Corporate Counsel
FROM THE SECTION OF LITIGATION COMMITTEE ON CORPORATE COUNSEL
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NEWS & DEVELOPMENTS

Post-*Nicastro*, Opposite Jurisdiction Outcomes for Foreign Defendant

In summer 2011, the U.S. Supreme Court decided *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). *Nicastro* dismissed New Jersey state tort claims against J. McIntyre, a British company, finding that J. McIntyre's contacts with New Jersey—which were limited to the sale of the one machine at issue—were insufficient to establish specific jurisdiction. However, *Nicastro* failed to produce a majority opinion and left unresolved whether Justice Brennan's stream-of-commerce theory, first articulated in *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102 (1987), would become obsolete. Indeed, although six justices agreed the claims against J. McIntyre must be dismissed, only four justices outright rejected Justice Brennan's approach and applied Justice O'Connor's *Asahi* opinion, which requires purposeful availment of the forum state and more than mere placement of a product into the stream of commerce. The decision was hailed as a victory for foreign manufacturers but the unresolved spilt between the applicable jurisdiction tests outlined by Justice Brennan and Justice O'Connor has limited its impact.

Most recently, two federal district courts came to differing conclusions with regard to jurisdiction over the same foreign defendant. In *Ainsworth v. Cargotec USA Inc.*, No. 2:10-cv-00236, 2011 WL 4443626 (S.D. Miss. Sept. 23, 2011), a federal district court in Mississippi considered *Nicastro* in a case involving state-tort claims against an Irish forklift manufacturer. The *Ainsworth* court found *Nicastro* to be "rather limited in its applicability" because the Supreme Court majority had "declined to choose between the [Justice Brennan and Justice O'Connor] *Asahi* plurality opinions." Left without clear guidance, *Ainsworth* followed Fifth Circuit precedent and applied Justice Brennan's stream-of-commerce theory to determine that jurisdiction over the foreign defendant was proper.

Conversely—and just one week later—a Kentucky federal district court decided *Lindsey v. Cargotec USA Inc.*, No. 4:09-cv-00071, 2011 WL 4587583 (W.D. Ky. Sept. 29, 2011). *Lindsey* determined that, in light of *Nicastro,* it could not exercise jurisdiction for state-tort claims over the same Irish forklift manufacturer. The *Lindsey* court followed *Nicastro* and prior Sixth Circuit precedent adopting Justice O'Connor's jurisdiction theory from *Asahi*. It also noted many similarities between the foreign defendants in *Nicastro* and *Lindsey*: no physical presence in the forum state, no ownership or use of property in the forum state, no direct shipments to or sales in the forum state. In both *Nicastro* and *Lindsey*, the foreign defendant's contact with the forum state was limited to an independent distributor.

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Cases like these that produce inconsistent results for the same foreign defendant having the same contacts with the forum state highlight the need for the Supreme Court to finally adopt one of the *Asahi* tests. Certainty and predictability in this realm is preferable for both foreign corporations and the domestic ones that deal with them. While it remains to be seen when such a decision will come down, *Nicastro* seems to indicate that the Court is not likely to take another 20-year hiatus from personal jurisdiction. The two tie-breaking justices indicated that they were open to hitting the reset button on this issue if the Court were presented with a case that provides "a better understanding of the relevant contemporary commercial circumstances."

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