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Lesnick v. Hollingsworth & Vose Co. - The Pure Stream of Commerce No Longer Flows Through the Fourth Circuit

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NOTE

LESNICK V. HOLLINGSWORTH & VOSE CO.—THE PURE STREAM OF COMMERCE NO LONGER FLOWS THROUGH THE FOURTH CIRCUIT

I. INTRODUCTION

Personal jurisdiction over nonresidents in a forum state has been problematic in our federal system for quite some time.[1] Today, in order to establish personal jurisdiction over a nonresident defendant, the nonresident must have minimum contacts with the forum state.[2] While the test may be stated succinctly, determining whether a person or corporation has minimum contacts with the forum state is an extremely complex process, as seen in the line of personal jurisdiction cases following *International Shoe Co. v. Washington.*[3]

The concept of "stream of commerce" arose within the framework of personal jurisdiction in the early 1960's.[4] Stated simply, the stream of commerce theory allows a forum state to assert jurisdiction over a nonresident manufacturer when that manufacturer releases an injury-producing product into the stream of commerce and the product causes injury in the forum state.[5] The courts have applied the stream of commerce theory in a wide variety of cases.[6] However, determining whether min-

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1. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).
2. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
3. *See infra* part II.
4. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).
5. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.11 (2d ed. 1993).
6. *See, e.g.,* Hahn v. Vermont Law School, 698 F.2d 48 (1st Cir. 1983) (breach of contract); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Pty. Ltd., 647 F.2d 200 (D.C. Cir. 1981) (trademark infringement); Data Disc, Inc. v. Systems Tech-

imum contacts exist in the area of products liability, where many different manufacturers combine their individual products to make a single product, is particularly problematic.[7]

Part of the confusion in the area of component parts manufacturer liability is a result of the United States Supreme Court's failure to issue a definitive statement on the subject. In two earlier cases, the Court seemed to approve of the stream of commerce theory and advocate its use.[8] However, in 1987 the Supreme Court split 4-4-1 on the issue of personal jurisdiction over component parts manufacturers in *Asahi Metal Industry Co. v. Superior Court*.[9] This fragmented holding has contributed to confusion and disparity in lower court decisions,[10] which is the focus of this note.

The Fourth Circuit recently decided *Lesnick v. Hollingsworth & Vose Co.*,[11] a products liability case involving the stream of commerce theory. In *Lesnick*, the Fourth Circuit concluded that a manufacturer's knowledge that his product would be sold in the forum state was not sufficient to establish the necessary minimum contacts with the forum.[12] In this decision, the Fourth Circuit expressly adopted the view of minimum contacts advocated by Justice O'Connor in *Asahi*.

This note suggests that the *Lesnick* court ruled incorrectly by adopting O'Connor's approach, which requires more than the manufacturer's knowledge that the product will be sold in the forum state. Part II gives a historical review of personal jurisdiction and the development of the stream of commerce theory. The competing views of the stream of commerce theory which emerged from the decision in *Asahi* are explained in depth. Next, Part III documents the Fourth Circuit decisions leading

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nology Assoc., 557 F.2d 1280 (9th Cir. 1977) (breach of contract and fraud); Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961) (products liability).

7. *See infra* parts II, III & IV. *See, e.g.*, Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987); Renner v. Lanard Toys Ltd., 277 (3d Cir. 1994); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (4th Cir. 1994).

8. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

9. 480 U.S. 102 (1987).

10. *See infra* parts III & IV.

11. 35 F.3d 939 (4th Cir. 1994).

12. *Id.* at 946-47.

up to *Lesnick* and discusses the background, outcome, and application of the Fourth Circuit's decision in *Lesnick*. Part IV explains how other circuits have decided the stream of commerce issue. An analysis of the future of the stream of commerce theory and a prediction of how the current Supreme Court would stand on the theory follows in Part V. Finally, Part VI concludes that the Supreme Court should adopt Justice Brennan's more liberal view of the stream of commerce theory which subjects the defendant to the forum court's jurisdiction if the defendant knew or should have known the product would go to the forum state.

II. HISTORICAL PERSPECTIVE

A. *Personal Jurisdiction Prior to* Asahi

1. The Supreme Court Speaks on Personal Jurisdiction

The advent of the modern approach to personal jurisdiction over nonresident defendants came in 1945 with *International Shoe Co. v. Washington.*[13] Rejecting the legal fiction of "presence" and focusing directly on the due process aspect of asserting personal jurisdiction,[14] the *International Shoe* Court stated:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[15]

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13. 326 U.S. 310 (1945). Prior to this case, the accepted method of establishing jurisdiction was dictated by Pennoyer v. Neff, 95 U.S. 714 (1878). For a thorough discussion of *Pennoyer*, see FRIEDENTHAL ET AL., *supra* note 5, § 3.3. The *Pennoyer* Court created a strict rule requiring physical presence by holding that a state could adjudicate a dispute involving a nonresident only if the nonresident could be personally served in the state or had property in the state that could be attached. *Pennoyer*, 95 U.S. at 734.

14. *See* FRIEDENTHAL ET AL., *supra* note 5, § 3.10.

15. *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

The basic principles of *International Shoe* were construed and expanded in subsequent decisions by the Supreme Court;[16] and in 1980, the Court explicitly adopted a two-pronged minimum contacts test in *World-Wide Volkswagen Corp. v. Woodson.*[17]

The first prong of the minimum contacts test requires the court to evaluate whether the defendant has engaged in conduct directed toward the forum state.[18] In other words, the defendant must "purposefully avail" himself of the privileges of conducting business in the forum.[19] In a series of cases since *Hanson v. Denckla,*[20] which added the "purposeful availment" requirement to the first prong of the minimum contacts test, the Court has further refined the "purposeful availment" theory.[21] One commentator has opined that this line of cases illus-

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16. *See generally* FRIEDENTHAL ET AL., *supra* note 5, § 3.11; William M. Richman, *Understanding Personal Jurisdiction,* 25 ARIZ. ST. L.J. 599 (1993).

17. 444 U.S. 286 (1980).

> As has long been settled, . . . a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. . . . The concept of minimum contacts . . . perform[s] two related, but distinguishable functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States . . . do not reach out beyond the limits imposed on them . . . as coequal sovereigns in a federal system.

Id. at 291-92.

18. *World-Wide Volkswagen,* 444 U.S. at 291 (citing *International Shoe,* 326 U.S. at 316). The minimum contacts branch of the test was expanded to include "purposeful availment" specifically in Hanson v. Denckla, 357 U.S. 235, 253 (1958). In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985), the Court further explained that "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."

19. *Hanson,* 357 U.S at 253.

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws (footnote omitted).

Id.

20. 357 U.S. 235 (1958).

21. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (finding that a defendant who established a contractual relationship with the plaintiff in the forum state purposefully availed himself of the forum state's laws); Calder v. Jones, 465 U.S. 783 (1984) (holding that defendant whose product was distributed by a third party had the necessary contacts with the forum); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (finding that defendant had not purposefully availed himself of the forum solely through the plaintiff's unilateral act of bringing the prod-

trates that "purposeful availment" should be defined as "a pattern of behavior by a defendant that can objectively be expected to result in contacts between the defendant and the state in question."[22]

Asserting personal jurisdiction over a nonresident defendant who has established minimum contacts with the forum state satisfies due process since the privilege of conducting business in the forum carries with it an obligation to respond to a suit in that state.[23] If a court finds that the nonresident defendant has not "purposefully availed" himself of the benefits of doing business in the forum state, the court need not balance the inconveniences of the parties.[24] However, if the defendant has directed his actions toward the forum, the court then moves to the second prong of the minimum contacts test.

The second prong of the minimum contacts test requires the court to inquire whether hearing the case in the forum state would offend "traditional notions of fair play and substantial justice."[25] The *International Shoe* Court noted that this prong would be satisfied as long as the defendant corporation had sufficient contacts with the forum state "as make it reasonable to require the corporation to defend the particular suit which is brought there."[26] The inquiry under this prong includes a balancing of the following factors: the burden on the defendant; the interests of the forum state; the plaintiff's interest in obtaining relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the interest of the states in furthering their social policies.[27]

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uct into the forum state); Kulko v. Superior Court, 436 U.S. 84 (1978) (holding that a father who allowed his child to spend time in California with the mother had not purposefully availed himself of California law).

22. Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 255 (1988). This definition is helpful in deciphering the vague concept of purposeful availment.

23. *International Shoe*, 326 U.S. at 319; *see also World-Wide Volkswagen*, 444 U.S. at 297 ("[T]he foreseeability that is critical . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

24. *See* FRIEDENTHAL ET AL., *supra* note 5, § 3.11.

25. *World-Wide Volkswagen*, 444 U.S. at 292; *International Shoe*, 326 U.S. at 316.

26. *International Shoe*, 326 U.S. at 317.

27. *World-Wide Volkswagen*, 444 U.S. at 292.

The Supreme Court proceeded to shape and refine the nebulous principles set forth in *International Shoe* in the years following the decision. The *International Shoe* Court pronounced four principles to assist the lower courts in evaluating the minimum contacts prong of the test.[28] These principles have evolved into the concepts of general jurisdiction and specific jurisdiction.[29]

One of the principles enunciated in *International Shoe* acknowledges that when a defendant has significant, continuous activities in the forum state, he may be haled into court there even if the cause of action is unrelated to his activities in the state.[30] This principle is the basis of the concept of general jurisdiction.[31] General jurisdiction requires substantial forum-related activity on the part of the defendant in order for a court to assert jurisdiction over the defendant.[32] If a defendant regularly conducts business in the forum state, the court may assert jurisdiction over him even though the cause of action does not arise from the defendant's forum activities.[33]

If a defendant does not have enough contacts with the forum state to support general jurisdiction, the court then looks to specific jurisdiction. "It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."[34]

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28. *See International Shoe*, 326 U.S. at 317-18.

29. The Supreme Court first formally recognized the distinction between general and specific jurisdiction in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). For a more detailed discussion of general and specific jurisdiction, see Lea Brilmayer, *Related Contacts & Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) and Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

30. *International Shoe*, 326 U.S. at 318. *See also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

31. For a more detailed discussion of general jurisdiction, see Brilmayer, *supra* note 29; Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81; Twitchell, *supra* note 29; Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966).

32. FRIEDENTHAL ET AL., *supra* note 5, § 3.10.

33. *See Helicopteros*, 466 U.S. at 414-15; *International Shoe*, 326 U.S. at 318.

34. *Helicopteros*, 466 U.S. at 414 n.8; *see also* Shaffer v. Heitner, 433 U.S. 186 (1977).

The concept of specific jurisdiction arises from three principles articulated in *International Shoe.*

The first principle announced that jurisdiction is permissible when the defendant has continuous and systematic activity in the forum state and the cause of action is related to that activity.[35] The second principle holds that even if the defendant conducts only sporadic activity or a single act within the forum, if the cause of action arises from that contact, then the forum may assert jurisdiction over the defendant.[36] Finally, if the defendant's sporadic or casual activity in the forum state does not give rise to the cause of action, the forum may not assert jurisdiction over the defendant.[37]

The defendant's activities in the forum state must conform with one of the principles discussed above in order for the court to assert specific jurisdiction over the defendant. Over the years, the courts have developed means of interpreting these principles.[38] One such interpretation is known as the "stream of commerce" theory, which arose in response to the question of whether a defendant manufacturer has purposefully availed itself of the forum state under the first prong of the minimum contacts test.

2. The Stream of Commerce Recognized and Applied

The stream of commerce theory arose as part of the minimum contacts analysis in the early 1960s.[39] The theory states that a company can be held accountable for injuries caused by its product in any state where the product is sold through the stream of commerce.[40] The genesis of the stream of commerce theory lies in *Gray v. American Radiator & Standard Sanitary Corp.*,[41] a products liability case arising in Illinois. The defen-

35. *International Shoe*, 326 U.S. 320; *see also* FRIEDENTHAL ET AL., *supra* note 5, § 3.10.

36. *International Shoe*, 326 U.S. at 318; *see* McGee v. International Life Ins. Co., 355 U.S. 220 (1957); *see also* FRIEDENTHAL ET AL., *supra* note 5, § 3.11.

37. *International Shoe*, 326 U.S. at 317; *see* Hanson v. Denckla, 357 U.S. 235 (1958); *see also* FRIEDENTHAL ET AL., *supra* note 5, § 3.11; Dayton, *supra* note 22.

38. *See* FRIEDENTHAL ET AL., *supra* note 5, § 3.11.

39. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).

40. *Id.* at 766.

41. 176 N.E.2d 761 (Ill. 1961). Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939

dant was an Ohio-based component parts manufacturer of water heater valves.[42] The only contact between the Ohio manufacturer and Illinois was the sale, by a third party, of a water heater containing the defective valve in Illinois.[43] The Illinois court held that assertion of jurisdiction over the Ohio-based defendant was permissible under what is now known as the stream of commerce theory.[44] After the *Gray* decision, many courts began to use the stream of commerce theory, applying it to final manufacturers and component parts manufacturers.[45]

The United States Supreme Court endorsed the stream of commerce theory in dicta in *World-Wide Volkswagen Corp. v. Woodson*.[46] *World-Wide Volkswagen* involved a products liability action resulting from a car accident in Oklahoma.[47] Citing *Gray* with approval, the Court stated that a forum state may exercise personal jurisdiction over "a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum

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(4th Cir. 1994), discussed in part III.B, *infra*, is factually similar to *Gray*.

42. *Gray*, 176 N.E.2d at 762. For a thorough discussion of *Gray*, see Dayton, *supra* note 22, at 262-67; Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 255-60 (1989).

43. *Gray*, 176 N.E.2d at 764.

44. *Id.* at 766. The court stated:

> Where the alleged liability arises . . . from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State. . . . [I]f a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damages caused by defects in those products.

Id.

45. *See, e.g.*, Coulter v. Sears, Roebuck & Co., 426 F.2d 1315 (5th Cir. 1970) (sale of final product); Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969) (sale of final product from foreign manufacturer); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969) (sale of final product); International Harvester Co. v. Hendrickson Mfg. Co., 459 S.W.2d 62 (Ark. 1970) (sale of component parts); Buckeye Boiler Co. v. Superior Court, 458 P.2d 57 (Cal. 1969) (sale of final product); Connelly v. Uniroyal, Inc., 389 N.E.2d 155 (Ill. 1979) (sale of tire from foreign manufacturer), *cert. denied*, 444 U.S. 1060 (1980); Metal-Matic, Inc. v. Eighth Judicial Dist. Court, 415 P.2d 617 (Nev. 1966) (sale of component parts); Winston Indus., Inc. v. Dist. Court, 560 P.2d 572 (Okla. 1977) (sale of final product).

46. 444 U.S. 286, 297 (1980); *see* FRIEDENTHAL ET AL., *supra* note 5, § 3.11.

47. 444 U.S. at 288. The plaintiffs brought suit against a group of defendants including the New York automobile retailer from whom they had purchased the car and a regional distributor for the New York-Connecticut-New Jersey region. *Id.*

State."[48] However, under the facts of *World-Wide Volkswagen* the Court found that the defendants did not purposefully avail themselves of Oklahoma's jurisdiction because the plaintiff, not the defendant distributors, had unilaterally introduced the product into Oklahoma.[49]

After *World-Wide Volkswagen*, several federal circuit courts adopted the view that placing a product into the stream of commerce with the defendant's mere awareness that his product may reach the forum state is enough to invoke personal jurisdiction over the defendant. The District of Columbia Circuit adopted this interpretation of the stream of commerce theory in a patent infringement suit.[50] The Second Circuit implicitly approved the *Gray* stream of commerce analysis in a products liability action.[51] The Third Circuit adopted the stream of commerce theory in a products liability case[52] and in an admiralty claim.[53] The Fifth Circuit, which had adopted the stream of commerce theory before *World-Wide Volkswagen*,[54] reaffirmed

48. *Id.* at 297-98. The Court stated that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295. Nevertheless, the Court explained that foreseeability was a valid consideration:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297.

49. *Id.* at 297-98.

50. *See* Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party, Ltd., 647 F.2d 200 (D.C. Cir. 1981). See *infra* part V.A for a further discussion of *Stabilisierungsfonds*.

51. *See* Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737 (2d Cir. 1985). A New York plaintiff was injured while using a wood-splitting maul manufactured by a Japanese company and distributed in the United States through a Pennsylvania distributor. In considering whether the Pennsylvania distributor would be subject to the jurisdiction of the New York court, the Second Circuit remanded the case to the district court for further fact-finding regarding the distributor's contacts with New York. *Id.* at 743. However, the Second Circuit cited *Gray* with approval and hinted that the Pennsylvania distributor might be amenable to suit in New York. *Id.*

52. *See* Hendrickson v. Reg O Co., 657 F.2d 9, 15 (3d Cir. 1981). The defendant, an Illinois valve manufacturer, was sued in the Virgin Islands when the plaintiff was injured in an explosion allegedly caused by a defective propane tank valve. *Id.*

53. *See* DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). "[A] manufacturer may be held amenable to process in a forum in which its products are sold, even if the products were sold indirectly through importers or distributors with independent sales and marketing schemes." *Id.* at 285.

54. *See* Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980) (involving a defective

its adherence to the theory in a products liability action.[55] The Sixth,[56] Seventh,[57] Ninth,[58] and Tenth[59] Circuits also adopted the stream of commerce theory in products liability cases.

The First Circuit tacitly rejected the stream of commerce theory in *Dalmau Rodriguez v. Hughes Aircraft Co.*[60] The court held that the sale of two helicopters to Puerto Rico could not constitute placing the goods into a "stream of commerce" and was too sporadic to justify subjecting the manufacturer to juris-

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cigarette lighter); Sells v. International Harvester Co., 513 F.2d 762 (5th Cir. 1975) (involving a defective truck fan blade); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969) (involving a plaintiff injured on an amusement ride).

55. *See* Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1084-85 (5th Cir. 1984). A Washington state component parts manufacturer of steel castings sold its castings to a California company. The California company then turned the castings into cylinders which served as parts of a dredge constructed in Louisiana. *Id.* at 1082. The Washington manufacturer was sued in Louisiana and the Fifth Circuit held that, under the stream of commerce theory, the manufacturer was subject to suit there. *Id.* at 1085-86.

56. *See* Noel v. S.S. Kresge Co., 669 F.2d 1150, 1154-55 (6th Cir. 1982). A Michigan retailer purchased "long-nose" pliers from a Japanese trading company that had purchased the pliers from an unrelated Korean manufacturer. The plaintiff's brother purchased the pliers from the retailer in Ohio and the plaintiff was injured in Ohio when the pliers broke. *Id.* at 1152. The Sixth Circuit held that Ohio had jurisdiction over the Japanese trading company because it had "at least indirectly sought to serve the market for its products in Ohio." *Id.* at 1155; *see also* Poyner v. Erma Werke GMBH, 618 F.2d 1186, 1190-91 (6th Cir.), *cert. denied sub nom.* Insurance Co. of North America v. Poyner, 449 U.S. 841 (1980) (involving a defective semi-automatic pistol manufactured in Germany).

57. *See* Nelson *ex rel.* Carson v. Park Indus., 717 F.2d 1120, 1125-26 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984). A Hong Kong manufacturer of flannel shirts was sued by a Wisconsin minor plaintiff because the shirt ignited after coming into contact with a cigarette lighter. *Id.* at 1122.

58. *See* Hedrick v. Daiko Shoji Co., 715 F.2d 1355, 1358-59 (9th Cir. 1983) (involving a defective wire-rope splice used to secure a ship's boom); Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155, 158-60 (9th Cir. 1980) (involving property damage after the wrong fertilizer was distributed).

59. *See* Fidelity & Casualty Co. v. Philadelphia Resins Corp., 766 F.2d 440, 446-47 (10th Cir. 1985). The insurer of a geophysical exploration company sued a Pennsylvania manufacturer of synthetic fiber cables in Utah for injuries sustained when the cable broke. The cable was purchased by an Arkansas helicopter pilot via mail order. The pilot then brought the cables to Utah to move the exploration company's equipment. *Id.* at 441-42.

60. 781 F.2d 9, 15 (1st Cir. 1986). A Puerto Rican plaintiff sued a California manufacturer of helicopters for injuries sustained when the helicopter crashed. The helicopter was purchased by the Puerto Rico Police Department through a third party Florida company. *Id.* at 10-12.

diction.[61] However, the First Circuit added that the "test is not knowledge of the ultimate destination [of defendant's product], but whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to be haled into court [in the forum]."[62]

The Eighth Circuit also seemingly rejected the stream of commerce theory in *Hutson v. Fehr Bros., Inc.*[63] The court acknowledged the impact of *Gray* and its progeny, but pointed out that the defendant in *Hutson* had not intentionally solicited business in the forum or exercised any control over the decision of the distributor to send the product there.[64] Therefore, the Eighth Circuit refused to assert jurisdiction over the defendant.[65]

Although the expansive stream of commerce approach was widely embraced after *World-Wide Volkswagen*, the clarity of the theory did not endure. In its next opinion involving the stream of commerce, the Supreme Court muddied the waters.

B. *The* Asahi *Split on Stream of Commerce*

In 1987, the Supreme Court issued its most recent statement on the stream of commerce theory of personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court.*[66] In *Asahi*, the plaintiff's motorcycle tire exploded, resulting in an accident that severely injured the plaintiff and killed his wife.[67] The plaintiff brought a products liability action in the California Superior Court against the tire manufacturer, Cheng Shin Rubber Industrial Company ("Cheng Shin"), and the manufacturer of the tire valve assembly, Asahi Metal Industry Company ("Asahi"). In addition, Cheng Shin filed an indemnity cross-claim against Asahi. The plaintiff then settled his claim against Cheng Shin,

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61. *Id.* at 15.
62. *Id.*
63. 584 F.2d 833, 836-37 (8th Cir.), *cert. denied*, 439 U.S. 983 (1978). In *Hutson*, a product sold by an Italian company reached Arkansas and caused a personal injury. *Id.* at 837; *see also* Humble v. Toyota Motor Co., 727 F.2d 709 (8th Cir. 1984).
64. *Hutson*, 584 F.2d at 837.
65. *Id.*
66. 480 U.S. 102 (1987).
67. *Id.* at 106.

leaving only the indemnity cross-claim between Asahi and Cheng Shin in the California court.[68] Asahi moved to quash Cheng Shin's service of summons on the ground that the Due Process Clause of the Fourteenth Amendment would be violated if California asserted jurisdiction because Asahi did not have the requisite minimum contacts with California.[69] The Supreme Court of California held that Asahi had sufficient contacts with California to assert jurisdiction under the purposeful availment requirement of *World-Wide Volkswagen*.[70]

The United States Supreme Court considered the question and applied the two-prong minimum contacts test articulated in *World-Wide Volkswagen*.[71] The Court was nearly unanimous on the second prong of the test. Eight of the nine justices joining in Part II.B. of the opinion agreed that allowing California to assert jurisdiction over Asahi in the indemnity action would violate "traditional notions of fair play and substantial justice."[72]

While the Supreme Court agreed that it would be unfair for Asahi to be haled into court in California,[73] the Court was sharply divided on the issue of whether Asahi had established minimum contacts with California under the first prong of the minimum contacts test.[74] Due to a split of opinion on the stream of commerce theory, there was no majority opinion on this issue. Justice O'Connor was joined by Chief Justice

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68. *Id.*

69. *Id.* The trial court denied Asahi's motion to dismiss. The California Court of Appeals then ordered the trial court to quash service due to lack of jurisdiction. *Id.*

70. Asahi Metal Indus. Co. v. Superior Court, 702 P.2d 543, 551 (Cal. 1987). The court stated that the requirement of purposeful availment has been met when a component parts manufacturer intentionally sells its products to another manufacturer knowing that the parts will be incorporated into the finished product and sold in the forum state. *Id.*

71. *See supra* notes 17-19 & 25-27 and accompanying text.

72. *Asahi*, 480 U.S. at 113 (quoting *International Shoe*, 326 U.S. at 316). Justice Scalia did not join in Part II.B. *Id.* at 104.

73. The Court applied the five-part balance of conveniences test laid out in *World-Wide Volkswagen* and concluded that the exercise of personal jurisdiction by the California court would be unreasonable and unfair. The burden on Asahi to litigate in California outweighed the minimal interest of Cheng Shin in having the case decided in California and the slight interests of the state in the outcome of the case. *Id.* at 114-16. See *supra* notes 25-27 and accompanying text for an explanation of the five-part balance of conveniences test.

74. *See supra* notes 17-24 and accompanying text.

Rehnquist and Justices Powell and Scalia in arguing that no minimum contacts existed.[75] Justice Brennan, joined by Justices White, Marshall and Blackmun, argued that minimum contacts were established through the stream of commerce theory.[76] Justice Stevens stood alone in arguing that the Court should not even consider the issue because the case had already been decided on the fairness prong of the minimum contacts test.[77] Each of these views is discussed in turn below.

1. The O'Connor Plurality

Justice O'Connor clearly rejected the idea that placing goods in the stream of commerce with knowledge that they will make their way to the forum state is enough to establish minimum contacts.[78] Relying on the "purposeful availment" and "substantial connection" language in *Hanson v. Denckla*[79] and *Burger King v. Rudzewicz*,[80] Justice O'Connor argued that additional conduct on the part of the defendant is necessary to indicate an intent to "serve the market in the forum state."[81]

The plurality opinion fashioned by Justice O'Connor has been criticized soundly by many commentators.[82] Professor Howard

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75. *Asahi*, 480 U.S. at 108.

76. *Id.* at 116.

77. *Id.* at 121.

78. *Id.* at 112.

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Id.

79. 357 U.S. 235, 253 (1958).

80. 471 U.S. 462, 475 (1985).

81. *Asahi*, 480 U.S. at 112. O'Connor suggests several actions that would show the requisite intent by the defendant, such as: 1) designing the product for the market in the forum state; 2) advertising in the forum state; 3) establishing channels for providing regular advice to customers in the forum state; or 4) marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *Id.*

82. *See, e.g.*, Dayton, *supra* note 22; Gregory Gelfand, A *Dissenting View of* Asahi Metal Industry Co., Ltd. v. Superior Court, 39 S.C. L. REV. 873 (1988); Erik T. Moe, Asahi Metal Industry Co. v. Superior Court: *The Stream of Commerce Doctrine, Barely Alive but Still Kicking*, 76 GEO. L.J. 203 (1987); Murphy, *supra* note 42; Howard

Stravitz points out that Justice O'Connor never even mentioned *Gray v. American Radiator & Standard Sanitary Corp.*,[83] even though it had been cited by the Supreme Court with approval in two prior cases.[84] Prior to the *Asahi* decision, the expansive stream of commerce theory had been embraced by the federal courts as a sound theory.[85] However, as one commentator aptly remarks, "[i]f O'Connor's view is accepted, the [stream of commerce] doctrine is dead, awaiting only burial. That such a view could garner even one justice's support, let alone four, suggests a complete lack of common ground between the objectives governing their analysis, and those previously thought to be universally accepted."[86]

O'Connor's opinion has also been criticized for ignoring economic reality.[87] Under her view, even manufacturers of the final product could arguably escape liability by employing middlemen and not controlling their market selection.[88] Even though Asahi had no office or agents in California, it had a healthy business in California and made substantial profits from sales in California.[89]

2. The Brennan Plurality

Justice Brennan disagreed strongly with Justice O'Connor's interpretation of the stream of commerce theory. Brennan's view has been referred to as the better reasoned view of the

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Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. Rev. 729 (1988).

83. 176 N.E.2d 761 (Ill. 1961).

84. Stravitz, *supra* note 82, at 791. The Court had cited *Gray* with approval in Calder v. Jones, 465 U.S. 783, 789 (1984) and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

85. *See, e.g.*, Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081 (5th Cir. 1984); Carson v. Park Indus., Inc., 717 F.2d 1120 (7th Cir. 1983); Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983); Hendrickson v. Reg O Co., 657 F.2d 9 (3d Cir. 1981); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party Ltd., 647 F.2d 200 (D.C. Cir. 1981); Poyner v. Erma Werke GMBH, 618 F.2d 1186 (6th Cir.), *cert. denied,* 449 U.S. 841 (1980).

86. Gelfand, *supra* note 82, at 882.

87. Gelfand, *supra* note 82, at 883-84, 884-85 n.46.

88. Gelfand, *supra* note 82, at 884-85 n.46.

89. Gelfand, *supra* note 82, at 884.

two plurality opinions[90] and has been supported by several commentators.[91]

Under the first prong of the minimum contacts test, Brennan concluded that Asahi had established minimum contacts with California; however, Brennan felt it would be unfair to hale the company into a California court under the second prong of the test.[92] Brennan contended that a showing of additional conduct directed toward the forum state was not needed in order to establish minimum contacts. His argument is cogent:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity.[93]

Justice Brennan also argued that the Court should adhere to its dicta in *World-Wide Volkswagen*, which specifically distinguished between foreseeability that a defendant's own actions and connections will bring his product to the forum state and the foreseeability that a third party will bring the defendant's product to the forum state.[94] The Court in *World-Wide Volks-*

90. Stravitz, *supra* note 82, at 793.

91. *See, e.g.*, Dayton, *supra* note 22; Gelfand, *supra* note 82; Moe, *supra* note 82; Murphy, *supra* note 32; Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105 (1991); Stravitz, *supra* note 82.

92. *Asahi*, 480 U.S. at 116. Justice Brennan said, "[t]his is one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).

93. *Id.* at 117.

94. *Id.* at 119.

wagen stated that only in the former situation should the defendant anticipate being haled into court in the forum State.[95]

3. Justice Stevens' Opinion

Since the Court had already decided that asserting jurisdiction over Asahi would be unreasonable and unfair, Justice Stevens found it unnecessary for the Court to articulate *any* new test regarding the necessary conduct of a defendant toward the forum to establish minimum contacts.[96] However, Stevens stated that if a test were required, the O'Connor plurality misapplied its new test to the facts of the case.[97] Justice Stevens failed to see the distinction that Justice O'Connor attempted to draw, stating: "[t]he [O'Connor] plurality seems to assume that an unwavering line can be drawn between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market."[98]

Stevens proposed that some sort of quantitative determination be made concerning the defendant's contacts, including the volume, value, and hazardous character of the components, to determine purposeful availment.[99] He concluded that, under the specific facts of this case, Asahi's contacts with California involved more than merely placing its product into the stream of commerce and would constitute purposeful availment of the forum.[100] Justice Stevens' conclusion seems to support Brennan's view of the stream of commerce theory. By not joining in Justice Brennan's opinion, Stevens' concurrence left the door open for the Court to endorse Brennan's view at some point in the future without having to overrule *Asahi* explicitly.

The state of the stream of commerce theory after *Asahi* is unclear. The validity of "mere awareness" was undermined by

95. *World-Wide Volkswagen*, 444 U.S. at 297.

96. *Asahi*, 480 U.S. at 121. "This finding alone requires reversal. . . . Accordingly, I see no reason in this case for the plurality to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts." *Id.* at 122.

97. *Id.* at 122.

98. *Id.*

99. *Id.*

100. *Id.*

the decision even though five of the nine justices endorsed it. Today, some federal circuit courts of appeals continue to embrace the expansive stream of commerce view advocated by Justice Brennan while others, like the Fourth Circuit, are moving toward a more restrictive view similar to that of Justice O'Connor.

III. CURRENT STATE OF THE STREAM OF COMMERCE THEORY IN THE FOURTH CIRCUIT

The *Asahi* decision provided little help to the lower courts struggling with the question of whether knowledge that a product is going to the forum state is enough to establish minimum contacts with the forum state. Circuit courts are forced to choose between the two views of the stream of commerce theory or find other ways to circumvent the question.[101] The evolving trend in the Fourth Circuit has been disjointed. The district courts within the Fourth Circuit had favored Brennan's view,[102] while the Fourth Circuit Court of Appeals had leaned toward the O'Connor view.[103] In 1994, the Court of Appeals for the Fourth Circuit specifically adopted the O'Connor view in *Lesnick v. Hollingsworth & Vose Co.*[104]

A. *The Fourth Circuit and the Stream of Commerce Before* Lesnick

Shortly after the Supreme Court rendered the *Asahi* decision, the District Court for the Southern District of West Virginia considered the stream of commerce theory in *Hall v.*

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101. *See infra* part IV.

102. *See* Stokes v. L. Geismar, S.A., 815 F. Supp. 904 (E.D. Va. 1993); Hall v. Zambelli, 669 F. Supp. 753 (S.D. W. Va. 1987).

103. *See* Federal Ins. Co. v. Lake Shore Inc., 886 F.2d 654 (4th Cir. 1989); *see also* Ellicott Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474 (4th Cir. 1993). In *Ellicott Machine*, the Fourth Circuit did not explicitly choose between the two views of the stream of commerce theory. However, the court did find that "[m]inimum contacts exist where the defendant 'purposefully direct[s]' its activities toward the residents of the forum." *Id.* at 477 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

104. 35 F.3d 939 (4th Cir. 1994). For a detailed discussion of *Lesnick*, *see infra* part III.B.

Zambelli.[105] The district court asserted jurisdiction over a Japanese fireworks manufacturer under the stream of commerce theory since the court found that the *Asahi* decision had not expressly destroyed the theory.[106]

In 1989, the Fourth Circuit Court of Appeals followed the holding of *World-Wide Volkswagen Corp. v. Woodson*[107] in *Federal Insurance Co. v. Lake Shore Inc.*[108] by reiterating that the stream of commerce theory could not be applied when the unilateral action of a third party brings the manufacturer's product into the forum state.[109] Even though it was foreseeable that the ship manufactured by the defendants would dock in South Carolina, the court held that the defendants had not established any purposeful contacts with South Carolina and therefore could not be subjected to South Carolina's jurisdiction.[110]

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105. 669 F. Supp. 753 (S.D. W. Va. 1987). The plaintiff was hit in the eye by a fireworks shell that exploded prematurely. He sued the Japanese manufacturer who sold the fireworks to the Pennsylvania vendor that employed the plaintiff in West Virginia. *Id.* at 753.

106. *Id.* at 756.

> The splintered writings of the justices in *Asahi* arguably leave in doubt the continued viability of the stream-of-commerce theory. Nevertheless, the Supreme Court's endorsement of the theory in *World-Wide Volkswagen* taken together with the lack of consensus in *Asahi* convinces this Court that the theory continues to have precedential value.

Id.

107. 444 U.S. 286 (1980).

108. 886 F.2d 654 (4th Cir. 1989). In *Federal Insurance,* General Electric shipped a turbine accessory base on a ship built in Wisconsin by one of the defendants. The ship was docked in South Carolina, and the accessory base was being loaded when the winch, designed by another defendant, malfunctioned causing damage to the accessory base. *Id.* at 656-57. Federal Insurance Company had to pay General Electric for the damaged accessory base. Federal Insurance Company then sued the builder of the ship and the manufacturer of the winch in the District Court of South Carolina. *Id.* at 657.

109. *Id.* at 660.

> All products are mobile to some extent and a product-by-product approach to personal jurisdiction would succeed only in drawing courts into an arcane and litigious search for meaningless distinctions. Predictability in structuring business dealings would be impaired and personal jurisdiction would rest on random and arbitrary categorizations. The relevant inquiry is the nature of the defendant's contacts with the forum.

Id.

110. *Id.* at 658.

> [A]ppellant may not rely on an unadorned "stream of commerce" theory to justify the assertion of personal jurisdiction over defendants. Appellant's alleged injuries did not arise out of defendants' direct or indirect commercial activities in the South Carolina market for cargo

In *Federal Insurance Co.*, the Fourth Circuit refused to decide between the two stream of commerce views since the question was not properly before the court.[111]

The District Court for the Eastern District of Virginia considered the stream of commerce theory in *Stokes v. L. Geismar, S.A.*[112] In *Stokes*, the manufacturer of an injury-causing saw moved to dismiss the case on the ground that the corporation lacked minimum contacts with Virginia because its product only arrived in Virginia via a United States distributor.[113] The court held that the manufacturer's knowledge that its product was going to be sold in Virginia was sufficient to justify asserting jurisdiction over the foreign corporation.[114]

The above cases did not address the question of which stream of commerce theory should apply in the Fourth Circuit. Justice O'Connor's view in *Asahi* had been cited with possible approval by the court of appeals in *Lake Shore, Inc.*[115] while the district courts seemed to follow Justice Brennan's more expansive view of the stream of commerce theory.[116] Therefore, the Fourth Circuit Court of Appeals found itself obliged to

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winches or ocean going vessels, and Lake Shore and Peterson did not create, control, employ, or benefit from a distribution system which brought the vessel to South Carolina.

Id. at 659.

111. *Id.* at 659-60.

We need not, of course, reject a "stream of commerce" theory in all circumstances in order to decide this case. Such a course would be problematic because the issue is one that has closely divided the Supreme Court. We do hold, however, that a "stream of commerce" theory of personal jurisdiction has no applicability here.

Id. at 659.

112. 815 F. Supp. 904 (E.D. Va. 1993). This case involved a worker who was injured while operating a rail cutting saw. Plaintiff brought suit against the manufacturer and distributor of the saw. The manufacturer was a French corporation and the distributor was a United States subsidiary, wholly owned by the French corporation. *Id.* at 905-06.

113. *Id.* at 906.

114. *Id.*

The fact that a foreign parent, like Geismar, conducts its marketing and distribution in the United States through an independent distribution system does not shield it from in personam jurisdiction. Due process is satisfied as long as the foreign manufacturer knew and intended that its product would be sold in Virginia.

Id. (citations omitted).

115. *See supra* notes 108-11 and accompanying text.

116. *See supra* notes 105-06 & 112-14 and accompanying text.

affirmatively define which version of the stream of commerce theory would apply in the Fourth Circuit. *Lesnick v. Hollingsworth & Vose Co.*[117] presented the appellate court with a perfect opportunity to do so.

B. *The Fourth Circuit Takes a Stand in* Lesnick v. Hollingsworth & Vose Co.

1. Background History of the *Lesnick* Case

Lesnick is the first published opinion directly involving the stream of commerce and component parts manufacturers issued by the Fourth Circuit following the *Asahi* decision.[118] The plaintiff, Beverly Lesnick, brought a wrongful death action in the District Court of Maryland alleging that the filters in Kent brand cigarettes caused her husband's death.[119] Mr. Lesnick was diagnosed in May 1989 with mesothelioma (a form of lung cancer) caused not by the inhalation of tobacco smoke, but by the inhalation of crocidolite asbestos, a substance incorporated into the filters of Kent cigarettes.[120] On November 21, 1989, Mr. Lesnick died.[121] Mrs. Lesnick's December 1991 diversity action named as defendants Lorillard, Incorporated, the manufacturer of Kent cigarettes and Hollingsworth & Vose Company, the manufacturer of the filters.[122]

Lorillard, Incorporated is a New York corporation with its principal place of business in New York.[123] There was no question that the Maryland court had jurisdiction over Lorillard

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117. 35 F.3d 939 (4th Cir. 1994).

118. *See supra* part II.B. for a summary of the *Asahi* decision. The Fourth Circuit recently handed down an unpublished opinion in which they implicitly adopted the O'Connor opinion of the stream of commerce theory. Jarre v. Druckmaschinen, A.G., No. 93-1848, 19 F.3d 1430, 1994 WL 95944, at *3 (4th Cir. Mar. 25, 1994) (unpublished opinion) ("[T]he mere placement of products into the stream of commerce by a nonresident defendant is not an act purposefully directed at the forum state.").

119. *Lesnick*, 35 F.3d at 940. Mrs. Lesnick based her claims on Maryland theories of negligence, strict liability, fraudulent misrepresentation, negligent misrepresentation, and breach of express warranty. *Id.*

120. *Id.* The filter was known as the "Micronite Filter" and was incorporated into Kent cigarettes manufactured between 1952 and 1956. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

because it was responsible for marketing and distributing the cigarettes nationwide. Hollingsworth & Vose Company is a Massachusetts corporation with its principal place of business in Massachusetts.[124] Hollingsworth & Vose made the filters in Massachusetts and shipped them to Lorillard's manufacturing plants in Kentucky and New Jersey where they were incorporated into the cigarettes.[125] The only connection Hollingsworth & Vose had with the state of Maryland was the fact that Hollingsworth & Vose knew the cigarettes would be sold in Maryland when it sold the material for the filters to Lorillard.[126]

2. The Parties Choose Between the Two Views

The Maryland long-arm statute gives the state jurisdiction over certain nonresidents.[127] However, Hollingworth & Vose argued that under the reasoning of Justice O'Connor's plurality opinion in *Asahi*,[128] jurisdiction could not be asserted over an out-of-state component parts manufacturer who simply placed its goods in the stream of commerce with the knowledge that the goods would eventually be sold in Maryland.[129]

Mrs. Lesnick first argued that the language of *Worldwide Volkswagen Corp. v. Woodson* should control.[130] *Worldwide*

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124. *Id.*

125. *Id.* Between 1952 and 1956, Hollingsworth & Vose supplied approximately ten billion filters containing asbestos to Lorillard. *Id.*

126. *Id.*

127. MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (1994). The statute provides in part:

> b) *In general.*—A court may exercise personal jurisdiction over a person, who directly or by an agent:
>
> 1) Transacts any business or performs any character of work or service in the State;
>
> 2) Contracts to supply goods, good, services, or manufactured products in the State;
>
> 3) Causes tortious injury in the State by an act or omission in the State;
>
> 4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he . . . engages in any other persistent course of conduct in the State. . . .

Id.

128. *See supra* notes 78-81 and accompanying text.

129. *Lesnick*, 35 F.3d at 940.

130. *Id.* at 941.

Volkswagen only requires that the defendant put a product "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum State" to establish minimum contacts.[131] Secondly, Mrs. Lesnick argued that even if the court applied the heightened standard posited by Justice O'Connor in *Asahi*, jurisdiction over Hollingsworth & Vose would still be appropriate because they were more than a mere component parts manufacturer. She characterized the relationship between Hollingsworth & Vose and Lorillard as a "virtual partnership" as the two companies worked together to "develop a filter for general distribution through integration into Lorillard's cigarettes."[132]

3. The District Court Rejects the Stream of Commerce Theory

Hollingsworth & Vose filed a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.[133] The district court granted the motion in an unpublished opinion, stating "Hollingsworth & Vose Company is not engaged directly, as is Lorillard, in bringing the alleged offending product into Maryland, or doing anything with respect to Maryland, other than supplying its product to defendant Lorillard in a state other than Maryland."[134] The trial court then entered final judgment in favor of Hollingsworth & Vose.[135]

4. The Fourth Circuit Adopts and Refines the O'Connor View

The Court of Appeals for the Fourth Circuit[136] began its opinion by recapping the history of personal jurisdiction.[137]

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131. *Worldwide Volkswagen*, 444 U.S. at 298.

132. *Lesnick*, 35 F.3d at 941. *See infra* note 156 for details of the agreement between Lorillard and Hollingsworth & Vose.

133. *Lesnick*, 35 F.3d at 941; *see* FED. R. CIV. P. 12(b)(2).

134. *Lesnick*, 35 F.3d at 941.

135. *Id.; see* FED. R. CIV. P. 54(b).

136. The case was heard by a three-judge panel of the Fourth Circuit which included Circuit Judges Murnaghan and Niemeyer and Judge Hilton, United States District Judge for the Eastern District of Virginia, sitting by designation. The decision in *Lesnick* was unanimous and the opinion was written by Judge Niemeyer. *Lesnick*, 35 F.3d at 939-40.

137. *Id.* at 941-45.

The court concluded that the minimum contacts test[138] should be applied along with the limitations articulated in *Hanson v. Denckla*[139] and *Burger King Corp. v. Rudzewicz*[140] in all situations involving out-of-state defendants.[141] The court then considered *World-Wide Volkswagen*,[142] which contains language specifically relating to the stream of commerce.[143] Although several other circuit courts of appeals have interpreted the *World-Wide Volkswagen* language as saying that delivery into the stream of commerce with knowledge the product will arrive in the forum state is enough to establish personal jurisdiction, the Court of Appeals for the Fourth Circuit interpreted the language differently.[144] The court reasoned that the reliance in *World-Wide Volkswagen* upon the fact that the defendants did not direct their activities toward Oklahoma, and therefore could not be expected to be haled into court there, meant that the language regarding the stream of commerce found in *World-Wide Volkswagen* should be interpreted narrowly.[145] The Fourth Circuit concluded that the holding in *World-Wide Volkswagen* requires some type of purposeful activity by

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138. *See supra* notes 18-27 and accompanying text.

139. 357 U.S. 235, 253 (1958) (holding that to assert personal jurisdiction over a nonresident defendant, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.").

140. 471 U.S. 462, 475 (1985) ("Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state.").

141. *Lesnick*, 35 F.3d at 942. The court explained:

> These modern principles of personal jurisdiction do not, and indeed under the Constitution could not, reorder the separate sovereignties of the states. A state's jurisdictional power remains territorial, to be exercised within its boundaries over persons, property and *activities* there. Rather, these principles focus on the nature and quality of contacts with the state to determine whether they justify the state's exercise of its judicial power over the person.

Id. at 943.

142. *Id.* at 943-44. *See supra* notes 46-49 and accompanying text for a discussion of the *World-Wide Volkswagen* case.

143. *See World-Wide Volkswagen*, 444 U.S. at 297-98. The Supreme Court stated: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.*

144. *Lesnick*, 35 F.3d at 943-44.

145. *Id.* at 944.

the defendant toward the forum state in order to establish meaningful contacts with the state.[146]

Next, the court considered *Asahi Metal Industry Co. v. Superior Court*.[147] After summarizing the three separate opinions regarding stream of commerce,[148] the Fourth Circuit held that "[t]o permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism."[149] The court felt that a rule like the one endorsed by Justice Brennan in *Asahi* would make it impossible for defendants to plan their business risks.[150]

The court then articulated a two-prong test (adopting the approach to minimum contacts advanced by Justice O'Connor) to be applied in the Fourth Circuit when considering the reach of personal jurisdiction. The court stated:

> [T]he test to be applied . . . inquires whether (1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into account such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff's interest in obtaining relief, (d) the efficient resolution of controversies as between states, and (e) the shared interests of the several states in furthering fundamental substantive social policies.[151]

After enunciating its test, the court of appeals proceeded to apply it to the facts of the *Lesnick* case. The court found that Hollingsworth & Vose had no presence in Maryland.[152] Hollingsworth & Vose admitted placing its filters into the

146. *Id.*
147. 480 U.S. 102 (1987). *See supra* part II.B for a detailed discussion of *Asahi*.
148. *Lesnick*, 35 F.3d at 944-45. *See supra* part II.B.
149. *Id.* at 945.
150. *Id.*
151. *Id.* at 945-46.
152. *Id.* at 946.

stream of commerce knowing that the Kent brand cigarettes would be sold by Lorillard in Maryland.[153] Less than one percent of Hollingsworth & Vose's income was derived through Lorillard's sale of cigarettes in Maryland.[154] The court held that these contacts, without more, were not sufficient for Maryland to establish jurisdiction over Hollingsworth & Vose.[155]

Mrs. Lesnick argued that because Hollingsworth & Vose had such a close connection with Lorillard, it should be subject to jurisdiction through Lorillard's contacts to Maryland.[156] The court acknowledged that the relationship between Hollingsworth & Vose and Lorillard represented "additional conduct" beyond merely placing the filters into the stream of commerce; however, the court found that this additional conduct did not rise to the level of establishing jurisdiction because Hollingsworth & Vose's conduct was not specifically directed toward Maryland.[157] Therefore, the District Court of Maryland could not exercise personal jurisdiction over Hollingsworth & Vose, and the lower court's decision was affirmed.[158]

C. *Application of the* Lesnick *Test*

The District Court for the Southern District of West Virginia recently applied the *Lesnick* test in *Bashaw v. Belz Hotel Management Co.*[159] Bashaw was injured while attending a seminar at a resort and conference center in Florida owned by the defendants. The plaintiff sued in West Virginia asserting jurisdiction based on advertisements by the defendants in national

153. *Id.*
154. *Id.*
155. *Id.* at 946-47.
156. *Id.* at 946. Lorillard and Hollingsworth & Vose had entered into a contract in 1952 in which the two companies agreed to own jointly the patent to the "Micronite Filter" and to share information about technical advances in the field. In addition, the two shared equally the costs of developing the filter, the costs of the manufacturing facilities, and royalties that might be earned from licensing their process. Hollingsworth & Vose agreed to sell the filter only to Lorillard for at least the first five years of their dealings. Lorillard had also agreed to indemnify Hollingsworth & Vose for any liability arising from harmful effects of the product. *Id.*
157. *Id.* at 946-47.
158. *Id.* at 947.
159. 872 F. Supp. 323 (S.D. W. Va. 1995).

trade magazines, operation of a toll-free telephone line, and the stream of commerce theory.[160]

The defendants moved to dismiss the suit based on a lack of personal jurisdiction, and the court applied the two-prong *Lesnick* test. Under the first prong of the test, there must be some substantial connection between the defendant and the forum state as established by actions purposefully directed toward the forum.[161] In *Bashaw*, the court held that the defendants lacked sufficient contacts with West Virginia because their actions were not purposefully directed toward West Virginia.[162] Once the case failed the first prong of the *Lesnick* test, the court declined to apply the second prong of the test.[163]

IV. DECISIONS OF OTHER CIRCUIT COURTS AFTER *ASAHI*

After the Supreme Court decided *Asahi*, the circuit courts began the arduous task of interpreting the decision and applying it to specific cases. Three circuits have expressly adopted Justice Brennan's view[164] and a fourth has hinted that it may approve the stream of commerce theory posited by Brennan.[165] Before *Lesnick*, only one circuit court had adopted the "additional conduct" theory advanced by Justice O'Connor.[166]

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160. *Id.* at 324-25.

161. *Lesnick*, 35 F.3d at 945-46.

162. The only contact the defendants had with West Virginia was a phone call from the plaintiff in West Virginia confirming the plaintiff's reservation. *Bashaw*, 872 F. Supp. at 324-25.

163. *Id.* at 327. The second prong of the Lesnick test addresses whether the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. *Lesnick*, 35 F.3d at 946.

In an interesting resolution to the problem, the district court did not dismiss the case due to lack of jurisdiction. Instead, the court granted the defendants' alternative motion to transfer venue to the District Court for the Southern District of Florida. *Bashaw*, 872 F. Supp. at 328.

164. *See* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613-15 (8th Cir. 1994); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992). These cases are discussed more thoroughly in part IV.A., *infra*.

165. *See* North Am. Philips Corp. v. American Vending Sales, Inc., 35 F.3d 1576 (Fed. Cir. 1994) (approving jurisdiction over a defendant who was conscious that his product would reach the forum state). This case is discussed more thoroughly in part IV.A., *infra*.

166. *See* Boit v. Gar-Tec Prods. Inc., 967 F.2d 671, 683 (1st Cir. 1992). This case

A. *Circuit Courts Adopting Brennan's View*

In 1992, the Seventh Circuit heard *Dehmlow v. Austin Fireworks*[167] and reiterated its support for Brennan's view of the stream of commerce theory. The *Dehmlow* case arose in Illinois, the birthplace of the stream of commerce theory.[168] The Illinois plaintiff received serious injuries in Illinois when a firework sold by a Kansas manufacturer detonated improperly.[169] The Kansas manufacturer sold the fireworks to a Wisconsin company specializing in fireworks display knowing that the Wisconsin company intended to take the fireworks to Illinois to set up a display.[170] The Court of Appeals for the Seventh Circuit held that the sale of the fireworks with knowledge that they would be going to Illinois was sufficient for the Illinois federal district court to assert jurisdiction over the Kansas manufacturer.[171]

The Court of Appeals for the Fifth Circuit recently reaffirmed its adherence to Brennan's view of the stream of commerce in *Ruston Gas Turbines, Inc. v. Donaldson Co.*[172] The Texas

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is discussed more thoroughly in part IV.B., *infra*.

167. 963 F.2d 941 (7th Cir. 1992).

168. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (1961). For previous Seventh Circuit cases advocating the stream of commerce theory, see Mason v. F. Lli Luigi & Franco Dal Maschio Fu G.B., 832 F.2d 383, 386-87 (7th Cir. 1987); Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 667 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987); Nelson v. Park Indus., Inc., 717 F.2d 1120, 1125-26 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984).

169. *Dehmlow*, 963 F.2d at 943.

170. *Id.* at 944. The district court dismissed the plaintiff's case for lack of personal jurisdiction based on World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980). *Id.*

171. *Id.* at 947. The court stated:

> Under the stream of commerce theory Dehmlow's case is resolved on his behalf by noting that Austin sold fireworks to Bartolotta [the Wisconsin company] with the knowledge that its fireworks would reach Illinois consumers in the stream of commerce. Because 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. (citations omitted) The court also concluded that, even if Justice O'Connor's view was applied, the facts of the case would meet the more stringent minimum contacts standards. *Id.* at 947-48.

172. 9 F.3d 415 (5th Cir. 1993). For other Fifth Circuit opinions rejecting O'Connor's "stream of commerce plus" theory, see Ham v. La Cienega Music Co., 4 F.3d 413, 145 (5th Cir. 1993) and Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 385-86 (5th Cir. 1989).

plaintiff sued a Delaware manufacturer of gas-turbine engines systems in federal district court in Texas. The Delaware manufacturer then filed a third party complaint against a Minnesota component parts manufacturer for indemnity.[173] The Minnesota manufacturer moved to dismiss the third party claim based on lack of personal jurisdiction.[174] The district court dismissed the case, adopting Justice O'Connor's view of personal jurisdiction enunciated in *Asahi*.[175] Based on its prior refusal to accept O'Connor's position, the Court of Appeals for the Fifth Circuit reversed, holding that the Texas district court could assert jurisdiction over the Minnesota component parts manufacturer.[176]

The Eighth Circuit chose to adopt Brennan's *Asahi* view of stream of commerce in the 1994 case of *Barone v. Rich Brothers Interstate Display Fireworks Co.*[177] In *Barone*, the Nebraska plaintiff received injuries from defective fireworks in Nebras-

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173. *Ruston*, 9 F.3d at 417.

174. *Id.* The facts indicate that the Minnesota component parts manufacturer (Corchran, Inc.) agreed in its contract with the Delaware systems manufacturer that the systems would be purchased by a Texas company. Corchran knew that its parts would be shipped to Texas; furthermore, Corchran shipped equipment directly from Minnesota to Texas on 211 separate occasions. *Id.*

175. *Id.* at 420. "[T]he [district] court concluded that because Donaldson did not show that Corchran engaged in acts 'purposefully directed toward the forum state,' a federal district court in Texas could not exercise personal jurisdiction over Corchran." *Id.*

176. *Id.*

> [The district court's] reasoning fails to recognize the Fifth Circuit's interpretation of the stream of commerce test and is therefore erroneous. . . . [T]his circuit [has] expressed its position that *Asahi* does not provide clear guidance on the 'minimum contacts' prong, and therefore we will continue to follow the stream of commerce analysis in *World-Wide Volkswagen*. Under the *World-Wide Volkswagen* test, Corchran's contacts with Texas are more than enough to justify an exercise of personal jurisdiction. Corchran intentionally placed its products into the stream of commerce by delivering them to a shipper destined for delivery in Texas . . . . Corchran not only *could have foreseen* that the products might end up in Texas, it *knew* as a fact that the products were going to be delivered to a specific user in Houston, Texas.

Id. (citations omitted).

177. 25 F.3d 610 (8th Cir. 1994). Prior to *Barone*, the Eighth Circuit seemed to have adopted Justice O'Connor's opinion in *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990). Other courts have interpreted *Falkirk* as adopting Justice O'Connor's view. *See, e.g.*, Boit v. Bar-Tec Products, Inc., 967 F.2d 671, 683 (1st Cir. 1992). However, in *Barone*, the Eighth Circuit limited *Falkirk* to its facts. *Barone*, 25 F.3d at 615.

ka.[178] The plaintiff sued the South Dakota distributor and the Japanese manufacturer of the fireworks in federal district court in Nebraska.[179] The Court of Appeals for the Eighth Circuit refused to apply *Asahi,* stating that "*Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant."[180] After deciding that *Asahi* did not apply, the court of appeals held that the district court could exercise personal jurisdiction over the Japanese manufacturer.[181]

In *North American Philips Corp. v. American Vending Sales, Inc.,*[182] a trademark infringement case, the Federal Circuit Court of Appeals intimated its approval of Justice Brennan's stream of commerce theory.[183] The plaintiff and holder of a patent sued two corporations, one from Texas and one from California, in Illinois.[184] The Court of Appeals for the Federal Circuit held that the two corporations had "voluntarily placed a substantial quantity of infringing articles into the stream of commerce *conscious* that they were destined for Illinois"[185] and therefore were subject to the jurisdiction of the Illinois court.[186]

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178. *Barone,* 25 F.3d at 610-11.

179. *Id.* The district court granted the Japanese manufacturer's motion to dismiss and refused to certify the question for appeal under 28 U.S.C. § 1292(b) (1992). The plaintiff then dismissed his claim against the South Dakota distributor without prejudice in order to have a final judgment to appeal to the Eighth Circuit Court of Appeals. *Barone,* 25 F.3d at 611.

180. *Id.* at 614. "Should one engage in vote counting, . . . it appears that five justices [in *Asahi*] agreed that continuous placement of a significant number of products into the stream of commerce with knowledge that the product would be distributed into the forum state represents sufficient minimum contacts to satisfy due process." *Id.*

181. *Id.* at 615.

182. 35 F.3d 1576 (Fed. Cir. 1994).

183. *Id.* at 1579-80.

184. *Id.* at 1577.

185. *Id.* at 1580 (emphasis added). The court continued:

> Regardless where the transactions are deemed to be situated under the tort or the "transacting business" provisions, these defendants were nonetheless parties to the importation into the forum state. Surely the reasonable market participant in the modern commercial world has to expect to be haled into the courts of that state, however distant, to answer for any liability based at least in part on that importation.

Id.

186. *Id.*

B. *Circuit Courts Adopting O'Connor's View*

Prior to *Lesnick*, only the First Circuit specifically embraced Justice O'Connor's approach to personal jurisdiction.[187] In *Boit v. Gar-Tec Products, Inc.*,[188] two Maine plaintiffs sued an Indiana manufacturer of a hot air gun, claiming the gun caused a fire at their home.[189] The First Circuit, applying Justice O'Connor's *Asahi* approach to personal jurisdiction, held that the defendant's contacts with Maine were insufficient to justify personal jurisdiction.[190]

C. *Circuit Courts Avoiding the Issue*

Immediately after the Supreme Court handed down the *Asahi* decision, one commentator predicted that the uncertainties left in its wake would lead courts to avoid the stream of commerce issue whenever jurisdiction could be ruled out.[191] To a large degree, this prediction has come true. Many courts *have* avoided addressing the stream of commerce question by deciding cases purely on the basis of the facts on record.[192] These courts have refused to choose between the two views in *Asahi* by holding that the outcome of the jurisdictional inquiry is identical under either view. One other court avoided, or at least delayed,

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187. The Eleventh Circuit cited the O'Connor approach in *Madara v. Hall*, 916 F.2d 1510, 1516-17 (11th Cir. 1990). However, it is unclear whether the court specifically endorsed the approach.

188. 967 F.2d 671 (1st Cir. 1992).

189. *Id.* at 673. The contractor working on the plaintiffs' home purchased the hot air gun through a mail-order catalog. *Id.* at 674.

190. *Id.* at 683. The court stated, "because 'mere awareness' that a product may end up in the forum state does not constitute 'purposeful availment,' the district court could not have constitutionally exercised personal jurisdiction over Gar-Tec." *Id.*

191. Note, *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 266 (1987).

192. *See, e.g.*, Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir.), *cert. dismissed*, 115 S. Ct. 18 (1994); Tobin v. Astra Pharmaceutical Prods., Inc., 993 F.2d 528, 543-44 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993); Shute v. Carnival Cruise Lines, 897 F.2d 377, 382 n.3 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

deciding the stream of commerce issue by remanding the case to the district court to flesh out additional jurisdictional facts.[193]

V. THE FUTURE OF THE STREAM OF COMMERCE THEORY

The future of the stream of commerce theory is unclear. Because of the 4-4-1 opinion in *Asahi*, the lower courts have less guidance in applying the stream of commerce theory than before the *Asahi* decision. As discussed in Part IV of this note, the various federal courts of appeal are still grappling with the determination of whether a manufacturer has established minimum contacts with a state by putting a product into the stream of commerce.

Several commentators have proposed solutions to the minimum contacts problem. One suggests a two-step stream of commerce analysis, consistent with Justice Brennan's rationale in *Asahi*.[194] Another commentator argues that a manufacturer should be subject to personal jurisdiction under the stream of commerce doctrine even absent actual awareness that the product was going to the forum state.[195] This view advocates a very "pure" stream of commerce theory similar to strict liability in tort; if the defendant's product causes injury to anyone anywhere, then it should be held liable in the forum where the injury occurred even though the defendant had no knowledge of the product's destination.

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193. Renner v. Lanard Toys Ltd., 33 F.3d 277, 283 (3d Cir. 1994).

194. Moe, *supra* note 82, at 224. The first step of this proposed analysis requires a determination of whether the defendant had actual knowledge of forum sales. The second step provides that if actual knowledge cannot be established, then the court should examine the defendant's forum contacts to determine whether knowledge of forum sales should be imputed to the defendant. *Id.* In essence, this approach looks to see whether a defendant had actual or constructive knowledge of significant forum sales which would demonstrate that the defendant has purposefully availed himself of the laws of the forum state. *Id.* As required by *International Shoe*, this proposed test would be applied to determine whether the defendant had minimum contacts with the forum state. The inquiry into fairness would still be applied under the second prong of *International Shoe*. *Id.*

195. Gelfand, *supra* note 82, at 883. "Holding a party liable only if he has knowledge that his product will reach the forum state simply places a premium on ignorance." Gelfand, *supra* note 82, at 886.

While the suggestions of these commentators are interesting, the only practical and likely solution is for the United States Supreme Court to consider the question again and choose between the O'Connor view and the Brennan view. The Supreme Court recently denied certiorari to the *Lesnick* case.[196] This case would have provided an excellent vehicle for the Court to make a decision between the two views since it involves a defendant that clearly had knowledge his product was going to the forum state. Unfortunately, the stream of commerce theory question remains unresolved.

A. *Prediction of the Supreme Court's Decision*

If the Supreme Court were to hear a stream of commerce case, it is difficult to envision how they would decide the issue today. The composition of the Court has changed drastically since *Asahi* was decided in 1987. Five new justices have joined the Court: Justices Kennedy, Souter, Thomas, Ginsburg, and Breyer. Of the five justices who have retired since *Asahi*, four subscribed to Brennan's view,[197] whereas only one agreed with O'Connor.[198]

However, three of the five new justices have discussed the stream of commerce theory in decisions they rendered prior to joining the Supreme Court.[199] While serving as a judge for the United States Court of Appeals for the Ninth Circuit, Justice

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196. 115 S. Ct. 1103 (1995). *See supra* Part III.B. for discussion of *Lesnick*.

197. Brennan was joined by Justices White, Marshall and Blackmun in his *Asahi* opinion. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987).

198. Justice Powell, who joined O'Connor's opinion, retired shortly after the *Asahi* decision was announced. THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1993, 495 (Clare Cushman ed. 1993). Chief Justice Rehnquist and Justice Scalia, who also joined in O'Connor's opinion, are still on the Court.

199. Justice Souter served on the New Hampshire Supreme Court from 1983 until 1990. President Bush appointed Souter to the First Circuit Court of Appeals in 1990. Three months later, Justice Brennan announced his retirement and Bush nominated Souter, to the United States Supreme Court. Souter was confirmed in October 1990. *Id.* at 524-25. He did not participate in any decisions involving the stream of commerce before joining the Court.

Justice Thomas was appointed to the Court of Appeals for the D.C. Circuit in 1990. He was nominated by President Bush in 1991 to replace retiring Justice Thurgood Marshall. After a great deal of controversy, he was confirmed in late 1991. *Id.* at 529. Thomas never participated in a stream of commerce decision prior to joining the Court.

Kennedy[200] authored an opinion in a libel case in which he discussed the stream of commerce.[201] Since the opinion was written before *Asahi*, Justice Kennedy simply repeated the prevalent view of the stream of commerce at that time which was reasonable foreseeability.[202] He went on to say that in a libel case, foreseeability that an offending publication would enter a forum is not consistent with fairness nor is it a fair measure of the reasonableness of an exercise of jurisdiction over the publisher.[203] Only if a substantial risk of defamation is reasonably foreseeable could the defendant be subjected to the jurisdiction of the forum court.[204]

Since Justice Kennedy authored the opinion in *Church of Scientology of California v. Adams* before *Asahi* was decided, it is difficult to predict how he would handle a stream of commerce question today. However, applying his reasoning in that case to a situation like *Lesnick*, he might well hold that a defendant could be haled into court wherever his product could reasonably be expected to cause injury.

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200. Justice Kennedy was nominated to the Court by President Reagan after the Senate rejected Judge Bork in 1988. Kennedy replaced the retiring Justice Powell. *Id.* at 519.

201. *See* Church of Scientology v. Adams, 584 F.2d 893 (9th Cir. 1978). This case pre-dates the *Asahi* decision. The California Church of Scientology sued a Missouri publisher of a newspaper in California for defamation arising from an article written and published in Missouri regarding the Missouri Church of Scientology. *Id.* at 895.

202. *Id.* at 897. Justice Kennedy stated:

> In products liability cases, this determination resolves into an inquiry as to whether the defendant could reasonably foresee that his product, when injected into the stream of commerce, would come to rest in the forum. . . . [T]he due process inquiry turns in large part on whether it was foreseeable that the defective product would be introduced into the state.

Id. (citations omitted).

203. *Id.* In *Church of Scientology,* a very small number of copies of the Missouri newspaper were circulated in California to approximately 150 regular subscribers of the newspaper. Justice Kennedy stated, "[w]hile it was reasonably foreseeable that the allegedly libelous articles would find their way to California, we think it was not reasonably foreseeable that any substantial risk of defamation would arise from their circulation in that state. . . ." *Id.* at 898.

204. *Id.* 898-99.

In 1981, Justice Ginsburg[205] authored an opinion regarding the stream of commerce theory in the context of a trademark infringement action.[206] The court held that jurisdiction could be exerted over the defendants because they "arranged for introduction of their wine into the United States stream of commerce with the expectation (or at least the intention and hope) that their products [would] be shelved and sold at numerous local outlets in diverse parts of the country."[207]

Ginsburg's opinion in *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party, Ltd.* was also written prior to the *Asahi* decision but right after *World-Wide Volkswagen.* Justice Ginsburg adhered to the dicta in *World-Wide Volkswagen* by holding that a defendant who places its product in the stream of commerce with the expectation or intention that the product reach the forum is subject to the personal jurisdiction of the forum state.[208] If Ginsburg continues to embrace this pre-*Asahi* philosophy, her vote would support Brennan's view of stream of commerce theory.

Justice Breyer,[209] the newest member of the Court, comes to the Supreme Court from the Court of Appeals for the First Circuit, which has never embraced the stream of commerce theory. In 1988, Breyer wrote the opinion in *Benitez-Allende v. Alcan Aluminio Do Brasil.*[210] In that case, Breyer interpreted *Asahi* to mean that a defendant's knowledge and intent of the sale of its product in the forum, considered along with the number of products actually sold in the forum, provide a sufficient

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205. Ruth Bader Ginsburg was nominated to the Court by President Clinton in 1993 to replace the retiring Justice White. THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 189 (Melvin I. Urofsky ed. 1994).

206. Stablisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party, Ltd., 647 F.2d 200 (D.C. Cir. 1981). Australian defendants challenged jurisdiction because they did not directly distribute their wine in the United States. Instead, they shipped the wine to a New York importer who had exclusive authority to distribute the wine in the eastern part of the United States. *Id.* at 203.

207. *Id.*

208. *Id.*

209. Breyer was nominated in May 1994 to replace the retiring Justice Blackmun. *Judge Breyer's Nomination*, WASH. POST, May 15, 1994, at C6.

210. 857 F.2d 26 (1st Cir. 1988). The case involved defective pressure cookers manufactured by the defendant and arose in Puerto Rico. The defendant argued that the court did not have jurisdiction because the defendant only sold the cookers to American distributors who then sold the cookers in Puerto Rico. *Id.* at 29.

basis for the assertion of jurisdiction.[211] The *Benitez-Allende* decision is a perfect example of how courts have avoided deciding between the two views in *Asahi*.[212]

Breyer's opinion in *Benitez-Allende* suggests that if he had to choose among the views expounded in *Asahi*, he would follow Justice Stevens. Breyer cited to Brennan's view with seeming approval and then added Stevens' argument that a significant number of sales over a period of years constitutes purposeful availment.[213] Almost as an aside, Breyer added that the defendant could be subjected to jurisdiction even under the view of Justice O'Connor.[214] The holding enunciated by Breyer combines both views, concluding that knowledge plus the number of products sold is a sufficient basis for the assertion of jurisdiction.[215] However, Justice Breyer's cursory treatment of O'Connor's analysis may indicate his disapproval of her approach to the stream of commerce.

If the Supreme Court were to hear a products liability case involving the stream of commerce theory in order to elucidate a clearer standard, another split of opinion similar to *Asahi* may occur. The prior decisions of Justices Kennedy and Ginsburg are of minimal guidance since the cases pre-dated *Asahi*. However, both have applied an expansive view of the stream of commerce theory in the past.[216] One could surmise from Justice Breyer's former opinion that he might lean toward the Stevens view. On the other hand, Breyer does come from the First Circuit Court of Appeals which has expressly adopted O'Connor's position. Justices Souter and Thomas have not spo-

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211. *Id.* The court found that the defendant in *Benitez-Allende* met both *Asahi* views. The defendant met Brennan's view through its knowledge that its products would be sold in Puerto Rico. It also met O'Connor's view by hiring an "export advisor" to go to Puerto Rico to meet an American distributor to discuss how the defendant's cookers could be sold in Puerto Rico. *Id.* at 29-30.

212. *See supra* notes 192-95 and accompanying text. In 1992, the First Circuit embraced O'Connor's restrictive view of the stream of commerce in Boit v. Gar-Tec Products, Inc., 967 F.2d 671 (1st Cir. 1992). *See supra* notes 188-91 and accompanying text.

213. *Benetez-Allende*, 857 F.2d at 30.

214. *Id.* "The opinion of the remaining four justices indicates that, once the factor of the meetings between Schmid and Diaz is taken into account, all nine justices would find the assertion of jurisdiction constitutional." *Id.*

215. *Id.* at 29.

216. *See supra* notes 203-06 & 208-10.

ken directly to the issue; however, they tend to vote conservatively and might favor Justice O'Connor's view.[217] Nonetheless, it is the position of this author that, in order to preserve the stream of commerce theory and notions of fair play, the Supreme Court should adopt Justice Brennan's view.

B. *Why the Brennan View Should Be Adopted by the Court*

Justice Brennan's opinion is the better reasoned view. A defendant who knows that his product is going to the forum state should not be surprised that if the product causes injury in the state, it will be haled into court there. In the commercial setting, it is not always possible to determine a manufacturer's actual knowledge.[218] If actual knowledge cannot be determined, then it may be possible to impute knowledge to the defendant if his product is regularly sold in the forum state.[219]

For component parts manufacturers, knowledge should also be sufficient to uphold jurisdiction. If not, then a component parts manufacturer would rarely be held accountable for injuries caused by its product since the manufacturer of the final product is most often the one responsible for advertising and distributing the final product in the forum state. A component parts manufacturer who knows the product is entering the forum state should not be exempt from liability simply because it has no additional contacts with the state.[220]

Consideration should be given to the length of the association between the component parts manufacturer and the distributor of the products.[221] If the association is a long one, then it is more likely that the component parts manufacturer knows that its products are going to the forum state.[222] If a significant

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217. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 427-30 (1994). In due process cases involving a court's jurisdiction over nonresident litigants and the Takings Clause of the Fifth Amendment, Justice Souter has voted liberally 16.7% of the time in the six cases he has considered. *Id.* In the three cases Justice Thomas has considered on these issues, he has voted liberally 33.3% of the time. *Id.*

218. Moe, *supra* note 82, at 225.

219. *Id.*

220. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).

221. Moe, *supra* note 82, at 226.

222. This argument can also be used to support the O'Connor approach requiring

amount of products are regularly sold to the final manufacturer/distributor by the component parts manufacturer, then the component parts manufacturer should reasonably anticipate being sued in a forum in which its product would eventually be found.[223]

Lesnick v. Hollingsworth & Vose Co.[224] is a case with facts favoring personal jurisdiction over the defendants which nevertheless yielded a bad result. If a company places a product into the stream of commerce *knowing* where the product is going, the company should be held accountable in the states where the product has caused injury. Hollingsworth & Vose knew that cigarettes containing its filters would be sold in Maryland. In fact, it sold ten billion filters to Lorillard with the knowledge that some would be sold in Maryland.[225] Selling the filters to Lorillard knowing that Hollingsworth & Vose would receive benefit from the sale of the cigarettes in Maryland in and of itself constitutes purposeful availment. Just as in *Burger King Corp. v. Rudzewicz*,[226] Hollingsworth & Vose sought out and entered into a contract to supply goods to a company that had a "substantial connection" with Maryland. In turn, that company passed Hollingsworth & Vose's product into Maryland. These actions constitute purposeful availment and the Maryland court should have been allowed to assert personal jurisdiction.

VI. CONCLUSION

Personal jurisdiction under the stream of commerce theory has been considered several times by the United States Supreme Court without the emergence of a controlling precedent. In *World-Wide Volkswagen*, the Court said in dicta that a state may assert personal jurisdiction over a corporation that "delivers its products into the stream of commerce with the expecta-

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something more than mere awareness.

223. Moe, *supra* note 82, at 226. In Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408 (1984), the Supreme Court intimated that regularity of the contacts when the cause of action arises from the contacts might be an important consideration. *Id.* at 414-15.

224. 35 F.3d 939 (4th Cir. 1994).

225. *Id.* at 940, 946.

226. 471 U.S. 462, 475 (1985).

tion that they will be purchased by consumers in the forum State."[227] This seemed to settle the question and most courts accepted the theory as valid.[228]

The apparent understanding of stream of commerce after *World-Wide Volkswagen* did not last long due to the decision in *Asahi Metal Industries Co. v. Superior Court*.[229] The *Asahi* case had the potential to provide a cogent test for use in the lower courts. Instead, it resulted in three distinctly separate opinions with no majority of the Court supporting any of the three.[230] After *Asahi*, the federal courts have less guidance than before on the question of in personam jurisdiction in stream of commerce cases. The various federal circuit courts of appeals are more widely divided on the issue today than ever before.

The time has come for the Supreme Court to resolve the uncertainty and lack of direction created by *Asahi* and give approval to long-arm jurisdiction where a manufacturer knows or should know that its product will enter the forum state. The *Lesnick* case offered an ideal opportunity for the Court to provide such clarity. However, the Court declined to do so, perhaps because of the distinct possibility of another split in opinion on the issue. Therefore, the conflicting interpretations of *Asahi* between the circuits remain unresolved. Hopefully, the Court will soon recognize that the problem is one that must be addressed in order to clear the waters of the stream of commerce.

Lori Elizabeth Jones

227. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
228. *See supra* notes 46-59 and accompanying text.
229. 480 U.S. 102 (1987).
230. *See supra* part II.B.