

BY-LINED ARTICLE

Limiting Personal Jurisdiction Over Foreign Entities

By James J. Ferrelli and Paul M. da Costa

July 12, 2011

Law360



Law360, New York (July 12, 2011) -- On June 27, 2011, the U.S. Supreme Court issued two landmark decisions limiting the assertion of personal jurisdiction over foreign manufacturers for products liability claims involving their products.

In *J. McIntyre Machinery Ltd. v. Nicastro*,¹ Justice Anthony Kennedy authored a plurality opinion for four members of the court that, combined with Justice Stephen Breyer's concurring opinion, overturned the Supreme Court of New Jersey's decision that had held a foreign manufacturer of an industrial recycling machine was subject to New Jersey's long-arm jurisdiction, in a New Jersey products liability case under the stream-of-commerce doctrine.

In *Goodyear Dunlop Tires Operations SA v. Brown*,² a unanimous Supreme Court reaffirmed the distinction between general and specific jurisdiction, holding that certain foreign subsidiaries of tire manufacturer Goodyear Tire and Rubber Company ("Goodyear USA") were not subject to personal jurisdiction in North Carolina to defend products liability claims arising from a bus accident in France, allegedly caused by a defective tire manufactured and sold in Europe by non-U.S. entities of Goodyear.

***Nicastro*: "Stream-of-Commerce" Is Not Necessarily "Purposeful Availment"**

Nicastro reversed the New Jersey Supreme Court's holding that a foreign manufacturer that distributed its products through a nationwide system that might cause those products to be sold in any of the 50 states was subject to personal jurisdiction in New Jersey, notwithstanding the absence of traditional minimum contacts with the forum state.

Although six members of the court rejected that principle under the facts of the *Nicastro* case, the opinions of the two concurring Justices Breyer and Samuel Alito, and of the dissenting Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, left open the possibility that in the appropriate case, "the relevant contemporary commercial circumstances,"³ could support a stream-of-commerce theory of personal jurisdiction.

Justice Kennedy's plurality opinion sought to clarify personal-jurisdiction concepts that have remained unclear since *Asahi Metal-Industry Co. v. Superior Court of Cal., Solano Cty.*⁴ was decided in 1987. Justice Kennedy noted that the due process clause of the U.S. Constitution protects a defendant's right "not to be coerced except by lawful judicial power" and that judicial power is not lawfully exercised unless a defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws,"⁵ In a products liability case, it is a defendant's conduct reflecting its "purposeful availment" that makes jurisdiction consistent with "traditional notions of fair play and substantial justice."⁶

Generally, Justice Kennedy explained, defendants that operate their businesses primarily outside a state have rights under the due process clause "not to be subjected to judgment in its courts as a general matter." Justice Kennedy reiterated that the primary inquiry should be whether the manufacturer's activities in placing goods into the stream of commerce "manifest an intention to submit to the power of a sovereign."

According to the plurality, the transmission of goods can support the exercise of jurisdiction only where the defendant actually targets the forum, as opposed to merely predicting that its goods may reach an ultimate consumer in the forum state. Thus, Justice Kennedy concluded that the manufacturer's actions, not merely its expectations, "empower a state's courts to subject him to judgment."

The plurality also concluded that the manufacturer had not purposefully directed any conduct at New Jersey; rather, discovery revealed only an intent by the manufacturer to serve a national market. Because the manufacturer did not engage in any specific activities in or toward New Jersey that revealed "an intent to invoke or benefit from the protection of its laws[,] New Jersey is without power to adjudge the rights and liabilities" of the manufacturer, and New Jersey's exercise of jurisdiction in this context violated due process.

Justice Breyer, joined by Justice Alito, issued a concurring opinion agreeing with the majority's conclusion, but they believed it was "unwise to announce a rule of broad applicability without full consideration of the modern-day consequences" of the majority opinion. Specifically, the concurring justices did not believe that the underlying factual record actually implicated modern concerns in the context of the global economy.

Justice Breyer emphasized that the underlying facts did not include, for example, the sale of products on the Web; the consignment of goods through an intermediary such as Amazon.com; or the marketing of products using pop-up Web advertisements intended for viewing in the forum state, which could all have considerable commercial consequences. Based on the limited facts relied upon by the New Jersey Supreme Court, the concurring justices agreed with the plurality's conclusion that the U.S. Supreme Court's existing precedents did not support the exercise of personal jurisdiction.

In contrast, Justice Ginsburg's dissent opined that the stream-of-commerce theory — where, as here, the foreign manufacturer specifically targeted the entire U.S. market, not individual states — was consistent with the concept of fundamental fairness under the due process clause as articulated in past personal-jurisdiction jurisprudence.

A majority of the U.S. Supreme Court in *Nicastro* rejected the New Jersey Supreme Court's holding that a manufacturer's mere awareness that its products might be sold in New Jersey satisfied the purposeful-availing requirement of established personal-jurisdiction case law.

While a plurality of the justices would reject the stream-of-commerce theory as a viable basis for personal jurisdiction, five of the nine justices left open the possibility that an appropriate factual matrix in another case could warrant the application of a stream-of-

commerce theory to assert jurisdiction over a nonresident manufacturer, based on the defendant's minimum contacts with the forum state.

Thus, personal jurisdiction jurisprudence following *Nicastro* appears to remain rooted in a careful weighing and analysis of pertinent jurisdictional facts regarding, as articulated in *Shaffer v. Heitner*,⁷ the relationship among "the defendant, the forum and the litigation," with particular focus on the defendant's conduct — as opposed to its mere expectations — as a key factor in the personal-jurisdiction analysis.

What defines pertinent jurisdictional facts will likely be determined by the fluid characteristics of the American economy, which has grown and continues to grow increasingly global as technology improves and becomes more widespread. Although the New Jersey Supreme Court's holding was reversed, its rationale — that the evolution and concurrent globalization of our economy requires the coincident evolution of jurisdictional concepts — was not rejected by a majority of the U.S. Supreme Court.

As the concurring opinion suggests, there will undoubtedly be future cases that present new and evolving jurisdictional facts to test the boundaries of personal jurisdiction jurisprudence. Justices Breyer and Alito suggest that a future case involving a foreign manufacturer using the power of the Web to sell, market or distribute its products to consumers in the United States could present an opportunity for the court to apply the stream-of-commerce theory consistently with existing jurisprudence to assert personal jurisdiction over a foreign defendant.

The focus, however, will likely continue to be on whether, under the circumstances, the foreign manufacturer's conduct, including its use of the Web to market and sell its products, is tantamount to purposeful availment, which is necessary to comport with due process and to support jurisdiction.

***Goodyear*: Reaffirming a Stringent Test for General Jurisdiction**

In *Goodyear*, the plaintiff's decedents — two 13-year-old boys returning from a trip to France with their soccer team — were killed when their bus overturned in an accident outside of Paris, France, allegedly due to defects in the tires manufactured and sold by the

foreign Goodyear entities. Those defendants were incorporated in Luxembourg, Turkey and France, and were indirect subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant.

The foreign entities manufactured tires primarily for sale in European and Asian markets; had no place of business, employees or bank accounts in North Carolina; and did not design, manufacture, advertise, solicit business, or themselves sell or ship tires in or to North Carolina. Nevertheless, a small percentage of the foreign entities' tires — tens of thousands out of tens of millions manufactured between 2004 and 2007 — were distributed within North Carolina by other Goodyear affiliates.

Writing for a unanimous court, Justice Ginsburg differentiated the concepts of specific jurisdiction and general jurisdiction, as developed in *International Shoe Co. v. Washington*⁸ and its progeny. Specific jurisdiction involves those cases in which the defendant's forum-related activity gives rise to the facts in suit.

In the *Goodyear* case, the foreign Goodyear entities' North Carolina-related activities — i.e., the indirect sales of their tires in North Carolina — did not give rise to the products liability claims asserted by the plaintiffs, which arose out of an accident in France allegedly caused by a defective tire that was manufactured and sold in Europe. Thus, Justice Ginsburg explained, the jurisdictional basis involved in the case was general jurisdiction, which required a different analysis.

General jurisdiction allows the defendant to be sued in the forum state, irrespective of the nature of the cause of action and of its connection with the defendant's forum-related activities. As Justice Ginsburg summarized: "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."

Only two Supreme Court cases decided since *International Shoe* have addressed whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts: *Perkins v. Benguet Consol. Mining Co.*,⁹ and *Helicopteros Nacionales de Colombia, S.A. v. Hall*.¹⁰

As explained by Justice Ginsburg, those cases demonstrate that the assertion of general jurisdiction against a defendant corporation had to be based on a finding that the forum state was the equivalent of the corporation's home.

Justice Ginsburg noted that even a regular flow of the foreign defendant's tires into North Carolina was insufficient to support the assertion of general jurisdiction over the defendants.

Accordingly, the court said there was no reason to differentiate between the ties to Texas held insufficient in *Helicopteros* and the sales of the foreign affiliates' tires that were sporadically made in North Carolina through intermediaries.

Justice Ginsburg emphasized that the holding advocated by the plaintiffs would essentially cause "any substantial manufacturer or seller of goods [to] be amenable to suit, on any claim for relief, wherever its products are distributed." The court concluded that the foreign affiliates' "attenuated connections to the state fall far short of the 'continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the state."

If there were any doubts that general jurisdiction requires demonstrating that the forum state essentially constitutes the "home" domicile of a defendant, the unanimous decision in *Goodyear* appears to resoundingly dispel them, and reaffirms the teachings of *International Shoe*, *Perkins* and *Helicopteros*.

Going forward, the primary basis for invoking jurisdiction over a foreign defendant under applicable long-arm statutes will continue to be the "minimum contacts" analysis of *International Shoe* and its progeny — and the invocation of specific jurisdiction in the forum state based on the forum-related contacts giving rise to the litigation.

James Ferrelli is a partner in the Cherry Hill, N.J., office of Duane Morris. Paul da Costa is an associate in the firm's Newark, N.J., office. Ferrelli and da Costa concentrate their practices in the areas of product liability, complex business litigation, mass torts and class actions.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

1. *J. McIntyre Mach. Ltd. v. Nicastro*, 2011 U.S. (U.S. June 27, 2011).
2. *Goodyear Dunlop Tires Operations v. Brown*, 2011 U.S. (U.S. June 27, 2011).
3. *Id.*, Justice Breyer concurring.
4. *Asahi Metal-Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987).
5. *Nicastro*, citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).
6. *Nicastro*.
7. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).
8. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
9. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (general jurisdiction properly exercised over Philippine corporation sued in Ohio, where defendant's affairs were handled during World War II).
10. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (no jurisdiction in Texas over Colombian corporation for wrongful-death action by survivors of U.S. citizens who died in crash in Peru of helicopter owned by corporation; the corporation's purchases and purchase-related activities in Texas were insufficient to subject it to general jurisdiction in Texas).