Personal Jurisdiction 2.0

Thursday, July 14, 2011

We gave you our quickie analysis of Goodyear Dunlop Tires Operations, S.A. v. Brown, ___ U.S. ___, 2011 WL 2518815 (U.S. June 27, 2011); and J. McIntyre Machinery, Ltd. v. Nicastro, ___ U.S. ___, 2011 WL 2518811 (U.S. June 27, 2011), here, the day after those cases were decided. We weren't alone. Our partner, Sean Wajert, analyzed these cases on his blog the day after. The Prawfs' network was even quicker out of the blocks than we were, and later posted an even more interesting followup here. SCOTUSblog posted an article about the two cases here. There's lots more, see here, here, here, here, and here.

This post, however, is "2.0." We're not going to rehash (much) the facts of Brown and Nicastro or offer detailed point-by-point analysis of the reasoning. We already did that. Today we're thinking in terms of what the Court did, and how that affects what we do going forward.

Initially, as we pointed out back when the Court first granted certiorari, both Brown and Nicastro were relative outliers. Both of them pushed the jurisdictional envelope pretty hard.

Brown held that there could be general personal jurisdiction – where a defendant could be sued about anything, such as a Korean business deal gone awry – based solely on a "stream of commerce" test if a few of its products (a few thousand tires (or as they say in Europe, "tyres") out of millions sold) ended up in the jurisdiction. Under that rationale, the plaintiff in Brown, an in-state resident injured abroad, could probably have brought the same suit in most, if not all, the states in the country, since some tires were probably shipped to each state. That ruling easily lended itself to apocalyptic "what if" hyoptheticals of remote and overlapping jurisdiction. It was in our minds, a "cert. granted with intent to reverse" waiting to happen.

Nicastro was almost as bad. A product passed through several hands and ended up injuring a plaintiff in New Jersey. The New Jersey Supreme Court – a state court deciding a state-law claim – pitched more than two centuries of constitutional federalism into the dustbin of history and instead looked to any and all stream of commerce in the entire country as a basis for augmenting state jurisdiction. We felt that poking a stick in the eye of federalism like that would upset the federalist wing of the Court, and it did. It was also a case that we expected to win.

There's one problem, however, with using outlier cases where a bedrock issue like personal jurisdiction is at stake. There are so many ways to reverse that kind of result, that what the Court most needs to decide might ultimately escape decision. That's not a good thing when the issue – finally revisited after a twenty-year snooze by the Court – is the "stream of commerce" theory of personal jurisdiction.

That also happened. "Stream of commerce" jurisdiction as a concept is not dead – just badly wounded. Only four justices voted to kill it outright in all applications. Two others determined that the Nicastro facts were so poor for the plaintiff that it wasn't necessary to wipe out stream of commerce to set down any hard and fast rules, although they agreed that the dissent's foreseeability-run-amok theory (the original Brennan half of Asahi) was wrong.

But we're getting ahead of ourselves, because we want to deal with Brown first, since a unanimous opinion is easier to analyze.

Because Brown was a great parade-of-horribles case, what we're looking for is a sense of the Court's general hostility to expansive "general" personal jurisdiction. After Brown nobody's going to be advancing stream of commerce as a basis for general jurisdiction. "[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales." 2011 WL 2518815, at *10 n.6; see id. at *8 (flatly rejecting "stream of commerce" as a basis for general jurisdiction, regardless of its effect on case-specific jurisdiction), at *9-10 (similar rejection of "sporadic" product sales). We're not interested in beating that dead horse, so we're focusing on the opinion's overall scope.

We want to know, first, what did the Court say about the quantity and quality of the contacts necessary for general jurisdiction? Second, what did that Court say about the problems that arise when general jurisdiction is recognized too loosely?

On the first point, the Court gave us a new and interesting formulation of "continuous and substantial" contacts – one unencrusted with the usual string of quotes and citations to prior Supreme Court opinions:

> "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. See Brilmayer 728 (identifying domicile, place of incorporation, and principal place of business as "paradig[m]" bases for the exercise of general jurisdiction)."

2011 WL 2518815, at *6 (citing no case, just a book). We can live with that definition. A corporation selects its state of incorporation and its principal place of business through conscious actions. It should do so with the understanding that those places will be the fora for its litigation generally.

Turning to the second issue, the Court indicated distaste for "sprawling" theories of general jurisdiction that allow suits about anything in any place a defendant's products are sold:

> "Under the sprawling view of general jurisdiction urged by respondents . . ., any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed."

Id. General jurisdiction requires a defendant to be "at home" in the jurisdiction. Id. at *10. The relationship of the plaintiff to the jurisdiction is irrelevant – it doesn't matter that the plaintiff lives there. General (as opposed to specific) jurisdiction depends solely on the quality of the defendant's ties. "[G]eneral jurisdiction to adjudicate has in [United States] practice never been based on the plaintiff's relationship to the forum." Id. at *10 n.5.

The Brown Court declined to decide some sort of mass piercing of the corporate veil alternative to stream of commerce that was belatedly advanced as an excuse for asserting general jurisdiction. 2011 WL 2518815, at *10. Based on the tenor of the opinion, however, we'd have to say that theory is toast as well. To the extent that theory would permit general jurisdiction – we reiterate, the ability to hear any suit about anything pertaining to the defendant – in a state where none of the corporate entities is incorporated/has a principal place of business, the "single enterprise" concept falls short of the activity test enunciated in Brown. Similarly, to the extent it would produce a result indistinguishable (and equally "sprawling") from the stream of commerce theory, it flies in the face of the Court's jurisprudential caution against casting the jurisdictional net too broadly.

In any event, we may not be waiting long for an answer. In Bauman v. DaimlerChrysler Corp., ___ F.3d ___, 2011 WL 1879210 (9th Cir. May 18, 2011), the Supreme Court's *bête noir*, the Ninth Circuit, allowed the exercise of general jurisdiction over a foreign corporation on a dumbed-down agency test based solely on the defendant's "right to control" its wholly-owned American subsidiary. Id. at *11-12. The result in Bauman is little different than what the Supreme Court rejected in Brown, in that a defendant doing no business in a jurisdiction is

exposed to suit there over anything and everything, and would be equally exposed to litigation anywhere its subsidiary operates, which is everywhere it sells products.

If the unanimous Court in Brown meant what it said about general personal jurisdiction, then Bauman is wrongly – badly wrongly – decided. We expect a *certiorari* petition in Bauman. We won't give odds on the Court's accepting the appea, as another long snooze may be in the offing, but if it does, our money would be on reversal.

That's what we think of Brown. The general (not specific) jurisdictional test appears now to be something akin to citizenship for purposes diversity jurisdiction. Defendants essentially get to select their general jurisdiction forum(s). In some situations, involving corporations domiciled abroad, the result will undoubtedly be identical to Brown – that no jurisdiction in the United States has general jurisdiction over the defendant, and personal jurisdiction may be asserted (if at all) only on the basis of case specific – "minimum contacts" theories.

Nice segue to Nicastro, if we do say so ourselves.

With respect to the Nicastro's treatment of the stream of commerce concept in connection with specific/minimum contacts personal jurisdiction, we have to say that the New Jersey Supreme Court's blatant disregard for federalism drew an equal and opposite reaction. Unlike the rather woolly "fairness" reasoning that we've seen in other cases of this ilk, the Nicastro plurality opinion is firmly based upon a foundation of power and authority – what states can and cannot do, given their roles in our constitutional structure. Heck, the plurality opinion reads rather like "federalism's greatest hits":

- Due process protects the defendant's "right not to be coerced except by lawful judicial power." Nicastro, 2011 WL 2518811, at *4 (plurality opinion).
- The case implicates "the power of a sovereign to resolve disputes through judicial process." Id. at *5.
- "Where a defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State." Id. at *6.
- "The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign." Id.

- Stream of commerce jurisdiction "discard[s] the central concept of sovereign authority in favor of considerations of fairness and foreseeability." Id. at *7.
- Stream of commerce jurisdiction "is inconsistent with the premises of lawful judicial power." Id.
- "[J]urisdiction is in the first instance a question of authority rather than fairness." Id. at *8.
- "[T]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders." Id.
- "[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis . . . so that the sovereign has the power to subject the defendant to judgment concerning that conduct." Id.
- "[W]hether a judicial judgment is lawful depends on whether the sovereign has authority to render it." Id.
- "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. . . . Ours is a legal system . . . establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." Id.
- "[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." Id.
- It would take an act of Congress for state jurisdiction to be based upon actions beyond that state's borders. Id. at *9.
- "Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is [defendant's] purposeful contacts with New Jersey, not with the United States, that alone are relevant." Id.
- The New Jersey Supreme Court also cited "significant policy reasons" to justify its holding . . ., but the Constitution commands restraint before discarding liberty in the name of expediency. Due process protects [defendant's] right to be subject only to lawful authority." Id. at *9-10.

Since the New Jersey court below had completely disregarded federalism, which is how sovereign authority is distributed in the United States, the Supreme Court's forcible reminder comes as no great surprise.

While we're happy to see federalism replace squishier concepts, Nicastro had been expected to choose between the two competing views expressed in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987): Justice O'Connor's "purposeful availment" test, or Justice Brennan's pure foreseeability test. We didn't get all the way there. While it's pretty clear that pure foreseeability is dead – only three Justices accepted it – whether something short of personal availment might suffice remains an open question.

Justice Kennedy's 4-justice plurality, ironically the same number of votes as in Asahi, laid down a strict purposeful availment test:

> "This Court has stated that a defendant's placing goods into the stream of commerce with the expectation that they will be purchased by consumers within the forum State may indicate purposeful availment. But that statement does not amend the general rule of personal jurisdiction. . . . The principal inquiry in cases of this sort 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. . . . [I]t is not enough that the defendant might have predicted that its goods will reach the forum State."

2011 WL 2518811, at *6.

Under this rule, the overseas pharma defendant in Tobin v. Astra Pharmaceutical Products, Inc., 993 F.2d 528 (6th Cir. 1993), would never have been subjected to a pro-plaintiff court that allowed a jury to second-guess the FDA's risk/benefit analysis that approved the drug. Id. at 536-37. The jurisdictional rationale in Tobin was no different to what the plurality rejected in Nicastro – that "by licensing [a distributor] to distribute [the drug] in all fifty states [the defendant] employed the distribution system that brought [drug] to [the forum]." 993 F.2d at 544. This any-state-equals-all-states rationale is precisely what the plurality rejected.

As we mentioned before, the lower court's overreaching was so blatant in Nicastro that its decision could be reversed without necessarily resolving the Asahi split. Indeed the Asahi split came about in the context of an equally blatant judicial power grab – both opinions in Asahi reached the same result that there was no jurisdiction in that case.

So we have to deal with the two-justice concurring opinion by Justices Breyer and Alito. They found that the facts didn't establish purposeful availment. Those facts were: (1) having an independent U.S. distributor, (2) the distributor's shipping one machine to the state; and (3) attending out-of-state trade shows. 2011 WL 2518811, at *19 (concurrence). A "single

isolated sale" simply wasn't enough. Id. There had to be a "something more" – relating specifically to the state in question – to permit the exercise of jurisdiction. Id. at *11. The plaintiff didn't show any effort peculiar to New Jersey, and since the plaintiff had the burden of proof, plaintiff lost. Id.

Given that the plaintiff in Tobin didn't show any marketing specific to that state (Kentucky) either, 993 F.2d at 543-44, today, the defense should win that type of case as well.

The Nicastro concurrence does make one thing perfectly clear – the requisite "something more" isn't foreseeability. Justice Breyer explicitly rejected such a test:

"Under that view, a producer is subject to jurisdiction for a products-liability action so long as it 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. In the context of this case, I cannot agree."

Id. at *12 (concurring opinion) (emphasis original). Pure foreseeability would "abandon" the "accepted inquiry" focused on "the defendant's contacts **with that forum**" – that is, with the state in question. Id. (emphasis original). The concurrence "reject[ed] the notion that a defendant's amenability to suit travels with the chattel." Id. Foreseeability "cannot" be "reconcile[d]" with either minimum contacts or purposeful availment." Id.

Significantly, the concurrence's unwillingness to embrace the plurality's federalism-driven rationale did not stem from fundamental disagreement, but rather from concerns about its application in other cases:

"The plurality seems to state strict rules that limit jurisdiction. . . . But what do those standards mean when a company targets the world [other e-commerce related questions omitted]? Those issues have serious commercial consequences but are totally absent in this case."

2011 WL 2518811, at *12. So it agreed, in less sweeping terms, that there was no jurisdiction. Thus, it seems pretty clear that these are two more votes against the dissent's – and the Brennan Asahi concurrence's – reliance on pure foreseeability as sufficient for stream of commerce personal jurisdiction. That issue seems dead.

More than that, we can't say. How much of a "something extra" the concurring justices would require is unclear. There are four votes for strict purposeful availment and two votes for what

we'll call "stream of commerce plus" – which might end up also being purposeful availment, depending on the case. We'll have to wait (we hope not for two more decades) for a product liability case involving e-commerce.

As far as practical considerations go, Nicastro dealt with a relatively common fact pattern – the foreign defendant did not sell products directly in the United States at all, but only through an exclusive distributor operating independently of the defendant's control. 2011 WL 2518811, at *5. The defendant's selling of all its products through an independent U.S. distributor (in that case, from Ohio) resulted in its avoiding litigation in New Jersey. To what extent do companies now have the ability to pick and choose (à la Brown) in specific personal jurisdiction cases?

Note that we said "companies" with no adjective. Although Nicastro dealt with a foreign (UK) company, its principles are equally applicable, under our federal system, to one sovereign state's power over the citizens of other states. 2011 WL 2518811, at *8 ("the undesirable consequences of [the stream of commerce] approach are no less significant for domestic producers"). So the rejection of foreseeability as a basis for personal jurisdiction extends to all cases.

We've litigated a number of these cases under Asahi, and where the stricter (O'Connor) half of Asahi was applied, the result was no amenability to suit except (usually – sometimes even that's thrown out) in the state where the independent distributor is incorporated/has a principal place of business. We'd recommend that defendants concerned about mass torts consider the structure of their distribution chains. This isn't a choice-of-law rule, so a New Jersey plaintiff suing in Ohio (what might be allowed in Nicastro) would still apply New Jersey law, but it gives our side a valuable tool to combat the other side's forum shopping that attempts to corral cases into aggregated proceedings in their preferred (hellhole) jurisdictions.

And for that reason – since the other side seems perfectly happy with rules that keep cases in jurisdictions having nothing to do with where injuries happen, as long as they like the jurisdiction – we don't find the Nicastro dissent's policy arguments very convincing. They look rather like crocodile tears to us. In any event, if there are serious problems with personal jurisdiction after Nicastro, Congress (or maybe even the FDA) could address them, within its own constitutional limits – but such a compromise might also entail substantive restrictions on liability.

Anyway, after Nicastro a defendant with a skillfully designed product distribution system may well be able to restrict personal jurisdiction to a select state or two. Such defendants must also take care to respect that system in practice, and not take state-specific actions that target jurisdictions that they are otherwise trying to avoid. Defendants who cheat their own distribution systems are likely to end up with the worst of both rules – and to make bad law for the rest of us.

Organizing a jurisdiction-restrictive distribution system might be an easier task for component part suppliers (such as in Asahi) that don't sell to the public at large. Conversely, however, component part suppliers will have to take care to avoid adverse jurisdictional provisions in their contracts with their customers.

That's as far as our crystal ball goes. We're limiting ourselves to product distribution networks of the sort involved in Nicastro. We have no idea what the Court might do with a purely e-commerce case. But as to the Internet, we frankly don't think that it should be the Court's job to sort this out in the first instance. The intersection between e-commerce and personal jurisdiction seems to us an issue more appropriately addressed by Congress than by the Courts.