**Civil Procedure Class Notes – 9.13**

* Why you probably hate PJ (Personal jurisdiction)
  + Specific PJ has vague rules
  + Supreme Court can’t make up its mind
    - But note: Cases that are hard are hard because they involve out-of-state activities by D (Defendant) that have in-state effects
    - Usually, D goes into forum state and does something in that state that gives rise to the cause of action (these are easier cases)
    - Supreme Court takes the hard cases and those are the famous one
      * It’s purposely hard and that’s why they take them
  + Why Green hates PJ: main points
    - He doesn’t understand Supreme Court’s priorities
      * There’s emphasis on D’s intentions/protections regarding PJ, but not the same worries about D concerning choice of law
      * Two situations
        + (1) can California constitutionally assert personal jurisdiction over a Nevadan?
        + (2) can California constitutionally extend its law (which creates $1b in liability) to a Nevadan (no liability under Nevada law)?
        + Differences in law can make a difference if you pay money or not; but SCt does not care whether D reached out to state whose law is applied; Supreme Court is expansive on state’s constitutional power to extend its law to an event
        + Idea is when choice of law is so important, why not be solicitous of D as you are for PJ?

Brennan says that, let’s forget about sovereignty for PJ and just decide if this is good forum – treats it more like the way SCt treats constitutional restrictions on choice of law

* + - If it’s true that states, when entered into the Union, retained sovereignty, why not look to international law to figure out what sovereign interests there are between states
      * If Due Process absorbs that, they should absorb international law
        + Like under Pennoyer, read into 14th amendment
        + Under Shoe and beyond, there’s not an attempt to look at international law

Now it’s just Justices’ view of what kind of makes sense under morality

* Shoe theory of power v. convenience/reasonableness (McGee factors)
  + Shoe: All about D’s intentional acts—MUST focus on what D intended in order to determine whether forum state has power
  + McGee factors (convenience/reasonableness)
    - Relevant, but won’t create PJ on own
  + In Worldwide Volkswagon
    - If you looked only at McGee you should have PJ, but Supreme Court said you must have power as well
  + Burger King: McGee factors sometimes serve to incline a court toward the conclusion that there is power if it is a borderline case – BUT you still need to have the D reach out to the forum state to some extent – WWVW shows that McGee factors are not enough on their own
  + Asahi: McGee factors on their own can knock a case out EVEN IF power exists
* Puzzling cases: out-of-state activities having in-state effects
  + McGee is like that; but it’s also easy case in sense that D has purposely intended activities to forum state and cause of action was directly related to those activities
* Examples
  + Demo is incorporated in Pa and has all of its employees and facilities in Pa  
    it sends one of its produce by mail to Paula (a California citizen)  
    the product injures Paula and she sues Demo in Ca
    - Glannon says PJ and suggests that there is always PJ when a D sends product into state, but that isn’t always so
  + Chung v. NANA (reindeer horns example)
    - Reason why court concluded NO PJ
      * D isn’t in business of sending horns to this state, did so on request of P
      * Also depends upon dangerous nature of product sometimes
        + Hypo of dangerous product and shipped on request: possibly PJ
  + World-Wide Volkswagen
    - D does something that they can reasonably foresee will have effects in forum. Is that enough?
      * No in WWVW
    - When Seaway sold car, could they foresee it would end up in Oklahoma?
      * Maybe yes, but even so nothing about sale that they directed intent/reached out to Oklahoma. They just knew it might end up there
      * Difference between knowing and intending.
      * Must purposely direct activities toward Oklahoma
  + Ohio v. Wyandotte
    - D dumped materials in Michigan and natural consequence that it ended up in Ohio. Foreseeable that it would end up in Ohio
      * D was subject to PJ in Ohio
      * What’s difference between this and World-Wide?
  + The Court seems to be struggling with a more general problem about when you are considered to intend the natural and foreseeable consequences of your actions and when you are not
  + A shoots B  
    A’s defense is that he did not intend that the bullet enter B, but only that it go right up to B’s body and no further
    - Here criminal law/tort law will conclude that you intended the natural and foreseeable consequences of your action
      * This is like the Wyandotte case
    - Is it always true that you intend foreseeable consequences in criminal law or tort law?
  + No – e.g. American forces drop a bomb on a munitions plant  
    there is a hospital next to the plant  
    do the American forces intend to destroy the hospital?
    - Foreseeable and natural consequence but they did not intend it – this is important under the law of warfare
  + The point is that it is difficult and fact-intensive to determine whether one intends the natural and foreseeable consequences of one’s action in other areas of the law so it is not surprising that it is difficult in PJ
  + This is what the SCt has been struggling with
  + Calder v. Jones
    - Court initially offered effects test
      * Subject to PJ in California while doing stuff in Florida because you knew it would have effects in California
      * Looked like Court was saying D intended effects
  + Walden v. Fiore
    - Something extra in Calder that gave rise to PJ that Walden didn’t have
      * Walden didn’t have this something, even though D knew his actions would have consequences for P in Nevada
      * But D in this case wasn’t subject to PJ because his actions were directed at money in Georgia – intent was not directed to person in Nevada
    - What was in Calder that would create PJ?
      * Not just fact that foreseeable consequences of article would affect California. Not enough.
        + D wrote about Californian doing stuff in California and interviewed people in California (by phone)
        + Court also points to fact that consequences of actions was harm in California (but this still doesn’t distinguish form Walden)
        + Green thinks other aspects about how D directed activity is important

Looks like Supreme Court shows that more is needed that foreseeable consequences of one’s action

D in Calder wanted article to be disseminated in California; in Walden, D didn’t intend consequences in Nevada

That’s why Green posed Essay Question 6 to parse out intentions of actions and where they’re directed

* Contract cases
  + Burger King v. Rudzewicz
    - Michiganders want to set up BK (Burger King) franchise and their direct relationships are with Michigan BK office
      * Michigan office says in many cases they need to deal with main office in Florida
        + Send money to Florida
        + Send contract to Florida

Contract under Florida law

* + - * Big deal that BK is demanding connection to Florida itself
  + Compare: D (Mich) wishes to buy widget from the P Corp (Fla)  
    he learns about the widget from a P Corp website, which he views in Mich  
    in the ad, D is required to email an order form to the P Corp’s office in Fla  
    the order form says that the contract is entered into in Fla (when the D Corp ships the widget) and is governed by Fla law  
    upon receipt of the widget D is required to send $25 to Fla  
    D does not pay, so P Corp sues D in Fla state ct - PJ?
    - Real worry because contacts from Florida were compelled by P in this case. Is it fair that you would subject D to PJ in Florida?
      * This is what Burger King case is talking about
      * BUT two ways to distinguish this hypo from Burger King case
        + (1) One contact in this case versus ongoing contact with Fl in Burger King case
        + (2) sophistication of business men

like a McGee factor, but coming into play into showing is D reached out to Florida intentionally

you might want to take into consideration of how sophisticated and aware that D is about contact

* + case was in federal court in Florida; why do we care about 14th Amendment?
    - Is it constitutional for federal court in Alaska to assert PJ over you for something that happens in Virginia?
    - Yes it is constitutional because United States is the relevant sovereign.
      * As far as constitution is concerned, it is 5th amendment that matters (about relationships between D and sovereign, the United States)
    - Why talking about 14th amendment?
      * Just because of federal rule of civil procedure (Rule 4.k.1.A)
        + About summons and territorial limits
        + You can’t submit someone to federal jurisdiction in that state if they wouldn’t be subject to state court PJ
        + Why have this rule?

People would flock to federal court to take advantage of its broad PJ scope

People would also force others to go across country for suits

* + Court makes a big deal in Burger King case about…
    - Choice of law clause
      * Clauses in contracts saying contract will be governed by a certain state law
      * They say that the Ds received protection of Fl law because of that clause
  + (KNOW DIFFERENCE)
    - Choice of forum clause
      * Contract clause says that if it will be litigated, it will be in particular place
        + Basically consenting to PJ in advance
* Stream of commerce
  + Out of state actions (putting product into stream) that have forum state effects (by commercial activity)
    - Component part examples
    - Distributor examples
* Asahi Metal Industry Co. v. Superior Court (U.S. 1987)
  + Cause of action
    - Zurcher lost control of motorcycle. He was injured and wife died. He alleges it was on his back tire that lost air unexpectedly and blew up.
    - He sues Cheng Shin who makes the tires.
      * Cheng Shin brings Asahi into case via indemnification
        + Asahi manufactures the tire valve (a component of entire wheel)
        + Indemnification: 3rd party will compensate D for all or part of the $ D paid to P
    - Zurcher’s claim against Cheng Shin/others get dismissed, but indemnification action still exists
      * Action is Cheng Shin against Asahi
  + Supreme Court says no PJ
    - Messy opinions with some parts that are law and some parts that aren’t law
    - Part II-B is law with more 8 justices agreeing
      * Based on McGee factors (IF WRITING EXAM AND MENTION each MCGEE FACTOR, DON’T MUDDLE THEM UP: make sure each factor is distinguishable)
        + Burden on D to go to forum

Definitely so here - burden on Asahi to come across Pacific to CA;

* + - * + P’s interest in obtaining relief – esp burden on P to go to D’s home (or place where suit would otherwise be brought)

Here no burden at all – Japan is closer to Taiwan that CA is

* + - * + Interests of forum state

CA would be interested in providing a forum for compensation of Californian harmed in accident in California, but that’s not this case - case only about indemnification now

* + - * + Interstate/international judicial system interest:

Choice of law

Action would probably be under Taiwanese or Japanese law and it is better to have such matters decided by a Taiwanese or Japanese court

Witnesses

Not clear CA witnesses to accident are relevant to indemnification

* + - * McGee factors are so poorly satisfied that there is no PJ
    - Part II-A is not law and doesn’t have enough justices behind it
      * About stream of commerce
      * Opinion that there is not power
      * Asahi knew of effects and “foreseeability”, but O’Connor says not enough
        + D’s awareness does not convert “mere act” of placing product into stream into an act “purposefully directed” toward the forum State
        + Need something more showing intent to serve market in forum state

“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.”

* + - * Hypo
        + Asahi sells all of its valves to Cheng Shin  
          Cheng Shin just happens to sell all its products in CA and Asahi knows this  
          power over Asahi in CA under O’Connor approach?

No, they know stream of commerce is taking it to California, but still didn’t show intent to serve California market

* + - * Green thinks this opinion doesn’t make any sense because component maker could potentially never be subject to PJ in place where final product ends up under O’Connor approach
    - Brennan’s concurrence
      * He thinks California has power over Asahi (but McGee factors kick it out)
      * Not “eddies of commerce,” it’s a stream (lots of product) and you benefit financially
        + You get protection and benefits from selling of products in California and should be subject to PJ.
      * Green: Brennan’s point of view is driving thought that there is PJ in example where all Asahi’s products end up in CA
    - Steven’s concurrence
      * Not just that you’re aware it’ll end up in forum state, you ramp up production because you know they end up in California
        + This isn’t passive business, you’re creating products knowing they’ll be sold and you’ll benefit
      * Furthermore, concurrence in II-B solves case. Court doesn’t even need to talk about stream of commerce
    - Glannon thinks there’s no law here; Green thinks that Brennan/Stevens approach is what one should take if it is justified in accepting dicta
      * We have 5 justices in favor and thought there was power; there’s similarity between Brennan and Stevens and can be seen as unified theory
      * You have more lower courts going with Brennan theory
      * If you take the idea of dicta seriously (as non-binding), you won’t have to follow any of the opinions about stream of commerce because they aren’t binding
* J. McIntyre Machinery Ltd v. Nicastro
  + Involved product liability suit in New Jersey state court
  + Guy working in New Jersey lost fingers; McIntyre (an English company that made machine) had US distributor (located in Ohio)
  + P goes after UK company
  + No PJ in NJ
  + Kennedy’s opinion
    - O’Connor all over again from Asahi
      * They didn’t intentionally reach out to New Jersey; they had distributor in Ohio but for US (not just New Jersey)
      * They reached out to US but not to New Jersey specifically
  + Breyer’s concurrence
    - If there had been regular flow of product to NJ (even without extra O’Connor evidence of intent to serve NJ market), there would’ve been PJ
    - But apparently not enough flow of product
    - He sort of offered Stevens/Brennan approach, but doesn’t apply because of small flow
  + Ginsburg dissent
    - Doesn’t articulate theory of choosing between Breyer/Brennan/Stevens on one hand and Kennedy/O’Connor on other
    - McIntyre doesn’t know states, but all that matters is that they direct to US
      * Satisfied O’Connor and Brennan/Stevens concerning US
      * Got a US distributor
    - Green caveat: Ginsburg approach not relevant in interstate case (NY distributor for Florida company), but relevant in foreign defendant case in that the foreign company has US distributor so PJ should exist
    - In general, the relevant sovereign when there is PJ asserted over a foreign defendant (even in state court) should be the US
      * Takeaway of Ginsburg dissent: International cases should be treated differently in PJ cases
* what does it mean for a cause of action to arise out of or be related to contact with the forum state?
  + Glannon gives examples of 2 tests; Green thinks up to 5 tests
    - Evidence test
    - But for test
  + Hypo
    - Driver, a citizen of New York, is on his way to his summer home in Massachusetts  
      after driving through Connecticut, he hits Pedestrian, a citizen of Connecticut in Massachusetts  
      is Driver subject to specific personal jurisdiction in Connecticut?
      * But for test satisfied
    - Hotel (UK) offer to Mass. Co. for discounted rates on UK hotel  
      Mass. Co. makes reservations for employees to stay at Hotel for a business trip  
      while staying at Hotel, Employee drowns in Hotel pool.   
      PJ over Hotel in Massachusetts?
      * Under But for test, yes PJ (Green more inclined to go with this test)
        + But for D’s Mass action (the solicitation) not cause of action would have arisen
      * Under evidence, no PJ
        + Mass action not relevant for cause of action