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Civil Procedure - Personal Jurisdiction: Evolution and Current Interpretation of the Stream of Commerce Test in the Third Circuit

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CIVIL PROCEDURE—PERSONAL JURISDICTION: EVOLUTION AND CURRENT INTERPRETATION OF THE STREAM OF COMMERCE TEST IN THE THIRD CIRCUIT

I. INTRODUCTION

Since the early 1900s, United States courts have increasingly exercised personal jurisdiction over non-resident defendants.[1] In the 1960s, both federal and state courts began to assert personal jurisdiction over non-resident manufacturers who purposefully placed injury-causing products into the "stream of commerce."[2] In the 1980s, the United States Supreme

1. *See* Kane v. New Jersey, 242 U.S. 160 (1916) (upholding New Jersey law requiring nonresident motorists to file consent form with Secretary of State of New Jersey appointing that official as their agent for service of process if legal proceedings arise from motor vehicle accident within state); Hess v. Pawloski, 274 U.S. 352 (1927) (expanding *Kane* by upholding Massachusetts law which declared that non-resident motorists, by driving on state roads, had consented to appointment of state official as their agent for service of process in motor vehicle accident cases); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (exercising jurisdiction over out-of-state corporate defendant on basis of presence within forum state instead of consent to suit); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (concluding that trust company had jurisdiction over out-of-state beneficiaries in proceeding to settle accounts); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) (concluding that Virginia's State Corporation Commission had jurisdiction in enforcement proceeding over out-of-state corporation that provided health insurance by mail to Virginia residents); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (concluding that no violation of due process would occur for Ohio courts to exercise jurisdiction over Philippine mining corporation that relocated its headquarters to Ohio during Japanese occupation of Philippines); McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (allowing California state court to exercise jurisdiction over Texas life insurance company because company sold life insurance policies to California citizens); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) (exercising personal jurisdiction pursuant to Federal Rule of Civil Procedure 37(b)(2)(A) when defendants failed to comply with discovery orders relating to personal jurisdiction); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (exercising jurisdiction over defendant even though plaintiff admitted to forum-shopping); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (allowing national franchisor headquartered in Florida to sue Michigan-based franchisee in Florida where alleged injury arose out of or related to actions of defendant that were directed toward forum state); *see also* Bradley W. Paulson, Comment, *Personal Jurisdiction Over Aliens: Unraveling Entangled Case Law*, 13 HOUS. J. INT'L L. 117, 118 (1990-91) (recognizing that power of United States courts to assert jurisdiction over alien defendants has increased over last century).

2. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961) (establishing stream of commerce analysis); *see also* Coulter v. Sears, Roebuck & Co., 426 F.2d 1315, 1318 (5th Cir. 1970) (applying stream of commerce analysis); Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 596 (5th Cir. 1969) (same); Uppgren v. Executive Aviation Servs., Inc., 304 F. Supp. 165, 169 (D. Minn. 1969) (same); Keckler v. Brookwood Country Club, 248 F. Supp. 645, 648 (N.D. Ill. 1965) (same); International Harvester Co. v. Hendrickson Mfg. Co., 459

Court approvingly cited the "stream of commerce" analysis in deciding three personal jurisdiction cases.[3] Unfortunately, these Supreme Court decisions have failed to clarify the scope of the stream of commerce analysis.[4] Without proper guidance from the Supreme Court, lower state and federal courts have applied different stream of commerce analyses in exercising personal jurisdiction over non-resident defendants.[5]

S.W.2d 62, 64-65 (Ark. 1970) (same); Buckeye Boiler Co. v. Superior Court, 458 P.2d 57, 64 (Cal. 1969) (same); Doggett v. Electronics Corp. of Am., 454 P.2d 63, 68 (Idaho 1969) (same); Andersen v. National Presto Indus., Inc., 135 N.W.2d 639, 643 (Iowa 1965) (same); Connelly v. Uniroyal, Inc., 389 N.E.2d 155, 160 (Ill. 1979) (same); Ehlers v. United States Heating & Cooling Mfg. Corp., 124 N.W.2d 824, 827 (Minn. 1963) (same); Metal-Matic, Inc. v. Eighth Judicial Dist. Court, 415 P.2d 617, 619 (Nev. 1966) (same); Winston Indus., Inc. v. Seventh Judicial District Court, 560 P.2d 572, 574 (Okla. 1977) (same); Smith v. York Food Mach. Co., 504 P.2d 782, 785 (Wash. 1972) (same). *But see* Chunky Corp. v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110, 116 (S.D.N.Y. 1969) (rejecting stream of commerce analysis and requiring more substantial source of conduct to justify exercise of *in personam* jurisdiction over foreign corporation); Hodge v. Sands Mfg. Co., 150 S.E.2d 793, 801-02 (W. Va. 1966) (holding that foreign corporation did not have minimum contacts sufficient to confer jurisdiction upon courts of forum state).

3. *See* Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987) (refusing to exercise personal jurisdiction over alien defendant in indemnification action between two alien corporations); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (allowing national franchisor headquartered in Florida to sue Michigan-based franchisee in Florida federal district court); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (concluding that Oklahoma state courts could not exercise personal jurisdiction over New York automobile distributor in products liability action).

4. Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 270 (1988-89) (noting that *World-Wide Volkswagen* did little to resolve confusion regarding stream of commerce theory); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 105 (1991) (noting that Supreme Court decisions on personal jurisdiction have failed to clarify personal jurisdiction); *see Asahi*, 480 U.S. at 102 (issuing three sharply divided opinions describing appropriate analysis for stream of commerce cases).

5. *Compare* Renner v. Lanard Toys, 33 F.3d 277 (3rd Cir. 1994) (avoiding stream of commerce issue by remanding case for further discovery to determine whether court had jurisdiction); Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir. 1994) (avoiding stream of commerce debate by exercising jurisdiction under all three *Asahi* tests); Tobin v. Astra Pharmaceutical Prods., 993 F.2d 528, 543 (6th Cir.) (stating that facts supported personal jurisdiction even under purposeful availment test), *cert. denied* 114 S. Ct. 304 (1993); Vermeulen v. Renault, U.S.A., 985 F.2d 1534, 1548 (11th Cir. 1993) (avoiding application of stream of commerce test by holding higher standard was met); Shute v. Carnival Cruise Lines, 897 F.2d 377, 382 (9th Cir. 1990) (same), *rev'd on other grounds*, 499 U.S. 585 (1991) *with* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614-15 (8th Cir. 1994) (adopting Justice Brennan's *Asahi* view); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993) (same); Boit v. Gar-Tec Prods., 967 F.2d 671, 683 (1st Cir. 1992) (adopting Justice O'Connor's *Asahi* view); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992) (adopting Justice Brennan's *Asahi* view). For a further discussion of *Asahi*, see *infra* notes 59-79 and accompanying text.

This Casebrief discusses the stream of commerce analysis for exercising personal jurisdiction as interpreted by the United States Court of Appeals for the Third Circuit. First, Part II describes the evolution of personal jurisdiction from the territorial principles of *Pennoyer v. Neff*,[6] through the minimum contacts test of *International Shoe Co. v. Washington*,[7] to the stream of commerce theory of *Asahi Metal Industry v. Superior Court*.[8] Then, Part III discusses how other circuits have interpreted the stream of commerce analysis.[9] Next, Part IV of this Casebrief discusses the Third Circuit's approach to applying the stream of commerce analysis to non-resident manufacturers.[10] Finally, Parts V and VI summarize and provide clear guidelines for lawyers dealing with personal jurisdiction issues in the Third Circuit.[11]

II. THE EVOLUTION OF PERSONAL JURISDICTION IN THE SUPREME COURT

Over the past 125 years, legal and economic changes in American society have altered personal jurisdiction in American courts.[12] The

6. 95 U.S. 714 (1877). *Pennoyer* limited personal jurisdiction to situations where a forum state could assert sovereignty over a defendant or his or her property. *Id.* at 722. For a further discussion of *Pennoyer*, see *infra* notes 14-25 and accompanying text.

7. 326 U.S. 310 (1945). In *International Shoe*, the United States Supreme Court recognized that courts have historically required a defendant's presence within a court's territorial jurisdiction as a prerequisite to exercising personal jurisdiction. *Id.* at 316. However, the Court reasoned that because personal service of process or other forms of notice are available to notify a defendant of legal proceedings, due process would not be offended by expanding the notion of corporate presence in terms of minimum contacts. *Id.* The Court concluded that a forum state could exercise personal jurisdiction over a non-resident defendant if the defendant had certain minimum contacts with the forum state. *Id.* For a further discussion of *International Shoe*, see *infra* notes 26-34 and accompanying text.

8. 480 U.S. 102 (1987). In *Asahi*, the Supreme Court refused to exercise personal jurisdiction over an alien defendant in an indemnification action involving two alien corporations. *Id.* at 108. For a further discussion of *Asahi*, see *infra* notes 59-79 and accompanying text.

9. For a further discussion of how courts have interpreted *Asahi* and the stream of commerce analysis, see *infra* notes 80-130 and accompanying text.

10. For a further discussion of the Third Circuit's application of the stream of commerce analysis, see *infra* notes 96-130 and accompanying text.

11. For a further discussion of the Third Circuit's guidelines to stream of commerce analysis, see *infra* notes 131-44 and accompanying text.

12. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957). In *McGee*, the Supreme Court recognized that many commercial transactions involve more than one state. *Id.* at 222-23. The Court stated:

> With this increasing nationalization of commerce has come a great increase in the amount of business conducted . . . across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 223. Twenty-three years later, in World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), the Supreme Court noted that the expansion in personal jurisdiction "is largely attributable to a fundamental transformation in the American economy." *Id.* at 292-93 (citing *McGee*, 355 U.S. at 222-23). The Supreme Court further

stream of commerce theory provides an example of how American courts adapted personal jurisdiction to reflect a growing interstate and international economy.[13] The evolution of personal jurisdiction over the last century began with *Pennoyer v. Neff*.[14]

In *Pennoyer*, the Supreme Court declined to exercise personal jurisdiction over a non-resident defendant who was not served with process in the forum state.[15] The Court set forth two "well-established principles" of public law that defined the scope of a court's jurisdiction: (1) "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory;" and (2) "no State can exercise direct jurisdiction and

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noted that the historical developments described in *McGee* have only accelerated in the past 23 years. *Id.* at 293.

13. Barone v. Rich Bros. Interstate Display Fireworks, 25 F.3d 610, 615 (8th Cir. 1994). Because of NAFTA and GATT, the United States Court of Appeals for the Eighth Circuit noted that "one can expect further globalization of commerce" and that there has been an "acceleration in the internationalization of commerce." *Id.* The Eighth Circuit concluded that it is only reasonable for companies that distribute defective products in this country "to anticipate being haled into court by plaintiffs in their home state." *Id.*; *see* Murphy, *supra* note 4, at 253 (commenting that courts introduced flexibility into personal jurisdiction standard to bridge gap between commercial economic reality and law).

14. 95 U.S. 714 (1877). Prior to the growth of interstate commerce, the Supreme Court adhered to a strict territorial basis for asserting personal jurisdiction. *See, e.g.*, Haddock v. Haddock, 201 U.S. 562, 567 (1906) (stating that personal judgment rendered upon constructive service is void against non-resident); Goldey v. Morning News, 156 U.S. 518, 521-22 (1895) (holding that judgment rendered in one state court is invalid in another state's courts unless service of process was made upon defendant within forum state); Hart v. Sansom, 110 U.S. 151, 155 (1884) (concluding that personal jurisdiction over non-resident is valid only if non-resident is served with process in forum state); Pennoyer v. Neff, 95 U.S. 714, 727 (1877) (denying personal jurisdiction because there was no in-state service of process).

In *Pennoyer*, J.H. Mitchell, an attorney, sued Marcus Neff for uncollected attorney's fees. *Id.* at 719. Mitchell obtained a default judgment against Neff. *Id.* at 719-20. Mitchell executed his judgment against Neff by forcing a sheriff's sale of property that Neff owned. *Id.* at 719. Years later, Neff sued a subsequent purchaser of the property arguing that the default judgment was invalid. *Id.* at 719-20. The Supreme Court agreed with Neff stating that the forum state lacked personal jurisdiction over Neff. *Id.* at 734.

15. *Pennoyer*, 95 U.S. at 727. The Supreme Court stated that a court cannot exercise a judgment if the court does not have jurisdiction over the party. *Id.* at 732-33. Exercising the judgment would not constitute due process of law and, therefore, would violate the Fourteenth Amendment.

The American people adopted the Fourteenth Amendment in 1868. Proclamation 13, 40th Cong., 2d Sess., 15 Stat., app. at 708 (1868). Only nine years later, the Supreme Court decided *Pennoyer*. The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

authority over persons or property without its territory."[16] Under these territorial principles, the Court divided personal jurisdiction into two categories: *in personam* and *in rem*.[17]

According to *Pennoyer*, a court could exert *in personam* jurisdiction over a defendant only if the plaintiff served the defendant with process while in the forum state, or if the defendant voluntarily appeared or consented to jurisdiction.[18] Also, *Pennoyer* stated that a court could exert *in rem* jurisdiction over a defendant only if the defendant had property in the forum state that the court could seize or attach.[19] In either case, jurisdiction rested upon symbolic assertions of sovereignty.[20]

As interstate commerce developed, *Pennoyer*'s territorial approach to personal jurisdiction became increasingly difficult to apply.[21] The expanding American economy became more involved with the interstate movement of goods and services.[22] As a result, state boundaries diminished in commercial significance.[23] The *Pennoyer* framework proved ill-suited for such an economy and, therefore, resulted in some unfair and absurd results.[24] The American economy required a more expansive no-

16. *Pennoyer*, 95 U.S. at 722.

17. *Id.* at 724-25. *In personam* jurisdiction refers to the power that a court has over the defendant himself in contrast to the court's power over the defendant's property. BLACK'S LAW DICTIONARY 791 (6th ed. 1990). A court without personal jurisdiction is without power to issue an *in personam* judgment. *Pennoyer*, 95 U.S. at 732-33. *In rem* jurisdiction refers to a judicial action which is taken against a defendant's property. BLACK'S LAW DICTIONARY 794 (6th ed. 1990).

18. *Pennoyer*, 95 U.S. at 724-25. The *Pennoyer* court stated that a lack of in-state service or a defendant's voluntary appearance was fatal to the plaintiff's action. *Id.* at 727. In fact, the parties in *Pennoyer* did not even argue that *in personam* jurisdiction existed. Neff v. Pennoyer, 17 F. Cas. 1279, 1280-81 (C.D. Or. 1875) (No. 10,083). Instead, the case centered on the existence of *in rem* jurisdiction. *Pennoyer*, 95 U.S. at 728.

19. *Pennoyer*, 95 U.S. at 724-25. *In rem* jurisdiction existed only if the defendant had property within the forum state and the court took control of the property. *Id.* As a result, creditors could only enforce an *in rem* judgment against the property brought within the court's control. *Id.* In addition, the *Pennoyer* Court emphasized that a court must attach property at the commencement of an *in rem* action. *Id.*

20. Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 23, 35 (1990-91).

21. *See, e.g.*, Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264 (1917) (creating legal fiction that foreign corporation doing business in forum state is present in that state and thus subject to service of process); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914) (same).

22. Murphy, *supra* note 4, at 253.

23. Kenneth F. Ripple & Mollie A. Murphy, World-Wide Volkswagen Corp. v. Woodson: *Reflections on the Road Ahead*, 56 THE NOTRE DAME LAW. 65, 70 (1980) (noting that "[a]s communication and commerce became increasingly interstate in character, state boundaries diminished in commercial importance").

24. *See, e.g.*, Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (allowing jurisdiction where defendant was served with process while flying over forum

tion of personal jurisdiction.[25] The Supreme Court recognized this need and expanded personal jurisdiction in *International Shoe Co. v. Washington.*[26]

In *International Shoe,* the Supreme Court adhered to *Pennoyer*'s territorial framework, but broadly construed the concept of "presence" to exercise personal jurisdiction over a non-resident manufacturer.[27] The Court

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state); Peabody v. Hamilton, 106 Mass. 217 (1870) (upholding jurisdiction where nonresident defendant was served with process on ship in Boston Harbor).

25. Murphy, *supra* note 4, at 253; *see* Ripple & Murphy, *supra* note 23, at 70 (stating that *Pennoyer*'s framework was ill-suited for economy involved in interstate movement of commerce). The *Pennoyer* framework did accommodate some interstate interests. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877). For example, *Pennoyer* sanctioned *quasi-in-rem* jurisdiction. *See id. Quasi-in rem* jurisdiction refers to proceedings that are brought against the defendant personally; however, the defendant's interest in the property serves as the basis for jurisdiction. BLACK'S LAW DICTIONARY 1245 (6th ed. 1990). *Quasi-in rem* jurisdiction affects only a particular person's interests in specific property and, therefore, is unlike *in rem* jurisdiction which determines interests in specific property as against the whole world. Avery v. Bender, 204 A.2d 314, 317 (Vt. 1964).

Pennoyer also recognized certain exceptions to its territorial precepts. For example, a state could require a partnership or an association to consent to forum jurisdiction as a condition of doing business there. *Pennoyer,* 95 U.S. at 734-36. In addition, lower courts broadly interpreted *Pennoyer*'s "presence" to create a few exceptions. For example, courts determined that a corporation conducting business in a state was "present" in that state and therefore subject to service of process. *See, e.g., McKibbin,* 243 U.S. at 264 (creating legal fiction that foreign corporation doing business in forum state is present in that state and thus subject to service of process); International Harvester v. Kentucky, 234 U.S. 579 (1914) (same). Also, if an out-of-state motorist used a particular state's highways, the motorist was deemed to have appointed an official of that state as her agent for accepting process. Hess v. Pawloski, 274 U.S. 352 (1927).

26. 326 U.S. 310 (1945). In *International Shoe,* the State of Washington Office of Unemployment Compensation and Placement sued the International Shoe Company to recover unpaid contributions under the state Unemployment Compensation Act. *Id.* at 311. The International Shoe Company was a Delaware corporation which had its principal place of business in St. Louis, Missouri. *Id.* at 313. The International Shoe Company manufactured and sold shoes. *Id.* The company had no office in Washington and made no contracts either for the sale or for the purchase of merchandise there. *Id.* Nevertheless, International Shoe employed between 11 and 13 salesmen in Washington. *Id.* The salesmen were limited to exhibiting their samples and soliciting orders. *Id.* at 314. They did not have the authority to enter into contracts or to make collections. *Id.* The salesmen transmitted their orders to International Shoe's St. Louis office and the company then shipped the merchandise to purchasers within Washington. *Id.*

International Shoe argued that its activities within Washington were not sufficient to manifest its presence there and, therefore, the state courts lacked personal jurisdiction over the company. *Id.* at 315. The Supreme Court disagreed and held that Washington state courts could exercise personal jurisdiction over International Shoe. *Id.* at 320-21.

27. *Id.* at 316, 320. In *International Shoe,* the Supreme Court recognized that a court's jurisdiction over a defendant was historically grounded on a court's de facto power over the defendant's person. *Id.* As a result, a defendant's presence within a court's territorial jurisdiction was a prerequisite to render a judgment personally binding the defendant. *Id.* The Supreme Court concluded that due process only requires that, if a defendant is not present within the forum state, the

stated that the terms "present" or "presence" merely symbolize a corporation's activities within a state which "courts will deem to be sufficient to satisfy the demands of due process."[28] The Supreme Court required that a corporate defendant have certain "minimum contacts" with the forum state, such that maintaining suit would not offend "traditional notions of fair play and substantial justice."[29] The Court stated that "fair play" requires sufficient contacts to make it reasonable to require a corporation to defend a particular suit.[30] The Supreme Court then provided two definitions for "minimum contacts."[31] First, the Court held that minimum contacts exist whenever a defendant engages in "systematic and continuous" activities in the forum state.[32] Second, the Court noted that a corporation's single act or occasional acts could be enough to constitute mini-

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defendant have certain minimum contacts with the forum state such that the lawsuit would not offend "traditional notions of fair play and substantial justice." *Id.* (citations omitted). The Supreme Court fit the assertion of jurisdiction into one of *Pennoyer*'s traditional territorial bases, namely *in personam* jurisdiction based on "presence." *Id.* at 321.

28. *Id.* at 316-17. *International Shoe* departed from prior cases in which the Supreme Court exercised jurisdiction over out-of-state corporations on the notion of consent. *See, e.g.*, Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373 (1920) (relying on express consent); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855) (relying on fictional notion of consent). Instead, *International Shoe* based jurisdiction on the equally fictional notion of corporate presence. *International Shoe*, 326 U.S. at 316-17. Nevertheless, the Court argued that this definition of corporate presence was consistent with prior Supreme Court decisions in which a corporate defendant's activities had been not only "continuous and systematic" but had also given rise to the cause of action. *Id.* at 317; *see, e.g.*, Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 255-56 (1909) (recognizing that foreign corporations are present within that state if corporation's agents and officers conduct business in that state); Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407, 414-15 (1905) (same); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 610-11 (1899) (same); St. Clair v. Cox, 106 U.S. 350, 355 (1882) (same).

29. *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Court explained that when a defendant conducts activities within a state, it enjoys the benefits and protection of that state's laws. *Id.* at 319. Consequently, a state could exert jurisdiction over a defendant in a suit arising from the defendant's activities within that state without violating due process. *Id.*

30. *Id.* at 317.

31. *Id.* at 318, 320.

32. *Id.* at 320. In a subsequent decision, the Supreme Court described this type of jurisdiction as general jurisdiction. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-47 (1952). A court can exercise general jurisdiction over a nonresident defendant if the defendant's contacts are so substantial, systematic and continuous that it is reasonable to compel the defendant to submit to the forum state's jurisdiction for all purposes. *Id.*; *see, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984) (applying general jurisdiction test first suggested in *International Shoe* and later developed in *Perkins*); *see also* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 613 (1988) (characterizing general jurisdiction as "dispute-blind" because not based on nature of controversy); Thomas T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1122-23 (1966) (stating that general jurisdiction can be based on unrelated contacts).

mum contacts if the act or acts gave rise to the cause of action.[33] Accordingly, the Court concluded that a state could exercise *in personam* jurisdiction if a non-resident defendant has enough minimum contacts with the forum state such that maintenance of the suit would not offend "traditional notions of fair play and substantial justice."[34]

In subsequent decisions, the Supreme Court clarified the minimum contacts test and its relationship to "traditional notions of fair play and substantial justice."[35] First, contacts must demonstrate that the defendant purposefully conducted activities within the forum state, thereby invoking the benefits and protection of the forum state's laws.[36] Second, the plaintiff has the burden of establishing jurisdiction by demonstrating that the defendant had sufficient minimum contacts with the forum state.[37] Once the plaintiff has met this burden, the defendant must present a compelling case that other factors render jurisdiction unreasonable.[38] In determining whether jurisdiction would be unreasonable under the circumstances, a court may consider the following five factors: (1) the de-

33. *International Shoe*, 326 U.S. at 318. In a subsequent decision, the Supreme Court described this type of jurisdiction as specific jurisdiction. Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647-48 (1950). In 1986, the Fifth Circuit held that even a single purposeful contact may be sufficient to meet the requirements of specific jurisdiction when the cause of action arises from the contact. Micromedia v. Automated Broadcast Controls, 799 F.2d 230, 234 (5th Cir. 1986) (citing McGee v. International Life Ins. Co., 355 U.S. 220, 223). Courts generally use a "totality of the circumstances" approach to determine whether a defendant's contacts with a forum state satisfy the requirements of general or specific jurisdiction. *See, e.g.*, Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985) (stating that number of contacts with forum state is one factor to be considered within "totality of circumstances"); Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026, 1029-30 (5th Cir. 1983) (concluding that totality of facts in case did not warrant exercise of personal jurisdiction).

34. *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Court applied this newly formulated test of corporate presence and concluded that the International Shoe Co. was amenable to jurisdiction. *Id.* at 320. The Court concluded that the company satisfied both definitions of minimum contacts. *Id.* First, International Shoe's activities in Washington resulted in a large volume of business, and therefore satisfied the "systematic and continuous" test. *Id.* Second, International Shoe's activities in Washington gave rise to the cause of action, and therefore satisfied the "related act" test. *Id.*

35. *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (establishing that minimum contacts analysis must focus on relationship between defendant, forum state and litigation). A court can exercise jurisdiction over a defendant if the defendant purposefully avails itself of the privilege of conducting activities within the forum or purposefully directs its activities toward forum residents. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

36. *Hanson*, 357 U.S. at 253; *International Shoe*, 326 U.S. at 319.

37. FDIC v. British-American Ins. Co., 828 F.2d 1439, 1441-42 (9th Cir. 1987); Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985).

38. *Burger King*, 471 U.S. at 477. In *Burger King*, the Supreme Court stated that a plaintiff must not employ jurisdictional rules in such a way as to make litigation "so gravely difficult and inconvenient" for the defendant that he or she is at a "severe disadvantage" compared with the plaintiff. *Id.* at 478 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)).

fendant's burden of defending the suit in the forum state; (2) the forum state's interest in adjudicating the controversy; (3) the plaintiff's interest in convenient and effective relief; (4) the interstate judicial system's interest in obtaining efficient resolution of controversies; and (5) the state's interests in furthering social policies.[39]

Because *International Shoe* and its progeny emphasized purposeful contacts, these decisions left unclear whether a state could exert personal jurisdiction over a non-resident manufacturer whose injury-causing product entered the forum state indirectly.[40] In 1961, the Illinois Supreme Court addressed this issue in *Gray v. American Radiator & Standard Sanitary Corp.*[41] In *Gray*, the Illinois Supreme Court concluded that the exercise of personal jurisdiction over a non-resident manufacturer was proper when the manufacturer's injury-causing product entered the forum state indirectly.[42] The plaintiff filed a products liability suit alleging that an Ohio manufacturer's defective valve caused her water heater to explode.[43] One defendant manufactured the allegedly defective valve in Ohio.[44] A second defendant purchased the valve and installed it in a water heater in Pennsylvania.[45] The defendants' only contact with Illinois was that the plaintiff, an Illinois consumer, purchased the water heater.[46] The Illinois Supreme Court concluded that it was reasonable for the manufacturers to defend a

39. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 307-313 (1981) (considering state's interest in furthering social policies); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980) (same); Kulko v. Superior Court of Cal., 436 U.S. 84, 92 (1978) (considering plaintiff's interest in convenient and effective relief and interstate judicial system's interest in obtaining efficient resolution of controversies); McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957) (considering defendant's burden of defending suit in forum state and forum state's interest in adjudicating controversy).

40. Murphy, *supra* note 4, at 256 (recognizing that Supreme Court's purposeful contacts requirement threatened state's ability to reach defendants that did not act directly in forum state).

As the American economy became interstate, manufacturers developed sophisticated distribution systems to transport their products indirectly into forum states. *Id.* at 255 (discussing advancements in manufacturers' distribution systems). As a result, some courts became concerned that the Supreme Court's purposeful contacts requirement threatened a forum state's ability to reach these manufacturers. *See* Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328, 334 (E.D. Pa. 1982) (stating that manufacturer should not be insulated from liability by establishing "indirect and multi-faceted chain of distribution"); Phillips v. Anchor Hocking Glass Corp., 413 P.2d 732, 735-37 (Ariz. 1966) (stating concern about recent Supreme Court decisions extending jurisdiction over nonresident defendants and their impact on product liability cases).

41. 176 N.E.2d 761 (Ill. 1961).

42. *Id.* at 767.

43. *Id.* at 762.

44. *Id.* at 764. A summons was served in Cleveland, Ohio on the registered agent of the Titan Valve Manufacturing Company. *Id.* at 762.

45. *Id.* at 764. Defendants American Radiator and Standard Sanitary Corporation were incorporated in Pennsylvania. *Id.*

46. *Id.* The court noted that "[Titans'] only contact with [Illinois] is found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania,

suit arising from alleged defects in their products.[47] The court reasoned that the defendants' products entered the forum state in the "ordinary course of commerce" which was sufficient to satisfy the minimum contacts test of *International Shoe*.[48]

Although many lower courts adopted Illinois' stream of commerce analysis, the United States Supreme Court did not adopt the theory until 1980 when it decided *World-Wide Volkswagen Corporation v. Woodson*.[49] In *World-Wide Volkswagen*, New York residents filed a products liability suit in Oklahoma.[50] While traveling through Oklahoma, the plaintiffs were involved in an automobile accident and suffered severe injuries.[51] Alleging that their injuries resulted from a defective automobile design, the plaintiffs sued the automobile's manufacturer and members of the manufacturer's distribution network, including its importer, regional distributor and retail dealer.[52] The defendants' only contact with the forum state was

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into a hot water heater which in the course of commerce was sold to an Illinois consumer." *Id.*

47. *Id.* at 766. The Illinois Supreme Court stated that a defendant's volume of business is not the only way a non-resident can form the required connection with a forum state. *Id.* at 764. The court recognized that jurisdictional requirements have been relaxed since *International Shoe* was decided. *Id.* The court concluded that "it is sufficient if the act or transaction itself has a substantial connection" with the forum state. *Id.* For a further discussion of *International Shoe*, see *supra* notes 26-34 and accompanying text.

48. *Id.* at 766. As a general proposition, the court stated that if a corporation decides to sell its products for ultimate use in another state, it is not unreasonable to hold the corporation answerable in that state for any damage caused by defects in the corporation's products. *Id.*

49. 444 U.S. 286 (1980).

50. *Id.* at 288. The plaintiffs were Harry and Kay Robinson and their two children. *Id.* at 288 & n.2. Kay Robinson sued on her own behalf. *Id.* The two Robinson children sued through their father, Harry Robinson. *Id.*

51. *Id.* at 288. The Robinsons were New York residents. *Id.* In 1976, they purchased a new Audi automobile from Seaway Volkswagen, Inc. in New York. *Id.* The following year, the Robinsons moved to Arizona. *Id.* As the Robinsons drove through Oklahoma, another car struck their Audi. *Id.* The accident caused a fire that severely burned Kay Robinson and her two children. *Id.*

52. *Id.* The Robinsons alleged that their injuries resulted from a defective design in the Audi's gas tank and fuel system. *Id.* The Robinsons filed a products liability suit in Oklahoma. *Id.* The Robinsons sued the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); the automobile's importer, Volkswagen of America, Inc. (Volkswagen); the automobile's regional distributor, World-Wide Volkswagen Corp. (World-Wide Volkswagen); and the automobile's retail dealer, Seaway Volkswagen, Inc. (Seaway). *Id.* Seaway and World-Wide Volkswagen entered special appearances and claimed that Oklahoma's exercise of personal jurisdiction over them violated due process. *Id.*

the location of the accident.[53] The defendants had sold the automobile in New York to New York residents.[54]

The Supreme Court characterized the defendants' contact with the forum state of Oklahoma as a "fortuitous circumstance."[55] The Court concluded that the defendants did not serve the Oklahoma market either directly or indirectly.[56] The Court found a total absence of those "affiliating circumstances" necessary to exercise jurisdiction.[57] Although the Court refused to exercise jurisdiction, the Court cited *Gray* in concluding that a forum can assert "personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased" in the forum state.[58]

Although the Supreme Court recognized the stream of commerce theory in *World-Wide Volkswagen*, the Court did not address its application with respect to international commerce until its decision in *Asahi Metal Industry v. Superior Court*.[59] In *Asahi*, a California resident filed a products

53. *Id.* at 287. Seaway and World-Wide Volkswagen were both incorporated and headquartered in New York. *Id.* at 288-89. Under contract with Volkswagen, World-Wide Volkswagen distributed vehicles, parts and accessories to retail dealers in New York, New Jersey and Connecticut. *Id.* at 289. There was no evidence that either World-Wide Volkswagen or Seaway conducted any business in Oklahoma. *Id.* In fact, there was no evidence that any other automobile sold by either World-Wide Volkswagen or Seaway had ever entered Oklahoma. *Id.*

54. *Id.* at 288.

55. *Id.* at 295. The Supreme Court rejected the argument that the foreseeability that the car would travel to other states provided a basis for jurisdiction. *Id.* at 295-96. The Court stated that the foreseeability which was critical to due process was not that the defendant's product might enter the forum state, rather that the defendant "should [have] reasonably anticipate[d] being haled into court" in the forum state. *Id.* at 297. The Court justified its holding regarding the Due Process Clause because potential defendants should be allowed to structure their conduct to avoid out-of-state litigation. *Id.*

56. *Id.* at 295. The defendants did not carry on any activities within Oklahoma. *Id.* They did not solicit any business in Oklahoma either through sales people or through advertisements reasonably calculated to reach Oklahoma. *Id.* They did not close any sales or perform any services there. *Id.* They did not regularly sell cars at wholesale or retail to Oklahoma customers. *Id.* They did not serve or seek to serve the Oklahoma market. *Id.* In fact, they availed "themselves of none of the privileges and benefits of Oklahoma law." *Id.*

57. *Id.* at 299. The Court explained that the concept of minimum contacts serves two related but distinguishable functions. *Id.* at 291-92. First, minimum contacts protects defendants from litigating in a distant or inconvenient forum. *Id.* at 292. Second, minimum contacts ensures that state courts do not reach beyond the limits placed on them by "their status as coequal sovereigns in a federal system." *Id.*

58. *Id.* at 297-98 (citing Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (1961)). The Supreme Court cited *Gray* with a "*Cf.*" signal, which means "compare." *Id.* As a result, one commentator suggested that it is not clear whether *Gray* was cited with approval. Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 94 n.78.

59. 480 U.S. 102 (1987).

liability suit in California against a Taiwanese manufacturer.[60] The Taiwanese manufacturer sought indemnification from a Japanese manufacturer, which made component parts for the Taiwanese manufacturer.[61] Although the California resident settled with the Taiwanese manufacturer, the Taiwanese manufacturer maintained the indemnity action in the California courts.[62] Because the Japanese manufacturer had no contacts with California, the Japanese manufacturer argued that California could not exert personal jurisdiction without violating due process.[63] The California Supreme Court disagreed and used the stream of commerce theory to exert personal jurisdiction over the Japanese manufacturer.[64] The United States Supreme Court unanimously reversed and refused to exercise jurisdiction.[65]

Although a unanimous Supreme Court refused to exercise jurisdiction, the Justices issued three sharply divided opinions.[66] Writing for the

60. *Id.* at 105-06. In *Asahi*, Gary Zucker, the original plaintiff, lost control of his Honda motorcycle and collided with a tractor. *Id.* at 105. The accident severely injured Zucker and killed Zucker's wife. *Id.* Zucker alleged that an explosion in the motorcycle's rear tire caused the accident. *Id.* at 106. Zucker also alleged that there were defects in the motorcycle tire, tube and sealant. *Id.* Consequently, the plaintiff sued Cheng Shin Rubber Industrial Co. (Cheng Shin), the Taiwanese manufacturer of the tube. *Id.*

61. *Id.* at 106. Cheng Shin sought indemnification from Asahi Metal Industry Co. (Asahi). *Id.* Asahi is a Japanese corporation that manufactures tire valve assemblies in Japan and then sells the assemblies to several tire manufacturers, including Cheng Shin. *Id.*

62. *Id.* at 106. The plaintiff eventually settled his claims against Cheng Shin and the other defendants. *Id.* Nevertheless, Cheng Shin's indemnity action against Asahi was still pending. *Id.*

63. *Id.* Asahi manufactured the tire valve assemblies in Japan. *Id.* Asahi sold the tire valve assemblies to Cheng Shin in Taiwan. *Id.* Asahi sent shipments of tire valve assemblies from Japan to Cheng Shin in Taiwan. *Id.* In an affidavit, the President of Asahi declared that Asahi never contemplated that its sales of tire valves to a manufacturer in Taiwan would subject Asahi to litigation in California. *Id.* at 107 (citing Asahi Metal Indus. v. Superior Court, 702 P.2d 543, 549-50 n.4 (1985), *rev'd*, 480 U.S. 102 (1987)).

64. *Id.* at 108. The California Supreme Court concluded that Asahi knew that Cheng Shin sold tire tubes in California that contained Asahi's valve assemblies. *Id.* Therefore, Asahi benefitted indirectly from Cheng Shin's sales in California. *Id.* The California Supreme Court reasoned that California's exercise of personal jurisdiction satisfied the Due Process Clause for two reasons. *Id.* First, Asahi intentionally placed its products into the stream of commerce. *Id.* Second, Asahi knew that some of its products would eventually reach California. *Id.*

65. *Id.* Justice O'Connor noted that minimum contacts had not been established and that California's exercise of personal jurisdiction was inconsistent "with fair play and substantial justice." *Id.* at 116.

66. *Id.* at 105, 108. Although Justice O'Connor wrote the opinion for the Court, her minimum contacts analysis did not command a majority. *Id.* at 105, 108-13, 116 (presenting Justice O'Connor's opinion with regard to minimum contacts and noting which Justices joined her analysis). Chief Justice Rehnquist, Justice Powell and Justice Scalia agreed with Justice O'Connor's analysis. *Id.* at 105. Justices White, Marshall and Blackmun supported Justice Brennan's analysis. *Id.* at 116 (Brennan, J., concurring). Finally, Justices White and Blackmun also joined Justice Stevens' opinion. *Id.* at 121 (Stevens, J., concurring). For a further discus-

Court, Justice O'Connor concluded that the mere act of placing a product in the stream of commerce does not constitute minimum contacts even if the defendant is aware that the stream of commerce will sweep its product into the forum state.[67] According to Justice O'Connor, a state can exercise personal jurisdiction only if the defendant purposefully directs its activities toward the forum state.[68] Therefore, Justice O'Connor's approach requires manufacturers to engage in purposeful conduct beyond placing its product into the stream of commerce.[69] Justice O'Connor provided examples of such additional conduct, including advertising in the forum state, designing the product for the forum state's market, providing customer support in the forum state and marketing the product through a distributor in the forum state.[70]

In a separate opinion, Justice Stevens agreed with Justice O'Connor's approach but concluded that she misapplied it to the facts of the case.[71] Justice Stevens argued that an unwavering line cannot be drawn between mere awareness that a component will enter a forum state and purposeful

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sion of Justice O'Connor's minimum contacts analysis, see *infra* notes 67-70 and accompanying text. For a further discussion of Justice Steven's minimum contacts analysis, see *infra* notes 71-73 and accompanying text. For a further discussion of Justice Brennan's minimum contacts analysis, see *infra* notes 74-77 and accompanying text.

67. *Id.* at 112.

68. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) and Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)). Justice O'Connor stated that the mere placement of a product into the stream of commerce, without more, is not an act purposefully directed at the forum state. *Id.* Justice O'Connor noted that a defendant's purpose or intent to serve a forum state's market can only be indicated by additional conduct. *Id.*

69. *Id.* Justice O'Connor stated that the defendant's awareness that the product will reach the forum state does not convert the act of placing a product into the stream of commerce into an act "purposefully directed" toward the forum state. *Id.*

70. *Id.* Applying this analysis to defendant Asahi, Justice O'Connor noted the following facts: Asahi did not conduct business in California; Asahi did not advertise or solicit business in California; Asahi did not create, control or employ the distribution system that swept Asahi's products into California; and Asahi did not design the valve assembles in anticipation of sales in California. *Id.* at 112-13. Justice O'Connor stated that, although Asahi may have been aware that some of its valve assemblies would be component parts of tire tubes sold in California, there was no evidence that Asahi had "purposefully avail[ed] itself of the California market." *Id.* at 112. Therefore, Justice O'Connor concluded that exerting jurisdiction over Asahi would violate the Due Process Clause. *Id.* at 113.

71. *Id.* at 121-22 (Stevens, J., concurring). Justice Stevens also noted that resolution of the stream of commerce issue was unnecessary. *Id.* at 121 (Stevens, J., concurring). Because eight Justices concluded that California's exercise of jurisdiction would be "unreasonable and unfair," Justice Stevens argued that a minimum contacts analysis was not necessary. *Id.* (Stevens, J., concurring). Justice Stevens stated that this case demonstrated that " 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Id.* at 121-22 (Stevens, J., concurring) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

availment of the forum state's market.[72] Justice Stevens formulated a test that examines the volume, value and hazardous character of the components.[73]

In the third opinion, Justice Brennan disagreed with Justice O'Connor and stated that the additional manufacturer conduct requirement was unnecessary.[74] Justice Brennan concluded that a defendant's awareness that "the final product is being marketed in the forum [s]tate" is enough to make personal jurisdiction reasonable.[75] In such cases, the defendant is benefitting economically from the retail sales in the forum market, and is benefitting indirectly from the forum state's legislation regulating intrastate commerce.[76] Because the defendant is indirectly enjoying the forum state's protection, Justice Brennan concluded that a forum state's exercise of jurisdiction over the defendant satisfies due process.[77]

Although the Justices could not agree on a minimum contacts analysis, eight Justices agreed that exercising personal jurisdiction over the Jap-

72. *Id.* at 122 (Stevens, J., concurring).

73. *Id.* (Stevens, J., concurring). Justice Stevens suggested that a regular course of dealing that involved deliveries of 100,000 units annually would constitute purposeful availment and would satisfy due process. *Id.* (Stevens, J., concurring). Justice Stevens also suggested that he believed such a course of dealing would constitute purposeful availment even if the product delivered was a standard product marketed world-wide. *Id.* (Stevens, J., concurring).

74. *Id.* at 116-17 (Brennan, J., concurring). Justice Brennan disagreed with Justice O'Connor's interpretation of the stream of commerce theory and with the conclusion that Asahi did not purposefully avail itself of the forum market. *Id.* (Brennan, J., concurring). In addition, Justice Brennan rejected the additional conduct requirement because it was a "marked retreat" from *World-Wide Volkswagen*. *Id.* at 118 (Brennan, J., concurring). Justice Brennan argued that *World-Wide Volkswagen* only requires that a defendant's conduct and connection with the forum state be such that he should reasonably anticipate being haled into the forum state's court. *Id.* at 119 (Brennan, J., concurring). Relying on *World-Wide Volkswagen*, Justice Brennan stated that a forum state can exercise jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that consumers will purchase them in the forum state. *Id.* at 119-20 (Brennan, J., concurring).

75. *Id.* at 117 (Brennan, J., concurring). Justice Brennan also noted that *World-Wide Volkswagen* approvingly cited *Gray*. *Id.* at 120 (Brennan, J., concurring). Because *Gray* was "a well known stream-of-commerce case," Justice Brennan interpreted *World-Wide Volkswagen* as preserving the stream of commerce theory. *Id.* (Brennan, J., concurring).

76. *Id.* at 117 (Brennan, J., concurring). Justice Brennan stated that these benefits accrue regardless of whether the defendant directly conducts business in the forum state or engages in additional conduct directed toward the forum state. *Id.* (Brennan, J., concurring).

77. *Id.* (Brennan, J., concurring). Justice Brennan stated that most courts and commentators have concluded that jurisdiction can be based on placing a product into the stream of commerce without any additional conduct. *Id.* (Brennan, J., concurring). Justice Brennan did note, however, that he concurred with the court's conclusion that an exercise of jurisdiction over Asahi would not be fair or in the interest of justice. *Id.* at 116 (Brennan, J., concurring).

anese manufacturer would be "unreasonable and unfair."[78] In reaching this conclusion, the Court considered "the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum [s]tate."[79] Because no single opinion commanded a majority, the minimum contacts analysis of the stream of commerce theory is presently unresolved. Until the Supreme Court addresses the issue again, lower courts must decipher which of the three *Asahi* opinions constitutes the appropriate analysis.

III. THE CIRCUIT COURTS: DIVIDED OVER THE PROPER APPROACH TO STREAM OF COMMERCE CASES

As a result of the *Asahi* decision, the current law regarding personal jurisdiction is unsettled.[80] Three approaches for applying the "stream of commerce" analysis have emerged in the circuit courts.[81] First, a majority of the circuit courts have avoided determining which minimum contacts analysis applies.[82] The Federal, Sixth, Ninth and Eleventh Circuits have

78. *Id.* at 116. The eight Justices who agreed that exercising personal jurisdiction would not be fair were Chief Justice Rehnquist, Justice Brennan, Justice White, Justice Marshall, Justice Blackmun, Justice Powell, Justice Stevens and Justice O'Connor. *Id.* at 105. Only Justice Scalia did not join Justice O'Connor's opinion which held that exercising personal jurisdiction over the Japanese manufacturer would be "unreasonable and unfair." *Id.* at 116. Justice Scalia denied jurisdiction because Asahi did not satisfy the minimum contacts requirement. *Id.* Although Justice Scalia did not write a separate opinion, it appears that he considered a fairness and reasonable analysis as unnecessary.

79. *Id.* at 116. Justice O'Connor stated that the burden on Asahi would be severe. *Id.* at 114. Justice O'Connor noted the distance between Asahi's headquarters in Japan and the forum state, California. *Id.* Justice O'Connor also noted the "unique burdens" associated with litigation in a foreign legal system. *Id.* Because neither party involved in the litigation was a California resident, Justice O'Connor stressed that the forum state's interest in the dispute was minimal. *Id.*

80. Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir.), *cert. denied*, 113 S. Ct. 2334 (1993) (noting "unsettled" state of law concerning personal jurisdiction). *Vermeulen* discussed how the Supreme Court has "grappled" with the stream of commerce theory of personal jurisdiction and the Court's decisions in *World-Wide Volkswagen* and *Asahi*. *Id.* at 1546-48. For a further discussion of *World-Wide Volkswagen*, see *supra* notes 49-58 and accompanying text. For a further discussion of *Asahi*, see *supra* notes 59-79 and accompanying text.

81. For a further discussion of the three circuit court approaches for applying the stream of commerce analysis, see *infra* notes 82-95 and accompanying text.

82. *Compare* Renner v. Lanard Toys Ltd., 33 F.3d 277, 282-84 (3d Cir. 1994) (noting that, although there is no clear final word on stream of commerce theory, defendant must demonstrate some purposeful availment of forum state and that additional discovery was needed to determine whether "there was the kind of purposeful availment that would show minimum contacts"); Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 & n.16 (Fed. Cir. 1994) (avoiding stream of commerce debate by concluding that jurisdictional requirements were met under either Justice O'Connor's *Asahi* test or Justice Brennan's *Asahi* test); Tobin v. Astra Pharmaceutical Prods., Inc., 993 F.2d 528, 542-45 (6th Cir.) (discussing *Asahi* and concluding jurisdiction was reasonable "even under" *Asahi*'s plurality opinion), *cert denied*, 114 S. Ct. 304 (1993); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1546-48 (11th Cir.) (discussing *World-Wide Volkswagen* and

affirmed lower courts' decisions exercising jurisdiction over non-resident defendants according to all three minimum contacts analyses.[83] Therefore, these circuit courts have not determined which minimum contacts analysis to apply in stream of commerce cases.

Second, the Fifth, Seventh and Eighth Circuits have followed the original "stream of commerce" theory advocated by the Supreme Court in *World-Wide Volkswagen*.[84] The Seventh Circuit justified this approach in

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Asahi and noting uncertain state of law concerning personal jurisdiction), *cert. denied*, 113 S. Ct. 2334 (1993); Shute v. Carnival Cruise Lines, 897 F.2d 377, 381-82 & n.3 (9th Cir. 1990) (noting Ninth Circuit's three part test to determine whether jurisdiction satisfies due process and that court need not reach question of whether knowledge of sales is sufficient, as Justice Brennan's test suggests, because defendant met three of four types of conduct mentioned by Justice O'Connor), *rev'd on other grounds*, 499 U.S. 585 (1991) *with* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 612-15 (8th Cir.) (noting additional conduct other than distribution as not necessary to establish jurisdiction and distinguishing *Asahi*), *cert. denied*, 115 S. Ct. 359 (1994); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993) (noting Fifth Circuit's rejection of Justice O'Connor's stream of commerce theory and following original stream of commerce theory developed in *World-Wide Volkswagen*); Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 682-83 (1st Cir. 1992) (noting that circuits facing stream of commerce questions directly have adopted Justice O'Connor's *Asahi* view that awareness that product may reach forum state is not same as purposeful availment); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992) (noting that Supreme Court established stream of commerce theory in *World-Wide Volkswagen* and that majority had not yet rejected it).

For a further discussion of Justice O'Connor's opinion in *Asahi*, see *supra* notes 67-70 and accompanying text. For a further discussion of Justice Steven's opinion in *Asahi*, see *supra* notes 71-73 and accompanying text. For a further discussion of Justice Brennan's opinion in *Asahi*, see *supra* notes 74-77 and accompanying text. For a further discussion of *Asahi*, see *supra* notes 59-79 and accompanying text. For a further discussion of *World-Wide Volkswagen*, see *supra* notes 49-58 and accompanying text.

83. Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir.) (finding that "under either stream of commerce theories, plaintiff made required jurisdictional showing"), *cert. denied*, 115 S. Ct. 18 (1994); Tobin v. Astra Pharmaceutical Prod., Inc., 993 F.2d 528, 542-45 (6th Cir.) (concluding jurisdiction was reasonable "even under" *Asahi*'s plurality opinion), *cert. denied*, 114 S. Ct. 304 (1993); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548-50 (11th Cir.) (concluding that jurisdiction is consistent with Justice O'Connor's more stringent stream of commerce analysis and therefore refusing to determine which analysis actually controls case), *cert. denied*, 113 S. Ct. 2334 (1993); Shute v. Carnival Cruise Lines, 897 F.2d 377, 382 n.3 (9th Cir. 1990) (avoiding issue whether Justice Brennan's test, in itself, supported jurisdiction because plaintiff satisfied Justice O'Connor's additional conduct requirements), *rev'd on other grounds*, 499 U.S. 585 (1991).

84. Barone v. Rich Bros. Interstate Display Fireworks, 25 F.3d 610, 614 (8th Cir.) (refusing to follow *Asahi* and noting that apparently five *Asahi* Justices followed reasoning in *World-Wide Volkswagen*), *cert. denied*, 115 S. Ct. 359 (1994); Ruston Gas Turbines v. Donaldson Co., 9 F.3d 415, 419 (5th Cir. 1993) (noting that Fifth Circuit has "continued to follow the original 'stream-of-commerce' theory" set forth by majority in *World-Wide Volkswagen* and has rejected Justice O'Connor's "stream-of-commerce-plus" theory); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992) (noting that Supreme Court established stream of commerce theory and majority had not yet rejected it). *See, e.g.*, Ham v. La Cienega Music,

Dehmlow v. Austin Fireworks.[85] In *Dehmlow*, the Seventh Circuit stated that the Supreme Court had established the stream of commerce theory in *World-Wide Volkswagen* and a majority of the Court had failed to reject that theory in *Asahi*.[86] Therefore, the Seventh Circuit argued that it could not depart from the Court's holding in *World-Wide Volkswagen* based on a belief that the current Supreme Court Justices would not readily agree with past Court decisions.[87]

The Eighth Circuit also advocated the original stream of commerce theory, but offered a different rationale.[88] The Eighth Circuit concluded that *Asahi* stood only for the proposition that it is unreasonable to adjudicate between two foreign companies absent the non-resident defendant's consent.[89] The Eighth Circuit noted that five Justices in *Asahi* agreed that a continuous and significant placement of products into the stream of commerce, with knowledge that the products will be distributed into the forum state, establishes minimum contacts sufficient to satisfy due process.[90] Therefore, the Eighth Circuit argued that the *Asahi* Court followed *World-Wide Volkswagen*'s holding that when a manufacturer serves a market either directly or indirectly, "it is not unreasonable to subject the manufacturer to suit" in the forum state if the manufacturer's defective product caused injury to the plaintiff in the forum state.[91]

Co., 4 F.3d 413, 415-16 (5th Cir. 1993) (stating that defendant meets minimum contacts standard where defendant's purposeful conduct directed at forum state allows benefit of state's laws and where defendant could anticipate litigation in forum state); Irving v. Owens-Corning Fiberglas, Corp., 864 F.2d 383, 386 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989) (noting that *Asahi* provides no "clear guidance" and that Fifth Circuit continues to follow *World-Wide Volkswagen*).

85. 963 F.2d 941, 946-47 (7th Cir. 1992) (discussing evolution of stream of commerce theory and noting why Seventh Circuit considers original stream of commerce theory "determinative").

86. *Id.* (discussing *World-Wide Volkswagen*, subsequent cases in Seventh Circuit and *Asahi*). The Seventh Circuit noted that "[b]ecause the Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected it, we consider that theory to be determinative." *Id.* at 947. The Seventh Circuit noted that while "this case is being decided on the basis of the more permissive stream of commerce theory," the defendant in *Dehmlow* demonstrated additional contacts with the forum state, therefore satisfying Justice O'Connor's stricter minimum contacts analysis in *Asahi*. *Id.* at 947-48.

87. *Id.* at 947 (noting that "[w]e may not depart from Court precedent on the basis of a belief" that current Justices would not agree with decisions of their predecessors); *see also* Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484-86 (1989) (noting that if Supreme Court precedent directly applies to case but Court's decision seems to be based on reasons rejected in another line of cases, lower court should follow decision that directly controls case and leave Supreme Court to overrule its prior decisions).

88. Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 612-15 (8th Cir.), *cert. denied*, 115 S. Ct. 359 (1994).

89. *Id.* at 614.

90. *Id.* The court in *Barone* noted that they were "loath" to count votes from a decision in which the Supreme Court was divided. *Id.* at 614.

91. *Id.* (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980)).

Third, the Court of Appeals for the First Circuit adopted Justice O'Connor's minimum contacts analysis.[92] In *Boit v. Gar-Tec Products*,[93] the First Circuit held that mere awareness that a product may end up in the forum state does not constitute purposeful availment.[94] In support of this holding, the First Circuit noted that circuits which have squarely addressed the stream of commerce issue after *Asahi* have also adopted Justice O'Connor's minimum contacts analysis.[95]

IV. THE THIRD CIRCUIT'S APPROACH TO STREAM OF COMMERCE CASES

Similar to the Supreme Court, the Third Circuit did not adopt the stream of commerce analysis until the 1980s.[96] Presently, the Third Circuit has decided only three stream of commerce cases.[97]

The Third Circuit first addressed the stream of commerce issue in *DeJames v. Magnificence Carriers*.[98] In *DeJames*, a New Jersey longshoreman suffered an injury while working on an automobile carrier vessel docked in New Jersey.[99] DeJames, the longshoreman, filed a products liability suit in New Jersey against the vessel's charterer and the vessel's converter, Hitachi.[100] Hitachi was a Japanese corporation which converted the vessel in Japan from a bulk carrier to an automobile carrier.[101] DeJames alleged that Hitachi negligently converted the vessel.[102] The location of Hitachi's

92. Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 683 (1st Cir. 1992). This approach has been described as the most stringent and has been referred to as the "stream of commerce plus." *See* Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993) (noting Justice O'Connor's "stream of commerce plus" theory).

93. 967 F.2d 671 (1st Cir. 1992).

94. *Id.* at 683.

95. *Id.* The First Circuit cited the Eighth and Eleventh Circuits as adopting Justice O'Connor's analysis. *Id.* In subsequent decisions, however, both circuits have altered their positions. For a further discussion of the Eleventh Circuit's position, see *supra* notes 80-83 and accompanying text. For a further discussion of the Eighth Circuit's position, see *supra* notes 82, 84, 88-91 and accompanying text.

96. *See* Renner v. Lanard Toys, 33 F.3d 277, 280 (3d Cir. 1994) (reaffirming viability of stream of commerce theory); DeJames v. Magnificence Carriers, 654 F.2d 280, 285 (3d Cir.) (characterizing stream of commerce as means for sustaining jurisdiction over non-resident manufacturers in product liability cases), *cert. denied*, 454 U.S. 1085 (1981).

97. Renner v. Lanard Toys, 33 F.3d 277 (3d Cir. 1994); Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); DeJames v. Magnificence Carriers, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). For a discussion of these three cases, see *infra* notes 98-130 and accompanying text.

98. 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

99. *Id.* at 282. The vessel, the M.V. Magnificence Venture, was moored to a pier in Camden, New Jersey. *Id.*

100. *Id.* at 282-83. DeJames filed the products liability suit in the United States District Court for the District of New Jersey. *Id.* at 282. DeJames alleged negligence and strict liability in tort. *Id.*

101. *Id.* at 282-83. In addition to being a Japanese corporation, Hitachi also maintained its principal place of business in Japan. *Id.*

102. *Id.*

vessel at the time of DeJames' injury constituted Hitachi's sole contact with New Jersey.[103] DeJames argued that New Jersey could exercise personal jurisdiction over Hitachi based on the stream of commerce analysis.[104] Hitachi filed a motion to dismiss the products liability suit for lack of personal jurisdiction.[105]

Relying on *International Shoe* and *World-Wide Volkswagen*, the Third Circuit granted Hitachi's motion and declined to exercise personal jurisdiction.[106] Although the Third Circuit approved the stream of commerce analysis as a valid basis for exercising personal jurisdiction, the Third Circuit held that a customer's unilateral action of bringing a manufacturer's product into a forum state does not establish minimum contacts with that forum state.[107] In dicta, the Third Circuit suggested that exercising jurisdiction over non-resident manufacturers may not be unreasonable if the manufacturers indirectly place their products into the stream of commerce through importers with independent sales and marketing schemes.[108] Nevertheless, the Third Circuit did not address whether a

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103. *Id.* at 284. Hitachi stated that further contact with the vessel ceased after it left Japan. *Id.* at 283. In addition, Hitachi did not maintain an office, have an agent or transact any business in New Jersey. *Id.*

104. *Id.* at 285. DeJames argued that Hitachi's conversion work on the vessel made Hitachi the vessel's manufacturer. *Id.* DeJames, therefore, contended that this fact distinguished his lawsuit from *World-Wide Volkswagen*. *Id.* *But see* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 288 (1980) (stating that defendants included local retailer, regional distributor and car manufacturer). DeJames asserted that courts may exercise jurisdiction over Hitachi when Hitachi's ships dock in the jurisdiction and an injury results from Hitachi's negligent work. *DeJames*, 654 F.2d at 285.

105. *Id.* at 283. Hitachi filed a motion to dismiss according to Rule 12(b)(2) of the Federal Rules of Civil Procedure. *Id.* Hitachi also argued that there was insufficient service of process. *Id.* at 282. The Japanese Minister of Foreign Affairs served Hitachi with process at Hitachi's place of business in Japan. *Id.* at 283. Apparently, this service of process was in accordance with an international treaty. *Id.*

106. *Id.* at 285-86. The Third Circuit recognized that a single contact between a defendant and a forum state may be the basis for jurisdiction if the lawsuit arose from the contact. *Id.* at 286. Nevertheless, the Third Circuit focused on whether the defendant should have anticipated being haled before the forum state's courts based on its conduct. *Id.* The Third Circuit concluded that Hitachi's conduct did not satisfy this requirement. *Id.*

107. *Id.* at 285-86. The Third Circuit rejected the argument that Hitachi should have foreseen that the vessel could have transported cars anywhere in the world, and therefore, Hitachi should have anticipated litigation in New Jersey. *Id.* at 286. The Third Circuit noted that the Supreme Court in *World-Wide Volkswagen* rejected the argument that foreseeability alone will support personal jurisdiction under the Due Process Clause. *Id.*

108. *Id.* at 285. The Third Circuit stated that jurisdiction in such cases is consistent with due process because "by increasing the distribution of its products through indirect sales within the forum, a manufacturer benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents." *Id.*

manufacturer's knowledge of product sales in a forum state will alone establish personal jurisdiction under the stream of commerce analysis.[109]

The Third Circuit addressed another expansive application of the stream of commerce analysis in *Max Daetwyler Corp. v. R. Meyer.*[110] In *Max Daetwyler*, a New York corporation commenced a patent infringement suit in a Pennsylvania federal court against a West German businessman.[111] The West German businessman manufactured printing products in Germany and independent distributors sold these products in the United States.[112] One distributor sold these printing products to three customers in Pennsylvania.[113]

The plaintiff, a New York Corporation, argued that the Third Circuit should not confine the stream of commerce analysis only to Pennsylvania because patent infringement arises under federal law.[114] Max Daetwyler argued that personal jurisdiction should be based on the non-resident defendant's aggregate contacts with the United States as a whole — a "national contacts" theory.[115] Max Daetwyler contended that the non-resident defendant participated in a distribution system aimed at major industrial markets, which reasonably included Pennsylvania.[116] Relying on *World-Wide Volkswagen*, the Third Circuit rejected a "national contacts" theory as a basis for exercising personal jurisdiction.[117] The Third Circuit reiterated *World-Wide Volkswagen*'s pronouncement that the mere likeli-

109. Renner v. Lanard Toys, 33 F.3d 277, 280 (3d Cir. 1994) (citing *DeJames*, 654 F.2d at 285).

110. 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

111. *Id.* at 291. The Max Daetwyler Corporation manufactures and sells doctor blades, a device used to remove excess ink from the printing surfaces of a rotogravure printing form. *Id.* Max Daetwyler filed this patent infringement suit in the United States District Court for the Eastern District of Pennsylvania. *Id.*

112. *Id.* at 291-92. Rolf Meyer, the West German businessman, is a sole proprietor who sells doctor blades. *Id.* at 291. Two distributors, Henry P. Korn Associates and the Uddeholm Corporation, sold Meyer's blades in the United States. *Id.* at 291-92. Uddeholm, a Delaware corporation, takes title to Meyer's blades in West Germany but warehouses the blades in Cleveland, Ohio. *Id.* at 292.

113. *Id.* at 298. Uddeholm sold Meyer's blades to three customers in Pennsylvania. *Id.* In addition, Uddeholm advertised Meyer's blades in several trade publications. *Id.* Henry P. Korn Associates, however, never sold Meyer's blades in Pennsylvania. *Id.*

114. *Id.* at 293.

115. *Id.* Under a "national contacts" theory, a court must determine personal jurisdiction based on the totality of the defendant's contacts throughout the United States. *Id.* This theory relies on the notion that "it is not the territory in which a court sits that determines the extent of its jurisdiction, but rather the geographical limits of the unit of government of which the court is a part." Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 291 (D. Conn. 1975).

116. *Max Daetwyler*, 762 F.2d at 298. In dicta, the Third Circuit stated that even if the court accepted Daetwyler's national contacts theory, the quality and quantity of Meyer's contacts must still satisfy the constitutional requirements of *International Shoe* and its progeny. *Id.* at 294-95.

117. *Id.* at 298 (citing World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)).

hood that a manufacturer's product will enter a forum state does not produce a constitutionally sufficient contact.[118]

After the Supreme Court's *Asahi* decision, the Third Circuit re-examined the stream of commerce analysis in *Renner v. Lanard Toys.*[119] In *Renner*, a toy plane exploded injuring the plaintiff.[120] David J. Renner, the plaintiff, filed a products liability action in Pennsylvania against Lanard Toys, the toy plane's manufacturer.[121] Lanard, a Hong Kong corporation with a New York office, filed a motion to dismiss for lack of personal jurisdiction.[122] Lanard argued that the corporation: (1) did not manufacture toys in Pennsylvania; (2) owned no real property in Pennsylvania; (3) had no employees, offices or bank accounts in Pennsylvania; and (4) lacked control over its distributors.[123] The Renners contended that jurisdiction would be reasonable because Lanard placed the toy into the stream of commerce, which brought the toy into Pennsylvania.[124]

The Third Circuit recognized the confusion stemming from the Supreme Court's decision in *Asahi.*[125] Nevertheless, the Third Circuit stated that certain guidelines have emerged.[126] First, the Third Circuit noted that the defendant must purposefully avail itself of the forum state for that state to exercise personal jurisdiction over the defendant.[127] Sec-

118. *Id.* at 298 (citing *World-Wide Volkswagen*, 444 U.S. at 286); *see World-Wide Volkswagen*, 444 U.S. at 297 (noting that manufacturer must attempt to market products to satisfy minimum contacts jurisdiction test). The Third Circuit interpreted *World-Wide Volkswagen* as suggesting that a non-resident manufacturer need not transact business in the forum state for that state to exercise jurisdiction if the manufacturer attempted to cultivate the forum state's market. *Max Daetwyler*, 762 F.2d at 298 n.11 (citing *World-Wide Volkswagen*, 444 U.S. at 286).

119. 33 F.3d 277 (3d Cir. 1994).

120. *Id.* at 278. The toy plane contained a cylinder with a propeller. *Id.* The toy plane flew from a hand-held launching pad. *Id.* The plaintiff alleged that the toy plane exploded, lodging plastic fragments in his left eye and face. *Id.*

121. *Id.* David J. Renner and his wife filed suit in the Commonwealth of Pennsylvania Court of Common Pleas for Erie County. *Id.* Lanard then removed the case to the United States District Court for the Western District of Pennsylvania. *Id.*

122. *Id.* The Renners purchased the toy at a McCrory's store in Pennsylvania. *Id.* Trade Power Associates Limited, a buying agent, purchased the toy from Lanard in Hong Kong and supplied it to McCrory's in Erie. *Id.*

123. *Id.* In response, the Renners produced two test reports which analyzed whether the toy plane met McCrory's safety standards. *Id.* at 278-79. A Hong Kong laboratory conducted the tests and directed the results to Lanard Toys. *Id.* at 279.

124. *Id.* at 279. Appellants advocated an expansive stream of commerce analysis. *Id.* They argued that courts may constitutionally exercise personal jurisdiction over a manufacturer who places a product into the stream of commerce with an expectation that such product will be sold in the forum state. *Id.*

125. *Id.* at 282 (citing Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987)). The Third Circuit summarized the three opinions in *Asahi* and concluded that the 4-4-1 vote made the stream of commerce analysis difficult to apply. *Id.* at 281-82 (citing *Asahi*, 480 U.S. at 102).

126. *Id.* at 282 (citing *Asahi*, 480 U.S. at 102).

127. *Id.* The Third Circuit stated that this proposition coincides with Justice Brennan's analysis in *Asahi. Id.* (citing *Asahi*, 480 U.S. at 102 (Brennan, J., concur-

ond, the Third Circuit indicated that an absence of direct sales or shipments into the forum state does not automatically end the personal jurisdiction inquiry.[128] The Third Circuit attempted to apply these guidelines to *Renner* but concluded that the factual record was incomplete.[129] Therefore, the Third Circuit remanded the case to the district court.[130] By remanding, the Third Circuit avoided deciding which minimum contacts analysis governs the Third Circuit.

V. ADVICE TO PRACTITIONERS

The Third Circuit has decided three stream of commerce cases.[131] In each case, the Third Circuit declined to exercise personal jurisdiction over the non-resident defendant.[132] Nevertheless, the Third Circuit has affirmed the validity of the stream of commerce analysis in products liability cases.[133]

In stream of commerce cases, the critical issue involves which minimum contacts analysis applies.[134] In *Asahi*, Justice O'Connor cited the Third Circuit's opinion in *Max Daetwyler* to develop her minimum contacts analysis.[135] In his *Asahi* concurrence, Justice Brennan noted that the Third Circuit cases contradict Justice O'Connor's analysis.[136] Justice Bren-

ring)). The Third Circuit characterized Justice Brennan's analysis as requiring more than mere awareness that one's products will enter the forum state. *Id.* (citing *Asahi*, 480 U.S. at 102 (Brennan, J., concurring)). The Third Circuit concluded that Justice Brennan's *Asahi* opinion required purposeful, rather than incidental, contacts. *Id.* (citing *Asahi*, 480 U.S. at 102 (Brennan, J., concurring)).

128. *Id.* The Third Circuit conceded, however, that the presence of direct shipments does show a defendant's purposeful availment. *Id.*

129. *Id.* at 283. The Third Circuit stated that if Lanard tested its product to meet McCrory's standards, then Lanard satisfied one of Justice O'Connor's additional conduct examples. *Id.* (citing *Asahi*, 480 U.S. at 102). Nevertheless, the record did not indicate that Lanard ordered the test. *Id.* The record only indicated that Lanard received a copy of the test results. *Id.*

130. *Id.* at 284.

131. *Renner*, 33 F.3d at 277; Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); DeJames v. Magnificence Carriers, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). For a discussion of these three cases, see *supra* notes 98-130 and accompanying text.

132. For a list of these three cases, see *supra* note 131. For a discussion of these three cases, see *supra* notes 98-130 and accompanying text.

133. *Renner*, 33 F.3d at 280; DeJames v. Magnificence Carriers, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). For a detailed discussion of *Renner*, see *supra* notes 119-30 and accompanying text. For a detailed discussion of *DeJames*, see *supra* notes 98-109 and accompanying text.

134. For a list of the relevant Third Circuit cases, see *supra* note 131. For a detailed discussion of these cases, see *supra* notes 98-130 and accompanying text.

135. Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (citing *Max Daetwyler*, 762 F.2d at 293-95; *DeJames*, 654 F.2d at 283). For a detailed discussion of *Asahi*, see *supra* notes 59-79 and accompanying text.

136. *Asahi*, 480 U.S. at 118 n.2 (1987) (citing *Max Daetwyler*, 762 F.2d at 298; *DeJames*, 654 F.2d at 285). For a detailed discussion of *Asahi*, see *supra* notes 59-79 and accompanying text.

nan characterized the Third Circuit's holdings as rejecting the stream of commerce analysis when the defendant could not anticipate the use of its product in the forum state and when the defendant neither sold nor indirectly marketed its products in the forum state.[137] The Third Circuit in *Renner* did not address Justice Brennan's characterization of Third Circuit precedent.[138] The Third Circuit's failure to determine which minimum contacts analysis should apply is consistent with the approach taken by the majority of the circuit courts.[139] The majority of the circuit courts have avoided advocating one particular minimum contacts analysis.[140]

Without clear direction from the Third Circuit, practitioners should emphasize the two guidelines set forth in *Renner*: (1) the defendant must purposefully avail itself of the forum state for the state to exercise personal jurisdiction over the defendant; and (2) an absence of direct sales or shipments into the forum state does not automatically end the personal jurisdiction inquiry.[141] In addition, practitioners should cautiously interpret the Supreme Court's holding in *Asahi* regarding unreasonable jurisdiction.[142] *Asahi* was a unique case in which both parties were foreign corporations with no connections to the forum state.[143] *Renner* differed from *Asahi* because *Renner* involved only one foreign party which may explain why the Third Circuit in *Renner* did not even address whether jurisdiction would be unreasonable.[144] Therefore, an unreasonable jurisdiction argument might not succeed in the Third Circuit.

VI. CONCLUSION

Although the stream of commerce analysis has existed for over thirty years, the doctrine remains an emerging legal concept within the Third Circuit.[145] The stream of commerce analysis allows a forum state to exer-

137. *Id.* (citing *Max Daetwyler*, 762 F.2d at 290; *DeJames*, 654 F.2d at 280).

138. Renner v. Lanard Toys, 33 F.3d 277, 277 (3d Cir. 1994).

139. For a discussion of the circuits' approaches to this issue, see *supra* notes 81-95 and accompanying text.

140. For a discussion of the approach that the majority of circuit courts have taken on this issue, see *supra* note 82 and accompanying text.

141. *Renner*, 33 F.3d at 282. For a further discussion of the Third Circuit's guidelines for applying the stream of commerce analysis, see *supra* notes 126-28 and accompanying text.

142. *See Asahi*, 480 U.S. at 116 (concluding that exercising personal jurisdiction would be "unreasonable and unfair"). For a further discussion of the Supreme Court's holding in *Asahi* regarding unreasonable jurisdiction, see *supra* notes 78-79 and accompanying text.

143. *Id.* at 105-06. For a further discussion of the facts involved in *Asahi*, see *supra* notes 60-63 and accompanying text.

144. *See Renner*, 33 F.3d at 278 (remanding case for further discovery to determine whether court had jurisdiction). For a further discussion of the Third Circuit's reasoning in *Renner*, see *supra* notes 125-30 and accompanying text.

145. *See Renner*, 33 F.3d at 277 (avoiding stream of commerce issue by remanding case for further discovery to determine whether court had jurisdiction); Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.) (approving stream of

cise personal jurisdiction over non-resident defendants.[146] Nevertheless, the Supreme Court and the Third Circuit have limited the doctrine's reach without clearly specifying the restrictions.[147] The Third Circuit does not generally exercise personal jurisdiction over every non-resident manufacturer involved in a products liability action.[148] Instead, the Third Circuit and other courts decide each stream of commerce case based on the particular facts of that case.[149] This is especially true ever since the Supreme Court decided *Asahi*.[150] Therefore, a stream of commerce case inherently requires a factual analysis to either distinguish or adapt existing legal precedent.

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commerce as valid basis for exercising personal jurisdiction), *cert. denied*, 474 U.S. 980 (1985); DeJames v. Magnificence Carriers, 654 F.2d 280 (3d Cir.) (characterizing stream of commerce as means for sustaining jurisdiction over non-resident manufacturers in product liability cases), *cert. denied*, 454 U.S. 1085 (1981). For a discussion of these three cases, see *supra* notes 98-130 and accompanying text.

146. For a further discussion of the stream of commerce analysis as a basis for exercising personal jurisdiction, see *supra* notes 41-144 and accompanying text.

147. *See Asahi*, 480 U.S. at 102 (issuing three sharply divided opinions describing appropriate analysis for stream of commerce cases); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (applying stream of commerce analysis to national franchisor headquartered in Florida suing Michigan-based franchisee in Florida federal district court); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (citing stream of commerce as basis for exercising personal jurisdiction); *Renner*, 33 F.3d at 277 (avoiding stream of commerce issue by remanding case for further discovery to determine whether court had jurisdiction); *Max Daetwyler*, 762 F.2d at 290 (approving stream of commerce as valid basis for exercising personal jurisdiction); *DeJames*, 654 F.2d at 280 (characterizing stream of commerce as means for sustaining jurisdiction over non-resident manufacturers in product liability cases).

148. *See Renner*, 33 F.3d at 282-84 (noting that, although there is no clear final word on stream of commerce theory, defendant must demonstrate some purposeful availment of forum state); *Max Daetwyler*, 762 F.2d at 298 (refusing to exercise personal jurisdiction on expansive interpretation of stream of commerce analysis); *DeJames*, 654 F.2d at 285 (characterizing stream of commerce as means for sustaining jurisdiction over non-resident manufacturers in product liability cases).

149. *See, e.g.*, Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir. 1994) (avoiding stream of commerce debate by exercising jurisdiction under all three *Asahi* tests); *Renner*, 33 F.3d at 277 (avoiding stream of commerce issue by remanding case for further discovery to determine whether court had jurisdiction); Tobin v. Astra Pharmaceutical Prods., 993 F.2d 528, 543 (6th Cir.) (stating that facts supported personal jurisdiction even under purposeful availment test), *cert. denied*, 114 S. Ct. 304 (1993); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993) (avoiding application of stream of commerce test by holding higher standard was met); Shute v. Carnival Cruise Lines, 897 F.2d 377, 382 (9th Cir. 1990) (same), *rev'd on other grounds*, 499 U.S. 585 (1991).

150. For a discussion of how the circuit courts have applied the Supreme Court's *Asahi* decision to stream of commerce cases, see *supra* notes 80-130 and accompanying text.