

# Wading Through the Stream of Commerce: When Can Foreign Manufacturers Expect to be Subject to Specific Jurisdiction in United States Courts?

---

By Alan G. Schwartz and Kevin M. Smith

Alan Schwartz is co-chair of the Product Liability practice group at Wiggin and Dana. He has particular experience in the area of pharmaceutical defense. Mr. Schwartz has been on the national defense teams in litigations involving several well-known prescription drugs. He has also served as Connecticut and regional defense counsel for pharmaceutical companies and medical device companies. In addition to pharmaceutical and medical device matters, Mr. Schwartz' practice includes cases involving beer kegs, seatbacks, welding rods, hair dyes, benzene exposure, contaminated IV solutions, and grinding wheels. He is a member of the International Association of Defense Counsel and the Defense Research Institute. Kevin Smith is a partner at Wiggin and Dana and co-chairs the Product Liability practice group with Mr. Schwartz. He focuses on aviation, product liability, and business litigation. Mr. Smith has counseled and defended product designers, manufacturers, sellers, owners, operators, and insurers in the aviation, pharmaceutical, and other industries. Mr. Smith also has represented business clients in commercial disputes and consumer class actions involving unfair and deceptive trade practices, antitrust, and other business tort claims. The authors wish to acknowledge the contributions of Wiggin and Dana associate Adam Farbiarz and summer clerk Christina Colon Williams to the preparation of this article.



THE QUESTION of whether a court may exercise personal jurisdiction over foreign product manufacturers on the basis of introducing goods into the “stream of commerce” has produced much litigation and confusion since that phrase was introduced in *World-*

*Wide Volkswagen Corp. v. Woodson*.<sup>1</sup> Recently, after two decades of relative silence, the United States Supreme Court attempted to clarify the stream-of-commerce doctrine in *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>2</sup> and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>3</sup> Unfortu-

---

<sup>1</sup> 444 U.S. 286, 298 (1980).

<sup>2</sup> 131 S. Ct. 2780 (2011).

<sup>3</sup> 131 S. Ct. 2846 (2011).

nately, although *Goodyear* articulated some helpful limits on general jurisdiction, neither decision clarified the stream-of-commerce theory of specific jurisdiction. As a result, foreign manufacturers continue to face uncertainty about when they can expect to be haled into a particular United States court under that theory.

This article discusses the origins of the stream-of-commerce doctrine and its development through the years, including the Supreme Court's most recent decisions on the issue—*McIntyre* and *Goodyear*. Despite the confusion left intact after *McIntyre* and *Goodyear*, as a practical matter, courts have tended to focus on three broad factors in deciding whether to assert specific jurisdiction over foreign manufacturers. Those factors are: a manufacturer's awareness of or control over downstream distribution, the volume of product that enters the market, and the manufacturer's contacts with the United States overall as compared to the forum where suit is brought. This article discusses a number of representative post-*McIntyre* cases that consider these factors in their analyses of stream-of-commerce jurisdiction and provides a list of specific facts that may inform a court's analysis of these three factors in a given case.

## I. The Origins and Development of the Stream-of-Commerce Doctrine

### A. Origins of, and Confusion Over, the Doctrine

In addition to any restrictions that a state's particular long-arm statute may provide, federal constitutional due process requires that the defendant have "certain

minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>4</sup> "Minimum contacts" requires the defendant to have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State."<sup>5</sup>

"Purposeful availment" may arise when a manufacturer introduces goods into the "stream of commerce," a phrase introduced by the Supreme Court in *World-Wide Volkswagen*. In that case, the Court said, in dicta, that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a [foreign] corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."<sup>6</sup> Seizing upon this language, some lower courts asserted that a manufacturer can be subject to jurisdiction simply by introducing goods into the stream of commerce.<sup>7</sup>

The Supreme Court again addressed the stream-of-commerce theory in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*.<sup>8</sup> *Asahi* was a product liability action arising out of a motorcycle accident. The rider of the motorcycle asserted that

<sup>4</sup> *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *accord Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano Cnty.*, 480 U.S. 102, 113 (1987).

<sup>5</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>6</sup> *World-Wide Volkswagen*, 444 U.S. at 297–298.

<sup>7</sup> *See, e.g., Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081, 1084 (5th Cir. 1984).

<sup>8</sup> 480 U.S. 102 (1987).

he was injured and that his passenger was killed because the motorcycle's rear tire exploded. The rider brought suit in California state court against both the Taiwanese manufacturer of the tire tube and the Japanese manufacturer of the tube's valve assembly. The Taiwanese manufacturer filed a crossclaim seeking indemnification from the Japanese manufacturer. The injured rider eventually settled his own claims, leaving only the crossclaim by the Taiwanese manufacturer against the Japanese manufacturer, and the Japanese manufacturer moved to dismiss on the basis of a lack of personal jurisdiction.

Ultimately, the Supreme Court held, in a part of an opinion authored by Justice O'Connor and joined by seven other Justices, that jurisdiction over the Japanese manufacturer would be "unreasonable and unfair."<sup>9</sup> For purposes of the stream-of-commerce doctrine, *Asahi's* dicta has proven to be as confusing as it is important. The dicta appeared in two opinions—in Justice O'Connor's plurality opinion and in a concurrence written by Justice Brennan, which constituted a different plurality.

Justice O'Connor's plurality endorsed the view that the "Due Process Clause . . . require[s] something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce."<sup>10</sup> In other words, merely

being able to foresee that one's product would end up in a forum is insufficient for jurisdiction, which requires instead that one's action be "purposefully directed" toward the forum.<sup>11</sup> Justice O'Connor provided examples of acts that "may indicate" an intent to serve the forum market, such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."<sup>12</sup>

Justice Brennan's concurrence opined that the "purposeful availment" requirement was easier to satisfy than the standard put forward by Justice O'Connor. Justice Brennan defined the stream of commerce as "the regular and *anticipated* flow of products from manufacture to distribution to retail sale," such that putting one's products into this "stream" was enough for jurisdiction, even apparently without "additional conduct" directed to the forum state.<sup>13</sup> Under Justice Brennan's view, so long as there is a regular flow of the product into the forum, then the defendant should reasonably anticipate being haled into court there, and the Constitution permits bringing suit against the manufacturer in that forum.

Because neither Justice O'Connor's nor Justice Brennan's stream-of-commerce theories commanded a majority, substantial confusion ensued as to whether merely

<sup>9</sup> *Asahi*, 480 U.S. at 116. The Court's holding was based on a number of factors: both the defendant and the plaintiff were foreign, the transaction that gave rise to the claim took place abroad, it was not demonstrably more convenient for the plaintiff to litigate in California than elsewhere, and California had only a slight interest in the action. See *id.* at 113–116.

<sup>10</sup> *Asahi*, 480 U.S. at 111, 107 (plurality opinion).

<sup>11</sup> *Id.* at 112 (plurality opinion).

<sup>12</sup> *Id.* at 112 (plurality opinion).

<sup>13</sup> *Id.* at 117 (concurring in part and concurring in the judgment) (emphasis added).

placing a product into the stream of commerce is enough for jurisdiction (as Justice Brennan opined) or rather whether actual intent to target the forum, which could be evidenced by “additional conduct” (as Justice O’Connor opined) is required.<sup>14</sup>

## B. *Goodyear* and *McIntyre*

In *Goodyear* and *McIntyre*, the Court sought to address questions that *Asahi* left unresolved. Both cases dealt with manufacturers based outside the United States whose products ended up in the United States through the stream of commerce. Although *Goodyear* clarified general jurisdiction principles, *McIntyre*, which addressed the issue

of specific jurisdiction, failed to resolve the confusion created by *Asahi*.

*Goodyear* arose out of a bus accident in France. Two North Carolina children were killed in the accident, and their parents brought suit in North Carolina against Goodyear, an Ohio-based tire manufacturer. Goodyear was licensed to do business in North Carolina and accordingly did not contest jurisdiction. The suit also named as defendants three indirect Goodyear subsidiaries, each incorporated and doing business, respectively, in France, Turkey, and Luxembourg. The three subsidiaries manufactured tires mainly for the European and Asian markets, although “a small percentage of [the subsidiaries’] tires (tens of thousands out of tens of millions manufactured between 2004 and 2007)” were distributed in North Carolina.<sup>15</sup> The subsidiaries did “not . . . themselves sell or ship tires to North Carolina customers.”<sup>16</sup>

A unanimous Supreme Court held that there was no jurisdiction over the subsidiaries in North Carolina. The Court explained that specific jurisdiction is only appropriate when “the suit ‘aris[es] out of or relate[s] to the defendant’s contacts with the forum.’”<sup>17</sup> By contrast, general jurisdiction, which is a court’s authority to hear “any and all claims” against a defendant, requires that the defendant’s “affiliations with the [forum] State [be] so ‘continuous and systematic’ as to render [the defendant] essentially at home in the forum State.”<sup>18</sup>

<sup>14</sup> Some federal circuits after *Asahi* chose neither standard. See, e.g., *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2d Cir. 1999) (“We need not adopt either view of the ‘stream of commerce’ standard”); *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197, 207 n. 11 (3d Cir. 1998) (“since we have not manifested a preference for either of the two standards, the demands of clarity counsel us to apply both standards explicitly”); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) (“Because jurisdiction . . . is consistent with due process under the more stringent ‘stream of commerce plus’ analysis adopted by the *Asahi* plurality, we need not determine which standard actually controls this case.”); *Nuance Communications, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1233–1234 (Fed. Cir. 2010) (applying both *Asahi* standards). Other circuits adopted one of the two standards. See, e.g., *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682–683 (1st Cir. 1992) (following the plurality test from *Asahi*); *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 420 (5th Cir. 1993) (“In the years after *Asahi*, the Fifth Circuit has continued to follow the original ‘stream of commerce’ theory established in the majority opinion of *World-Wide Volkswagen*, and has rejected the ‘stream-of-commerce plus’ theory advocated by the *Asahi* plurality.”).

<sup>15</sup> *Goodyear*, 131 S. Ct. at 2852.

<sup>16</sup> *Id.*

<sup>17</sup> *Goodyear*, 131 S. Ct. at 2853 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984)) (alteration in *Goodyear*).

<sup>18</sup> *Id.* at 2851 (citing *Int’l Shoe*, 326 U.S. at 317).

There was no specific jurisdiction because the “episode-in-suit, the bus accident” occurred in France and the tire that allegedly caused the accident was made in France.<sup>19</sup> The suit, in other words, did not “arise out of” the defendant’s contact with North Carolina.

There was also no general jurisdiction because the foreign manufacturers’ connection to North Carolina was too attenuated to meet the high “continuous and systematic” standard. In reversing the North Carolina court’s “stream-of-commerce analysis [which] elided the essential difference between case-specific and all-purpose (general) jurisdiction,” the Court clarified that the stream-of-commerce theory was irrelevant for the general-jurisdiction inquiry.<sup>20</sup> “Flow of a manufacturer’s products into the forum . . . may bolster an affiliation germane to *specific* jurisdiction . . . But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.”<sup>21</sup>

*Goodyear* thus clarified that the stream of commerce cannot be invoked as a basis for general jurisdiction, which in all cases requires “continuous and systematic” contact. *Goodyear* did not, however, speak to the application of the stream-of-commerce theory in a specific-jurisdiction case—that is, in a case that “arises” from the fact that the injury-causing product has been introduced into the forum.

*McIntyre* was such a case. *McIntyre* referred to the “decades-old questions left open in *Asahi*,” and noted the opportunity

to “provide greater clarity.”<sup>22</sup> But the Court was again unable to command a majority view on whether the standard for specific jurisdiction under the stream-of-commerce theory required only introduction of the product into the regular stream of commerce, as contemplated by Justice Brennan in *Asahi*, or “something more,” as Justice O’Connor had envisioned.

J. McIntyre Machinery was a British manufacturer of scrap metal machines whose place of incorporation and operation was England. The company had an agreement with an independent distributor that sold its machines in the United States. Alongside the distributor, McIntyre officials attended annual conventions on scrap metal in states across the country. None of these conventions were in New Jersey. The conventions, together with the machines that were sold in the United States through the distributor, constituted the entirety of McIntyre’s presence in the United States. No more than four of McIntyre’s machines ended up in New Jersey, one of which was used by the plaintiff, who seriously injured his hand while using a machine.

The plaintiff brought a lawsuit in New Jersey, and eventually the New Jersey Supreme Court held that personal jurisdiction over McIntyre was proper, reasoning that McIntyre’s products moved through a nationwide distribution system and, because of this, McIntyre knew or should have known that its products could end up in *any* of the fifty states, including New Jersey, particularly given that McIntyre did not “take some reasonable step to prevent the distribution of its products in this state.”<sup>23</sup>

<sup>19</sup> *Id.* at 2851.

<sup>20</sup> *Id.* at 2855.

<sup>21</sup> *Goodyear*, 131 S. Ct. at 2855 (original emphasis).

<sup>22</sup> *McIntyre*, 131 S. Ct. at 2785–2886 (opinion of Kennedy, J.).

<sup>23</sup> *Id.* at 2786.

The United States Supreme Court reversed with splintered opinions. A plurality opinion authored by Justice Kennedy essentially tracked Justice O'Connor's *Asahi* standard, under which merely introducing a product into the stream is insufficient: "The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum state."<sup>24</sup> The plurality also took issue with the notion that targeting the entire country could subject a foreign company to jurisdiction in any one state absent contacts with that specific state: "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," and, because "the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."<sup>25</sup> Nonetheless, the opinion stopped short of addressing the "constitutional concerns that might be attendant to that exercise of power" by a federal court.<sup>26</sup>

Justice Breyer's concurrence, joined by Justice Alito, opined that the case should be decided on narrower grounds. Justice Breyer said that the "the outcome of this case is determined by [Supreme Court] precedents,"<sup>27</sup> and that no Supreme Court case had found "a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient" for specific jurisdiction.<sup>28</sup> Under these facts, Justice

Breyer said, there was neither a "'regular . . . flow' or 'regular course' of sales in New Jersey" (a reference to Justice Brennan's standard in *Asahi*) nor "something more" (a reference to Justice O'Connor's standard).<sup>29</sup> Accordingly, because the facts of the case fell within precedent and did not implicate any "recent changes in commerce and communication," Justice Breyer thought it "unwise to announce a rule of broad applicability."<sup>30</sup>

Justice Breyer also said that in no event could there be jurisdiction based "upon no more than the occurrence of a product-based accident in the forum State."<sup>31</sup> Such a one-size-fits-all standard would be unfair because it would not take into account a host of important facts—the size of the manufacturer, the distance to the forum, the number of items that reached the forum, and whether the manufacturer was domestic or foreign—all factors, which Justice Breyer asserted, might affect the jurisdictional analysis.

Further, Justice Breyer raised several questions that remained inadequately addressed by the plurality opinion:

But what do these standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious

---

<sup>24</sup> *Id.* at 2788.

<sup>25</sup> 131 S. Ct. at 2789.

<sup>26</sup> *Id.* at 2790.

<sup>27</sup> *McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring in the judgment) (alteration in original).

<sup>28</sup> *Id.* at 2792.

---

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, at 2791.

<sup>31</sup> *Id.*, at 2793.



commercial consequences but are totally absent in this case.<sup>32</sup>

Through these questions, Justice Breyer's opinion emphasized a tension between the goals of the plurality opinion and the realities of modern commerce, where the marketing, distribution, and sale of products from a foreign company may not clearly target a particular forum state.

The third and final opinion in *McIntyre* was a dissent, authored by Justice Ginsburg and joined by Justices Sotomayor and Kagan. The dissent reframed the facts to emphasize the intended and actual global reach of McIntyre UK, focusing on the regularity of its attendance at the annual scrap metal conventions across the United States and its intentional decision to engage an Ohio-based distributor for the sole purpose of reaching and profiting from the entire United States market.<sup>33</sup>

Justice Ginsburg wrote that the exercise of jurisdiction over McIntyre UK was "fair and reasonable."<sup>34</sup> Justice Ginsburg disagreed with Justice Kennedy's requirement of a state-by-state analysis: "McIntyre UK . . . 'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor."<sup>35</sup> But the dissent went on, seemingly undercutting its assertion that a state-by-state analysis was

entirely unnecessary, asking "How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?"<sup>36</sup> What would the result have been if New Jersey had been a small import market or a small scrap metal market? In any event, the dissent said that numerous courts had held that "a local plaintiff injured by the activity of a manufacturer seeking to exploit a multistate or global market" can bring suit in a "court[] of the place where the product was sold and caused injury."<sup>37</sup> The dissent concluded with an "Appendix" of citations to twelve federal and state cases that so held.

## II. Post-McIntyre Considerations

In the wake of the three opinions in *McIntyre*, courts and foreign manufacturers are left with more questions than answers. When a Supreme Court opinion does not command a majority, the case's controlling holding is the position of the judges who concurred on the narrowest grounds.<sup>38</sup> In *McIntyre*, Justices Breyer and Alito cast the fifth and sixth votes concurring in the judgment. The concurrence asserted that "the outcome of this case is determined by [Supreme Court] precedents." Accordingly, two federal Courts of Appeals, along with other lower courts, have acknowledged that "the narrowest holding is that which can be distilled from Justice Breyer's concurrence—that the law remains the same after

<sup>32</sup> *Id.*, at 2793.

<sup>33</sup> *Id.*, at 2797 (Ginsburg, J., dissenting).

<sup>34</sup> *Id.* at 2800.

<sup>35</sup> *Id.* at 2801.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2804.

<sup>38</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977).

*McIntyre*.”<sup>39</sup> Some other lower courts, however, have treated *McIntyre* as having made new law.<sup>40</sup> Similarly, one Court of Appeals noted in a sentence that did not control the court’s holding, and which cited to the *McIntyre* plurality, that “the Supreme Court has rejected the exercise of jurisdiction where a defendant has merely placed a product into the stream of

commerce foreseeing that it might ultimately reach the forum state.”<sup>41</sup> Regardless, *McIntyre* and its progeny have shed some new light on the factors that manufacturers should consider in litigating specific jurisdiction under the stream-of-commerce theory.

Following *McIntyre*, courts have focused on three factors in particular: 1) the manufacturer’s awareness of and involvement in the downstream distribution of product; 2) the volume of product that ends up in the forum state; and 3) whether the forum state has a relationship to the product that is more robust than other states or the United States as a whole.

As the following representative cases illustrate, these three factors are related: the more downstream control that a manufacturer exercises, the less “flow” of product in the forum is needed to show purposeful availment. By the same token, the less control or downstream involvement, the more product in the forum is needed to justify an application of specific jurisdiction. And where there is less control or downstream involvement in a particular forum, or less volume imported to the United States overall or to the particular forum state, the harder it will be to justify that the manufacturer could have anticipated that its product would end up in that forum.

The Fifth Circuit analyzed *McIntyre* in the context of a products-liability suit in *Ainsworth v. Moffett Engineering, Ltd.*<sup>42</sup> In that case, a man in Mississippi was run over and killed by a forklift manufactured by an Irish company. The forklift had

<sup>39</sup> AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358, 1363–1364 (Fed. Cir. 2012); Ainsworth v. Moffett Engineering, Ltd., 716 F.3d 174, 179 (5th Cir. 2013) (quoting *AFTG-TG*). Similarly, the Tenth Circuit has declined to assert that *McIntyre* displaced the uncertainty as to which of the tests announced in *Asahi* controls. *Monge v. RG Petro-Mach. (Grp.) Co. Ltd.*, 701 F.3d 598, 619–620 (10th Cir. 2012) (analyzing purposeful availment under each of the *Asahi* theories). Some state supreme courts have also declined to view *McIntyre* as providing a new rule. *See, e.g.*, State v. NV Sumatra Tobacco Trading Co., 2013 WL 1248285, \*29 (Tenn. Mar. 28, 2013) (“*J. McIntyre Machinery* fails to signal a change in the law.”); *Russell v. SNFA*, 987 N.E.2d 778, 794 (Ill. 2013) (aside from rejecting New Jersey’s rule that in-forum injury alone is sufficient for jurisdiction, “*McIntyre* has not definitively clarified the proper application of the stream-of-commerce theory. We disagree with defendant’s contention . . . that Justice Breyer’s concurrence in *McIntyre* should be construed as adopting Justice O’Connor’s narrow construction”); *Willemsen v. Invacare Corp.*, 282 P.3d 867, 875 (Ore. 2012) (en banc *cert. denied*, 133 S. Ct. 984 (2013) (Justice Breyer’s controlling opinion was decided on the grounds that the stream-of-commerce-based jurisdiction requires a “regular course of sales”).

<sup>40</sup> *Windsor v. Spinner Indus. Co., Ltd.*, 825 F. Supp.2d 632, 638 (D. Md. 2011), as amended (Dec. 15, 2011) (“*McIntyre* clearly rejects foreseeability as the standard for personal jurisdiction.”); *Smith v. Teledyne Cont’l Motors, Inc.*, 840 F. Supp.2d 927, 929 (D. S.C. 2012) (the “common denominator of the Court’s reasoning” was the “stream-of-commerce plus” rubric enunciated in an opinion by Justice O’Connor in *Asahi*).

<sup>41</sup> *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 392 (4th Cir. 2012) (citing the *McIntyre* plurality).

<sup>42</sup> 716 F.3d 174 (5th Cir. 2013).



made its way to Mississippi by way of the manufacturer's distributor, which was incorporated in Delaware and had a principal place of business in Ohio.

The court's test tracked the standard put forward by Justice Brennan in *Asahi*: "mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce."<sup>43</sup> The court recognized that this "stream-of-commerce test . . . is in tension with the plurality opinion [in *McIntyre*], under which [the manufacturer] would likely not be subject to personal jurisdiction in Mississippi."<sup>44</sup> But the court did not view itself as bound by the *McIntyre* plurality. In its view, Justice Breyer's concurrence represented the holding of *McIntyre*, and it had emphasized that stream-of-commerce jurisdiction, consistent with the Supreme Court's precedents, required only that there be more than a "single isolated sale."

Considering the three factors identified above, the court found that the manufacturer was sufficiently aware of the downstream distribution of its forklifts because the distributor "sells or markets [the manufacturer's] products in all fifty states, and [the manufacturer] makes no attempt to limit the territory in which [the distributor] sells its products."<sup>45</sup> The court also emphasized the ostensibly large volume of the manufacturer's forklifts sold in the United States and in Mississippi in particular. The court said that, over a ten-year period, the manufacturer "sold 13,073 forklifts to [the distributor], worth

approximately \$254,000,000. [The distributor] sold 203 of those forklifts, worth approximately \$3,950,000, to customers in Mississippi. Those Mississippi sales accounted for approximately 1.55% of [the manufacturer's] United States sales during that period." The court also addressed the third factor, the state-specific hook. The court reasoned that the manufacturer "designed and manufactured a forklift for poultry-related uses. Thus, even though [the manufacturer] did not have specific knowledge of sales by [the distributor] in Mississippi, it reasonably could have expected that such sales would be made, given the fact that Mississippi is the fourth largest poultry-producing state in the United States."<sup>46</sup>

*UTC Fire & Sec. Americas Corp., Inc. v. NCS Power, Inc.*<sup>47</sup> asserted a similarly attenuated forum-specific hook. In that case, a Chinese battery manufacturer contracted with a Washington-based company to distribute batteries in North America. A Delaware-based corporation placed orders with the distributor for batteries to be installed in a mobile device used by realtors to track listings. Three-hundred thousand batteries were delivered by the Chinese manufacturer to the Delaware company's facility in Oregon. The batteries were incorporated into the mobile devices and distributed to realtors, some of whom were in New York. When the batteries malfunctioned causing damages in New York, the Delaware purchaser sued the Washington distributor, and the distributor filed a third-party complaint against the Chinese manufacturer.

The district court found that there was no general jurisdiction over the Chinese

<sup>43</sup> *Id.* at 177 (alteration in original) (internal quotation marks omitted).

<sup>44</sup> *Id.* at 178.

<sup>45</sup> *Id.* at 179.

<sup>46</sup> *Id.*

<sup>47</sup> 844 F. Supp.2d 366 (S.D.N.Y. 2012).

company, but that there was specific jurisdiction under the New York long-arm statute that satisfied constitutional due process. The court opined that Justice Breyer's concurrence in *McIntyre* controlled, and "declined to adopt the plurality's holding that mere foreseeability that goods could wind up in a particular state could never form a constitutionally sufficient basis for the exercise of personal jurisdiction under the stream-of-commerce theory."<sup>48</sup>

The court found that the manufacturer had sufficient knowledge about and control over the downstream distribution chain, specifically citing the facts that the manufacturer "had an agency agreement—not an independent distributorship agreement—with [the distributor], under which orders could not be fulfilled without [the manufacturer's] specific approval," and that the order shipped to Oregon which contained the defective batteries presumably had been approved by the manufacturer.<sup>49</sup>

In addition, the court relied on the volume of the product placed into the stream of commerce, explaining that "[i]t is reasonable to infer that, when [the manufacturer] delivered a high volume of batteries (over 300,000 in this case) to a major electronics distributor in North America, it did so with the expectation—indeed, the hope—that they would be sold to customers in markets throughout the United States."<sup>50</sup> The court also noted that it was significant that the batteries were sold to a "national company."<sup>51</sup>

As for state-specific contact, the court gave two reasons the manufacturer should have expected the batteries to wind up in New York. The first was the sheer "size of the New York market and the quantity of batteries."<sup>52</sup> The second was that the distributor—which, again, was acting as an agent, not wholly independently of, the manufacturer—"solicited business within the New York market and actually sold [the manufacturer's] batteries to at least one New York *customer* (albeit not the customer whose purchases underlie the claims in this case)."<sup>53</sup>

*Monje v. Spin Master Inc.*<sup>54</sup> involved an action brought in Arizona against an Australian company that manufactured a toy that allegedly injured a child in Arizona. The toy was distributed by a United States-based company. The court asserted that "Justice Breyer's concurring opinion preserved the status quo in the Ninth Circuit," but also said that *McIntyre* required "something more" than merely introducing a product into the stream of commerce. This "something more" might simply be coaxing the "regular flow" of a product to a destination.<sup>55</sup>

The court identified and analyzed three familiar "principles" for determining whether specific jurisdiction could be asserted, based on the stream-of-commerce doctrine: 1) "the extensiveness of the foreign entity's involvement in the downstream process is a key indicator";<sup>56</sup> 2) "quantity matters";<sup>57</sup> and 3) the "open

---

<sup>52</sup> *Id.* at 375.

<sup>53</sup> *Id.* at 376.

<sup>54</sup> 2013 WL 2369888 (D. Ariz. May 29, 2013).

<sup>55</sup> *Id.* at \*6.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at \*7.

---

<sup>48</sup> *UTC Fire*, 844 F. Supp.2d at 376.

<sup>49</sup> *Id.* at 376.

<sup>50</sup> *Id.* at 375.

<sup>51</sup> *Id.* at 376.

question of how to address a federal court's jurisdiction where the defendant has sufficient contacts with the United States as a whole, but not necessarily with a particular state."<sup>58</sup>

As for downstream involvement, the court found numerous indicators of control by the Australian manufacturer. The manufacturer "had an employee who oversaw the distribution of [the toys] and maintained contact with" the distributor.<sup>59</sup> The manufacturer had also "supplied [the distributor] with a wealth of marketing material to use in the United States, including packaging artwork, marketing plans, television drafts, and posters."<sup>60</sup> The court also said that "[i]t does not appear [the manufacturer] relinquished full control of distribution to [the distributor]. . . . [The manufacturer's] control over the distribution process was apparent when it ordered a suspension of all shipments" following a product-related injury, and because it "was actively involved in responding to retailers' concerns."<sup>61</sup> The manufacturer

also reached out to potential customers in the United States and invited them to try its products. On its website, Moose informed interested customers that, "[w]hether you are from Australia or the USA[,] Moose products can be found far and wide." . . . The website then invites those "Stateside" to "find [their] closest store" by contacting their

customer service team, who could presumably direct the customers to nearby retail outlets that contained Moose products.<sup>62</sup>

With respect to volume, the court wrote that "the sale of 4.2 million sets of [toys of the type that allegedly caused the injury] contrasts rather sharply with the sale of the metal-shearing machines in *J. McIntyre*."<sup>63</sup> The court said that this volume indicated an intent to target the United States as a whole.

As for specifically targeting Arizona, the court said that it did not view itself as bound by the plurality opinion's assertion that a forum-by-forum analysis was necessary. The Arizona court said that the manufacturer had failed to present "any evidence that [the toys] were sold only in certain parts of the United States, but not others."<sup>64</sup> For this reason, the manufacturer had "targeted" the entire United States and a federal court sitting where the injury occurred could exercise jurisdiction.

Notwithstanding the court's rejection of a forum-by-forum analysis, it seems unlikely that the court would have been as inclined to eschew the analysis if the perceived volume had been small and the manufacturer had not "work[ed] closely with" its distributor in the United States.<sup>65</sup> Indeed, it would seem consistent with the court's opinion that a manufacturer who provides only a small volume of product to a truly independent distributor would only be subject to jurisdiction if there is a showing of forum-specific availment, such

<sup>58</sup> *Id.* The third factor relates to the issue raised, but not decided, in Justice Kennedy's plurality opinion in *McIntyre*. See *supra* text accompanying notes 25–26.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*8.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*8.

<sup>64</sup> *Id.* at \*9.

<sup>65</sup> *Id.*

as the distributor being located in the forum.<sup>66</sup>

In *King v. General Motors Corp.*,<sup>67</sup> the court held that Alabama had jurisdiction over GM Canada, a manufacturing subsidiary of the American car-maker, in an action arising out of a car accident. The court took care to distinguish GM Canada from the defendant in *McIntyre*, writing that “GM Canada possesses more than some vague awareness that its products *might* reach United States markets—it manufactures vehicles, such as the one at

issue, to comply with federal regulations.”<sup>68</sup>

The court also invoked the fact that GM Canada did not have an attenuated relationship with its parent and distributor: “While GM Canada and GM Corporation may not have created a written distribution agreement, the sale to GM Corporation was clearly not a sale to an end-user. Indeed, the court finds that this commercial relationship mirrors an example provided by Justice O’Connor in *Asahi* of a manufacturer ‘marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.’”<sup>69</sup> Unlike *Monje*, the court said that GM Canada activities “demonstrate[d] a targeting of Alabama’s commercial automobile market,”<sup>70</sup> and repeatedly said that GM Canada sought to serve Alabama in particular, even though the court cited no fact in support of this conclusion other than the close relationship between the manufacturer and the parent distributor.

Some state courts have also applied the three factors in determining whether jurisdiction is appropriate under the stream-of-commerce doctrine after *McIntyre*. In *State v. NV Sumatra Tobacco Trading Co.*,<sup>71</sup> the state of Tennessee sued an Indonesian cigarette manufacturer for failing to make statutorily mandated payments into an escrow fund. The statute required payments from manufacturers selling tobacco to consumers in the state.<sup>72</sup> The Indonesian manufacturer’s cigarettes were sold in the state by a Florida

<sup>66</sup> Moreover, although the issue is beyond the scope of this article, an out-of-state United States manufacturer should expect a court to place greater emphasis on its forum-specific contacts than a court may apply to a foreign manufacturer’s contacts. For example, in *Innovation Ventures, LLC v. Custom Nutrition Laboratories, LLC*, a U.S.-based energy drink manufacturer was sued by a competitor in Michigan, and the court held that jurisdiction was appropriate. 2013 WL 2198542 (E.D. Mich. May 20, 2013). In addition to relying on the out-of-state manufacturer’s awareness of the downstream distribution (“knowingly and intentionally taking advantage of the established distribution chains of multiple national retailers”), and the volume of product that it had placed into the stream of commerce (“thousands of bottles of its product to Walgreens’ Ohio distribution center every month with the knowledge that some not insignificant portion of those products is being delivered to Walgreens’ more than 200 Michigan stores to be purchased by Michigan consumers”), the court found that, despite conducting no business in Michigan, one of the distribution centers was “just south of the Michigan-Ohio border,” that there were 228 Walgreens stores in Michigan, and that there was no dispute that the manufacturer’s products were sold in Walgreens’ Michigan stores. The court added that there were “between two and four additional national retail chains to which [the manufacturer] supplies products, and each retailer has roughly ten to twenty locations operating in Michigan that sell those products.” *Id.* at \*7.

<sup>67</sup> 2012 WL 1340066 (N.D. Ala. Apr. 18, 2012).

<sup>68</sup> *Id.* at \*7 (original emphasis).

<sup>69</sup> *Id.* (quoting *Asahi*, 480 U.S. at 112).

<sup>70</sup> *Id.* at \*8.

<sup>71</sup> 2013 WL 1248285 (Tenn. Mar. 28, 2013).

<sup>72</sup> *Id.* at \*2.

businessperson. On their way from Indonesia, the cigarettes passed through at least two independent distribution companies—a Singapore company and a British Virgin Islands company.<sup>73</sup>

The Tennessee Supreme Court said that *McIntyre* “fail[ed] to signal a change in the law,”<sup>74</sup> although the court also said that Tennessee favored the “stream of commerce plus’ doctrine employed by Justice O’Connor in *Asahi*”<sup>75</sup> and proceeded to apply that test. The court analyzed the manufacturer’s United States contacts, writing that such contacts are not “irrelevant to the minimum contacts analysis” but that “national contacts *alone* cannot justify jurisdiction in an individual state.”<sup>76</sup> The court said that the national contacts did “not add up to much.”<sup>77</sup> These contacts consisted of “[f]iling a trademark application, submitting an ingredients list, and conforming the packages to federal standards,” giving the Florida businessperson “posters [advertising the brand] to display in stores” and the fact that the brand of cigarette packaging “prominently displayed the words “American Blend,” accompanied by stripes and a flying eagle.”<sup>78</sup>

The court observed that there was no aggressive advertising aimed at the United States and the manufacturer did not participate in trade shows or make internet sales. The court also added that, “[e]ven if

we assume that agents of [the manufacturer] met with [the businessperson] in Florida once or twice, that minimal physical contact with the United States is not the type or quality of contact that would suggest jurisdiction is proper in Tennessee.”<sup>79</sup> With regard to volume, the court found that 11.5 million cigarettes made by the Indonesian manufacturer had been sold in Tennessee, and opined that, whether thought of in numbers of individual cigarettes, packs, or cartons, “[n]one of these quantities is insignificant.”

Nonetheless, the court insisted that “quantity alone is not dispositive.”<sup>80</sup> Despite the large volume, it held that jurisdiction was inappropriate because the manufacturer’s involvement in downstream distribution was essentially nonexistent: “The fundamental issue with the sales of [these] cigarettes in Tennessee is that [the manufacturer] had almost nothing to do with them. . . . The record reveals that the arrival of [the] cigarettes in Tennessee was almost wholly attributable to the initiative of [the businessperson].”<sup>81</sup>

---

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 32.

<sup>81</sup> *Id.*; cf. *Willemsen v. Invacare Corp.*, 282 P.3d 867, 874–875 (Ore. 2012) (en banc) *cert. denied*, 133 S. Ct. 984 (2013) (also stating that *McIntyre* did not change the law, but holding that jurisdiction was appropriate principally because “the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a ‘regular flow or course of business,’” as compared to the single sale at issue in *McIntyre*, and, therefore the “sale of the CTE battery charger in Oregon that led to the death of plaintiffs’ mother was not an isolated or fortuitous occurrence”) (alterations omitted).

---

<sup>73</sup> *Id.* at \*3.

<sup>74</sup> *Id.* at \*29.

<sup>75</sup> *Id.* at \*26.

<sup>76</sup> *Id.* at \*31 (original emphasis).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

### III. Conclusions

Following *McIntyre*, specific jurisdiction over a foreign manufacturer under a stream-of-commerce jurisdiction theory is unsettled. However, the cases make clear that downstream awareness or control, volume of product, and forum-specific contacts play a role in courts' analyses. Specific facts that can inform these broad factors include:

- Distributor is an agent, not independent, of manufacturer;
- Distributor deals exclusively in manufacturer's product;
- Distributor has a well-known distribution network;
- Manufacturer and distributor are parent/subsidiary, or in same corporate family;
- Manufacturer and distributor are several layers of distribution apart;
- Manufacturer directs distributor's marketing efforts;
- Manufacturer retains authority to approve sales;
- Manufacturer directly markets to consumers or services consumers;
- Manufacturer makes consumer-ready products, not component parts;
- Manufacturer makes products for forum-specific use;
- Manufacturer is large or sophisticated;
- Manufacturer exports a large volume of goods; and
- Product is exported to an area that is geographically close to place of injury.