More Comments on Personal Jurisdiction

Tuesday, July 19, 2011

Our recent post on the Supreme Court's two "stream of commerce" personal jurisdiction decisions, produced an email to us from Arthur Fergenson, at Ansa Assuncao, LLP, who argued the J. McIntyre v. Nicastro case to the Supreme Court. His comments were sufficiently lengthy and astute, that we asked him if we could present them to our readers as a post. He graciously agreed. The following are Art's reactions to our analysis of Nicastro:(which he calls J. McIntyre):

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I enjoyed reading your recent column on Goodyear and J. McIntyre. I was counsel of record and argued J. McIntyre for petitioner, and I had the benefit of three terrific amicus briefs, one which came from PLAC. As far as “stream of commerce” is concerned, I believe that it is more than wounded; rather, it is gone, along with all the jurisprudence that has grown up around it over the last 20 plus years. I reach that conclusion not only based upon the plurality in J. McIntyre and the absence of any defense of stream of commerce by the dissent, but also the use of the identical term - “metaphor” - in Goodyear at slip op. 9. The US Supreme Court cases of the 1980s that mentioned stream of commerce did not apply a different standard than the International Shoe test. The lower courts since Asahi have created a separate jurisdictional test out of whole cloth.

You discuss the concurrence’s use of the single act doctrine to reach its conclusion that jurisdiction could not be exercised. This is, I believe, the first time that the Supreme Court has so ruled. While it was careful, last in Burger King, to discuss the single act doctrine (now probably known as the “eddy” doctrine), it never concluded that a particular fact pattern fit in it.

There is much else, I believe, that can be derived from the three opinions, plus some language in Goodyear, that will assist in dismissing actions. As you give an example, the “national contacts” test is dead, as the dissent states. As Justice Breyer states, specific jurisdiction is a state-centric, defendant-focused analysis compelled by the Constitution. I also believe that the two-part test is a thing of the past, as we asked for in our briefing, not only because the plurality believed that the general appeal to fairness is wrong (per Burnham), but also because

the dissent is silent on the matter when it should have said something about it had it wanted to preserve its use. Justice Breyer properly rejected the general appeal (relied upon by the NJ Supreme Court in this case, and by other courts, to justify a relaxation of jurisdictional limits) to changed commerce, stating that it has to be proven and be relevant.

In essence, we are, I think, back to the basic dispute: constitutional protections for defendants versus convenience for plaintiffs. The dissent is, at its core, a restatement of the Brennan dissents in the 1980s: get rid of minimum contacts, rely on the convenience of the plaintiff and the courts, and place the burden on defendant to prove a hardship of constitutional magnitude. That was rejected then and has been rejected now. Indeed, Justice Breyer stated twice that the burden was on plaintiff to prove jurisdiction.

Finally, while the principles of federalism and the competing sovereignties were sufficient for the plurality, Justice Breyer focused at the end of his opinion, on the fundamental unfairness of obliging a non-resident economic actor to become aware, as a condition of conducting business in the US, of the myriad of laws in all US jurisdictions and all the ways that the courts function. This is particularly a problem for foreign (in the literal sense of outside the US) economic actors. Only by an act of purposeful availment of a particular state, is it fair to consider that the actor has attorned to the jurisdiction of that state's court system with its unique practices and makeup. This is new to the jurisprudence, it is one that we argued for in our briefing, and it gives a new dimension, I think, to the notion of fairness and to why this right has been lodged in the due process clause of the 14th Amendment.

I have a lot of other thoughts about the potential impact of these opinions, but this email has gone on for too long as it is.

Thank you again for your thoughtful column. Although I am sure that I will be responding to others, yours is the first that has prompted me to so write.