

New Jersey Law Journal

VOL. 200 NO. 7

MAY 17, 2010

ESTABLISHED 1878

COMPLEX LITIGATION & *E - Discovery*

Distribution Scheme Knowledge Is Enough To Warrant State Jurisdiction Over Manufacturers

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In February, the New Jersey Supreme Court fundamentally and unconstitutionally expanded the jurisdiction of state courts over foreign defendants or it simply confirmed longstanding precedent. It depends on whom you believe.

Justice Roberto A. Rivera-Soto wrote in his dissent that *Nicastro v. McIntyre Machinery, Ltd.* is ripe for U.S. Supreme Court review because New Jersey “has decided an important federal question in a way that conflicts with” settled federal constitutional principles.

The Court held that a manufacturer is subject to the in personam jurisdiction of a New Jersey court even absent minimum contacts with the state if it knew or reasonably should have known that through its distribution scheme its products were being sold to New Jersey consumers. If a manufacturer does not want to be subject

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to jurisdiction, it must take reasonable steps to prevent distribution in the state, the Court said. To understand the potential significance of this holding, it helps to revisit cases governing personal jurisdiction.

The boundaries of personal jurisdiction defined by the fluid interpretation of the 14th Amendment’s Due Process Clause evolved with the increasingly national and then global scope of commercial trade. So the 19th century *Pennoyer v. Neff* requirement of physical presence in the state gave way in 1945 to *Int’l Shoe Co. v. Washington* and the more relaxed standard of “minimum contacts” with the forum state.

In 1980, in *World-Wide Volkswagen Corp. v. Woodson*, the U.S. Supreme Court again revisited these boundaries, introducing the “stream-of-commerce” theory. The Court held that a forum state may exercise jurisdiction over a corporation “that delivers its products into the stream-of-commerce with the expectation that they will be purchased by consumers in the forum state.”

Significant in light of *McIntyre*, the mere likelihood that a product would find

its way into the forum state was insufficient in *World-Wide Volkswagen*. Rather, the defendant’s expectation and conduct had to be such that “he should reasonably anticipate being haled into court” in the forum state. The shorthand description for this theory of personal jurisdiction is “purposeful availment,” as due process is not violated when jurisdiction is exercised over a defendant that has purposefully availed itself of the forum state’s benefits.

Relying on *World-Wide Volkswagen* and its progeny, the New Jersey Supreme Court in 1986 formally incorporated the stream-of-commerce approach into New Jersey jurisdictional precedent. In *Charles Gendler & Co. v. Telecom Equip. Corp.*, the Court, acknowledging that manufacturers purposefully deriving benefits from New Jersey’s market should not be permitted to escape responsibility there, held that a manufacturer would be subject to jurisdiction if it “knew or reasonably should have known of the distribution system through which its products were being sold” in New Jersey.

Although initially the Court broadly stated that a manufacturer using a nation-

wide distribution system should reasonably expect that its products would be sold in all states, it later stated that the “crucial question is whether [the manufacturer] was aware or should have been aware of a system of distribution that is purposefully directed at New Jersey residents.”

Within months of *Charles Gendler*, a divided U.S. Supreme Court decided *Asahi Metal Industry Co., Ltd. v. Superior Court of CA*, presenting two interpretations of stream-of-commerce requirements. The question posed was whether “mere awareness” on the part of a manufacturer that its products would reach the forum state constituted sufficient “minimum contacts” for the exercise of jurisdiction.

Justice Sandra Day O’Connor, writing for a nonmajority of four justices, held that because “purposeful availment” remained the critical factor, jurisdiction based on the stream-of-commerce theory could not be satisfied by “mere awareness that the stream-of-commerce may or will sweep the product into the forum state.” Justice O’Connor wrote that “additional conduct” evidencing an “intent or purpose” to serve the forum state was required such as advertising in the state or marketing through a sales agent in the state. Justice William Brennan, writing for another nonmajority of four justices, held to the contrary that “awareness that the final product is being marketed in the forum state” satisfies the constitutional threshold. Such awareness means that the possibility of a lawsuit could not come as a surprise, and a manufacturer that benefits economically from the sale of its products in a state could be held to account in that state for any defects in those products, he wrote.

It is with this precedent, then, that the New Jersey Supreme Court decided *McIntyre*. *J. McIntyre Machinery, Ltd.*, is a British manufacturer with no employees, agents or subsidiaries in the United States. However, it sells its products in this country through an independent distributor in Ohio, and *J. McIntyre*’s president regularly attended U.S. trade shows where the distributor presented *McIntyre* machines. A machine was purchased by a New Jersey company after its representative saw the product at a Las Vegas convention. A company employee subsequently severely

injured his hand in the machine and sued the American distributor and the British manufacturer.

The Court acknowledged that the manufacturer did not have “a presence or minimum contacts” in New Jersey and, thus, the stream-of-commerce theory was the sole basis for finding jurisdiction. The opinion repeatedly refers to the “global economy” and its “startling advances in the transportation of products and people and instantaneous dissemination of information.”

The decision concludes that a “manufacturer will be subject to New Jersey’s jurisdiction if it knows or reasonably should have known that through its distribution scheme its products were being sold in New Jersey.” Specifically, the Court held that “a foreign manufacturer that places a defective product in the stream-of-commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product liability action.”

Significantly, the majority characterized its holding as a simple reaffirmation of *Charles Gendler*. Additionally, while acknowledging that its decision echoed Justice Brennan’s views in *Asahi*, the Court noted that a nationwide distribution scheme may be consistent with Justice O’Connor’s “stream-of-commerce plus” approach because “targeting of the national market” may constitute the “additional conduct” her opinion demanded.

The focus, according to the majority opinion, is not on the manufacturer’s control of the distribution scheme, indeed no control is necessary, but rather on the manufacturer’s knowledge of the distribution scheme through which it benefits economically from each state where its products are sold.

The Court appeared to signal an unusual and significant limitation on this particular articulation of the stream-of-commerce approach, potentially limiting it to product liability cases, and perhaps even only to those involving serious injuries. Specifically, the Court stated that this theory was “particularly suitable to product liability actions” and that it “will not necessarily be a substitute for other jurisdictional

doctrine i.e., minimum contacts that will apply in contract and other actions.”

In a scathing dissent, Justice Helen Hoens labeled the opinion “an entirely new and unbounded test for asserting jurisdiction over foreign entities.” She argued that *Charles Gendler* and the two *Asahi* opinions applied the stream-of-commerce theory as part of a larger due process analysis, not as an independent basis for jurisdiction.

Justice Hoens highlighted the “crucial question” from *Charles Gendler* of whether the manufacturer was aware of a distribution scheme that was “purposefully directed at New Jersey residents.” She wrote that both Justices O’Connor’s and Brennan’s *Asahi* opinions acknowledged that the proper test was one of purposeful availment and cautioned against letting the stream-of-commerce “label” take the place of a purposeful availment analysis. Even Justice Brennan’s articulation of stream-of-commerce jurisdiction contemplated a “regular and anticipated flow of products from manufacturers to distribution to retail sale,” in contrast to the single *McIntyre* machine that found its way to New Jersey, Justice Hoens wrote.

Justice Hoens argued that the decision uncritically applies the precedents’ labels of “purposeful marketing” and “distribution scheme” to the scant factual record in *McIntyre* to meet the requirement that there be some knowledge or expectation that the product will be sold in the forum state. She concluded that the majority “simply replaces targeting of this state, which would comport with due process, with a generic effort toward the whole of the United States, which does not.”

New Jersey courts now may assert jurisdiction over manufacturers whose products are brought to the state so long as it can be shown that the manufacturer was or should have been aware of the distribution scheme that brought them here. Manufacturers may be sued in this state regardless of whether any marketing or other business activities took place in or were specifically directed at New Jersey. So, for now, the onus is on the manufacturer to take specific steps to keep its products from finding their way here if it is to avoid the attachment of personal jurisdiction. ■