Lect 18

Three considerations in PJ cases we have discussed so far

1. Pennoyer theory of power
   1. - is it still good law (esp. when Int’l Shoe does not seem to be able to justify it)?
2. Int’l Shoe power theory
3. McGee factors
   1. Not a theory of when there is PJ, but an element in analysis
      1. If clearly not satisfied, it violates due process to take PJ
      2. If it is clearly satisfied – it is still not enough on its own to give a state a power
         1. See World Wide VW
         2. But it helps in iffy cases of power...?

World-Wide Volkswagen v. Woodson (White)

- Is there PJ over NY Ds in state ct in OK?

Retention of power conception

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

So let’s look to power. What are contacts between NY Ds and the forum?

- no sales in OK

- no advertisements

- no evidence that any car they ever sold ever entered OK before this case

Why isn’t it enough that the use of the car in OK was a foreseeable consequence of the sale in NY?

- purposefully availed themselves of the protection of OK in sense that they were sold on the assumption that the cars could be used in OK

- would turn every chattel into an agent for service of process...?

If foreseeability that car would end up in OK is not enough, what about...

Ohio v. Wyandotte Chemicals

* Pollutants dumped in Mich ended up in Ohio – PJ in Ohio

why?

How do we distinguish Wyandotte from WWVW?

* level of certainty?
* Human agency vs agency of natural processes?

Ct says foreseeability of being haled into ct, not foreseeability that product will enter state is what is important

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

- how does one determine whether being haled into court is foreseeable?

- isn’t this the question that needs to be answered?

- Green thinks is circular, though it can be meaningful in justifying PJ in cases where it is very foreseeable that there would be PJ on the basis of established law – eg tagging

Brennan’s dissent:

- basically emphasizes McGee fairness criteria

- should look to whether there is actual inconvenience to the defendant

- inconvenience on Ps to go to D’s home

- interest of forum state in providing plaintiff with forum for relief

* witnesses

**Asahi**

1) motorcycle accident in Cal - Zurcher loses control of his Honda and collides with tractor

- blow out on tire was cause

- he is severly injured

- wife is killed

2) sues in Cal state ct

- Cheng Shin Rubber is D (Taiwanese manufacturer of tube)

3) Cheng Shin brings cross-complaint against co-defendants for indemnification

* joins Asahi

4) other parties drop out due to settlement – left with only Cheng Shin against Asahi

5) Asahi moves to quash service of summons

- ct denies

- Ct App Cal issues peremptory writ of mandate (No PJ)

* SctCal reversed (PJ)
* USSCt reversed (No PJ)

6) What about Cal’s long-arm statute?

- up to limits of 14th A & Cal Const.

7) Asahi contacts w/ Cal?

Eg advertising, solicitations?

Nothing except fact that component part valve assemblies go into products that it knows are sold in California

8) Level of products in Cal?

- must be in the thousands or even tens of thousands

Justice O'CONNOR announced the judgment of the Court and delivered the unanimous opinion of the Court with respect to Part I, the opinion of the Court with respect to Part II-B, in which THE CHIEF JUSTICE, Justice BRENNAN, Justice WHITE, Justice MARSHALL, Justice BLACKMUN, Justice POWELL, and Justice STEVENS join, and an opinion with respect to Parts II-A and III, in which THE CHIEF JUSTICE, Justice POWELL, and Justice SCALIA join.

start with opinion that has 8 justices in its favor

9) reasonableness? II.B

We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." (O'Connor)

Here McGee factors are strongly against PJ

- severe burden on D to got to Cal

- no benefit to P of litigating in Cal

- no Cal interest in compensation, Zurcher already has his money–

- except CA interest to extent that indemnification would deter Asahi and those similarly situated from creating products used in other products that are sold in CA and cause harm there

- what law applies?

- Taiwanese or Japanese...?

- no Cal witnesses (probably) concerning indemnification

McGee factors are ground for decision

irony that reasonableness, which was used to expand pj in McGee can now be used to restrict it

This is new law that makes Asahi relevant

**Now O’Connor’s opinion in II.A**

who are in favor?

4 justices

- her conclusion?

mere foreseeability that product would end up in forum state through stream of commerce not enough

what is needed?

* 1. Additional conduct indicating an intent to serve market in forum state
  2. Eg
  3. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, 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. But 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. (O'Connor)

what would satisfy her here…?

what could asahi do?

What if all of Asahi’s products ended up in CA – might there still be no PJ over it there under O’Connor’s opinions?

- probably, there would still be no extra something indicating in intent to serve CA market

Justice Brennan’s concurrence (rejects II.A)

* no additional conduct indicating intent besides putting into stream of commerce with awareness of sales in forum state is necessary
* you intend it if it is natural consequence of your action  
  - also are benefiting economically from the fact that products make it to Cal

- 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. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity.

What about Stevens’s concurrence?

no need to come to issue of power bc under McGee factors there is no PJ

- BUT if one considers power, it exists even under O’Connor’s theory – Asahi did more than merely place in stream with knowledge many would end up in CA

* regular *production* to satisfy these sales to Cheng Chin
* also hazardous character of component
* The plurality seems to assume that an unwavering line can be drawn between "mere awareness" that a component will find its way into the forum State and "purposeful availment" of the forum's market. Over the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than "[t]he placement of a product into the stream of commerce, without more...." Ibid. Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.

What is difference between Stevens and Brennan? – might be the same, but there might be a difference

- assume Asahi has already made the products and sells them with knowledge that many will go to forum state

- Brennan would see PJ and Stevens wouldn’t, because the extra something needed is production with knowledge?

Federal courts tended to use Brennan/Stevens approach post-Asahi, bc appeared to have 5 Justices in its favor

**McIntyre**

Product liability suit in NJ state court against McIntyre machinery and against distributor (McIntyre Machinery America)

- scrap metal machine manufactured in England and sold through distributor

- severed four of his fingers of P’s hand in NJ

- McIntryre USA is independent of McI UK

- what about PJ over McI USA? – what are their contacts w/ NJ

- shipped to NJ, ads in NJ

- problem is that they are bankrupt

what are contacts between McIntyre UK and NJ?

* sold maybe 4 machines in NJ through distributor
  + went to trade shows in other states
  + wanted to serve US market

Have three opinions  
  
Kennedy’s (4)

Breyer (concurring) (2)

Ginsburg (dissenting) (3)

What about McGee factors

* Kennedy does not even mention them – issue is power
* But they are for PJ in NJ

Issue is power

* Let’s begin with Kennedy’s opinion.
* Adopts O’Connor’s opinion in Asahi
* “The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign….Sometimes a defendant does so by sending its goods rather than its agents. 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.”
* “These facts may reveal an intent to serve the U. S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.”
  + O’Connor in Asahi:
  + “Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, 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.”
* What would work
  + Ads in NJ?
    - * Why bother? – US distributor did it
    - Any other facts you might use?
      * Ginsburg mentions some
        + NJ people went to trade shows in other states, Maybe McIntyre people spoke to them?
        + NJ has largest scrap metal market
* Imagine that all of the products McIntyre sold in the US (through McIntyre Machinery America) were sold in NJ but that the facts of the case were otherwise the same. Wouldn’t Kennedy still say that there was no PJ in New Jersey?
  + Probably - still no intent to serve NJ market
  + Imagine that McIntyre USA was McIntyre’s distributor only for the Northeast (ME, NH, VT, MA, RI, CT, NY, NJ, PA). Would Kennedy still say that there was no PJ in New Jersey?
    - If he said there was PJ, then can’t one respond that there should be PJ in McIntyre case because McI UK was the US distributor and NJ is in the US?
    - On the other hand, wouldn’t that mean that there is the intent to serve NJ if McI UK had only a world-wide distributor, because NJ is in the world...?
  + Is there any US state where the P’s could sue McIntyre?
  + No general jurisd in US state...
    - Is there spec jur in another US state
      * OH because of dealings in OH with McIntyre US?
      * But would OH satisfy the McGee factors?
    - The US has constitutional power over McI UK because it reached out to US
    - But no federal court in NJ can get PJ because of FRCP 4(k)(1)(A)
      * Fed ct has PJ only if state ct in state where fed ct is located would
      * If no US state court can get PJ, then no federal court can either
      * This could be fixed by overriding 4(k)(1)(A) though – eg through federal statute