Bristol-Myers Squibb v. Superior Court

The Last Nail in the Coffin of Stream-of-Commerce Personal Jurisdiction

By Richard A. Dean and Katya S. Cronin

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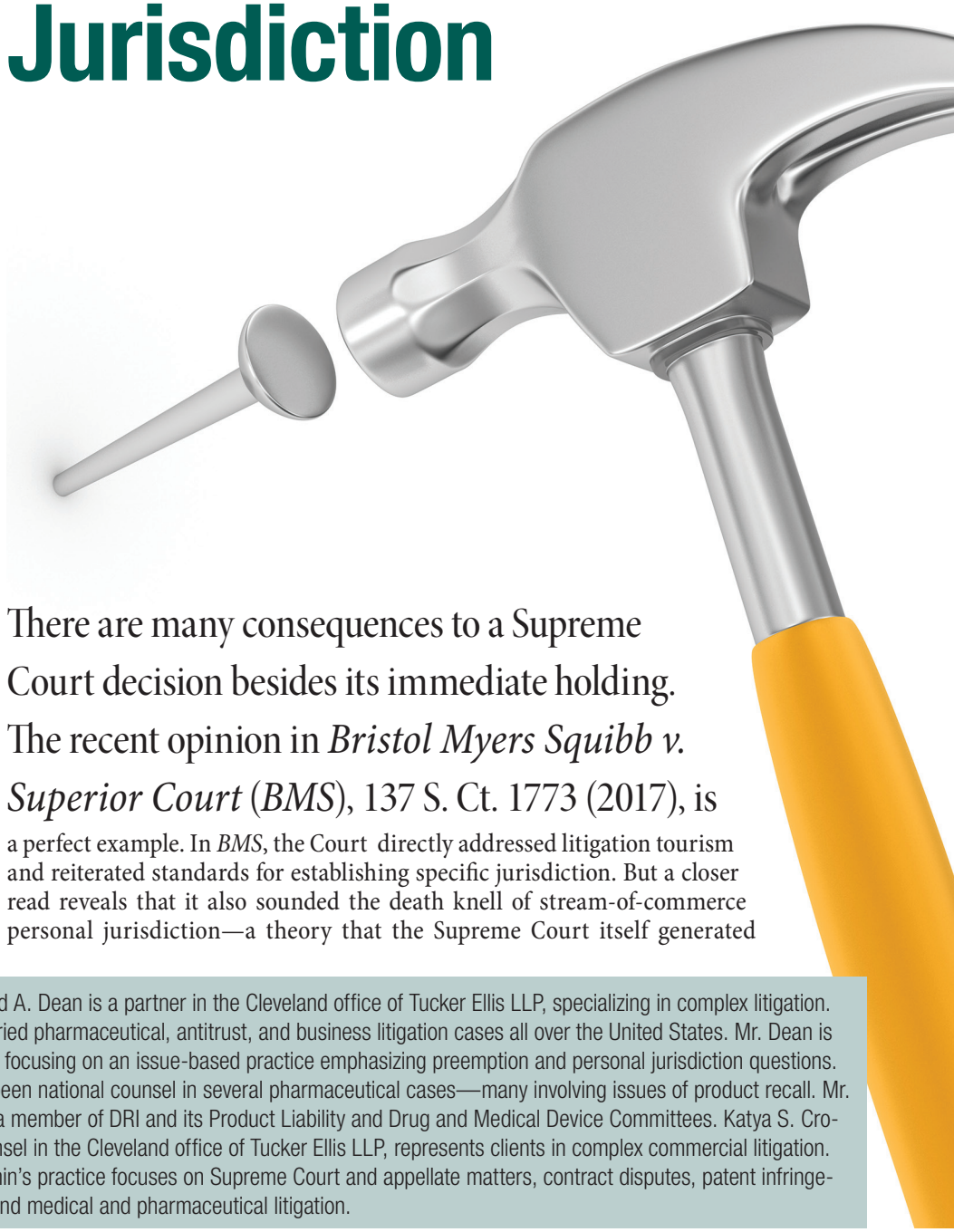

There are many consequences to a Supreme Court decision besides its immediate holding. The recent opinion in *Bristol Myers Squibb v. Superior Court* (*BMS*), 137 S. Ct. 1773 (2017), is a perfect example. In *BMS*, the Court directly addressed litigation tourism and reiterated standards for establishing specific jurisdiction. But a closer read reveals that it also sounded the death knell of stream-of-commerce personal jurisdiction—a theory that the Supreme Court itself generated

■ Richard A. Dean is a partner in the Cleveland office of Tucker Ellis LLP, specializing in complex litigation. He has tried pharmaceutical, antitrust, and business litigation cases all over the United States. Mr. Dean is currently focusing on an issue-based practice emphasizing preemption and personal jurisdiction questions. He has been national counsel in several pharmaceutical cases—many involving issues of product recall. Mr. Dean is a member of DRI and its Product Liability and Drug and Medical Device Committees. Katya S. Cronin, counsel in the Cleveland office of Tucker Ellis LLP, represents clients in complex commercial litigation. Ms. Cronin's practice focuses on Supreme Court and appellate matters, contract disputes, patent infringements, and medical and pharmaceutical litigation.

long ago and has been wrestling with for years. In essence, *BMS* cast aside the notion that globalization could justify 50-state forum shopping.

The Beginning: *World Wide Volkswagen Corp. v. Woodson*

The Court first formally addressed the stream-of-commerce theory in *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). There, the Court was confronted with the case of a New York plaintiff who had purchased a car from a New York dealership and was injured in a fiery collision in Oklahoma. The plaintiff sued in Oklahoma. Volkswagen, the car manufacturer, offered no jurisdictional defense. The car dealer that sold the car in New York, however, did assert a personal jurisdiction defense along with the wholesale distributor. There was no dispute that these two entities did not conduct any business in Oklahoma. Under well-established principles of personal jurisdiction, this lack of any connection to Oklahoma meant that due process would not permit jurisdiction over the car dealer and the wholesale distributor. Citing its opinion in *International Shoe v. Washington,* 326 U.S. 310 (1945), the Court held that "[t]he relationship between the defendant and the forum must be such that it is 'reasonable… to require the corporation to defend the particular suit which is brought there.'" *World-Wide Volkswagen*, 444 U.S. at 292. The Court disclaimed, however, the idea that "foreseeability is wholly irrelevant" to personal jurisdiction, concluding that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that *delivers its products into the stream of commerce* with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297–98 (citation omitted) (emphasis added). The Court reasoned,

> When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Hence, the Court noted,

> if the sale of a product of a manufacturer or distributor… is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.

Id. at 297.

In dissent, Justice Marshall took the concept even further and argued that personal specific jurisdiction over the defendants could be "premised on the deliberate and purposeful actions of defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles." *Id.* at 314. Justice Blackmun shared this view but wrote separately.

Despite being the minority position, Justice Marshall's statement took on a life of its own. After *World-Wide Volkswagen*, lower courts frequently interpreted the Due Process Clause to allow personal jurisdiction over a defendant, based on nothing more than a defendant's act of placing a product in the stream of commerce. In *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1358 (9th Cir. 1983), for example, the Ninth Circuit held a Japanese manufacturer subject to jurisdiction in Oregon for injuries sustained in that state, noting that the manufacturer "performed a forum-related act when it produced a splice that it knew was destined for ocean-going vessels serving United States ports, including those of Oregon." Likewise, in *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 200 (5th Cir. 1980), the Fifth Circuit held a Japanese manufacturer amenable to jurisdiction in Texas because the manufacturer "had every reason to believe its product would be sold to a nation-wide market, that is, in any or all states."

Asahi Metal Industry v. Superior Court of California Creates More Uncertainty

Seven years later, in *Asahi Metal Industry v. Superior Court of California, Solanno City*, 480 U.S. 102 (1987), Justice Brennan penned an opinion for four justices and concluded that "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with Due Process…." *Id.* at 117. He insisted as follows:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.

Id.

Justice O'Connor, speaking for four other justices, rejected that notion and wrote that a "substantial" connection between the defendant and forum state was necessary for jurisdiction. She insisted that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 112. Additional conduct indicating an intent or purpose to serve the market in the forum state, according to the plurality, includes "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." *Id.* Emphatically, however, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* Justice O'Connor further noted that Asahi had not taken any action purposely to avail itself of the California market, because "Asahi does not do business in California." *Id.* To elaborate, "[i]t has no office, agents, employees, or property in California," "[i]t does not advertise or otherwise solicit business in California," and "[i]t did not create, control, or employ the distribution system that brought its valves to California." *Id.* In short, there was "no evidence that Asahi designed its product in anticipation of sales in California." *Id.*

This 4–4 split in *Asahi* predictably created further uncertainty in the lower courts, with the plaintiffs' bar heavily relying on Justice Brennan's opinion to champion the stream-of-commerce theory in cases across the country. *Id.* at 109–114. In *Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d

610, 613–615 (8th Cir. 1994), for example, the Eighth Circuit declared that "[i]n this age of NAFTA and GATT, one can expect further globalization of commerce, and it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states."

Although the case focused on jurisdiction over natural persons, rather than corporate entities, *Walden v. Fiore*, 134 S. Ct. 1115 (2014), dealt the first definitive blow to the stream-of-commerce theory.

Likewise, in *Stokes v. L. Geismar, S.A.*, 815 F. Supp. 904, 907 (E.D.Va. 1993), the court asserted jurisdiction over a French corporation, reasoning that there was "no evidence of any attempt… to limit th[e] U.S. marketing strategy to avoid Virginia or any other particular state." In *Tobin v. Astra Pharmaceutical Products*, 993 F.2d 528, 544 (6th Cir. 1993), a Dutch pharmaceutical manufacturer of a drug alleged to have caused a Kentucky resident's heart disease argued that "it has done nothing in particular to purposefully avail itself of the Kentucky market as distinguished from any other state in the union." The Sixth Circuit disagreed, holding that "[i]f [it] were to accept defendant's argument on this point, a foreign manufacturer could insulate itself from liability in each of the fifty states simply by using an independent national distributor to market its products." *Id.* And in *Kernan v. Kurz–Hastings*, 175 F.3d 236, 242–44 (2nd Cir. 1999), the Second Circuit held liable a Japanese manufacturer of an allegedly defective stamping press that caused a workplace injury in New York, insisting that an "exclusive sales rights agreement" between the Japanese manufacturer and a Pennsylvania distributor "contemplates that [the distributor] will sell [the manufacturer's] machines in North America and throughout the world, serv[ing] as evidence of [the manufacturer's] attempt to serve the New York market, albeit indirectly." These are but a few examples of the types of contacts that lower courts thought merited the assertion of personal jurisdiction based on the stream-of-commerce theory.

Over two decades later, in 2011, the Supreme Court once again turned its attention to personal jurisdiction. In *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915 (2011), the Supreme Court addressed a question of general jurisdiction but attempted to resolve confusion over the stream-of-commerce theory discussed in *Asahi*. Chiding the North Carolina courts for failing to distinguish between specific and general jurisdiction, the Supreme Court unanimously held that the stream-of-commerce theory cannot serve as a basis for a state court's exercise of *general* jurisdiction. *Id.* at 927.

The Beginning of the End: *J. McIntyre Machine v. Nicastro*

On the same day that the Court rendered its decision in *Goodyear*, it also decided a case asking whether a foreign manufacturer could be subject to specific jurisdiction arising out of products sold within the forum by an independent distributor. *J. McIntyre Machine v. Nicastro*, 564 U.S. 873 (2011). Here, the Court was deeply divided. Justice Kennedy, joined by Justices Roberts, Scalia, and Thomas, noted that the stream-of-commerce theory advanced in *Volkswagen* and *Asahi* "does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market." *Id.* at 881–82. The plurality thus held that the manufacturer had not engaged in "conduct purposefully directed" at New Jersey by manufacturing—at most—four products that ultimately reached New Jersey, focusing on the defendant's lack of an "intent to invoke or benefit from the protection of [New Jersey's] laws." The plurality further remarked that "[s]ince *Asahi* was decided, the courts have sought to reconcile the competing opinions," but "Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power." *Id.* Thus, insisted the plurality, the "Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *Id.*

Justice Breyer authored a concurrence, which Justice Alito joined, expressing concerns about the language used in Justice Kennedy's opinion and its application to the modern economy, but agreeing with the result on the basis of the facts presented and earlier precedent. *Id.* at 885. In dissent, Justice Ginsburg (who had written the opinion for the Court in *Goodyear*), joined by Justices Sotomayor and Kagan, objected to the plurality's focus on a defendant's consent to jurisdiction, instead arguing that the motivating concepts should be "reason and fairness" and that the defendant's decision to distribute products in the United States made the exercise of specific jurisdiction reasonable.

Although the plurality's position in *Nicastro* signaled the beginning of the end for the stream-of-commerce theory, the lack of a clear five-person majority further contributed to the confusion in the lower courts. In *Ainsworth v. Moffett Engineering*, 716 F.3d 174 (5th Cir. 2013), for example, the Fifth Circuit was faced with facts substantially similar to those presented in *Nicastro*—a foreign manufacturer that did not sell forklifts directly to customers in the United States but rather sold to an exclusive distributor. The Fifth Circuit, however, reasoned that *Nicastro* was a fractured opinion that should be limited to its specific facts, and following the stream-of-commerce theory, the court held that these indirect sales were sufficient to establish minimum contacts.

At long last, in 2014, the Supreme Court handed down a unanimous opinion on specific jurisdiction. Although the case focused on jurisdiction over natural persons, rather than corporate entities, *Walden v.*

Fiore, 134 S. Ct. 1115 (2014), dealt the first definitive blow to the stream-of-commerce theory. The defendant in *Walden* was a Georgia police officer sued in federal court in Nevada for confiscating a large amount of cash carried by two Nevada residents in an airport on their travels back to Las Vegas. The Ninth Circuit held that personal jurisdiction was appropriate because the Georgia police officer was alleged to have "expressly aimed" conduct at Nevada residents. Justice Thomas, delivering the opinion of a unanimous court, ruled that such a standard was incompatible with its jurisprudence on specific jurisdiction because it focused on the plaintiff's connections with the forum, rather than the defendant's. *Id.* In addition, the opinion emphasized that the defendant's contact must be with the forum state itself, not merely with residents who reside within the forum, ruling that "the plaintiff cannot be the only link between the defendant and the forum" and holding that an injury to a forum resident is not sufficient in itself to create personal jurisdiction. *Id.* at 1122. For example, if a Canadian manufacturer sold an airplane only in Canada but it was flown to the United States, where maintenance was performed on it in Illinois, the fact that the plaintiff "contacted" the plane in Illinois would not itself suffice to establish personal jurisdiction. An inquiry would need to be made about whether any conduct by the manufacturer in Illinois gave rise to the injury.

This analysis was recently followed by the Seventh Circuit in *Noboa v. Barcelo Corporacion Empresariai*, 812 F. 3d 571 (7th Cir. 2016). An Illinois resident who had booked a trip through Orbitz and was injured abroad sued foreign entities with no connection to Illinois, citing the causal chain of events beginning with the internet booking in Illinois as the basis for a connection to Illinois. Following the reasoning in *Walden*, the court held,

> the pertinent question is whether the defendant has links to the jurisdiction in which the suit was filed, not whether the plaintiff has such links—or whether the loss flowed through a chain from plaintiff's contacts with the jurisdiction of suit. Only intentional contacts by the *defendant* with a forum jurisdiction can support specific jurisdiction.

Id. (emphasis added).

The Last Nail in the Coffin

Finally, in 2017, the Court handed down its latest specific jurisdiction decision in *BMS*, 137 S. Ct. at 1782. Although the majority opinion (of eight justices) does not explicitly mention the stream-of-commerce theory or the Court's reasoning in *Nicastro*, the lynchpin of the decision is that even a corporation, which indisputably had availed itself of the benefits of the California market by aiming its manufacturing, distribution, and advertising at the state, cannot be haled into court under the banner of specific jurisdiction, unless plaintiffs are also able to establish that they were injured by that *precise* conduct in the forum state—*not* by the company's largely identical conduct elsewhere. In essence, the opinion deals a fatal blow to the refrain that the new economic realities of globalization mean that a company with a national distribution network can be sued in any state of a plaintiff's choosing.

The sole dissenter in *BMS*, Justice Sotomayor, advocated for the standard exposition of the "stream-of-commerce" theory—that a defendant should be amenable to jurisdiction where it was manufacturing a product and when it purposely aimed to sell the product widely throughout the United States, including in the forum state. Justice Sotomayor specifically relied on *Nicastro*, noting that there was "no dispute that Bristol-Myers 'purposefully avail[ed] itself… of California and its substantial pharmaceutical market." *Id.* at 1786. "The question here," Justice Sotomayor argued, "is not whether Bristol–Myers is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix—it is." *Id.* Instead, "[t]he question is whether Bristol–Myers is subject to suit in California only on the residents' claims, or whether a state court may also hear the nonresidents' 'identical' claims." *Id.* As Justice Sotomayor recognized, the majority's resounding answer in the negative fatally wounds the stream-of-commerce theory and "eliminate[s] nationwide mass actions in any State other than those in which a defendant is 'essentially at home.'" *Id.*

In the wake of *Nicastro*, *Walden*, and *BMS*, the stream-of-commerce theory now boils down to the unremarkable proposition, echoed as far back as *International Shoe*, that a defendant who purposely directs his or her activities at a state, and injures a plaintiff there through that very conduct, is subject to specific jurisdiction in the forum state. No longer can the theory be used to patch up an otherwise shaky jurisdictional basis on account of the modern economic realities and to bring in a corporate defendant in a far flung forum of a plaintiff's choosing.

Despite the Supreme Court's restrictive approach to specific jurisdiction in recent years, however, many lower courts remain unconvinced and continue to apply the stream-of-commerce theory as a matter of "hornbook law."

Despite the Supreme Court's restrictive approach to specific jurisdiction in recent years, however, many lower courts remain unconvinced and continue to apply the stream-of-commerce theory as a matter of "hornbook law." *Everett v. Leading Edge Air Foils, LLC*, No. 14-C-1189, 2017 WL 2894135, at *4 (E.D. Wis. July 7, 2017). *See also Lindsley v. Am. Honda Motor Co., Inc.*, No. CV 16-941, 2017 WL 3217140, at *2 (E.D. Pa. July 28, 2017) (holding that because *BMS* "makes absolutely no mention of either Justice Brennan or Justice O'Connor's theories under the stream of commerce doctrine," the Court's opinion does not alter the doctrine). To sound the ultimate death knell of stream of commerce, the Court may well have to address the issue head-on and leave no doubt or wiggle room for the theory's most ardent supporters. FD