

# CLIENT ALERTS

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## Can placing your product into the “stream of commerce” land you in court?

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It is well-established that a company can be sued in a state where they are headquartered or have their principal place of business. But what if a company is sued in a state where it has no physical presence and where its only contact is that one of its products landed in the “stream of commerce” and ended up causing injury in the forum state? This is referred to as “stream of commerce” personal jurisdiction, and if this is the company’s only contact with the forum state, the company may be able to successfully move to dismiss on the grounds of lack of personal jurisdiction.

The United States Supreme Court has held that stream of commerce jurisdiction exists only if the defendant: 1) places its product into the stream of commerce directed at the forum state; and 2) engages in conduct purposefully directed at the forum state. The defendant must take some action to purposefully avail itself of the privilege of conducting activities in the forum state. According to Justice O’Connor’s plurality opinion in *Asahi Metal Industries Co. Ltd. v. Superior Court of California*, 480 U.S. 102, 112 (1987), 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.”

As previously reported, the Sixth Circuit has adopted Justice O’Connor’s approach from *Asahi* and uses a “stream of commerce plus” test to analyze personal jurisdiction. *Parker v. Winwood*, 938 F.3d 833, 840–41 (6th Cir. 2019). The Sixth Circuit looks at additional conduct of the company that indicates an intent or purpose to serve the market in the forum state.

For example, in *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 480–84 (6th Cir. 2003), the Sixth Circuit made jurisdictional findings as to two defendants. The court found that there was no personal jurisdiction under the “stream of commerce plus” theory as to the first defendant because that

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defendant was “merely aware” that its product was being nationally distributed by another company, but the choice to distribute was “out of its hands.” Personal jurisdiction did exist for the second defendant, because that defendant “sought” nationwide distribution of its product by contracting with a distributor for nationwide distribution.

Recent district court cases have reaffirmed the Sixth Circuit’s “stream of commerce plus” test. For example:

- *Olivia v. Airbus Americas, Inc.*, No. 1:19 CV 1701, 2020 WL 1451972, at \*4–5 (N.D. Ohio Mar. 25, 2020): *Olivia* used the Sixth Circuit’s “stream of commerce plus” approach to determine that personal jurisdiction did not exist for a company that manufactured airline seats. The company did nothing “more than place its airline seats into the stream of commerce” and the plaintiff provided no facts “to show that [the defendant] markets, advertises, or sells its airline seats in Ohio.” There was no “purposeful availment” when the only allegations are that the defendant “sold its airline seats to Spirit Airlines and the airline seats may have reached Ohio.”
- *Snabel v. Great States Corp.*, No. 1:19 CV 2052, 2020 WL 1814148, at \*3–4 (N.D. Ohio Apr. 9, 2020): *Snabel* used the “stream of commerce plus” approach to determine that personal jurisdiction did not exist for an electric chainsaw company. The court held that the fact that the defendant advertised its product on TV channels seen in Ohio was not enough to establish jurisdiction. The defendant did not purposefully avail itself of doing business in Ohio just because the home shopping network advertised its chainsaw.

A defendant being sued in a foreign state where it does not have operations and where there is at least arguably no basis for personal jurisdiction beyond a “stream of commerce” theory should consider challenging personal jurisdiction. A successful personal jurisdiction motion under Federal Rule of Civil Procedure 12(b)(2) can save huge amounts of time and money that would otherwise be spent on litigation and discovery. Counsel for companies that have connections to products outside their home state should be aware of these jurisdictional issues in case litigation arises.

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