



# Plaintiff's jurisdiction and products liability

## The U.S. Supreme Court has announced the “at home” rule of general or all-purpose jurisdiction

BY DANIEL DELL’OSSO

What was once a fairly simple matter – suing an American auto maker or tire manufacturer in California for injuries suffered by a California plaintiff while using the defendant’s product in California – is not so simple any longer. Recent decisions by both the United States Supreme Court and the California Supreme Court have inspired manufacturers to challenge jurisdiction in these cases, requiring that plaintiffs spend

some time considering jurisdiction as part of routine case screening. More importantly, the tried and true “stream of commerce” allegation may not be enough to establish personal jurisdiction without a showing that the manufacturer intended its product to reach the forum state.

In January of 2014, the United States Supreme Court handed down its decision in *Daimler AG v. Bauman* (2014) 134 S.Ct. 746; the Court announced the “at home” rule of general or all-purpose

jurisdiction. In an 8-1 decision authored by Justice Ruth Bader Ginsberg, the court held the exercise of general jurisdiction was only proper in a state where the defendant is “at home.” And that “With respect to a corporation, the place of incorporation and principal place of business are “paradig[m]... bases for general jurisdiction.” (*Bauman* at 760.) Which has come to mean as a practical matter that a court may only exercise general/all-purpose jurisdiction over a corporation in its state of incorporation,



or that in the state which houses its principle place of business.

In the brief time since this decision was handed down, auto manufacturers and tire makers have seized upon it to routinely challenge a plaintiff's choice of venue. Taking advantage of the often blurred distinction between general and specific jurisdiction, the manufacturers have used *Daimler*, with some success, to argue that jurisdiction over them is proper only in their state of incorporation or in the state which houses their principal place of business.

### The line between general and specific jurisdiction

And then, in August of 2016 the California Supreme Court issued its decision *Bristol-Myers Squibb v. The Superior Court of San Francisco County* 1 Cal.5th 783 (2016) cert. granted sub nom. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 827 (2017). In *Bristol-Myers*, the California Supreme Court drew a distinction between general jurisdiction, and specific jurisdiction, in which jurisdiction is limited to specific litigation related to defendant's forum state contacts.

In highlighting this distinction, the California Supreme court held that non-California resident plaintiffs could sue Bristol Myers Squibb (BMS) in California because of the relationship between BMS, California and the litigation. In reaching its holding, the California Supreme Court relied on an analysis of three factors (1) whether the defendant has purposefully directed its activities at the forum; (2) whether plaintiff's claims arise out of or are related to these forum directed activities; and (3) whether the exercise of jurisdiction is reasonable and does not offend traditional notions of fair play and substantial justice.

Following the decision, BMS petitioned for certiorari to the United States Supreme Court challenging the California court's finding as it relates to the second element of specific jurisdiction

whether the plaintiff's claims arise out of BMS's forum related activities. BMS's challenge and the Supreme Court's grant of cert. raises the question of whether the rule articulated in *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286-297-298, that delivering a product into the stream of commerce with the expectation it will be purchased by consumers in the forum state is a sufficient basis for personal jurisdiction, is still viable.

In *Asahi Metal Industry Co. Ltd v. Superior Court of Cal.* (1987) 480 U.S. 102, four of the eight justices were of the opinion that if a corporation is aware that its final product is being marketed in the forum state, there is a possibility of a lawsuit in the state. The other four justices opined that there must be an "intent or purpose to serve the market in the forum state, when a product is placed into the stream of commerce in the forum state."

### Stream of commerce: Two schools of thought

In light of this split between the justices recent jurisprudence on stream of commerce indicates that courts are coalescing around two discernible schools of thought as to how to apply the competing approaches in *Asahi*, particularly in light of the Court's more recent pronouncement in *J. McIntyre Machinery Ltd. v. Nicaastro* (2011) 131 S.Ct. 2780.

*Nicaastro* attempted to define the contours of the stream of commerce theory. According to one school of thought, *Nicaastro* requires that a defendant must direct its activities with respect to its products toward the forum in order to be subject to personal jurisdiction for lawsuits relating to its products. The second school of thought, post-*Nicaastro*, requires only it be foreseeable that a defendant's products would enter the forum in order for the defendant to be subject to personal jurisdiction there. As a result, courts are coming to opposite conclusions as to the meaning of *Nicaastro*, apparently as a result of a disagreement as to how

*Nicaastro* should be viewed in light of prior Supreme Court authorities, particularly *Asahi*.

In *Nicaastro*, a four-justice plurality held that under the stream of commerce theory, a defendant must target a forum with its products in order to be subject to personal jurisdiction for lawsuits relating to its products. And, that the mere fact that a defendant may have predicted that its products would wind up in the forum is not enough to subject the defendant to personal jurisdiction for such lawsuits. (*Nicaastro*, 131 S.Ct. at 2789-90.) The plurality therefore concluded that the defendant in *Nicaastro* was not subject to personal jurisdiction under a stream of commerce theory, as it had not targeted the forum with its products. (*Ibid.*) A two-justice concurrence agreed that the defendant in *Nicaastro* was not subject to personal jurisdiction, but ruled that personal jurisdiction was lacking because the case at bar involved only one isolated sale of a product, which could not give rise to personal jurisdiction under any circumstances. (*Id.* at 2791-92.) Of note, the concurrence held that *Nicaastro* could be resolved by the then-existing precedents. (*Ibid.*)

However, prior to *Nicaastro*, the most recent Supreme Court case to consider the stream of commerce theory at length was *Asahi*. And, in *Asahi*, a four-justice plurality led by Justice O'Connor held that in order for defendant to be subject to jurisdiction in a forum for lawsuits relating to its products under the stream of commerce theory, it was not enough that a defendant might have predicted that its products would enter the forum, rather the defendant must have taken some act to purposefully direct its products toward the forum. (*Id.* at 112.) A second four-justice plurality led by Justice Brennan disagreed with the O'Connor plurality, holding that a defendant could be subject to personal jurisdiction in a forum under a stream of commerce theory merely where it was foreseeable that the defendant's products would enter the forum.



According to the Brennan plurality, personal jurisdiction was proper even if there were no acts directed to the forum. (*Id.* at 117.)

Because *Asahi* produced two plurality opinions, some courts interpreting *Asahi* have applied the O'Connor plurality and others have applied the Brennan plurality. See *Boit v. Gar-Tec Products Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (applying the O'Connor plurality from *Asahi*); see also *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (applying the Brennan plurality in *Asahi*); *Rustin Gas Turbines Inc. v. Donaldson Company*, 9 F.3d 415, 420 (5th Cir. 1993) (same); *Intercarrier Communications LLC v. Whatsapp Inc.*, 3:12-CV-776 \*5 fn. 3 (E.D. Va. Sept. 13, 2013); see also *Canntelo LLC v. Axis Communications AB*, Civil No. 13-1084 \*5-6 (D.P.R. July 11, 2013) (same); *C&K Auto Imports Inc. v. Daimler AG*, N.J. Super. A.D. 2013 \*4 (Super Ct. N.J. App. Div. June 21, 2013) (same); *Dejana v. Marine Technology Inc.*, No. 10-CV-4029 \*5-6 (E.D.N.Y. Sept. 26, 2011) (same). See also, *Smith v. Teledyne Continental Motors Inc.*, 840 F. Supp. 2d 927, 931 (D.S.C. 2012) (holding that the *Nicastro* plurality and concurrence “agree that at a minimum, the limitations of O'Connor’s test [from *Asahi*] should be applied, although the plurality would apply an even stricter test, the parameters of which were not precisely defined ... therefore the “stream of commerce plus” test [the O'Connor plurality test from *Asahi*] now commands the majority of this court.”); see also *Northern Ins. Co. of New York v. Construction Navale Bordeaux*, No. 11-60462-CV \*5 (S.D. Fla. July 11, 2011) (same).

At the same time, some courts hold that after *Nicastro*, the Brennan test from *Asahi* is still controlling, because *Nicastro* left the law unchanged. Most recently, in *Service Solutions U.S. LLC v. Autel U.S.*

*Inc.*, No. 13-10534 \*3 (E.D. Mich. Oct. 18, 2013), the court held that *Nicastro* left the law on the stream of commerce theory unchanged, and that *Asahi* still applies as it always had, the same way before and after *Nicastro*. Similarly, in *Ainsworth v. Moffett Engineering Ltd.*, 716 F.3d 174 (5th Cir. 2013) the Fifth Circuit held that because *Nicastro* did not produce a majority opinion, the holding of *Nicastro* may be viewed as the position taken by the justices who concurred on the narrowest grounds, and that because the concurring opinion in *Nicastro* endorsed the Supreme Court’s precedents, *Asahi* still controls this issue. (*Id.* at 178.)

However, and perhaps most importantly, when considering *Asahi*, the *Nicastro* plurality correctly noted that “stream of commerce” is simply a “metaphor” to describe the “purposeful availment” test when the sale of goods are involved. “[T]he stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures.” *Nicastro* 131 S.Ct. at 2791 (Kennedy, J., for the plurality).

Nonetheless, caution is warranted here. While it is correct that the flow of products into the forum state “may bolster an affiliation” between the foreign defendant and the forum state that is germane to the jurisdictional analysis, (See e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S.Ct. 2846, 2855), there is simply no precedent for the conclusion of various lower courts that the exercise of specific personal jurisdiction is proper simply because a product entered the “stream of commerce” and ended up in the forum state; or that placing a product in the stream of commerce is a substitute for proof of purposeful availment by the defendant.

Hence, the mere possibility that a product might end up in a given state cannot constitute the specific intent necessary to support personal jurisdiction. “[F]oreseeability” alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” (*World-Wide Volkswagen*, 444 U.S. at 295.) Were it otherwise, “[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.” (*Id.* at 296.)

[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. (*World-Wide Volkswagen*, 444 U.S. at 297.) The “stream of commerce” metaphor invites unwarranted reliance upon hypothetical expectations and “should have knows,” rather than admissible evidence that establishes conduct by the defendant designed to take advantage of the forum state.

Competing authorities notwithstanding, three things are now clear: (1) that product manufacturers now are more likely to challenge jurisdiction than they have in the past; (2) that if Plaintiff intends to assert general jurisdiction, the forum choices are limited to a defendant’s state of incorporation, or its principal place of business; and (3) attempting to establish specific jurisdiction based solely on the fact that the defendant placed its product in the stream of commerce and it ended up in California is likely not enough – at least until the Supreme Court decides *Bristol-Myers Squibb*, which considering the make-up of the court, is not likely to make it easier on plaintiffs.



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