

Is U.S. Supreme Court Review Inevitable?

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A broad impact is likely on companies, both in the United States and other nations, that manufacture products for U.S. distribution.

New Jersey High Court Extends Long-Arm Jurisdiction

The Supreme Court of New Jersey recently issued a decision in *Nicastro v. McIntyre Machinery America*, in which the court held that a foreign manufacturer of an industrial recycling machine was subject to New Jersey's

long-arm jurisdiction under the stream-of-commerce doctrine. See *Nicastro v. McIntyre Machinery America, Ltd., et al.*, 987 A.2d 575 (2010), *petition for cert. filed*, (U.S. May 18, 2010) (No. 09-1343). The *Nicastro* court's application of a stream-of-commerce theory over a traditional minimum-contacts analysis was rooted in the court's recognition of marketplace globalization and accelerated transnational commerce. In particular, the *Nicastro* court stressed the integration of the American economy into the global economy as the justification for extending the reach of New Jersey's long-arm jurisdiction under a stream-of-commerce theory. This article explores the evolving standard under which courts decide whether to exercise personal jurisdiction, as highlighted by *Nicastro*, and the potential impact that the increased vulnerability of foreign manu-

facturers will have on international business operations.

The preeminent issue addressed by the New Jersey Supreme Court in *Nicastro* was whether the Due Process Clause of the U.S. Constitution rendered a U.S. state powerless to provide relief to a resident who suffered serious injury from a product sold and marketed by a foreign manufacturer through an independent distributor when the foreign manufacturer knew that the final destination might be a consumer in that state.

The plaintiff, Robert Nicastro, filed a product liability lawsuit in New Jersey state court after losing four fingers while working with a recycling machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre), a company organized and operating under the laws of the United Kingdom. J. McIntyre designed and manufactured the recycling machine at its headquarters in the United Kingdom, and it sold the machine to its exclusive distributor located in Ohio, McIntyre Machinery America, Ltd. (McIntyre America). Subsequently, McIntyre America sold the machine to Nicastro's employer, Curcio Scrap Metal. The owner of Curcio Scrap Metal purchased the machine from McIntyre America after meeting repre-

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sentatives from McIntyre America at a trade convention in Las Vegas. The plaintiff included McIntyre America and J. McIntyre as defendants in the suit, alleging that the recycling machine was defective insofar as it did not include a safety guard to prevent Nicastro's hand from becoming caught in the machine's blades.

The foreign manufacturer, J. McIntyre, argued that it did not have sufficient minimum contacts with New Jersey to justify the state's exercise of personal jurisdiction. In support of this argument, J. McIntyre explained that it had no knowledge of McIntyre America's distribution of the recycling machine to Nicastro's employer in New Jersey, and denied any role or control in McIntyre America's sale of the machine to Nicastro's employer. J. McIntyre indicated that it had not placed the recycling machine into the stream of commerce in a purposeful manner directed toward New Jersey, denied marketing the machine in New Jersey, and maintained that it had not made any contacts or relationships with the jurisdiction of New Jersey. J. McIntyre argued that it merely placed the machine into the stream of commerce outside of New Jersey, and this action was insufficient to establish personal jurisdiction in the state. Nicastro, the plaintiff, took the position that New Jersey could exercise jurisdiction based on the fact that J. McIntyre placed an allegedly defective machine into the stream of commerce in such a way that its geographical market was the entire United States. The New Jersey Supreme Court agreed.

Discovery established that J. McIntyre and McIntyre America were independently owned, operated and controlled as distinct entities, but that J. McIntyre did direct and guide McIntyre America's advertising and sales efforts whenever possible. Although the owner of Curcio Scrap Metal purchased the recycling machine from McIntyre America, the labeling on the machine provided J. McIntyre's name and address. Moreover, the recycling machine came with an instruction manual that referenced safety regulations from both the United States and the United Kingdom. Discovery also evinced that J. McIntyre executives attended exhibitions, trade conventions and conferences in various cities in the United States between 1990 and 2005, although none were in New Jersey.

The Supreme Court of New Jersey found these facts sufficient to demonstrate "calculated efforts to penetrate the overall American market." *Nicastro*, 987 A.2d at 592. The court found that J. McIntyre "clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States." *Nicastro*, 987 A.2d at 593.

The *Nicastro* court discussed the development of the law governing personal jurisdiction in performing its analysis. Reviewing personal jurisdiction jurisprudence, the court explained that "[t]he power of a state to subject a person or business to the jurisdiction of its courts has evolved with the changing nature of the American economy." *Nicastro*, 987 A.2d at 582. The New Jersey Supreme Court's analysis included a review of its prior decision in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460 (1986), as well as the U.S. Supreme Court's decision in *Asahi Metal Industry Co. v. Superior Court of Calif.*, 480 U.S. 102 (1987), and its progeny.

In *Charles Gendler*, the New Jersey Supreme Court defined the stream-of-commerce theory to establish personal jurisdiction over a nonresident manufacturer for injuries caused by its defective product if a manufacturer introduced its product into the stream of commerce with actual or imputed knowledge that its product would be sold in the forum state. The *Nicastro* court stated that its recognition of the stream-of-commerce theory in *Charles Gendler* was supported by *Asahi* and other precedent, which had "embraced the stream-of-commerce theory in one form or another." *Nicastro*, 987 A.2d at 589.

The *Nicastro* court recognized that the plaintiff could not satisfy the minimum-contacts analysis; rather, the plaintiff's complaint could only survive if jurisdiction existed under the stream-of-commerce theory. After establishing this framework, the majority offered insight into its ultimate decision, which was that progression of international commerce required a revamped approach to the exercise of personal jurisdiction that would move beyond the analytical prisms established in the past personal jurisdiction decisions of *Pennoyer*, *International Shoe*, and *World Wide Volkswagen*. *Nicastro* arguably reflects the evolution of our economy and the progres-

sion of globalization, and acknowledges the necessity of the evolution of jurisdictional concepts over time to adapt to changes in our society and economy.

After determining that its prior reasoning and holding in *Charles Gendler* was proper, the *Nicastro* majority concluded that "a foreign manufacturer that places a defective product in the stream of com-

***Nicastro* arguably**

reflects the evolution of our economy and the progression of globalization, and acknowledges the necessity of the evolution of jurisdictional concepts.

merce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the *in personam* jurisdiction of a New Jersey court in a product-liability action." *Id.*

With its finding that the stream-of-commerce doctrine was ideally suited to product liability cases, the court reasoned that its holding would ensure that manufacturers that targeted defective products "at a wide geographic market that includes New Jersey will not be immune from suit" in New Jersey courts. *Id.* at 591. *Nicastro*, however, acknowledged that certain product liability cases involving minor injuries may preclude the application of the stream-of-commerce theory insofar as it would violate the traditional notions of fair play and substantial justice. Similarly, the court noted that the minimum-contacts doctrine would still apply in contract and other cases.

The holding set forth in *Nicastro* was based on the majority's conclusion that J. McIntyre "knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers." *Id.* at 577. Absent J. McIntyre's ability to establish that defending itself in a New Jersey court would offend tradi-

tional notions of fair play and substantial justice, the court would permit the exercise of personal jurisdiction by New Jersey courts. According to the *Nicastro* majority, a foreign manufacturer's knowledge of a distribution scheme by which it receives economic benefits will sufficiently establish that New Jersey courts can exercise personal jurisdiction, even if a manufac-

The *Nicastro* decision

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turer may not control the distribution of its products.

***Nicastro*: Forging a “New and Uncharted Path”?**

Counsel for J. McIntyre has filed a petition for a writ of *certiorari* with the Supreme Court of the United States, arguing that the *Nicastro* decision is inconsistent with legal precedent. Petition for Writ of *Certiorari, Nicastro* (U.S. May 18, 2010) (No. 09-1343). J. McIntyre contends that *Nicastro* is a “sweeping departure” from the U.S. Supreme Court’s due process jurisprudence. *Id.* at 2. J. McIntyre asserts that the “profound” impact of the *Nicastro* decision is that New Jersey will now exercise worldwide jurisdiction without regard to constitutional limitations. *Id.* at 2–3. J. McIntyre argues that the impact of *Nicastro* resonates far beyond New Jersey’s borders, pointing out that New Jersey has a population of almost nine million people, who are all potential consumers of products manufactured all over world.

The issues raised in J. McIntyre’s petition largely echo the concerns voiced in the dissenting opinions by New Jersey Supreme Court Justices Hoens and Rivera-Soto. See *Nicastro*, 987 A.2d 575, 594–605 (Hoens, J., dissenting); *Nicastro*, 987 A.2d 575, 605 (Rivera-Soto, J., dissenting). Justice Hoens filed a dissenting opinion, in which Justice Rivera-Soto joined, stating that the

version of the stream-of-commerce theory that the *Nicastro* majority applied radically departed from the articulations of that theory as embraced by the New Jersey Supreme Court in *Gendler* and by the opinion of the United States Supreme Court in *Asahi*.

As stated in Justice Hoens’ dissent, while the *Nicastro* majority’s “repeated quotations and soaring language about the realities of the global marketplace might compel the casual reader to follow what appears to be the majority’s relentless logic,” these allusions to the “global marketplace” cannot mask the fact that the *Nicastro* decision “stretches our notions about due process, and about what is fundamentally fair, beyond the breaking point.” *Id.* at 594–95. According to Justice Hoens, the *Nicastro* majority “has, notwithstanding its protestations to the contrary, elected to forge a new and uncharted path.” *Id.* at 595.

Justice Hoens argued that the *Nicastro* majority strayed far from the precedents it purported to apply in its articulation of the stream-of-commerce theory. According to Justice Hoens, the *Nicastro* majority has “abandoned the cautious wisdom of *Gendler* and *Asahi*, creating in their place a new test that consists of but one inquiry: whether a product has found its way” into New Jersey. *Id.* Justice Hoens concluded that the majority had “replaced a carefully balanced test... with an unbounded one that presumes that participation in the global economy, without more, bespeaks purposeful availment of the benefits of this jurisdiction.” *Id.* at 605. Justice Rivera-Soto filed a separate, dissenting opinion, stating that the *Nicastro* majority’s decision eviscerated “established notions of constitutional decision making that formed the bedrock of our federal system.” *Id.* Justice Rivera-Soto concluded that this decision was “ripe for review and correction by the Supreme Court of the United States.” *Id.*

Personal Jurisdiction Jurisprudence

The *Nicastro* majority indicated that the decision was intended to affirm the New Jersey Supreme Court’s ruling in *Gendler*, 102 N.J. 460. Any analysis of the reasoning behind the *Nicastro* decision necessarily must discuss the *Gendler* and *Asahi* opinions, as well as other applicable legal precedent.

In *Gendler*, the New Jersey Supreme Court reversed the judgment of the lower

court, which found that the appellant, an international manufacturer, had sufficient contacts to subject the manufacturer to the court’s jurisdiction. The only evidence in the record relating to the stream-of-commerce theory was the appellant’s certification that it manufactured telephone equipment for sale to companies throughout the world. *Id.* at 468.

After the appellee, a corporation, alleged that certain telephone equipment did not perform as warranted, the corporation sued the international manufacturer, which had its principal place of business in Tokyo, Japan. *Id.* The trial court granted the international manufacturer’s motion to dismiss, and the appellate division reversed the judgment. The New Jersey Supreme Court reversed the judgment of the appellate division, and held that the appellant, the international manufacturer, was not subject to personal jurisdiction. Although the stream-of-commerce theory applied in the action, the New Jersey Supreme Court stated that the record offered insufficient evidence to determine whether the appellant, the international manufacturer, was aware of or should have been aware of the distribution system of its phones in the United States. Therefore, the court was reluctant to find that the appellant, the international manufacturer, was subject to personal jurisdiction. *Id.*

In *Gendler*, the New Jersey Supreme Court held that a state court’s assertion of personal jurisdiction over a defendant must comport with the due process requirement of the Fourteenth Amendment. *Gendler*, 102 N.J. at 469. The *Gendler* court noted that New Jersey’s long-arm statute permitted service of process on nonresident defendants “consistent with due process of law,” which consequently would “allow out-of-state service to the uttermost limits permitted by the United States Constitution.” *Id.* The New Jersey Supreme Court considered the changes in the law governing personal jurisdiction over the years, noting the United States Supreme Court’s determination that due process required that a defendant have certain minimum contacts with a forum and that the exercise of jurisdiction did not offend “traditional notions of fair play and substantial justice.” *Gendler*, 102 N.J. at 469 (quoting *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158

(1945)). The court noted that the purpose of the minimum contacts test was to ensure the fairness and reasonableness of requiring a nonresident to defend a lawsuit in the forum state. *Gendler*, 102 N.J. at 470; *International Shoe*, 66 S. Ct. at 158. The New Jersey Supreme Court noted that “[g]iven this focus, the jurisdictional test is not to be applied mechanically.” *Gendler*, 102 N.J. at 470. Rather, a court must examine the “quality and nature” of the defendant’s activity “in relation to the fair and orderly administration of the laws” on a case-by-case basis to determine if the minimum-contacts standard was satisfied. *Gendler*, 102 N.J. at 470; *International Shoe*, 66 S. Ct. at 159–160.

The *Gendler* court acknowledged that “the due-process limitation protects the defendant’s liberty interest in not being subject to the entry of a judgment in a jurisdiction with which the defendant does not have sufficient minimum contacts.” *Gendler*, 102 N.J. at 470 (citing *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2181–82 (1985)). The New Jersey Supreme Court further acknowledged in *Gendler* that “[b]y precluding state courts from unfairly requiring non-residents to defend themselves, the due-process clause also insures [sic] that a state’s grasp does not exceed its jurisdictional reach.” *Gendler*, 102 N.J. at 470. By focusing on the nonresident defendant’s contacts with the forum, the minimum-contacts test’s intention was to protect a defendant’s liberty interest. *Id.* In considering when it was fair to subject the defendant to suit in the forum, the *Gendler* decision echoed U.S. Supreme Court precedent, noting that a defendant’s contacts with the forum state must be such that it “should reasonably anticipate being haled into court there.” *Id.* at 470; *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559, 567 (1980). The New Jersey Supreme Court noted in *Gendler* that “the minimum-contacts test gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *Id.* A defendant is on notice that it is subject to suit when it “purposefully avails itself of the privilege of conducting activities within the forum State, thus

invoking the benefits and protections of its laws.” *Gendler*, 102 N.J. at 471 (citing *Hanson v. Denckla*, 78 S. Ct. 1228, 1240 (1958); *Burger King*, 105 S. Ct. at 2182; *World-Wide Volkswagen*, 100 S. Ct. at 567). The *Gendler* court explained that “the crucial question is whether [the foreign manufacturer] was aware or should have been aware of a system of distribution that is purposefully directed at New Jersey residents.” *Gendler*, 102 N.J. at 484. Consistent with United States Supreme Court precedent, however, the court expressly stated that “[i]t is the purposeful act of the defendant, not the unilateral activity of another who merely claims a relationship to the defendant, that connects the defendant to the forum.” *Gendler*, 102 N.J. at 471 (citing *Hanson*, 78 S. Ct. at 1239–40).

Further, as noted in Justice Hoens’ dissent, an analysis of the plurality opinions of the United States Supreme Court in *Asahi*, 107 S. Ct. 1026, also made clear that the Supreme Court’s core concern in evaluating the exercise of long-arm jurisdiction is due process. *Nicastro*, 987 A.2d 575, 597 (2010). Both Justice O’Connor’s plurality opinion in *Asahi* and Justice Brennan’s concurring opinion agreed that the basis for all jurisdictional questions had roots in traditional notions of due process. *See Asahi*, 107 S. Ct. at 1030 (O’Connor, J., plurality opinion); *Asahi*, 107 S. Ct. at 1034–35 (Brennan, J., concurring). Moreover, jurisdictional decisions must comport with “fair play and substantial justice.” *See Asahi*, 107 S. Ct. at 1033 (O’Connor, J., plurality opinion) (quoting *International Shoe*, 66 S. Ct. at 158); *Asahi*, 107 S. Ct. at 1034 (Brennan, J., concurring) (quoting *International Shoe*, 66 S. Ct. at 160). Each of the plurality opinions in *Asahi* used the same test: whether the foreign manufacturer had done something to “purposefully avail itself of the market in the forum State.” *Asahi*, 107 S. Ct. at 1031 (O’Connor, J., plurality opinion); *Asahi*, 107 S. Ct. at 1034 (Brennan, J., concurring).

The plurality opinions in *Asahi* both noted that it was inappropriate to define the stream-of-commerce theory so that a label replaced an evaluation of purposeful availment. *Nicastro*, 987 A.2d at 597 (2010). In considering the stream-of-commerce theory, Justice O’Connor in *Asahi* found that merely placing a product into the stream of

commerce was insufficient to support jurisdiction because, without more, it could not constitute action purposefully directed at the forum state. *Asahi*, 107 S. Ct. at 1031 (O’Connor, J., plurality opinion). While Justice Brennan reached a different conclusion regarding what finding purposeful availment demanded, his opinion did not contradict the notion that merely placing a product into the stream of commerce did not sufficiently establish personal jurisdiction over a defendant. *Asahi*, 107 S. Ct. at 1034.

As noted by Justice Hoens in *Nicastro*, the *Asahi* plurality opinions both cautioned against using stream of commerce “as a surrogate for the analysis of the connection between the foreign entity and the forum that due process demands.” *Nicastro*, 987 A.2d at 598 (2010). The *Asahi* plurality opinions differ only in their definition of what additional proofs are necessary in order for the assertion of jurisdiction to pass constitutional muster. *Id.* Neither of the *Asahi* opinions equated merely placing a product into the stream of commerce somewhere in the United States with purposeful availment sufficient to comport with due process and to support jurisdiction. *Id.* at 600.

The *Nicastro* majority decision appears inconsistent with the New Jersey Supreme Court’s holdings in *Gendler* that a due process analysis is the core of the personal jurisdiction question, and that it is the purposeful act of the *defendant*, not the “unilateral activity” of a related entity, that tied a defendant to a forum. *Gendler*, 102 N.J. at 471 (1986). In addition, the majority decision in *Nicastro* also appears inconsistent with the principles articulated in *Asahi* and other personal jurisdiction jurisprudence.

The Impact of *Nicastro*

The *Nicastro* decision will likely have a broad impact on companies outside of New Jersey, both in the United States and other nations, that manufacture products for distribution in the United States, especially if a United States-based distributor then directs the products to New Jersey consumers. *Nicastro* has established a minimal standard for New Jersey courts to exercise personal jurisdiction. The key question in the future will simply be whether a manufacturer has introduced its products into a distribution scheme that targets a national market that includes New Jersey.

Jurisdiction under the *Nicastro* stream-of-commerce theory does not require a showing that the manufacturer exercised any control over a distribution scheme. If a manufacturer merely had awareness of and used a distribution system by which it reaped economic benefits from possible sales to New Jersey, the companies' conduct would trigger personal jurisdiction in New Jersey. The *Nicastro* court determined that mere awareness by the manufacturer that its product might be sold in New Jersey satisfied the "purposeful availment" requirement of past personal jurisdiction case law. Consequently, using independent middlemen, or some other distribution scheme, will not insulate foreign or out-of-state manufacturers that place allegedly defective products into the U.S. economy when those manufacturers clearly know or should know that they sell their products for ultimate distribution throughout the United States, including in New Jersey and in other states.

The *Nicastro* majority noted that prospective plaintiffs with "lesser injuries" will not necessarily be entitled to rely on the stream-of-commerce theory. Rather, those plaintiffs will have to satisfy the traditional minimum-contacts analysis. The *Nicastro* decision, however, did not provide any

guidelines for future courts to use when determining what types of injuries would trigger jurisdiction under the stream-of-commerce doctrine. Accordingly, all foreign manufacturers should understand that New Jersey courts will likely assert jurisdiction over them whenever a New Jersey resident has been injured by a product that they manufactured and introduced into the United States economy. The extent to which courts will apply or decline to apply *Nicastro* to cases involving "lesser injuries," and the determinative factors in such cases, will develop in the future.

On a broad scale, perhaps the *Nicastro* decision will provide the impetus for the United States Supreme Court to revisit the issue of personal jurisdiction. Courts from other jurisdictions seem equally unsure of how to navigate the stream-of-commerce doctrine. As noted by the Alabama Supreme Court in *Ex parte DBI, Inc.*, 23 So. 3d 635 (Ala. 2009), "in the murky aftermath of the plurality opinions in *Asahi*, the task [of determining whether to exercise personal jurisdiction over a defendant] has not been made any easier. Until more definite direction is given, [courts] revert to the last expressions from the United States Supreme Court in *World-*

Wide Volkswagen and *Burger King* that are not hampered by the lack of a majority." *Ex parte DBI, Inc.*, 23 So. 3d at 649. Whether and the extent to which other state courts will follow *Nicastro* remains to be seen.

In addition to the uncertain state of personal jurisdiction jurisprudence, foreign manufacturers should also know about possible legislative changes on the horizon. Just a few weeks after the *Nicastro* decision, the Foreign Manufacturers Legal Accountability Act was introduced in the U.S. Congress. The Foreign Manufacturers Legal Accountability Act of 2010, H.R. 4678, 111th Cong. (2010). The bill is designed to make it easier for plaintiffs to hold foreign manufacturers accountable in U.S. courts. Similar legislation was proposed last year. The Foreign Manufacturers Legal Accountability Act of 2009, S. 1606, 111th Cong. (2009). Both bills are gathering support from members of Congress with varied political philosophies. Foreign manufacturers should consult their legal counsel to determine the potential effect of these developments on their international business operations and vulnerability to suit in U.S. federal and state courts, and counsel for foreign manufacturers should become familiar with these legislative initiatives. 