

## Clarifying The Impact Of Nicaastro

*Law360, New York (January 23, 2012, 1:36 PM ET)* -- Another federal appeals court will have an opportunity to assess the reach of the U.S. Supreme Court's decision in *J. McIntyre Machinery Ltd. v. Nicaastro*.

In *Ainsworth v. Cargotec USA Inc.*, No. 2:10-cv-00236 (S.D. Miss., Dec. 15, 2011), the district court certified its opinion finding personal jurisdiction in a forklift case.

Readers will recall that *Nicaastro* resulted in a 6-3 decision with a plurality opinion by Justice Anthony Kennedy, Justices Stephen Breyer and Samuel Alito concurring in the judgment, and Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan dissenting.

Kennedy addressed the stream-of-commerce notion, stating that no "stream-of-commerce" doctrine can displace that general rule of purposeful availment, even for product liability cases. He acknowledged that the standards for determining state jurisdiction over an absent party have been a bit unclear because of decades-old questions left open in *Asahi*.

This imprecision arising from *Asahi*, for the most part, resulted from its statement of the relation between jurisdiction and the notion of placing a product in the "stream of commerce." That concept, like other metaphors, has its "deficiencies as well as its utilities."

A defendant's placement of goods into commerce "with the expectation that they will be purchased by consumers within the forum State" may sometimes indicate purposeful availment. But that does not swallow the general rule of personal jurisdiction. The principal inquiry in cases of this sort is still whether the defendant's activities manifest an intention to submit to the power of a sovereign.

Breyer, joined by Alito, agreed in the result, but concluded that because this case did not present the new and special issues arising from recent changes in commerce and communication, it was unnecessary to get into full analysis of the stream-of-commerce issue as it might be applied to 21st-century marketing.

Since then, lower courts have continued to grapple with the meaning of the decision, with most recognizing that merely depositing goods in the stream of commerce, with knowledge that some will end up in the forum state, is not enough to satisfy the minimum contacts standard for personal jurisdiction.

Here, plaintiffs were the survivors of a Mississippi resident who was struck and killed by a forklift designed and manufactured by defendant Moffett Engineering, an Irish corporation, with its principal place of business in Dundalk, County Louth, Ireland.

Moffett has never maintained a physical presence in Mississippi. It does not own, possess or use any property in Mississippi. It has never had any officers, employees or agents stationed in Mississippi, and it has never sent any of its employees to Mississippi for business purposes. It has never directly shipped or sold any of its products to customers there, and it has never directly solicited business from any company located in Mississippi.

Moffett sold all of its products to defendant Cargotec, which had the exclusive right to market and sell Moffett's products pursuant to a contract which specifically defines the U.S. as Cargotec's sales territory. Cargotec sells or markets Moffett products in all 50 states. Moffett does not attempt to limit the territory in which Cargotec sells its products.

Further, Moffett does not communicate with the end-purchasers of its products in any fashion, and it is not aware of their identities or locations. Cargotec sold 203 of those forklifts to customers in Mississippi, about 1.55 percent of Moffett's United States sales.

The district court previously denied Moffett's motion to dismiss for lack of personal jurisdiction. *Ainsworth v. Cargotec USA, Inc.* (S.D. Miss. May 9, 2011). After that decision, the Supreme Court issued its opinion in *J. McIntyre Machinery Ltd. v. Robert Nicaastro*, 131 S. Ct. 2780 (2011). Moffett filed a motion for reconsideration, arguing that decision controlled this dispute.

The district court denied the motion again, and concluded that Breyer's Nicaastro opinion was only applicable to cases presenting the same factual scenario as that case.

But the court did agree the decision involves a controlling question of law as to which there is substantial ground for difference of opinion, noting at least one decision employing the stricter analysis from Justice Kennedy's plurality opinion, *Keranos LLC v. Analog Devices Inc.* (E.D. Tex. Sept. 12, 2011).

Review would materially advance the litigation, concluded the court, certifying it to the Fifth Circuit. A case to keep our eye on.

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