

## The Supreme Court Reins in “Stream of Commerce” Personal Jurisdiction

Tuesday, June 28, 2011

In the last two Supreme Court cases we have been following this term, the Court took a critical look at the stream of commerce basis for personal jurisdiction and, as we hoped (and expected), ruled in defendants favor in both. We discussed both lower court decisions in our prior post [Personal Jurisdiction—A Primer](#) which criticizes those decisions as extreme expansions of corporate personal jurisdiction which potentially could have resulted in product manufacturers being sued anywhere over anything. Fortunately, the Supreme Court also thought both cases went too far – although it appears to have been a closer call in the context of specific jurisdiction.

### Goodyear – Stream of Commerce Doesn’t Create General Jurisdiction

In a unanimous decision authored by Justice Ginsburg (who, by the way, authored the dissent in [Nicastro](#)), the Court found that the stream of commerce theory was an “inadequate basis for the exercise of general jurisdiction” and limited its application to specific jurisdiction. [Goodyear v. Brown](#), No. 10-76, [slip op.](#) (U.S. June 27, 2011). While our earlier [post](#) also has a more detailed discussion of specific v. general jurisdiction, here is how the Court explained the distinction in [Goodyear](#). General jurisdiction allows a court to hear any claims in any matter about anything against a defendant because the defendant’s “affiliations with the State are so “continuous and systematic” as to render them essentially at home in the forum State. [Slip op.](#) at 2.

*“Specific jurisdiction, on the other hand, depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”*

At issue in [Goodyear](#) was whether plaintiffs, residents of North Carolina, could sue foreign tire manufacturers in North Carolina state court alleging that the tires defendants manufactured abroad were defective and the cause of a fatal bus accident in France. [Id.](#) at 3-4. The tires at issue weren’t manufactured in the United States. They weren’t sold to anyone in the United States. The accident didn’t occur in the United States. You can understand why a finding of personal jurisdiction in this case worried us.

Everyone was in agreement that the court couldn't exercise specific personal jurisdiction because none of the events at issue took place in North Carolina. Arguing in favor of a broad interpretation of the stream of commerce theory, plaintiffs urged that that North Carolina could exercise general jurisdiction because "[s]ome of the tires made abroad by [the] foreign [defendants] . . . had reached North Carolina through the stream of commerce." *Id.* As we've previously calculated, "some" was approximately one-twentieth of one percent of total product sales.

But, the Court did not need to analyze too closely the scope or breadth of the stream of commerce theory, instead deciding to limit its application to instances of specific jurisdiction only:

*"The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer. Typically, in such cases, a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum.*

...

*The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant."*

[Slip op.](#) at 9-11 (citations and quotation marks omitted). So the takeaway is – it's simply impossible for the "stream of commerce" to create "general" jurisdiction. It's like trying to stick butter up.... Well, we'll leave the rest of *that* analogy to those that know it, but bottom line, it can't be done.

A unanimous decision in this case wasn't that surprising given the extremely attenuated connections between the defendants and the forum. But the Court faced the more difficult question in the second stream of commerce case it decided yesterday – how to reconcile stream of commerce jurisdiction in a global marketplace.

#### Nicastro – Actions Win Out Over Expectations

In J. McIntyre Machinery, Ltd. v. Nicastro, No. 09-1343, [slip op.](#) (June 27, 2011), the Court was faced with the application of stream of commerce jurisdiction based on one of competing opinions authored by Justices O'Connor and Brennan in Asahi Metal Industry Co. v. Superior Court of Cal.,

Solano Cty., 480 U.S. 102 (1987). (Asahi is also discussed in greater detail in our prior [post](#)). While the Nicastro Court decided 6-3 to reverse the New Jersey Supreme Court's decision allowing the exercise of jurisdiction over a foreign defendant, the lead opinion, authored by Justice Kennedy and intended "to provide greater clarity," [slip op.](#) at 4, on the 4-4 split in Asahi, was joined by only three other justices [Chief Justice Roberts and Justices Scalia and Thomas]. Justices Breyer and Alito concurred in the judgment but not the reasoning of the plurality. So, while we wholeheartedly agree with the decision and are strongly encouraged by the plurality's reinvigoration of the purposeful conduct test, Justice Kennedy wasn't able to achieve greater "clarity." One needs a majority for that.

Let's start with the facts. Plaintiff was a scrap metal worker from New Jersey who injured his hand while using a machine manufactured in England by the defendant, an English company. Plaintiff brought his products liability action in state court in New Jersey – where the injury occurred. [Slip op.](#) at 2-3. We already have a stronger connection than in Goodyear, but still a pretty lousy one.

Plaintiff relied on three facts to support the assertion of jurisdiction over the defendant:

- Defendant utilized an independent distributor in Ohio to sell its product in the United States;
- Defendant attended annual conventions in the United States – but not New Jersey -- to advertise its products; and
- Between one and four of defendant's machines ended up in New Jersey.

Id. at 3. The New Jersey Supreme Court determined that jurisdiction was proper

*"because the injury occurred in New Jersey; because petitioner knew or reasonably should have known that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states; and because petitioner failed to take some reasonable step to prevent the distribution of its products in this State."*

Id. at 3-4. In other words, the New Jersey Supreme Court took it on itself simply to abolish state boundaries (and thus our federal system) in pursuit of expanded personal jurisdiction.

The Supreme Court disagreed, as we thought it would, and the plurality found that the New Jersey court had imprudently aligned itself with Justice Brennan's foreseeability test from Asahi. Id. at 7 (Justice Brennan's approach "discarded the central concept of sovereign authority in favor of

considerations of fairness and foreseeability.”). Finding “greater clarity” in Justice O’Connor’s opinion, Justice Kennedy writes:

*“But Justice Brennan’s concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court’s precedents make clear that it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.”*

Id. at 8. Continuing its support of a “purposeful conduct” test, the plurality states that personal jurisdiction requires a case-by-case analysis:

*“The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”*

Id. at 9.

So, which sovereign are we talking about – the United States or a particular state? With a domestic defendant, jurisdiction is attainable in its home state. But, if a foreign defendant directs his “conduct” to the entire United States, the plurality admits that conceivably “a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.” Id. In fact, applying the purposeful conduct test to the facts of Nicastro, the plurality found that while the defendant had directed its marketing to the United States, it did not engage in purposeful conduct directed to New Jersey such that a New Jersey state court could properly exercise jurisdiction over the case. Id. at 10-11.

The plurality went on to state that this should be a rare occurrence as “foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.” Id. at 9. The dissent seems less convinced that state-specific marketing campaigns are the wave of the future. [Dissenting slip op.](#) at 10, 13-17. Admittedly, at least with respect to pharmaceuticals and medical devices, we agree. If our clients manufactured combines maybe Iowa-specific ads would be a good strategy. But typically prescription drugs know no geographical boundaries and based on Nicastro, our foreign clients US-based marketing campaigns are insufficient, in and of themselves, to establish personal jurisdiction.

Just a quick note on the concurring opinion. Essentially, Justices Breyer and Alito believed the plurality need not have gone so far as “to announce a rule of broad applicability”, [concurring slip op.](#) at 1, where the same decision could have been reached using either of the dueling Asahi opinions. Under

Justice O'Connor's notion of "requiring something more" than simply placing the product in the stream of commerce or Justice Brennan's concept that the sale need be part of the "regular and anticipated flow" of commerce into the State:

*"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. at 2-3. So, under either test – "regular flow" or "something more" – the contacts or conduct of the defendant in Nicastro aren't enough. Wanting to leave the discussion open for another day, Justice Breyer acknowledged that "contemporary commercial circumstances" – such as selling goods through an intermediary via the web – might raise issues that require a hard look at existing personal jurisdiction rules, "but those are totally absent in this case." Id. at 4, 7.

Finally, what about the domestic implications if New Jersey's interpretation of stream of commerce jurisdiction had prevailed? Both the plurality and concurring opinions recognized that

*"A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue."*

Id. at 5; see also Nicastro, plurality opinion, slip op. at 10. Given the size of the U.S. market for drugs and medical devices, it is unlikely this will have much bearing on our domestic clients, but a worthy point nonetheless.

Two for two! A great way to end the Supreme Court term.