

The global reach of U.S. personal jurisdiction

In two cases, Court will consider for the first time in decades key issues concerning state court assertions.

BY PETER TROOBOFF

During its 2010-11 term, the U.S. Supreme Court will hear two cases that address for the first time in decades important issues concerning the requirements under the due process clause of the 14th

Amendment for state courts to assert personal jurisdiction over non-U.S. defendants. The Court has granted certiorari and ordered argument

in tandem of these cases, which involve decisions of state appellate courts in North Carolina and New Jersey arising from claims for injuries in France and New Jersey from allegedly defective products made in Turkey and England, respectively. Briefs for petitioners in both cases were filed in

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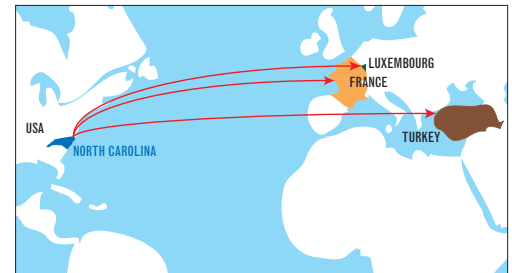
mid-November and, in addition, the United States filed an amicus curiae brief in support of the petitioners in the case involving the claims in North Carolina. The U.S. Chamber of Commerce and three other industry associations filed amicus briefs in support of the petitioners in both cases. Oral argument is scheduled for Jan. 11, 2011.

When it last addressed some of the issues raised by these pending cases, the Court repeated Justice John Marshall Harlan's warning that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Industry Co. v. Supreme Court of California*, 480 U.S. 102, 115 (1987). Both

pending cases raise important questions about when U.S. courts may hear claims arising from alleged injuries caused by products manufactured and placed into commerce by corporations that operate multinationally. From the decisions to be reviewed and from the briefs filed to date, it is clear that the American companies that sell, invest and operate in a globalized economy have a major stake in these cases.

Equally focused on these cases will be members of the bar who represent persons who suffer personal injury from products imported into this country. In addition, these cases raise the issue of whether U.S. interests require federal legislation and a multilateral treaty solution to the questions presented that cannot be resolved solely through a personal-jurisdiction ruling based on U.S. constitutional principles. Finally, the analytical approach that the Court takes in its opinions may have a significant impact on the many personal-jurisdiction cases that arise from marketing and sales of products through the Internet, often in combination with traditional means of distribution.

In *Goodyear Luxembourg Tires S.A. v. Brown* (No. 10-76), the petitioners challenge North



Carolina's assertion of general personal jurisdiction over non-U.S. affiliates in Luxembourg, Turkey and France of The Goodyear Tire & Rubber Co. The respondents are the administrators of the estates of two teenage soccer players from North Carolina who died tragically in 2004 in a bus accident on the way to de Gaulle Airport. The French accident is alleged to have been caused by the separation of plies on a bus tire that was manufactured by the Turkish petitioner. Although the tire bore warnings and other information that would have allegedly permitted its import into the United States, the model involved in the accident was never sold in North Carolina. Jurisdictional discovery showed that a disputed but clearly rather small percentage of total production of the petitioners' other model tires were sold in North Carolina, and their shipment and sale was arranged entirely by third parties.

The North Carolina Court of Appeals analyzed the case on the basis of whether the petitioners had engaged in "continuous and systematic contacts" with the state that were "substantial" in nature. If such contacts existed, then the petitioners were, under estab-



PETER TROOBOFF is senior counsel in Washington at Covington & Burling.

lished precedent, subject to general jurisdiction permitting suit against them even if a claim related to events that occurred outside of North Carolina. The North Carolina intermediate appellate court addressed this jurisdictional question by determining whether the petitioners had “engaged in acts by which they purposefully avail[ed] themselves of the privilege of conducting activities within” North Carolina. Further, the court, relying on its reading of *Asahi*, held that the required conduct toward North Carolina could be found on the basis of an awareness of placing goods in commerce that resulted in sales in that state, at least when a nonforum manufacturer has failed to exclude North Carolina from the territory in which products may be sold.

The petitioners and their supporting amici rely on extensive precedent for their position that the court erred when it applied to the general-jurisdiction issue the purposeful-availment test based on a stream-of-commerce analysis. They submit that this test applies only to cases in which the cause of action arises from or is related to the defendant’s contacts with the forum, i.e., cases based on specific jurisdiction over the defendant. The petitioners and the amici argue that the decision will encourage forum shopping; create a disincentive to the sale of products in the United States and to U.S. exports to other countries; and interfere with U.S. efforts to negotiate a treaty that would restrict other nations from asserting exorbitant grounds of jurisdiction over U.S. interests.

In the certiorari proceedings the respondents appeared to argue that the case may also be framed as a specific-jurisdiction case. They point to a nexus between North Carolina and the tire that gave rise to the cause of action since that tire could have been sent to the state. The petitioners and the United States argue that, even if it is a specific-jurisdiction case, the court erred in its analysis because there is a complete absence of the required relationship of the defendant and the cause of action with the forum. The North Carolina Supreme Court denied discretionary review.

In the other personal-jurisdiction case, *J. McIntyre Machinery Ltd. v. Nicastro* (No. 09-1343), the petitioner, a U.K. manufacturer of scrap metal shear machines, argued that

New Jersey lacked personal jurisdiction over it to hear the respondent’s claim for damages sustained in New Jersey during the operation of a U.K.-manufactured machine. The respondent’s employer purchased the machine at a U.S. trade show in Las Vegas from the exclusive Ohio-based distributor of the machines, which was not an affiliate of the manufacturer, although its name resembled that of the U.K. company. The Supreme Court of New Jersey held, 5-2, over a strong dissent, that the exercise of specific personal jurisdiction over the petitioner was constitutionally permissible under the due process clause. 201 N.J. 49 (2010).

The New Jersey court relied heavily on its reading that *Asahi* “embraced the stream-of-commerce theory in one form or another” as a basis for asserting personal jurisdiction over a nonresident defendant. Writing for the majority, Justice Barry Albin held that the U.K. manufacturer fell under this doctrine by virtue of its having “targeted the United States market for the sale of its recycling products” so that it “knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers.” A minimum-contacts analysis is no longer appropriate, the court found, in a products liability action. Further, the court added, the petitioner could, if it wished, “make clear that it is not marketing its products into this State.” The court also based its decision on the state’s “strong interest” in exercising jurisdiction and applying its law, thereby avoiding having its citizen seek relief in the United Kingdom, “which may not have the same protections provided by this State’s product-liability law.”

In its brief, the U.K. petitioner rejects the New Jersey court’s reliance for its holding on the “radical transformation of international commerce” and “present realities of international trade” as well as “complex marketing techniques of transnational corporations that bring products, some dangerous and defective, into our State.” The petitioner emphasizes that both plurality opinions in *Asahi* required the defendant to have minimum contacts with a forum state—either the purposefully directed conduct of the defendant toward the forum, or, at least, actual awareness of marketing in

the forum. The petitioner contends that neither is present in this case since it never was shown to have “ever taken the slightest purposeful act toward New Jersey” or even “considered” New Jersey for machine sales.

The amici strongly support the petitioners on this last point, with the Chamber elaborating on the deleterious consequences for U.S. business and international trade of requiring “affirmative steps to preclude the entry of its product into a forum state.” The Chamber also asks the Court to clarify two points about the “additional conduct” requirement for specific jurisdiction—first, that an arms’-length, independent distributor of a manufacturer’s products is legally distinct from an agent and, as a result, a manufacturer may not be present for jurisdictional purposes in locations where such a distributor happens to sell its products; and, second, that a Web site for a manufacturer’s products that is accessible in a forum does not, without more, constitute under *Asahi* the manufacturer’s advertising in that forum.