

Case Study: *J. McIntyre Machinery Ltd. v. Nicastro*

By Kelly Wilkins MacHenry

As published in *Product Liability Law360* on January 18, 2011, reprinted and/or posted with permission.

On Jan. 11, 2011, the U.S. Supreme Court heard argument on a product liability case that could either reinforce that court's holdings about whether a foreign corporation may be sued in the United States in state courts, or one that could radically change the picture due to increased globalization of commerce. The key question the court is considering is whether a new contemporary international economy allows a state to exercise specific, personal jurisdiction over a foreign manufacturer solely because the manufacturer targets the national market as a whole and a consumer buys the product in that state.

Petitioner J. McIntyre Machinery Ltd. was a British corporation based in Nottingham, England. It was a manufacturer of heavy equipment used in the scrap metal industry. McIntyre Machinery of America, Inc. (MMA) was its exclusive distributor and a distinct corporate entity, an Ohio corporation with its principal place of business in Ohio. The two companies had no written contract between them. In 1995, Robert Nicastro's New Jersey employer Curcio Scrap Metal Inc. ordered a metal-shearing machine from J. McIntyre. J. McIntyre made the machine in England, shipped it by sea and sold it to MMA. MMA then sold and shipped it over land to Curcio Scrap Metal in New Jersey.

Nicastro worked for Curcio Scrap Metal. On Oct. 11, 2001, he was operating the machine when his right hand got caught in it, severing four of his fingers. He and his wife, New Jersey residents, sued J. McIntyre Machinery in New Jersey state court on product liability claims. They alleged the machine lacked adequate safety protections and was defectively designed. MMA went bankrupt and dissolved before suit was filed.

The trial court dismissed the case for lack of personal jurisdiction. The Appellate Division reversed, and the Supreme Court of New Jersey affirmed the Appellate Division's decision. In a decision that began, "Today, all the world is a market," the New Jersey Supreme Court discarded the guideposts of minimum contacts (after finding none) and purposeful availment as "outmoded." It found they no longer applied to a new global marketplace, and instead held that J. McIntyre knew or should have known that its distribution scheme could make its products available to New Jersey consumers. J. McIntyre petitioned to the U.S. Supreme Court, and certiorari was granted.

In the Supreme Court, J. McIntyre argued that upholding jurisdiction over it would "radically revise the test for personal jurisdiction over a foreign manufacturer." J. McIntyre main-

tained that personal jurisdiction rests not on a consumer's activity or where a product ultimately ends up, but rather on the quality of the defendant's activities directed toward the forum state. It argued that the theme of a global marketplace had not been explored and had no evidentiary support in the record. It contended that the basic methods of selling and transporting products are essentially the same as over the past decades — over air, sea, land and road. It noted that the legislative and executive branches would be those to act to change the jurisdiction laws.

In opposition, Nicastro argued that J. McIntyre had the requisite minimum contacts with New Jersey. He contended that J. McIntyre purposefully marketed its product nationwide and put it into a distribution scheme for national sales. He argued that the manufacturer and distributor worked together to promote and sell J. McIntyre's products in the U.S.

During the argument on Jan. 11, the court posed many questions and hypotheticals to both sides. Arthur Ferguson argued for J. McIntyre, and Alexander Ross Jr. argued for Nicastro.

In questions about what constituted "purposeful availment," Justice Stephen Breyer expressed concerns about the policy problem of potentially subjecting small businesses and those in developing countries to suit in all 50 states where laws vary, which would be costly and would impede the development of such companies. Justice Breyer commented, "I'd worry about a rule of law that subjects every small business in every developing country to have to be aware of the law in 50 states simply because they agreed to sell to an independent company who is going to sell to America."

In a hypothetical about whether on the same facts the worker had been from Montana instead, when Nicastro's counsel answered that he would not have been able to sue in Montana because there would have been no purposeful availment, Chief Justice John Roberts commented, "To me, that's a significant limitation on your theory."

The justices were very interested in the potential effects of Internet communications by manufacturers on the question of jurisdiction, and to what extent Internet activity between manufacturers and buyers would create purposeful availment of a market.

Justice Ruth Bader Ginsberg focused on the available and proper forums for suit by a plaintiff such as Nicastro, and Justice Sonia Sotomayor questioned about fact specifics such as the level of coordination between the manufacturer and distributor, and the advertising and on-product materials provided with the machine.

Justice Antonin Scalia posited that Congress could instead act to establish a uniform system of subjecting foreign manufacturers to suit in federal courts, rather than vesting such jurisdiction with state courts. J. McIntyre had also noted that one bill is currently pending in Congress to require certain foreign manufacturers to select a state in which to subject themselves to jurisdiction, as a condition of doing business in the U.S.

Justice Elena Kagan focused some of her questions on J. McIntyre's targeting of the entire national market, noting that "the United States is the United States. It's made up of 50 states." She expressed the view that New Jersey was targeted by the manufacturer no less than any other state.

Those filing friend-of-the-court briefs arguing that jurisdiction should not be found over the manufacturer include the Product Liability Advisory Council Inc., the Chamber of Commerce of the United States and other business associations. Those filing friend-of-the-court briefs urging that jurisdiction should be found include the American Association of Justice (a plaintiffs' lawyers group), Public Citizen, a workers' advocacy organization, a group of law professors and a group of 18 state attorneys general (not including New Jersey's).

If the court upholds jurisdiction over J. McIntyre in this case, it could dramatically change how foreign manufacturers do business in the U.S., or whether they do business here at all. It would likely change the way foreign companies advertise (including on the Internet), as well as how they interact with distributors, buyers and potential buyers.

On the other hand, if the court reverses and finds there was no specific jurisdiction over McIntyre, foreign manufacturers would continue to be able to be sued in state courts in cases of minimum contacts of and purposeful availment of the state market, or in many instances could be sued through their U.S. distributors.

Two past decisions from the Supreme Court in product liability cases are central to the court's analysis in this case. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), related to a tire valve made by a Taiwanese company, and the resulting indemnification claim between the supplier and the manufacturer; no jurisdiction was found over the supplier. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), arose out of a VW car crash in Oklahoma and the plaintiff's claim against the New York distributor; no jurisdiction was found over the distributor.

Asahi, the most recent of those cases, was decided in 1987, and except for Justice Scalia there has been complete turnover in the court's membership in those nearly 24 years. Other product liability cases, including two on preemption already argued and a similar case about general personal jurisdiction over a foreign corporation (*Goodyear Luxembourg Tires v. Brown*) that was heard immediately after this case, are being considered by the high court this term.

J. McIntyre Machinery is represented by Arthur Fergenson, Steven Gooby, Robert Assuncao and James Coons of Ansa Assuncao LLP. Following the argument, Assuncao commented, "It was an honor to appear before the court. We were pleased with the interest expressed by the justices and look forward to the decision." Robert Nicastro is represented by Alexander Ross Jr. and Janice Heinold of Rakoski & Ross PC.

The case is *J. McIntyre Machinery Ltd. v. Nicastro*, United States Supreme Court, No. 09-1343.



Kelly Wilkins MacHenry
602.382.6370
kmacheny@swlaw.com

Kelly represents clients in product liability, financial services, and business litigation. She advises, defends and tries cases for companies throughout the United States and is the co-chair of the firm's Consumer Product Safety team. She created the yearly cover story feature of Arizona civil verdicts for Arizona Attorney magazine and has written the article for six consecutive years.

Snell & Wilmer
L.L.P.
LAW OFFICES

www.swlaw.com