“Stream of commerce plus” or minus?  
Advancing the law of personal jurisdiction in product liability cases

By Melissa A. Murphy-Petros

Issues concerning personal jurisdiction and stream of commerce have important implications for companies from other states and countries in product liability actions. A company located in another state or country selling products that eventually reach the forum state or the U.S. market could under certain circumstances be subject to personal jurisdiction and suit in the forum state or the U.S. even though the company does not have a physical presence within that state or country. Divergent case law has demonstrated that the courts have been split over the question of personal jurisdiction and the application of the stream of commerce theory in product liability cases. Generally, many federal circuit and state supreme courts faced with this question have divided into three approaches: “stream of commerce plus”, “stream of commerce” and deciding not to decide. This article discusses these three distinct approaches and advocates a concerted effort by the defense bar at both the trial and appellate levels to promote judicial adoption of the "stream of commerce plus" test.

Many product liability cases raise an important, recurring, and unanswered question of personal jurisdiction over a product or component’s designer, manufacturer, or distributor – the scope and application of the stream of commerce theory of minimum contacts. Indeed, “[g]iven the increasingly interstate and international character of today’s economy and the relatively free movement of goods and services without regard to state and national boundaries, few issues of personal jurisdiction are more important than the status of this stream of commerce theory.” 4 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE, V.4 § 1067.4 (2006).

The many federal courts of appeals and state supreme courts that have addressed this issue are deeply split. One group of courts uses the “stream of commerce” test first mentioned in World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), and advocated by Justice Brennan in his plurality opinion in Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987). A different group of courts applies the “stream of commerce plus” test promulgated by Justice O’Connor in a different Asahi plurality.

Since World-Wide Volkswagen and Asahi, the economic landscape has changed dramatically. As a result of such developments as the Internet and liberalization of world trade, domestic and foreign companies of all sizes now have unlimited access to the United States market. See, e.g., Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996):

The Internet represents perhaps the latest and greatest manifestation of these historical globe-shrinking trends. It enables anyone with the right equipment and knowledge … to operate an international business cheaply, and from a desktop. That business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able to “structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.” (quoting World-Wide Volkswagen, 444 U.S. at 297).

Product liability suits involving jurisdictional issues recur frequently. In Saia v. Scrip-to-Tokai Corp., 851 N.E.2d 693 (Ill. App. 2006), pet for leave to appeal denied, 861 N.E.2d 664 (Ill. 2006), cert. denied, 127 S. Ct. 2252 167 L. Ed. 2d 1090 (2007), for example, the Illinois Appellate Court found that personal jurisdiction over Tokai Corporation in Illinois was constitutionally permissible solely because it designed a product in Japan and its U.S. subsidiary in California—a separate corporation in whose operations Tokai plays no role—bought the design in Japan, had the product manufactured in Mexico by a Mexican corporation, and then distributed the product into the national stream of commerce in the United States, from which it ultimately came to Illinois. These essential facts are not unique to any particular jurisdiction, and with no current
national uniform interpretation and application of the stream of commerce theory, some federal and state courts would

Because there is no uniform national interpretation of the stream of commerce theory of minimum contacts in product liability actions, any person or business involved in the design, manufacture, or distribution of a product for nationwide sale is faced with uncertainty regarding an essential business concern—whether they may be hauled into court in every jurisdiction where the product with which they were involved is sold, regardless of whether they intended its sale there. Savage, 147 F. Supp. 2d at 93 (“[I]f the Court were to accept plaintiff’s explanation for why jurisdiction lies in Connecticut, jurisdiction would of necessity lie in every state in the nation.”). This uncertainty has created an environment in which “little predictability remains for potential plaintiffs and defendants in the present world economy.” Kopke v. A. Hartrodt S.R.L., 629 N.W.2d 662, 685 (Wis. 2001), cert. denied, 534 U.S. 1079 (2002) (Crooks, J., dissenting).

Until the Supreme Court decides to resolve it, this uncertainty and its resultant implications must always be borne in mind by product litigators as they frame their arguments seeking dismissal or venue changes on jurisdictional grounds. A concerted effort by in-house counsel and the trial bar to promote judicial adoption of the “stream of commerce plus” test will lay the groundwork for appellate advocates to continue their efforts to advance this critical area of the law in a direction beneficial to the defense.

The Federal Circuits and the State Supreme Courts Are Deeply Split in Their Application of the Stream of Commerce Theory

Which Stream to Follow?
The Supreme Court first considered the stream of commerce theory of minimum contacts in product liability actions in World-Wide Volkswagen, 444 U.S. 286 (1980). In World-Wide Volkswagen, the question presented was whether an Oklahoma court could exercise personal jurisdiction over an automobile retailer and wholesaler—both New York corporations—in a product liability action. Id. at 288–89. The defendants’ only contact with Oklahoma was through the sale of a car to a non-resident consumer in New York, who then drove the car to Oklahoma where the subject accident occurred. Id. The Court found no “efforts [by defendants] to serve, directly or indirectly, the market for its products in [Oklahoma],” id. at 297, and held that the defendants could not be subjected to personal jurisdiction where their alleged contacts with the forum state were based on the unilateral act of the consumer and not on any act of their own. Id. at 298.

The plaintiffs in World-Wide Volkswagen argued that “because an automobile is mobile by its very design and purposes it was ‘foreseeable’ that the [subject automobile] would cause injury in Oklahoma.” Id. at 295. The Court responded that “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” Id. at 295. The Court then noted, however, that foreseeability is not “wholly irrelevant.”

[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297.

Although the World-Wide Volkswagen Court held that “the mere likelihood that the product will find its way into the forum State” is not “critical to due process analysis,” it also held that “the 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 they will be purchased by consumers in the forum State.” Id. at 298. These arguably conflicting holdings left open the question of precisely what quality and quantity of contacts between a product’s non-resident manufacturer-distributor-designer and the forum state would demonstrate an “expectation that [its products] will be purchased by consumers in the forum State.” Id. at 298. While the Court clearly held that jurisdiction could not be based upon the foreseeable unilateral actions of a consumer, it was not clear on when a defendant’s act of participating in the
placement of a product in the stream of commerce that foreseeably could end up in the forum state would satisfy the minimum contacts requirement of the Due Process Clause.

Lower courts differed in their interpretation of World-Wide Volkswagen, as Justice O’Connor noted when the Court next addressed the question in Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987):

Since World-Wide Volkswagen, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant’s product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum State. Some courts have understood the Due Process Clause, as interpreted in World-Wide Volkswagen, to allow an exercise of personal jurisdiction to be based on no more than the defendant’s act of placing the product in the stream of commerce. Other courts have understood … World-Wide Volkswagen to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.

Id. at 110 (O’Connor, J., plurality opinion).

Asahi presented the Court with the opportunity to clarify the stream of commerce issue, but it was unable to reach a majority conclusion. In one plurality opinion, Justice O’Connor – joined by Chief Justice Rehnquist and Justices Powell and Scalia – set out the “stream of commerce plus” theory of minimum contacts. Under the “stream of commerce plus” theory, a defendant who places its product into the stream of commerce has minimum contacts with the forum state sufficient to subject it to jurisdiction only where it has also done something purposefully directed toward the forum state:

The “substantial connection,” Burger King, 471 U.S. at 475, 105 S. Ct. at 2184; McGee, 355 U.S. at 223, 78 S. Ct. at 201, between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state. Burger King, supra, 471 U.S. at 476, 105 S. Ct. at 2184; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S. Ct. 1473, 1478, 79 L.Ed.2d 790 (1984). The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may 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. But a defendant’s awareness that the stream of commerce may 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 toward the forum State.

Id. at 112 (emphasis in original) (O’Connor, J., plurality opinion).

Justice Brennan—joined by Justices White, Marshall, and Blackmun—disagreed. Id. at 116-122 (Brennan, J., plurality opinion). He reasoned instead that minimum contacts exist whenever the defendant is “aware” that the “final product is being marketed in the forum state”:

Under [Justice O’Connor’s] view, a plaintiff would be required to show “[a]dditional conduct” directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause. Ibid. I see no need for such a showing, however. 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. As long as a participant in the process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot
come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State’s laws that regulate and facilitate commercial activity. 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 (Brennan, J., plurality opinion).

The Supreme Court has not addressed the stream of commerce theory in the nearly 21 years since _Asahi_, and its failure in _Asahi_ to reach a majority on the issue has left unsettled the law of personal jurisdiction in product liability suits in both federal and state courts across the country. See, e.g., _Ruston Gas Turbines, Inc. v. Donaldson Co., Inc._, 9 F.3d 415, 420 (5th Cir. 1993) (“_Asahi_ does not provide clear guidance on the ‘minimum contacts’ prong.”); _Vermuelen v. Renault, U.S.A. Inc._, 965 F.2d 1014, 1024-1025 (11th Cir. 1992), cert. denied, 508 U.S. 907 (1993) (“[T]he current state of the law regarding personal jurisdiction is unsettled.”); _Ruckstuhl v. Owens Corning Fiberglas Corp._, 731 So.2d 881, 889 (La. 1999), cert. denied, 528 U.S. 1019 (1999) (“[W]e have no Supreme Court precedent that guides us as to which theory, if either, represents the law.”). Indeed, commentators now refer to personal jurisdiction in product liability suits as a “quagmire” in which “confusion and disagreement are the order of the day.” Andrew Kurvers Spalding, _Note: In the Stream of Commerce Clause: Revisiting Asahi in the Wake of Lopez and Morrison_, 4 NEV. L. J. 141, 155 (2003) (“quagmire”); Robert J. Condlin, “Defendant Veto” or “Totality of the Circumstances?” It’s Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again, 54 CATH. U. L. REV. 53, 147 (2004) (“confusion and disagreement are the order of the day”).

Three Distinct Approaches

With no majority in _Asahi_, the many federal circuit and state supreme courts that have been faced with a stream of commerce question in a product liability action have divided into three dichotomous approaches.

“Stream of Commerce Plus”
The first group of courts has adopted Justice O’Connor’s “stream of commerce plus” theory. This group holds that personal jurisdiction over a product’s manufacturer-designer-distributor is permissible where the product is placed in the stream of commerce and where the defendant has undertaken additional conduct specifically directed toward the forum state, such as advertising there or designing the product specifically for its market. This group includes the First and Sixth Circuits, as well as the states of Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Pennsylvania, Rhode Island, South Dakota, and the District of Columbia. See, e.g., _Rodriguez v. Fullerton Tires Corp._, 115 F.3d 81, 85 (1st Cir. 1997); _Boit v. Gar-Tec Products, Inc._, 967 F.2d 671, 682–83 (1st Cir. 1992); _Fortis Corporate Ins. v. Viken Ship Management_, 450 F.3d 214, 218–21 (6th Cir. 2006); _Bridgeport Music, Inc. v. Still N The Water Publishing_, 327 F.3d 472, 479–80 (6th Cir. 2003), cert. denied, 540 U.S. 948 (2003); _Hapner v. Solis Apparatus v. Manufactories, Ltd._, 411 N.W.2d 439, 447–50 (Mich. 1987); _Sorrells v. R 7 R Custom Coach Works, Inc._, 636 So.2d 668, 669, 674–75 (Miss. 1994); _Conway v. Royalite Plastics, Ltd._, 12 S.W.3d 314, 318–19 (Mo. 2000); _Bedrejo v. Triple E Canada, Ltd._, 984 P.2d 739, 742 (Mont. 1999); _Wagner v. Unicorn Corp._, 526 N.W.2d 74, 78–80 (Neb. 1995); _Vermont Wholesale Building Products, Inc. v. J.W. Jones Lumber Co., Inc._, 914 A.2d 818, 822–28 (N.H. 2006); _Kachur v. Yugo Motor Corp._, 632 A.2d 1297, 1300–01 (Pa. 1993); _Anderson v. Metropolitan Life Ins. Co._, 694 A.2d 701, 703 (R.I. 1997); _Frankenfeld v. Crompton Corp._, 697 N.W.2d 378, 382-386 (S.D. 2005); _Holder v. Haarmann & Reimer Corp._, 779 A.2d 264, 275 (D.C. 2001).

“Stream of Commerce”

A second group of courts has adopted Justice Brennan’s “stream of commerce” theory. This group holds that personal jurisdiction over a product’s manufacturer-designer-distributor in the forum state is permissible where the product is placed into the stream of commerce; no additional conduct of the defendant directed toward the forum state is required. It includes those courts that have explicitly chosen to follow the “expectation-stream of commerce” sentence in _World-Wide Volkswagen_ (444 U.S. at 298) on the ground that _World-Wide Volkswagen_ was the last Supreme Court case to yield a majority on the amount of contact required to support personal jurisdiction under the stream of commerce theory. These courts rely upon _World-Wide Volkswagen_ for the proposition that a product liability defendant has minimum contacts with the forum state if it

Deciding Not to Decide
A final group of courts has expressly and explicitly decided not to decide the question of how to apply the stream of commerce theory of personal jurisdiction in product liability suits given the “unfortunate ambiguity created by Asahi.” Dehmlow, 963 F.2d at 949 (Ripple, J., concurring). These courts instead decide each case on its own facts, with the result being “a crazy-quilt pattern of jurisdictional policies and standards that no longer resembles its historical antecedents or has any unifying principle, consistency, or predictable capability.” Condlin, 54 CATH. U. L. REV. at 1147. As the Sixth Circuit noted when it left this group in favor of joining the First Circuit and adopting the “stream of commerce plus” theory, the courts who have not have decided to “undertak[e] the time-consuming task of analyzing the facts under all three [Asahi] approaches, and then … select an approach based on the end result.” Bridgeport Music, 327 F.2d at 480. This group includes the Second, Third, and Eleventh Circuits, and the states of Louisiana, Minnesota, New Jersey, and Texas. See, e.g., Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 243–44 (2d Cir. 1999); Pennzoil Products Co. v. Colelli & Associates, Inc., 149 F.3d 197, 203–05 (3d Cir. 1998); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993), cert. denied, 508 U.S. 907 (1993); Ruckstuhl v. Owens Corning Fiberglas Corp., 731 So. 2d 881, 889–90 (La. 1999), cert. denied, 528 U.S. 1019 (1999); Juvelich v. Yamazaki Mazak Optronics Corp., 682 N.W.2d 565, 572 (Minn. 2004); Lebel v. Everglades Marina, Inc., 558 A.2d 1252, 1253 (N.J. 1989); CMMC v. Salinas, 929 S.W.2d 435, 439–40 (Tex. 1996).

Saia (Illinois) v. Savage (Connecticut): A Real-Life Example of the Courts’ Conflict in Action

In Saia v. Scripto-Tokai, 851 N.E.2d 693 (Ill. App. 2006), cert. denied, ___ U.S. ___, 127 S. Ct. 2252 (2007), the Illinois Appellate Court applied Justice Brennan’s “stream of commerce” test to find that personal jurisdiction over Tokai Corporation was constitutionally permissible because—despite Tokai’s undisputed lack of minimum contacts with Illinois—a product it designed in Japan was placed into the national stream of commerce by its U.S. subsidiary. By contrast, in Savage v. Scripto-Tokai Corp., 147 F. Supp. 2d 86 (D. Conn. 2001), the court applied the “stream of commerce plus” test to identical facts as those in Saia and found that Connecticut could not exercise jurisdiction over Tokai.

The plaintiffs in both Saia and Savage sued Tokai after a lighter it designed in Japan caused a house fire. Saia, 851 N.E.2d at 695; Savage, 147 F. Supp. 2d at 88. The plaintiffs in both cases asserted that personal jurisdiction over Tokai was constitutionally permissible in Illinois and Connecticut, respectively, because Tokai sold the lighter design to Scripto, and Scripto had the lighter manufactured in Mexico by a Mexican corporation and then distributed the lighter into the national stream of commerce from which it ended up in both states. Saia, 851 N.E.2d at 695–96; Savage, 147 F. Supp. 2d at 89–90. It was undisputed in both cases that Tokai had no minimum contacts with either Illinois or Connecticut. Saia, 851 N.E.2d at 695–96; Savage, 147 F. Supp. 2d at 88–89.

In Saia, the appellate court acknowledged that “in … this case, [Tokai] did not directly market its product in [Illinois], and [plaintiff] failed to show the extent of [Tokai’s] indirect benefit from sales in Illinois.” Id., 851 N.E.2d at 698. However, the appellate court nevertheless held that personal jurisdiction could be imposed upon Tokai because Scripto—its U.S.
subsidiary—placed the lighter into the national stream of commerce, through which the lighter ultimately ended up in Illinois. \textit{Id.} at 698-701. The appellate court found that “it is a reasonable inference” that Tokai “obtained considerable indirect benefit from the profits [Scripto] earns from sales in Illinois of lighting rods [Tokai] designed,” \textit{(Id.} at 700) because Scripto “distributed the lighting rods to various [national] customers, including K mart, and some of those customers sold [the] lighting rods in Illinois” \textit{(Id.} at 699):

Since Tokai owns all the shares of the distributor, Scripto, and Scripto owns the manufacturer, Tokai obtains all profits from the manufacture and sale in this state of the product it designed. We find the record sufficient to support the conclusion that Tokai obtained considerable indirect benefit from the profits its wholly owned subsidiary earns from sales in Illinois of lighting rods Tokai designed.

\textit{Id.} at 700.

By contrast, in \textit{Savage}, the district court granted Tokai’s motion to dismiss for lack of personal jurisdiction applying the “stream of commerce plus” test (147 F. Supp. 2d at 92) because, it reasoned, “the focus must remain on the defendant’s contacts with the forum state” (147 F. Supp. 2d at 93):

It is undisputed that Tokai has no specific connections to the State of Connecticut, and plaintiff conceded at oral argument that if the court were to accept plaintiff’s explanation for why jurisdiction lies in Connecticut, jurisdiction would of necessity lie in every state in the nation. Such “national contacts” or “aggregate contacts” have been recognized as a basis for jurisdiction, when they have been recognized at all, only in federal question cases involving statutes authorizing nationwide service of process. The Court agrees with [Tokai] that in the absence of any congressional enactment providing for national jurisdiction over foreign corporations for products liability purposes, the focus must remain on [Tokai]’s contacts with the forum state.

147 F. Supp. 2d at 93 (citations omitted).

* * *

The Court concludes that this record does not constitute a prima facie showing of jurisdiction over Tokai, because it does not allow the inference that Tokai injected the Aim ‘n Flame lighter into the stream of commerce, or engaged in any of the additional factors necessary under Justice O’Connor’s “stream of commerce plus” theory. Tokai has not manufactured the product since 1991; in fact, it appears that the manufacturing facilities in Mexico deal with Scripto, not the corporate parent, Tokai. The mere fact that Tokai is the designer of the subject product is insufficient to create personal jurisdiction; accepting such a theory would allow for the exercise of jurisdiction over every basement inventor in the world, simply because a product he or she conceived was manufactured and ended up in Connecticut.

147 F. Supp. 2d at 94 (citations omitted).

Of note, the \textit{Savage} court, unlike the \textit{Saia} court, specifically held that Tokai’s ownership of Scripto was an insufficient basis for personal jurisdiction:

While plaintiffs purport not to rely on aggregate contacts as the source for jurisdiction here, their theory—that establishing a national distribution system through a wholly-owned subsidiary constitutes purposeful availment—is really just that. However, mere ownership by a parent corporation present in the forum state generally will not subject the parent to personal jurisdiction in that forum. This rule applies even when the separation between parent and subsidiary is merely formal, as long as it is real.

147 F. Supp. 2d at 93 (citations omitted).
The Conflict Creates Significant Problems for All Parties to a Product Liability Action
Like all businesses, product designers, manufacturers, and distributors frequently structure their business operations to avoid contact with certain states. They do this for a variety of reasons, including taxes; labor costs; right-to-work/union issues; the state regulatory environment; quality of the labor force; and the state’s educational infrastructure. When a business entity actively and affirmatively avoids contact with a particular state, it necessarily follows that the business does not have the minimum contacts with that state necessary for that state to exercise jurisdiction over it consistent with the Due Process Clause. World-Wide Volkswagen recognized this point:

The Due Process Clause, by “ensuring the orderly administration of the laws,” International Shoe Co. v. Washington, 326 U.S. at 319, 66 S. Ct. at 159, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. World-Wide Volkswagen, 444 U.S. at 297.

The minimum contacts test applicable to defendants in a product liability suit should thus provide certainty to those involved in the design, manufacture, or distribution of a product that is placed in the stream of commerce. Product designers, manufacturers, and distributors should be able to plan for the potential of defending a suit in a particular state, or they should be able to avoid contacts with a particular state. No one can plan appropriately if the applicable personal jurisdiction standards differ across the country, as Luv n’ Care v. Insta-Mix, Inc., 438 F.3d 465 (5th Cir. 2006), cert. denied, ___ U.S. ___, 126 S. Ct. 2968 (2006), illustrates.

In Luv n’ Care, a Fifth Circuit majority applied the “stream of commerce” theory and found that jurisdiction over the defendant bottle designer was permissible in Louisiana despite the fact that the defendant was a Colorado corporation with no contacts to Louisiana. Id. at 470–71. The majority based its decision on the fact that the defendant sold approximately 82,000 of its bottles to Wal-Mart in Colorado, who eventually distributed them in Louisiana without the defendant’s knowledge. Id. at 471–74. In reaching this conclusion, the majority rejected the defendant’s argument that it had “structured its primary conduct to avoid jurisdiction by including in the vendor agreement a condition that transfers ownership from [defendant] to Wal-Mart at the time that Wal-Mart receives its shipments in Colorado Springs” (Id. at 471):

We disagree with [defendant] that this conclusion means that it must choose between doing business with Wal-Mart or being subject to suit in all fifty states. It is possible that [defendant] will avoid suit in a jurisdiction that requires some additional act beyond “mere foreseeability” for personal jurisdiction to attach. See, e.g., Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992). … [Defendant] could also attach conditions to its vendor agreement that forbid Wal-Mart from shipping to those states that operate under a “mere foreseeability” regime, or to all distribution centers outside the Great Plains, or to any forum in which mounting a defense would be inconvenient.

Id. at 472 n. 13.

The “Stream of Commerce Plus” Test Is the Most Consistent with Federalism and Due Process
At both the trial and appellate levels, in-house counsel and product litigators should advance the argument that all courts should adopt Justice O’Connor’s “stream of commerce plus” test as the national uniform standard for determining personal jurisdiction in product liability actions. For the reasons discussed throughout, the “stream of commerce plus” test is the test that most closely comports with federalism and due process.

In World-Wide Volkswagen, the Court addressed the interplay between the concept of minimum contacts and the principles of federalism:

The concept of minimum contacts … can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a
distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen, 444 U.S. at 291–92. The constitutional principles of federalism thus require that a defendant’s minimum contacts with the forum state be established as a necessary prerequisite to jurisdiction:

[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the nation was to be a common market, a “free trade unit” in which the States are debarred from acting as separable economic entities. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538, 69 S. Ct. 657, 665, 93 L. Ed. 865 (1949). But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their own courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. at 293.

Justice O’Connor’s “stream of commerce plus” test protects state sovereignty by requiring a showing that the defendant purposefully directed its actions toward the forum state in some way beyond the placement of a product into the stream of commerce. Asahi, 480 U.S. at 112 (O’Connor, J., plurality opinion). By contrast, the “stream of commerce” test erases state boundaries – under that test, “jurisdiction would of necessity lie in every state in the nation.” Savage, 147 F. Supp. 2d at 93. See also Lessnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945 (4th Cir. 1994), cert. denied, 513 U.S. 1151 (1995) (“To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism.”). By requiring the defendant to take an action directed toward the forum state before jurisdiction can be found, the “stream of commerce plus” test upholds the unique sovereignty of each state.

The “stream of commerce” plus test also best meets the requirements for due process, under which a “defendant’s contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” World-Wide Volkswagen, 444 U.S. at 292 (internal quotations omitted). It is inherently unfair—as the “stream of commerce” test allows—to “subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks.” Lessnick, 35 F.3d at 945. Indeed, the “stream of commerce” test in those jurisdictions where it is applied has created the precise result that was rejected in World-Wide Volkswagen: that “[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.” World-Wide Volkswagen, 444 U.S. at 295.

About the Author
Melissa A. Murphy-Petros, Of Counsel with Wilson Elser in Chicago, concentrates her practice in post-trial and appellate litigation nationwide. She briefed and argued Saia v. Scripto-Tokai Corp., 851 N.E.2d 693 (Ill. App. 2006), cert. denied, ___ U.S. ___, 127 S. Ct. 2252 (2007), and was counsel of record before the Supreme Court. DRI supported Ms. Murphy-Petros’ petition for writ of certiorari in Saia with a motion for leave to file a brief as amicus curiae. Ms. Murphy-Petros is a member of DRI’s Appellate Advocacy Committee and Amicus Subcommittee.

This article was originally published in DRI In-House Defense Quarterly, Spring 2008.

This article is for general guidance only and does not contain definitive legal advice.
Contact us at productliability@wilsonelser.com.
© 2008 Wilson Elser Moskowitz Edelman & Dicker LLP. All Rights Reserved.