Non-residents’ streams of conduct and personal jurisdiction

By Jeffrey A. Parness

The U.S. Supreme Court decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), greatly expanded the opportunities for subjecting defending parties to civil actions to suits brought outside their states of residency. The Court there held that the Due Process Clause of the U.S. Constitution generally requires that, in order for a nonresident defendant to be subject to in personam personal jurisdiction (in the absence of in-state service or consent), the defendant must have certain contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Under International Shoe, a nonresident defendant’s contacts with the forum are considered in two ways. First, the nonresident may have so many contacts with the forum that the assertion of jurisdiction for any or all matters is warranted. This is called “general” in personam personal jurisdiction. Second, the nonresident may have fewer but still sufficient minimal contacts with the forum to justify the assertion of authority for any matters relating to those contacts. This is called “specific” in personam personal jurisdiction.

For a nonresident to be subject to specific jurisdiction, the nonresident must have such contacts with the forum so as to make the assertion of authority fair and just.

The test for distinguishing between cases of sufficient and insufficient contacts is neither mechanical nor quantitative. A variety of factors must be considered, with the relevant inquiries similar to those in a general jurisdiction analysis. These factors serve two related, but distinguishable, functions: to protect defending parties against the burdens of litigating in a distant or inconvenient forum and to insure that trial courts do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

In a specific jurisdiction analysis, the connection between the nonresident defendant and the chosen forum is always of paramount importance. Thus, the existence of some contacts, ties, or relations between the nonresident and the forum is a prerequisite to any exercise of specific jurisdiction.

The U.S. Supreme Court held in Woodson, supra, that even if the defendant would suffer minimal (or no) inconvenience from being forced to litigate in a foreign state, even if the forum state has a very strong interest in
applying its own law, and even if the forum state is otherwise convenient, Due Process will sometimes divest the state of the power to have its courts render a valid judgment because the defendant has insufficient contacts.

In focusing on a nonresident's contacts, actual physical presence in the forum is not always required. Rather, the focus is on whether the nonresident's connections with the forum are such that the nonresident should reasonably anticipate being hauled into court there and on whether the nonresident purposefully directed a commercial product or service, or other things.

Thus, the mere unilateral activity of one in the state who claims some relationship with the nonresident cannot satisfy the requirement of some contact, tie, or relation. *Kulko v. Superior Court of California*, 436 U.S. 94 (1978).

In *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102, (1987), the Court was equally divided on whether a corporate nonresident's direction of a commercial product toward a foreign state was sufficient for specific in personam jurisdiction. The defendant's product had been placed into commerce with the nonresident's company's awareness that the stream of commerce might or would sweep the product into the forum state.

The *Asahi* ruling could have been but was neither clarified nor further refined significantly in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011) (plurality opinion seemingly limits the use of a broad stream of commerce doctrine).

The controversy over Nicastro's uncertain approach to Asahi is illustrated in *Ainsworth v. Moffett Engineering, Ltd.*, 2013 WL 1920729 (5th Cir. 2013). Local cases employing Asahi in a stream of commerce setting include *Jennings v. AC Hydraulic AIS*, 383 F.3d 546 (7th Cir. 2004) (foreign company advertising nationally, with website sales via Florida distributors).

Stream of commerce ads involving Web sites that are sufficient to prompt specific jurisdiction typically require not only some level of "interactivity" between the nonresident and forum residents, but also significant "voluntary contacts" with the forum, as by the nonresident indicating it would ship products to the forum. *Illinois v. Hemi Group LLC*, 622 F.3d 754 (7th Cir. 2010).

Assuming a nonresident has sufficient contacts, ties, or relations, specific jurisdiction still may be exercised only if the court finds a proper balance among other noncontact factors, including the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interests of all relevant states in furthering fundamental substantive social policies. *World-Wide Volkswagen Corp.*, supra.

The most difficult issue in specific jurisdiction cases often involves the requirement of purposeful availment by the nonresident of the benefits to be had in the foreign forum. This requirement was described in *Calder v. Jones*, 465 U.S. 783 (1984), as involving whether the nonresident defendant "expressly aimed" conduct at the forum.

The U.S. Supreme Court recently (3-4-13) granted certiorari in *Fiore v. Walden*, 666 F.3d 558 (9th Cir. 2012), affording it yet another chance to elaborate on this requirement.

In *Fiore*, a federal TSA agent operating in Atlanta was sued in a Nevada federal district court because he illegally prompted a seizure of plaintiffs' cash in an Atlanta airport by submitting a false probable cause affidavit to facilitate a Georgia federal action to forfeit the cash to the government. Specific jurisdiction was grounded on the TSA agent's knowledge of plaintiffs' "significant connections" to Nevada, as plaintiffs told the agent they were flying from Atlanta to Nevada; the seized funds were connected to Nevada; and the agent received documents from the plaintiffs upon their post-seizure return to Nevada.
One of the questions presented in Fiore is described as whether Due Process permits specific jurisdiction over a nonresident defendant "whole sole 'contact' with the forum state is his knowledge that the plaintiff has connections to that state." 81 U.S.L.W. 3489 (3-15-13). While not a typical stream of commerce dispute, the decision in Fiore could help to settle the unsettling questions since Asahi about streams of both commerce and other conduct.

In the meantime, Illinois trial courts will be challenged in specific jurisdiction cases. Since April, 2013, they are guided by Russell v. SNFA, 2013 Ill. 113909. In Russell, specific jurisdiction was sustained in an opinion by Chief Justice Kilbride, with four justices concurring, one justice who took no part, and a dissent by Justice Garman.

Chief Justice Kilbride, upon reviewing Asahi and Nicastro, declared that Wiles v. Morita Iron Works Co., 125 Ill. 2d 144 (1988) still guides. Thus, "specific activity" in Illinois may not be necessary where there is more than "a single or isolated sale of defendant's products in Illinois."

Justice Garman, in dissent, thought Asahi and Nicastro should be read to require "something more" than mere placement of a product in a stream of commerce, a requirement she found lacking in SNFA.

There are many streams of conduct cases involving specific in personam personal jurisdiction. The stream of commerce cases have been particularly challenging since Asahi. Those challenges are illustrated in the recent Illinois Supreme Court decision in Russell. The ruling in Fiore may make specific jurisdiction analysis, in both a commerce and a noncommerce setting, less challenging if the U.S. Supreme Court decides the third time is a charm.