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Personal Jurisdiction: Oregon Case Offers High Court Two Ways to Prune the Legal Doctrine's Thicket

by Mark Moller

Commentators do not mince words about personal jurisdiction doctrine. That area of law, it is widely agreed, is an "erratic," "confused," "incoherent" mess. *See*, *e.g.*, Allan Erbsen, *Impersonal Jurisdiction*, 60 Emory L.J. 1, 96 (2010). A case in which a certiorari petition is currently before the U.S. Supreme Court, *Novo Nordisk A/S v.Lukas-Werner,* offers two different opportunities for dispelling some of the confusion.

Novo Nordisk typifies the jurisdictional problems that plague transnational product liability suits. A foreign manufacturer, Denmark's Novo Nordisk A/S, sold its pharmaceuticals to an independent American distributor. That distributor turned around and resold these products for its own profit around the United States. After the distributor sold one such product to an Oregon purchaser who later contracted cancer, the purchaser and her husband sued Novo Nordisk in Oregon, alleging that the manufacturer's pharmaceutical had caused her disease. Although the Oregon trial court initially held that it lacked jurisdiction over Novo Nordisk A/S because the company did not itself sell or market its products in Oregon, the court later reversed itself. Relying on the Oregon Supreme Court's interpretation of Justice Breyer's concurrence in 2011's *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780 (2011), the trial court upheld jurisdiction because Novo Nordisk's products were "regularly" resold by the independent distributor in Oregon. The Circuit Court of the State of Oregon for the County of Multnomah affirmed. The Oregon Supreme Court declined to hear the appeal.

The Oregon court's flip-flop not only signals the stark confusion vexing lower courts in *Nicastro*'s wake. It may reflect an emerging trend in which lower courts invoke isolated language in *Nicastro's* fractured opinions to hinge jurisdiction on the "regularity" with which a defendant's products are sold in the forum. Premising jurisdiction on this kind of threshold is a recipe for arbitrariness. If personal jurisdiction law is ever to achieve clarity and predictability, the Court must identify some limits that sideline the need for ad hoc inquiries into vague magic sales thresholds.

Purposeful Availment and Independent Distributors

The facts of *Novo Nordisk* tee up two different opportunities to elucidate personal jurisdiction doctrine. First, the Court might use the case to clarify when activities of independent distributors and other middlemen subject a defendant to jurisdiction. Since *Hanson v. Denckla*, the Court has insisted that specific jurisdiction depends on showing the defendant has "purposefully availed itself of the privilege of conducting activities in the State." 357 U.S. 235, 253 (1958). But in the 1987 decision *Asahi Metal Industry Company. v. Superior Court*, the Court split over how to apply this principle in cases, like *Novo Nordisk*, where the defendant's goods reach the forum through the sales efforts of third parties.

Justice Brennan's *Asahi* concurrence reasoned the "purposefully availed" requirement is met in that context so long as the defendant is aware that third parties regularly resell its product in the forum. Justice O'Connor's opinion, by contrast, insisted that the defendant must "create" the distribution system or otherwise "control[] or employ" the third-party distributors. 480 U.S. 102, 112 (1987). Neither approach commanded a majority in *Asahi*, and, in the aftermath, lower courts predictably fractured between the two tests. Today, that twenty-six-year-old split continues to widen—surely among the longest unresolved such splits in modern American constitutional law.

Purposeful availment can be understood as an example of what the legal scholar Lawrence Lessig terms a "translation" of historical principles into a context unanticipated by the Framers. Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993). State jurisdiction, in the original understanding, depends on the defendant's voluntary "presence" in the forum state. Yet that concept has proven notoriously indeterminate when a corporate defendant's "contact"

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with the forum consists of nothing more than the sale of its products there by third parties. Requiring purposeful availment extracts from the historical concept of "voluntary presence" two root ideas: the defendant's products (1) must not only enter a state's territory, but (2) those contacts must also result from the defendant's independent decision to target markets located within a given state's borders.

Applying that principle in *Novo Nordisk* might require two showings: First, the defendant must possess a right, by virtue of its supply contract with the distributor, to dictate where that product ends up. And, second, the defendant must have exercised that right by ordering its distributor to target specific markets, including the forum state. Under this proposed approach, Oregon would lack jurisdiction over Novo Nordisk because it did not direct where its distributor resold its products.

Critics will argue that this proposed rule allows a defendant, through the way it arranges distribution of its product, to "wash its hands, Pilate-like," of jurisdiction, as Justice Ginsburg put it in her *Nicastro* dissent. But the virtue of this bright-line default rule lies in its clarity and predictability, particularly for policymakers. It gives Congress clear notice that further expansion of American courts' already broad extraterritorial jurisdiction must come from the political process. Congress is ultimately best positioned to assess the trade-offs, both diplomatic and economic, of extending American personal jurisdiction overseas more broadly. If it finds those trade-offs militate in favor of broader jurisdiction, it has the power to green-light *federal* courts' personal jurisdiction over foreign defendants based simply on their sales to distributors located in the United States. The basis for doing so would be the nationwide targeting theory that federal rulemakers, so far, have chosen to authorize in extremely limited fashion. *See* FED. R. CIV. P. 4(k)(2).

Jurisdictional "Reasonableness" in Transnational Product Liability Cases

Novo Nordisk is a rich case, and personal jurisdiction doctrine is richly confused. Should the Court prove too divided over the rule just proposed, *Novo Nordisk* also presents opportunities to dispel confusion in a completely different corner of personal jurisdiction doctrine—application of the specific jurisdiction test's "reasonableness" prong to transnational disputes.

That prong, first explicitly added to the test for specific jurisdiction in 1980's *Worldwide Volkswagen v. Woodson*, 444 U.S. 286 (1980), directs courts to balance several factors bearing on whether exercise of jurisdiction comports with "fair play and substantial justice"—namely, the forum state's interest in exercising jurisdiction, the plaintiff's interest in obtaining relief, the efficiency of the forum, the forum's convenience for the defendant, and the substantive interests of the "several states."

Those factors, if they cut decisively against the reasonableness of jurisdiction, defeat jurisdiction even if the plaintiffs establish the defendant's minimum contacts and purposeful availment. Yet, the Court's past opinions provide limited guidance about how to weigh the factors—fatally undermining the predictability of the specific jurisdiction test, while creating cover for subjective decisionmaking.

When weighing the reasonableness factors in a case like *Novo Nordisk*, two facts leap out. First, the defendant resisting jurisdiction is a foreign company. Second, plaintiffs have an opportunity to recover—and can thus fully satisfy their interest in obtaining relief—against another company over which personal jurisdiction plainly lies in American courts. At least so long as the U.S. distributor that sponsored the pharmaceutical is both solvent and jointly liable for any injuries proven attributable to problems with the drug, there is no need to sue the foreign manufacturer. Indeed, the U.S. distributor (Novo Nordisk, Inc.) is also already a party to the case.

A similar set of facts figured prominently in *Asahi*. That case, too, involved a transnational assertion of jurisdiction—something the Court stressed implicated the "several states'" interest in forestalling diplomatic friction. But, in addition, the injured California plaintiff was able to obtain satisfaction from the solvent local distributor of Asahi's product. This last fact, *Asahi* emphasized, meant that California's interest in asserting jurisdiction over Asahi was especially weak. 480 U.S. 102, 114-115 (1987). Both the diplomatic concern and lack of a compelling state interest received pride of place in the Court's decision to quash California's assertion of jurisdiction.

Conclusion

Novo Nordisk provides a clean vehicle for generalizing from *Asahi* a clear, commonsense rule: However the reasonableness factors should be applied in other contexts, diplomatic concerns plus the absence of a compelling forum interest make jurisdiction categorically unreasonable in the class of cases represented by *Asahi* and *Novo Nordisk*—that is, transnational cases against foreign defendant manufacturers in which the plaintiff can also recover from a solvent, jointly liable distributor that is well within American courts' jurisdictional reach.

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