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Mapping The Divide Over Stream Of Commerce Doctrine

Law360, New York (November 19, 2013, 5:16 PM ET) -- Recent jurisprudence pertaining to the stream of commerce theory of personal jurisdiction demonstrates that courts are coalescing around two discernible schools of thought as to how to interpret J. McIntyre Machinery Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

Nicastro attempted to delineate the contours of the stream of commerce theory — the theory as per which a defendant foreign to a forum is subject to personal jurisdiction in a forum where the defendant's products have entered the forum and given rise to a lawsuit there.

According to one school of thought, Nicastro requires that a defendant must direct its activities with respect to its products toward the forum in order to be subject to personal jurisdiction there for lawsuits relating to its products on a stream of commerce theory.

According to another school of thought, after Nicastro, it must merely be foreseeable that a defendant's products would enter the forum in order for the defendant to be subject to personal jurisdiction there for lawsuits related to its products on a stream of commerce theory. As discussed below, courts are coming to opposite conclusions as to the meaning of Nicastro apparently as a result of a disagreement as to how Nicastro interpreted prior to Supreme Court precedent, particularly Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty., 480 U.S. 102 (1987).

In Nicastro, a four-justice plurality held that a defendant must target a forum with its products in order to be subject to personal jurisdiction there for lawsuits relating to its products under a stream of commerce theory, and the mere fact that a defendant may have predicted that its products would wind up in the forum is not enough to subject the defendant to personal jurisdiction for such lawsuits. Nicastro, 131 S. Ct. at 2789-90.

The plurality held, thus, that the defendant in Nicastro was not subject to personal jurisdiction under a stream of commerce theory, as it had not targeted the forum with its products. Id. A two-justice concurrence agreed that the defendant in Nicastro was not subject to personal jurisdiction, but ruled that personal jurisdiction was lacking because the case at bar involved only one isolated sale of a product, which could not give rise to personal jurisdiction under any circumstances. Id. at 2791-92. The concurrence held that Nicastro could be resolved by the then existing precedents. Id.

Prior to Nicastro, the most recent Supreme Court case to consider the stream of commerce theory at length was Asahi Metal Industry Co. v. Superior Court of California, Solano Cty., 480 U.S. 102 (1987). In Asahi, a four-justice plurality led by Justice Sandra Day O'Connor

held that in order for a defendant to be subject to jurisdiction in a forum for lawsuits relating to its products under the stream of commerce theory, it was not enough that a defendant might have predicted that its products would enter the forum, rather the defendant must have taken some act with respect to its products purposefully directed toward the forum. Id. at 112.

Also in Asahi, a four-justice plurality led by Justice William Brennan disagreed with the O'Connor plurality, holding that a defendant could be subject to personal jurisdiction in a forum under a stream of commerce theory merely where it was foreseeable that the defendant's products would enter the forum, and the defendant need not have necessarily taken any acts directed to the forum in order to be subject to personal jurisdiction there. Id. at 117.

As Asahi produced two plurality opinions, some courts interpreting Asahi have applied the O'Connor plurality and others have applied the Brennan plurality. See Boit v. Gar-Tec Products Inc., 967 F.2d 671, 683 (1st Cir. 1992) (applying the O'Connor plurality from Asahi); see also Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992) (applying the Brennan plurality in Asahi); Rustin Gas Turbines Inc. v. Donaldson Company, 9 F.3d 415, 420 (5th Cir. 1993) (same).

In other words, some courts have held that under Asahi, as per the O'Connor plurality, a defendant must direct its activities with respect to its products toward the forum in order to be subject to personal jurisdiction there under a stream of commerce theory. Other courts have held that under Asahi, as per the Brennan plurality, it merely must have been foreseeable that a defendant's products would enter the forum in order for the defendant to be subject to personal jurisdiction there under a stream of commerce theory.

Thus, Asahi and Nicastro are the two leading legal authorities on the stream of commerce theory of personal jurisdiction, and neither produced a majority opinion that clearly articulated one controlling standard on this issue. Both cases have been read to mean either that a defendant must direct its activities with its products toward the forum in order to be subject to personal jurisdiction there on a stream of commerce theory, or that a defendant can be subject to personal jurisdiction in these circumstances merely where it was foreseeable that a defendant's products would enter the forum.

Predictably, courts disagree over the meaning of Nicastro, and over the viability of Asahi after Nicastro. Recent case law suggests that courts are lining up into two separate schools of thought as to how to interpret Nicastro. On the one hand, some courts hold that Nicastro requires that a defendant must specifically direct its products toward the forum in order to be subject to personal jurisdiction there for lawsuits relating to its products on a stream of commerce theory.

See Intercarrier Communications LLC v. Whatsapp Inc., 3:12-cv-776 *5 fn. 3 (E.D.Va. Sept. 13, 2013); see also Canntelo LLC v. Axis Communications AB, Civil No. 13-1084 *5-6 (D.P.R. July 11, 2013) (same); C&K Auto Imports Inc. v. Daimler AG, N.J. Super. A.D. 2013 *4 (Super Ct. N.J. App. Div. June 21, 2013) (same); Dejana v. Marine Technology Inc., No. 10 — cv — 4029 * 5-6 (E.D.N.Y. Sept. 26, 2011) (same).

The proposition that Nicastro requires that a defendant must direct its activities with respect to its products toward the forum in order to be subject to personal jurisdiction there under a stream of commerce theory appears to be based on the idea that both the plurality and the concurrence in Nicastro adopted Justice O'Connor's plurality opinion in Asahi — the contention that the defendant must purposefully direct its activities toward the forum in

order to be subject to personal jurisdiction there.

See Smith v. Teledyne Continental Motors Inc., 840 F. Supp. 2d 927, 931 (D.S.C. 2012) (holding that the Nicastro plurality and concurrence "agree that at a minimum, the limitations of Justice O'Connor's test [from Asahi] should be applied, although the plurality would apply an even stricter test, the parameters of which were not precisely defined ... therefore the 'stream of commerce plus' test [the O'Connor plurality test from Asahi] now commands the majority of this court."); see also Northern Ins. Co. of New York v. Construction Navale Bordeaux, No. 11-60462-CV *5 (S.D.Fla. July 11, 2011) (same).

Thus, one group of courts interprets Nicastro to mean that the Supreme Court now requires that a defendant must direct its activities toward the forum with its products in order to be subject to personal jurisdiction there for lawsuits relating to its products under a stream of commerce theory. This conclusion apparently stems from the proposition that both the plurality and the concurrence in Nicastro endorsed Justice O'Connor's test from Asahi.

On the other hand, some courts hold that even after Nicastro, the Brennan test from Asahi still can control, as Nicastro left the law unchanged. Recently, Service Solutions U.S. LLC v. Autel U.S. Inc., No. 13-10534 *3 (E.D. Mich. Oct. 18, 2013), held that Nicastro left the law on the steam of commerce theory unchanged, and that Asahi still applies the same way before and after Nicastro. Similarly, in Ainsworth v. Moffett Engineering Ltd., 716 F.3d 174 (5th Cir. 2013) the Fifth Circuit held that because Nicastro did not produce a majority opinion, the holding of Nicastro may be viewed as the position taken by the justices who concurred on the narrowest grounds, and that because the concurring opinion in Nicastro endorsed the Supreme Court's precedents, Asahi still controls this issue. Id. at 178.

Ainsworth held further that even after Nicastro, Justice Brennan's test from Asahi applies, and that a defendant need not target the forum with its products or direct its products to the forum in order to be subject to personal jurisdiction there under a stream of commerce theory. Id. at 177-179. Rather, according to Ainsworth, it must merely be foreseeable that the defendant's products would come into the forum for a finding of personal jurisdiction on this theory. Id. Ainsworth noted that its decision was "in tension" with the plurality opinion in Nicastro. Id. at 178. See also AFTG-TG LLC v. Nuvoton Technology Corp., 689 F.3d 1358, 1363 (Fed. Cir. 2012) (holding that because Nicastro produced no majority opinion, Nicastro left stream of commerce theory unchanged, and that Asahi still applies).

Ainsworth appears to disagree with cases like Teledyne Continental in that the latter held that the Nicastro concurrence and plurality endorsed the O'Connor plurality from Asahi, while the former holds that the concurrence in Nicastro did not reject the Brennan test from Asahi. Therefore, a second school of thought holds that Nicastro did not change stream of commerce jurisprudence, that Asahi still controls, and that as per Brennan's plurality in Asahi, a defendant can be subject to personal jurisdiction in a forum under a stream of commerce theory for lawsuits related to its products where it is merely foreseeable that a defendant's products would enter the forum.

Thus, interpretation of the stream of commerce theory of personal jurisdiction after Nicastro seems to be coalescing into two discernible schools of thought. One school of thought holds that after Nicastro, the Supreme Court requires that a defendant must direct its activities with respect to its products toward the forum in order to be subject to personal jurisdiction there for lawsuits related to its products on a stream of commerce theory. Apparently, this school of thought's conclusion is based on the belief that both the plurality and the concurrence in Nicastro embraced the O'Connor plurality, and rejected the Brennan plurality, from Asahi.

Another school of thought holds that a defendant need not target the forum with its products in order to be subject to personal jurisdiction there for lawsuits relating to its products because the Brennan plurality from Asahi remains good law. This school of thought's conclusion appears to be based on the belief that the concurrence in Nicastro did not reject the Brennan test from Asahi. Courts will almost certainly continue to disagree on this issue for the foreseeable future.

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