

## Outsourcing Liability: General and Specific Jurisdiction over Foreign National Corporations in American State Courts

### CASE AT A GLANCE

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#### **Goodyear Luxembourg Tires, S.A.**

Two American teenagers were killed in a bus crash outside Paris, France. The allegedly defective Goodyear bus tire that contributed to the accident was designed, manufactured, and sold by three Goodyear foreign subsidiaries. A small percentage of the foreign tires were distributed in North Carolina. The teenagers' parents brought suit against the American Goodyear parent corporation and its foreign subsidiaries in North Carolina state court. In this appeal, the foreign defendants challenge whether an American state court may validly exercise general personal jurisdiction over foreign corporate subsidiaries where the lawsuit does not arise out of or relate to defendants' attenuated contacts with the forum court.

#### **J. McIntyre Machinery, Ltd.**

Robert Nicastro, an employee of Curcio Scrap Metal, Inc. in New Jersey, had four fingers severed from his hand by a metal-shearing machine manufactured in England by J. McIntyre Machinery, Ltd. McIntyre employees attended trade shows in the United States and sold equipment through these trade shows. The New Jersey Supreme Court held that under the stream-of-commerce theory of specific personal jurisdiction, McIntyre England was subject to the jurisdiction of New Jersey courts. In this appeal, McIntyre England challenges whether under the stream-of-commerce theory, a foreign manufacturer who targets the entire U.S. market for sale of its products may be subject to personal jurisdiction where their product is purchased by a forum state consumer.

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#### ***Goodyear Luxembourg Tires, S.A. v. Brown*** **Docket No. 10-76**

**Argument Date: January 11, 2011**  
**From: The North Carolina Court of Appeals**

#### ***J. McIntyre Machinery, Ltd. v. Nicastro, et ux.*** **Docket No. 09-1343**

**Argument Date: January 11, 2011**  
**From: The Supreme Court of New Jersey**

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### ISSUES

May an American state court validly assert general personal jurisdiction consistent with due process over a foreign subsidiary where some small percentage of the subsidiary's products reach the forum state through the stream of commerce, but the subsidiary's contacts with the forum state are attenuated and the underlying lawsuit does not arise out of, or relate to, the defendant's contacts with the state?

May an American state court validly, consistent with territoriality concepts, assert specific personal jurisdiction over a foreign national corporation pursuant to the stream-of-commerce theory where the

manufacturer targets the entire United States market for the sale of its product and its product is purchased by a consumer in a forum state?

### FACTS

#### *Goodyear Luxembourg Tires, S.A.*

In April 2004, Julian Brown and Matthew Helms, two American thirteen-year-olds, were killed in a bus accident in Paris, France. It subsequently was determined that the Goodyear bus tire plies separated, contributing to the accident.

The Goodyear Tire & Rubber Co. is an Ohio corporation, which has manufacturing facilities in North Carolina. Its three subsidiaries Goodyear Luxembourg, Goodyear Turkey, and Goodyear France are located in Luxembourg, Turkey, and France. The subsidiaries primarily design and manufacture tires for the European and Asian markets, which require different tires to carry heavier loads and meet varying road conditions. On request, specialty Goodyear tires from Europe are shipped and distributed in the United States through Goodyear's internal distribution network. Such specialty tires manufactured at the subsidiaries' plants were routinely requested, brought into, and sold in North Carolina by Goodyear.

Between 2004 and 2007, at Goodyear's request the subsidiaries manufactured approximately 45,000 tires that were distributed in North Carolina. This was out of a total manufacturing capacity of 90 million tires. Many of these tires were used in the United States for specialized vehicles such as horse and boat trailers, cement mixers, and waste haulers. The particular Goodyear tire on the French bus, which was designed for European highway bus and truck driving, is a size not generally used in the United States and was never distributed in North Carolina.

None of the foreign Goodyear subsidiaries has a place of business or employees in North Carolina; none designs, manufactures, or advertises products there; solicits business, sells or ships products into the state; negotiates contracts, pays taxes, or maintains bank accounts there. The subsidiaries are not registered to do business in North Carolina, have not appointed North Carolina agents for service of process, and have not used the North Carolina court system.

The teenagers' parents filed a lawsuit in North Carolina state court against the parent Goodyear Corporation and its three foreign subsidiaries. The foreign subsidiaries moved to dismiss for lack of personal jurisdiction. The trial court denied the motions, holding that the foreign subsidiaries were subject to general jurisdiction in North Carolina. The trial court held that the defendants had systematic and continuous ties with North Carolina that were substantial; that the quantity, quality, and nature of the contacts, as well as the convenience of the parties, all weighed in favor of the exercise of general jurisdiction; and that the exercise of personal jurisdiction comported with due process.

The North Carolina Court of Appeals affirmed, holding that the case involved the exercise of general jurisdiction over the defendants, not specific jurisdiction. The appellate court found that the defendants had purposefully and intentionally placed their products in the stream of commerce, and knew or should have known that some of its tires ultimately were distributed in the United States, and that several thousand of the subsidiaries' tires found their way into North Carolina markets. In addition, the court held that North Carolina had a well-recognized interest in providing a forum in which its citizens could seek redress for injuries they sustained. The North Carolina Supreme Court refused to review this decision, without an opinion.

#### *J. McIntyre Machinery, Ltd.*

Robert Nicastro was employed by Curcio Scrap Metal, Inc. in Saddle Brook, New Jersey. In 2001, four fingers of his left hand were severed when he was using a three-ton scrap metal shear machine. The shear machine was manufactured by J. McIntyre in Nottingham, England. The machine was sold and shipped to McIntyre's exclusive distributor

in the United States, McIntyre Machinery of America, Inc. (MMA), in Stow, Ohio. In 1995, MMA sold and shipped the shear machine to Curcio in New Jersey.

J. McIntyre is a company organized under the laws of the United Kingdom and its principal place of business is Nottingham, England. J. McIntyre and MMA were distinct corporate entities, independently operated and controlled without any common ownership. McIntyre England regularly marketed the company's heavy equipment for use in the scrap metal industry at trade shows, conventions, and conferences throughout the United States from 1990 to 2005. McIntyre employees attended twenty-six such events in various states during that period. At these trade shows, McIntyre England had direct contact with potential customers from around the country and would learn where their machines were sent. Although MMA was a separate corporate entity, it acted as the American conduit for McIntyre England machines throughout the United States.

Nicastro and his wife filed a products liability action against both McIntyre England and MMA in 2003 in New Jersey state court. In 2001, MMA filed for bankruptcy and in 2003 the bankruptcy was closed, before the plaintiffs filed their action. J. McIntyre answered the products liability complaint and moved to dismiss the case for lack of personal jurisdiction in the New Jersey court. The trial court granted the motion. On appeal, the Superior Court of New Jersey remanded for additional jurisdictional discovery. In 2006 the trial court again granted McIntyre's motion, holding that McIntyre was not subject to New Jersey personal jurisdiction because there was no basis to conclude that McIntyre had any expectation that its products would be sold and shipped to New Jersey.

The plaintiffs appealed and in 2008, the New Jersey Appellate Division reversed, holding that jurisdiction was proper over McIntyre based on Justice O'Connor's concurring opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987) (articulating a "stream-of-commerce-plus" rationale for exertion of personal jurisdiction).

In 2010, the New Jersey Supreme Court affirmed the Appellate Division's finding of personal jurisdiction. The court held that while the defendant lacked sufficient traditional minimum contacts with the forum state, the stream-of-commerce theory applied to bring McIntyre England within the specific jurisdiction of the court. The New Jersey Supreme Court held that because J. McIntyre sold products in the United States through a single, unaffiliated distributor located in Ohio, it targeted the entire United States, including New Jersey. By targeting the United States for the sale of its products, McIntyre knew or reasonably should have known that this distribution scheme could make its products available to New Jersey consumers.

The New Jersey Supreme Court affirmed its leading personal jurisdiction decision, holding: "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 products liability action." *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127 (N.J. 1986).

The New Jersey Supreme Court also indicated a policy reason for asserting personal jurisdiction: the desire to avoid allowing an

American company to outsource its product manufacture to an offshore or foreign country, and then market, distribute, and sell the product in the United States while evading jurisdiction of American courts for defective products causing injury.

## CASE ANALYSIS

It is a fundamental principle of American jurisprudence that in order to render a valid and binding judgment, a court must possess both personal jurisdiction over the parties and subject matter jurisdiction over the nature of the dispute. The dual companion appeals in *Goodyear Luxembourg Tires, S.A. (Goodyear)* and *J. McIntyre Machinery, Ltd. (McIntyre)* concern the evolving contours of personal jurisdiction over nonresident defendants, a subject that has engaged the Supreme Court for more than 130 years. The Supreme Court will once again provide some guidance for assertions of personal jurisdiction over nonresident defendants, in the context of this evolving jurisprudence and now in an expanded international context. These cases differ not only on the facts, but on the jurisprudential principles forming the basis for the courts' opinions.

As every first-year law student can recite, the Supreme Court's nineteenth-century understanding of the limitations on a state's exercise of personal jurisdiction over nonresident defendants was grounded in concerns over state sovereignty and territoriality. *Pennoyer v. Neff*, 95 U.S. 714 (1877). By the mid-twentieth century, however, with the expansion of the American economy and increased concern over individual liberty, the Court shifted the focus of personal jurisdiction to due process concerns mandated by the Fourteenth Amendment. *Int'l. Shoe Co. v. Washington*, 326 U.S. 310 (1945). That is, a state court could not assert personal jurisdiction over a nonresident defendant if to do so would violate fundamental fairness and deprive a person of his or her property or liberty interests.

The Supreme Court's 1945 decision in *International Shoe* provides the basis for much of the Court's subsequent personal jurisdiction jurisprudence over the last 55 years. Addressing the special problem of corporate presence in a state, the Court famously announced that a state legitimately could exercise personal jurisdiction over a nonresident corporation, provided that the corporation had sufficient minimum contacts with the state such that asserting jurisdiction would not violate "traditional notions of fair play and substantial justice." Although the Court did not define what minimum contacts were sufficient to support an assertion of personal jurisdiction, the Court counseled that such an evaluation was not a purely mechanical exercise, but instead should include the assessment of the quality and nature of the defendant's contacts with the forum, whether the defendant had purposefully availed itself of the forum, and whether assertion of jurisdiction would impose an inconvenience on the defendant.

Although the *International Shoe* Court did not employ the terms "general" and "specific" jurisdiction, it is conventionally recognized that the Court embraced the concept of general jurisdiction: that is, that a state court may exercise jurisdiction over a nonresident corporate defendant if the corporation has sufficient minimum contacts with the forum state and the corporation conducts substantial, systematic, and continuous business within the state. General jurisdiction refers, then, to the assertion of jurisdiction over cases that are not related to the defendant's forum activities. The appeal in *Goodyear Luxembourg*

*Tires, et al.*, involves consideration of the North Carolina state court's assertion of general jurisdiction over foreign subsidiary defendants.

However, the Supreme Court in *International Shoe* did not supply any guidance concerning the concept of "specific" jurisdiction: that is, whether a court may exercise jurisdiction over a nonresident defendant where the underlying claims in the litigation arise out of or relate to the nonresident corporations' contacts with the state. Since 1945, the Supreme Court has not endorsed any particular test for specific jurisdiction, although the Court had the opportunity to do so in 1984. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (declining to endorse any formulation of specific jurisdiction). The appeal in the companion *J. McIntyre Machinery, Ltd.* case, involves consideration of a New Jersey state court's assertion of specific jurisdiction under a "stream-of-commerce" rationale.

Between 1945 and 1980, Supreme Court cases dealing with state assertions of personal jurisdiction over nonresident defendants chiefly were concerned with defining the *International Shoe* requirement of "minimum contacts," and this famous case line is denominated as *International Shoe*'s "progeny." By 1980, the Court had liberally expanded the reach of state court personal jurisdiction over nonresident individuals and corporate entities, consistent with *International Shoe* due process requirements.

In 1980, however, in *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court reconsidered its personal jurisdiction jurisprudence in the context of a so-called stream-of-commerce case, 444 U.S. 286 (1980). *World-Wide Volkswagen* involved an Audi manufactured in Germany, imported by a distributor in New York, and sold by a New Jersey retailer. The car was driven to Oklahoma where it was involved in an accident, causing injury and death to the car's occupants. The issue concerned whether an Oklahoma state court could assert personal jurisdiction over the New Jersey retailer, who had placed the product into the stream of commerce, allegedly causing injury in Oklahoma. The Supreme Court rejected this attempted exercise of personal jurisdiction. In so doing, the Court set forth a new test for assertions of personal jurisdiction in "stream-of-commerce" cases.

In *World-Wide Volkswagen*, the Court set forth a five-factor test to evaluate a state court's assertion of personal jurisdiction over nonresident corporate defendants, requiring assessment of: (1) the defendant's burden in litigating in the forum, (2) the forum state's interest in the litigation, (3) the plaintiff's interest in convenient and effective relief, (4) the judicial system's interest in efficient resolution of controversies, and (5) the shared interests of the several states in furthering fundamental social policies. In addition, the Court also indicated that in stream-of-commerce cases, the touchstone for asserting personal jurisdiction was not mere placement of a product in the stream of commerce, but whether in so doing a defendant could "reasonably anticipate being haled into court" in a distant forum. In absence of such reasonable foreseeability, the Court suggested, a product manufacturer would appoint all his transient "chattels" as agents for service of process.

The Court was confronted with a vexing stream-of-commerce case seven years later, involving assertion of personal jurisdiction over two foreign national defendants. In *Asahi Metal Industry Co. v. Superior*

*Court*, 480 U.S. 102 (1987), the Court further muddled personal jurisdiction jurisprudence with a series of fractured opinions.

The *Asahi* litigation arose out of a California motorcycle accident resulting from a tire blowout. The California plaintiff settled the litigation with the foreign tire manufacturer, leaving the tire company to sue the foreign valve manufacturer for indemnification. In a split decision, the Supreme Court held that California could not legitimately assert personal jurisdiction over the foreign defendants. The *Asahi* case, however, did not produce a majority decision, but two plurality decisions.

Justice O'Connor's plurality decision indicated that in order for a court to assert personal jurisdiction in a stream-of-commerce case, the defendant must not only have placed its product into the stream of commerce, but must have engaged in additional conduct that *purposefully directed* the product to the forum state. This became known as the "stream-of-commerce-plus" formulation for specific jurisdiction.

In a separate plurality opinion, Justice Brennan indicated that if a corporate defendant placed a product into the stream of commerce, then "mere awareness" that it might wind up in a distant forum and cause injury was sufficient to permit a state court to exercise personal jurisdiction over the nonresident defendant. Notwithstanding the difference of opinions expressed in the two plurality opinions, the Court endorsed the five factor test articulated in *World-Wide Volkswagen*, and on that basis found a lack of personal jurisdiction in the California court.

The Court's plurality opinions in *Asahi* predictably have led to confusion and disarray among lower courts. In stream-of-commerce cases, some courts have adopted Justice O'Connor's "stream-of-commerce-plus" approach, while others have adopted Justice Brennan's "mere awareness" standard. The continuing vitality of either approach may be subject to reassessment by the Court in the *McIntyre* appeal.

#### *Goodyear Luxembourg Tires, S.A.*

In *Goodyear*, the foreign subsidiaries argue that assertion of general personal jurisdiction violates due process not only because they lack physical contact with North Carolina, but because their other contacts are so tenuous as to fall far short of the threshold set by *International Shoe*: that defendants' operations within the forum state are substantial, systematic, and continuous. The *Goodyear* defendants contend that the North Carolina decisions vastly expand the scope of general jurisdiction, in essence embracing a liberal standard that would make any substantial seller of goods amenable to a lawsuit on any cause of action, wherever its products are distributed.

The *Goodyear* defendants suggest that the North Carolina courts' broad view of general jurisdiction should be rejected because pre-*International Shoe* case law rejected mere sales in a state as a basis for jurisdiction. After surveying pre-*International Shoe* precedents, the *Goodyear* defendants contend that these cases teach that: (1) there is no clear historical practice permitting a state to exercise general jurisdiction over a foreign corporation, (2) courts required a significant physical presence in a state as a prerequisite for jurisdiction over a foreign corporation even with respect to in-state claims, (3) the mere sales of a foreign corporation's products in a state were insufficient to establish the presence necessary for jurisdiction, and

(4) the in-state presence of subsidiaries or affiliates did not amount to presence on the part of an out-of-state corporation.

In addition, the *Goodyear* defendants contend that the North Carolina decisions violate more contemporary post-*International Shoe* standards, and therefore mere distribution of a corporation's goods in the forum, unaccompanied by any physical presence, cannot suffice for general jurisdiction. They contend that it is unprecedented for a court to assert general jurisdiction over a defendant without any physical presence in the state. On the facts, the *Goodyear* defendants suggest that the small quantities of tires distributed in North Carolina are insufficient to meet any plausible standard for general jurisdiction.

Furthermore, the *Goodyear* subsidiaries suggest that general jurisdiction cannot be based on a stream-of-commerce theory, but even were this possible, then there was little factual evidence that the defendants even knew their tires were sold in North Carolina. Moreover, the defendants claim they could not reasonably have anticipated being haled into the North Carolina court based on a stream-of-commerce theory of jurisdiction. The subsidiaries further argue that subjecting them to jurisdiction over all their global conduct is vastly disproportionate to the limited benefits they may have received from North Carolina.

With regard to fundamental fairness and convenience, the *Goodyear* subsidiaries suggest that subjecting corporations to litigation in states where they have no physical presence, on claims arising across the globe, is presumptively unfair and inconvenient. Alternatively, the defendants argue that the assertion of general jurisdiction fails *Asahi's* "reasonableness" prong because the burden on them is severe, North Carolina has little interest in out-of-state conduct, much of the evidence is located overseas, and the international setting militates against the aggressive expansion of personal jurisdiction.

Moreover, the *Goodyear* defendants argue that if the Supreme Court upholds the North Carolina decisions, this will present an open invitation to forum-shopping by plaintiffs. By subjecting the subsidiaries to general jurisdiction wherever a foreign company's products are distributed would result in virtually universal jurisdiction in every state court over every significant foreign or domestic seller. "The attendant invitation to rampant forum shopping is inconsistent with both basic fairness and 'the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure.'"

The *Goodyear* defendants and their amici including the United States, the U.S. Chamber of Commerce, the Products Liability Council and the Washington Legal Foundation (among others) further suggest that the Supreme Court endorsing this expansive view of general jurisdiction creating widespread amenability to litigation from limited contacts would likely deter interstate and foreign commerce. From this perspective, predicating expansive general jurisdiction upon interstate conduct would create disincentives for corporations to engage in such conduct. The *Goodyear* defendants argue that this burden is potentially even greater as applied to international commerce.

Finally, although the *Goodyear* defendants believe that a stream-of-commerce analysis is inappropriate in a general jurisdiction case (such as this), they alternatively argue that assertion of personal jurisdiction under *Asahi* standards similarly fails. They indicate that

there was no showing that the defendants knew that their products were being distributed in North Carolina, and that there was no showing of “additional conduct” as required by Justice O’Connor’s *Asahi* plurality. The *Goodyear* defendants pointedly reject Justice Brennan’s intent (“should have known”) standard for personal jurisdiction analysis. Reviewing all five reasonableness factors articulated in *Asahi*, the *Goodyear* defendants conclude that, similarly to the *Asahi* defendant, assertion of personal jurisdiction fails.

The *Goodyear* plaintiffs, the parents’ of the deceased teens, have characterized this appeal as testing the limits of corporate outsourcing. In this view, the battle over the legitimacy of state court jurisdiction is really a battle over whether American corporations, through the outsourcing of design, manufacture, and distribution of products, can seek to evade liability in American courts for defective products and other causes of action. By shielding foreign subsidiaries from suit in American courts, the plaintiffs argue that American corporations would be encouraged to outsource more of their enterprises to overseas entities beyond the reach of American courts. In addition, adopting a limited jurisdictional theory would devastate the American economy by encouraging American companies to outsource manufacturing and jobs to foreign subsidiaries in order to outsource their tort liabilities to foreign courts.

The *Goodyear* plaintiffs then have cast their appeal as a battle between the ancients and the moderns: Presenting the Supreme Court with “the clear choice between refining well-established principles of ‘general jurisdiction’ to reflect and address the realities of twenty-first-century transnational commerce or calcifying those principles in discarded nineteenth century business models.”

Nonetheless, the plaintiffs rely on the *International Shoe* fundamental requirements for general jurisdiction: that a corporation’s contacts must be continuous, systematic, and substantial such that the exercise of jurisdiction over it comports with due process. Reviewing the personal jurisdiction jurisprudence, the plaintiffs discern a trend towards expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents because of the increasing nationalization of commerce. They contend that several courts have reaffirmed that jurisdiction may not be avoided merely because the defendant did not physically enter the forum.

However, the plaintiffs request that the current Court build on this jurisprudential foundation and consider the limits of due process in twenty-first-century transnational commerce. The *Goodyear* plaintiffs invoke the “single business enterprise” doctrine to support their theory of general jurisdiction. Pursuant to this doctrine, a local parent’s ownership, control, and portrayal to the public that all companies are part of a common enterprise warrants the exercise of general jurisdiction over foreign subsidiaries. Arguing that the *Goodyear* foreign subsidiaries actually are part of an integrated internal Goodyear supply and distribution enterprise, the plaintiffs suggest that the subsidiaries’ contacts with North Carolina were continuous, systematic, and substantial, and they derived substantial income from sales there.

Finally, invoking the five factor test from *World-Wide Volkswagen* and *Asahi*, the plaintiffs argue that the assertion of personal jurisdiction satisfies due process standards. They suggest that the *Goodyear* defendants would suffer little burden in defending in North

Carolina; that North Carolina has a heightened interest in protecting its citizens from defective products; that the plaintiffs have a great interest in not being forced to litigate in France pursuant to different applicable law; and the judicial system has an interest in the economical resolution of this litigation against three foreign defendants in one forum. Lastly, the plaintiffs argue that the states have a shared interest in preventing the outsourcing of job opportunities to foreign countries, which they believe would be a consequence of reversing the North Carolina courts’ decisions.

#### *J. McIntyre Machinery, Ltd.*

The *McIntyre* appeal presents the Court with a fundamentally different personal jurisdiction issue: In *McIntyre*, the Court must assess whether the New Jersey court’s assertion of specific jurisdiction, pursuant to a stream-of-commerce rationale, was a legitimate exercise of the court’s authority. *McIntyre* differs from *Goodyear* on both the facts and the applicable jurisdictional test: the defendant’s product was sent to New Jersey and injured a New Jersey citizen in New Jersey. The significant wrinkle in *McIntyre*, however, is that the foreign defendant targeted a national market rather than a particular state market. *McIntyre*, then, concerns an assertion of specific jurisdiction under the Court’s stream-of-commerce jurisprudence. The Court will now determine whether such a national marketing target is sufficient to support an assertion of specific jurisdiction under a stream-of-commerce theory.

Reverting to older theories of personal jurisdiction, the *McIntyre* defendant focuses its arguments against the New Jersey Supreme Court’s decision as an affront to core principles of state sovereignty and territoriality. After surveying the nineteenth-century roots for territorial jurisdiction, the *McIntyre* defendant links modern minimum contacts jurisprudence to state territorial concerns. Thus, fairness and federalism are comprehended in one single standard. Moreover, the defendant suggests that the U.S. Supreme Court has never jettisoned the historical underpinnings of territorially limited sovereignty.

In the defendant’s view, the New Jersey decision would subject a producer of goods anywhere in the world to personal jurisdiction in New Jersey state court under the stream-of-commerce branch of personal jurisdiction if the defendant targets the United States market, and just one New Jersey consumer purchases just one product. A plaintiff would no longer have to demonstrate that the defendant thought about New Jersey or even knew it existed. In so holding, the defendant argues that the New Jersey Supreme Court ignored a foreign defendant’s due process rights under the Constitution and failed to appreciate the limits on the role of the states in the federal system.

The *McIntyre* defendant assails the New Jersey Supreme Court for overreaching in its opinion and grounding the assertion of personal jurisdiction on such notions as the radical transformation of today’s global market and the problem of offshore outsourcing to evade jurisdiction of American courts. The defendant points out that the “new realities” of the global market cannot suffice as a rationale to expand jurisdiction; those realities existed 25 years ago when the Court decided *Asahi*.

In addition, the *McIntyre* defendant contends that the New Jersey court disregarded the Supreme Court’s jurisdictional rules established in *Asahi*. Endorsing Justice O’Connor’s plurality opinion in *Asahi* (and

strongly rejecting Justice Brennan’s opinion), the *McIntyre* defendant suggests that Justice O’Connor’s formulation for stream-of-commerce cases (“stream-of-commerce-plus”) sets forth a rule of law that provides certainty in cases involving foreign defendants. Hence, there is no need now to discard that jurisprudence based on a transformation of global commerce that occurred decades ago.

The *McIntyre* defendant argues that in evaluating personal jurisdiction, the New Jersey court incorrectly eliminated from that calculus any need for the defendant to be aware of the forum state, something the U.S. Supreme Court has never considered. Finally, the *McIntyre* defendant and its amici make a point similar to the *Goodyear* defendants: that the New Jersey court did not respect globalization, but was fighting against it: by asserting personal jurisdiction over the foreign defendant in this case, the court effectively created a trade barrier. The defendant argues that if the Supreme Court upholds the assertion of personal jurisdiction, it would have a potentially catastrophic impact on trade. Furthermore, the New Jersey courts have no business taking steps to mitigate any perceived unfairness of free trade or the freer flow of goods across borders. As such, the New Jersey court articulated an outmoded, parochial protectionism. The defendant asserts that such parochialism threatens the United States’ relations with other countries and their judicial systems.

The Nicastro, the plaintiffs in this appeal, argue in response that there is nothing remarkable in the New Jersey court’s exercise of specific jurisdiction over *McIntyre* England. New Jersey’s exercise of personal jurisdiction was consistent with the Supreme Court’s due process precedents, which permit a state to hale a foreign manufacturer into court where a manufacturer places a product into the stream of commerce with the expectation that it will be purchased by a consumer in that state, and the product causes injury.

The plaintiffs argue that the stream-of-commerce theory and standards announced in *World-Wide Volkswagen* are easily met in this case. Simply, this case involves a finished product and a manufacturer who delivered the product with the expectation that it would be purchased anywhere in the United States. The plaintiffs assert that *McIntyre* England had clear notice, from numerous American decisions, that on the basis of its conduct it could be haled into court where its products were sold and caused harm. *McIntyre* England’s purposeful acts of attending U.S. trade shows and conferences and selling its equipment show its intent to serve the national market, which includes by definition New Jersey. Thus, *McIntyre*’s purposeful conduct linked it to New Jersey. *McIntyre* England could have structured its activities to avoid jurisdiction, but it did not.

In addition, both *Asahi* plurality decisions support the assertion of personal jurisdiction, claim the Nicastro. Purposeful availment is satisfied by a manufacturer’s placement of a product in the stream of commerce with awareness that the final product is being marketed in the forum state. The types of additional conduct described by Justice O’Connor in *Asahi* that support the assertion of personal jurisdiction exist on the facts in this case, argue the plaintiffs.

Moreover, the plaintiffs claim that the assertion of personal jurisdiction in this case would not interfere with international relations. The concerns of *McIntyre* and its amici deal primarily with assertions of general jurisdiction, not with specific jurisdiction exercised over tort

claims brought in the forum where an injury has occurred. Finally, according to the plaintiffs, the territoriality concerns do not operate as an independent limitation on assertions of personal jurisdiction. Due process limitations on personal jurisdiction concern liberty, not territoriality.

## SIGNIFICANCE

The Supreme Court has not decided a case dealing with personal jurisdiction since 1990, when the Court issued a split opinion dealing with so-called “tag” jurisdiction. *Burnham v. Superior Court*, 495 U.S. 604 (1990). That decision, addressing the issue of whether personal jurisdiction may be asserted over a transient individual who is served with process while temporarily visiting a state for a few days, provided an entertaining diversion from the Court’s more considered historical personal jurisdiction jurisprudence. And if *Burnham* represents something of a personal jurisdiction sideshow, then the Supreme Court has not issued a foundational personal jurisdiction opinion since *Asahi*, in 1987.

We are now almost a quarter-century removed from the Court’s last considered examination of personal jurisdiction. The *Asahi* case has some relevance to the *Goodyear* and *McIntyre* appeals: all involve the ability of state courts to assert personal jurisdiction over nonresident foreign corporate defendants. And with the New Year, it will be more than 30 years since the Supreme Court decided the seminal stream-of-commerce case, *World-Wide Volkswagen*.

As civil procedure professors and all law students appreciate, the Court’s fractured *Asahi* decisions are a mess, although they present interesting and challenging teaching material. Predictably, the *Asahi* decisions have inspired an array of conflicting decisions among state courts considering the assertion of personal jurisdiction over domestic and foreign corporate defendants whose products find their way into a state. Moreover, with the passage of a quarter-century, the authors of the two *Asahi* plurality decisions, Justices Brennan and O’Connor, no longer sit on the Court.

The *Goodyear* appeal presents the Court with questions relating to the assertion of general jurisdiction. This will no doubt require the Court to plumb the depths of *International Shoe* and its progeny and to answer the question of whether foreign subsidiaries without a significant physical presence in a state are amenable to a state court’s personal jurisdiction. At best, the Court’s *Goodyear* decision may provide yet one more *International Shoe* progeny. At worst, the Court may further muddle understanding of the concept of general jurisdiction.

The *McIntyre* appeal embodies a siren song for revisiting the Court’s *Asahi* debacle. Civil procedure professors, at least not to mention state court judges, might appreciate some elucidation and instruction from the Court concerning what parts of *Asahi* survive, if any. *McIntyre*, then, presents the Court with the tempting opportunity for a “do-over.”

Both appeals are set against the contemporary backdrop of trade globalization and the outsourcing of American manufacturing and jobs. The foreign defendants and their amici would have the Court believe that expansive assertions of jurisdiction will impair free trade and impair international relations. The American plaintiffs, on the other hand, cast the issue as a further evil consequence of the American

trend towards outsourcing: in this instance, outsourcing American liabilities through offshore enterprises that may render corporations immune from the jurisdiction of American state courts for their products causing injury.

It has been a hallmark of more than 130 years of Supreme Court personal jurisdiction jurisprudence that the Court has articulated evolving standards in light of changed societal and economic conditions. For some periods, this has meant a liberal expansion of the reach of state courts over nonresident defendants. Other periods, however, have illustrated Court retrenchments of such broad principles. It remains to be seen whether the Supreme Court will respond to the background arguments in these two appeals for the expansion or restriction of personal jurisdiction jurisprudence based on a new global economy. It will be interesting to discover whether the Court, perceived to embody a pro-business mindset, will heed the admonitions that the embrace of expansive personal jurisdiction principles will undermine global business, or will instead respond to the suggestion that rejection of personal jurisdiction will encourage further outsourcing of American business.

What is for certain, though, is there will be more than abundant citation to *Pennoyer v. Neff*, *International Shoe*, *World-Wide Volkswagen*, and *Asahi*, with *Hanson v. Denckla*, *Burger King*, *Keeton v. Hustler*, and other progeny thrown in for good measure.

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For Petitioner J. McIntyre Machinery, Ltd. (Arthur F. Fergenson, 410.203.1247)

For Respondent Robert Nicasro, et ux. (Alexander W. Ross Jr., 856.988.0500)

## AMICUS BRIEFS

In Support of Petitioners Goodyear Luxembourg Tires, S.A., Goodyear Lastikleri T.A.S., and Goodyear Dunlop Tires France, S.A.

Chamber of Commerce of the United States of America (Peter B. Rutledge, 706.542.1328)

Organization for International Investment and Association of International Automobile Manufacturers Inc. (Carter G. Phillips, 202.736.8000)

Product Liability Advisory Council, Inc. (Alan E. Untereiner, 202.775.4500)

United States (Neal Kumar Katyal, Acting Solicitor General, 202.514.2217)

Washington Legal Foundation and Allied Educational Foundation (Daniel J. Popeo, 202.588.0302)

In Support of Petitioner J. McIntyre Machinery, Ltd.

Chamber of Commerce of the United States of America (Peter B. Rutledge, 706.542.1328)

Organization for International Investment and Association of International Automobile Manufacturers Inc. (Carter G. Phillips, 202.736.8000)

Product Liability Advisory Council, Inc. (Alan E. Untereiner, 202.775.4500)

In Support of Respondent Robert Nicasro, et ux.

American Association for Justice (Jonathan W. Miller, 215.893.3405)

Arkansas (Ali M. Brady, 501.682.1319)

Law Professors (Justin T. Green, 212.973.3403)

Public Citizen, Inc. (Scott L. Nelson, 202.588.7724)

Workers' Injury Law & Advocacy Group (Kathleen G. Sumner, 336.294.9388)