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PRODUCT LIABILITY SUITS AND THE STREAM OF COMMERCE AFTER *ASAHI*: *WORLD-WIDE VOLKSWAGEN* IS STILL THE ANSWER

I. INTRODUCTION

Beginning in 1980, the United States Supreme Court applied the 'stream of commerce' analysis to decide a personal jurisdiction case involving a non-resident defendant in a products liability suit, *World-Wide Volkswagen v. Woodson*.¹ The stream of commerce theory developed in product liability cases because a manufacturer usually only comes into direct contact with the forum state through intermediaries such as retailers or distributors.² A state can still exert personal jurisdiction over a manufacturer who delivers its products into the stream of commerce without offending Due Process if the 'stream of commerce' analysis is satisfied.³

Under the *World-Wide Volkswagen* standard, it is not unreasonable to subject a manufacturer to suit in the forum state "if the sale of a product . . . arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other states."⁴ The Supreme Court then employed the stream of commerce analysis in 1987 to decide *Asahi Metal Industries v. Superior Court*,⁵ another products liability suit involving foreign parties.⁶ *Asahi* did not help to clarify how much contact is needed to establish that the non-resident manufacturer has directly or indirectly served the forum state in product liability suits as set forth in *World-Wide Volkswagen*; it only helped to confuse the amount of contact required before a court may exercise personal jurisdiction.⁷ *Asahi* further confused the issue because the Court split into three groups over the amount of contact required in the stream of commerce analysis for a defendant to establish a purposeful contact in the forum state.⁸ Justice O'Connor, joined by The Chief Justice, Justice Powell, and Justice Scalia concluded that more than just placing the product into the stream of commerce was required to establish a purposeful contact.⁹ Justice Brennan, joined by Justice White, Justice Marshall, and Justice Blackmun held that jurisdiction was reasonable as long as the defendant knew the

1. 444 U.S. 286 (1980) (refusing to allow Oklahoma to exercise personal jurisdiction over the non-resident Volkswagen manufacturer under a stream of commerce analysis).

2. See *Pennzoil Prods. Co. v. Colelli & Assoc., Inc.*, 149 F.3d 197, 203 (3d Cir. 1998).

3. See *World-Wide Volkswagen*, 444 U.S. at 297-98.

4. *Id.* at 297.

5. 480 U.S. 102 (1987).

6. *Id.* (refusing to exercise personal jurisdiction over defendant based on reasonableness factors without clarifying the stream of commerce analysis). *Id.*

7. See *Packerware Corp. v. B & R Plastics, Inc.*, 15 F. Supp. 2d 1074, 1079 (D. Kan. 1998).

8. See *Asahi*, 480 U.S. at 112, 116-17.

9. See *id.* at 112.

product was being marketed in the forum state.¹⁰ Justice Stevens issued his own opinion that a purposeful contact analysis was not required in *Asahi* because jurisdiction was overall unreasonable.¹¹ Today, the situation exists where the circuit courts apply different stream of commerce analyses in similar product liability suits.¹² Many of the circuits simply apply the facts in the record to the minimum contacts analyses outlined in *Asahi* by both Justice O'Connor and Justice Brennan.¹³ A few of the circuits have held that *World-Wide Volkswagen's* precedent was not overruled by a majority in *Asahi*; therefore, its standard is still the law.¹⁴ While the circuits explicitly applying *World-Wide Volkswagen* are in the minority, most all the circuits are using the language of *World-Wide Volkswagen* in applying the stream of commerce analysis leading to the conclusion that *Asahi* did not change the standard for a purposeful contact in the stream of commerce analysis.¹⁵

This comment discusses how *Asahi* did not change the stream of commerce analysis because the majority of the circuit courts are still impliedly following the analysis established in *World-Wide Volkswagen* through the use of its language in analyzing the case facts under the stream of commerce test. Part II discusses the Supreme Court decisions in *World-Wide Volkswagen* and *Asahi* and the establishment of the stream of commerce analysis. Part III describes the varied approaches to the stream of commerce analysis adopted by the different circuit courts. Part IIIA examines how many of the circuits are applying the facts in the record to all the different analyses set forth in *Asahi*, yet using the *World-Wide Volkswagen* language in defining the tests. Secondly, Part IIIB describes how two of the circuits have reconciled *World-Wide Volkswagen* and *Asahi* in applying the stream of commerce test. Part IIIC sets forth the First Circuit's position of adopting Justice O'Connor's analysis in *Asahi*. Lastly, the approach taken by the circuits explicitly using the stream of commerce standard under *World-Wide Volkswagen* is discussed in Part IIID. Part IV concludes the comment based on the overall approach taken by the circuits that *World-Wide Volkswagen's* standard for the stream of commerce analysis was not changed by *Asahi* in product liability suits.

10. *See id.* at 116-17.

11. *See id.* at 121-22.

12. *Cf. Pennzoil Prods. Co. v. Collelli & Assoc., Inc.*, 149 F.3d 197, 206-07 (3rd Cir. 1998) (avoiding stream of commerce debate by satisfying the standards of both *Asahi* pluralities); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994) (reconciling *World-Wide Volkswagen* and *Asahi*); *Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610, 613-14 (8th Cir. 1994) (following original stream of commerce test used in *World-Wide Volkswagen* because it had not been overruled by a majority of the courts); *Ruston Gas Turbines v. Corchran*, 9 F.3d 415, 420 (5th Cir. 1993) (adopting Justice O'Connor's view that additional conduct is necessary for a defendant to purposefully avail himself of the forum state); *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 542-43 (6th Cir. 1993) (concluding that based on the facts of the specific case jurisdiction was reasonable under all views outlined in *Asahi*); *Vermeulen v. Renault, U.S.A. Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) (refusing to choose specific test since facts satisfied all in *Asahi*. Court also noted those circuits choosing to simply follow *World-Wide Volkswagen*); *Boit v. Gar-tec Prods. Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (adopting Justice O'Connor's view that additional conduct is necessary for a defendant to purposefully avail himself of the forum state); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (same).

13. *See Pennzoil*, 149 F.3d at 206-07; *Tobin*, 993 F.2d at 542-43; *Vermeulen*, 965 F.2d at 1026; *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

14. *See Barone*, 25 F.3d at 613-14; *Ruston*, 9 F.3d at 420; *Dehmlow*, 963 F.2d at 947.

15. *See discussion infra* Parts III.A.1-3.

II. WORLD-WIDE VOLKSWAGEN TO ASAHI, THE DEBATE OVER STREAM OF COMMERCE

The Supreme Court used the stream of commerce theory in product liability cases to address the growing interstate and international economy.¹⁶ Because a product manufacturer usually does not come into direct contact with a state even though its products are marketed in that state, the state needed a way to assert jurisdiction over the manufacturer when its products were involved in lawsuits.¹⁷ A state is able to assert jurisdiction over the manufacturer as long as a purposeful contact is established through the stream of commerce.¹⁸ In other words, jurisdiction is reasonable as long as “a corporation delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.”¹⁹ The stream of commerce analysis was first used by the Supreme Court in *World-Wide Volkswagen*.²⁰ The analysis was later employed in *Asahi* when the Supreme Court failed to re-define the amount of contact required under the stream of commerce.²¹

A. *World-Wide Volkswagen*

The Supreme Court adopted the stream of commerce theory in 1980 when it decided *World-Wide Volkswagen Corp. v. Woodson*.²² For a forum state to exercise jurisdiction over a defendant through the stream of commerce theory, the defendant’s contacts with the state must be such “that he should reasonably anticipate being haled into court there.”²³ Jurisdiction over a non-resident manufacturer in a products liability suit is reasonable when the sale of the product in the forum state arises from the efforts of the manufacturer or distributor “to serve directly or indirectly, the market for its product” which has allegedly caused the injury at issue.²⁴ In *World-Wide Volkswagen* the court ultimately denied jurisdiction over the defendants because they had no activity in Oklahoma, therefore making it unreasonable to subject the defendants to suit there.²⁵

World-Wide Volkswagen involved a products liability suit by New York

16. See *World-Wide Volkswagen*, 444 U.S. at 294 (quoting its own language in *Hanson v. Denckla*, 357 U.S. 235, 250-51, the court stated “As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome”).

17. See *World-Wide Volkswagen*, 444 U.S. at 293-94.

18. See *id.* at 297-98.

19. *Id.* at 298.

20. See *id.* at 297-98.

21. See *Asahi*, 480 U.S. at 112, 116-22.

22. 444 U.S. 286 (1980).

23. *Id.* at 297; see also *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

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

25. See *id.* at 286-87.

residents who were injured while traveling through Oklahoma.²⁶ The Robinsons purchased an Audi in New York from Seaway Volkswagen.²⁷ One year later, the Robinsons left New York to move across country to Arizona.²⁸ While passing through Oklahoma, the plaintiffs' Audi was hit in the rear by another car, causing a fire which severely burned the plaintiffs.²⁹ The plaintiffs brought a products liability suit in Oklahoma, claiming that their injuries resulted from defective design in the Audi's fuel system.³⁰ The plaintiffs sued the automobile's manufacturer and members of the manufacturer's distribution network.³¹ Audi's regional distributor, World-Wide Volkswagen Corp., and its retail dealer, Seaway, raised the issue that Oklahoma could not assert personal jurisdiction.³² The plaintiffs presented no evidence that the defendants had any contact with Oklahoma outside of the location of the accident involving the Audi that was sold to the plaintiffs in New York.³³

The Court refused to allow jurisdiction to be based on one isolated occurrence in which the plaintiffs who bought an Audi in New York happened to be involved in an accident in Oklahoma.³⁴ Because an automobile is mobile by its design, it is foreseeable that an Audi sold in New York could cause injury in Oklahoma.³⁵ Yet, foreseeability of the injury alone is not sufficient to establish personal jurisdiction.³⁶ It must be foreseeable to the defendant based on its conduct and connection with the forum State that it could be haled into court in the forum state.³⁷ Non-resident defendants should foresee being haled into court where the manufacturer or distributor spent effort to serve the forum state's market either directly or indirectly.³⁸ Therefore, a forum state may assert jurisdiction under the Due Process Clause when an entity "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."³⁹ The Court found a total absence of any circumstances indicating that the defendant

26. *Id.* at 288. The plaintiffs were Harry and Kay Robinson and their two children. The entire family was New York residents. The family was moving from New York to Arizona when they were involved in a car accident in Oklahoma. *Id.*

27. *See id.*

28. *See id.* at 288.

29. *See id.*

30. *See World-Wide Volkswagen*, 444 U.S. at 288.

31. *See id.* The plaintiffs joined the manufacturer Audi, its importer Volkswagen of America, Inc., its regional distributor, World-Wide Volkswagen Corp., and its retail dealer Seaway. *Id.*

32. *See id.*

33. *See id.* at 289. World-Wide and Seaway are both incorporated with their principal place of business in New York. Neither defendant "does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma." *Id.*

34. *See id.* at 295.

35. *See id.*

36. *See World-Wide Volkswagen*, 444 U.S. at 295. The court reiterated language used in *Hanson v. Denckla* that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the due process clause. The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State." *Id.*

37. *See id.* at 297.

38. *See id.* It is no longer unreasonable for the Court to assert jurisdiction if the product has been marketed for the forum state and the allegedly defective product caused the injury. *Id.*

39. *See World-Wide Volkswagen*, 444 U.S. at 298. (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E. 2d 761 (Ill. 1961)).

Volkswagen served the Oklahoma market and refused to allow the exercise of jurisdiction over the defendant.⁴⁰ Jurisdiction over the defendants was unreasonable and in violation of the Due Process Clause because the defendants did not have a sufficient connection with Oklahoma to justify jurisdiction under the stream of commerce theory.⁴¹

B. *Asahi*

After applying the stream of commerce theory in *World-Wide Volkswagen* to non-resident defendants, the court applied the theory to foreign defendants in *Asahi Metal Industry v. Superior Court*.⁴² In *Asahi*, the Court was deciding “whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes ‘minimum contacts’ between the defendant and the forum State.”⁴³ The court concluded that jurisdiction was unfair under the reasonableness factors analysis.⁴⁴ A majority of the court was *not* able to decide, though, how much contact is required by the defendant for the forum state to exercise jurisdiction under the stream of commerce theory.⁴⁵

The facts of *Asahi* helped the court to conclude that jurisdiction would be unreasonable because the only claim left involved two foreign parties.⁴⁶ *Asahi* involved a products liability suit by a California citizen against a Taiwanese manufacturer of a motorcycle tire tube.⁴⁷ While driving his motorcycle on an Interstate in California, Gary Zurcher lost control and collided with a tractor.⁴⁸ He was severely injured and his passenger was killed.⁴⁹ He alleged that his rear tire exploded after a sudden loss of air because the motorcycle tire, tube, and sealant were defective.⁵⁰ Zurcher sued the Taiwanese manufacturer of the tube, Cheng Shin Rubber Industrial Co.⁵¹ The Taiwanese manufacturer filed a cross-complaint seeking indemnification from Asahi Metal Industry Co., the Japanese manufacturer of the tube’s valve assembly.⁵² Cheng Shin settled all of its claims with Zurcher, leaving only the indemnification claim against Asahi.⁵³ The Supreme Court

40. *See id.* at 298. Seaway’s sales are made in Massena New York only, and World-Wide Volkswagen’s market is limited to dealers in New York, New Jersey, and Connecticut. *Id.*

41. *See id.* at 286-87.

42. 480 U.S. 102 (1987).

43. *Id.* at 105.

44. *See id.* at 114.

45. *See id.* at 112-16.

46. *See id.* at 106.

47. *See id.* at 105.

48. *See Asahi*, 480 U.S. at 105.

49. *See id.*

50. *See id.* at 106.

51. *See id.*

52. *See id.*

53. *See id.* The Court placed emphasis on the fact that both parties in the litigation were foreign companies in assessing the reasonable factors. *Id.*

ultimately refused to exercise personal jurisdiction over the indemnification claim.⁵⁴

The Court agreed that exercising personal jurisdiction over the defendant would be unfair under the “reasonableness factors” analysis, even though a majority of the Justices could not agree on whether a purposeful contact existed under the minimum contacts analysis.⁵⁵ Under the reasonableness factors, the Court considered the “burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief.”⁵⁶ The degree of burden on the defendant is given significant weight when a foreign defendant is involved.⁵⁷ The Court also considered that the procedural and substantive policies of Japan and Taiwan would be affected by the state of California’s assertion of jurisdiction over the alien defendant.⁵⁸ Because the only claim left involved two foreign parties, the Court emphasized that a state should exercise great care when extending jurisdiction into the international field.⁵⁹ Not only was the burden too high on Asahi, California’s interest in the litigation was nonexistent, and the plaintiff did not demonstrate that it was more convenient to litigate the indemnification claim against Asahi in California rather than its foreign country.⁶⁰

While the Court agreed that the exercise of jurisdiction violated due process based on the reasonableness factors, the Court did not obtain a majority view on the issue of purposeful contact.⁶¹ The Court issued three different opinions on whether the defendant had “purposefully availed” itself of the forum State to satisfy the minimum contacts test under the stream of commerce theory.⁶² Justice O’Connor concluded that the mere placement of a product in the stream of commerce is not enough to establish a purposeful contact; the defendant needs additional conduct.⁶³ The defendant must purposefully avail itself of the privilege of conducting activities in the forum states, or direct intentional acts towards the forum state to be subject to jurisdiction.⁶⁴ “But a defendant’s awareness that the stream of commerce may

54. *See Asahi*, 480 U.S. at 116. A unanimous Court decided that the exercise of jurisdiction would offend the “traditional notions of fair play and substantial justice” because the reasonableness factors weighed against the exercise of jurisdiction without a majority establishing if a purposeful contact existed. *Id.* at 115-16.

55. *See id.*

56. *Id.*

57. *See id.* at 115 (citing *United States v. First Nat’l City Bank*, 379 U.S. 378, 404 (1965)).

58. *See id.* The procedural and substantive policies of other nations whose interests will be affected by the exercise of jurisdiction were taken into consideration since the only remaining issue was whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan. *Id.*

59. *See id.*

60. *See Asahi*, 480 U.S. at 114-16. The burden was too high on Asahi because it had no offices in California, no property or agents in California, solicited no business and no direct sales in California, it also did not design or control the system of distribution that carried its product into California. California’s interest in providing its citizens a forum was diminished since the plaintiff was a Taiwanese corporation. *Id.*

61. *See id.* at 112-16.

62. *See id.* at 105, 108. Justice O’Connor was joined by Chief Justice Rehnquist, Justice Powell, and Justice Scalia in her plurality opinion. Justice Brennan was joined by Justices White, Marshall, and Blackmun in his minimum contacts analysis. *Id.* at 116. Justices White and Marshall also joined Justice Steven’s opinion. *Id.* at 121.

63. *See id.* at 112.

64. *See id.* Examples of additional conduct indicating an intent or purpose to serve the market: “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to

or will sweep the product into the forum State does not convert the mere act of placing the product into the stream an act purposefully directed towards the forum State.”⁶⁵ Justice O’Connor concluded that Asahi did not demonstrate any additional conduct purposefully directed towards California in order to justify asserting jurisdiction.⁶⁶

In a separate opinion, Justice Brennan, joined by Justice White, Justice Marshall, and Justice Blackmun, disagreed with Justice O’Connor’s conclusion that Asahi did not “purposefully avail itself of the California market.”⁶⁷ Justice Brennan found that as long as the defendant was aware that the final product was being marketed in the forum state, the possibility of a lawsuit was foreseeable enough to make the exercise of jurisdiction reasonable.⁶⁸ No additional conduct was needed to find a purposeful contact under the stream of commerce theory.⁶⁹ He argued that the burden of the potential litigation is not outweighed by the benefit the defendant receives economically from the sale of the final product in the forum State.⁷⁰ Even though Justice Brennan held that jurisdiction was unreasonable under the reasonableness factors analysis, he concluded that Asahi had established a purposeful contact under the stream of commerce theory.⁷¹

Demonstrating the diversity of opinions in the case, Justice Stevens wrote separately.⁷² He argued that Justice O’Connor’s opinion mistakenly assumes 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.”⁷³ Justice Steven’s opinion strongly suggested that an examination of minimum contacts was not even necessary since the court found that the exercise of jurisdiction would be unfair under the reasonableness factors analysis.⁷⁴

No opinion in *Asahi* commanded a majority regarding what level of contact is required by a defendant for the forum state to exercise jurisdiction under the

serve as the sales agent in the forum State.” *Id.*

65. *Id.* at 112-13.

66. *See Asahi*, 480 U.S. at 112-13. Justice O’Connor argued that even if Asahi was aware that some of its valves would be incorporated into tire tubes sold in California, no additional conduct was demonstrated that Asahi purposefully availed itself of the California market. *Id.* at 113. “Asahi has no offices, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves into California.” *Id.*

67. *Id.* at 116.

68. *See id.* (Brennan, J., concurring). Justice Brennan found that Asahi was aware of the marketing of its product in California because of the sales to his manufacturer making the assertion of jurisdiction reasonable under the stream of commerce theory. *Id.* at 121. Yet, Justice Brennan agreed with the Court that the reasonableness factors weighed too heavily against assertion of jurisdiction to comport with fair play. *Id.* at 116.

69. *See id.* at 117. (Brennan, J., concurring). Justice Brennan argued that the requirement of additional conduct was a retreat from *World-Wide Volkswagen*. *Id.* at 118. He argued that *World-Wide Volkswagen* only required that a defendant should reasonably anticipate being haled into court in the forum state. *Id.* at 117-18.

70. *See id.* “These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.” *Id.* at 117.

71. *See id.* at 116.

72. *See Asahi*, 480 U.S. at 121.

73. *Id.* at 121. Justice Stevens argued that to decide whether conduct rises to the level of purposeful availment, a determination must be made regarding the volume, the value, and the hazardous character of the components. *Id.* at 122.

74. *See id.*

stream of commerce theory.⁷⁵ Therefore, the minimum contacts analysis of the stream of commerce theory was not clarified by *Asahi*, but only further befuddled. The Supreme Court's decision in *World-Wide Volkswagen* that jurisdiction over the manufacturer must arise from the efforts of the manufacturer to serve the market either directly or indirectly still stands as the last decision commanding a majority of the court on the level of contact needed to establish minimum contacts under the stream of commerce theory.⁷⁶ Due to the current state of the stream of commerce theory, the circuit courts have been left to decipher which opinion appropriately addresses the level of conduct required for minimum contact in product liability cases.⁷⁷

III. THE DIFFERENT PATHS OF THE CIRCUIT COURTS AFTER *ASAHI*

The failure of the Supreme Court to obtain a majority view on the amount of contact required under the stream of commerce theory has unsettled the law of personal jurisdiction in product liability suits.⁷⁸ The circuit courts use varied approaches in applying the stream of commerce analysis in product liability cases that involve a nonresident defendant.⁷⁹ Three of the circuit courts are avoiding the debate over the proper minimum contacts analysis by basing their decisions upon the facts presented in the record.⁸⁰ The Third, Sixth, and Eleventh Circuits choose to apply all three minimum contacts analyses used in *Asahi* to the facts in the record without supporting one analysis over the other.⁸¹ The Fourth and Tenth Circuits reconciled the decisions in *World-Wide Volkswagen* and *Asahi* in order to apply one test.⁸² The First Circuit is the only circuit to conclusively adopt the position of Justice O'Connor in applying the stream of commerce analysis in product liability suits.⁸³ Because *Asahi* did not command a majority of the Court on the amount of contact required under stream of commerce, three of the circuits still apply the standard in *World-Wide Volkswagen*.⁸⁴ Even though these circuits are in the minority, most all of the circuits use *World-Wide Volkswagen* language in applying the facts to the stream of commerce test.⁸⁵ Therefore, the stream of commerce test was not changed by *Asahi* as evident from the use of the language of *World-Wide Volkswagen* by most all the circuits.

75. See discussion *infra* Part II.

76. See discussion *infra* Part II.

77. See discussion *infra* Part III.

78. See discussion *infra* Part II.B.

79. See discussion *infra* Part III.

80. See discussion *infra* Part III.A.1-3.

81. See discussion *infra* Part III.A.1-3.

82. See *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994).

83. See *Boit v. Gar-Tec Prods. Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992).

84. See discussion *infra* Part III.D.1-3.

85. See discussion *infra* Part III.

A. Choosing not to Choose

The majority of the circuits avoid being involved in the debate over the stream of commerce theory and thus engage in lengthy analyses regarding purposeful contacts.⁸⁶ The Third, Sixth, and Eleventh Circuits apply all the minimum contacts analyses in *Asahi* to the facts in the record in order to avoid choosing one test over another.⁸⁷ In analyzing their facts, though, the circuits utilize the language of *World-Wide Volkswagen* in describing a ‘purposeful contact’ under the different theories.⁸⁸ The standard set in *World-Wide Volkswagen* is still used by the circuits since *Asahi* did not clarify what a ‘purposeful contact’ required.

1. Third Circuit

The Third Circuit continued with precedent in its jurisdiction by choosing not to decide which minimum contacts analysis to apply.⁸⁹ In *Pennzoil Products Co. v. Colelli & Ass’n*,⁹⁰ the court engaged in a discussion of all three different analyses in *Asahi* to arrive at its conclusion that “since the facts of this (case) satisfy the standards of both *Asahi* pluralities, we do not have occasion to select one standard or the other as the law of this circuit.”⁹¹ *Pennzoil Products* involved a suit by an oil refinery against corporations that sold solvent to oil producers that subsequently sold their crude oil to the refinery.⁹² Colelli sold to crude oil producers in Ohio a solvent designed to reduce the accumulation of wax in the shafts of oil wells.⁹³ The oil producers subsequently sold the oil to refineries.⁹⁴ The Pennzoil refinery alleged that the solvent caused damage to its refinery because the oil was tainted with silicon.⁹⁵ Colelli filed a motion to dismiss the suit for lack of personal jurisdiction, claiming that Pennsylvania’s exercise of jurisdiction violated Due Process.⁹⁶ The Third Circuit ultimately held that jurisdiction could be exercised over the defendant under the stream of commerce theory.⁹⁷

In reaching its conclusion that personal jurisdiction existed over the defendant,

86. See discussion *infra* Part III.A.1-3.

87. See discussion *infra* Part III.A.1-3.

88. See discussion *infra* Part III.A.1-3.

89. See *Pennzoil Prods. Co. v. Colelli & Assoc., Inc.*, 149 F.3d 197, 205 (3d Cir. 1998) in which the court follows their decision in *Renner v. Lanard Toys Ltd.* 33 F.3d 277 (3d Cir. 1994) to not adopt one analysis over another. *Renner* involved a products liability suit against a Hong Kong manufacturer of a toy plane which allegedly exploded and injured Renner. 33 F.3d at 278. Even though the court held that one analysis in *Asahi* was not being used over another, the court employed language from *World-Wide Volkswagen* in deciding that “the mere knowledge or awareness that one’s products will end up in the forum state without some regularity of shipment would not be enough. The contact must be purposeful, rather than incidental . . .” *Id.* at 282. See also *World-Wide Volkswagen*, 444 U.S. at 297-98.

90. 149 F.3d 197 (3rd Cir. 1998).

91. *Id.* at 207 n.13.

92. See *id.* at 199.

93. See *id.*

94. See *id.*

95. See *id.*

96. See *Pennzoil*, 149 F.3d at 200.

97. See *id.*

the Third Circuit first defined the stream of commerce test with the analysis from *World-Wide Volkswagen*.⁹⁸ The court held that the defendant must have the necessary minimum contacts with the forum state “for the defendant to have reasonably anticipated being haled into court there.”⁹⁹ In product liability suits it is reasonable for jurisdiction to be “asserted over a nonresident defendant which injected its goods, albeit indirectly, into the forum state and . . . derived a substantial benefit from the forum state.”¹⁰⁰

In deciding whether Colelli had served the forum state to establish jurisdiction, the court discussed the *Asahi* decision and its failure to reach a majority.¹⁰¹ After discussing all three opinions in *Asahi*, the court noted that “since Justice O’Connor’s standard is more demanding than Justice Brennan’s, any factual scenario that satisfies the former will probably satisfy the latter as well.”¹⁰² The court was able to establish jurisdiction under both Justice O’Connor’s and Justice Brennan’s test because of Colelli’s contacts with the forum state.¹⁰³ Justice O’Connor’s test requiring additional conduct had been met from the fact that Colelli had established “channels for providing regular advice to Pennzoil’s personnel” and sent samples to Pennzoil’s laboratories demonstrating an intent to “design” a product to serve the forum state.¹⁰⁴ Justice Brennan’s test of simply placing the product into the stream of commerce was easily satisfied because Colelli placed its solvents into the stream of commerce and benefitted from its sales.¹⁰⁵ The court avoided choosing a stream of commerce analysis in *Asahi* because it found sufficient contacts by Colelli under both analyses that illustrated Colelli had served the forum market.¹⁰⁶ The Third Circuit employed the *World-Wide Volkswagen* standard that a non-resident manufacturer must either directly or indirectly serve the forum market since *Asahi* did not clarify the level of contact required to assert jurisdiction with a majority of the court.¹⁰⁷

2. Sixth Circuit

The Sixth Circuit did not engage in a lengthy discussion of the three different minimum contact analyses set forth in *Asahi* as did the Third Circuit, but it also did not choose one analysis over another to decide the facts in the record.¹⁰⁸ In a very

98. *See id.* at 201.

99. *Id.*

100. *Id.* at 203.

101. *See id.* at 204.

102. *Pennzoil*, 149 F.3d at 199 n.11.

103. *See id.* at 206-07.

104. *See id.* at 206. Justice O’Connor’s requirement of additional conduct was also met because Colelli had a number of telephone conversations with lab personnel at the refinery which in effect established channels into the forum state. *Id.* The Court also noted that even Justice Stevens standard was met, even though it is not essential to the analysis. “The relative volume and value of the silicon-laced oil forwarded to Pennsylvania . . . (was) sixty percent of the crude oil generated by the Ohio producers. *Id.* at 206 n.12.

105. *See id.* at 207.

106. *See id.* at 205-07.

107. *See id.* at 201, 203-04.

108. *See Tobin v. Astra Pharm. Prods. Inc.*, 993 F.2d 528, 543-44 (6th Cir. 1993).

short analysis, the Sixth Circuit used the same rationale as the Third Circuit in deciding that if the more stringent *Asahi* plurality test was met, the exercise of jurisdiction would be proper under any test currently in use by the different courts.¹⁰⁹ The Sixth Circuit also avoided defining the stream of commerce test with either language from *World-Wide Volkswagen* or *Asahi* by simply reasoning that enough facts existed to assert jurisdiction.¹¹⁰

The Sixth Circuit addressed the stream of commerce debate in *Tobin v. Astra Pharmaceutical Products, Inc.*¹¹¹ *Tobin* involved a suit by Kathy Tobin against a Dutch drug manufacturer, Duphar B.V., and Astra Pharmaceutical, its United States distributor.¹¹² Tobin received ritodrine, a drug manufactured by Duphar, during her pre-term labor.¹¹³ The dosages would increase when the contractions increased during labor.¹¹⁴ When given the drug, her heart would race, and her legs and hands would swell.¹¹⁵ After other complications, she was taken off ritodrine and delivered healthy twins.¹¹⁶ A month after being discharged from the hospital, Tobin had a heart transplant from complications with the drug.¹¹⁷ After Duphar was dismissed for lack of personal jurisdiction, a jury found Astra liable for defective design and failure to warn for the conditions that led to Tobin's heart transplant.¹¹⁸

The Sixth Circuit ruled on appeal that dismissal of Duphar was inappropriate since Duphar had sufficient contacts to satisfy the stream of commerce test even under the *Asahi* plurality requirements of Justice O'Connor, which requires more than just mere awareness.¹¹⁹ Duphar designed the product for the United States in its efforts to obtain FDA approval and made direct efforts to avail itself of the markets in each state by negotiating a licensing agreement with Astra Pharmaceuticals.¹²⁰ The court based its holding on the amount of contacts established in the record to find jurisdiction proper over the defendant and thus avoided defining purposeful avilment under either *World-Wide Volkswagen* or *Asahi*.¹²¹

3. Eleventh Circuit

The Eleventh Circuit has adopted the same position as the courts already

109. *See id.* at 543. The court stated the "even under the test set forth in the plurality opinion of *Asahi*, . . . , Duphar (the defendant) has contact that is "something more" than mere awareness that the stream of commerce will sweep the product into the forum state." *Id.*

110. *See id.*

111. 993 F.2d 528 (6th Cir. 1993).

112. *Id.* at 532. Duphar B.V. is a corporation in the Netherlands that manufactures ritodrine. Astra Pharmaceutical is Duphar's United States distributor. *Id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See Tobin*, 993 F.2d at 532.

118. *See id.*

119. *See id.* at 543.

120. *See id.* at 543-44.

121. *See id.*

discussed because it also chose to not join the minimum contacts debate.¹²² In *Vermeulen v. Renault*,¹²³ the Eleventh Circuit decided the case based on the facts in the record and concluded that since enough facts existed to find jurisdiction under Justice O'Connor's more stringent test, the court did not need to determine which analysis in *Asahi* actually controlled the case.¹²⁴ The court used the *World-Wide Volkswagen* standard to establish jurisdiction because it reasoned that since Renault had "directly targeted" its cars toward the United States, it could reasonably expect to be subject to suit there.¹²⁵ *Vermeulen* involved a products liability suit by a car owner against Renault, a French manufacturer, alleging defective design and manufacture.¹²⁶ Laura Vermeulen suffered a spinal injury leaving her a quadriplegic after an accident in her Renault LeCar in Georgia.¹²⁷ Vermeulen alleged that her injuries were the result of negligent manufacture and design of the car's passenger restraint system.¹²⁸ The court held that Vermeulen established jurisdiction over Renault, reversing the district court's dismissal.¹²⁹

In deciding that jurisdiction was proper, the court examined in detail each of the three decisions on the proper minimum contacts analysis in *Asahi* and was able to find facts to support jurisdiction under all analyses.¹³⁰ Renault delivered its products into the stream of commerce with the expectation that they would be purchased in the United States, thus satisfying Justice Brennan's test.¹³¹ Renault also met Justice O'Connor's test because it designed the car for the American market, advertised its product in the United States, and established channels here for providing advice to its customers.¹³² The court characterized Justice Brennan's holding in *Asahi* that the "additional conduct showing was not necessary" as a liberal reading of *World-Wide Volkswagen*.¹³³ The liberal characterization of Justice Brennan's view compared with the stringent view of Justice O'Connor's explains why many courts are still following the standard set in *World-Wide*

122. See *Vermeulen v. Renault, U.S.A. Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993). The Eleventh Circuit has changed its position on the stream of commerce analysis from an earlier decision. *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). In *Madara*, the court concluded that a defendant must satisfy Justice O'Connor's stream of commerce test in order to exercise jurisdiction. *Id.*

123. 985 F.2d 1534 (11th Cir. 1993).

124. See *id.* at 1548.

125. See *id.* at 1550.

126. *Id.* at 1537. Renault is the manufacturer and designer of the 1982 LeCar, a corporation which is wholly owned by the French government. *Id.*

127. See *id.*

128. See *id.* at 1541.

129. See *Vermeulen*, 985 F.2d at 1537.

130. See *id.* at 1547-48. The Court detailed each of the examples Justice O'Connor listed in her requirement for "additional conduct" by the defendant. *Id.* at 1547. The Court also mentioned Justice Steven's requirement of analyzing the "volume, the value, and the hazardous character of the components." *Id.*

131. See *id.* at 1548.

132. See *id.* at 1549. Renault also took an active role in training personnel in repair, servicing, and preparation of Renault products, and created and controlled the distribution network that brought its products into the United States. *Id.* at 1550.

133. *Id.* at 1547. The Court quoted Justice Brennan's language that 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." *Id.*

Volkswagen, since its standard represents more of a middle view.¹³⁴

Even though the Eleventh Circuit found jurisdiction by applying the facts to all three analyses in *Asahi*, the court employed the language of the *World-Wide Volkswagen* standard in its holding to establish that jurisdiction was reasonable.¹³⁵ Renault demonstrated that it had attempted to serve the forum market because it directly targeted its LeCars toward that United States and took numerous steps to ensure the car would be brought to the United States.¹³⁶ Due to all the contacts Renault had with the United States it could “fairly expect to defend in this country the very type of action this case presents: a personal injury action challenging the car’s design and safety.”¹³⁷ The Eleventh Circuit also noted after its conclusion that “in the absence of further guidance from the Supreme Court, several courts have declined to follow the *Asahi* plurality’s analysis, and have instead continued to apply the “stream of commerce” approach adopted in *World-Wide Volkswagen*.”¹³⁸ The language of *World-Wide Volkswagen*, coupled with the reference to cases still applying the standard in *World-Wide Volkswagen*, illustrates how the standard set forth in *World-Wide Volkswagen* is still the precedent for the stream of commerce theory, since *Asahi* did not raise or lower the standard with a majority of the Court.

The circuits which chose to not be involved in the debate over minimum contacts illustrate that *Asahi* did not give any guidance on how to define “purposeful availment” under the stream of commerce theory. *Asahi*’s lack of guidance forces courts to painstakingly consider if the facts in each case meet Justice O’Connor’s more stringent test, which enables the court to satisfy subsequent different analyses.¹³⁹ These courts use the language set forth in *World-Wide Volkswagen* that jurisdiction must arise from the efforts of the non-resident defendant to serve the forum state in order to define purposeful availment because *Asahi* did not clarify the amount of contact required under the stream of commerce theory.¹⁴⁰ Through their use of language, the circuits impliedly use *World-Wide Volkswagen* as the stream of commerce analysis illustrating that *Asahi* did not change the standard.

134. See *World-Wide Volkswagen*, 444 U.S. at 297. The *World-Wide Volkswagen* standard for purposeful availment is the middle view because it establishes jurisdiction based on the efforts of the manufacturer to serve directly or indirectly the forum State’s market therefore making it reasonable to subject it to suit in one of those States. Justice O’Connor’s view requires additional conduct above and beyond placing the product in the stream of commerce while Justice Brennan’s view requires only that the defendant be aware the final product is being marketed in the forum state. See *Asahi*, 480 U.S. at 112, 116.

135. See *Vermeulen*, 985 F.2d at 1550.

136. See *id.*

137. See *id.*

138. *Id.* at 1548. The Court lists examples of the courts choosing to follow the standard set forth in *World-Wide Volkswagen*. *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 386 (5th Cir. 1989); *DeMoss v. City Market, Inc.*, 762 F. Supp. 913, 918 (D. Utah 1991); *Abuan v. General Electric Co.*, 735 F. Supp. 1479, 1483 (D. Guam 1990); *Curtis Management Group v. Academy of Motion Pictures Arts & Sciences*, 717 F. Supp. 1362, 1369 (S.D. Ind. 1989); *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).

139. See *supra* notes 102, 124, and accompanying text.

140. See discussion *infra* Part III.A.1-3.

B. Reconciling World-Wide Volkswagen and Asahi

The Fourth Circuit and the Tenth Circuit both reconciled *World-Wide Volkswagen* and *Asahi* in deciding if a defendant directed his activities toward the forum state sufficient to establish jurisdiction.¹⁴¹ While the Fourth Circuit analyzed the stream of commerce debate in a products liability suit,¹⁴² the Tenth Circuit has not addressed the issue in a products liability setting. The Tenth Circuit addressed the issue of a purposeful contact in a suit to establish a duty to defend by liability insurers.¹⁴³

1. Fourth Circuit

The Fourth Circuit took an approach different than the previous mentioned circuits which chose to apply the facts to both Justice O'Connor's and Justice Brennan's analyses in *Asahi*.¹⁴⁴ The Fourth Circuit reconciled *World-Wide Volkswagen* and *Asahi* with prior Supreme Court precedent by interpreting *World-Wide Volkswagen* narrowly.¹⁴⁵ By its reading of *World-Wide Volkswagen*, a defendant must purposely direct his or her activities toward the forum state to satisfy the stream of commerce test.¹⁴⁶ After *Asahi*, the Fourth Circuit interpreted the stream of commerce test to still require the same, illustrating once again that *Asahi* did not change the stream of commerce standard established in *World-Wide Volkswagen*.¹⁴⁷

The Fourth Circuit addressed the debate over the stream of commerce theory in *Lesnick v. Hollingsworth & Vose Co.*,¹⁴⁸ a products liability suit brought by the estate of a deceased cigarette smoker against a corporation that had provided asbestos containing filters for cigarettes.¹⁴⁹ Beverly Lesnick brought suit after her husband died from lung cancer.¹⁵⁰ She alleged that the filters in Kent brand cigarettes that were manufactured by Hollingsworth & Vose Co. were part of her husband's death because of the asbestos incorporated into the filters.¹⁵¹ Lesnick sued both Hollingsworth & Vose Co. and Lorillard, Inc. because Hollingsworth & Vose manufactured the filter and then shipped it to Lorillard's plants.¹⁵² Only Hollingsworth & Vose asserted the claim of lack of personal jurisdiction.¹⁵³ Factually, Hollingsworth & Vose provided Lorillard with material for approxi-

141. See discussion *infra* Part III.B.1-2.

142. See *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994).

143. See *OMI Holdings, Inc. v. Royal Insurance Co. of Canada*, 149 F.3d 1086 (10th Cir. 1998).

144. See *supra* notes 168-70, and accompanying text.

145. See *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994).

146. See *id.* at 943-44.

147. See *id.*

148. 35 F.3d 939 (4th Cir. 1994).

149. See *id.* at 940.

150. See *id.*

151. See *id.*

152. See *id.*

153. See *id.*

mately 10 billion asbestos-containing filters which were incorporated into cigarettes sold throughout the nation.¹⁵⁴ Lesnick alleged specifically that the defendants “knew or should have known of the dangers of crocidolite asbestos at the time the cigarettes and filters were manufactured, but that they failed to make improvements in them or to warn the public of these dangers.”¹⁵⁵ In denying jurisdiction, the court concluded that Hollingsworth & Vose’s activities were not directed toward serving the forum state.¹⁵⁶

In discussing whether Hollingsworth & Vose had purposefully availed themselves of the forum state by directing their product toward its market, the court discussed in detail both *World-Wide Volkswagen* and *Asahi*.¹⁵⁷ The Fourth Circuit held that the stream of commerce test in *World-Wide Volkswagen* indicates that “the Court has not abandoned the notion that jurisdiction must rest on a person’s activity deliberately directed toward the forum state.”¹⁵⁸ In analyzing *Asahi*, the court noted that the Supreme Court failed in its attempts to clarify the language in *World-Wide Volkswagen* that a “mere placement of goods in the stream of commerce subjects a plaintiff to suit in any state where the goods might foreseeably cause injury.”¹⁵⁹ Instead of involving itself in the stream of commerce debate, the Fourth Circuit chose to reconcile the two decisions with past Supreme Court precedent.¹⁶⁰ The court held that “our reading of *World-Wide Volkswagen* and *Asahi* is that the Supreme Court has not abandoned the *International Shoe*¹⁶¹ two-pronged test as further articulated in *Hanson*¹⁶² & *Burger King*.”¹⁶³ The court held that the minimum contacts analysis for the stream of commerce test requires that an out-of-state person have engaged in some activity purposely directed toward the forum state.¹⁶⁴ Hollingsworth & Vose had no activity purposefully directed towards the forum state.¹⁶⁵ The only contact with the forum state was through its relationship with Lorillard’s contacts.¹⁶⁶ The company’s relationship in selling cigarettes did not

154. See *Lesnick*, 35 F.3d at 940.

155. See *id.*

156. See *id.* at 946-47.

157. See *id.* at 943-45.

158. *Id.* at 943. The court recognized that *World-Wide Volkswagen* has been interpreted to only require that a product be placed into the stream of commerce with the expectation that it will be purchased by consumers in the forum state in order to exercise personal jurisdiction over a non-resident defendant. (citing e.g., *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1084-85 (5th Cir. 1984), *Nelson v. Park Industries, Inc.*, 717 F.2d 1120, 1125-26 (7th Cir. 1983), cert denied, 104 S. Ct. 1277, 1278 (1984)). However, the Fourth circuit interpreted the holding to be “much narrower, requiring purposeful activity on the part of the defendants to establish a meaningful contact with the forum state.” *Id.* at 944.

159. *Id.* at 944. The Fourth Circuit discussed Justice O’Connor’s view as siding with those courts that have rejected the broad reading of *World-Wide Volkswagen* that if a manufacturer is simply aware that its product may be sold in the forum state, jurisdiction may be allowed. Under Justice O’Connor’s view, *World-Wide Volkswagen* should be read as requiring more of the defendant than just mere knowledge. *Id.*

160. See *Lesnick*, 35 F.3d at 945.

161. 326 U.S. 310, 316 (1957).

162. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

163. *Lesnick*, 35 F.3d at 945; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *World-Wide Volkswagen*, 444 U.S. at 297.

164. See *Lesnick*, 35 F.3d at 945.

165. See *id.* at 946-47.

166. See *id.* at 946.

rise to the level of establishing jurisdiction because the conduct (the relationship) was not directed toward the forum state.¹⁶⁷

In trying to reconcile the cases, the court has without explaining its reasons concluded that *Asahi* did not affect the stream of commerce test established in *World-Wide Volkswagen*.¹⁶⁸ By its reading of *World-Wide Volkswagen*, it required a defendant to purposely direct his or her activities toward the forum state to establish a meaningful contact.¹⁶⁹ After *Asahi*, the Fourth Circuit still interprets the stream of commerce test to require that a person purposefully direct his or her activities toward the forum state.¹⁷⁰ Even though the court approached the current debate over the stream of commerce analysis in a different way than the previously mentioned courts, the Fourth Circuit relied on the precedent set in *World-Wide Volkswagen* without allowing the three different opinions in *Asahi* to have changed the standard.¹⁷¹

2. Tenth Circuit

For non-resident defendants, product liability cases are not the only setting in which the stream of commerce debate after *Asahi* occurred.¹⁷² Since *Asahi*, the Tenth Circuit has not addressed the stream of commerce debate in a products liability case.¹⁷³ The Tenth Circuit explored the issue of what level of contact is required to assert jurisdiction in a suit to establish a duty to defend by liability insurers in *OMI Holdings, Inc. v. Royal Insurance Co. of Canada*.¹⁷⁴ The Tenth Circuit has not directly addressed the on-going debate involving the stream of commerce test after *Asahi*,¹⁷⁵ but in *OMI Holdings* it applied the purposeful contact analysis using both *Asahi* and *World-Wide Volkswagen*.¹⁷⁶

*OMI Holdings, Inc. v. Royal Insurance Co. of Canada*¹⁷⁷ involved a suit by a defendant in a patent infringement suit to establish the duty to defend against several of its liability insurers.¹⁷⁸ In examining whether the insurers had minimum contacts with the forum state, the Tenth Circuit applied a two-fold analysis

167. See *id.* at 946-47.

168. See *id.* at 943-45.

169. See *id.* at 944.

170. See *Lesnick*, 35 F.3d at 945.

171. See *id.* at 943-45.

172. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991). *Shute* involved a personal injury suit by a passenger aboard Carnival Cruise Lines for injuries sustained in a slip and fall. *Id.* at 379. The Ninth Circuit applied the facts in the record and found jurisdiction under both Justice O'Connor's and Justice Brennan's analysis in *Asahi*. See *id.* at 381-82. See also *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994). *Beverly Hills Fan Co.* involved a suit by Beverly, a holder of a design patent for ceiling fans against Ultec, the manufacturer and importer of the fans allegedly infringing on Beverly's patent. *Id.* at 1560. The Federal Circuit also used the facts in the record to find jurisdiction reasonable under either *Asahi* tests. See *id.* at 1566.

173. See *OMI Holdings, Inc. v. Royal Insurance Co. of Canada*, 149 F.3d 1086 (10th Cir. 1998).

174. See *id.* at 1089-90.

175. See *id.* at 1092-93.

176. See *Packerware Corp.*, 15 F. Supp. 2d at 1079.

177. 149 F.3d 1068 (10th Cir. 1998).

178. See *id.* at 1089-90.

incorporating both *Asahi* and *World-Wide Volkswagen*.¹⁷⁹ The court first employed the language of *World-Wide Volkswagen* to decide “whether the defendant has such minimum contacts with the forum state ‘that he should reasonably anticipate being haled into court there.’”¹⁸⁰ As part of this question, the court used *Asahi*’s plurality test to decide if these contacts resulted from “actions by the defendant himself that create a substantial connection with the forum state.”¹⁸¹ Because of these established standards, the court held it must examine “the quantity and quality” of the defendant’s contacts with the forum state.¹⁸²

In examining the insurer’s contacts, the court found that the defendant insurer demonstrated some showing of minimum contacts with the forum state based on the territory coverage clause, yet the court held that “sole reliance on the territory of coverage clause creates contacts which are qualitatively low on the due process scale.”¹⁸³ The court ultimately found jurisdiction unreasonable under the reasonableness factors analysis.¹⁸⁴ Like the Fourth Circuit in *Lesnick v. Hollingsworth & Vose Co.*,¹⁸⁵ the Tenth Circuit reconciled *World-Wide Volkswagen* and *Asahi* to establish one purposeful contact test to which it applied the facts in the record to decide if jurisdiction was reasonable.¹⁸⁶

C. Adopting Justice O’Connor’s Test

The First Circuit is the only circuit to conclusively adopt one position set forth in *Asahi* over another in product liability suits. The First Circuit in two recent decisions has supported the analysis set forth by the Justice O’Connor plurality in *Asahi* that additional conduct must accompany placing the product into the stream of commerce.¹⁸⁷ The First Circuit upheld Justice O’Connor’s analysis in *Boit v. Gar-Tec Products Inc.*¹⁸⁸ which was based on previous First Circuit decisions, and an Eighth and Eleventh Circuit opinions, both of which have subsequently changed.¹⁸⁹ *Boit* was then upheld by the First Circuit in *Rodriguez v. Fullerton*

179. *See id.* at 1091.

180. *See id.* (quoting *Worldwide Volkswagen*, 444 U.S. at 297).

181. *OMI Holdings*, 149 F.3d at 1091 (quoting *Asahi*, 480 U.S. at 109).

182. *OMI Holdings*, 149 F.3d at 1092.

183. *Id.* at 1095.

184. *See id.* at 1095-98. The court held that the burden on the defendant insurer was significant, the forum state’s interest in the litigation was low because neither plaintiffs nor defendants were forum state residents, the plaintiffs could receive relief in an alternative forum, and exercising jurisdiction in the forum state would affect the substantive social policies of a foreign country. *Id.*

185. 35 F.3d 939 (4th Cir. 1994).

186. *See OMI Holdings*, 149 F.3d at 1091-92.

187. *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997); *Boit v. Gar-Tec Prods. Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992).

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

189. *See Boit*, 967 F.2d at 683 (citing *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990); *Madara v. Hall*, 916 F.2d 1510, 1516-17 (11th Cir. 1990); *Keds Corp. v. Renee Int’l Trading Corp.*, 888 F.2d 215, 220 (1st Cir. 1989); *Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989) as those circuits which have adopted Justice O’Connor’s plurality view). The Eighth Circuit changed its position to follow the precedent of *World-Wide Volkswagen*. *See Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610, 614 (8th Cir. 1994). The Eleventh Circuit now applies both *Asahi* tests refusing to choose one analysis over another. *See Vermeulen v. Renault*, 985 F.2d 1534 (11th Cir. 1993).

*Tires Corp.*¹⁹⁰ which relied exclusively on *Boit* and failed to discuss approaches taken by other circuits.¹⁹¹

The First Circuit analyzed the stream of commerce theory in a pre-*Asahi* decision, *Rodriguez v. Hughes Aircraft Co.*¹⁹² In *Hughes Aircraft Co.*, the court held that simply because the defendant knew that the two helicopters it sold to another company were destined for the forum state, the defendant had not purposefully engaged in other forum activities to be reasonable to haul it into court in the forum state.¹⁹³ In *Hughes Aircraft Co.*, the court used *World-Wide Volkswagen* language acknowledging that the manufacturer must engage in purposeful activities so that the defendant can expect to be taken to court in the forum state.¹⁹⁴

The First Circuit relied on its decision in *Hughes Aircraft Co.* to justify its adoption of Justice O'Connor's analysis in *Boit v. Gar-tec Products Inc.*¹⁹⁵ *Boit* involved a products liability action against a non-resident manufacturer of hot air guns.¹⁹⁶ William Babson, a contractor who was working on the home of the Boits, used an electric hot gun to strip paint from the exterior clapboards.¹⁹⁷ Babson placed a written order with Brookstone for the hot air gun that was shipped through the mail.¹⁹⁸ The gun was labeled "Gar-Tec," and the gun was shipped in a box containing a manual with the name "Gar-Tec."¹⁹⁹ The Boits alleged that the heat from the hot air gun penetrated the exterior wall of their home and ignited materials inside the wall, causing a fire that seriously damaged their home and belongings.²⁰⁰ The court affirmed the district court's finding that Gar-Tec was not subject to the jurisdiction of the forum state.²⁰¹

In denying jurisdiction, the court in *Boit* interpreted *Asahi* as not undermining its decision in *Hughes Aircraft Co.*²⁰² The *Boit* court made the leap that the additional conduct Justice O'Connor proposed in *Asahi* is what makes it reasonable to haul a defendant into court in the forum state, even though a majority of the Supreme Court did not hold that the additional conduct was necessary.²⁰³ The First Circuit concluded that the minimum contacts standard required more than just the mere placement of a product into the stream of commerce; the defendant must have

190. 115 F.3d 81 (1st Cir. 1997).

191. *See id.* at 85.

192. 781 F.2d 9 (1st Cir. 1986).

193. *See* 781 F.2d at 15. The defendants in *Hughes Aircraft Co.* sold two helicopters to a company which in turn resold the helicopters to a police department in Puerto Rico. The court held that it was an "isolated splash," not the type of transaction that could reasonably lead a manufacturer to believe it could be haled into court. The court held that it did not matter whether Hughes knew that the helicopters were being sold to the police department in Puerto Rico because the test is whether the defendant purposefully engaged in forum activities so it could be reasonably haled into court there. *Id.*

194. *See id.*

195. 967 F.2d 671, 682-83 (1st Cir. 1992).

196. *See id.* at 673-74.

197. *See id.* at 673.

198. *See id.* at 674.

199. *See id.*

200. *See id.* at 673.

201. *See Boit*, 967 F.2d at 673.

202. *See id.* at 682-83.

203. *See id.*

designed, advertised, marketed, or established channels for providing advice in the forum state.²⁰⁴ The First Circuit held that “those circuits that have squarely addressed the stream-of-commerce issue since *Asahi* have adopted Justice O’Connor’s plurality view.”²⁰⁵ The only evidence offered for its stance, though, is two prior First Circuit cases, an Eleventh and an Eighth Circuit opinion both of which have subsequently changed.²⁰⁶

Using Justice O’Connor’s analysis, the First Circuit ultimately held that the defendant in *Boit* did not possess the required minimum contacts for jurisdiction.²⁰⁷ No evidence existed that the product was designed, advertised, or marketed in the forum state.²⁰⁸ The court also relied on the fact that the plaintiffs could not cite a post-*Asahi* case holding “that by placing a product into the stream of commerce with knowledge that the product could end up in the forum state a defendant purposefully established minimum contacts in that state.”²⁰⁹

The First Circuit upheld its decision in *Boit* in its later decision, *Rodriguez v. Fullerton Tires Corp.*,²¹⁰ holding again that additional conduct was necessary to satisfy the stream of commerce theory.²¹¹ *Fullerton Tires Corp.* involved a products liability suit against a tire dealer who brought a third party complaint against a non-resident tire manufacturer.²¹² The court simply held that *Asahi* was still good law which required more than just mere knowledge that the stream of commerce would bring the tire rims into the forum state in order to establish minimum contacts.²¹³

The First Circuit made no distinction between the language in *World-Wide Volkswagen* requiring that a defendant have asserted its intent directly or indirectly to serve the forum state such that it is reasonable to haul him into court, and Justice O’Connor’s plurality decision in *Asahi* in which she felt additional conduct such as marketing or advertising the product in the forum state was needed by the defendant to make jurisdiction reasonable.²¹⁴ Even though the court relied on Justice O’Connor’s test, it did not address that Justice O’Connor’s plurality view is a more stringent test because of the requirement of additional conduct, and that Justice Brennan’s test of simply being aware the product is being marketed in the forum state is a lower threshold.²¹⁵ The First Circuit no longer used the *World-Wide Volkswagen* language that it had applied in its previous *Hughes Aircraft Co.* decision because it assumed that the additional conduct in Justice O’Connor’s test was the amount of contact required to haul a defendant into court in the forum state.²¹⁶

204. See *id.* at 683.

205. See *id.*

206. See *id.*

207. See *Boit*, 967 F.2d at 683.

208. See *id.* at 683.

209. See *id.*

210. 115 F.3d 81 (1st Cir. 1997).

211. See *id.* at 85.

212. See *id.* at 82.

213. See *id.* at 85.

214. See *Boit*, 967 F.2d at 682-83.

215. See *Fullerton Tires Corp.*, 115 F.3d at 85.

216. See *supra* notes 194, 202-03, and accompanying text.

D. Relying on the Established Precedent of World-Wide Volkswagen

While many of the circuits chose not to decide which stream of commerce analysis to apply, a few of the circuits still explicitly opt to follow the established precedent of *World-Wide Volkswagen*.²¹⁷ *World-Wide Volkswagen* was the last Supreme Court case to yield a majority consensus on the amount of contact required to establish a purposeful contact under the stream of commerce theory.²¹⁸ *Asahi* not only lacked a majority view on the purposeful contact issue, the facts of *Asahi* cause the case to have a more narrower focus than *World-Wide Volkswagen*.²¹⁹ *Asahi* only involved an indemnification suit by a foreign plaintiff against a foreign defendant.²²⁰ The facts of *Asahi* limit the discussion of a purposeful contact unlike the facts in *World-Wide Volkswagen*.²²¹ *World-Wide Volkswagen* may have involved non-resident parties, but the case did not involve the foreign public policy issues present in *Asahi*.²²² Because both parties in *Asahi* were foreign, the Court was forced to consider the substantive and procedural policies of Taiwan and Japan.²²³ If California asserted jurisdiction, the court would be asserting its authority over a claim that did not concern the United States.²²⁴ The Seventh, Eighth, and Fifth Circuits have all recognized the problems in *Asahi* and followed the precedent set in *World-Wide Volkswagen*, since *Asahi* did not by a majority change the requirements of the stream of commerce theory.²²⁵

1. Seventh Circuit

The Seventh Circuit was the forerunner among the three circuits still following the precedent set in *World-Wide Volkswagen*.²²⁶ The Seventh circuit applied the standard in *World-Wide Volkswagen* in a products liability suit against a nonresident manufacturer of defective fireworks.²²⁷ In *Dehmlow v. Austin Fireworks*,²²⁸ the plaintiff, Dehmlow, was injured during a fireworks display at a high-school in Illinois.²²⁹ While acting as a shooter for the fireworks display for Bartolotta Fireworks, Inc., Dehmlow suffered permanent injuries and disfigurement when one of the fireworks manufactured and distributed by Austin Fireworks, the defendant,

217. See discussion *infra* Part III.D.1-3.

218. See notes 1-8 *supra*, and accompanying text.

219. See discussion *infra* Part III.B.

220. See *Asahi*, 480 U.S. at 103.

221. See *Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610, 611-12 (8th Cir. 1994).

222. See *Asahi*, 480 U.S. at 115.

223. See *id.*

224. See *id.*

225. See discussion *infra* Part III.D.1-3.

226. The Seventh Circuit decided their case in 1992 while the Fifth circuit soon followed in 1993 with the Eighth Circuits first decision in 1994. See discussion *infra* Part III.D.1-3.

227. See *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 943 (7th Cir. 1992). The suit was brought by Craig Dehmlow, an Illinois resident against Austin Fireworks, a Kansas corporation who manufactured and distributed fireworks to a certain Wisconsin corporation who displayed fireworks in Illinois and throughout the Midwest. *Id.*

228. 963 F.2d 941 (7th Cir. 1992).

229. See *id.* at 943.

improperly detonated.²³⁰ Austin Fireworks is a Kansas corporation which manufactured and distributed the fireworks used in the Illinois display.²³¹ The Seventh Circuit held that personal jurisdiction over Austin Fireworks was proper under the stream of commerce theory in *World-Wide Volkswagen*.²³²

The court began its discussion of whether the defendant Austin had enough purposeful contacts under the stream of commerce theory with a discussion of *World-Wide Volkswagen*.²³³ In reiterating the Supreme Court's language, the court held that a "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."²³⁴ The Seventh Circuit stated that the Supreme Court's decision in *Asahi* cast doubt on the stream of commerce theory because it could not agree which level of contact was required under the stream of commerce theory.²³⁵ Instead of involving itself in the stream of commerce debate like many of the circuits, the Seventh Circuit chose to decide its stream of commerce cases under the familiar umbrella of precedent and follow the last Supreme Court decision to receive a majority, *World-Wide Volkswagen*.²³⁶ The court held:

[b]ecause the Supreme Court established the stream of commerce theory and a majority of the Court has not yet rejected it, we consider that theory to be determinative. We may not depart from Court precedent on the basis of a belief that present Supreme Court Justices would not readily agree with past Court decisions.²³⁷

The stream of commerce theory also establishes an element of fairness because a state has an interest in protecting its citizens against defendants who have the benefit of modern transportation and communication to distribute their products all over the world.²³⁸ In asserting jurisdiction over Austin Fireworks, the court ruled that the required contacts under the *World-Wide Volkswagen* standard existed based on Austin Firework's national advertising, its regular Illinois customers, and its agent's contacts in Illinois for firework displays.²³⁹

Even though the Seventh Circuit appeared firm in its commitment to the established precedent of *World-Wide Volkswagen*, the court recognized the split by

230. *See id.*

231. *See id.*

232. *See id.* at 947.

233. *See id.* at 946.

234. *Dehmlow*, 963 F.2d at 946 (quoting the Supreme court in *World-Wide Volkswagen*, 444 U.S. at 297-98).

235. *See Dehmlow*, 963 F.2d at 947 (citing *Asahi*, 480 U.S. at 114-18).

236. *See id.* at 947. The Seventh Circuit chose to follow precedent because precedent is a course of conduct which serves as a guide for future conduct in cases until the 'legal principle' is changed by subsequent cases. BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

237. *Dehmlow*, 963 F.2d at 947.

238. *See id.*

239. *See id.* at 944.

the court in *Asahi* and addressed Justice O'Connor's more stringent test.²⁴⁰ The court held that the plaintiff also satisfied Justice O'Connor's test because the defendant had purposefully directed its sale of fireworks toward the forum state and by its actions showed an intent to serve the forum state's markets.²⁴¹ Interestingly, though, in its conclusion under the stream of commerce theory, the Seventh Circuit returned to the language of *World-Wide Volkswagen*.²⁴² The court held that when a defendant directed its conduct toward serving the forum state, it could not complain that it could not have foreseen being haled into court in the forum state.²⁴³ Just like the previous circuits which chose to apply the facts to all the *Asahi* tests and used the language in *World-Wide Volkswagen* to define the standard, the Seventh Circuit used the language to define its standard under *Asahi* also.²⁴⁴ The Seventh Circuit not only explicitly applied the test in *World-Wide Volkswagen*, it also illustrated that even when a court applies the facts to the tests in *Asahi*, the language in *World-Wide Volkswagen* must be used because *Asahi* did not change the standard.²⁴⁵

2. Eighth Circuit

The Eighth Circuit is the most recent circuit to address the stream of commerce debate, choosing to follow the established precedent set in *World-Wide Volkswagen*.²⁴⁶ Since the *Asahi* decision, the Eighth Circuit has issued two separate opinions supporting *World-Wide Volkswagen*.²⁴⁷ Its most recent decision, *Vandelune v. 4B Elevator Components Unlimited*,²⁴⁸ the Eighth Circuit relied on its own precedent of *Barone v. Rich Bros. Interstate Display Fireworks Co.*²⁴⁹

The Eighth Circuit in *Barone v. Rich Bros. Interstate Display Fireworks Co.*²⁵⁰ upheld the *World-Wide Volkswagen* analysis in a products liability suit against a foreign manufacturer of fireworks.²⁵¹ Bernard Barone was injured during a fireworks display and sued the distributor as well as the manufacturer of the fireworks, Hosoya Fireworks Co. of Tokyo, Japan.²⁵² The Eighth Circuit ultimately

240. See *id.* at 947. The court tried to qualify their analysis by stating that since a more permissive stream of commerce theory was used, it would address the plaintiff Dehmlow contention "that the facts of his case satisfy even the more stringent minimum contacts test." *Id.*

241. See *id.*

242. See *id.* at 948. See also *World-Wide Volkswagen*, 444 U.S. at 297.

243. See *Dehmlow*, 963 F.2d at 948.

244. See *id.*

245. See *id.* at 947-48.

246. See *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998), *cert. denied*, 525 U.S. 1018 (1998).

247. See *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994); *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998).

248. 148 F.3d 943 (8th Cir. 1998).

249. 25 F.3d 610 (8th Cir. 1994).

250. See *id.*

251. *Id.* at 610-14.

252. See *id.* at 611. Barone was employed by Highland Country Club of Omaha, Nebraska. The distributor was Rich Bros. Interstate Display Fireworks Co. Of Sioux Falls, South Dakota, and two manufacturers, one which was Hosoya. *Id.*

concluded that Hosoya was subject to personal jurisdiction in the forum state because the defendant indirectly served the forum market and reaped the benefits of its distributors throughout the country.²⁵³

The Eighth Circuit discussed the stream of commerce analysis by comparing the language of *World-Wide Volkswagen* to Justice Brennan's opinion in *Asahi*.²⁵⁴ The Eighth Circuit held that the Justices in *Asahi* who agreed that placement of a product into the stream of commerce with the knowledge that the product would be distributed into the forum state satisfied due process (Justice Brennan's view), were "simply following the Court's earlier statement in *World-Wide Volkswagen* that when a manufacturer or distributor attempts to serve a market directly or indirectly . . . , it is not unreasonable to subject it to suit in [that market]."²⁵⁵ Unlike the Eleventh Circuit, which considered *World-Wide Volkswagen* the middle ground between Justice O'Connor's view and Justice Brennan's view,²⁵⁶ the Eighth Circuit held that the test is still the same under either Justice Brennan's view or *World-Wide Volkswagen* because Justice O'Connor's group was simply trying, but not able, to raise the standard.²⁵⁷ The Eighth Circuit did not distinguish the fact that Justice Brennan's test only required that a participant be *aware* that the product is being marketed in the forum state,²⁵⁸ while *World-Wide Volkswagen* required at least indirect attempts to serve the forum state's market.²⁵⁹

After reconciling *World-Wide Volkswagen* with Justice Brennan's concurring view in *Asahi*, the court in *Barone* yielded support to its position to apply the *World-Wide Volkswagen* standard.²⁶⁰ Quoting from the Seventh Circuit, the Eighth Circuit held that "[b]ecause the Supreme Court established the stream of commerce theory, and a majority of the court has not yet rejected it, we consider that theory to be determinative."²⁶¹ Under a *World-Wide Volkswagen* standard, "there must be some act by which the defendant purposefully avails itself of . . . the forum State, thus invoking the benefits and protections of its laws."²⁶² The *Barone* court held that the defendant was subject to the jurisdiction of the forum state because it "poured its products into regional distributors throughout the country."²⁶³ The defendant Hosoya also reaped the benefits of its network of distributors such that suit in the forum state was reasonable.²⁶⁴

In addition to realizing the value of following past precedent, the Eighth Circuit also examined the issue of the limiting factual situation in *Asahi* that few

253. See *id.* at 615.

254. See *id.* at 614.

255. See *id.*

256. See *supra* note 134, and accompanying text.

257. See *Barone*, 25 F.3d at 614 n.4.

258. See *Asahi*, 480 U.S. at 117.

259. 444 U.S. at 297.

260. 25 F.3d at 614.

261. See *id.* (quoting *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992)).

262. See *id.* at 612; see also *World-Wide Volkswagen*, 444 U.S. at 291.

263. 25 F.3d at 615.

264. See *id.* Hosoya received between "a quarter of a million and a million dollars worth of fireworks (averaging \$640,000 annually over a six-year period), which constituted between fifty-one and ninety-two percent (averaging just over seventy percent) of Hosoya's fireworks business." *Id.* at 611.

courts address directly.²⁶⁵ The Eighth Circuit held 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.”²⁶⁶ The factual scenario limited *Asahi* because the only claim left involved an indemnification claim between a Taiwanese corporation and a Japanese corporation.²⁶⁷ The Supreme Court did not even know if California law would govern an indemnification claim between the two foreign parties when the sale was made in Taiwan and the shipment of goods in Japan.²⁶⁸

The Eighth Circuit upheld its decision in *Barone in Vandelune v. 4B Elevator Components Unlimited*.²⁶⁹ *Vandelune* involved a products liability suit by an employee at Consolidated Cooperative Grain Elevator in Iowa against the British manufacturer of a safety warning device used in grain elevators, Synatel Instrumentation Ltd.²⁷⁰ *Vandelune* was seriously injured in a grain dust explosion allegedly caused by a faulty Speedswitch Monitor which failed to function properly.²⁷¹ The Speedswitch is supposed to stop the conveyer belt in the Elevator when its speed is reduced by twenty percent of its normal operating speed.²⁷² The claim asserted that the warning device was not triggered until too late.²⁷³ Relying on *World-Wide Volkswagen*, the Eighth Circuit reversed the district court in holding that the manufacturer had sufficient contacts under the stream of commerce theory to permit jurisdiction.²⁷⁴

The trial court in *Vandelune* relied on Justice O'Connor's opinion in *Asahi* and held that the defendant did not have enough purposeful activity directed towards the forum state.²⁷⁵ The Eighth Circuit overruled the trial court based on a previous Eighth Court decision²⁷⁶ which ruled that due to the *Asahi* split on what level of contact is required under the stream of commerce theory to satisfy the due process in a products liability case, the teachings of *Burger King* and *World-Wide Volkswagen* would still be followed.²⁷⁷ Under *World-Wide Volkswagen*, “a manufacturer whose product ends up in the forum State on an ‘attenuated, random, or fortuitous’ basis has not purposefully directed its activities at residents of that State.”²⁷⁸ However, when a manufacturer puts his or her products “into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-

265. See *id.* at 614. No other circuit courts were found which specifically ruled that the *Asahi* holding could be limited simply by the factually scenario since the only dispute left was an indemnification claim between two foreign entities.

266. See *Barone*, 25 F.3d at 614.

267. *Asahi*, 480 U.S. at 114-15.

268. See *id.* at 115.

269. 148 F.3d 943 (8th Cir. 1998).

270. *Id.* at 945.

271. See *id.*

272. See *id.*

273. See *id.* at 945-46.

274. See *id.* at 948.

275. 148 F.3d at 947.

276. See *Barone*, 25 F.3d at 615.

277. See *Vandelune*, 148 F.3d at 948.

278. See *id.* See also *Burger King*, 471 U.S. at 475; *World-Wide Volkswagen*, 444 U.S. at 296-97.

State trade area, the manufacturer has “purposefully reaped the benefits” of the laws of each State in that trade area for due process purposes.²⁷⁹ Based on the design of the product for the grain elevator market, the shipping of the product into the region, and the amount of sales in Iowa, the court held that the defendant’s motion to dismiss for lack of personal jurisdiction should have been denied.²⁸⁰ In its two decisions, the Eighth Circuit reaffirmed the precedent value of *World-Wide Volkswagen* and recognized the limitations of *Asahi*.²⁸¹

3. Fifth Circuit

Recognizing that the precedent in *World-Wide Volkswagen* has not been overruled by a majority of the Supreme Court, like the Eighth Circuit, the Fifth Circuit also continued to follow the stream of commerce theory established in *World-Wide Volkswagen*.²⁸² The Fifth Circuit most recently addressed the stream of commerce issue in a third party complaint for contribution in *Ruston Gas Turbines, Inc., v. Donaldson Co.*²⁸³ *Ruston Gas* involved a products liability suit by Ruston against Donaldson over the manufacture and sale of two gas-turbine engine systems.²⁸⁴ Donaldson filed a third party complaint against Corchran, a company which had manufactured certain component parts of the systems that Donaldson sold to Ruston.²⁸⁵ Corchran filed the motion to dismiss the third party claim on the basis of lack of personal jurisdiction, believing it did not have the requisite contacts with the forum state.²⁸⁶ The Fifth Circuit held that jurisdiction could be exercised over Corchran because he had intentionally placed his product into the stream of commerce in order to serve the forum state.²⁸⁷

In asserting jurisdiction, the court began its discussion of the stream of commerce theory by using the language of *World-Wide Volkswagen*.²⁸⁸ The minimum contacts prong is satisfied as long as the “non-resident defendant purposefully avails itself of the privilege of conducting activities within the forum state . . . ‘purposeful availment’ must be such that the defendant should reasonably

279. See *Vandelune*, 148 F.3d at 948.

280. See *id.* The court held that the fact the Switch monitors were distributed through its affiliate with its distinctive “Owl” logo and decal on each device, and employees attended technical support meetings close to the Iowa border also contributed to the conclusion that the contacts with the forum state were not “attenuated, random, or fortuitous.” *Id.*

281. See discussion *infra* Part III.D.2.

282. See *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 (5th Cir. 1993)(following *World-Wide Volkswagen* until its rejection by a majority of the Supreme Court); *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 386 (5th Cir. 1989)(gauging purposeful contacts by the stream of commerce standard established in *World-Wide Volkswagen* since *Asahi* does not provide any clear guidance on the issue); *Beary v. Beech Aircraft Co.*, 818 F.2d 370, 375 (5th Cir. 1987)(referring to the uncertainty in *Asahi*).

283. 9 F.3d 415 (5th Cir. 1993).

284. See *id.* at 417. Ruston sued Donaldson for breach of contract, breach of warranty and strict products liability over a contract between the two companies. *Id.*

285. See *id.* Corchran is a Minnesota corporation and conducts no business in Texas, the state where the suit has been filed. *Id.*

286. See *id.*

287. See *id.* at 420-21.

288. See *id.* at 419.

anticipate being haled into court in the forum state.²⁸⁹ The Fifth Circuit interpreted *World-Wide Volkswagen* liberally by holding that “mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant’s product made its way into the forum state while still in the stream of commerce.”²⁹⁰ Using its liberal analysis, the court reasoned that Corchran “intentionally placed its products into the stream of commerce by delivering them to a shipper destined for delivery in Texas.”²⁹¹ Corchran knew that its products would end up in Texas.²⁹² Corchran also should have anticipated being haled into court in Texas from its 211 contacts with Texas through its business relationships, making the exercise of jurisdiction proper.²⁹³

In keeping with its own precedent, the Fifth Circuit established jurisdiction on the basis of *World-Wide Volkswagen*, and disregarded the stream of commerce “plus” theory of Justice O’Connor in *Asahi*.²⁹⁴ The Fifth Circuit rejected *Asahi*’s “splintered view” because it did not command a majority of the court or provide clear guidance on the amount of contact required under the stream of commerce theory.²⁹⁵ The Fifth Circuit explicitly chose to follow the stream of commerce theory established in *World-Wide Volkswagen* because it was the last Supreme Court decision to give clear guidance on the issue of minimum contacts in the stream of commerce analysis.²⁹⁶

These three circuits which chose to follow the precedent in *World-Wide Volkswagen* realized the limited application of *Asahi*.²⁹⁷ *Asahi* was first limited by its facts because it involved two foreign parties.²⁹⁸ *Asahi* was next limited because a majority of the Court did not decide how much contact was required under the stream of commerce theory.²⁹⁹ While the other circuits are holding that they are not choosing a test under *Asahi*, they are impliedly still following *World-Wide Volkswagen* because they must use its language to define a purposeful contact under the stream of commerce theory.³⁰⁰ The Seventh, Eighth, and Fifth Circuits are explicitly calling it to the Supreme Court’s attention that *Asahi* did not change the stream of commerce theory and *World-Wide Volkswagen* is still precedent.³⁰¹

289. *Ruston Gas*, 9 F.3d at 419 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). The Fifth Circuit follows the Supreme Court’s rationale in *World-Wide Volkswagen* that it is enough for minimum contacts if a non-resident defendant places their product into the stream of commerce with knowledge of its use in the forum state. *Id.*

290. *See Ruston Gas*, 9 F.3d at 419.

291. *See id.* at 420.

292. *See id.*

293. *See id.* at 420-21.

294. *See id.* at 420; *see also supra* note 282.

295. *See id.*

296. *See Ruston Gas*, 9 F.3d at 420 (quoting *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 386 (5th Cir. 1989)).

297. *See discussion infra* Part III.D.2.

298. *See Asahi*, 480 U.S. 114-15.

299. *See id.* at 112, 116-17.

300. *See discussion infra* Part III.

301. *See discussion infra* Part III.D.1-3.

IV. CONCLUSION

The stream of commerce test was originally created to enable a state to exercise jurisdiction over non-resident manufacturers who did not have direct contact with that state.³⁰² States sought to protect their citizens who were injured by products of the manufacturers, and the stream of commerce test enabled states to bring the manufacturers into court to enforce liability.³⁰³ The Supreme Court in *World-Wide Volkswagen* applied the stream of commerce test, holding that the contact should be such that the defendant should reasonably foresee being haled into court in the forum state.³⁰⁴ When the Supreme Court decided *Asahi*, it was slated as the case to help further clarify the amount of contact the defendant must have with the forum state for the exercise of jurisdiction to be proper.³⁰⁵ Instead, *Asahi* further confused the issue³⁰⁶ by splitting the Court.³⁰⁷ Justice O'Connor's four held that additional conduct on the part of the defendant is needed for the exercise of jurisdiction to be proper.³⁰⁸ However, Justice Brennan's four held that as long as the product is placed into the stream of commerce, and the defendant benefits from the sale of the product in the forum state, the exercise of jurisdiction should be proper.³⁰⁹ Neither group was able to raise or lower the amount of contact the defendant must have with the forum state that was established in *World-Wide Volkswagen* because neither had a majority.³¹⁰

The confusion over the stream of commerce test continued into the circuit courts, as evidenced by the split in the circuits in applying the analysis in product liability suits.³¹¹ The First Circuit chose Justice O'Connor's test in requiring additional conduct by the defendant³¹² while the Fourth Circuit reconciled *World-Wide Volkswagen* and *Asahi* into one test.³¹³ Three of the circuits chose to apply the facts in the record to all of the tests in *Asahi*.³¹⁴ These circuits simply ensure that enough facts exist so that the exercise of jurisdiction under any analysis is appropriate.³¹⁵ Even though only three of the circuit courts explicitly chose to continue applying *World-Wide Volkswagen's* precedent,³¹⁶ most all the circuit courts impliedly follow *World-Wide Volkswagen's* standard by employing its

302. See *Pennzoil Prods. Co. v. Colelli & Assoc., Inc.*, 149 F.3d 197, 203 (3d Cir. 1998).

303. See *id.*

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

305. See *Packerware Corp. v. B & R Plastic, Inc.*, 15 F. Supp. 2d 1074, 1079 (D. Kan. 1998).

306. See *id.*

307. See *Asahi*, 480 U.S. at 112, 116-17.

308. See *id.* at 112.

309. See *id.* at 116-17.

310. See *id.* at 112-17.

311. See discussion *infra* Part III.

312. See *Boit v. Gar-Tec Prods. Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992).

313. See *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994).

314. See discussion *infra* Part III.A.1-3.

315. See discussion *infra* Part III.A.1-3.

316. See discussion *infra* Part III.D.1-3.

language.³¹⁷ Because *Asahi* did not provide any guidance on how to define a purposeful contact under the stream of commerce test, *World-Wide Volkswagen* is still the most logical answer.³¹⁸ *World-Wide Volkswagen* is the only court to define purposeful contact with majority support, and it is still precedent.³¹⁹ *World-Wide Volkswagen's* stream of commerce test which held that it is not unreasonable to subject a defendant to suit in the forum state "if the sale of a product . . . arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States" remains the standard for product liability suits.³²⁰

Because *World-Wide Volkswagen* is still the standard for the stream of commerce analysis, non-resident defendants and their attorneys must be wary that *Asahi* did not raise the amount of conduct needed to find the exercise of personal jurisdiction proper. Even in the circuit courts claiming to be following *Asahi* by applying the facts in the record to all the *Asahi* analyses, *World-Wide Volkswagen* language is still employed to describe stream of commerce standard.³²¹ Courts still examine whether the defendant has shown any intent to serve the forum state either directly or indirectly in order to make the exercise of jurisdiction reasonable.³²²

Because of all the different tests being employed by the circuit courts, the Supreme Court must revisit the issue of personal jurisdiction under the stream of commerce theory. In *Asahi*, the Court sought to clarify the amount of contact required to establish jurisdiction when a non-resident manufacturer places its product into the stream of commerce.³²³ The court failed in its goal since four sought to raise the bar while another four sought to lower the bar and neither succeeded.³²⁴ The circuit split is evidence of the confusion in applying the stream of commerce analysis not only in product liability suits, but in any case in which a purposeful contact analysis is used.³²⁵ Currently, *World-Wide Volkswagen* is the standard for the stream of commerce test because most all of the circuits employ its language to define the test,³²⁶ and *Asahi* did not change the standard with a majority of the Court.³²⁷ *World-Wide Volkswagen* therefore, stands as the precedent until the Supreme Court unifies the circuits and changes the standard.

Kristin R. Baker

317. See discussion *infra* Part III.

318. See discussion *infra* Part II.B.

319. See *supra* notes 1-8, and accompanying text.

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

321. See discussion *infra* Part III.

322. See discussion *infra* Part III.

323. 480 U.S. at 105.

324. See *id.* at 112, 116-17.

325. See discussion *infra* Part III.

326. See discussion *infra* Part III.

327. See discussion *infra* Part III.