

**Stream of commerce "plus" theory**

平成 18 年 7 月 14 日

安藤 誠二

As a preliminary matter, we note that in the instant action, the district court, as well as the parties on appeal, presume that this Circuit has adopted Justice O'Connor's approach to purposeful availment as articulated in *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102 (1987) (O'Connor, J.) (plurality op.). In *Asahi*, which reflects the Supreme Court's most recent discussion of purposeful availment, the Court debated whether a foreign manufacturer that places a product in the stream of commerce purposefully avails itself of the privilege of conducting business in a state where the product ultimately is found. In her plurality opinion, which embraces what has come to be known as the "stream of commerce 'plus'" theory, Justice O'Connor opined that "[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." *Asahi*, 480 U.S. at 112.

Although a majority of the *Asahi* Court agreed that jurisdiction was not proper, Justice O'Connor secured only three other justices to join in her articulation of a stream of commerce "plus" theory. *See id.* at 116-22.

While some appellate courts have expressly adopted one of *Asahi's* conflicting conceptions of minimum contacts via the stream of commerce, most circuits, including the Sixth Circuit, have avoided explicitly articulating a preference. *See, e.g., Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197 (3d Cir. 1999) (declining to expressly adopt any of the *Asahi* plurality positions); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-15 (8th Cir. 1994) (adopting a position consistent with that of Justice Brennan); *Ruston Gas Turbines, Inc. v. Donaldson Company*, 9 F.3d 415, 420 (5th Cir. 1993) (same); *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (adopting a position consistent with that of Justice O'Connor); and *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (same); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) ("Because jurisdiction . . . over [the defendant] in this case . . . is consistent with due process under the more stringent 'stream of commerce plus' analysis adopted by the [O'Connor] plurality, we need not determine which standard actually controls this case"); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (concluding that exercise of jurisdiction must satisfy the test articulated by the O'Connor plurality).

Although this Circuit thusfar has avoided expressly adopting a position, the only published opinions in our Circuit directly addressing the issue, albeit admittedly in dicta, express a leaning toward Justice O'Connor's approach. In *CompuServe*, we noted that the "injection of . . . [a]

product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction." *See CompuServe*, 89 F.3d at 1265. In *Tobin*, the court did not expressly adopt Justice O'Connor's stream of commerce "plus" test, but did cite with approval from Justice O'Connor's opinion and acknowledged without rebuke that the district court had relied heavily on Justice O'Connor's opinion. *See Tobin*, 993 F.2d at 543.

In the instant action, the parties do not call upon the Court to adopt one *Asahi* approach over the other, and thus it is tempting once again to defer committing to one particular approach. However, unlike other instances in which an analysis under all three *Asahi* approaches would yield the same result, thus permitting avoiding establishing a clear rule, the facts in the instant action, particularly under the relaxed prima facie standard, would seem to dictate different results under the three *Asahi* plurality approaches. Therefore, instead of undertaking the time-consuming task of analyzing the facts under all three approaches, and then being left to select an approach based upon the end result, we make clear today our preference for Justice O'Connor's stream of commerce "plus" approach, for the reasons set forth in that opinion, and conduct the remainder of our analysis accordingly.

( Bridgeport Music, Inc., et al., *Plaintiffs-Appellants*, v. Still N The Water Publishing, et al., *Defendants-Appellees*, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, Decided and Filed: May 5, 2003 )