Appeals Court Rejects Personal Jurisdiction Over Foreign Manufacturer

December 2, 2011 by Sean Wajert

As we have noted for reader, lower courts continue to work to interpret and apply the Supreme Court's decision in J. McIntyre Machinery Ltd. v. Nicastro. Earlier this week, a California appeals court found that the lower court should not have exercised personal jurisdiction over a Canadian unit of Dow Chemical Co. See Dow Chemical Canada ULC v. The Superior Court of Los Angeles County, No. B222609 Cal. Ct. App. 2d Dist.) (unpubl.).

The court noted that this case presented a question left open in Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987), but now resolved by J. McIntyre Machinery, Ltd. v. Nicastro, 131 S.Ct. 2780 (2011): whether merely placing products into the stream of commerce in a foreign country (or another state), aware that some may or will be swept into the forum state, is enough to subject a defendant to personal jurisdiction—or whether due process requires that the defendant have engaged in additional conduct, directed at the forum, before it can be found to have purposefully availed itself of the privilege of conducting activities within the forum state. The court concluded that defendant Dow Chemical Canada ULC was not subject to jurisdiction because it did not purposefully avail itself of the privilege of conducting activities within the forum state.

Plaintiffs were allegedly injured in an accident involving a 1996 Sea-Doo watercraft. This product liability action was subsequently brought against Dow Chemical Canada ULC (Dow), among others, based on an alleged defect in the fuel tank. Dow appeared specially and moved to quash service of the summons on the ground that it lacked the requisite minimum contacts with California to justify the state's assertion of personal jurisdiction. Its principal place of business was Calgary, Alberta, Canada; it had never advertised any products in California. The gas tanks and gas filler tank necks that were the subject of this litigation were sold exclusively in Canada pursuant to purchase order agreements entered into in Canada. Plaintiff contended, however, that the court had specific jurisdiction because Dow allegedly knew that its gas tanks were being installed in products that would be sold in the United States, including California.

The trial court rejected Dow's motion; the court of appeals denied Dow's petition for writ of mandate; the California Supreme Court denied Dow's timely petition for discretionary review. But the United States Supreme Court granted Dow's petition for certiorari on June 28, 2011, ordered that the judgment be vacated and remanded the matter for further consideration in light of *J. McIntyre Machinery, Ltd. v. Nicastro*.

On remand, the court said it was facing the question whether merely depositing goods in the stream of commerce, with knowledge that some will end up in a finished product manufactured by another and sold in the forum state, is enough to satisfy the minimum contacts standard for personal jurisdiction. The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due

process remains whether the defendant purposefully established “minimum contacts” in the forum state.

In *Asahi*, the United States Supreme Court split on the impact of placing a product into the stream of commerce, with a fractured set of opinions, expressing separate standards for deciding the issue, none of which received the support of a majority of the Court. Under Justice O’Connor’s view, placement of a product into a stream of commerce with awareness that it may be carried into a forum state would not, by itself, be adequate for the exercise of jurisdiction over a defendant. 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. But Justice Brennan expressed the position that a chain of distribution carrying a product into the forum could be adequate to permit the exercise of jurisdiction over foreign defendants, because the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.

According to the California court on remand here, in *J. McIntyre Machinery v. Nicastro*, the Supreme Court resolved the question in *Asahi* left unresolved by the competing opinions. The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. The principal inquiry in cases of this sort, said the plurality, is whether the defendant’s activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The concurrence in *Nicastro* noted no evidence of a “regular course” of sales into the state, so there was no "something more," such as special state-related design, advertising, advice, marketing, or anything else.

Here, at no time did Dow engage in any activities in California that revealed an intent to invoke or benefit from the protection of its laws. Nor was there any evidence that the design of Dow’s product was in any way California-specific. It was not sufficient for jurisdiction in this case that the defendant might have predicted or known that its products would reach California. Defendant never undertook to ship its components to California; it supplied its gas tanks and filler necks exclusively in Canada. It matters not whether it knew or could have predicted that another party would sell the finished Sea-Doos incorporating the gas tanks in California. Dow did not advertise or market products in California; it never sold products in, or directly to customers in, California; it never maintained an office or other facility of any kind in California; it had never been qualified to do business in California; and it had no agent for service of process in California.

Due process requires that Dow would have engaged in more than that, in additional conduct directed at the forum, before it could be found to have purposefully availed itself of the privilege of conducting activities within California.