**Lect 18**

**Asahi**

**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

McGee factors?

* in favor of PJ
* burdensome for P to go to Engl
* not that burdensome for D to go to NJ
* witnesses in NJ
* NJ is interested in providing a forum for litigating an accident in the state
* NJ law probably applies

BUT also need power

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
			* but what if there was no federal SMJ? Then the case could nopt be in fed ct even though the US had PJ.
	+ **BREYER?**
* Breyer claims that there would be PJ if there was O’Connor’s extra something directed to the NJ OR there was a “regular flow” or “regular course” of sales in New Jersey.
* What does this sound like in Asahi? – stevens/brennan
* But there was neither an O’Connor extra something nor regular flow
* Here, the relevant facts found by the New Jersey Supreme Court show no “regular … flow” or “regular course” of sales in New Jersey; and there is no “something more,” such as special state-related design, advertising, advice, marketing, or anything else. Mr. Nicastro, who here bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey.
* What about Ginsburg’s approach?
	+ D wants to distribute anywhere in US - she thinks that is enough for a foreign D to be subject to PJ in the state where the harm arises.
	+ “In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, “purposefully availed itself ” of the United States market nationwide, not a market in a single State or a discrete collection of States.”
* Different approach when you have a foreign manufacturer…?
* Question is only relationship to US as a whole

no issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey’s exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State.

* Since McIntyre has sufficient connections with US as a whole, there is PJ

* which opinion is binding on the power question, given that there is no majority opinion?
* Breyer’s bc it is the narrowest grounds for the decision (namely, no PJ)

Intentional torts

* Does not fit the Intl Shoe quid pro quo theory very well
	+ D is not really getting benefit of protection of forum state’s laws
* but still need some Int’l Shoe idea of D reaching out to forum state
* Calder v Jones
	+ - Floridian Nat’l Enquirer writer and editor were sued, along with publisher and distributor, for defamation in CA state court by CA resident
	- Writer and editor argued no PJ in CA because they had no control over where the distribution was
	- SCt held unanimously there was PJ