Service of Process and Personal Jurisdiction Defenses for Foreign Manufacturers:

Navigating the Murky Waters of The Hague Service Convention and The Stream of Commerce Theory

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Introduction

Of all the defenses available to foreign pharmaceutical and medical device manufacturers involved in product liability actions, none can be more effective at stopping a lawsuit in its tracks than the defenses of inadequate service of process and a lack of personal jurisdiction. Because these defenses must be raised and litigated at the outset of a litigation, a successful inadequate service of process or lack of personal jurisdiction defense may help a foreign manufacturer avoid the time and expense of defending a lawsuit on the merits. In some litigations, plaintiffs may elect not to sue a foreign manufacturer in order to save the time and expense it takes to serve process on foreign defendants and avoid a protracted battle over whether the court has personal jurisdiction over the manufacturer. In light of the potentially powerful effect these defenses may present, foreign manufacturers should not overlook whether they have a valid defense to plaintiff's service of process or the court's exercise of personal jurisdiction.

Service of Process Under the Hague Service Convention

When serving process on a foreign manufacturer, plaintiffs are required to comply with both the service laws of the forum in which the suit was filed and international law. Under international law, service of process on foreign corporations is governed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil Matters ("Hague Service Convention"). A copy of the Hague Service Convention is available at the Hague Conference on Private International Law ("Hague Conference") website at www.hcch.net/upload/conventions/txt14en.pdf. The Hague Service Convention, which was first executed in November 1965, was intended to create an internationally recognized procedure for serving process on foreign defendants in civil lawsuits. Under the Hague Service Convention, signatory countries are entitled to create or designate a Central Authority to receive requests from litigants (usually plaintiffs) to serve process on parties that reside in the signatory country. *1965 Hague Service Convention at Article 2*. A list of all signatory countries along with the contact information for their Central Authorities is available at the Conference website at www.hcch.net/index_en.php?act=conventions.authorities&cid=17.

Service of Process Through the Central Authority

Service of process through the Central Authority is the primary method of service authorized by the Hague Service Convention. Plaintiffs seeking to serve process through the Central Authority must provide it with two copies of the

documents to be served, typically the Summons and Complaint. *1965 Hague Service Convention at Article 3*. Along with the Summons and Complaint, the Hague Service Convention also requires that the plaintiff complete and provide the Central Authority with two copies of a: (1) Request for Service; (2) Certificate of Service; and (3) Summary of the Document to be Served. *Id. at Articles 3 and 5*. These documents are available at the Hague Conference website at www.hcch.net/upload/actform14ef.pdf. Only the Summary page is served on the foreign entity being served. The Central Authority maintains the Request page and completes and returns the Certificate of Service to the plaintiff upon completion of service. The version of the Request, Certificate of Service and Summary documents available at the Hague Conference website also includes a "Warning" page. Although the Hague Conference recommends that the Warning page be included amongst the materials served on the foreign defendant, the Warning page is not a required document under the Hague Service Convention. Finally, signatory countries can require that the serving party include translated copies of the documents to be served including the Summary page. *1965 Hague Service Convention at Article 5*. The United States Department of State's website contains a country-by-country breakdown of what each signatory country requires in order to effectuate international service of process on defendants in their jurisdiction. *See travel.state.gov/law/judicial/judicial_2510.html.*

If the plaintiff provides the Central Authority with the appropriate documents, the Central Authority will serve process on the party either in conformance with the laws of the signatory country or via the method requested by the plaintiff, provided plaintiff's requested method is permitted by laws of the signatory country. *1965 Hague Service Convention at Article 5*. Upon completion of service, the Central Authority must provide the requesting party with an executed copy of the Certificate of Service. *Id. at Article 6*. If the requesting party fails to provide copies of all the required documents, the Central Authority must notify the requesting party of the deficiency so it can be cured. *Id*.

Although compliance with the Hague Service Convention is required to effectuate service on a foreign manufacturer, failure to comply with every technical requirement of the Hague Service Convention may not render service ineffective where the foreign manufacturer received actual notice of the lawsuit. For example, plaintiff may fail to serve the defendant with the Summary page or only provide the Central Authority with one copy of the required documents. If the Central Authority still completes service and returns a Certificate of Service despite the technical deficiency, the federal courts consider this to be *prima facie* evidence that proper service was effectuated under the Hague Service Convention. *See, e.g., Zions First Nat. Bank v. Moto Diesel Mexicana, S.A. de C.V.*, No. 08-10528, 2011 U.S. Dist. LEXIS 72989, at *4 (E.D. Mich. Jul. 7, 2011) (holding that the Certificate of Service filed with the Court is prima facie evidence that service complied with the Hague Convention and the laws of the foreign jurisdiction). Moreover, many federal courts, for example, will apply a substantial compliance test to evaluate whether service has been effectuated even though plaintiff has not perfectly complied with the Hague Service Convention

requirements. *See, e.g.*, *United Nat'l Retirement Fund v. Ariela, Inc.*, 643 F. Supp. 2d 328, 335 (S.D.N.Y. 2008) ("Thus, where the plaintiff made a good faith attempt to comply with the [Hague] Convention, and where the defendant received sufficient notice of the action such that no injustice would result, it is within the Court's discretion to deem service of process properly perfected."); *Northrup King Co. v. Compania Productura Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1389-1390 (8th Cir. 1995) (holding that service was properly effectuated on the defendant even if it was not served with the Summary page required by the Hague Convention because it received actual notice of the lawsuit and was not prejudiced by its absence); *Zions First Nat. Bank* 2011 U.S. Dist. LEXIS 72989 at *4 (holding that service was properly effectuated even though the Summons served on the defendant did not specify whether its time to respond was to be measured in calendar or business days).

The Hague Service Convention Does Not Preclude Service By Mail

Serving a foreign defendant through a Central Authority can take significant time. According to the Hague Conference, 66% of service requests are completed by Central Authorities within two months. *See Outline of Hague Service Convention* available at the Hague Conference website at www.hcch.net/upload/outline14e.pdf. The remaining 34% take longer than two months. In addition, having Summonses and Complaints translated into a foreign language can be a costly endeavor. As a result, whenever possible, plaintiffs try to avoid serving foreign defendants through the Central Authority.

Although the Central Authority was intended to be the primary means of serving process under the Hague Service Convention, other means of service may also be available in certain countries. Article 10 of the Hague Service Convention specifically provides that it will not interfere with "the freedom to send judicial documents by postal channels" where the signatory country does not object. *1965 Hague Service Convention at Article 10*. Some countries, Canada and Italy for example, have not objected to the service of process through the mail. But even when a signatory country does not object, service of process on a foreign defendant through the mail still may not constitute valid service for one of several reasons.

First, there is a split of authority on whether Article 10 of the Hague Service Convention applies to initial service of the Summons and Complaint. Some courts, including the Fifth and Eight Circuits, have held that by using the word "send", Article 10 does not apply to service of initial process. *See Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374, 384 (5th Cir. 2002) ("[I]if the drafters [of the Hague Service Convention] had meant for Article 10(a) to provide an additional manner of service of judicial documents, they would have used "service" instead of "send."); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989) (holding that "Article 10(a) merely provides a method for sending subsequent documents after service of process has been obtained by means of the Central Authority."). On the other hand, many courts, including the

Second and Ninth Circuits, have held that Article 10 applies to initial service of process. *See Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986) (holding that "the word 'send' in Article 10(a) was intended to mean 'service'"); *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004) (holding that interpreting the word "send" to include service of initial process "is consistent with the purpose of the Convention to facilitate inter-national service of judicial documents").

Second, where plaintiffs serve initial process on a foreign defendant through the mail, they may fail to provide the Summary page or translated documents typically required when serving process through the Central Authority. Many courts have held that plaintiffs' failure to include the Summary page and translated documents when serving process through the mail does not violate the Hague Service Convention because those requirements only apply when serving process through the Central Authority. *See, e.g., Brown v. Bandai America, Inc.*, No. 3-01-cv-0442-R, 2002 U.S. Dist. LEXIS 8664, at *16 & n.7 (N.D. Tex. May 14, 2002); *Heredia v. Transport S.A.S., Inc.*, 101 F. Supp. 2d 158, 162 (S.D.N.Y. 2000); *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 638 (D.S.C. 1989); *Weight v. Kawasaki Heavy Indus. Ltd.*, 597 F. Supp. 1082, 1086 (E.D.Va. 1984).

Third, although the Hague Service Convention does not preclude service by mail, it also does not specifically authorize it. *Brockmeyer*, 383 F.3d at 803-4; *Julien v. Williams*, 2010 U.S. Dist. LEXIS 132704, at *6-7 (M.D. Fl. Dec. 15, 2010); *The Know With v. Knitting Fever, Inc.*, 2010 U.S. Dist. LEXIS 70412, at *7-8 (E.D. Pa. July 13, 2010). As a result, serving a foreign corporation by mail is only effective if such a method is specifically authorized by the law of the forum where suit was filed. *Id.* Serving a foreign corporation by mail is not a universally recognized method of process in United States' courts. In the federal courts, for example, Federal Rule of Civil Procedure 4(f) only authorizes the use of mail to serve foreign corporations if: (1) service by mail is authorized by the laws of the country where the foreign corporation is located; (2) the mailing was made by the Court Clerk; or (3) the Court ordered use of the mail to effectuate service.

Personal Jurisdiction as it Relates to Foreign Manufacturers

Defendants Must Assert he Personal Jurisdiction Defense as Early as Practicable

In every pharmaceutical or medical device case involving a foreign manufacturer, the personal jurisdiction defense should be evaluated and considered from the outset of the litigation. A successful personal jurisdiction defense can save a foreign manufacturer from expending extraordinary time and money defending a product liability suit. In addition, the rules of most courts require that the defendant litigate the personal jurisdiction defenses at the outset of the lawsuit or risk having the defense deemed waived or abandoned. In federal court, for example, if the defendant files a pre-Answer motion to dismiss under Fed. R. Civ. P. 12(b), any personal jurisdiction defenses must also be raised at

that time or the defendant risks having it deemed waived. *See Fed. R. Civ. P. 12(g)(2) and (h)(1)* (limiting defendants to one pre-Answer motion to dismiss and deeming the personal jurisdiction defense waived if it is not raised in a pre-Answer motion or preserved in the defendant's Answer). If the defendant elects not to raise its personal jurisdiction defense by motion, it can still preserve the defense by raising it as an affirmative defense in its Answer.

However, even if a foreign manufacturer properly preserves its personal jurisdiction defense, the defense must still be raised by motion within a reasonable amount of time after the defendant files its Answer. Courts will generally not permit defendants to raise the personal jurisdiction defense after the case has been litigated on the merits for a significant amount of time. Several courts have held that a defendant waives or forfeits a properly preserved personal jurisdiction defense by failing to move to dismiss the suit on personal jurisdiction grounds early on in the litigation because otherwise, the defendant wastes the court's time and resources and lulls the plaintiff into believing that the case will be litigated on the merits. *See, e.g., Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-97 (7th Cir. 1993) (holding that the defendants waived their personal jurisdiction defense after they "fully participated in litigation of the merits for over two-and-a-half years without actively contesting personal jurisdiction"); *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443-44 (3d Cir. 1999) (holding that the defendants waived their personal jurisdiction even though they properly preserved their personal jurisdiction defenses in their Answer because they actively pursued summary judgment before litigating the personal jurisdiction issue). As a result, it is imperative for foreign manufacturers to fully evaluate and decide whether to seek dismissal of an action on personal jurisdiction grounds at the most early practicable time in the litigation. The filing of a personal jurisdiction motion before substantial discovery on the merits of the case takes place will help to ensure that the Court does not find that the defendant waived its personal jurisdictional defense.

An Assertion of Personal Jurisdiction Must Comply with the Forum's Long-Arm Statute and the Federal Due Process Clause

In determining whether a foreign manufacturer has a strong personal jurisdiction defense, it must engage in a two-step analysis. First, the foreign manufacturer must determine whether the forum state's long-arm statute permits an exercise of jurisdiction over it. *IMO Industries, Inc. v. Kierket AG*, 155 F.3d 254, 258 (3d Cir. 1998); *Int'l Technologies Consultants v. Euroglas S.A.*, 107 F.3d 386, 391 (6th Cir. 1997). Second, the exercise of jurisdiction over the defendant must also comport with the due process requirements of the United States Constitution. *Id.*

In product liability cases subject to an MDL, the issue of which jurisdiction's law applies to the personal jurisdiction issue often arises. In MDL situations, most courts have held that the long arm statute of the jurisdiction in which the case was filed and transferred from applies but that the federal law of

the circuit in which the MDL court sits should be utilized in determining whether an exercise of personal jurisdiction over the foreign defendants comports with federal due process. *See in re Chinese Drywall Prods. Liab. Litig.*, No. 09-6687, 2012 U.S. Dist. LEXIS 124903, at *24 (E.D. La. Sep. 4, 2012) (holding that "the MDL transferee court … is obliged to apply ... the substantive law of the transferor court … and the federal law of its own circuit."); *Knouse v. Gen. Am. Life Ins. Co.*, 391 F.3d 907, 911 (8th Cir. 2004) (same).

Compliance with the Forum's Long-Arm Statute

The first step of the personal jurisdiction analysis, whether the state's long arm jurisdiction permits an exercise of jurisdiction, should not be overlooked. In most states, the long arm statute has been drafted or interpreted to be as broad as the federal Due Process Clause. In those situations, the personal jurisdiction analysis essentially folds into the question of whether an exercise of personal jurisdiction would violate the Due Process Clause. *See, e.g., General Retail Servs. v. Wireless Toys Franchises, L.L.C.*, 255 Fed. Appx. 775, 793 (5th Cir. 2007) ("Because the Texas long-arm statute extends to the limits of federal due process, the two-step inquiry collapses into one federal due process analysis.").

Several states, however, have long arm statutes whose reach are far narrower than the federal Due Process clause. In most product liability actions, plaintiffs are seeking to hold foreign manufacturers liable for conduct that occurred outside the United States which allegedly caused injuries to a forum resident. In some states, New York, Georgia, Kentucky and Ohio for example, personal jurisdiction against a foreign manufacturer whose conduct may have caused injuries to a forum resident only exists if the forum manufacturer regularly conducts business, engages in a persistent course of conduct, or derives substantial revenue from goods used or consumed in the forum. *See NY CPLR § 302(3); Off. Code Georgia Ann. § 9-10-91(3).Ky. Rev. Stat. Ann. § 454.210(2)(a)(4); Ohio Rev. Code Ann. § 2307.382(4).* Depending on the long arm statute and the nature of the foreign manufacturers' conduct, the defendant may have an argument that the long arm statute does not permit an exercise of personal jurisdiction.

Compliance with the Federal Due Process Clause

Even if the forum's long arm statute does not preclude an exercise of personal jurisdiction, the inquiry does not end there. In order for a court to exercise personal jurisdiction over a foreign manufacturer, the court must analyze whether an assertion of jurisdiction would violate the federal Due Process Clause. Under the federal Due Process Clause, a foreign defendant may only be subject to the court's personal jurisdiction where the defendant has had sufficient contacts with the State "such that maintenance of the suit does not offend traditional motions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Minimum contacts exists where the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within

the forum State, thus invoking the benefits and protections of its laws" *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Purposeful availment requires a showing that the defendant's contacts with the forum state were the result of its own conduct rather than "random, fortuitous or attenuated contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 465, 475 (1985).

Development of the Stream of Commerce Test

In product liability actions involving foreign manufacturers, whether personal jurisdiction exists usually depends on application of the "stream of commerce" test. The stream of commerce theory of personal jurisdiction traces its roots back to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), where the Court held that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may constitute purposeful availment.

The United States Supreme Court next addressed the stream of commerce theory in *Asahi Metal Industry Co. v. Superior Court of Cal., Salano Cty.*, 480 U.S. 102 (1987). *Asahi* involved a product liability action against the Chinese manufacturer of a motorcycle tire and tube which allegedly caused plaintiff's motorcycle accident. The tire and tube manufacturer filed a third-party action against the Taiwanese manufacturer of the valve assembly. *Asahi*, 480 U.S. at 105-6. After plaintiff settled his claims, the only claim that remained was the third-party indemnity action between the two foreign manufacturers. The Taiwanese manufacturer moved to dismiss the third-party claim due to a lack of personal jurisdiction. *Id.* On appeal, the California Supreme Court held that the Taiwanese manufacturer was subject to the court's jurisdiction because it sold its products internationally and was aware that is products made their way into California. *Id.* at 108.

The United States Supreme Court reversed, holding that an exercise of jurisdiction over the third-party defendant violated the Due Process Clause because the remaining indemnity claim between two foreign manufacturers had little connection to California and the burdens on the Taiwanese manufacturer of having to defend the lawsuit in California was too substantial. *Asahi*, U.S. at 116-17. The Court, however, failed to reach a majority opinion on whether personal jurisdiction could be based on a stream of commerce theory. A plurality of the Court, led by Justice O'Connor, rejected arguments that a foreign defendant's decision to place its product in the stream of commerce, coupled only with awareness that the product could ultimately end up in a particular forum, was sufficient to subject the defendant to the personal jurisdiction of that forum. *Id.* at 111-12. Justice O'Connor advocated for a "stream of commerce plus" test, which would permit a court to exercise jurisdiction over a foreign defendant that has placed its product into the stream of commerce and engaged in some purposeful conduct directed towards the particular forum at issue. *Id.* at 112. For example, Justice O'Connor explained that if the defendant designed its product specifically for sale or use in a particular forum, such conduct may indicate an

intent or purpose to serve the market in that forum and therefore, establish the necessary minimum contacts. *Id.* Under Justice O'Connor's approach, "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." *Id*. Unfortunately, Justice O'Connor could not secure a majority of the Court to agree with her "stream of commerce plus" approach. As a result, the contours of the stream of commerce theory of jurisdiction were left to the federal appellate courts to develop.

The stream of commerce test was recently re-examined by the Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). In *McIntyre*, plaintiff, a New Jersey resident, was injured by an industrial machine that was manufactured by an English company. *McIntyre*, 131 S. Ct. at 2786. The foreign manufacturer had no presence in the United States but entered into an agreement with an Ohio company to distribute its products throughout the United States, and its employees visited the United States on a few occasions (though never New Jersey) to market its product. Plaintiff was only able to demonstrate that one of the defendant's products, the product that allegedly injured plaintiff, made its way into New Jersey. *Id.* Based on these facts, the New Jersey Supreme Court held that personal jurisdiction existed over the English manufacturer because it targeted the United States as a whole and could anticipate that its products might enter New Jersey. *Id.*

The United States Supreme Court reversed, holding that an exercise of personal jurisdiction violated the Due Process Clause given the limited nature of the foreign manufacturer's contacts with New Jersey. *McIntyre*, 131 S. Ct. at 2790. A plurality of the Court, led by Justice Kennedy, reiterated that Supreme Court precedent requires that personal jurisdiction analysis be based on the defendant's actions, not its expectations. *Id.* at 2789. Furthermore, the plurality cautioned that personal jurisdiction requires a "forum-by-forum" analysis so that a defendant's decision to market its product in the United States as a whole does not automatically equate to a finding that the defendant is subject to the jurisdiction in every state that its products reached. *Id.* Unfortunately, the Court once again could not reach a majority consensus on the appropriate stream of commerce test. As a result, the interpretation and scope of the stream of commerce theory of personal jurisdiction continues to be addressed by the federal appellate and trial courts.

Current State of the Stream of Commerce Test

Whether a foreign manufacturer may be subjected to the personal jurisdiction of a particular court is a fact-sensitive inquiry that requires an analysis of the manufacturer's specific efforts to direct its products towards the United States and the forum state. In light of the Supreme Court's inability to reach a majority consensus on the stream of commerce theory in *McIntyre*, whether a foreign manufacturer may be subject to a court's personal jurisdiction is also still largely dependent on where the manufacturer has been sued.

In jurisdictions where the Circuit Courts previously adopted a version of the stream of commerce test, the Court's decision in *McIntyre* has generally not changed that approach. The Seventh Circuit, for example, has used a broad interpretation of the stream of commerce test in deciding whether a foreign manufacturer may be subject to the court's personal jurisdiction in a product liability suit. *See, e.g., Eckberg v. Liebherr Crawler Crane Co.*, No. 05-c-3725, 2007 U.S. Dist. LEXIS 47310, at *12 (N.D. Ill. Jun. 27, 2007) ("The Seventh Circuit has consistently chosen to interpret the 'stream of commerce' theory broadly, explicitly declining to follow the narrower interpretation introduced in *Asahi*."). In *Giotis v. Appollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), the plaintiff, a Wisconsin resident was injured by fireworks that the manufacturer sold nationally through a series of distributors. The district court held that the manufacturer was not subject to the court's personal jurisdiction because it did not directly market or sell its products in Wisconsin. The Seventh Circuit reversed holding that because the manufacturer was aware that its distributors had the ability to advertise and sell its products in Wisconsin, personal jurisdiction existed over the manufacturer under a stream of commerce theory. *Giotis*, 800 F.2d at 667.

Despite the plurality opinion in *McIntyre* stressing that the courts analyze the defendant's forum-related activities, courts in the Seventh Circuit continue to rely on *Giotis* and use this broad version of the stream of commerce test to find that personal jurisdiction exists over foreign manufacturers who distribute their products throughout the United States through subsidiaries or independent distributors. *See, e.g., Garrard v. Pirelli Tire LLC*, No. 3:11-cv-824, 2012 U.S. Dist. LEXIS 85066 (S.D. Ill. Jun. 20, 2012) (holding that a German tire manufacturer which sold tires to a motorcycle manufacturer in Japan which sold its motorcycles throughout the United States was subject to the court's jurisdiction where the tire allegedly injured an Illinois resident because it placed its tires into the stream of commerce through a "sophisticated global distribution system" and could expect that its products would make their way to Illinois).

On the other hand, the Sixth Circuit previously adopted Justice O'Connor's stream of commerce plus test. In *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993), plaintiff allegedly suffered personal injuries as a result of her use of a pharmaceutical product called Ritrodine and filed a lawsuit in the Western District of Kentucky. The product was designed and manufactured by defendant Duphar B.V., a company located in the Netherlands. *Tobin*, 993 F.2d at 532. Relying on *Asahi*, the trial court granted Duphar's motion to dismiss finding that its mere placement of its product in the stream of commerce, even with knowledge that it might reach Kentucky, did not constitute purposeful availment. *Id.* at 542. On appeal, the Sixth Circuit reversed holding that Duphar was subject to the court's personal jurisdiction because it had conducted several activities directed at the United States as a whole. *Tobin*, 993 F.2d at 542-45. The court noted that Duphar submitted the New Drug Application to the FDA, sent representatives to the United States to conduct clinical trials and negotiated a licensing agreement with Astra which required

Astra to market the product throughout the entire United States. *Id.* The court also noted that Duphar contractually retained control over the labeling of the product. *Id.* Based on these facts, the court found that jurisdiction existed over Duphar because its contacts with the United States and Kentucky consisted of more than just mere awareness that its products were being sold in the forum. *Id.* Since *McIntyre* was decided, courts in the Sixth Circuit continue to use Justice O'Connor's stream of commerce plus test. *See, e.g., Lindsey v. Cargotec USA, Inc.*, No. 4:09CV-00071-JHM, 2011 U.S. Dist. LEXIS 112781, at *19 (W.D. Ky. Sep. 30, 2011) ("Because the Supreme Court in *McIntyre* did not 'conclusively define the breadth and scope of the stream of commerce theory, as there was not a majority consensus on a singular test' … the Court will continue to adhere to the Sixth Circuit's analysis of purposeful availment.").

In circuits where the governing stream of commerce test is not so clear, however, some courts seem to have latched on to the language in *McIntyre*'s plurality opinion stressing that personal jurisdiction only exists over a foreign manufacturer where it has purposefully engaged in conduct directed at the forum rather than the United States as a whole. In *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 640 (D. Md. 2011), for example, plaintiff alleged that he was injured as a result of a defective bicycle component manufactured by the defendant, a Taiwanese company. Although the defendant knew that its products were sold throughout the United States, the court granted its motion to dismiss because there was "nothing to show that [the defendant] intentionally directed any conduct toward the State of Maryland." *Id.* at 643. Similarly, in *Sieg v. Sears Roebuck & Co.*, 855 F. Supp. 2d 320 (M.D. Pa. 2012), plaintiff brought a product liability suit against the Taiwanese manufacturer of a power tap that allegedly caused a fire. Although the court found that the defendant attempted "to cater to the United States market as a whole," the court held that it did not have personal jurisdiction over the defendant because there was no evidence that it directed activities directly at the Commonwealth of Pennsylvania. *Id.* at 327.

Conclusion

In sum, while service of process and personal jurisdiction defenses may not be glamorous, they can still be a powerful tool for foreign pharmaceutical and medical device manufacturers. In addition to helping avoid or short circuit a lawsuit, strong challenges to plaintiff's service of process and the court's jurisdiction can also be an effective negotiating method. For example, a foreign defendant may be able to persuade plaintiffs' counsel to agree to forego certain discovery or agree to certain limits on discovery in exchange for the defendant waiving its service of process and personal jurisdiction defenses. As a result, practitioners defending foreign manufacturers in product liability suits should keep abreast of new developments in these areas of law.