CMMC V. SALINAS: THE TEXAS LONG-ARM STATUTE DOES NOT REACH FRENCH EQUIPMENT MANUFACTURER (BUT MAYBE IT SHOULD)

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SUMMARY

The Texas Supreme Court has provided an example of why reforming personal jurisdiction jurisprudence for international defendants may be proper. In *CMMC v. Salinas* the Supreme Court reversed a court of appeals decision that extended long-arm jurisdiction to a French equipment manufacturer in a products liability suit.[1] The ruling purports to sidestep the debate regarding the minimum contacts test and the stream of commerce test in *Asahi Metal Industry Co. v. Superior Court*.[2] However, the Texas Supreme Court decision clearly favors Justice O'Connor's plurality opinion,[3] which recommends a "stream of commerce plus" test—that is, requiring the defendant to purposefully direct action toward the forum state.[4] The decision hinges on the limited nature of CMMC's contact with Texas, the forum state, and the State's fledgling wine industry.[5] It ignores, as it must, the likelihood of substantial sales by the manufacturer with other states[6] that may have large, well-established wine and juice industries.

This Note reviews the Texas decision in light of the history of personal jurisdiction and the stream of commerce test. It argues that a revised minimum contacts test for international defendants based on national contacts would produce a fairer result for plaintiffs without violating defendants' due process rights. Part II outlines the facts in *CMMC v. Salinas*. Part III reviews the history of personal jurisdiction under *International Shoe* and its progeny, focusing on the stream of commerce test for minimum contacts as developed by the Supreme Court and applied in the Fifth Circuit and in Texas. Part IV analyzes the court of appeals' and the Supreme Court's application of the test in *CMMC v. Salinas* and suggests an alternative.

1. *See* CMMC v. Salinas, 929 S.W.2d 435, 436 (Tex. 1996).
2. *See id.* at 439.
3. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).
4. *See id.* at 112; CMMC v. Salinas, 929 S.W.2d at 440.
5. *See* CMMC v. Salinas, 929 S.W.2d at 337–40.
6. *See, e.g.,* International Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (discussing what "presence" of a corporation will be "sufficient to satisfy demands of due process"); *see also* Alan J. Lazarus, *Jurisdiction, Venue, and Service of Process Issues in Litigation Involving a Foreign Party*, 31 TORT & INS. L.J. 29, 44–46 (1995) (discussing decisions imputing jurisdiction in every state from national marketing efforts).

I. BACKGROUND OF *CMMC V. SALINAS*

The case arose as a products liability suit filed by Ambrocio Salinas, a worker at Hill Country Cellars, a small winery in Cedar Park, Texas.[7] Salinas was injured while cleaning an allegedly defective wine press manufactured by CMMC and purchased by Hill Country through KLR Machines, Inc., an independent distributor of wine- and juice-making equipment.[8] CMMC sold its equipment in the United States directly and through KLR; it did no direct U.S. advertising, but KLR advertised CMMC's products in national wine-making periodicals.[9] CMMC had no direct contact with Hill Country or Texas and had only a few isolated sales of equipment in Texas.[10] The deposition of KLR Vice President R. Ivan Linderman cites significant sales by KLR to wine and juice producers in western states, but did not provide detailed information on CMMC sales within the United States.[11] KLR sold the wine press to Hill Country and arranged for transport to Hill Country through the port of Houston.[12] CMMC knew KLR was sending the press to Hill Country for use in Texas.[13] CMMC rewound the press for use in the United States, and Hill Country made one warranty claim on the press, which KLR honored, billing CMMC.[14]

CMMC entered a special appearance in the trial court contesting jurisdiction.[15] The trial court dismissed the case for want of personal jurisdiction.[16] The court of appeals reversed and remanded, finding that CMMC had sufficient minimum contacts with Texas to justify the exercise of personal jurisdiction in the case.[17] The court of appeals held that the Texas long-arm statute conferred jurisdiction over CMMC because CMMC delivered its product into the stream of commerce that carried the product into the State.[18] Although CMMC did not do business systematically with

7. *See* Salinas v. CMMC, 903 S.W.2d 138, 140–41 (Tex. App.—Austin 1995), *rev'd*, 929 S.W.2d 435 (Tex. 1996).
8. *See id.* at 140–41.
9. *See id.*
10. *See id.* at 141.
11. *See* Deposition of R. Ivan Linderman, July 11, 1994, on file with District Court, Williamson County, Texas, 368th Judicial District, No. 93-189-C368, at 31, 102.
12. *See* CMMC v. Salinas, 929 S.W.2d 435, 436 (Tex. 1996).
13. *See* Salinas v. CMMC, 903 S.W.2d at 141.
14. *See* CMMC v. Salinas, 929 S.W.2d at 436.
15. *See id.*
16. *See id.* at 437.
17. *See* Salinas v. CMMC, 903 S.W.2d at 146.
18. *See id.* at 144–45.

Texas customers, did not solicit buyers specifically in Texas through advertisements or a designated in-state distributor, and had no direct contact with anyone in Texas, CMMC was aware of the ultimate destination of its wine press.[19] The court of appeals held that direct placement of a product into the stream of commerce establishes minimum contacts, but may not establish minimum contacts in instances where the unilateral activity of an entity in another state was the sole means of transporting it into the State.[20] The Texas Supreme Court reversed unanimously the court of appeals, holding that a manufacturer's isolated sale to the forum state and knowledge that equipment will be delivered and used in the forum state are insufficient to warrant the exercise of personal jurisdiction without evidence of more purposeful contact by the manufacturer with the forum.[21]

II. PERSONAL JURISDICTION VIA THE STREAM OF COMMERCE

A. The Development of the Due Process Standard

Because the assertion of jurisdiction by Texas courts over nonresidents arises from a long-arm statute that reaches as far as the U.S. Constitution allows, an analysis of personal jurisdiction requires an overview of those constitutional limits.[22] To understand the decisions of both the court of appeals and the Texas Supreme Court, it is necessary to review the development of the due process standard, which limits the states' exercise of personal jurisdiction over nonresident defendants.

Review of the due process limits on personal jurisdiction begins necessarily with *International Shoe Co. v. Washington* in which the Supreme Court first articulated the "minimum contacts" standard: Due process requires that a state may exercise personal jurisdiction over a defendant not in the forum only if the defendant has "certain minimum contacts

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19. *See id.*

20. *See id.* at 144.

21. *See* CMMC v. Salinas, 929 S.W.2d at 436, 440 ("A manufacturer cannot fairly be expected to litigate in every part of the world where its products may end up; its contacts with the forum must be more purposeful . . . before it can constitutionally be subjected to personal jurisdiction.").

22. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997); *see also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 412–13 (1984) (interpreting Texas long-arm statute as reaching the constitutional limits of due process); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1234 (5th Cir. 1973) (same); U-Anchor Advertising v. Burt, 553 S.W.2d 760, 762 (Tex. 1977) (same).

with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[23] The Court has held that due process was met even when the only contacts with the forum of a nonresident defendant insurance company were mailing the contract to the forum, the insured's mailing payments from the forum, and the insured's living in the forum at the time of death.[24] However, when there is no activity by a nonresident defendant in the forum state, the unilateral activity of a plaintiff claiming a relationship with the defendant is not sufficient to satisfy the minimum contacts test for personal jurisdiction; there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[25] Mere acquiescence by a nonresident to an act that will have an "effect" in a forum does not make jurisdiction reasonable; more is required, such as a claim of physical or property damage or commercial activities from which a nonresident derives benefit.[26]

B. The Stream of Commerce Test

CMMC v. Salinas deals with an important development building on the *International Shoe* line of cases: The "stream of commerce" test for determining minimum contacts in product liability cases. The stream of commerce test for minimum contacts arose from a state court decision to authorize extension of personal jurisdiction by a nonresident safety valve manufacturer whose product was incorporated, also outside the forum, into a water heater sold to a consumer in the forum.[27] The court reasoned that specialization of commercial activity and interdependence of business enterprises justified extension of jurisdiction to a party that benefits only indirectly from commercial activity in a forum if an alleged defect in his product is raised in a suit as the cause of injury in the forum.[28] The stream of commerce doctrine gained wider currency when the Supreme

23. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

24. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 221–22 (1957).

25. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

26. *See* Kulko v. Superior Court, 436 U.S. 84, 96–97 (1978).

27. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961).

28. *See id.*

Court endorsed it in *World-Wide Volkswagen Corp. v. Woodson.*[29]

In *World-Wide*, the Supreme Court held that a New York automobile retailer and associated regional distributor were not subject to Oklahoma's long-arm statute in a products liability suit solely because a vehicle the retailer sold was involved in an accident in Oklahoma which gave rise to a suit.[30] The retailer and distributor conducted no activity in the forum, made no sales, solicited no business through salesmen or advertising "reasonably calculated to reach the State," sold no cars at wholesale or retail to customers from the forum, and did not indirectly, through others, seek to serve the market.[31] Although a vehicle is by nature mobile and a seller could reasonably foresee that the product would reach the distant forum, the Court refused to make foreseeability alone the criterion for jurisdiction because it would effectively appoint a chattel the agent for service of process for every seller of chattels.[32] The decision emphasized that both the defendant's conduct and the defendant's connection to the forum have to justify jurisdiction, ensuring that the nonresident could reasonably anticipate being haled into court there; however, the decision affirmed that indirect sales could still subject a party to jurisdiction:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. 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 that they will be purchased by consumers in the forum State.[33]

Justice Brennan, in dissent, suggested that other considerations, such as the interests of a state and other

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29. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (citing *Hanson*, 357 U.S. at 253; *Gray*, 176 N.E.2d at 761).

30. *See World-Wide*, 444 U.S. at 295–99. The regional distributor served New York, New Jersey, and Connecticut. *See id.* at 289.

31. *Id.* at 295.

32. *See id.* at 296.

33. *Id.* at 297–98 (citing *Gray*, 176 N.E.2d at 761).

parties in proceeding with a cause in the selected forum, could outweigh the relative insignificance of the defendant's contacts.[34] In addition, Justice Brennan objected to limiting the stream of commerce to a flow that stops at the user of a product, arguing there was no reason to distinguish "between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there."[35] He suggested that foreseeability of harm in the forum should be sufficient.[36]

Burger King Corp. v. Rudzewicz[37] is a case about a contract dispute, not a product in the stream of commerce; however, Justice O'Connor cited *Burger King* in *Asahi*, arguing for a narrowed stream of commerce test.[38] In *Burger King* Justice Brennan's majority opinion outlined a two-prong test for jurisdiction. The first prong of the test was a strict minimum contacts test, requiring that the defendant purposely avail himself of the privilege of conducting business in the forum state, and that jurisdiction not be asserted based only on "'random,' 'fortuitous,' or 'attenuated' contacts."[39]

The second prong was a reasonableness analysis, based on elements identified in *World-Wide* as those "implicit in [the] emphasis on reasonableness" in the minimum contacts test.[40] The second prong analysis is made "as appropriate" and may establish the reasonableness of jurisdiction "upon a lesser showing of minimum contacts than would otherwise be required," or may defeat jurisdiction in spite of a clear showing of purposeful contact if the nonresident can present a compelling case that jurisdiction would be unreasonable.[41] Factors cited to strengthen a *weak* case for jurisdiction are the "'burden [presumably low] on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's

34. *See id.* at 300 (Brennan, J., dissenting).

35. *Id.* at 306–07.

36. *See id.*

37. 471 U.S. 462, 463–64 (1985). In *Burger King* the Court held that Florida, the headquarters for Burger King Corp. and the forum designated for disputes in its franchise contracts, had jurisdiction over a dispute with a Michigan franchisee. *See id.* at 464, 487.

38. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

39. *Burger King*, 471 U.S. at 475 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

40. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

41. *Burger King*, 471 U.S. at 477.

interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'"[42] Essentially the same factors are used to defeat an otherwise *strong* argument for jurisdiction; however, the analysis also should consider whether conducting the case in the forum creates such grave difficulty or inconvenience that a party is at a severe disadvantage in the suit.[43]

Commentators have noted the irony that Justice Brennan's two-prong test was undoubtedly meant to expand the jurisdiction of the state courts, but that it was used in *Asahi* to prevent California from taking jurisdiction.[44] In *Asahi* the Court split 4-4 on the issue of whether a tire component manufacturer (valve stem) had sufficient minimum contacts with California to support jurisdiction in California over an indemnity claim of the Taiwanese tire tube manufacturer against the Japanese valve stem manufacturer.[45] The plaintiff, a California resident, had settled his claims against all parties from the original product liability suit, leaving only the indemnity claim against Asahi.[46] A unanimous court found that whether there were minimum contacts or not, analysis of the factors cited in *World-Wide* (the second prong of the long-arm analysis in *Burger King*) demonstrated that the interests of the several states were best served by dismissing an action in which the forum state retained only a slight, collateral interest.[47]

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42. *Id.* (quoting *World-Wide*, 444 U.S. at 292).

43. *See id.* at 478.

44. *See* Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 782 (1988); *see also* Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 612–24 (1986) (analyzing Justice Brennan's approach to personal jurisdiction from *McGee* through *Burger King*).

45. Chief Justice Rehnquist and Justices Powell and Scalia joined Justice O'Connor in finding insufficient minimum contacts to support jurisdiction. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987). Justices White, Marshall, and Blackmun joined Justice Brennan in finding sufficient minimum contacts to support jurisdiction. *See id.* at 116.

46. *See id.* at 106.

47. *See id.* at 115; *see also* Bruce N. Morton, *Contacts, Fairness and State Interests: Personal Jurisdiction After* Asahi Metal Industry Co. v. Superior Court of California, 9 PACE L. REV. 451, 492–93 (1989) (arguing that the forum state interest is irrelevant and suggesting a jurisdictional analysis that focuses solely on the defendant); Stravitz, *supra* note 44, at 811–12 (suggesting that the court

The split on the stream of commerce test was not, however, resolved. Justice O'Connor's opinion articulated a "stream of commerce plus" test, requiring that a nonresident defendant do more than place his product into the stream of commerce to satisfy the minimum contacts test.[48] The stream of commerce plus test would be satisfied by conduct indicating "intent or purpose to serve the market in the forum State," such as product design specific to the market, advertising, providing advice to customers in the forum state, or marketing through a distributor who agrees to be an agent for the forum.[49] Mere awareness that the product would reach the forum is not enough.[50]

Justice Brennan's concurring opinion rejected Justice O'Connor's minimum contacts analysis. Justice Brennan's opinion clearly suggested that incorporation of a component into a product as well as indirect marketing of a final product were activities that could meet the minimum contacts test without further purposeful contact:

> 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 this 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.[51]

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rely on forum non conveniens rather than the additional fairness analysis of *Asahi*).

48. *Asahi*, 480 U.S. at 112 ("[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 into an act purposefully directed toward the forum State.").

49. *Id.*; *see also* Morton, *supra* note 47, at 471 (criticizing the test's basis on intent as providing the defendant potentially excessive "unilateral control over the fora in which it will be subject to personal jurisdiction").

50. *See Asahi*, 480 U.S. at 112.

51. *Id.* at 117.

As Justice Brennan admitted in his opinion, there is disagreement among the circuits over the extent of the stream of commerce doctrine;[52] however, he noted that Justice O'Connor's opinion suggested adopting the minority view that narrows the stream of commerce doctrine.[53]

Justice Stevens, joined by Justices White and Blackmun, did not join the plurality opinion because he said it was not necessary to assess whether the defendant had minimum contacts,[54] suggesting that the *Burger King* reasonableness analysis was an alternative, rather than a supplement, to minimum contacts analysis.[55] His comments, however, also suggested that if he had to make a determination, the volume of units involved, their value, and their hazardous character, even though marketed the same throughout the world, might incline him to find "purposeful availment."[56]

C. The Stream of Commerce Test in Texas and in the Fifth Circuit

The Texas long-arm statute defines "doing business" in Texas as including the commission of "a tort in whole or in part in this state,"[57] and the Texas courts have found that the statute reaches as far as the federal Constitution permits for both specific and general jurisdiction.[58] The Fifth Circuit Court of Appeals has acknowledged the reach of the Texas statute in diversity cases applying Texas law and has applied the stream of commerce doctrine liberally.

In *Oswalt v. Scripto*, the Fifth Circuit found jurisdiction over a Japanese cigarette lighter manufacturer who made, sold, and delivered its product to a U.S. distributor in Japan

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52. *See id.* at 117–18 nn.1–2 (citing Bean Dredging Corp. v. Dredge Tech Corp., 744 F.2d 1081 (5th Cir. 1984); Hendrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983); Nelson v. Park Indus., Inc., 717 F.2d 1120, 1226 (7th Cir. 1983); Poyner v. Erma Werke GmbH, 618 F.2d 1186, 1190–91 (6th Cir. 1980)).

53. *See id.* at 118 n.2.

54. *See id.* at 121.

55. *See id.*

56. *Id.* at 122; *see also* R. Lawrence Dessem, *Personal Jurisdiction After* Asahi*: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 75–78 (1987) (supporting product volume and value as elements in minimum contacts analysis, but not the product's hazardous character because it would amount to double-counting).

57. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2) (Vernon 1997).

58. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 412–13 (1984) (interpreting the Texas long-arm statute as reaching the constitutional limits of due process); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1234 (5th Cir. 1973) (same); U-Anchor Advertising v. Burt, 553 S.W.2d 760, 762 (Tex. 1977) (same)).

when a Texas resident was injured by a single lighter from a display card purchased from a wholesaler in Midland, Texas.[59] Jurisdiction was based on the manufacturer's having been told that one of the U.S. distributor's customers had national retail outlets.[60] Actual knowledge of the distribution to Texas was not necessary as long as the manufacturer, who sold three to four million lighters to the distributor each year, had "reason to know or expect that the cigarette lighter would reach Texas."[61] Basing its decision on *World-Wide*, the court found the manufacturer's use of the network of the U.S. distributor was an effort "to serve indirectly the market for its product in Texas."[62] It also explicitly rejected dictum from an earlier decision suggesting that a reasonable expectation that a product would reach the forum had to be coupled with other manufacturer contacts with the forum.[63]

In finding a Yugoslav exporter of asbestos subject to the reach of the Texas statute, the Fifth Circuit in *Irving v. Owens-Corning Fiberglas Corp.* explicitly held that the minimum contacts plus test suggested by Justice O'Connor was not "clear guidance" on the issue of stream of commerce and that the test in *World-Wide* controlled.[64] Purposeful contact for due process could include release of products into the stream of commerce with the expectation that they would be purchased by consumers in the forum state, even in the absence of actual knowledge of the identity or location of the product user.[65] Jurisdiction existed from the foreseeability of use in the forum when the exporter contracted with an American agent who sold the product to a Texas user when the exporter (1) placed no geographic limits on the agent's sales activity, (2) arranged for shipment to Houston, and (3) shared Houston import costs of product testing bag-cleaning.[66] Once its import activities met the minimum

59. Oswalt v. Scripto, Inc., 616 F.2d 191, 197–98 (5th Cir. 1980).

60. *See id.* at 197. Although *Oswalt* predates *Asahi*, it follows the pattern Lazarus identifies of post-*Asahi* decisions finding jurisdiction in individual states when a product is marketed nationally. *See* Lazarus, *supra* note 6, at 44–46.

61. *Oswalt*, 616 F.2d at 198.

62. *Id.* at 200.

63. *See id.* at 201 (citing Jetco Elec. Indus. v. Gardiner, 473 F.2d 1228, 1234 (5th Cir. 1973)).

64. Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 385–86 (5th Cir. 1989) (noting other Fifth Circuit decisions adopting the *World-Wide* test for minimum contacts).

65. *See Irving*, 864 F.2d at 386.

66. *See id.* at 386–87.

contacts test, the court found that even giving "'significant weight' to the unique burdens placed on parties who face litigation in a foreign legal system," those burdens did not outweigh the strong interest of multiple Texas plaintiffs alleging injuries occurring in Texas.[67] The defendant exporter handled sales of approximately five thousand metric tons of asbestos per year for fifteen years.[68]

In *Gulf Consolidated Services v. Corinth Pipeworks* the Fifth Circuit arguably broadened the Supreme Court's stream of commerce doctrine by using *World-Wide* as a basis for jurisdiction in a contract dispute between a Greek oil field casing manufacturer and a Texas pipe importer and seller for a breach of the implied warranties of merchantability and fitness for a particular purpose.[69] Again, although the manufacture and sale took place in Greece, the court held that the pipe was sold in anticipation of shipment to Texas and that economic injury in Texas gave the forum a "demonstrable interest" in local resolution.[70] Circuit Judge Reavley dissented, arguing that the stream of commerce doctrine should be applicable only in products liability actions, not contract disputes.[71] Judge Reavley offered the purposeful availment test of *Burger King* as the appropriate standard for a contract dispute, noting that the public policy considerations justifying the lower hurdle of the stream of commerce test should not apply in a contract dispute "where the parties have had some type of direct contact and were able to structure the transaction in light of jurisdictional considerations."[72]

More recently, the Fifth Circuit in *Ruston Gas Turbines v. Donaldson Co.* held that Corchran, a Minnesota corporation that supplied components to another Minnesota manufacturer, Donaldson, was subject to jurisdiction in Texas for parts Donaldson in turn supplied to Ruston Gas Turbines, for two gas turbine engine systems Ruston manufactured and sold in Texas.[73] Jurisdiction is based on Corchran's "intentionally plac[ing] its products into the

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67. *See id.* at 387 (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987)).

68. *See id.* at 384.

69. *See* Gulf Consol. Servs. v. Corinth Pipeworks, S.A., 898 F.2d 1071, 1074 (5th Cir. 1990).

70. *Id.*

71. *See id.* at 1078–79 (Reavley, J., dissenting).

72. *Id.* at 1079.

73. *See* Ruston Gas Turbines Inc. v. Donaldson Co., 9 F.3d 415, 420–21 (5th Cir. 1993).

stream of commerce by delivering them to a shipper destined for delivery in Texas," which allowed Corchran to foresee (and in fact know) that its product would be used in Texas.[74] In addition, the court held that Corchran's multiple sales to Donaldson and direct shipments to other Texas entities over a fifteen-year period made it reasonable for Corchran to anticipate that he could be haled into court in Texas.[75] The decision also states that "[a] single act by the defendant directed at the forum state . . . can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted;"[76] however, given Corchran's multiple contacts, it is dictum.

Texas state courts have also interpreted the long-arm statute broadly and applied the stream of commerce doctrine liberally. Texas has based personal jurisdiction over a foreign manufacturer of steel pipe on the manufacturer's indirect sales in the forum: The court held that a manufacturer's "reasonable expectation that the product will enter the forum state" as the controlling test in stream of commerce analysis,[77] and it rejected the argument that the manufacturer could not have a reasonable expectation of the product's destination when it did not retain "right of control" of the ultimate disposition of the product.[78] In *Keen v. Ashot Ashkelon* the court also held an Israeli manufacturer of a "sand shoe," a component of a truck trailer, subject to Texas jurisdiction, again based on the manufacturer's expectation about the ultimate destination of his product to "anywhere in the United States."[79] In *Keen* jurisdiction was premised on minimum contacts alone as the only issue before the court.[80]

Several more recent Texas decisions, however, have read the long-arm statute more narrowly. In a decision refusing to extend jurisdiction in an insurance contribution suit to the English insurer of an English company with Texas subsidiaries, the Texas Supreme Court found minimum contacts, but held that it was one of the "rare cases" in which the defendant had presented a compelling case that

74. *Id.* at 420.
75. *See id.* at 420–21.
76. *Id.* at 419.
77. *See* Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 200–01 (Tex. 1985) (citing Oswalt v. Scripto, 616 F.2d 191, 201 (5th Cir. 1980)).
78. *Id.* at 201.
79. Keen v. Ashot Ashkelon Ltd., 748 S.W.2d 91, 93 (Tex. 1988).
80. *See id.* at 93 n.1.

jurisdiction would be unreasonable.[81] The determination was based on a balancing test like that in *Asahi*, in which the court found insufficient forum interest in a dispute between an English entity's insurers, even though the dispute was brought in the name of the Texas employer in the underlying wrongful death suit.[82] Although not directly apposite to a stream of commerce issue, the decision showed the court's willingness to use *Asahi*'s "international" analysis to pull back the state's long arm. In addition, the opinion emphasized that "foreseeability" was not determinative to establish minimum contacts[83] and, relying on *Burger King*, that the defendant must have "purposefully availed itself of the privilege of conducting activities within the forum state" to meet the requirement of minimum contacts.[84]

A more recent products liability decision showed even more distinctly the trend that led to *CMMC v. Salinas*. In *CSR v. Link* Texas refused to extend jurisdiction to an Australian manufacturer of asbestos, which sold 363 tons of asbestos to Johns-Manville in Australia.[85] The product ended up in a Johns-Manville plant in Houston, Texas, where it was incorporated into transit pipe.[86] The court rejected the plaintiff's argument for basing jurisdiction on CSR's awareness of the Johns-Manville plant in Texas.[87] Because Johns-Manville also had plants in Louisiana, New Jersey, Illinois, and California, the court required a purposeful act directed towards the forum state in addition to CSR's ability to foresee the use of the fiber in Texas.[88] As authority, the court cites Justice O'Connor's discussion of minimum contacts in *Asahi*, providing no indication of the Supreme Court split down the middle on the issue of how to define minimum contacts in a stream of commerce case.[89] Justice Baker's dissenting opinion addresses other issues and raises no objection to the court's reading of the long-arm statute.[90]

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81. Guardian Royal Exch. Assurance, Ltd. v. English China Clays, 815 S.W.2d 223, 232–33 (Tex. 1991).
82. *See id.*
83. *See id.* at 227.
84. *Id.* at 226.
85. *See* 925 S.W.2d 591, 595 (Tex. 1996).
86. *See id.* at 594.
87. *See id.* at 595.
88. *See id.*
89. *See id.*
90. *See id.* at 599–604.

III. *CMMC v. SALINAS* AND AN ARGUMENT FOR A NEW STREAM OF COMMERCE STANDARD FOR INTERNATIONAL DEFENDANTS

A. CMMC v. Salinas

Given the Texas Supreme Court's holding in *CSR*, which came after the court of appeals ruling in *Salinas v. CMMC*, it should be no surprise that the supreme court reversed the court of appeals in *CMMC v. Salinas*. Comparing the tests for minimum contacts outlined by Justices O'Connor and Brennan in *Asahi*, the court of appeals held that the Texas Supreme Court and the Fifth Circuit had explicitly adopted the stream of commerce doctrine without the additional conduct test suggested by Justice O'Connor.[91] The court also cited public policy interests in finding minimum contacts to support jurisdiction in a products liability case even when the contacts are not as numerous as those in *Gulf* and *Ruston*, cases setting precedent in the Fifth Circuit.[92] Like Corchran shipping components in *Ruston*, CMMC shipped the press directly to Texas at the distributor's order, giving it knowledge beyond mere foreseeability that the product would end up in the forum.[93] That single act was found sufficient for the minimum contacts test even though CMMC did not directly solicit business in Texas or advertise, relying instead for its U.S. market on KLR's advertisements in national wine magazines.[94] The court acknowledged that "the minimum contacts that exist in this case are not overwhelming;" however, the directness of CMMC's single act, the shipment to Texas, convinced the court that being haled into court in Texas would not come as an unfair surprise.[95]

After determining there were minimum contacts, the court of appeals assessed whether jurisdiction would offend "traditional notions of fair play and substantial justice" by requiring CMMC to overcome the presumption that the

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91. *See* Salinas v. CMMC, 903 S.W.2d 138, 143 (Tex. App.—Austin 1995), *rev'd*, 929 S.W.2d 435 (Tex. 1996) (citing Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 386 (5th Cir. 1989); Keen v. Ashot Ashkelon Ltd., 748 S.W.2d 91, 93 (Tex. 1988)).

92. *See* Salinas v. CMMC, 903 S.W.2d at 143 n.3 (citing Gulf Consolidated Servs. v. Corinth Pipeworks, 898 F.2d 1071, 1073 (5th Cir. 1990); Ruston Gas Turbines v. Donaldson, 9 F.3d 415 (5th Cir. 1993)).

93. *See* Salinas v. CMMC, 903 S.W.2d at 144 ("Unlike the foreign defendant in *Asahi*, who sold a valve stem to a tire manufacturer in another foreign country, CMMC sold a completed press to a known user in Texas . . . .").

94. *See* CMMC v. Salinas, 929 S.W.2d 435, 439 (Tex. 1996).

95. Salinas v. CMMC, 903 S.W.2d at 145.

existence of minimum contacts did not justify jurisdiction.[96] First, it noted that in *Asahi* the forum's interest in adjudicating the dispute was slight, while here Texas had an interest in protecting its resident from allegedly tortious behavior.[97] Second, it held that Texas had an interest in protecting its citizens from defective products.[98] Third, it argued that it would be a greater injustice to force Salinas to litigate his case in France than to require a manufacturer that delivered its product to Texas to litigate in Texas.[99] Finally, it noted that Texas was the location of the injury and the location of the greatest part of the evidence and witnesses.[100]

In reversing the court of appeals, the Texas Supreme Court followed its lead in *CSR* and read the stream of commerce test narrowly. The Supreme Court was careful to state in *CMMC v. Salinas*, as it failed to do in *CSR*, that it was not following Justice O'Connor's minimum contacts plus test.[101] The court quoted extensively from both Justice O'Connor and Justice Brennan but stated it did not need to take sides in the debate because of the difference between the facts in *Asahi* and *CMMC v. Salinas*, although it cited the number of sales as the only difference.[102] The Court also noted disarmingly that a single indirect equipment sale did not appear to meet even Justice Brennan's test for the stream of commerce, that is, the "'regular and anticipated flow of products from manufacture to distribution to retail sale.'"[103] Justice Brennan's discussion in *Asahi* and the majority opinion in *World-Wide* both distinguished between indirect sales through distributors and marketers (which can create jurisdiction), sale of components (which can create jurisdiction), and isolated acts of product users (which, he reluctantly conceded, did not create jurisdiction).[104] Using his argument to disqualify a single act from creating jurisdiction took his discussion out of context.

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96. *Id.* (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See* CMMC v. Salinas, 929 S.W.2d 435, 439 (Tex. 1996).

102. *See id.* at 438–39 (comparing the flow of products in *Salinas* to the flow in *Ashai*; stating, "There is no flow of products from CMMC to Texas; there is scarcely a dribble.").

103. *Id.* at 439 (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987)).

104. *See id.*

The court also used the issue of the single contact to distinguish the Fifth Circuit and Texas precedents. It acknowledged that the Fifth Circuit in *Ruston* and *Irving* recognized that a single act could support jurisdiction;[105] however, it did not distinguish those statements by pointing to the multiple transactions in both cases, making the statements dicta. Instead, the court developed an argument leaning toward Justice O'Connor's minimum contacts plus test, requiring that the single act be "purposefully directed" toward the forum.[106] As Justice O'Connor did in *Asahi*, the Texas Supreme Court relied on the language in *Burger King*, adding an element of purposeful intent appropriate in finding jurisdiction in a contract dispute to a test originally designed to address the complex chains of distribution that can arise in products liability.[107]

The court's handling of the pre-*CSR* Texas precedents is less clear. It distinguished *Kawasaki* by noting the millions of dollars in sales by Kawasaki to Texas as compared to KLR's single sale of a CMMC wine press;[108] however, it did not explain its divergence from *Keen*'s broad reading of the stream of commerce doctrine. *Keen* found jurisdiction based on a component manufacturer's awareness that its product could end up anywhere in the United States once incorporated into its buyer's product.[109] The court in *CMMC* stated merely that the *Keen* holding was not broad; it offered as proof only a citation count—that the opinion quoted Justice O'Connor's narrow *Asahi* opinion more often than Justice Brennan's broader view.[110] In *CSR* the court required evidence of purpose to serve the Texas market if a manufacturer made indirect sales and did not have specific knowledge of sales to Texas.[111] In *CMMC v. Salinas* the court also appeared to require that indirect sales be *multiple and continuous* if the stream of commerce doctrine were to bring them within the reach of the Texas courts.[112] The court's fairness analysis is peremptory, stating that it is not unfair to require Salinas to litigate his dispute outside of Texas, given

105. *See id.*
106. *Id.* at 439–40.
107. *See id.* at 439 ("[The] act must be purposefully directed at the forum state so that the defendant could foresee being haled into court there.").
108. *See id.* at 439–44.
109. *See id.* at 439.
110. *See id.* at 440 ("[W]e cited Justice O'Connor's plurality opinion twice and did not mention Justice Brennan's concurring opinion.").
111. *See* CSR v. Link, 925 S.W.2d 591, 594 (Tex. 1996).
112. *See* CMMC v. Salinas, 929 S.W.2d at 493–40.

the French manufacturer's lack of purposeful contact with Salinas or his employer.[113] The court's reference to international interests also is peremptory and it does not even mention Texas' interest in the dispute.

B. An Option for a Different Stream of Commerce Test for International Defendants

Commentators have noted the elastic and confusing nature of the minimum contacts and stream of commerce tests, particularly following the Supreme Court's split in *Asahi*. Rather than increasing predictability for the international defendant or the domestic plaintiff purchasing equipment or products manufactured abroad, *Asahi* increases the uncertainty of the outcome of the minimum contacts analysis and adds yet another somewhat intangible element to the fairness analysis.[114] *CMMC v. Salinas* shows that *Asahi* has created some uncertainty in Texas and the makings of a disagreement between Texas and the Fifth Circuit. But it is not that uncertainty alone that makes *CMMC v. Salinas* a disturbing decision.

First, given the increasing ease with which products move in international commerce, narrowing the reach of U.S. courts is a step in the "wrong direction."[115] The more likely it is that consumers and workers will be affected by products manufactured abroad and distributed throughout the United States by parties unaffiliated with the foreign manufacturers, the less fair it is to consumers and workers to limit their ability to hold those manufacturers accountable for their products when they cause injury.[116] Although the Texas Supreme Court did not find it unfair or unreasonable for Salinas to sue CMMC in France,[117] the likelihood of such a suit by a manual laborer with limited resources is small.

Second, preventing effective redress by the employee against the manufacturer places an undue burden on the employer for the equipment manufacturer's errors. When the employee is effectively limited to seeking redress from the

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113. *See id.* at 440.

114. *See* Dessem, *supra* note 56, at 77–85 (endorsing the decision in *Asahi* not to adopt a separate minimum contacts standard for international defendants but to rely on an enhanced "fairness" analysis).

115. Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 56, 65 (1988) (pointing out the competitive disadvantage for domestic manufacturers in a personal jurisdiction analysis that favors international interests).

116. *See id.* at 56.

117. *See* Salinas v. CMMC, 903 S.W.2d 138, 145 (Tex. App.—Austin 1995).

employer alone, he must seek full compensation for injury from the employer. An employer may have the resources to seek redress from the foreign manufacturer abroad; however, the manufacturer has both the benefit of the sale and the boon of greater protection from suit than a manufacturer in the forum has. Again, the increasing ease of broad-based international marketing and trade erases some of the advantages the local manufacturer had in the past that would balance out the jurisdictional imbalance. In the case of Salinas's employer, Hill Country Cellars, the result may place an additional burden on a start-up industry dependent on foreign manufacturers for equipment.

Third, although taking the special burdens of U.S. litigation on the international defendant into account is appropriate for both due process and foreign policy reasons, basing the due process analysis on an individual state's contact with an international defendant may not be. Professor Gary Born, whose article in prepublication form was cited but not followed by Justice O'Connor in *Asahi*,[118] suggested that although "[d]ue process analysis in international cases . . . should require closer prelitigation contacts between the defendant and the forum than would be necessary in domestic cases,"[119] the identity of the individual states in that analysis should be irrelevant. He suggests a national contacts test which would permit courts to exercise jurisdiction to the fullest extent of international law, would extend jurisdiction to defendants with "significant United States contacts spread evenly, but thinly, over a number of individual states," and would still provide a reasonable measure of the inconvenience to foreign defendants given the relative homogeneity of procedural rules in the states.[120] In pure state law cases, like *CMMC v. Salinas*, Born suggests a mixed test to ensure that the forum state's interest is taken into account, so that a state would not take jurisdiction "absent some minimal link between the defendant and the

118. *See* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 115 (1987).

119. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 36 (1987).

120. *Id.* at 37–38; *see also* Yvonne Luketich Blauvelt, *Personal Jurisdiction After* Asahi Metal Industry Co. v. Superior Court of California, 49 OHIO ST. L.J. 853, 874 (1988) (endorsing a "national contacts" test for international defendants); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 525–28 (1993) (recommending legislation to create a national standard).

forum state."[121] Decisions like *Oswalt* suggest that broad-based national marketing efforts are already taken into account in finding minimum contacts where there is evidence of only an isolated act. *CMMC v. Salinas* provided Texas with an opportunity, which it declined, to base jurisdiction on a small number of sales when national marketing can reach only a few states because of the limits of the market.

A mixed national and state contacts test could have simplified the argument for jurisdiction in *CMMC v. Salinas* and would have eliminated some of the possible interstate bias inherent in the application of the current standard. A state with a more developed wine industry, like California, would likely have more than one sale by CMMC to factor into the minimum contacts analysis, making the extension of jurisdiction easier to justify. Although there are both procedural and geographical differences between Texas and California courts, common sense suggests that a French manufacturer with extensive sales to several states in the United States has already cleared the largest hurdle of unfair surprise at being haled into a U.S. court. Implementation of a combined national and state contacts test would have produced a fairer result in *CMMC v. Salinas*, allowing an injured employee to pursue his product liability claim in the forum where he was injured without imposing wholly unanticipated burdens on a manufacturer with significant past sales to the U.S. wine and juice industry.

121. Born, *supra* note 119, at 41–42.

IV. CONCLUSION

The Texas Supreme Court rejected jurisdiction over a French wine press manufacturer in a products liability suit, finding that its delivery by the manufacturer at the order of an independent distributor was not sufficient to establish minimum contacts without a stronger showing of intent to serve the Texas market. The decision arguably narrows the past application of the Texas long-arm statute that Texas and the Fifth Circuit had found to reach manufacturers selling through distributors and foreseeing service of the Texas market through national marketing efforts. Texas now requires more purposeful activity directed toward the State to find jurisdiction when the sale in question is a relatively isolated event. The decision appears to adopt Justice O'Connor's minimum contacts plus test from *Asahi* in fact if not in name. A fairer decision may have resulted if minimum contacts for an international defendant were based on total national contacts when a manufacturer has a single or few sales in one state but multiple sales to customers in other states.

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