

## Supreme Court Rejects Expansive 'Stream of Commerce' Theory of Personal Jurisdiction

Author: [Kim M. Watterson](#), Partner, Pittsburgh

Author: [Paige H. Forster](#), Associate, Pittsburgh

**Publication Date: June 29, 2011**

### **Due Process Requires That a Defendant Purposefully Target Activities Toward a Particular State in Order To Be Subject to Jurisdiction There**

This week, the U.S. Supreme Court issued two opinions clarifying the criteria that must be satisfied before a court may constitutionally exercise personal jurisdiction over a defendant—*J. McIntyre Machinery, Ltd. v. Nicastro* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*. Both decisions involved product liability suits asserted against non-U.S. manufacturers, but both have relevance as well for domestic corporations defending lawsuits under any liability theory. The decisions were highly anticipated because the cases, *J. McIntyre* in particular, were expected to resolve a decades-old debate about the contours of the so-called "stream of commerce" theory of personal jurisdiction. The Court delivered.

Two plurality opinions issued almost 25 years ago in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), injected the "stream of commerce" metaphor into the vernacular of the personal jurisdiction inquiry. In dicta, Justice O'Connor (joined by three other Justices) wrote that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant...indicat[ing] an intent or purpose to serve the market in the forum State, [is required]...[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112. Justice Brennan (joined by three other Justices) disagreed that "additional conduct" (besides putting the product into the stream of commerce) is required to justify the exercise of personal jurisdiction. In Justice Brennan's view, "As long as [the defendant]...is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Brennan, J., concurring).

Since *Asahi*, the stream of commerce theory of personal jurisdiction has been the subject of great debate—including about (1) whether the theory is controlling law and (2) what a plaintiff must prove in order to establish jurisdiction under the theory. Taking the theory to its extreme, the New Jersey Supreme Court held in *J. McIntyre* that "courts can exercise jurisdiction over a foreign manufacturer...so long as the manufacturer knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." The U.S. Supreme Court reversed.

Ironically, *McIntyre* resulted in three opinions with no single opinion commanding the majority—similar to *Asahi*, the notoriously splintered case the Court set out to clarify. But with regard to basic principles, *McIntyre* is not as fractured as it first appears. Both the plurality and the concurrence, a total of six justices, agreed in rejecting the New Jersey Supreme Court's sweeping jurisdictional rule—namely, that jurisdiction can be based on the defendant's targeting of the U.S. market as a whole, even when the defendant took no actions directed toward the state in which the plaintiff has sued. The plurality and concurrence also agreed in rejecting Justice Brennan's *Asahi* stream of commerce analysis insofar as that analysis made foreseeability—the defendant's

ability to anticipate being haled into a jurisdiction because it is foreseeable that its product could end up there-the "touchstone of jurisdiction." Slip op. at 7.

Foreseeability, according to the *McIntyre* plurality, is not enough to satisfy the due process principles that underlie the jurisdictional question. Instead, the defendant's *conduct*-and, more specifically, its conduct directed toward a *particular state*-are the constitutionally required relevant considerations. Consequently, actions targeting the U.S. market in general are not enough. Without proof that the defendant engaged in conduct specifically aimed at getting its product into a particular state, personal jurisdiction does not lie just because the product made its way there-no matter how foreseeable it might have been that the product would end up there. In *McIntyre*, a British manufacturer sold a machine to an independent U.S. distributor, who in turn sold it to the plaintiff's employer. The machine that allegedly injured the plaintiff in New Jersey was one of only a handful of the defendant's products that made their way to that state. Applying the framework of analysis it announced, the U.S. Supreme Court held that the New Jersey court lacked jurisdiction because the plaintiff did not establish that the defendant "engaged in conduct purposefully directed at New Jersey." *Id.* at 11.

The plurality made sure to mention both the scope of the opinion's applicability and the practical consequences flowing from the framework of analysis that was announced. First, the principle that "personal jurisdiction requires a forum-by-forum...analysis" holds equally true for foreign and domestic defendants. *Id.* at 8-9, 10. A domestic defendant that does not purposefully direct its activities toward a particular state cannot be sued in that state merely because, for example, it sells its products to a distributor who then distributes them nationwide. *Id.* Second, the plurality took the time to mention the practical significance of its ruling-noting the "undesirable consequences" of a foreseeability-based approach, including the "significant expenses...incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible." *Id.* at 10.

In a concurring opinion, Justice Breyer, joined by Justice Alito, agreed that a defendant's actions directed toward a particular state must be the focus of the personal jurisdiction inquiry. However, he wrote separately to note his concern that the plurality opinion is too "broad" and may foreclose jurisdiction in cases involving electronic commerce, such as where "a company targets the world by selling products from its Web site" or "consigns the products through an intermediary (say, Amazon.com)." Concurring slip op. at 4. In turn, the dissent (authored by Justice Ginsburg and joined by Justices Sotomayor and Kagan) would have embraced a foreseeability-based analysis, explaining that a conduct-based analysis will allow defendants to structure their conduct in order to avoid jurisdiction. According to the dissent, a conduct-based inquiry is not constitutionally required, nor are its results fair.

*McIntyre*'s companion case, *Goodyear*, placed the stream of commerce analogy within the larger framework of the personal jurisdiction inquiry-explaining that the "[f]low of a manufacturer's products into the forum" through the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction" but is not relevant to the *general* jurisdiction inquiry (emphasis included). Slip op. at 10. Reviewing the two bases of personal jurisdiction, the opinion noted that "general or all-purpose jurisdiction" arises when a corporation's "affiliations with the State are so continuous and systematic" that it is "essentially at home in the forum State." *Id.* at 2. "[S]pecific or case-linked jurisdiction," on the other hand, arises when there is a connection "between the forum and the underlying controversy." *Id.* at 2. The U.S. Supreme Court ruled that the North Carolina court did not have either general or specific personal jurisdiction over the Turkish subsidiary of a U.S. corporation. There was no general jurisdiction because the subsidiary's contacts with North Carolina-namely, sales of "a small percentage of [its] tires (tens of thousands out of tens of millions ...)" within the state-did not render it "essentially at home" there. *Id.* at 13. And there was no specific jurisdiction either, because the allegedly defective product (a bus tire) never went into North Carolina, but instead injured U.S. citizens who were



traveling in France. Thus, *Goodyear* builds on *McIntyre* by explaining when the newly clarified stream of commerce analogy is relevant to the personal jurisdiction inquiry.

This week's two personal jurisdiction cases-*McIntyre* especially-provide solid footing on which a defendant can fight jurisdiction in any state where it has not "purposefully availed" itself of the privilege of conducting activities, even if its products make their way to that forum. Under *McIntyre*, courts going forward will look at the defendant's conduct in targeting the forum state, rather than the foreseeability that the defendant would be sued there. The decision adds a welcome level of clarity and concreteness to the personal jurisdiction inquiry.

### **About Reed Smith**

Reed Smith is a global relationship law firm with more than 1,600 lawyers in 23 offices throughout the United States, Europe, Asia and the Middle East.

The information contained herein is intended to be a general guide only and not to be comprehensive, nor to provide legal advice. You should not rely on the information contained herein as if it were legal or other professional advice.

The business carried on from offices in the United States and Germany is carried on by Reed Smith LLP of Delaware, USA; from the other offices is carried on by Reed Smith LLP of England; but in Hong Kong, the business is carried on by Reed Smith Richards Butler. A list of all Partners and employed attorneys as well as their court admissions can be inspected at the website <http://www.reedsmith.com/>.

© Reed Smith LLP 2011. All rights reserved.