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PERSONAL JURISDICTION

STREAM OF COMMERCE

Nearly two years have passed since the U.S. Supreme Court split three ways in *J. McIntyre Machinery Ltd. v. Nicastro*. During that time, trial and appellate courts, and at least one state supreme court, have handled an array of cases involving personal jurisdiction over foreign defendants. Reflecting the divided views in *J. McIntyre*, these recent rulings continue to paint a mottled picture of what it takes to establish jurisdiction under the stream of commerce theory in product liability and other cases. This BNA Special Report examines these recent opinions and, along with interviews with key practitioners and experts, details how and why this jurisdictional issue has become so divisive.

***J. McIntyre* and the Quagmire of Specific Personal Jurisdiction**

A scrap-metal worker and the British manufacturer of the machine that allegedly hurt him squared off over the worker's ability to sue the company in New Jersey state court in *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). Surprisingly fundamental questions were unresolved and, nearly two years later, still are.

Among those questions: When a foreign company places goods into commerce, what conduct by that company constitutes "minimum contacts" sufficient to subject it to the jurisdiction of a particular U.S. state's courts?

In some cases, a defendant's contacts, or lack of relationship, with the forum state make clear whether jurisdiction exists over that defendant.

But in many cases, as *J. McIntyre* and its varied progeny demonstrate, the issue is contentious.

In *J. McIntyre*, the justices broke three ways with the opinions in the case doing battle over the theoretical basis for specific personal jurisdiction.

The concurrence and dissent endorsed a fairness-based view of due process, even though they differed on the outcome of the case. Meanwhile, the plurality argued that a defendant's consent to a state's sovereign authority underlies the lawfulness of a court's judgments.

Yet practical considerations, the size of the defendant and the role of the internet, for example, lapped at the edges of theory, and led Stephen G. Breyer and Samuel A. Alito Jr.—two justices whose votes will be crucial for decisions in future cases—to wait for a case presenting some of those issues.

Neither Breyer nor Alito committed to an approach to minimum contacts and, arguably, they did not rule out the more liberal view of what it takes to assert jurisdiction under a stream of commerce theory.

Experts interviewed by BNA from December 2012 through February 2013 gave several reasons why agreement is so hard to come by for specific personal jurisdiction, in which the cause of action relates to the defendant's contacts with the forum.

“ . . . [T]here’s a tension between an injured plaintiff being able to sue wherever he or she might live or may want to bring a lawsuit, versus the rights of a foreign defendant, the due process rights of that defendant of being haled into a court in a jurisdiction they had absolutely nothing to do with.”

STEVEN F. GOOBY, COUNSEL FOR J. MCINTYRE
MACHINERY

“At least from a product liability and personal injury standpoint, . . . I think there’s a tension between an injured plaintiff being able to sue wherever he or she might live or may want to bring a lawsuit, versus the rights of a foreign defendant, the due process rights of that defendant of being haled into a court in a jurisdiction they had absolutely nothing to do with,” Steven F. Gooby, who represented J. McIntyre Machinery, told BNA Dec. 7.

“So,” Gooby asked, “is the paramount focus on the defendant’s due process rights, or is it on an injured plaintiff’s ability to sue?”

Professor Andrew Popper of American University’s law school in Washington, D.C., told BNA Dec. 20 that arguments on the side of foreign businesses, including in the legislative context, focus either on fairness and due process, particularly for smaller entities, or on comity—the idea that “U.S. companies could be in great jeopardy abroad”—which he sees as less principled.

“I see that as a lot of smoke,” Popper said. “. . . Who’s going to come out and say I’m in favor of a company that makes a defective good or uses a stolen technology profiting in the United States and not being accountable? Who’s willing to say that? Nobody is.

“The reason it’s hard to decide is what’s below the surface is a huge amount of money that can be covered with legitimate constitutional conscience,” Popper said.

Others see the jurisprudential trouble stemming from the underlying theory.

“There’s a lack of basic consensus on what these imagined terms of fair play and substantial justice and minimum contacts, what they mean,” Professor Lea Brilmayer of Yale Law School told BNA Dec. 20.

“How do you get five people on the Supreme Court to agree to an interpretation of something as vague as that?” Brilmayer asked.

“There’s a lack of basic consensus on what these imagined terms of fair play and substantial justice and minimum contacts, what they mean. How do you get five people on the Supreme Court to agree to an interpretation of something as vague as that?”

PROFESSOR LEA BRILMAYER OF YALE LAW SCHOOL

Professor Nicholas Wittner of Michigan State University’s School of Law told BNA Feb. 28, “This is really a thorny issue.

“One of the considerations is the notion of foreign sovereignty and intrusion into another nation’s sovereignty,” Wittner said. “Some courts take an approach where there’s greater deference, and other courts don’t. That might be at the bottom of all of this.”

Asahi and J. McIntyre

The deep split in *J. McIntyre*, decided in June 2011, must be analyzed in relation to another Supreme Court case, *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). *Asahi* also addressed the role of the stream of commerce as a basis for specific personal jurisdiction—and, like *J. McIntyre*, left the issue open.

The plurality opinions of Justices Sandra Day O’Connor and William J. Brennan Jr. in *Asahi* sketched the contours of the debate.

In the words of Judge James K. Bredar of the U.S. District Court for the District of Maryland in *Spinner Industry Co.*, D. Md., No. 1:10-cv-00114, 10/20/11 (2011 BL 321508):

Justice Brennan’s opinion espouses a broad view of jurisdiction in which a defendant purposefully avails himself of the privilege of doing business in the forum State whenever it is aware, or could have foreseen, that its product would ultimately be sold there. . . . Justice O’Connor’s opinion, in contrast, espouses a restrictive view that rejects foreseeability as a standard and instead requires that a defendant take some deliberate and overt action to target the markets of the forum State in particular.

In *J. McIntyre*, the Supreme Court overturned the New Jersey Supreme Court’s ruling that jurisdiction existed there in a 6–3 vote, but was again unable to muster a majority on the stream-of-commerce theory (39 PSLR 687, 7/4/11).

Four justices, in an opinion by Justice Anthony M. Kennedy, rejected Brennan’s approach.

Breyer, joined by Alito, decided the case based on precedent, saying the single sale of a machine made by defendant J. McIntyre Machinery Ltd. was insufficient to establish jurisdiction. Breyer also wanted to wait for a case involving internet sales or other “contemporary commercial circumstances” before stating a rule.

Three justices dissented in an opinion by Justice Ruth Bader Ginsburg, who found precedents, including *Asahi*, distinguishable, and would have determined *J.*

McIntyre Machinery's efforts to target a national market sufficient for jurisdiction in New Jersey.

Courts have cited *J. McIntyre* 190 times since it was decided, according to a Bloomberg Law citation analysis. The bulk are product liability cases, but many are in intellectual property and other areas.

Where no opinion in a Supreme Court case commands a majority, precedent calls for lower courts to take the holding of the case from the opinion expressing the narrowest grounds concurring in the judgment.

In the case of *J. McIntyre*, that opinion is Breyer's.

But the lower courts are not at all clear on how this principle plays out. Some courts have effectively found a majority holding, saying Breyer, joined by Alito, and the plurality all rejected the Brennan view of the stream-of-commerce theory.

But Brennan's approach is alive and well within the Fifth Circuit, where courts have not read Breyer as joining the plurality on that point, and have applied Breyer's decision to rely on precedent.

The U.S. Court of Appeal for the Fifth Circuit's interpretations of Supreme Court precedent have accepted foreseeability as a basis for jurisdiction.

Other courts, also following Breyer's precedent-based approach, have followed the interpretations of their circuits—some favoring O'Connor's view, some trying to accommodate both tests.

Another court found that all the justices endorsed the exercise of jurisdiction based on "the right set of facts" involving a U.S. distributor of a foreign-made product.

Meanwhile, one three-judge state appellate panel split three ways in its reasoning—a situation emblematic of the divisiveness of the issue.

Will the right case come along that allows the justices to build a majority and deliver a rule that gives some predictability to litigants?

The high court recently has turned down two chances to review personal jurisdiction issues in product liability cases.

The court, however, accepted a non-products case presenting personal jurisdiction issues March 4. The case, *Walden v. Fiore*, U.S., No. 12-574, *certiorari granted* 3/4/13, concerns alleged Fourth Amendment violations by a law enforcement officer acting as a deputy of the Drug Enforcement Administration.

Hot-Button

A personal jurisdiction case like *J. McIntyre*, sometimes called *Nicastro*, "clearly is and continues to be, and I think always will be, a very hot-button type of case," Gooby said.

"There's lots and lots, not only of cases that cite to *Nicastro* and all the precedent before, but also lots of law review articles," Gooby said.

"... It's an intriguing issue, and it's one that I think is of interest to every lawyer, no matter what their practice area may be, because we all study this as one of the first things we study in law school in civil procedure," he said. "... And it has constitutional roots, so I think all those things wrapped into one make it a very intriguing issue."

The constitutional roots are in the Due Process Clause. Over the decades, the Supreme Court has extrapolated what the clause means for the exercise of jurisdiction over a nonresident defendant.

Using these guideposts, the *Asahi* court looked at whether the Japanese defendant's activities—specifically its awareness that its components would reach California, the forum state—constituted " 'minimum contacts' between the defendant and the forum State such that the exercise of jurisdiction does not offend 'traditional notions of fair play and substantial justice,' " in O'Connor's words, quoting from earlier caselaw.

A majority of the *Asahi* court rejected—on reasonableness grounds—the exercise of jurisdiction over the Japanese manufacturer of tire valves in a California suit in which only indemnity claims by a Chinese tire maker remained.

But the court split on minimum-contacts grounds. Justice William J. Brennan Jr., carrying the votes of three other justices, pegged the minimum to a defendant's "aware[ness] that the final product is being marketed in the forum State."

Justice Sandra Day O'Connor, meanwhile, also with the agreement of three other justices, said the minimum required "[a]dditional conduct of the defendant" to show "an intent or purpose to serve the market in the forum State."

Twenty-four years later, the court decided *J. McIntyre*. Kennedy, writing for himself and three other justices, said Brennan's approach improperly "discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability."

The plurality found no basis for the New Jersey courts' jurisdiction over *J. McIntyre Machinery*.

Breyer's concurrence agreed with the outcome.

"None of our precedents finds that a single isolated sale . . . is sufficient" for jurisdiction," Breyer wrote, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and both the Brennan and O'Connor opinions from *Asahi*.

In Brennan's view, Breyer wrote, "jurisdiction should lie where a sale in a State is part of 'the regular and anticipated flow' of commerce into the State, but not where that sale is only an 'edd[y],' i.e., an isolated occurrence."

The defendant, *J. McIntyre Machinery*, sold one machine, or "no more than four machines," that ended up in New Jersey, according to facts in the case.

Breyer declined to state rules based on a defendant's intention "to submit to the power of a sovereign," and its targeting of the forum, as Kennedy would have it.

"[W]hat do those standards mean when a company targets the world by selling products from its Web site?" Breyer asked.

Nor did he endorse the New Jersey Supreme Court's very broad approach to the stream of commerce.

Indeed, in its brief to the Supreme Court, *J. McIntyre Machinery* argued the New Jersey Supreme Court went further than Brennan when it held that jurisdiction existed even though it "[did] not find that *J. McIntyre* had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case" (38 PSLR 1182, 11/22/10).

The New Jersey holding set the jurisdictional minimum where the defendant "reasonably should know" of nationwide distribution "that might lead to any of those products being sold in any of the fifty states."

Breyer said that position was irreconcilable with "the constitutional demand for 'minimum contacts' and

‘purposeful[ly] avail[ment],’ each of which rests upon a particular notion of defendant-centered fairness.”

And what seems fair for a large manufacturer might not seem fair in the case of a small manufacturer, he said.

“At a minimum,” Breyer continued, “I would not work such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests without a better understanding of the relevant contemporary commercial circumstances.”

“If you’re a large company abroad and you have reliable partners in the United States . . . , you can think of a lot of ways to demonstrate how much you don’t intend to submit to the jurisdiction [of the sovereign]. . . . You keep your toe out of the pool.”

PROFESSOR ANDREW POPPER OF AMERICAN UNIVERSITY’S WASHINGTON COLLEGE OF LAW

Observers tend to see *J. McIntyre* as something of a win for foreign defendants.

“*Nicastro* is a confining opinion,” Popper, who advocates for greater amenability to suit, said.

“Did the manufacturer’s conduct manifest an intention to submit to the rules, laws, systems of a state? That definition of purposeful availment is quite limiting,” Popper said.

“In some ways it makes it easier for large foreign companies to behave strategically,” he said. “If you’re a large company abroad and you have reliable partners in the United States . . . , you can think of a lot of ways to demonstrate how much you don’t intend to submit to the jurisdiction [of the sovereign]. . . . You keep your toe out of the pool.”

Gooby said, “The way we’ve argued it, the Due Process Clause is the paramount concern [over concern for a plaintiff’s ability to sue], and that’s what has to be attended to first. . . . And I think that’s where the court is right now.”

For Brilmayer, however, the case did not contribute much. “I don’t feel that it settled any big outstanding issues. . . . I don’t see what’s really changed,” she said.

All Over the Map

Lower courts have gone in different directions following *J. McIntyre*. “They’re all over the place,” Popper said.

In a relatively early decision interpreting the case, *Windsor v. Spinner Industry Co.* (39 PSLR 1217, 11/7/11), the U.S. District Court for the District of Maryland, which was considering jurisdiction over a Taiwanese bicycle component maker, said it read *J. McIntyre* “as rejecting the foreseeability standard of personal jurisdiction, but otherwise leaving the legal landscape untouched.”

The opinion had some influence within the Fourth Circuit, where at least three opinions have used

O’Connor’s “stream of commerce plus” test since *J. McIntyre*.

The dissenting judge in the split New Mexico case, *Sproul v. Rob & Charlies Inc.*, N.M. Ct. App., No. 31,167, 8/15/12 (40 PSLR 945, 8/27/12), also said Breyer rejected Brennan’s “stream of commerce” test.

In *Dow Chemical Canada ULC v. Superior Court*, 202 Cal. App. 4th 170 (Cal. Ct. App. 2011) (2011 BL 325536), the California Court of Appeal, Second District, said *J. McIntyre* “resolved” the stream-of-commerce issue in *Asahi*.

“A hundred [J. McIntyre Machinery] machines in different states, and one makes its way into South Carolina? Is that sufficient now for jurisdiction because you have a lot more contact with the United States as a whole? There’s a pretty strong argument there.”

PROFESSOR NICHOLAS WITTNER OF MICHIGAN STATE UNIVERSITY’S SCHOOL OF LAW

The California appeals court quoted at some length from *J. McIntyre*’s plurality opinion in determining that California courts did not have jurisdiction over Dow Chemical Canada, the manufacturer of the gas tank in a personal watercraft, because it did not purposefully avail itself of the privilege of conducting activities within the forum state. The case also quoted from Breyer’s concurrence.

In finding no jurisdiction, the appeals court changed course from a pre-*J. McIntyre* round of litigation in which the California courts found the exercise of jurisdiction over Dow Chemical Canada proper.

The California Supreme Court and U.S. Supreme Court both declined review of the case (40 PSLR 1161, 10/15/12).

Many courts have proceeded on the explicit or implicit belief that *J. McIntyre* did not create a change in the law sufficient to alter the practice in their jurisdictions. Several courts pointed to the emphasis on precedent by Breyer, the justice who concurred on the narrowest grounds.

On this reasoning, courts in the Fifth Circuit have continued to hew to the Breyer view (40 PSLR 997, 9/10/12) (39 PSLR 1137, 10/17/11). A court in the Sixth Circuit, with the same defendant before it as in one of the district courts in the Fifth Circuit, found no jurisdiction, based on Sixth Circuit precedent that foreseeability or awareness is insufficient for jurisdiction.

A court in the Third Circuit, in *Sieg v. Sears Roebuck & Co.*, M.D. Pa., No. 3:10-cv-00606, 2/24/12, said it would continue to apply both the Brennan and O’Connor tests under Third Circuit precedent because *J. McIntyre* did not choose between them (40 PSLR 279, 3/5/12).

In a series of intellectual property cases, the U.S. Court of Appeals for the Ninth Circuit found *J. McIntyre* “consistent” with the “purposeful direction” test used for tort cases in that circuit.

The cases are *Mavrix Photo Inc. v. Brand Techs. Inc.*, 647 F.3d 1218 (9th Cir. 2011) [2011 BL 204489]; *CollegeSource Inc. v. AcademyOne Inc.*, 653 F.3d 1066, (9th Cir. 2011) [2011 BL 204502]; and *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, (9th Cir. 2012) [2012 BL 330233].

The Ninth Circuit also ruled that the Nevada courts had jurisdiction over the Atlanta law enforcement officer sued in *Walden v. Fiore* because, acting in Georgia, he “expressly aimed” his conduct at Nevada when he seized gambling proceeds from a Nevada couple. That case is now before the U.S. Supreme Court.

The U.S. Court of Appeals for the Federal Circuit, in a patent case, *AFTG-TG LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358 (Fed. Cir. 2012) [2012 BL 216155], also stayed with its precedent, which avoided a choice of tests. The concurrence said Breyer in fact endorsed the O’Connor test.

Other courts have emphasized the facts of the cases before them.

The U.S. District Court for the Northern District of Alabama, in *King v. General Motors Corp.*, N.D. Ala., No. 5:11-cv-02269, 4/18/12 (40 PSLR 509, 4/30/12), found jurisdiction over General Motors Canada based on sales in Alabama of thousands of vehicles made by GM Canada.

“[I]f not Alabama, what market does GM Canada serve?” the court asked.

The Oregon Supreme Court in *Willemssen v. Invacare Corp.*, 282 P.3d 867 (2012) [2012 BL 183954] (40 PSLR 857, 8/6/12), found jurisdiction over the Taiwanese manufacturer of a wheelchair component after the U.S. Supreme Court had directed it to reconsider its earlier opinion in light of *J. McIntyre*.

The Oregon court distinguished *J. McIntyre* on sales data, the centerpiece of Breyer’s opinion.

Breyer found the single sale of a J. McIntyre Machinery product in New Jersey insufficient to support jurisdiction there, but the Oregon Supreme Court pointed to data showing sales of 1,102 wheelchairs with the relevant components in Oregon over a two-year period.

The Illinois Appellate Court found jurisdiction over foreign manufacturers in two cases after *J. McIntyre*.

In *Russell v. SNFA*, 965 N.E.2d 1 (Ill. App. Ct. 2011) (40 PSLR 75, 1/16/12), the court distinguished *J. McIntyre* on sales data, saying more than 2,000 SNFA helicopter parts had been sold in the state over a seven-year period.

The Illinois top court also said, “[I]n *McIntyre*, all the justices found that distribution [of a foreign-made product] by an American distributor in the states could be sufficient to establish jurisdiction, given the right set of facts.”

In the other case, *Soria v. Chrysler Canada Inc.*, 958 N.E.2d 285 (Ill. Ct. App. 2011) [2011 BL 170247] (39 PSLR 1217, 11/7/11), the Illinois Appellate Court found jurisdiction over Chrysler Canada under either *Asahi* theory.

Popper described Illinois as a state with a broad reading of *J. McIntyre*.

Aggregate Contacts?

“What you don’t see” in cases after *J. McIntyre*, Popper said, is discussion of jurisdiction based on an aggregation of national contacts in situations where products

are sold throughout the United States but the foreign producer does not target a particular state.

“That was the hope and the riddle of *Asahi*, coming from [Brennan’s] concurring opinion,” Popper said, “that somewhere along the line there’d be a way to think through the due process requirements to include what seems to be obvious, which is if somebody’s benefiting significantly—economically—from doing business here, they ought to be subject to the laws of the United States, the product liability laws specifically and the intellectual property laws specifically.

“And there was more dialogue in the law reviews prior to *Nicastro* than after,” he said.

But Wittner said the issue —“whether the contacts [relevant for jurisdiction are] not the number of contacts with the forum state, but rather the contacts with the United States as a whole”—remains open after *J. McIntyre*. “If the manufacturer is targeting the entire U.S., then the number of contacts between it and the forum state don’t need to be so extensive,” he said.

“A hundred [J. McIntyre Machinery] machines in different states, and one makes its way into South Carolina? Is that sufficient now for jurisdiction because you have a lot more contact with the United States as a whole? There’s a pretty strong argument there,” he said.

The Beating Heart of Theory

A fundamentally different view of the theory underlying personal jurisdiction divides the plurality from the other two opinions in *J. McIntyre*.

Kennedy set out a clear vision of consent to state sovereignty as a basis for jurisdiction. “Due process protects the defendant’s right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws,’ ” he wrote.

Later in the opinion, Kennedy wrote, “Justice Brennan’s concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. . . . [I]t is the defendant’s actions, not his expectations, that empower a state’s courts to subject him to judgment.”

Kennedy also described jurisdiction as “a question of authority rather than fairness.”

Yet Breyer, despite concurring in the outcome, said that “minimum contacts” and “purposeful availment” each rest on a “notion of defendant-focused fairness.”

Ginsburg, in the dissenting opinion, addressed the issue head on. “[T]he plurality’s notion that consent is the animating concept draws no support from controlling decisions of this Court,” she wrote.

Ginsburg continued in a footnote, saying the plurality’s reliance on a defendant’s “submission” to state authority “seems scarcely different from the long-discredited fiction of implied consent. It bears emphasis that a majority of this Court’s members do not share the plurality’s view.”

Rather, Ginsburg said, “[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe [Co. v. Washington]*, 326 U.S. 310 (1945), gave prime place to reason and fairness.”

Brilmayer attributes part of the problem to precedents.

“When the groundwork was being laid for the modern interpretation, probably 1930-1950, I think they thought the problem was easier than it was going to be,” she said. “And there were a bunch of opinions like *International Shoe* which were adequate for what was going on then, but which were seriously undertheorized.

“*International Shoe* was not such a hard case. *Perkins v. Benguet [Consolidated Mining Co.]*, 342 U.S. 437 (1952), on general jurisdiction] was not such a hard case. And the verbal formulations that they rested on were attractive enough that they could get a majority opinion. But they didn’t know what they were talking about,” Brilmayer said.

“If due process isn’t about how much money you have to spend defending in a foreign state, what is it about? Well, it’s about whether you should have to defend in that foreign state at all, regardless of the money.”

BRILMAYER OF YALE LAW SCHOOL

“Up to the point of *World-Wide Volkswagen*, it was still undecided whether the real issue was the practical burden that you put on the defendant of having to come to defend. . . . *World-Wide Volkswagen* was the first in a series of four or five cases where they panned the idea and said, well, it’s really got something to do with state sovereignty,” she said.

“But at that point you would have to come in with some idea of why state sovereignty lends itself to jurisdictional dismissals, and they never did that,” Brilmayer said.

The court has been “backed into” state sovereignty, Brilmayer said.

“If due process isn’t about how much money you have to spend defending in a foreign state, what is it about? Well, it’s about whether you should have to defend in that foreign state at all, regardless of the money,” she said.

“Because once you throw the cost factor out, you have to look for something that would explain why a case might be barred even when it costs almost nothing extra to litigate there. You’re telling a state it can’t do something,” she said.

“Now what could possibly explain that? My answer is that the analysis can be found in earlier liberal philosophy like John Locke,” Brilmayer said. “John Locke says if you’re in a state, you’re consenting to the king asserting his authority over you, and that’s because a state is this thing defined territorially.”

Wittner views the sovereignty issue, at least in part, from the perspective of the other sovereign.

Personal jurisdiction over a foreign defendant involves “a situation where we’re asserting jurisdiction over another country’s national,” he said. “That by definition is intruding into the sovereignty of a foreign nation.

“ . . . When we take a look at specific personal jurisdiction, I say it’s thorny because you have a situation where having personal jurisdiction over another state in the United States—another state’s citizen—that intrudes on the sovereignty of another state,” Wittner said.

“When you then take it to the next level of a foreign country, some courts and certainly Justice Kennedy find that that has much greater sensitivity, so you need more in the way of minimum contacts in order to do that,” he said.

Defendant Size

Breyer, whose opinion is grounded in a fairness principle, raised the issue of small and large defendants.

“What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product . . . exclusively to a large distributor, who resells a single item . . . to a buyer from a distant State,” Breyer said.

Should the size of the defendant make a difference for specific jurisdiction?

“My brain tells me no,” Brilmayer said. “My heart says the little mom and pop is different from General Motors, but . . . I don’t see any reason why they should be different, aside from general jurisdiction.”

She continued, “Now in theory we’ve been told the heart has nothing to do with it . . . so people don’t write articles about this, about the practical differences.”

Wittner views the differences between large and small defendants factoring into the reasonableness inquiry, rather than minimum contacts.

“It’s reasonableness. It’s the ability of the defendant to defend,” he said.

“It implicates, of course, the cost of defense,” said Wittner, “and when you’re talking about litigating in Alaska about a product that’s manufactured by a small company in Florida, that just doesn’t sound reasonable—especially when that small mom and pop shop had no idea that that product was actually going into Alaska.”

But, he added, “I don’t think doctrinally [reasonableness] is anything separate, like a prong. I think it’s a factor to be taken into consideration.”

A lack of academic writing has hampered development, Brilmayer said. In other constitutional areas, “you get good amicus briefs, you get good academic literature,” she said.

“So whatever it is that can be given to help the court, it’s given, in areas like the First Amendment, or affirmative action, or Tenth Amendment or even Commerce Clause,” Brilmayer said.

“But personal jurisdiction? It doesn’t mostly attract academics; the academic writing, a lot of it is very ‘casenotes’ in nature. . . . That can be useful, but it needs to be pulled together into some major national debate that the Supreme Court can see and can stick its neck out on,” she said.

The Next High Court Case

The Supreme Court has declined to review two personal jurisdiction decisions involving manufacturers of component parts, the California case ultimately finding

no jurisdiction over Dow Chemical Canada (40 PSLR 1161, 10/15/12), and the Oregon case determining that jurisdiction exists over the Taiwanese wheelchair-part maker (41 PSLR 96, 1/28/13).

Breyer has indicated he would like to see a case involving internet sales or other “contemporary” modes of commerce that will help the court see the implications of any new rules for those situations.

The choice of case may make a difference.

“What I hope for are good facts,” Popper said. “And that good facts will produce some flexibility and some more expansive language than *Nicastro* produced. I didn’t think the facts in *Nicastro* were so bad, but obviously they weren’t to the liking of the court.”

He added, “It’d be nice to see the Supreme Court get a case that irritates even them.”

Wittner said, “A passive website? That is not intriguing enough. It’s going to have to be some substantially interactive website.”

Brilmayer also hoped for the right vehicle.

“I’m crossing my fingers about the internet cases, that they wait until there’s a case that they really have some kind of good grasp on,” Brilmayer said. “Because if they take a case and the reasoning is not very satisfactory, those things get dug in and you’ll never fix things up. I don’t think they should take a messy case and do a messy job of it just because it’s internet.”

“[A]ll the problems they had figuring out the stream of commerce are going to be there in spades with any digital communications,” she predicted.

Meanwhile, the actions of a DEA agent who seized allegedly legitimate gambling proceeds may be the focus of the court’s next statement on specific personal jurisdiction. No argument had been set as of March 15.

By MARTINA S. BARASH