

PRODUCT LIABILITY and AVIATION

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CLOUDY SKIES AHEAD: A DIVIDED SUPREME COURT PROVIDES UNCERTAIN COURSE FOR JURISDICTION OVER OUT-OF-STATE MANUFACTURERS

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The Due Process Clause of the Fourteenth Amendment protects individuals from the unlawful exercise of power. Among other things, it protects individuals from being sued in states where the individual has no connection; a state court may only obtain specific jurisdiction over a defendant if that defendant has sufficient “minimum contacts” with the State consistent with “traditional notions of fair play and substantial justice.” In the context of product liability and aviation cases, the application of this rule has been far from clear. For instance, when the product of an out-of-state manufacturer makes its way into a state, and allegedly injures a resident of that state, what amount of contact is necessary to subject the out-of-state manufacturer to jurisdiction in that state’s courts?

Grappling with this question almost 25 years ago, the United States Supreme Court was unable to garner a majority opinion. In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), four Justices deemed the placement of a product into the “stream of commerce” as sufficient activity justifying the imposition of jurisdiction over an out-of-state defendant. Four other Justices, however, concluded that a manufacturer must do more than simply introduce its product into the “stream of commerce.” Rather, in order to have sufficient “minimum contacts” justifying the exercise of jurisdiction, a manufacturer must take some other action “purposefully directed toward the forum state.” These two opinions have come to be known as the “stream of commerce” and “stream of commerce plus” theories, and because neither theory was supported by a majority of the Justices, courts have been left with insufficient guidance.

In *J. McIntyre Machinery, Ltd. v. Nicastro* (No. 09-

1343, June 27, 2011), with a new opportunity to provide guidance on these important issues, the Court again failed to provide a majority opinion. In that case, plaintiff Nicastro had been injured in his home state of New Jersey while using a metal-shearing machine that had been manufactured in England. McIntyre, the foreign manufacturer, had never marketed its goods in New Jersey or shipped them there. McIntyre had marketed its goods nationally and had attended trade shows in other states. Further, an independent distributor (McIntyre Machinery America, Ltd.) sold McIntyre’s products in the United States, and there was no evidence that McIntyre had any control over the distributor. Nicastro sued McIntyre in New Jersey state court, and McIntyre challenged the court’s jurisdiction. The New Jersey Supreme Court held that jurisdiction was proper because the manufacturer knew “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 United States Supreme Court reversed the holding of the New Jersey Supreme Court, with six Justices concluding that jurisdiction was improper where a manufacturer sells its products nationwide and a single product is sold in the forum state. Apart from this conclusion, however, the Justices could not agree on parameters to help guide the lower courts in the future application of these rules.

Justice Kennedy authored an opinion in which three other Justices joined. Justice Kennedy concluded that the so-called “stream of commerce” theory articulat-

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ed in *Asahi* was never intended to supplant the traditional test that a defendant must “purposefully avail itself of the privilege of conducting activities within the forum state” for the exercise of jurisdiction to be proper. The “principal inquiry” for Justice Kennedy was whether “the defendant’s activities manifest an intention to submit to the power of a sovereign.” With respect to product manufacturers, Justice Kennedy explained:

The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

Justice Kennedy’s opinion made clear that he disagreed with the “stream of commerce” theory as articulated by Justice Brennan in his plurality opinion in *Asahi*, which was based on foreseeability rather than on the defendant’s actions. Justice Kennedy also concluded that contacts with the United States generally will not suffice as contacts with a sovereign forum state. While McIntyre may have sought to serve the entire United States market, its contacts here did not show that it “purposefully availed itself of the New Jersey market.”

Justice Breyer, joined by Justice Alito, concurred in the judgment, agreeing that a nationwide marketing plan and a single sale of a product into a state is an insufficient basis for asserting jurisdiction. For that reason, he believed the exercise of jurisdiction was improper in this case. Justice Breyer, however, concluded that the plurality opinion was “making broad pronouncements that refashion basic jurisdictional rules.” He did not identify in detail in what way the rules were being “refashioned.” Further, he “do[es] not agree with the plurality’s seemingly strict no-jurisdiction rule” but also does not agree with the “absolute approach adopted by the New Jersey Supreme Court.” Justice Breyer declined to provide any further guidance because the factual record left “many open questions” and because he was concerned how broad statements might be applied in the context of

modern commerce:

The plurality seems to state strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’ But what do these standards mean when a company targets the world by selling its products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

Justice Ginsburg, joined by two other Justices, dissented. Justice Ginsburg believed that the plurality decision allows an out-of-state manufacturer to “escape” jurisdiction simply by engaging a U.S. distributor to handle sales and shipments within the United States. She noted that McIntyre had at least annual contacts with the United States generally and that this particular industry (scrap metal) had a large presence in New Jersey. Because many marketing arrangements for sales in the United States treat the country as a whole, Justice Ginsburg concluded that it is unfair and inappropriate to rely on a test for jurisdiction that focuses solely on activities directed toward one specific state, rather than toward the country as a whole.

McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States ... If McIntyre UK is answerable in the United States at all, is it not ‘perfectly appropriate to permit the exercise of that jurisdiction ... at the place of injury’?

Noting McIntyre’s regular contacts with the United

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States as a whole, Justice Ginsburg believed that the state where Nicastro was injured was “entirely appropriate for the adjudication of his claim.”

Given Justice Breyer’s conclusion that it was inappropriate to provide any “broad pronouncements,” it is difficult to assess how the Court might rule in other contexts. While it may seem at first blush that six Justices reject consideration of “nationwide contacts,” Justice Ginsburg essentially invited Justices Breyer and Alito to join her, stating that “assigning weight to the local or international stage on which the parties operate would, to a considerable extent, answer the concerns expressed by Justice Breyer.” Even this conclusion, therefore, is uncertain. Apart from disapproving of recent attempts to apply Justice Brennan’s stream of commerce theory, these opinions provide little definitive guidance on how courts should address jurisdictional issues in the future.

Although Nicastro involved a foreign manufacturer, these jurisdictional principles apply equally to domestic manufacturers selling their products in other states. In order to manage risk and prepare for the possibility of litigation, manufacturers must understand these jurisdictional rules and how they might be applied. Manufacturers should consult with counsel to identify the jurisdictions where they may be subject to suit and discuss avenues for limiting their exposure. ♦

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.

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