William Mitchell Law Review

Volume 24 | Issue 1 Article 1

1998

Civil Procedure—The Stream of Commerce Theory in Minnesota: Does the Shoe Fit?

Scott M. Hagel

CIVIL PROCEDURE—THE STREAM OF COMMERCE THEORY IN MINNESOTA: DOES THE SHOE FIT?

In re Minnesota Asbestos Litigation,
552 N.W.2d 242 (Minn. 1996)

I. INTRODUCTION

The law governing personal jurisdiction in America is in disarray.[1] Over the last fifty years the United States Supreme Court has attempted to clarify the standards which establish where a civil action may be brought.[2] Unfortunately, instead of providing guidance, the Court has created confusion by issuing split opinions[3] and standards without explanation.[4]

In *In re Minnesota Asbestos Litigation*[5] the Minnesota Supreme Court followed the high court's lead and furthered the confusion for those liti-

1. *See generally* Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1027 (1995) (explaining the current state of American jurisdictional law).
2. *See infra* Section II. A. - C.
3. *See infra* Section II. C.
4. *See infra* Section II. A. - C.
5. 552 N.W.2d 242 (Minn. 1996).

gating in Minnesota.[6] The court issued a conclusory opinion in an area where guidance is badly needed and, and as a result, contradicted the small amount of precedent upon which practitioners relied.[7]

This case note will examine the long and confusing road that is American personal jurisdiction law.[8] It will also examine the confusion created by the Minnesota Supreme Court's most recent decision on the topic.[9] Lastly, it will call out for guidance on what should be a simple question: When can a civil action be brought in Minnesota?

II. BACKGROUND: THE EVOLUTION OF TWO STREAM OF COMMERCE THEORIES

A. *Traditional Basis*

The Supreme Court first examined personal jurisdiction in *Pennoyer v. Neff*,[10] where it laid out the doctrine of territoriality.[11] The Court later expanded this notion by creating fictions allowing the assertion of jurisdiction over defendants who were domiciled within the forum[12] or consented to jurisdiction either expressly[13] or implicitly.[14]

Problems arose in the application of these theories as a result of industrialization and the prominence of the corporate form, which could be present in more than one jurisdiction at a time.[15] In its first finding regarding jurisdiction over corporations, the Supreme Court held that a state could not exercise jurisdiction over the corporation outside the state

---

6. *See infra* Sections III.B., IV.A.
7. *See infra* Section II.E.
8. *See infra* Section II.A.-C.
9. *See infra* Section III.B., IV.A.
10. 95 U.S. 714 (1877). The Court based its decision on the principles of public law that: 1)each state has jurisdiction over the persons and property located within its borders and 2)that each state cannot exert jurisdiction outside of its territorial borders. *See id.* at 722.
11. *See id.* at 727(holding that absent express waiver, a defendant's presence within the forum state was a prerequisite to a state's assertion of personal jurisdiction over the defendant).
12. *See* McDonald v. Mabee, 243 U.S. 90, 92 (1917) (suggesting in dictum that domicile coupled with service of process outside of the forum state would be sufficient to confer personal jurisdiction over a defendant).
13. *See* Kane v. New Jersey, 242 U.S. 160, 169 (1916) (upholding the validity of a New Jersey statute requiring all out of state motorists to appoint an agent, within the state, to receive service of process before using the state's highways).
14. *See* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (upholding the validity of a Massachusetts statute which appointed an agent, authorized to receive service of process, for all nonresident motorists whenever they used the state's highways).
15. *See generally* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1066 (2d ed. 1987) [hereinafter WRIGHT & MILLER] (discussing the evolution of personal jurisdiction law as it applies to corporations).

of its incorporation.[16] This strict rule was eventually relaxed, allowing personal jurisdiction to be asserted over corporations under the consent[17] and presence[18] theories.[19]

B. *International Shoe and Its Progeny*

In *International Shoe Co. v. Washington*,[20] the Supreme Court adopted an approach separate and apart from the fictions that had evolved in the wake of *Pennoyer*.[21] The *International Shoe* decision set forth a two-step analysis: (1) is jurisdiction over the defendant within the scope of the

---

16. *See* Bank of Augusta v. Earle, 38 U.S.(13 Pet.) 519, 588 (1839). The court stated:

> [A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation [sic] can have no existence. It must dwell in the place its creation, and cannot migrate to another sovereignty.

Id.

17. *See, e.g.*, St. Clair v. Cox, 106 U.S. 350, 356 (1882) (allowing a state to require the appointment of an agent to receive service of process as a condition of doing business within the state); Lafayette Ins. Co. v. French, et al., 59 U.S. (18 How.) 404, 407 (1855) (allowing corporations to consent to jurisdiction by appointing an agent within the forum state).

18. *See, e.g.*, Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917) (citing St. Louis Southwestern Ry. Co. v. Alexander, 227 U.S. 218, 226 (1913), where the court authorized service of process upon a foreign corporation without consent based, in part, on an inference that the foreign corporation was present in the state due to its activities in the state); Barrow S.S. Co. v. Kane, 170 U.S. 100, 106 (1898) (discussing the evolving treatment of corporations as individual persons and the treatment of corporations and their members as present in their state of incorporation for purposes of establishing jurisdiction over them). However, a deficiency in this theory existed since the contacts were measured at the time the complaint was filed, allowing a corporation to avoid being haled into court by putting an end to its contacts within the forum. *See, e.g.*, Agra Chem. Distrib. Co., Inc. v. Marion Lab., Inc., 523 F. Supp 699, 702 (W.D.N.Y. 1981) (noting the split of authority and then applying the rule measuring defendant's contacts at the time the complaint was served). The presence theory and the consent theory were later combined into the "doing business test." *See, e.g.*, Hutchinson v. Chase & Gilbert Inc., 45 F.2d. 139 (2d Cir. 1930) (stating that the controlling consideration when determining under the "presence" analysis whether to subject a foreign corporations to suit in the forum state is that "there must be some continuous dealings in the state of the forum; enough to demand a trial away from [the corporation's] home").

19. *See generally* WRIGHT & MILLER, *supra* note 15, § 1066 (discussing the various theories of personal jurisdiction over corporations and their evolution).

20. 326 U.S. 310 (1945).

21. *See* Juenger, *supra* note 1, at 1030-31. However, the court failed to use *International Shoe* to sever the ties *Pennoyer* forged between jurisdiction and due process. *Id.*

state's long-arm statute;[22] and, (2) if jurisdiction falls within the scope of the long-arm statute, does the assertion of jurisdiction violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[23] Jurisdiction is constitutional under step two of this analysis if the defendant has "minimum contacts"[24] with the forum state and, assuming there are minimum contacts, if the assertion of jurisdiction will not offend "traditional notions of fair play and substantial justice."[25]

---

22. States whose long-arm statutes extend to the limits of the Fourteenth Amendment either expressly or by court interpretation include: ALA. R. CIV. P. 4.2.; ALASKA STAT. § 09.05.015 (Michie 1996); ARIZ. R. CIV. P. 4(e)(2) (West 1987 & Supp. 1996); ARK. CODE ANN. § 16-4-101 (Michie 1994 & Supp. 1995); CAL. CIV. PROC. CODE § 410.10 (West 1993 & Supp. 1996); COLO. REV. STAT. ANN. § 13-1-124 (West 1997); CONN. GEN. STAT. ANN. § 52-59b (West 1990 & Supp. 1991); DEL. CODE ANN. tit. 10, § 3104, 3114 (Michie 1994 & Supp. 1996); D.C. CODE ANN. § 13-423 (Michie 1981 & Supp. 1997); FLA. STAT. ANN. §§ 48.181, 48.193 (West Supp. 1997); GA. CODE ANN. §§ 9-10-91 (Michie 1982 & Supp. 1997); HAW. REV. STAT. ANN. §§ 634-35 (Michie 1995 & Supp. 1996); IDAHO CODE § 5-514 (Michie 1990 & Supp. 1997); 735 ILL. STAT. ANN. § 5/2-209 (Smith-Hurd 1993 & Supp. 1997); IND. R. TRIAL P. 4.4 (West 1996 & Supp. 1997); IOWA CODE ANN. § 617.3 (West 1950 & Supp. 1997); KAN. STAT. ANN. § 60-308 (1994 & Supp. 1996); KY. REV. STAT. ANN. § 454.210 (Michie 1985 & Supp. 1996); LA. REV. STAT. ANN. §§ 13:3201, 13:3206 (West 1991 & Supp. 1997); ME. REV. STAT. ANN. tit. 14, § 704-A (West 1980 & Supp. 1996); MD. CODE ANN., CTS. & JUD. PROC. §§ 6-103 (Michie 1995 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 1985 & Supp. 1997); MICH. COMP. LAWS ANN. §§ 600.705, 600.715, 600.725, 600.735, 600.755 (West 1981 & Supp. 1997); MINN. STAT. §§ 303.13, 543.19 (1996); MISS. CODE ANN. §§ 13–3-57, 93-11-67 (1972 & Supp. 1997); MO. ANN. STAT. § 351.594, 506.500 (West 1991 & Supp. 1997); NEB. REV. STAT. ANN. § 25-536 (Michie 1995 & Supp. 1997); NEV. REV. STAT. §§ 14-065, 14-080 (1995); N.H. REV. STAT. ANN. §§ 293-A:121, 510:4 (Michie 1997); N.J. CIV. PRAC. R. 4:4-4:4-5; N.Y. P. L. R. 302 (McKinney 1990 & Supp. 1997); N.C. GEN. STAT. § 1-75.4 (Michie 1992 & Supp. 1995); N.D. R. CIV. P. 4 (Michie 1996); OKLA. STAT. ANN. tit. 12, § 2004 (West 1993 & Supp. 1997); OR. R. CIV. P. ANN. 4 (Butterworth 1995); PA. CONS. STAT. ANN. § 5301, 5322 (West 1981 & Supp. 1997); R.I. GEN. LAWS § 9-5-33 (Michie 1985 & Supp. 1996); S.C. CODE ANN. § 36-2-803 (Law Co-op. 1976 & Supp. 1996); S.D. CODIFIED LAWS ANN. § 15-7-2 (Michie 1984 & Supp. 1997); TENN. CODE ANN. §§ 20-2-201-202, -214 (Michie 1994 & Supp. 1996); TEX. CIV. PRAC. & REM. CODE. ANN. §§17.041-.042 (West 1997); TEX. R. CIV. P. ANN. 108 (West 1979 & Supp. 1997); TEX. FAM. CODE ANN. §11.051 (West 1993 & Supp. 1997); UTAH CODE ANN. §§ 78-27-22 to -28 (Michie 1996 & Supp. 1997); VT. STAT. ANN. tit. 12, § 913 (Equity 1973 & Michie Supp. 1997); VA. CODE ANN. § 8.01-328.1 (Michie 1992 & Supp. 1997); WASH. REV. CODE ANN. §§ 4.28.185, 26.26.080 (West 1997); WIS. STAT. ANN. § 801.05 (West 1994 & Supp. 1997) WYO. STAT. ANN. § 5-1-107 (Michie 1997). States which limit the exercise of jurisdiction with their long-arm statutes include: MONT. CODE ANN. § 25-20 Rule 4B (1997); N.M. STAT. ANN. § 38-1-16 (Michie 1978 & Supp. 1997); OHIO REV. CODE ANN. § 2307.382 (Banks & Baldwin 1994 & Supp. 1997); OHIO R. CIV. P. 4.3 (1997); W. VA. CODE § 56-3-33 (Michie 1997).

23. *See* U.S. CONST. amend. XIV, § 1; *International Shoe*, 326 U.S. at 316.

24. *See International Shoe*, 326 U.S. at 316.

25. *See id.* "[D]ue process requires only that . . . [the defendant] have certain minimum contacts with [the forum] . . . such that the maintenance of the suit

The Court failed, however, to adequately define "minimum contacts" or "traditional notions of fair play and substantial justice."[26] The Court attempted to clarify these standards several times since its decision in *International Shoe*, but instead has only increased the confusion.[27] In *Hanson v. Denkla*,[28] for example, the Court declared that before a forum may assert personal jurisdiction over a nonresident, the defendant must have purposefully availed itself to the protections of the forum state through some affirmative act.[29] The Court failed, like it had in *International Shoe*, to adequately define "purposefully avail." In another decision on the topic, the Court held that any jurisdictional requirement must take into account not only due process but also the relationship among the forum, defendant, and the litigation.[30]

This succession of opinions[31] has left practitioners and courts with an

---

does not offend 'traditional notions of fair play and substantial justice.'" (quoting Justice Douglas in *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *See also* Domtar, Inc., v. Niagara Fire Ins. Co., 533 N.W.2d 25, 29 (Minn. 1995), *cert. denied*, 116 S. Ct. 583 (1995) (applying the "minimum contact" and "fair play and substantial justice" criteria in Minnesota).

26. *See generally* WRIGHT & MILLER, *supra* note 15, § 1067 (analyzing the deficiencies in the *International Shoe* opinion).

27. *See id.*

28. 357 U.S. 235 (1958).

29. *See id.* at 253. "[I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Id.* at 253; *see also* Dent-Air, Inc. v. Beech Mountain Air Serv., 332 N.W.2d 904, 907 (Minn. 1983) (applying the purposeful availment standard in Minnesota); *see, e.g.*, Kopperud v. Agers, 312 N.W.2d 443, 445 (Minn. 1978) (finding that defendant purposely availed himself of the State by committing fraud).

30. *See* Rush v. Savchuk, 444 U.S. 320, 328 (1980) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

31. In addition to the cases mentioned, the Supreme Court has made several other attempts to clarify the area of personal jurisdiction. *See* Helicopteros Nacionales de Columbia, S.A., v. Hall, 466 U.S. 408, 410 (1984) (identifying the difference between general and specific jurisdiction); Calder v. Jones, 465 U.S. 783, 790 (1984) (rejecting the argument that First Amendment concerns should be used in jurisdictional inquiries); Keeton v. Hustler Magazine Inc., 465 U.S. 770, 773-74 (1984) (allowing a plaintiff to bring suit in New Hampshire because the statute of limitations had not yet run even though plaintiff had no real connection with the state); Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxite de Guinee, 456 U.S. 694, 702 (1982) (seeming to eliminate the concept of federalism from the personal jurisdiction calculus); Kulko v. Superior Court, 436 U.S. 84, 101 (1978) (holding that the mere act of putting one's child on a plane is not sufficient to meet the minimum contacts criteria); *Shaffer*, 433 U.S. at 207 n.24 (stating that the minimum contacts analysis applies in cases involving quasi-in rem jurisdiction where plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the non-existence of similar interests of particular persons).

amorphous body of law requiring further interpretation.[32] It is not surprising, therefore, that courts interpreting these standards have followed widely divergent paths and have adopted conflicting approaches.[33]

C. *The Stream of Commerce Approach*

The Illinois Supreme Court originated the stream of commerce theory in *Gray v. American Radiator & Standard Sanitary Corp.*[34] In *Gray*, the court upheld personal jurisdiction over a component parts manufacturer that had no direct contacts with Illinois, but whose product had surfaced in Illinois after the defendant had placed its product into the stream of commerce.[35] The court held that if a corporation can foresee its products reaching the forum state through the stream of commerce it is not unjust for the forum to hold the corporation amenable to jurisdiction.[36] The court reasoned that since the defendant has benefited from the protection of the forum state, even if only *indirectly*, it should have to answer for the harm caused by its products.[37] After *Gray*, the stream of commerce theory gained widespread acceptance in this country.[38]

It was not until almost twenty years later, however, that the Supreme Court, once again trying to define the parameters of the Fourteenth Amendment, addressed the stream of commerce theory.[39] The case was *World-Wide Volkswagen Corp. v. Woodson*,[40] in which the Court held that the foreseeability of defendant's products reaching the forum state was not itself enough to subject the defendant to jurisdiction.[41] The Court stated that a defendant must "purposely avail[] itself of the privileges of conducting activities within the forum state" so that it may reasonably anticipate

---

32. *See generally*, Sean K. Hornbeck, Comment, *Transnational Litigation & Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1405 (1996) (noting that the tests applied by jurisdictions often change and evolve with each subsequent case).

33. *See id.*

34. 176 N.E.2d 761 (Ill. 1961).

35. *See id.* at 767.

36. *See id.* at 766.

37. *See id.* at 767 (emphasis supplied).

38. *See* Margoles v. Johns, 483 F.2d 1212, 1218-19 n.12 (D.C. Cir. 1973); Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 596 (5th Cir. 1969); Consolidated Lab. Inc., v. Shandon Scientific Co., 384 F.2d 797, 800 (7th Cir. 1967); Buckeye Boiler Co. v. Superior Court, 458 P.2d 57, 64 (Cal. 1969); Winston Indus., Inc. v. District Court, 560 P.2d 572, 574 (Okla. 1977).

39. *See generally* Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 264-65 (1988) (discussing the evolution of the stream of commerce theory after *Gray*).

40. 444 U.S. 286 (1980).

41. *See id.* at 295-98. The Supreme Court seemed to endorse the stream of commerce theory as announced in *Gray*, but went on to distinguish *Gray* based on the facts of the case. *See id.*

being haled into court in the forum state.[42]

The Court's announcement in *World-Wide Volkswagen* that mere foreseeability was not enough appears to restrict the *Gray* stream of commerce approach. The *World-Wide Volkswagen* decision had little effect, however, on the application of the stream of commerce theory by lower courts.[43] Instead, courts simply emphasized the defendant's role in the distribution system[44] and the significance of the defendant's "expectation"[45] that their products would reach the forum when applying the stream of commerce theory.[46]

The Supreme Court further added to the confusion in *Asahi Metal Industry Company v. Superior Court.*[47] Rather than clarifying the area, a divided Court could agree only on the result.[48] The Court could not, however, agree when the placing of a product into the stream of commerce constituted the type of "minimum contacts" necessary to make the assertion of jurisdiction constitutional.[49] Writing for the plurality,[50] Justice

42. *See id.* at 297 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

43. *See* Hornbeck, *supra* note 32, at 1405 (stating that the "lower courts interpreted [*World-Wide Volkswagen's*] language in a varied and confusing manner."); *see also* R. Lawrence Dessem, *Personal Jurisdiction after Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 51-57 (1987) (discussing the confusion that *World-Wide Volkswagen* created within the federal court system). Decisions in the majority of the federal circuits upheld an expansive exercise of the stream of commerce theory. *See id.* However, the Third, Eighth, and Eleventh circuits have adopted a significantly narrower interpretation of the stream of commerce theory. *See id.*

44. *See, e.g.*, Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1084 (5th Cir. 1984) (citing Worldwide Volkswagen v. Woodson, 444 U.S. 286 at 297-298 (1980), which held that due process would not permit Oklahoma to impose jurisdiction over the local New York retailer of a defective automobile, or over the New York automobile wholesale distributor who sold to the retailers in New York); Nelson by Carson v. Park Indus., Inc., 717 F.2d 1120, 1125-26 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984) (distinguishing the defendants from those in *Worldwide Volkswagen* in that the defendants in *Nelson* were at the start of the market distribution system and could reasonably anticipate being subject to suit in any forum within that market where their product caused injury); Alabama Power Co. v. VSL. Corp., 448 So.2d 327, 329 (Ala. 1984) (upholding Alabama's exercise of jurisdiction over a Minnesota manufacturer of trusses based on the manufacturer's actual knowledge that its trusses would be used in Alabama).

45. *See, e.g., Park Indus., Inc.*, 717 F.2d at 1125-26; Oswalt v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980); Svendsen v. Questor Corp., 304 N.W.2d 428, 431 (Iowa 1981).

46. *See generally*, Murphy, *supra* note 39, at 270-271 (discussing the effect that *World-Wide Volkswagen* had on lower courts).

47. 480 U.S. 102 (1987). In *Asahi* the Court was faced with the question of whether awareness that a product would reach the forum state was sufficient to constitute "minimum contacts." *Id.* at 105.

48. *See id.* at 113 (1987).

49. *See id.* at 115. All the Court could apparently agree upon was that once the California plaintiff had settled with the defendants, it would be unreasonable

O'Connor found that merely placing a product into the stream of commerce was not enough unless coupled with some other act.[51] In an attempt to identify what may constitute just such an act, Justice O'Connor stated: "for example, designing the product for the market . . . , advertising in the forum state, establishing channels for providing regular advice to customers . . . , or marketing the product through a distributor . . . in the forum state."[52] Justice O'Connor also reiterated that under *World-Wide Volkswagen*, "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 of commerce into an act purposefully directed toward the forum State."[53] This has become known as the stream of commerce plus approach.[54]

Justice Brennan's opinion, on the other hand, focused on the traditional stream of commerce theory as announced in *Gray* and dismissed the additional conduct requirement as unnecessary.[55] Justice Brennan stated that, "[a]s long as [the defendant] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."[56]

In the aftermath of *Asahi*, courts and practitioners are left with two competing approaches[57] both of which have been followed by lower courts,[58] including those in Minnesota.[59] As a result, more confusion exists

---

and unfair to subject the Japanese defendant and the Taiwanese defendant to personal jurisdiction in California. *See id.* at 113-15.

50. Justice O'Connor was joined by Chief Justice Rehnquist, Justice Powell, and Justice Scalia. *See id.* at 103.

51. *See id.* at 112. "Additional conduct of the defendant may include an intent or purpose to serve the market in the forum state." *Id.* (plurality opinion of Justice O'Conner) (adopting reasoning from the Eighth Circuit).

52. *See id.* at 112.

53. *Id.*

54. *See* Timothy C. Lynch, *Roman Candles and Bottle Rockets: The Eighth Circuit Blows Up the "Stream of Commerce Plus" Analysis in Barone v. Rich Bros. Interstate Display Fireworks Inc.*, 29 CREIGHTON L. REV. 1371, 1372, 1419 n.12 (1996) (citing Vermeulen v. Renault U.S.A., Inc., 965 F.2d 1014, 1025 (11th Cir. 1992)).

55. *See Asahi*, 480 U.S. at 117 (Justice Brennan, concurring in part and concurring in the judgment) (Justice White, Justice Marshall & Justice Blackmun concurring in part).

56. *Id.*

57. It should also be noted that Justice Stevens advocated a third option to the approaches advocated by Justices O'Connor and Brennan. *See Id.* at 121 (Justice Stevens concurring in part with the plurality opinion). Under Stevens' approach, a reasonableness test would be used to measure the defendant's contacts with the forum. *See Id.*

58. Identifying which jurisdictions have selected one *Asahi* view over another is complicated by the fact that many courts have applied the various *Asahi* approaches in an inconsistent and piecemeal fashion. The following is a modest attempt to catalog the approaches followed in various jurisdictions. The reader is, of course, encouraged to take a closer look at the law followed in his or her juris-

with regard to the stream of commerce approach than ever before.[60] The standards are extraordinarily difficult to apply and there is no consensus as to the appropriate test or what standard the Supreme Court will adopt next.[61]

D. The Eighth Circuit

When faced with a personal jurisdiction question, the Eighth Circuit employs a five-part test to determine whether the requisite "minimum

---

diction. For cases following Justice O'Connor's standard *see* Terracom v. Valley Nat'l Bank, 49 F.3d 555, 561-62 (9th Cir. 1995); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 940-47 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); Tobin v. Astra Pharm. Prods. Inc., 993 F.2d 528, 544 (6th Cir. 1993), *cert. denied*, 510 U.S. 914 (1993); Falkirk Mining Co., v. Japan Steel Works, Ltd., 906 F.2d 369, 375-76 (8th Cir. 1990). For cases following Justice Brennan's standard *see* Ruston Gas Turbines, Inc., v. Donaldson Co., Inc., 9 F.3d 415, 419 (5th Cir. 1993); Irving v. Owens-Corning Fiberglass, Corp., 864 F.2d 383, 386 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989); Giotis v. Appollo of the Ozarks, 800 F.2d 660 (7th Cir. 1984), *cert. denied* 479 U.S. 1092 (1987); Oswalt v. Scripto, 616 F.2d 191 (5th Cir. 1980); Renner v. Lanard Toys, Ltd., 33 F.3d 277 (3rd Cir. 1994); Forschner Group, Inc., v. New Trends, Vrolixs J.-C, No.CIV.A.B-89-531, 1994 WL 708129, at *4 (D. Conn. Aug. 10, 1994); DeMoss v. City Mkt. Inc., 762 F. Supp 913, 918 (D. Utah 1991); Abuan v. General Elec. Co., 735 F. Supp. 1479, 1484 (D. Guam 1990); AG-Chem Equip. Co. v. Avco Corp., 666 F. Supp 1010, 1012-17 (W.D. Mich. 1987), *vacated*, 701 F. Supp. 603 (W.D. Mich. 1988); Wessinger v. Vetter Corp., 685 F. Supp 769, 776-77 (D. Kan 1987); Hall v. Zambelli, 669 F. Supp 753, 756 (S.D. W. Va. 1987). For cases following Justice Stevens' standard *see* D'Almeida v. Stork Brabant B.V., 71 F.3d 50, 51 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1570 (1996); Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26, 29 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989). The opinion in *Benitez-Allende* was written by Justice Breyer while he was sitting on the Court of Appeals for the First Circuit. *Benitez-Allende*, 857 F.2d at 28.

59. *See* Domtar, Inc. v. Niagara Fire Ins. Co., 533 N.W.2d 25, 29 (Minn. 1995), *cert. denied*, 116 S. Ct. 583 (1995); *see also* Stanek v. A.P.I., Inc., 474 N.W.2d 829, 833 (Minn. Ct. App. 1991), *review denied*, (Minn. Oct. 31, 1991), *cert. denied*, 503 U.S. 977 (1993) (suggesting that Justice O'Connor's minimum contacts plus standard does not apply in Minnesota).

60. *See* Juenger, *supra* note 1, at 1027.

61. Since the decision in *Asahi*, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, and Justice Breyer have all been appointed to the Court. Four of these Justices replaced the supporters of the traditional stream of commerce theory as advocated by Justice Brennan in *Asahi*. Therefore, uncertainty exists as to how the court would decide a stream of commerce case should one arise today. At least one commentator has suggested that if the current Court were to hear a stream of commerce case, the end result would be a split opinion. *See* Lori Elizabeth Jones, *Lesnick v. Hollingsworth & Vose Co.–The Pure Stream of Commerce No Longer Flows Through The Fourth Circuit*, 29 U. RICH. L. REV. 421, 452-65 (1995) (analyzing how the current Supreme Court Justices have dealt with the stream of commerce theory in the past).

contacts" are present.[62] In determining whether minimum contacts exist, the Eighth Circuit examines:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties.[63]

It is the first factor of this test—the nature and quality of the contacts—which appears to be of critical importance in stream of commerce cases. That is, under what circumstances does placing a product into the stream of commerce produce contacts of the nature and quality sufficient to justify jurisdiction under the Federal Constitution?

The Eighth Circuit has, in answering this question, rejected the *Gray* stream of commerce approach, holding that something more is required than just the expectation, on the part of the defendant, that the product would reach the forum.[64] According to the Eighth Circuit, merely placing a product in the stream of commerce, absent some intent to serve the forum market, is not sufficient contact to justify personal jurisdiction.[65]

---

62. *See* Land-o-Nod Co. v. Bassett Furniture Indus., Inc., 708 F.2d 1338, 1340 (8th Cir. 1983); Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211, 1215 (8th Cir. 1977); Aftanase v. Econ. Baler Co., 343 F.2d 187, 192 (8th Cir. 1965).

63. *Land-o-Nod*, 708 F.2d at 1340 (citing *Aaron Ferer & Sons*, 564 F.2d at 1215; *Aftanase*, 343 F.2d at 195-97). The last two factors are of secondary importance and not determinative. *Id.* (citing *Aaron Ferer & Sons*, 564 F.2d at 1210 n.5); *see also* Rostad v. On Deck, Inc., 372 N.W.2d 717, 719-21 (Minn. 1985), *cert. denied*, 474 U.S. 1006 (1985) (citing *Aftanase v. Econ. Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965)).

64. *See* Hutson v. Fehr Bros., Inc., 584 F.2d 833, 836-37 (8th Cir. 1978). *Hutson* involved an Italian defendant whose only connection with the forum was placing its product in the stream of commerce. *See id.* at 834-35. While the defendant had no direct connection with the forum, it appears that the defendant could have foreseen its product reaching the forum state. *See id. See also* Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990) (using Minnesota's five part test and relying on the *Asahi* minimum contacts plus analysis to overrule the district court); Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc., 950 F.2d 526, 528 (8th Cir. 1991); Gould v. P.T. Krakatau Steel, 927 F.2d 573 (8th Cir. 1992), *cert. denied*, 50 U.S. 908 (1992). It should be noted that the Eighth Circuit has, to a large extent, been a leader in the development of the stream of commerce theory. *See* Murphy, *supra* note 39, at 260-73 (noting the Eighth Circuit's "separate path"); *see generally* Lynch, *supra* note 54, at 1391-99 (discussing the evolution of the approach used by the Eighth Circuit). In fact, it is an Eighth Circuit opinion that appears to have been the basis for the stream of commerce plus approach announced in *Asahi* by Justice O'Connor. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 111-12 (1987) (plurality opinion of Justice O'Connor) (discussing Humble v. Toyota Motor Co. Ltd., 727 F.2d 709 (8th Cir. 1984) in support of the stream of commerce plus theory; also citing Hutson v. Fehr Bros., Inc., 584 F.2d 833 (8th Cir. 1978)).

65. *See Hutson*, 584 F.2d at 837. The facts of each case must be weighted to

Thus, the Eighth Circuit requires that the defendant intend to serve the forum market in addition to having knowledge that its product will reach the forum.[66]

E. Minnesota

The same five-part test has been adopted by Minnesota courts.[67] The mere use of the Eighth Circuit's test by Minnesota courts does not indicate, however, that Minnesota has adopted the Eighth Circuit's restrictive approach for determining the nature and the quality of the contacts in stream of commerce cases.[68] In fact, in the past Minnesota has followed a much different approach while purporting to use the same five-factor analysis.[69]

For example, prior to *In re Minnesota Asbestos Litigation*,[70] the leading stream of commerce case in Minnesota was *Rostad v. On-Deck, Inc.*[71] In *Rostad*, the plaintiff was injured when a baseball bat weight manufactured by the defendant flew off of a bat and struck him.[72] Defendant, On-Deck, a

---

determine whether the requisite "affiliating circumstances" are present. *Id.* at 837(citing Hanson v. Denckla, 357 U.S. 235, 246 (1958)). It should be noted however, the court was deeply divided on the issue with one of the three dissenting judges calling the majority decision "a giant leap backward in the law." *Id.* at 841(Lay, J., dissenting).

66. *See Humble*, 727 F.2d at 710. In *Humble* the court upheld the district court's finding that it could not assert personal jurisdiction over a Japanese company which placed its products into the stream of commerce with the knowledge that the products would reach the forum state. *See id.* The court again emphasized that the defendant had not advertised, solicited or otherwise sought to serve the forum market. *See id.*; *see also* Humble v. Toyota Motor Co. Ltd., 578 F. Supp. 530 (N.D. Iowa 1982) (district court decision). It should be noted, however, that a recent decision would seem to indicate that the Eighth Circuit may be in the process of taking a more liberal approach to personal jurisdiction. *See* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994), *cert. denied*, 513 U.S. 948 (1994) (acknowledging that O'Connor's stream of commerce plus theory is non-binding precedent since it failed to gain the support of a majority of Justices in *Asahi*).

67. *See* Rostad v. On-Deck Inc., 372 N.W.2d 717, 719-20 (Minn. 1985), *cert. denied*, 474 U.S. 1006 (1985); Dent-Air, Inc., v. Beech Mountain Air Serv., Inc., 332 N.W.2d 904, 907 (Minn. 1983); Stanek v. A.P.I. Inc., 474 N.W.2d 829, 832-33 (Minn. Ct. App. 1991), *review denied*, (Minn. Oct. 31, 1991), *cert. denied*, 503 U.S. 977 (1992). As is the case in the Eighth Circuit, in Minnesota the first three factors carry more weight than that last two factors. *See Rostad*, at 719-20; *see also* Marquette Nat'l Bank v. Norris, 270 N.W.2d 290, 295 (Minn. 1978) (stating that the first three factors are "primary factors" and should be given more weight).

68. *See infra* Section IIE discussing Minnesota's approach to the stream of commerce theory.

69. *See id.*

70. 552 N.W.2d 242 (Minn. 1996).

71. 372 N.W.2d 717 (Minn. 1985), *cert. denied*, 474 U.S. 1006 (1985).

72. *See id.* at 718.

New Jersey Corporation, had no offices or agents in Minnesota and was not licensed to do business in the state.[73] Despite the defendant's lack of direct contacts with the Minnesota, the supreme court affirmed the court of appeals, finding that jurisdiction over On-Deck was appropriate.[74]

The court's holding rejected the defendant's contention that after *World-Wide Volkswagen* "purposeful contacts" must be direct contacts.[75] The court reasoned that any other result would "'doom all products liability cases to dismissal from forums other than the place of manufacture or initial sale.'"[76] Instead, the *Rostad* court followed the traditional interpretation of *Gray* and *World-Wide Volkswagen* in finding jurisdiction over On-Deck.[77] The court held that "[t]he forum State does not exceed its power 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."[78] Because of On-Deck's extensive indirect contacts, the court concluded that it must have expected its products to reach Minnesota.[79] Thus, the *Rostad* court did not use Justice O'Connor's stream of commerce plus analysis which has become the benchmark of prior Eighth Circuit decisions.[80] Rather, the court followed an approach much like that proposed

---

73. *See id.*

74. *See id.* at 722.

75. *See id.* at 720. The court stated that the defendant's contention that to be purposeful the contacts must be direct contacts "misconstrues *World-Wide Volkswagen*, ignores the Supreme Court's express recognition of the theory, forgets scholarly comment on the subject, and fails to account for the plethora of cases upholding jurisdiction under a stream-of-commerce theory." *Id.*

76. *See id.* (citing Stewart Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 442-43 (1981)).

77. *See id.* at 721. *Gray* has been adopted, in part, in Minnesota for the purposes of determining whether the quantity of the contacts, and the nature and quality of the contacts are sufficient to meet the "minimum contacts" criteria. *See id.* at 722; *see also* Stanek v. A.P.I., Inc., 474 N.W.2d 829, 833 (Minn. Ct. App. 1991), *review denied*, (Minn. Oct. 31, 1991), *cert. denied*, 503 U.S. 977 (1993) (stating that the *Rostad* court adopted the *Gray* approach).

78. *Rostad*, 372 N.W.2d 720 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (emphasis added).

79. *See id.* On-Deck's indirect contacts included: the use of national distributors in selling the product, "extensive marketing" by the weights inventor, and extensive profits derived from the sale of the product in Minnesota. *See id.* at 718-19.

80. This approach has been expressly rejected in Minnesota. *See Stanek*, 474 N.W.2d at 833-34.

> According to four justices . . . 'something more' than the defendant's act of placing the product in the stream of commerce is required to satisfy due process. Five justices, however, refused to join in this part of the opinion, explicated by Justice O'Connor. Thus, we conclude that the stream-of-commerce theory advanced in *Gray* and followed in *Rostad has not been limited* by the U.S. Supreme Court.

by Justice Brennan in *Asahi*,[81] as originally set forth in the *Gray* case.

As a result of *Rostad*, the Minnesota Court of Appeals has applied the more liberal approach in recent decisions.[82] For example, in *Stanek v. A.P.I., Inc.*,[83] two Minnesota workers sued a Canadian manufacturer of asbestos, Lac D'Amiante du Quebec, Ltee (LAQ), for injuries suffered while on the job at a Minnesota company, which had purchased LAQ asbestos for its own place of business.[84] The Minnesota Court of Appeals found that Minnesota could exercise jurisdiction over LAQ even though LAQ did not advertise or maintain any form of business activity in Minnesota.[85]

Practitioners should, however, be cautious in relying on *Rostad* and subsequent court of appeals decisions such as *Stanek* in light of the Minnesota Supreme Court's most recent stream of commerce decision in *In re Minnesota Asbestos Litigation*.[86] It appears that the Minnesota Supreme Court has, based on its decision in *In re Minnesota Asbestos Litigation*, reconsidered its position and has opted for a more restrictive approach[87] similar to the approach endorsed by Justice O'Connor in *Asahi*.

III. THE *IN RE MINNESOTA ASBESTOS LITIGATION* DECISION

A. *The Facts*

The plaintiffs in *In re Minnesota Asbestos Litigation* consisted of 187 people who suffered from various diseases allegedly caused by exposure to

---

Id. (emphasis added).

81. *See Rostad*, 372 N.W.2d at 720. *Compare* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (applying similar standards which do not require direct contacts but only the defendant's expectation that they may be haled into court in the forum state).

82. *See* State v. Granite Gate Resorts, Inc., No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997); *In re* Minnesota Asbestos Litig., 540 N.W.2d 896 (Minn. Ct. App.), *rev'd*, 552 N.W.2d 242 (Minn. 1996); Bergherr v. Sommer, 523 N.W.2d 17 (Minn. Ct. App. 1994), *appeal dismissed*, (Minn. Jan. 25, 1995); National City Bank v. Ceresota Mill Ltd. Partnership, 476 N.W.2d 787 (Minn. Ct. App. 1991), *aff'd*, 488 N.W.2d 248 (Minn. July 31, 1992); Stanek v. A.P.I., Inc., 474 N.W.2d 829 (Minn. Ct. App.), *review denied*, (Minn. Oct. 31, 1991), *cert. denied*, 503 U.S. 977 (1993).

83. *Stanek*, 474 N.W.2d at 831.

84. *See id.*

85. *See id; see also Domtar*, 533 N.W.2d at 33-34. In *Domtar*, the Minnesota Supreme Court upheld jurisdiction over a Canadian insurer that did not do business in Minnesota, but did insure Domtar, a Canadian company which operated a tar factory in Minnesota. *See id.* The court based its finding of minimum contacts on the fact that the Canadian insurer had agreed to defend Domtar against liability. *See id.*

86. *See In re* Minnesota Asbestos Litig., 552 N.W.2d 242, 248 (Minn. 1996).

87. *See id.* at 244, 247-48.

products manufactured by Johns-Manville Corporation (Manville).[88] One product produced by Manville alleged to have caused the illnesses was Manville's Transite Pressure Pipe.[89] Distributor Colonial Sugar Refining Co., Ltd. (CRS) provided Manville with the asbestos needed to produce the Transite Pressure Pipe.[90]

CSR is a multinational Australian company with its principal place of business in Sydney.[91] CSR had never been licensed or registered to do business in Minnesota[92] and had no other direct contacts with Minnesota.[93] Although CSR never had any direct contacts with Minnesota, CSR did have several indirect contacts with the state.[94] For instance, CSR made multiple visits to Manville's factories with the intention of fostering the companies' business relationship and to gather information which it used in refining its product so that Manville would increase the use of CSR asbestos.[95] This effort proved successful, and as a result CSR asbestos was distributed on a national scale through Manville's Transite Pressure Pipe.[96] CSR also advertised in international trade publications that were distributed in the United States.[97]

Over CSR's course of dealings with Manville, CSR developed an understanding of Manville's business.[98] As a result of this understanding, CSR had knowledge that Manville was one of the largest suppliers of build-

---

88. *See id.* at 244-45.

89. *See id.*

90. *See id.* CSR actually sold the asbestos through one of its subsidiaries, Australian Blue Asbestos Pty. Ltd., which CSR wholly acquired in 1966. *Id.*

91. *See id.*

92. *See id.* at 244. CSR was not licensed to do business anywhere in the United States. *See id.*

93. *See id.* at 244-45. According to the court of appeals CSR never:

> 1. Maintained an office, telephone, . . . address, or bank account in Minnesota; 2. Employed anyone . . . in Minnesota; 3. Owned, leased, or possessed any . . . assets in Minnesota, . . . ; 4. Had been a party to a contract in Minnesota . . .; 5. Engaged in any advertising directed to or otherwise calculated to reach Minnesota; 6. Sold any products in or transported any products to Minnesota . . . ; 7. Mined, manufactured, processed, exported, converted, compounded, retailed and/or required to be used asbestos . . . to or for anyone in Minnesota; 8. Designed, tested, evaluated, packaged, furnished, supplied, or sold asbestos . . . to or for anyone in Minnesota; and 9. Marketed, distributed, or shipped raw asbestos to or in Minnesota.

Id.

94. *See In re* Minnesota Asbestos Litig., 540 N.W.2d 896, 898 (Minn. Ct. App. 1995); *see also* Respondent's Brief at 5, *In re* Minnesota Asbestos Litig. (No. C1-95-223).

95. *See id.*

96. *See In re* Minnesota Asbestos Litig., 540 N.W.2d at 898.

97. *See* Respondent's Brief at 5, *In re* Minnesota Asbestos Litig.(No.C1-95-223).

98. *See id.* at 5-6.

ing products in the United States and that when CSR's products were used by Manville, those products would be distributed to a national market.[99] In addition, CSR was aware of Manville's extensive connections with the state of Minnesota.[100]

B. *The Court's Analysis*

The court in *In re Minnesota Asbestos Litigation* reversed the holding of the court of appeals[101] and reinstated the district court's order dismissing the complaint against CSR.[102] The court first determined that the Minnesota long-arm statute[103] allowed the assertion of personal jurisdiction "to the extent that . . . [C]onstitutional requirements of due process will allow."[104] The court then examined the contacts that CSR had with Minnesota to determine if the requisite "minimum contacts" existed.[105] The court claimed to examine: 1)the quantity of contacts with Minnesota, 2)the nature and quality of those contacts and 3)the source and connection of the cause of action with those contacts.[106] The court then rejected[107] the plaintiff's contention that CSR's relationship with Manville was such that Manville's contacts with Minnesota should be imputed to CSR.[108] Rather, the court found that Manville's activities were nothing more than the "'unilateral activity of those who claim some relationship with [the] nonresident defendant,'"[109] and were insufficient to satisfy the "minimum contacts" requirement.[110] Since CSR did not "purposely establish"[111] contacts with Minnesota the court concluded, without explanation,

---

99. *See In re* Minnesota Asbestos Litig., 540 N.W.2d at 898.

100. *See id.* The record indicates that CSR knew that Manville served a national market that included Minnesota. *See id.*

101. *See id.* at 902 (holding that the district court could assert personal jurisdiction over CSR under a stream of commerce theory).

102. *See In re* Minnesota Asbestos Litig., 552 N.W.2d 242, 248 (Minn. 1996).

103. *See* MINN. STAT. § 543.19, Subd. (1)(c) (1986). "[A] court of this state . . . may exercise personal jurisdiction over any foreign corporation . . . [who] [c]ommits any act outside Minnesota causing injury or property damage in Minnesota. . . ." *Id.*; *see* Domtar, Inc. v. Niagara Fire Ins. Co., 533 N.W.2d 25, 29 (Minn.), *cert. denied*, 116 S. Ct. 583 (1995) (interpreting § 543.19 to extend to the limits of the federal due process requirements); *see also* S.B. Schmidt Paper v. A to Z Paper Co., Inc., 452 N.W.2d 485, 487 (Minn. Ct. App. 1990).

104. *See Domtar*, 533 N.W.2d at 29; *See also* Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 410 (Minn. 1992).

105. *See In re* Minnesota Asbestos Litig., 552 N.W.2d at 246.

106. *See id.*

107. *See id.* at 246-47. "There is no . . . legal basis for such a contention." *Id.* at 247.

108. *See id.* at 247.

109. *Id.* (quoting Hanson v. Denckla, 357 U.S. 235 (1958)).

110. *See id.* at 246-47.

111. *See id.* at 247 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)). The touchstone of due process requires that the defendant purposely

that the plaintiffs could not establish sufficient "minimum contacts."[112]

Lastly, the court examined whether the assertion of jurisdiction over CSR would offend "traditional notions of fair play and substantial justice."[113] The court conceded that CSR could foresee that its products would reach Minnesota.[114] However, the court stated that the foreseeability that is important is the foreseeability of being haled into court in Minnesota.[115] The court stated that "[t]o show that kind of foreseeability, the plaintiff must show that CSR *intended* to directly or indirectly market its product in Minnesota or that CSR delivered its asbestos into the stream of commerce with the *expectation* that it would be purchased by customers in Minnesota."[116] The court concluded that the plaintiffs failed to make such a showing.

IV. ANALYSIS OF *IN RE MINNESOTA ASBESTOS LITIGATION*

The court in *In re Minnesota Asbestos Litigation*[117] was faced with a difficult decision in light of the widespread confusion that exists in the area of personal jurisdiction.[118] The court should have used the opportunity to clarify the current state of the stream of commerce theory in Minnesota. Instead, the court issued a conclusory opinion which is inconsistent with prior Minnesota precedent and, as a result, adds to the already confused state of the law.[119]

---

establish minimum contacts in the forum state. *See Burger King*, 471 U.S. at 474 (1985).

112. *See In re* Minnesota Asbestos Litig., 552 N.W.2d at 247. The contacts were not of 1)sufficient quantity, or 2)sufficient quality or nature, and 3)the connection of the contacts with the cause of action was insufficient. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* (citing World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980)).

116. *Id.* (emphasis added).

117. 552 N.W.2d 242 (Minn. 1996).

118. *See supra* Section II.

119. *Compare In re* Minnesota Asbestos Litig., 552 N.W.2d at 247 *with* Rostad v. On-Deck, Inc., 372 N.W.2d 717, 720-22 (Minn. 1985), *cert. denied*, 474 U.S. 1006 (1985) (stating that neither defendant established direct contacts, because both marketed their products on a national scale and both sold their products through an intermediary which did significant amounts of business in Minnesota) *and* Stanek v. A.P.I., Inc., 474 N.W.2d 829, 832-35 (Minn. Ct. App. 1991), *review denied*, (Minn. Oct. 31, 1991), *cert. denied*, 503 U.S. 977 (1993) (finding minimum contacts between a Canadian asbestos manufacturer and Minnesota based on the sale of asbestos to Minnesota companies, even though the manufacturer never maintained an office, advertised, or engaged in continuous business in Minnesota).

A. *Minimum Contacts*

In deciding whether minimum contacts were present, the *In re Minnesota Asbestos Litigation* court relied on the Minnesota five-part test[120] which, of course, is the hallmark of Minnesota personal jurisdiction analysis.[121] While the court failed to expressly acknowledge as much, part two of the test, which deals with the nature and quality of the contacts,[122] played the critical role in the court's decision. In holding that the nature and quality of the contacts were not sufficient to allow Minnesota to constitutionally assert jurisdiction over CSR, the *In re Minnesota Asbestos Litigation* court placed great emphasis on the fact that there were no direct contacts between CSR and Minnesota.[123] This conclusion is problematic because it conflicts with prior Minnesota stream of commerce decisions which suggest that only indirect contacts are required.

To begin with, Minnesota courts have traditionally followed the stream of commerce theory as advanced in *Gray* and *World-Wide Volkswagen* to determine whether a sufficient quality of contacts existed.[124] In *Rostad*, for example, the court determined that due process was not offended by the exercising of jurisdiction over a corporation that delivers its products into the stream of commerce with the *expectation* that the products will be purchased by consumers in the forum state.[125] Thus, *Rostad* appeared to establish that indirect contacts alone are sufficient as long as the defendant purposefully established those contacts.[126] *In re Minnesota Asbestos Litigation* conflicts with this understanding of *Rostad*. Thus, the court should have concluded under *Rostad*, that Manville's extensive contacts with Minnesota should be imputed to CSR, and that such indirect contacts were sufficient to make the assertion of jurisdiction constitutional.[127]

Similarly, the decision in *In re Minnesota Asbestos Litigation* seems to

120. *In re* Minnesota Asbestos Litigation, 552 N.W.2d at 246.

121. See *supra* note 67 and accompanying text.

122. *See supra* note 70 and accompanying text.

123. *See In re* Minnesota Asbestos Litig., 552 N.W.2d at 247.

124. *See supra* notes 33-48 and accompanying text.

125. *See In re* Minnesota Asbestos Litig., 540 N.W.2d 896, 899-901 (Minn. Ct. App. 1995) (citing *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717, 720 (Minn. 1985).

126. *See Rostad*, 372 N.W.2d at 720-22, (rejecting the argument that contacts must be direct contacts and stating "[the argument] ignores the Supreme Court's express recognition of the theory, forgets scholarly comment on the subject, and fails to account for the plethora of cases upholding jurisdiction under a stream-of-commerce theory."); *see also* Stanek v. A.P.I., Inc., 474 N.W.2d 829, 833-34 (Minn. Ct. App. 1991), *review denied*, (Minn. Oct. 31, 1991), *cert. denied*, 503 U.S. 977 (1993) (suggesting that, because only four of the Justices in the *Asahi* decision maintained that minimum contacts requires "something more" than a defendant merely placing its product in the stream of commerce, the Supreme Court did not therefore limit the stream of commerce theory advanced in the *Gray* and *Rostad* decisions).

127. *See* Rostad v. On-Deck, Inc., 372 N.W.2d at 720.

conflict with the court of appeals decision in *Stanek v. A.P.I.*[128] In *Stanek*, the court concluded that the "wide spread sale of asbestos" was sufficient to meet the quality and nature criteria in Minnesota.[129] Considering that *In re Minnesota Asbestos Litigation* involved the distribution of asbestos too, the hazardous nature of the product factor suggests that the quality and nature of the contacts were sufficient to allow Minnesota to assert personal jurisdiction over CSR. Thus, the *In re Minnesota Asbestos Litigation* decision has left in doubt the precedential value of *Rostad* and the cases that followed *Rostad*.[130]

Even assuming, however, that Minnesota follows the stream of commerce approach that requires something more than indirect contacts, the *In re Minnesota Asbestos Litigation* decision is still problematic. It is well-settled that the nature and quality of the contacts are sufficient to justify jurisdiction if the defendant has purposefully availed itself to the benefits and protections of the forum state.[131] Clearly CSR purposefully availed itself to the benefits and protections of Minnesota law and, therefore, had the nature and the quality of contacts with Minnesota necessary to justify personal jurisdiction. The record clearly shows that CSR made several attempts to improve its asbestos for use by Manville and that it took actions to create a national market for its product,[132] a market that included Min-

128. 474 N.W.2d 829 (Minn. Ct. App. 1991), *review denied*, (Minn. Oct. 31, 1991), *cert. denied*, 503 U.S. 977 (1993).

129. *See id.* at 834-35. "It is unknown which . . . sales reached Minnesota, . . . [n]evertheless, [the defendant's] extensive sales to large American distributors suggest contacts sufficient in nature and quality so that a reasonable inference may be drawn from the character of the business." *Id.* (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961)). Indeed, many courts, including those in Minnesota, have considered the hazardous nature of the products when determining the nature and quality of the contacts. *See* Velandra v. Regie Nationale Des Usines Renault 336 F.2d 292, 297-98 (6th Cir. 1964); Pendzimas v. Eastern Metal Prod. Corp., 218 F. Supp 524, 528 (D. Minn. 1961); Stanek, 474 N.W.2d at 835 (citing *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982)). "[A] lesser volume of inherently dangerous products constitute[s] a more significant contact with the state than would a larger volume of products offering little or no hazard to the inhabitants of the state." *Velandra*, 336 F.2d at 297-98.

130. *See supra* note 120 and accompanying text.

131. *See* Dent-Air, Inc., v. Beech Mountain Air Serv., Inc., 332 N.W.2d 904, 907 (Minn. 1983).

132. CSR visited the Manville plant every few years to find out what it could do to its asbestos so that Manville would use it in their products. *See* Respondent's Brief at 3-4, *In re* Minnesota Asbestos Litig., (No. C1-95-223). "Work done by C.S.R. to prove that blue fiber [asbestos] was satisfactory [for its use in asbestos cement products] helped materially to bring about [an increase in the fiber's price] and augmented work by Johns-Manville." *See In re* Minnesota Asbestos Litig., 540 N.W.2d 896, 898 (Minn. Ct. App. 1996); *see also* Respondent's Brief at 5, *In re* Minnesota Asbestos Litig. (No. C1-95-223).

nesota.[133] The record also indicates that Manville essentially acted as a distributor for CSR asbestos.[134] CSR repeatedly visited Manville's operations over the course of their business dealings for the sole purpose of fostering their relationship with the hope that Manville would increase its use of CSR asbestos.[135] Additionally, CSR had full knowledge that Manville was one of the largest producers of building materials in the county and distributed its products to every state in the nation.[136]

In short, no matter which of the two stream of commerce approaches is applied, CSR had the nature and quality of contacts necessary for Minnesota to constitutionally assert jurisdiction over CSR. None of the additional factors in the Minnesota five-factor test precludes this result. Clearly the first factor, the quantity of the contacts, was satisfied given the numerous contacts CSR had with Minnesota via Manville.[137] The third, and last major factor in the five-part analysis—the source of the contacts[138]—also supports the assertion of jurisdiction over CSR. Like factor two, this factor seemed to trouble the court. The court noted that the source of CSR's contacts with Minnesota were though Manville, an intermediary.[139] However, the court failed to acknowledge that Minnesota courts have previously found that when a company wants to establish a national market which includes Minnesota, the fact that the product only reaches Minnesota through an intermediary is not enough to prevent the court from asserting jurisdiction.[140] Therefore, this third factor also weighs in favor of jurisdiction over CSR.

Nor do the last two factors—the forum's interest in providing a forum and the convenience of the forum—weigh against the assertion of jurisdiction over CSR. These last two factors—the interest of Minnesota in providing forum and the convenience of parties—are generally less important and receive less consideration which was definitely the case in *In re Minnesota Asbestos Litigation* where the court gave these last two factors only a cursory treatment. Factor four clearly existed since Minnesota has a strong interest in providing a forum for citizens injured by hazardous

133. *See* Respondent's Brief at 9, *In re* Minnesota Asbestos Litig., (No. C1-95-223); *See also* Rostad v. On-Deck, Inc., 372 N.W.2d 717, 721 (Minn. 1985), *cert. denied*, 474 U.S. 1006 (1985) (considering that On-Deck entered into contracts to distribute its product throughout North America, including Minnesota).

134. *See In re* Minnesota Asbestos Litig., 540 N.W.2d 896, 898 (Minn. Ct. App. 1996) (concluding that Manville was acting as CSR's distributor).

135. *See In re* Minnesota Asbestos Litig., 540 N.W.2d at 898. The "[w]ork done by C.S.R. to prove that blue fiber was satisfactory helped materially to bring about [a price increase] and augmented work by Johns-Manville." *Id.*

136. *See id.* at 898-99.

137. *See supra* notes 92-100 and accompanying text.

138. *See supra* Sections II.D & II.E.

139. *See In re* Minnesota Asbestos Litig., 552 N.W.2d 242, 244-45 (Minn. 1996).

140. *See* Rostad v. On-Deck, Inc., 372 N.W.2d 717, 722 (Minn. 1985), *cert. denied*, 474 U.S. 1006 (1985).

products.[141] With respect to factor five,[142] although litigation in Minnesota would not be convenient and would place a great burden on CSR,[143] this last factor is greatly outweighed by those in favor of jurisdiction.

In short, the Minnesota Supreme court, based on prior Minnesota case law and United States Supreme Court precedent, should have concluded that CSR had the minimum contacts with Minnesota necessary to make jurisdiction constitutional.

B. Fair Play and Substantial Justice

In addition to the requirement of minimum contacts, courts must examine those contacts to ensure that the assertion of jurisdiction would not offend "traditional notions of fair play and substantial justice."[144] In determining what "traditional notions of fair play and substantial justice" are, most courts use another test,[145] which is separate and apart from the minimum contacts five-part test. Instead of utilizing this test, however, the *In re Minnesota Asbestos Litigation* Court erroneously focused on whether or not CSR could foresee being haled into court in Minnesota.[146] While foreseeabiltiy is an important determination, the court clearly came to the wrong conclusion. If CSR could foresee that its products would reach Minnesota, then CSR must have expected consumers to purchase its products. And if CSR expected Minnesota consumers to purchase its product, then CSR could foresee a potential lawsuit in Minnesota.[147]

---

141. *See In re* Minnesota Asbestos Litig., 540 N.W.2d at 902.

142. The fifth factor asks the court to evaluate the convenience to the party or parties over whom jurisdiction is to be granted. *See Rostad*, 372 N.W.2d at 720.

143. *Cf.* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) (noting the burden on a foreign defendant should have significant weight in assessing the reasonableness of stretching personal jurisdiction over national boundaries).

144. *See supra* note 25 and accompanying text.

145. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980):

> [T]he forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Id. (citation omitted). *See generally* Hornbeck, *supra* note 32, at 1406-07 (discussing that the due process analysis should always be a "primary concern").

146. *See In re* Minnesota Asbestos Litig., 552 N.W.2d 242, 247 (Minn. 1996). "The foreseeability required is one which demonstrates 'that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Id.* (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).

147. *See In re* Minnesota Asbestos Litig., 540 N.W.2d 896, 900 (Minn. Ct. App. 1995); *cf.* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Justice Brennan, concurring in part and concurring in the judgment).

V. SUGGESTED APPROACH

As the above analysis shows, had the Minnesota Supreme Court followed prior precedent it would have found sufficient contacts to allow the assertion of jurisdiction over CSR. However, the court focused on the fact that no direct contacts existed, which suggests only one conclusion: The court was looking for something more than what was needed prior to this case. This something more—which is the hallmark of the stream of commerce plus approach used by the Eighth Circuit and used by Justice O'Connor in *Asahi*—conflicts with the approach used in prior Minnesota decisions.

In *In re Minnesota Asbestos Litigation*, the Minnesota Supreme Court broadsided the legal community, as well as Minnesota consumers, with its denial of jurisdiction over a corporate defendant.[148] Although the court seems to be headed in a new direction regarding the application of the stream of commerce theory in Minnesota, nowhere in the opinion did the court acknowledge this. As a result, the court has left the bench and bar confused[149] and has left future Minnesota plaintiffs with asbestosis as a result of CSR's products uncompensated for their injuries. What is needed to rectify the confusion is a reasoned and clear explanation by the Minnesota Supreme Court regarding what, if any, stream of commerce approach Minnesota follows.[150]

A well-reasoned opinion or a clear majority opinion from the United States Supreme Court on the stream of commerce issue would, of course, also alleviate the problem. Jurisdictional law in this country is in disarray as a result of the "minimum contacts" and "traditions of fair play and substantial justice" criteria, originally announced in *International Shoe*.[151] The Supreme Court's failure to adequately define these standards has resulted in multiple theories as to what are the applicable limits of the Due Process Clause of the Fourteenth Amendment.[152] This is particularly true in stream of commerce cases where there exists at least two and arguably three separate approaches. Minnesota is just one example of this.

148. *See In re* Minnesota Asbestos Litig., 552 N.W.2d at 248. Even more perplexing than the courts apparent change in direction, is the fact that the court was not even required to reach the jurisdictional issue to find in favor of CSR. *See id.* at 245-46. The court also ruled that a large portion of the proof offered by the plaintiffs was inadmissible. *See id.* As a result, the court could have disposed of the case without addressing the jurisdictional issue. *See id.* at 247 n.3.

149. *See, e.g.*, State v. Granite Gate Resorts, Inc., No. C6-97-89, 1997 WL 557670, at *7 (Minn. Ct. App. Sept. 5, 1997). In a well reasoned opinion, the Minnesota Court of Appeals upheld jurisdiction over an Internet advertiser following the stream of commerce approach as it stood prior to *In re Minnesota Asbestos Litigation*. *Id.*

150. *See id.*

151. *See supra* note 58 and accompanying text.

152. *See supra* note 58 and accompanying text.

Of course, these problems stem, at least in part, from the societal changes that this country has experienced over the last fifty years. Currently, we live in a world where commerce is conducted on an international scale. When developing the current jurisdictional factors, the Court could not have imagined the problems that modern society faces as a results of the global market. Consequently, the outdated standards promulgated by the Court require a complete overhaul. The Court again, as in *Pennoyer* and *International Shoe*, needs to take an active role and redefine the standards that determine when a civil action may be brought.[153] In the process, the court should examine the mistakes of the past and take a more pragmatic view as to what due process requires. Armed with this pragmatic view, the court can then promulgate new standards that practitioners can apply without the uncertainty that currently runs amok in jurisdictional law. Additionally, these factors must reflect and anticipate the problems that American society now faces in the global market and the world economy.

VI. CONCLUSION

As a result of the amorphous nature of Supreme Court personal jurisdiction law, Minnesota, like other jurisdictions, has developed multiple approaches for dealing with personal jurisdiction questions. Nowhere is this more true than when a defendant has placed a product into the stream of commerce. To date there are two, and arguably three, approaches to the stream of commerce problem. After the Minnesota Supreme Court's decision in *In re Minnesota Asbestos Litigation*, Minnesota appears to follow at least two of these stream of commerce approaches. What Minnesota needs is a well reasoned clear explanation of what, if any, approach is being followed in the state. Only then will it be possible for

153. *See generally* Kevin C. Kennedy, *Stretching the Long-Arm in Asahi Metal Industry Co., Ltd., v. Superior Court: Worldwide Jurisdiction after World-Wide Volkswagen?*, 4 B.U. INT'L L.J. 327, 349 (1986) (suggesting that the same result could be accomplished through Congressional action to regulation the exercise of jurisdiction over foreign component parts manufacturers); Luther L. McDougall III, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 59 (1982) (stating that "[o]nly by abandoning these already obsolete doctrines can the Court hope to achieve more appropriate results"); Bruce Posnak, *The Court Doesn't Know Its Asahi From Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 876 (1990) (advocating that the law of personal jurisdiction be made more predictable and easier to apply); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 852-53 (1989) (advocating that a theory of political consent should serve as the basis for jurisdictional standards rather than the Fourteenth Amendment); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts; Time for a Change*, 63 OR. L. REV. 485, 527-28 (1984) (advocating new jurisdictional standards which would focus on fairness to the defendant rather than "minimum contacts").

practitioners, plaintiffs, defendants, and courts to answer what should be a simple question: When can a civil action be brought in Minnesota?

Scott M. Hagel