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Foreign Corporation's Mere Awareness That Its Products May Ultimately End Up In a Forum State Is Not Sufficient Contact to Support Personal Jurisdiction

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In *Dow Chemical Canada ULC v. Superior Court*, 2011 WL 6382110 (Cal. App. 2d Dist. Dec. 21, 2011), the *California Court of Appeal, Second District*, held that "plac[ing] 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 not, by itself, sufficient to support the forum state's exercise of personal jurisdiction over the manufacturer of the products. The Court's decision explores the limits of personal jurisdiction after the recent decision by the *United States Supreme Court* in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 8780 (2011), and provides more certainty to foreign corporations regarding the likelihood of being forced to litigate in California courts.

In *Dow Chemical*, nine California residents were injured when a "Sea-Doo" watercraft exploded on the California side of Lake Havasu. A product liability action was subsequently brought against Dow Chemical Canada ULC ("Dow Canada") based upon an alleged defect in the fuel tank. Dow Canada specially appeared in the California court to argue that it lacked the sufficient minimum contacts with California to support the exercise of personal jurisdiction. To support its argument, Dow Canada demonstrated that (i) its principal place of business was in Canada; (ii) it never sold products to customers in California; (iii) it had no office or facilities of any kind in California; and (iv) it had no agent for service of process in California. In addition, Dow Canada argued that the gas tanks were manufactured and sold in Canada. Dow Canada argued that under the "stream-of-commerce plus" test first developed by the Supreme Court in *Asahi Metal Industries Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-13 (1987), placing a product in the stream of commerce in a foreign country was *not* sufficient to confer personal jurisdiction, even if the manufacturer knew that the end product would eventually be sold in the forum state. The trial court rejected Dow Canada's argument and held that the company purposefully availed itself of doing business in California because it was aware that the watercrafts incorporating its components would end up being sold and used in California. Dow Canada appealed all the way to the United States Supreme Court, which vacated the lower court's order and remanded the

matter for consideration by the California courts in light of the Supreme Court's more recent decision in *Nicastro*.

In *Nicastro*, the United States Supreme Court reversed the New Jersey Supreme Court's finding of personal jurisdiction over an English manufacturer in a product liability action. The plaintiff in *Nicastro* had seriously injured himself while using a machine made by petitioner J. McIntyre Machinery ("J. McIntyre"). J. McIntyre made the machine in England and hired an independent distributor in Ohio to sell its machines in the United States. J. McIntyre accompanied the distributor to trade shows in the United States (although never in New Jersey). One its products ended up in New Jersey, and the New Jersey Supreme Court held that the New Jersey courts properly exercised personal jurisdiction over J. McIntyre because the company knew or reasonably should have known that its products could have been sold in New Jersey. The United States Supreme Court reversed. The Court observed that J. McIntyre did not have "a single contact with New Jersey short of the machine in question ending up in [New Jersey]." The Court held that this contact, by itself, was insufficient to show that J. McIntyre purposefully availed itself of the New Jersey market.

After discussing United States Supreme Court precedent on the limits of personal jurisdiction over foreign defendants, the California Court of Appeal in *Dow Chemical* directed the trial court to vacate its order denying Dow Canada's motion to quash service of process and to enter a new order granting the motion. The Court of Appeal held that at no time did Dow Canada engage in any activities in California that revealed an intent to invoke or benefit from the protection of California's laws. Under *Nicastro*, due process required that Dow Canada have engaged in some conduct directed at the forum, beyond a mere awareness that some of its products may end up California.

This decision by the Court of Appeal outlines the outer limits of personal jurisdiction in California. In order for the California state courts to exercise personal jurisdiction over a non-California manufacturer, the company must engage is some sort of purposeful conduct directed towards the forum state. The Court of Appeal identified the following examples of purposeful conduct that could lead to the exercise of personal jurisdiction by a California court: advertising or marketing in California, selling in California, selling directly to customers who are residents of California, maintaining a physical presence in California, qualifying for business in California, designating an agent of service of process in California and/or designing products to comply with regulations enacted by California. This decision provides helpful guidance to non-California corporations that manufacture products that may ultimately find their way to California.

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