



Personal Jurisdiction in the Wake of *J. McIntyre Machinery, Ltd. v. Nicastro*: Your Product Ending Up There Is Not Enough

by Russell S. Ponessa

For more than thirty years, the courts have issued widely divergent and often result-oriented decisions regarding the exercise of personal jurisdiction over product liability defendants. The "stream of commerce" metaphor first announced in the 1980 United States Supreme Court decision in *World-Wide Volkswagen* took hold and largely carried the day. Dicta became precedent, and in the view of many courts a company's product became its registered agent for service of process - regardless of where the product ended up, or how it got there. A new Supreme Court decision has signaled a shift in the other direction making personal jurisdiction an important tool, defensively and offensively, in the handling of product liability cases.

The June 27, 2011, United States Supreme Court decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) should cause domestic and foreign product manufacturers, distributors, and sellers to take a close look at where they can be sued. In *McIntyre*, a four-justice plurality and a two-justice concurrence held that J. McIntyre Machinery, Ltd., a Great Britain machinery manufacturer, was not subject to personal jurisdiction in the state court of New Jersey - even though Robert Nicastro was injured in New Jersey while using a metal shearing machine made by J. McIntyre.

In the wake of the *McIntyre* decision, the reasonable foreseeability that a product placed into the stream of commerce may end up in any of the 50 states is not enough to subject a company to personal jurisdiction. The constitutional right to Due Process requires "something more." There must be proof that a product liability defendant affirmatively acted to purposefully target the state in which it is sued. *McIntyre* returns the focus to the constitutional underpinning of the due process rights of the company being sued. It also stems the tide of cases making personal jurisdiction over a non-forum state product defendant a foregone conclusion. Domestic and foreign product manufacturers, distributors, and sellers, should therefore re-evaluate where they can be sued; where their corporate affiliates (both foreign and domestic parents and subsidiaries) can be sued; and where the companies they get their products from, and sell their products to, can be sued.

Due Process Limits on Personal Jurisdiction - From *International Shoe* to *Asahi Metal*

The outer boundaries of a court's authority to proceed against a defendant are drawn from the United States Constitution. The Due Process Clause of the Fourteenth Amendment provides that a state "shall [not] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XLV, § 2. The United States Supreme Court's 1945 decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) remains the "canonical opinion" on personal jurisdiction. *International Shoe* provides that a State may authorize its courts to exercise personal jurisdiction over an out-of-state



defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316.

The often used categories of "general jurisdiction" and "specific jurisdiction" also come from *International Shoe*. A court may assert general jurisdiction, giving it the authority to hear any and all types of claims against a foreign corporation (whether from a sister state or a foreign country), only where the corporation's contacts with the state are so "continuous and systematic" as to render the corporation essentially "at home" in the forum state. *International Shoe*, 326 U.S. at 317. In contrast to general, or all-purpose, jurisdiction, specific jurisdiction allows for the exercise of authority where the foreign corporation's contacts with the forum state give rise to the lawsuit at issue. *Id.* at 317.

In the over half a century since *International Shoe*, the Supreme Court has focused on cases involving the exercise of specific jurisdiction, particularly circumstances involving "single or occasional acts" occurring or having their impact within the forum state. The principal inquiry being whether there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Kulko v. Superior Court of California*, 436 U.S. 84, 94 (1978).

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Supreme Court again confronted the question of specific jurisdiction. The case arose out of an automobile accident in Oklahoma. Plaintiffs, who purchased the automobile in New York and were injured in the accident, brought a products liability action against the manufacturer of the automobile in state court in Oklahoma alleging a defective design and placement of the automobile's gas tank and fuel system. 444 U.S. at 288. The plaintiffs also sued the automobile retailer and its wholesaler, both New York corporations that did no business in Oklahoma. *Id.* at 289. In a majority decision issued by Justice White, the Court in *World-Wide Volkswagen* held that a single sale to a customer in New York, who then takes the alleged accident-causing product (an automobile) to a different state (Oklahoma) where the accident then occurs, is not a sufficient basis for asserting personal jurisdiction over the New York defendants. *Id.* at 295 and 298-99.

The impact of *World-Wide Volkswagen* on the exercise of personal jurisdiction in product liability cases did not, however, end with its holding. The decision included a discussion of whether it was "foreseeable" that a product "mobile by its very design and purpose" sold in one state would be the cause of injury in another state. *Id.* at 295. Relying on its prior precedent, the Court explained that the "foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State." *Id.* at 297. The Court then went outside the reasoning necessary for its decision, stating "[t]he forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum states." 444 U.S. at 297-98. While the example used dealt with jurisdiction over manufacturers and national distributors, the only parties contesting jurisdiction in *World-Wide Volkswagen* were the retail dealer and regional distributor. *Id.* at 288-89. Thus, the Court's discussion of what is now called the "stream of commerce theory" of personal jurisdiction is dicta, not precedent. See *Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1124-25 (7th Cir. 1983).



Since *World-Wide Volkswagen*, the concepts of "foreseeability" and "stream of commerce" have frequently surfaced in cases where the defendant sold a product in one state, yet the product ended up in a state in which the defendant did little or nothing to "purposefully avail itself of the privilege or benefits of conducting activities." Some courts interpreted *World-Wide Volkswagen* to allow the exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product into the stream of commerce. See, e.g. *Nelson*, 717 F.2d at 1127. Other courts held to the established precedents, and the constitutional limits of the Due Process Clause, to find no personal jurisdiction where the actions of the defendant were not purposefully directed at the forum state beyond the act of placing a product into the stream of commerce. See, e.g. *Brand v. Menlove Dodge*, 796 F.2d 1070, 1075 (9th Cir. 1986).

This split in authority birthed by the "stream of commerce" metaphor in *World-Wide Volkswagen* was fueled by the 1987 Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The case arose from a 1978 motorcycle accident on a California highway. The accident was allegedly caused by the sudden loss of air in the rear tire of the motorcycle. The claim was that the motorcycle tire, tube, and sealant were defective. The injured plaintiff sued Cheng Shin Rubber Industrial Company, Ltd. ("Cheng Shin"), the Chinese manufacturer of the tire tube. Cheng Shin then sought indemnification from the manufacturer of the allegedly defective valve stem assembly, Asahi Metal Industry Co., Ltd. Asahi Metal, a Japanese corporation, was joined as a defendant in the California state court action. 400 U.S. at 105-06. Neither Cheng Shin nor Asahi Metal had any direct connection with California.

In a procedural posture reflective of the larger lack of consensus on the standard for personal jurisdiction, the trial court held there was personal jurisdiction over Asahi Metal. The California Court of Appeals reversed, finding "it would be unreasonable to require Asahi to respond in California solely on the basis of the ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world including California." *Id.* at 107-08. The Supreme Court of California then reversed the Court of Appeals and held because Asahi Metal was aware the stream of commerce would eventually bring some of the valve stems it sold to Cheng Shin into California, that was sufficient to permit California to exercise personal jurisdiction. *Id.* at 108.

The United States Supreme Court granted *certiorari* and, in a fractured decision, the judgment of the Court was that the exercise of personal jurisdiction over Asahi Metal by the courts of California exceeded the limits of due process. 480 U.S. at 112-113. The debate over the standard for personal jurisdiction raised by *World-Wide Volkswagen* was not, however, put to rest. A four-justice plurality, led by Justice O'Connor, held that 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." 480 U.S. at 112. The Due Process Clause, reasoned Justice O'Connor, requires "more" than the placement of a product into the stream of commerce. *Id.* Examples of the required "something more" included conduct of the defendant in "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* Justice O'Connor's standard for personal jurisdiction in *Asahi* has been variously described as the "stream of commerce plus" or the "foreseeability plus" standard.



Justice Brennan, in a separate four-justice plurality opinion, agreed with the Court's overall judgment that "the exercise of personal jurisdiction over Asahi in this case would not comport with fair play and substantial justice." 480 U.S. at 116. Justice Brennan very clearly did not, however, agree with Justice O'Connor on the standard for specific jurisdiction over product liability defendants, "nor with the conclusion that Asahi did not purposefully avail itself of the California market." *Id.* After noting that since *World-Wide Volkswagen* "most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct," Justice Brennan provided his position that as long as the defendant is aware that the final product is being marketed in the forum state no showing of additional conduct is required. 480 U.S. at 117. Justice Brennan also pointed to his dissent in *World-Wide Volkswagen*, noting that in his "view the foreseeability that a customer would use a product in a distant state was a sufficient basis for jurisdiction." 480 U.S. at 120, n.3.

With *World-Wide Volkswagen* and *Asahi* as the backdrop, it is no surprise that the courts, both state and federal, remained divided over the standard upon which to test personal jurisdiction over domestic and foreign-based product liability defendants who are not at home in the forum state.

J. McIntyre Machinery, Ltd. v. Nicastro

In its June 27, 2011, decision in *McIntyre*, the United States Supreme Court again addressed the standard for determining when a product liability defendant is subject to specific jurisdiction outside of its home state or country. Plaintiff Robert Nicastro was injured while using a metal shearing machine manufactured by J. McIntyre Machinery, Ltd. 131 S. Ct. at 2786. The accident occurred in New Jersey, the plaintiff's state of residence, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The machine was sold into the United States through a separate company and independent distributor, McIntyre Machinery America Ltd., which declared bankruptcy in 2001. *Id.* at 2786 and 2796. The facts of record also included that J. McIntyre participated in annual trade shows in various States, but never in New Jersey; that up to four of its machines, including the one that caused the injuries giving rise to the lawsuit, ended up in New Jersey; and that J. McIntyre held certain United States patents on its recycling technology. *Id.* at 2782, 2786.

Nicastro sued J. McIntyre in New Jersey, alleging the metal shear was defective. J. McIntyre moved to dismiss, arguing that it was not subject to personal jurisdiction in the New Jersey courts. The New Jersey Supreme Court, relying in part on Justice Brennan's foreseeability standard in *Asahi*, held that personal jurisdiction over J. McIntyre comported with due process because "[t]he foreign manufacturer knew or reasonably should have known that by placing a product in the stream of commerce through a distribution scheme that targeted a fifty-state market the product might be purchased by a New Jersey consumer." *Nicastro v. McIntyre Machinery Am., Ltd.*, 987 A.2d 575, 577 (2010). J. McIntyre appealed to the United States Supreme Court which reversed the Supreme Court of New Jersey, and held that J. McIntyre did not engage in conduct purposefully directed at New Jersey and therefore J. McIntyre was not subject to personal jurisdiction in the lawsuit brought there by Robert Nicastro. 131 S. Ct. at 2791.



In *McIntyre*, a four justice plurality, led by Justice Kennedy, rejected a "foreseeability only" standard of personal jurisdiction, stating:

Both the New Jersey Supreme Court holding and its account of what it called '[t]he stream of commerce doctrine of jurisdiction' were incorrect, however. This Court's *Asahi* decision may be responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

Id. at 2786. Justice Kennedy then addressed Justice Brennan's concurrence in *Asahi* (described as "advocating a rule based on general notions of fairness and foreseeability"), calling it "inconsistent with the premises of lawful judicial power." *Id.* at 2789. He went on to declare that "[t]his Court's precedents made clear that it is the defendant's actions, not his expectations, that empower a State's court to subject him to judgment." *Id.* Justice Kennedy further reasoned that in "products liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with the traditional notions of fair play and substantial justice," and that, "as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum state." *Id.* at 2787 and 2788.

After noting that personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis, Justice Kennedy wrote:

It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town. And the issue of foreseeability may itself be contested so that significant expenses are incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible.

Id. at 2790. The conclusion reached in the plurality decision of Justice Kennedy was that "due process protects [J. McIntyre's] right to be subject only to lawful authority" and, because J. McIntyre did not "engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws," that "New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process." *Id.* at 2791.

Justice Breyer, with Justice Alito, concurred with the judgment that J. McIntyre was not subject to personal jurisdiction in New Jersey, but did not join the plurality opinion. *Id.* He viewed the outcome of the case as being determined by the Court's prior precedents. Justice Breyer relied on *World-Wide Volkswagen* for the holding that "a single sale to a customer that takes an accident-causing product to a different state (where the accident takes place) is not a sufficient basis for asserting jurisdiction," *Id.* at 2792, and on *Asahi* in which "the Court, in separate opinions, has strongly suggested that a single sale of a product in a state does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place." *Id.* Justice Breyer then turned to the factual record on appeal stating "[i]n my view, these facts do not provide contacts between the British firm and the State of New



Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case." *Id.* at 2791.

In a vigorous dissent, Justice Ginsburg, joined by Justices Sotomayor and Kagan, wrote that she would hold J. McIntyre "answerable in New Jersey for the harm Nicaastro suffered at his workplace in that state using McIntyre UK's shearing machine." 131 S. Ct. at 2804. Describing it as the "modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*," Justice Ginsburg advanced the stream of commerce and foreseeability alone standard for personal jurisdiction. *Id.* at 2800-01. Based on such a standard, Justice Ginsburg reached the conclusion that J. McIntyre "purposefully availed itself of the United States market nationwide [and] thereby availed itself of the market of all states in which the products were sold by its exclusive distributor." *Id.* at 2801. Recognizing the widely different standard for personal jurisdiction set forth in her dissent, Justice Ginsburg concluded by stating "I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the 'notions of fair play and substantial justice' underlying *International Shoe*." *Id.* at 2804.

In a decision issued the same day as *McIntyre*, the Supreme Court also addressed the exercise of general jurisdiction over a non-forum based product liability defendant. In *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011), Justice Ginsburg, this time writing for a unanimous Court, reaffirmed that the exercise of general jurisdiction requires the corporation's contacts to be sufficiently "continuous and systematic" as to render it "at home" in the forum state. 131 S. Ct. at 2851. The stream of commerce theory was rejected as a basis for general jurisdiction which, in most circumstances, requires that the company have a significant business presence in the forum state. *Id.* at 2855-56.

Personal Jurisdiction Over Product Liability Defendants Following *McIntyre*

The United States Supreme Court's 2011 decision in *McIntyre* revitalizes the due process requirements of "minimum contacts" and "purposeful availment" for the lawful exercise of personal jurisdiction. Rather than closing the curtain on the defensive use of personal jurisdiction in cases where a product enters the stream of commerce and later becomes the subject of a lawsuit, *McIntyre* provides product liability defendants with the very significant position that they are not subject to personal jurisdiction wherever their product ends up. A strong argument can be made that *McIntyre* rejects the concept of "foreseeability" and the resulting justification that marketing or selling a product in the United States makes a company subject to personal jurisdiction in all 50 states. The *McIntyre* decision is also important because a majority of the Court did not reach a result-oriented outcome.

The downside of *McIntyre* is that it leaves the courts without a clear standard for deciding the question of specific jurisdiction over a product manufacturer, distributor, or seller foreign to the forum state. Some decisions issued after *McIntyre* accept the proposition that placing a product into the stream of commerce and targeting a national market is not enough for the exercise of personal jurisdiction. See *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 2011 WL 3702423 at *8 (D.N.J. Aug. 22, 2011); *Lindsey v. Cargotech USA, Inc.*, 2011 WL 4587583 (W.D. Ky. Sept. 30, 2011) at *1; and *Powell v. Profile Design LLC*, 2011 WL 5006825 at ¶ 9 (W.D. Tex. Oct. 17, 2011) and 2012 WL 149518 at *12 (W.D. Tex. Jan.



18, 2012). Other decisions suggest that courts that previously adopted Justice Brennan's foreseeability test are not ready to set it aside. See *Ainsworth v. Cargotech USA, Inc.*, 2011 WL 4443626 at *7 (D. Miss. Sept.23, 2011) and *Original Creations, Inc. v. Ready America, Inc.*, 2011 WL 4738268 at *4, n.7 (N.D. Ill. Oct. 5, 2011). An informal survey of the decisions available to date that reference *McIntyre* indicates that in the cases involving product liability claims over half found no personal jurisdiction over a non-forum based defendant.

In the wake of *J. McIntyre Machinery, Ltd. v. Nicastro*, personal jurisdiction is an important consideration for product manufacturers, distributors and sellers. A company whose products enter into the stream of commerce should evaluate where it can, and cannot, be sued. It is also important to evaluate where the companies you do business with are subject to personal jurisdiction. Is the company whose products you distribute or sell subject to personal jurisdiction in the same states you are? The same question should be asked about the companies providing the component parts, and the companies distributing and selling the products. If you are not comfortable with the answers, look to the terms of your contracts with those companies to establish a consistent geographic scope for personal jurisdiction.



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