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OKLAHOMA HIGH COURT REJECTS “STREAM OF COMMERCE” DOCTRINE AS BASIS FOR SPECIFIC JURISDICTION

by Gary Isaac

In the past several years, the U.S. Supreme Court has issued several decisions significantly limiting the assertion of personal jurisdiction over nonresident defendants.¹ However, it has been left to the lower state and federal courts to apply the principles delineated by the Supreme Court. One recent personal jurisdiction decision of note is [Montgomery v. Airbus Helicopters, Inc.](#), 414 P.3d 824 (Okl. 2018), which concluded that in the wake of *Walden* and *Bristol-Myers Squibb (“BMS”)*, the “stream of commerce” doctrine is no longer a viable basis for specific jurisdiction.

The “stream of commerce” doctrine

The “stream of commerce” doctrine rests on the idea that a corporation may be subject to specific jurisdiction if it “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State” and the plaintiff’s claims arise out of use of the product in the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). The Supreme Court took up the doctrine in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), but neither case resulted in a majority decision articulating a clear test for its application. Rather, two competing formulations of the doctrine emerged from *Asahi*.

Under Justice O’Connor’s “stream of commerce plus” test, “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State,” and “[a]dditional conduct of the defendant” is required to “indicate an intent or purpose to serve the market in the forum State, for example, 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 serve as the sales agent in the forum State.” 480 U.S. at 112.

By contrast, under Justice Brennan’s test, the mere act of placing a product in the stream of commerce may be sufficient, at least so long as there is a “regular and anticipated flow of products” from the defendant to the forum state and the defendant “is aware that the final product is being marketed in the forum State.” *Id.* at 117. In *McIntyre*, Justice Kennedy’s plurality opinion (564 U.S. at 883-85) followed

¹ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Walden v. Fiore*, 571 U.S. 277 (2014); *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

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Justice O'Connor's approach, but as in *Asahi*, no opinion garnered a majority of the Court.

Walden and BMS

The Supreme Court's decisions in *Walden* and *BMS* have been the subject of previous Washington Legal Foundation *Legal Backgrounders*,² and it is beyond the scope of this commentary to discuss those decisions again in depth. Suffice it to say that in *Walden*, the Court articulated several basic principles that govern where specific jurisdiction is at issue: that due process permits the exercise of specific jurisdiction only where the defendant's "suit-related conduct" creates a "substantial connection" with the forum state and the claims "arise out of contacts that the 'defendant *himself* creates with the forum'" (571 U.S. at 284; emphasis in original); that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction" (*id.* at 286); and that "mere injury to a forum resident is not a sufficient connection to the forum" (*id.* at 290).

Moreover, in *BMS*, the Court made clear that without a connection between a defendant's in-state conduct and the claims at issue, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." 137 S. Ct. at 1781. The Court likewise made clear that "'the mere fact'" that a defendant's conduct outside the forum "'affected plaintiffs with connections to the forum State'" does "'not suffice to authorize jurisdiction.'" *Id.* at 1781–82 (quoting *Walden*, 571 U.S. at 291).

The Montgomery Court's Application of BMS and Walden

The issue in *Montgomery* was whether certain nonresident defendants were subject to specific jurisdiction in Oklahoma for claims arising out of a helicopter crash there. Defendant Airbus Helicopters, Inc. ("Airbus") sold the helicopter in an unassembled condition F.O.B. its place of business in Texas to EagleMed, which operated a helicopter ambulance service based in Wichita, Kansas. 414 P.3d at 826. EagleMed arranged for the helicopter to be shipped to Wichita for assembly. *Id.* "The purchase agreement between EagleMed and Airbus contained a forum selection and choice of law clause regarding any litigation to take place in Texas" (*id.*), but "Airbus did know that this helicopter would be going to EagleMed's headquarters in Wichita and purportedly knew it would be used in Oklahoma." *Id.*

Four years later, defendant Soloy sold and shipped an "engine conversion kit" to EagleMed in Wichita, and the kit "was installed shortly thereafter." *Id.* The court noted that "[a]ccording to Soloy, it did not specifically design its conversion kit for the Oklahoma market, nor did it direct advertising or marketing materials specifically to Oklahoma." *Id.* Moreover, "Soloy has no offices, agents, employees, or property in Oklahoma nor does it distribute to Oklahoma." *Id.*

EagleMed's service territory included five states: Kansas, Oklahoma, Missouri, Arkansas, and Nebraska. *Id.* at 827. Airbus apparently "offered continuous technical support to EagleMed regarding their helicopters," but all of Airbus's communications with EagleMed were "made with the main base in Wichita, even though it is likely that some of the communication regarded helicopters which were located in Oklahoma." *Id.*

In 2013, the helicopter crashed shortly after takeoff in Oklahoma City, killing two Oklahoma residents. The pilot's widow then brought suit in Oklahoma.

² See Andrew Tauber and Gary Isaac, [US Supreme Court Curtails Forum Shopping](#), Aug. 11, 2017; Dan Himmelfarb, Gary Isaac, and Andrew Tauber, [Personal Jurisdiction Over Corporate Defendants: Debunking Plaintiffs' Post-Daimler Dodges](#), Apr. 7, 2017; and Gary Isaac, [Does Daimler v. Bauman Portend an End to Madison County's Reign as a Top 'Magnet Jurisdiction'?](#), June 19, 2015.

In analyzing the defendants' amenability to specific jurisdiction, the court noted that its prior decisions had "focused either on the 'totality of contacts' between the non-resident defendant[s] and the State of Oklahoma and the resident plaintiff[s], or the nature of the contacts and whether the contact occurred in the 'stream of commerce.'" *Id.* at 831 (footnote and internal quotation marks omitted). The court noted that its prior decisions had not "formally adopt[ed] either the O'Connor or Brennan test" (*id.* at 833), but that it had recognized "that Justice O'Connor's stricter 'stream of commerce plus' test can be met when a defendant's conduct outside the forum results in their product being placed in the forum and they know and benefit from that placement." *Id.*

Relying on *Walden* and *BMS*, however, the court held Airbus and Soloy could not be subject to specific jurisdiction under the "stream of commerce" doctrine (*id.*), and that by "omit[ting]" any reference to "previous 'stream of commerce analysis," *Walden* and *BMS* had "presumptively, at least implicitly, reject[ed] such analysis." *Id.* at 831. The court offered several reasons for this conclusion.

First, the court observed, *BMS* "requires an affiliation between the forum and the underlying controversy, an activity or an occurrence that takes place in the forum State, which subjects the cause to the State's regulation." *Id.* at 833. "Accordingly," the *Montgomery* Court found, under *BMS*, "a 'sliding scale' approach, or 'totality of the contacts' or 'stream of commerce' approach is insufficient to establish specific personal jurisdiction." *Id.*³

Second, the court noted that "[t]he only direct contacts appear to be between the non-resident EagleMed and the non-residents Airbus and Soloy ... in Texas and in Kansas" (*id.* at 832), and that "[p]ursuant to *Walden* ... a defendant's relationship with a third party, such as EagleMed, is an insufficient basis for jurisdiction." *Id.* at 833.

And, finally, the court found, "EagleMed's unilateral choice to fly the helicopter into Oklahoma cannot serve as a basis for subjecting Airbus and Soloy to suit in Oklahoma." *Id.* at 834.

It remains to be seen whether other courts will follow *Montgomery* and hold that *Walden* and *BMS* foreclose reliance on the "stream of commerce" doctrine because those decisions "at least implicitly[] reject[ed]" it. *Id.* at 831.⁴

³ In *BMS*, the Court expressly rejected California's "sliding scale approach," under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." 137 S. Ct. at 1781. "Our cases," the Court noted, "provide no support for this approach, which resembles a loose and spurious form of general jurisdiction." *Id.* And *Montgomery* found "persuasive" that in "two recent cases"—including another Oklahoma case—where the state courts had used a totality of the circumstances approach, the U.S. Supreme Court had granted certiorari, vacated the judgment, and remanded for further consideration in light of *BMS*. See 414 P.3d at 834 & nn. 31 & 32 (citing cases).

⁴ Thus far, only a few other cases have said anything about this issue. In *Rodriguez v. City of Phila.*, 2017 U.S. Dist. LEXIS 180661 (E.D. Pa. Oct. 31, 2017), for example, the court found that "[t]he facts in *Walden* are inapposite to the facts of this case, which involve goods being placed into the stream of commerce by an out-of-state manufacturer," and "[t]herefore, *Walden* has no bearing on this decision." *Id.* at *18 n.7. And in *Tarver v. Ford Motor Co.*, 2017 WL 3527710 (W.D. Okla. Aug. 16, 2017), a federal court sitting in Oklahoma declined to reconsider, based on *BMS*, its prior finding of specific jurisdiction; in a pre-*Montgomery* decision, the court found that reconsideration was unwarranted because, *inter alia*, the initial finding of personal jurisdiction was based "in substantial part pursuant to the 'stream of commerce' theory articulated in *Asahi*," and *BMS* "makes no mention of the 'stream of commerce' doctrine." *Id.* at *3. Indeed, in its Conclusion, the *Montgomery* court observed that "Airbus and Soloy created very specific products but did not aim the products at Oklahoma markets" and that "[t]he emergency helicopter industry is not a traditional industry with a traditional manufacturer selling products to masses of consumers." 414 P.3d at 834. We will also have to wait to see whether the Oklahoma Supreme Court will apply its holding in *Montgomery* to a case involving "a traditional manufacturer selling products to masses of consumers."