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## Up the stream of commerce

By Diane S. Kaplan

In the last day of its 2010-2011 term, the U.S. Supreme Court issued multiple opinions in *J. McIntyre Machinery v. Nicastro* (U.S. Supreme Court, 2011) that raised but did not resolve a complex personal jurisdiction issue with roots in Illinois dating back half a century.

The 4-2-3 ruling held that an English manufacturer was not subject to personal jurisdiction in the state of New Jersey because it had not purposefully availed itself of the benefits of that state. J. McIntyre Machinery Ltd. sold its industrial products in the United States through an independent distributor that was authorized to seek sales throughout the country. The distributor sold one of J. McIntyre's metal shearers to a company in New Jersey whose employee, Robert Nicastro, lost four fingers while operating the machine. The New Jersey Supreme Court had previously upheld personal jurisdiction over J. McIntyre, finding that it had purposefully availed itself of the markets for the sale of its products in all 50 states through an economic network euphemistically referred to as the "stream of commerce." The U.S. Supreme Court reversed.

The four-vote plurality opinion written by Justice Anthony M. Kennedy and joined by Chief Justice John G. Roberts Jr. and Justices Antonin G. Scalia and Clarence Thomas found that J. McIntyre had not purposefully directed its sales to New Jersey notwithstanding its efforts to sell its products throughout the country in a stream of commerce. Rather, the plurality stated that "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that clause ensures."

In effect, merely accessing a national economic network for the sale and distribution of goods does not create the constitutionally required relationship between the defendant, the forum and the lawsuit needed to satisfy the due process minimum contacts requirement. According to Kennedy, the due process clause allows a state to exercise personal jurisdiction only when the defendant's activities manifest an intention to submit the sovereign authority of the state. A concurring opinion written by Justice Stephen G. Breyer and joined by Justice Samuel A. Alito agreed to reverse the New Jersey Supreme Court's ruling but did not agree with the plurality's strict application of the purposeful availment doctrine, preferring instead to defer such analysis to a more appropriate case.

Justice Ruth Bader Ginsburg's dissent, joined by Justices Sonia M. Sotomayor and Elena Kagan, voted to affirm the New Jersey ruling on the grounds that J. McIntyre should not be able to shield itself from personal jurisdiction

in the United States by interposing a domestic distributor between itself and every state in which it seeks or does business. Such treatment, the dissent argued, would provide unfair litigation advantages to foreign manufacturers that are unavailable to domestic manufacturers that do not import goods to the United States through independent distributors.

The court granted cert. in *J. McIntyre* to settle the 24-year-old 4-4-1 split decision in *Asahi Metal Industry Co. v. Superior Court* (1987). The issue in *Asahi* was whether personal jurisdiction over the foreign component part manufacturer, based on the stream of commerce theory, was constitutional notwithstanding the defendant's lack of direct contact with the forum state.

The stream of commerce theory of jurisdiction was first

raised in the Illinois Supreme Court case of *Gray v. American Radiator & Standard Sanitary Corp.* (Ill. 1961). The *Gray* court upheld personal jurisdiction over an Ohio component part manufacturer that sold its product to a Pennsylvania manufacturer that distributed and sold the

final product, through a stream of commerce, to Illinois.

The Illinois court upheld jurisdiction because "manufacturers seldom dealt directly with consumers in other states" and "it would be unfair to allow a component part manufacturer to escape jurisdiction simply because it did not do business directly with the consuming public." The underlying rationale of *Gray's* stream of commerce theory was that purposeful availment of economic markets that predictably course through states is comparable to purposeful availment of a specific state for jurisdictional purposes.

In *Asahi*, the court attempted to apply the stream of commerce theory to a foreign component part manufacturer that sold its product to another foreign manufacturer that distributed and sold the final product through a stream of commerce in the United States. The *Asahi* court, however, could not agree on the proper application of the stream of commerce theory. Justice William J. Brennan's four-vote plurality opinion argued that a defendant's "mere placement" of a product into a stream of commerce satisfied the purposeful availment requirement because such conduct was intentional rather than accidental, isolated or fortuitous. Justice Sandra Day O'Connor's four-vote plurality argued for a more exacting purposeful availment standard. It countered that "placement plus additional activity purposefully directed toward the forum state" was required to satisfy the purposeful availment requirement.

The court did not revisit the stream of commerce theory until it granted cert. 24 years later in *J. McIntyre* where, once again, it raised but did not resolve the constitutional application of the stream of commerce theory. Consequently, the underlying constitutional question remains unsettled: When a defendant places its product into a stream of commerce that will predictably reach a state what more, if anything, must that defendant do to be amenable to jurisdiction in that state? The answer to that question will determine whether the court has empowered the American judiciary to advance or retreat into the increasingly globalized economy.

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*Diane S. Kaplan is a law professor at The John Marshall Law School. She was invited to participate in writing an amicus brief in J. McIntyre Machinery v. Nicastro based on her law review article, "Paddling Up The Wrong Stream: Why The Stream Of Commerce Theory Is Not Part Of The Minimum Contacts Doctrine," 55 Baylor Law Review 503-602 (2003). She can be contacted at [7kaplan@jmls.edu](mailto:7kaplan@jmls.edu).*