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Civil Procedure—Personal Jurisdiction

'Stream-of-Commerce' Personal Jurisdiction Only Partially Clarified by Supreme Court

A fractured U.S. Supreme Court June 27 was unable to fashion a majority to resolve the ''decades-old questions left open'' by dueling opinions in *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102 (1987), regarding the ''stream of commerce'' doctrine of specific jurisdiction. Six justices, however, agreed that a British company that manufactures metal-shearing machines lacked sufficient minimum contacts with New Jersey to give its courts personal jurisdiction over the company in a product liability case (*J. McIntyre Machinery Ltd. v. Nicastro*, U.S., No. 09-1343, 6/27/11).

In contrast, a unanimous Supreme Court agreed that North Carolina courts did not properly apply the high bar in general jurisdiction cases—''confusing or blending'' specific and general jurisdictional rules—and therefore incorrectly found personal jurisdiction over foreign corporations in a lawsuit involving a fatal bus accident in Paris allegedly caused by the defendants' tires, which are manufactured abroad (*Goodyear Dunlop Tires Operations SA v. Brown*, U.S., No. 10-76, 6/27/11).

In *Nicastro*, Justice Anthony M. Kennedy, writing for a plurality including Chief Justice John G. Roberts Jr. and Justices Antonin G. Scalia and Clarence Thomas, rejected both the New Jersey Supreme Court's ruling and Justice William J. Brennan Jr.'s opinion for four justices in *Asahi*, which Kennedy said improperly ''discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability.'' Kennedy aligned instead with Justice Sandra Day O'Connor's opinion for four other justices in *Asahi*, which required more than merely placing a product into the stream of commerce.

Concurring in the judgment, Justice Stephen G. Breyer, joined by Justice Samuel A. Alito Jr., agreed the New Jersey opinion was flawed, but said the case was an ''unsuitable vehicle'' for fashioning personal jurisdiction rules for the era of internet commerce.

Dissenting, Justice Ruth Bader Ginsburg, joined by Justices Sonia M. Sotomayor and Elena Kagan, argued that the state court could exercise jurisdiction over the British company without violating due process concerns. Indeed, she emphasized, the court's ruling could provide foreign corporations an easy way to avoid liability in the United States merely by using a U.S. distributor rather than selling the products itself.

Ginsburg, however, wrote for the entire court in *Goodyear*, with a textbook summary of specific and general jurisdiction cases post-*Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), and concluded that the foreign Goodyear Tire and Rubber Co. subsidiaries did not have the required ''continuous and systematic'' affiliation with North Carolina to allow for general jurisdiction.

Legal commentators who spoke to BNA had a mixed reaction to *Nicastro*, but generally expressed frustration that the issues left by *Asahi* were not settled. Gary Born, an expert on international litigation and arbitration, told BNA in an e-mail, ''The Supreme Court's decision in *Nicastro* was expected to clarify the uncertainties surrounding the stream of commerce doctrine resulting from the Court's plurality opnion in *Asahi;* regrettably, the Court did not clarify, and likely aggravated, this uncertainty. It produced another plurality and a splintered set of contradictory opinions that will provide litigants and lower courts with scant guidance.''

Andrew F. Popper, a professor at American University's law school in Washington, D.C., and an expert on personal jurisdiction, told BNA in an e-mail, ''The only way injured plaintiffs are going to have their day in court in cases of this nature is if Congress passes and the President signs legislation similar to HR 4678,'' a personal-jurisdiction bill that died last year. ''Short of that, I don't see these cases as helpful to victims of foreign-made defective goods.''

Several experts applauded the unanimous ruling in *Goodyear,* saying it was appropriate and foreseeable.

Nicastro. J. McIntyre Machinery Ltd. is a British corporation headquartered in Nottingham, England. It designed and manufactured the ''McIntyre Model 640 Shear'' involved in the case. Between 1995 and 2001 McIntyre hired an Ohio company, McIntyre Machinery America Ltd., to serve as its American distributor, and although the names are similar, the two companies are distinct entities.

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Robert Nicastro, an employee of Curcio Scrap Metal in New Jersey, lost four fingers on his right hand while using the machine. He brought a products liability suit in New Jersey state court against McIntyre, which sought dismissal for lack of personal jurisdiction.

The New Jersey Supreme Court held that personal jurisdiction existed in the case under the stream of commerce theory as explained in *Asahi*. Echoing Brennan's *Asahi* opinion, the New Jersey court concluded the company ''knew or reasonably should have known'' that its products were being sold nationwide and did not ''take some reasonable step'' to prevent it ending up in New Jersey.

The plurality here argued that ''[i]t was the premise of [Brennan's opinion] that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair.'' In contrast, O'Connor's opinion contained a higher bar: ''The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.''

Dueling Opinions. The plurality said that Brennan's opinion was flawed, and could lead to problematic results such as a small farm owner in Florida who hires a U.S. distributor for its crops finding itself open to lawsuits in Alaska ''without ever leaving town.''

Addressing this case, the plurality concluded there was no ''purposeful availment'' of New Jersey by the British company. The state court's rationale was too weak for jurisdiction—discovery had found the only contact with New Jersey was the sale of this particular machine. All marketing done by the company was conducted at conventions held outside of New Jersey.

Breyer agreed the facts alleged were too minimal to find jurisdiction under controlling precedent: ''None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.'' Thus, he rejected the New Jersey ruling.

Breyer wrote separately, however, to stress that it was ''unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.'' He hoped for the participation of the U.S. solicitor general in a future case so as to consider the range of jurisdictional possibilities that could occur in the era of internet marketing and sales. What may be fair for a large manufacturer may be unfair to the ''Appalachian potter'' who sells to a distributor who in turn sells the product to a person in Hawaii, he said.

He also rejected the factual arguments made by Ginsburg in dissent to support jurisdiction, noting that they were not raised by Nicastro himself.

In her dissent, Ginsburg detailed the marketing efforts undertaken by McIntyre at multiple Institute of Scrap Metal Industries conventions in various locations across the country. She concluded, ''McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products 'anywhere in the United States.' ''

She added that it was hard to think of a more proper forum for the products liability case than New Jersey, which is where the accident occurred. Would it really be more proper to hold the case in Nottingham, England? she asked.

Nicholas Wittner, a professor at Michigan State University's School of Law, East Lansing, Mich., told BNA June 27, ''Justice Brennan's test has been diminished.'' Wittner teaches product liability law and is an expert on personal jurisdiction and preemption.

Born said that Kennedy's opinion is more restrictive than O'Connor's in *Asahi*. The plurality opinion ''aspired to restate, and sharply limit, the scope of both specific personal jurisdiction and the stream of commerce doctrine—apparently requiring a specific intention to submit to the forum's jurisdiction by 'targetting' the forum market,'' a narrower view than O'Connor's, he said.

Lea Brilmayer, a professor at Yale Law School, New Haven, Conn., told BNA that the plurality's opinion was the view of ''four people who want to clean it up conceptually'' in reaction to the ''muddled line of reasoning'' in *Asahi*. The members of the *Nicastro* plurality were willing to go off by themselves to get clarity, she said.

''When judges start to care deeply about theory, they can't agree,'' she said.

Arthur F. Fergenson, Ansa Assuncao, Ellicott City, Md., argued for McIntyre. Alexander W. Ross Jr., Rakoski & Ross, Marlton, N.J., argued for Nicastro.

Goodyear. The *Goodyear* case also dealt with a tragedy, as it involved the death of two 13-year-old boys from North Carolina who were headed by bus to Charles de Gaulle Airport on a trip with fellow soccer players.

The Goodyear Tire and Rubber Co., an Ohio corporation, did not contest personal jurisdiction in the North Carolina court. Instead, the case dealt with whether three foreign subsidiaries—based in Luxembourg, France, and Turkey—could be sued in the state because the three companies did not ''design, manufacture, or advertise their products in North Carolina'' or have any place of business or employees in the state.

The court detailed both specific and general jurisdiction. Two forms of specific jurisdiction exist: (1) ''continuous and systematic'' activity that ''gave rise'' to the suit itself and (2) engaging in ''single or occasional acts'' within a state and facing suit regarding those acts. Specific jurisdiction was not present in the case because the accident occurred in Paris and the allegedly defective tire was manufactured and sold abroad.

Thus, the North Carolina Court of Appeals (the state supreme court declined to review the holding) rested its holding on general jurisdiction. That concept, the Supreme Court noted, permits jurisdiction when ''affiliations with the State . . . render them essentially at home in the forum State.''

'Not At Home.' After reviewing the only two post-*International Shoe* general jurisdiction cases that it has adjudicated, the Supreme Court concluded Goodyear's foreign subsidiaries were ''in no sense at home in North Carolina.''

The first case, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), dealt with a Philippine company sued in Ohio. The Supreme Court found that jurisdiction was present in the case given that the company managed business in Ohio while Japan occupied the Philippines during World War II.

''To the extent the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio: the corporation's president maintained his office there, kept the company files in that office, and supervised

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from the Ohio office 'the necessarily limited wartime activities of the company,' '' the court said.

In *Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408 (1984), the court held general jurisdiction lacking in a Texas case involving a Colombian helicopter crash in Peru. The court rejected such contacts as the Colombian company's CEO visiting Houston for a contract-negotiation meeting, purchasing services from a Texas company, and sending personnel to Texas for training sessions as sufficient for general jurisdiction.

The court concluded the ties in this case were as weak as the ones in *Helicopteros*. The fact that a few Goodyear foreign subsidiary tires had ended up in North Carolina was not sufficient.

The state court mentioned a ''stream of commerce'' theory (similar to the issue in *Nicastro*), but the court stressed that ''analysis edided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum . . . 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.''

'Easy Decision.' Born told BNA in an e-mail that the *Goodyear* decision ''was a very easy one'' in which the court ''reaffirmed its long-standing use of categories of specific and general jurisdiction, and underscored that general jurisdiction requires a very significant connection between the defendant and the forum state.'' He pointed to the ''at home'' language as ''the one arguably new aspect of the decision.''

In an e-mail to BNA, Wittner said, ''The decision below was legally untenable. The contacts were paltry compared with those in *Helicopteros*, where the Supreme Court's also found no general jurisdiction. There was simply nothing to show the continuous and systematic contacts that you need for general jurisdiction. And not only that, but the lower court mixed up the tests for specific and general jurisdiction, too.''

Brilmayer, whose writings on general jurisdiction were cited by the court, told BNA that at one level the decision simply applied the holdings of *Perkins* and *Helicopteros* to the facts. But *Helicopteros*, she said, was ''all over the map and unsatisfying.'' This opinion, she said, ''breaks new ground in putting the principles at stake on solid ground.''

Meir Feder, Jones Day, New York, argued for the Goodyear subsidiaries. Collyn A. Peddie, Houston, argued for the parents of the two boys. Assistant Solicitor General Benjamin J. Horwich argued for the United States amicus curiae.

BY MICHAEL O. LOATMAN AND MARTINA S. BARASH

Full text of Goodyear at http://pub.bna.com/lw/1076.pdf and 79 U.S.L.W. 4696.

Full text of J. McIntyre Machinery Ltd. at http://op.bna.com/pslr.nsf/r?Open=pats-8j8ppt and 79 U.S.L.W. 4684.