic Economy 2010*, at 94, available at [http://transatlantic.sais-jhu.edu/bin/c/s/te2010\\_chapter3.pdf](http://transatlantic.sais-jhu.edu/bin/c/s/te2010_chapter3.pdf); Bureau of Economic Analysis, *Foreign Direct Investment in the U.S.: Financial and Operating Data for U.S. Affiliates of Foreign Multinational Companies: Employment by State and Country 2007-2008*, available at [http://www.bea.gov/international/xls/mousa\\_all\\_employ\\_state\\_etry.xls](http://www.bea.gov/international/xls/mousa_all_employ_state_etry.xls). One major explanation for this success is a stable and predictable legal regime.

The U.S. Department of Commerce has reported, however, that the unpredictability and cost of litigation are among the top concerns of foreign businesses considering both whether and how much to invest in the United States. U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, at 5-6 (Oct. 2008) (Commerce Report), available at [http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL\\_Latest\\_iaa\\_main\\_001171.pdf](http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iaa_main_001171.pdf). In one study, the business leaders surveyed ranked a “fair and predictable legal environment” as the second most important factor in assessing potential countries in which to do business. *Sustaining New York's and the U.S.'s Global Financial Services Leadership*, at 15-16 (Jan. 2007), available at [http://www.nyc.gov/html/om/pdf/ny\\_report\\_final.pdf](http://www.nyc.gov/html/om/pdf/ny_report_final.pdf). These leaders expressed concern that the U.S. legal environment is “less fair and less predictable” than that of other countries. *Id.* at 16.

Part of the unpredictability in the U.S. legal environment comes from our federal system, with its multitude of potential legal regimes that a company may encounter. In the Department of Commerce report, the potentially overlapping application of federal and state law was noted as a “distinctive feature of the U.S. legal system” that an “international investor might find \*\*\* unfamiliar.” *Id.* at 3-4 & Box 1. Yet the Department was at least able to state with confidence that “[e]ven with 50 States (plus the District of Columbia), it is typically clear which State legal systems are relevant.” *Id.* at 4.

If plaintiffs’ theory of general jurisdiction were adopted, however, potential foreign investors would not have even this modest assurance about the predictability of the U.S. legal environment. Plaintiffs’ proposed rule would have sweeping and highly problematic consequences for manufacturers of motor vehicles and other products sold or distributed in Wisconsin. It could potentially render an out-of-state manufacturer subject to suit in Wisconsin based solely on the Wisconsin contacts of the manufacturer’s subsidiary—even when (as here) corporate formalities have been observed, the subsidiary has more than an “adequate level of capitalization” to satisfy any judgment that the plaintiffs might obtain, and the subsidiary carries on its own business and is not merely an instrumentality of its parent, so that the stringent standards “justifying disregard of the separate legal entity of the corporation” and piercing of the

corporate veil cannot be satisfied. *See Consumer's Co-op.*, 142 Wis. 2d at 486, 497, 419 N.W.2d at 218, 223. Plaintiffs' proposed rule would also dramatically expand opportunities for forum shopping and therefore aggravate this "source of significant investor uncertainty." Commerce Report at 8-9.

Companies operating in the global marketplace employ a wide variety of corporate structures and business arrangements to bring their products from the place of manufacturing to the consumer. Companies may establish subsidiaries or affiliates to serve different countries or regions or may sell their products to independent distributors in a country. These arrangements are not nefarious schemes to be looked upon with a jaundiced eye. *See Bestfoods*, 524 U.S. at 61 ("[A] corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary will not be penalized by a judicial determination of liability for the legal obligations of the subsidiary."). Foreign entities with adequately capitalized local subsidiaries do not escape liability for the conduct of their subsidiaries—they merely accept that responsibility indirectly through their ownership interest in their subsidiaries, the latter of which are, of course, fully subject to jurisdiction in the forum. Such arrangements are legitimate forms of carrying on beneficial international and interstate commerce, which bring significant benefits to the Wisconsin economy in the form of foreign direct investment.

As this Court has recognized, “limited liability for members of a corporation is the rule, not the exception.” *Ruppa v. Am. States Ins.*, 91 Wis. 2d 628, 644-45, 284 N.W.2d 318, 324 (1979) (citing *Anderson v. Abbott*, 321 U.S. 349, 362 (1944)). It is upon this fundamental principle of corporate law that “large undertakings are rested, vast enterprises launched, and huge sums of capital attracted.” *Abbott*, 321 U.S. at 362.

For companies considering whether to establish subsidiaries in Wisconsin or to expand their existing investments here, plaintiffs’ rule would represent a significant blow to fairness and predictability, and thereby decrease Wisconsin’s attractiveness for foreign direct investment.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: December 17, 2010

Respectfully submitted,

Association of International Automobile Manufacturers,  
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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 2,995 words.

Dated: December 17, 2010

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: December 17, 2010

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## CERTIFICATE OF SERVICE

I hereby certify that, on December 17, 2010, I personally caused the original and 22 copies of the foregoing **AMICUS CURIAE BRIEF OF ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AND ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF DEFENDANT-RESPONDENT** to be sent by first-class, postage pre-paid mail to the Clerk of the Court.

I further certify that, on December 17, 2010, I personally caused 3 copies of the foregoing **AMICUS CURIAE BRIEF OF ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AND ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF DEFENDANT-RESPONDENT** to be sent by first-class, postage pre-paid mail to:

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