

# Marketplace Seller Inventory: Purposeful Availment Aplenty

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In this article, Cram compares Pennsylvania's questionable due

process violation determination in *Online Merchants Guild* with the Washington Board of Tax Appeals' well-supported finding that Amazon sellers had nexus where their inventory was stored and shipped to purchasers.

A seller can market goods worldwide using the internet. A marketplace seller with products listed on a large internet platform gains access to the platform's market. Marketplace sellers participating in Amazon's Fulfillment by Amazon program (FBA sellers) list their products on Amazon's website and ship their inventory to Amazon, which positions that inventory in its fulfillment facilities for quick delivery. Amazon takes the orders and payments for the FBA sellers' products and delivers those items to purchasers. The due process clause requires some "minimum connection" between the state and the person, property, or transaction it seeks to tax.<sup>1</sup> If an

<sup>1</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-345 (1954)), overruled on other grounds, *South Dakota v. Wayfair*, 585 U.S. \_\_\_, 138 S. Ct. 2080 (2018). In *Quill*, the Court held that North Dakota's use tax assessment against an out-of-state office supply seller with no in-state physical presence but doing extensive catalog advertising and making significant mail order sales in the state did not violate due process but did violate the commerce clause. *Wayfair* later overruled the *Quill* physical presence nexus rule.

out-of-state seller purposefully avails itself of the benefits of an economic market in the forum state, it may subject itself to that state's personal jurisdiction.<sup>2</sup> Does an out-of-state FBA seller with inventory in the forum state have sufficient contacts under the due process clause to establish personal jurisdiction for tax purposes?

The Commonwealth Court of Pennsylvania and Washington Board of Tax Appeals (BTA) reached conflicting conclusions on that question. In *Online Merchants Guild*,<sup>3</sup> the commonwealth court held that FBA sellers whose sole connection with Pennsylvania consisted of inventory stored in Amazon warehouses lacked sufficient contacts under the due process clause for the Department of Revenue to require them to collect and remit sales tax<sup>4</sup> on sales of that inventory to in-state customers or pay state tax on such income.<sup>5</sup> Relying on *McIntyre*,<sup>6</sup> the commonwealth court concluded that FBA sellers' conduct fell short of "purposeful availment"<sup>7</sup> of any Pennsylvania protections or benefits because Amazon, not FBA sellers, controlled the location of FBA sellers' inventory.<sup>8</sup>

In *Jenson Online Inc.*,<sup>9</sup> the BTA held that the taxpayers, four FBA sellers with inventory in

<sup>2</sup> *Quill*, 504 U.S. 298, 307.

<sup>3</sup> *Online Merchants Guild v. Hassell*, Memorandum Opinion, Case No. 179 M.D. 2021 (Sept. 9, 2022).

<sup>4</sup> The term "sales tax" will be used throughout the article to refer to both sales tax and use tax.

<sup>5</sup> Memorandum Opinion at 2.

<sup>6</sup> *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873 (2011).

<sup>7</sup> "It is essential . . . that there 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." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>8</sup> Memorandum Opinion at 17, 19-20.

<sup>9</sup> *Jenson Online Inc. v. Washington Department of Revenue*, BTA, Dkt. Nos. 19-033, 19-063, 19-066, 20-136 (Mar. 30, 2022), appeal by Orthotic Shop Inc. and S&F Corp. pending at Wash. Court of Appeals, Division 3, Case No. 393-216.

Amazon facilities in Washington, had nexus for business and occupation (B&O) tax and sales tax on their facilitated sales to Washington customers for various periods between 2010 and 2018. In *Jon Bargains Inc.*,<sup>10</sup> with similar facts, the BTA reached the same conclusion. Finding no constitutional violation with the assessments, the BTA concluded that the FBA sellers had purposely availed themselves of the benefits and protections of Washington by using Amazon's website to direct their products to a national audience (including Washington), selling their products to Washington customers, and having products stored in Amazon's Washington warehouses and shipped from there to Washington buyers.<sup>11</sup>

All states imposing sales tax have by now enacted laws requiring marketplace facilitators such as Amazon to collect sales tax on facilitated marketplace sales.<sup>12</sup> The marketplace facilitator sales tax collection requirement provides an efficient way to enhance tax compliance in the growing area of marketplace sales. A marketplace facilitator registers with the state to collect and remit tax on the sales of its many marketplace sellers — without the state needing to deal directly with each marketplace seller.

Although the issue of whether an out-of-state FBA seller with inventory in the forum state can be required to collect that state's sales tax may now be moot, it remains for facilitated sales occurring before the effective dates of those laws and for the seller's direct sales. The issue of whether the presence of FBA seller inventory in the state creates income or franchise tax nexus also remains.

This article compares the commonwealth court's questionable due process violation determination with the BTA's well-supported finding that FBA sellers had nexus where their inventory was stored and shipped to purchasers. First, after some background, this article explores the FBA seller-Amazon contractual relationship under the Amazon Services Business Solutions

Agreement (BSA),<sup>13</sup> describing how FBA sellers purposefully avail themselves of protections and benefits of states where their inventory is regularly located. Second, this article highlights the weakness of the *Online Merchants Guild* decision, which focused solely on Amazon's control of FBA seller inventory location, and the strength of the *Jenson* decision, which considered all FBA sellers' connections to the inventory state through their contractual relationship with Amazon. Finally, this article applies "stream of commerce" analysis from recent U.S. Supreme Court decisions to support the conclusion that FBA sellers show purposeful availment conduct "aplenty"<sup>14</sup> in states where Amazon regularly locates that inventory and should expect their products to be purchased there, establishing personal jurisdiction.

### Background

Amazon is the world's largest e-commerce platform, advertising and selling its own merchandise on its website as well as facilitating its marketplace seller sales.<sup>15</sup> In the 4th quarter of 2022, 59 percent of Amazon's units were sold by marketplace sellers.<sup>16</sup> More than 90 percent of top sellers on Amazon use the FBA Program.<sup>17</sup>

Over the past few decades, as Amazon's direct and marketplace e-commerce sales grew, Amazon expanded its footprint, building warehouses and fulfillment centers in a steadily increasing number of states to provide prompt delivery of merchandise purchased online. Amazon has over 180 fulfillment and sortation centers located throughout the United States (including 22 in Pennsylvania and 15 in Washington), and additional fulfillment centers in other countries.<sup>18</sup> As its footprint expanded, Amazon began collecting and remitting sales tax on its direct sales in the states in which it had physical presence. However, Amazon considered the

<sup>10</sup> *Jon Bargains Inc. v. Washington Department of Revenue*, Dkt. No. 19-078 (Mar. 30, 2022).

<sup>11</sup> *Jenson* at 24.

<sup>12</sup> *Wayfair* Implementation and Marketplace Facilitator Work Group White Paper at 9-10, Uniformity Committee (July 1, 2021), downloadable at [www.mtc.gov](http://www.mtc.gov).

<sup>13</sup> The terms of the Amazon Services Business Solutions Agreement are available online.

<sup>14</sup> *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29 (1988).

<sup>15</sup> Marketplace Pulse, "Marketplace Pulse Year in Review 2022."

<sup>16</sup> Marketplace Pulse, "Amazon Percent of Units by Third-Party Sellers."

<sup>17</sup> Marketplace Pulse, "Marketplace Pulse Year in Review 2022."

<sup>18</sup> Seller Essentials, "Amazon Warehouse Locations."

obligation to collect sales tax on its FBA sellers' sales to belong to the FBA sellers.

Even though Amazon collected sales tax on its direct e-commerce sales in many states, little sales tax was being collected on Amazon's facilitated sales. Starting in 2017, a few states began enacting laws requiring marketplace facilitators to collect sales tax on their facilitated sales.<sup>19</sup> Pennsylvania required marketplace facilitators to elect by March 1, 2018, to either start collecting sales tax on facilitated sales or provide notice to purchasers and report their facilitated sales to the DOR.<sup>20</sup> Pennsylvania later required marketplace facilitators to begin collecting sales tax on facilitated sales by July 1, 2019.<sup>21</sup> Washington required marketplace facilitators to elect by January 1, 2018, to collect sales tax on facilitated sales or provide notice to purchasers and report its facilitated sales to the DOR.<sup>22</sup> Washington also later required marketplace facilitators to start collecting sales tax on facilitated sales by October 1, 2018.<sup>23</sup>

### BSA

The BSA defines the contractual relationship between Amazon and the FBA seller, enabling the FBA seller to list and promote its products on the Amazon website<sup>24</sup> and access Amazon's extensive market. The FBA seller registers its products with Amazon and must provide accurate product information, which is shown on the product listing displayed on Amazon's website.<sup>25</sup> The

product listing must disclose the FBA seller as the "seller."<sup>26</sup> The FBA seller sets the prices for its products.<sup>27</sup> When a customer places an order on the Amazon website for the FBA seller's product, Amazon receives the order on behalf of the FBA seller, along with the customer's payment, and remits that payment to the FBA seller after deducting Amazon's fulfillment service fees.<sup>28</sup> The FBA seller ships its inventory to Amazon for storage in an Amazon facility of Amazon's choosing. Amazon will locate that inventory in facilities in proximity to the FBA seller's market to enhance speed and efficiency in delivering the product to the purchaser within two days, mutually benefiting Amazon and the FBA seller.<sup>29</sup> Amazon charges the FBA seller storage fees for the time that inventory is in an Amazon facility.<sup>30</sup> The FBA seller retains title and ownership of its inventory located in an Amazon facility until sold to a customer or otherwise disposed of.<sup>31</sup> Amazon keeps electronic records that track the FBA seller's inventory, identifying the number of units of that inventory stored in any Amazon fulfillment center.<sup>32</sup> After accepting the customer's order and payment on behalf of the FBA seller, Amazon ships the FBA seller's product to the customer and handles returns.<sup>33</sup> The customer communicates with Amazon concerning the order, delivery, or post-delivery issues.

The BSA makes the FBA seller responsible for compliance with state and local tax laws concerning sales on the Amazon platform.<sup>34</sup> The FBA seller is responsible for the collection, reporting, and payment of its taxes.<sup>35</sup> The FBA seller expressly acknowledges that storing its

<sup>19</sup> Minnesota enacted 2017 H.F. 1, Pennsylvania enacted 2017 Act 43, Rhode Island enacted 2017 H. 5175A, and Washington enacted 2017 H.B. 2163. As previously mentioned, all states imposing sales tax now have those tax collection requirements in place.

<sup>20</sup> Act 43 required marketplace facilitators making over \$10,000 in aggregate sales into Pennsylvania for the prior 12-calendar-month period to make that election.

<sup>21</sup> 2019 Act 13 required marketplace facilitators lacking physical presence and with \$100,000 or more in Pennsylvania sales in the prior 12-calendar-month period to commence collection.

<sup>22</sup> 2017 H.B. 2163 required marketplace facilitators with \$10,000 or more in direct and facilitated sales into Washington for the current or prior calendar year to make the election.

<sup>23</sup> The collection requirement applied to marketplace facilitators lacking physical presence with over \$100,000 in direct or facilitated sales or 200 transactions in the current or prior calendar year. 2019 SSB 5581 eliminated the 200-transaction economic nexus threshold.

<sup>24</sup> BSA, para. S-1.2.

<sup>25</sup> *Id.* at paras. S-1.1, F-2.

<sup>26</sup> Amazon Seller Central, "Selling Policies and Seller Code of Conduct."

<sup>27</sup> Amazon Seller Central, "Amazon Marketplace Fair Pricing Policy."

<sup>28</sup> BSA, para. S-1.2.

<sup>29</sup> See Testimony of Scott Moody, FBA seller, Transcript of Injunction Hearing in *Online Merchants Guild v. Hassell* at 31-32, Case No. 1:21-CV-000369, U.S. District Court for the District of Middle Pennsylvania, attached as Exhibit 2 of The Online Merchant Guild's Memorandum in Support of Application for Summary Judgment in *Online Merchants Guild*, Case No. 179 MD 2021.

<sup>30</sup> BSA, paras. F-3.1, 9.1.

<sup>31</sup> *Id.* at para. F-3.3.

<sup>32</sup> *Id.* at para. F-3.4.

<sup>33</sup> *Id.* at para. F-8.2.

<sup>34</sup> Amazon Seller Central, "Tax Policies."

<sup>35</sup> BSA, para. 10.



inventory in Amazon fulfillment centers may create nexus in the state or other localities in which the inventory is stored, and the FBA seller is solely responsible for any taxes owed as a result of that storage.<sup>36</sup> The FBA seller must indemnify Amazon against third-party claims and liability for the FBA seller's products, intellectual property infringement, taxes, and duties to collect taxes.<sup>37</sup>

When the FBA seller accesses Amazon's market by listing its products on Amazon's website, ships its products to Amazon, relies on Amazon to determine where its inventory should be stored in order to achieve the fastest delivery of its products to purchasers, pays Amazon for inventory storage and sales fulfillment service fees, and accepts the sales proceeds from Amazon, the FBA seller has purposefully availed itself of the protections and benefits provided by the state and local jurisdictions in which its inventory is regularly stored and sales are fulfilled. The FBA seller's inventory must be safely and securely stored. Delivery of that inventory to purchasers will require roads and traffic control. Those services place demands on state and local resources: police and fire protection, utilities services, and transportation infrastructure. Records showing the dates and amounts of the FBA seller's shipments of inventory to Amazon, placement of that inventory in Amazon facilities, and sales and delivery of that inventory to purchasers should show a regular pattern sufficient to establish personal jurisdiction for tax purposes, as opposed to sporadic, occasional, or otherwise de minimis activity.

The FBA seller seeks sales anywhere within the reach of Amazon's website, certainly including the jurisdictions where Amazon stores inventory for quick delivery to the FBA seller's market. Because Amazon tracks the location and disposition of the FBA seller's inventory, the FBA seller should have that information available if requested. Nonetheless, the FBA seller seeks the protections and benefits of the jurisdictions where its inventory is stored and sales are fulfilled,

regardless of whether the FBA seller chooses to know where that inventory is located.

The FBA seller acknowledges assumption of products liability risk in the BSA by agreeing to indemnify Amazon. The FBA seller should expect to be sued in jurisdictions where its products are sold and could cause injury.<sup>38</sup> The FBA seller also acknowledges in the BSA the risk of tax liabilities created by storage of its inventory and should expect to owe taxes and be subject to assessments in jurisdictions where its inventory is regularly stored and sales are fulfilled.

### Online Merchants Guild

As Amazon expanded its facilities in Pennsylvania, the DOR negotiated agreements with Amazon for sales tax collection. In 2012 the DOR and Amazon entered into an agreement providing that Amazon would collect sales tax on its direct sales in Pennsylvania.<sup>39</sup> In 2018 the DOR and Amazon entered into an agreement that Amazon would also start collecting sales tax on its facilitated sales in Pennsylvania on April 1, 2018.<sup>40</sup>

The DOR had tax compliance concerns regarding FBA sellers with inventory located in Amazon facilities in Pennsylvania, so it developed a voluntary disclosure program to provide those FBA sellers the opportunity to register and collect sales tax and pay income tax on their Pennsylvania sales made on or after January 1, 2019. In return, the DOR would waive penalties

<sup>38</sup> The FBA seller generally always qualifies as the "seller" (or "manufacturer," if applicable) under a state's products liability laws. Injured parties purchasing defective products from FBA sellers on Amazon's website have litigated whether Amazon can also be considered a "seller," in addition to the FBA seller. In some cases, Amazon has also been included in the "seller" or "distributor" category for products liability purposes. In other cases, that term is limited to the FBA seller as the inventory titleholder. Courts in those decisions considered the contractual relationship between the FBA seller and Amazon established in the BSA, highlighting the FBA seller's obligation to indemnify Amazon for any claims or losses arising from or related to the sale of its products. See, e.g., *Bolger v. Amazon.com LLC*, 53 Cal. App. 5th 431, 267 Cal. Rptr. 3d 601 (App. 4th Dist. 2020) (California purchaser injured by defective laptop battery purchased from FBA seller on Amazon sued FBA seller, Amazon, and others, seeking strict product liability; FBA seller defaulted, but court found Amazon sufficiently involved in distribution chain to be subject to strict liability); *Erie Insurance Co. v. Amazon.com Inc.*, 925 F.3d 135 (4th Cir. 2019) (In insurer indemnification claim against Amazon for damages caused by defective headlamp purchased from FBA seller on Amazon, court held that Amazon was not a seller under Maryland's products liability law because it did not have title to the headlamp).

<sup>39</sup> Memorandum Opinion at 11.

<sup>40</sup> *Id.*

<sup>36</sup> *Id.* at para. F-14.

<sup>37</sup> *Id.* at para. F-6.1.

and the FBA sellers' liability for any sales or income tax owed on their Pennsylvania sales before that date.<sup>41</sup>

Secretary of Revenue C. Daniel Hassell issued a writ to Amazon on November 1, 2019, requiring Amazon to provide to the DOR the names, tax ID numbers, and addresses of the third-party sellers who contracted with Amazon to have inventory for sale on Amazon's marketplace platform and who had inventory valued at \$10,000 or more in Amazon's Pennsylvania warehouses on at least one of the following days in 2019: March 30, June 29, September 29, and December 28.<sup>42</sup> Amazon provided the DOR the list on or about April 1, 2020.<sup>43</sup> The DOR identified from that list the FBA sellers that had not already registered with the state.<sup>44</sup> By March 21, 2021, the DOR had sent business activities questionnaire requests to 11,263 sellers from the list provided by Amazon, offering a voluntary compliance program to those who came forward.<sup>45</sup>

The Online Merchants Guild, a trade organization representing FBA sellers, filed suit in the U.S. District Court for the District of Middle Pennsylvania<sup>46</sup> February 26, 2021, seeking injunctive and declaratory relief against the DOR and its questionnaires sent to guild members, arguing that the department lacked personal jurisdiction over them and that the questionnaires violated their constitutional rights.<sup>47</sup> The DOR moved for dismissal, and the federal district court conducted an evidentiary hearing.<sup>48</sup>

Scott Moody, an FBA seller and member of the guild who received one of the questionnaires, testified at the evidentiary hearing. Moody, located in New Hampshire, said his business became an FBA seller in September 2018. He

understood that Amazon was collecting sales tax on his FBA sales. He did not know how much, if any, inventory he had in Amazon facilities in Pennsylvania, although he admitted to shipping some of his inventory to an Amazon facility there.<sup>49</sup> He said Amazon could not provide him tracking reports of his inventory locations.<sup>50</sup> He acknowledged signing the BSA and was aware of the provision in the BSA making his business responsible for any state taxes concerning his sales.<sup>51</sup> He knew the locations of Amazon's fulfillment centers, as that information was available on Amazon's website for FBA sellers.<sup>52</sup> He understood that Amazon located its fulfillment centers in or near urban centers to accomplish two-day delivery of products to customers.<sup>53</sup> Moody also acknowledged that he owns the inventory sent to Amazon until a customer pays for it.<sup>54</sup> He testified about the benefits of being an FBA seller:

If you were a brick and mortar retailer, you may have a new product idea, but you're only selling to your little neighborhood. . . . But now I can test to the entire really North American market. . . . So that is an incredible opportunity. . . .<sup>55</sup>

By being an FBA I ensure the largest marketing exposure, audience exposure to my products.<sup>56</sup>

On May 28, 2021, the federal district court dismissed the guild's suit on comity grounds.<sup>57</sup> On June 2, 2021, the guild filed in the commonwealth court its application for emergency relief against the DOR, seeking a stay on its members' responding to the questionnaires and a determination that those questionnaires violated

<sup>41</sup> *Id.* at 13. As previously noted, under its agreement with the DOR, Amazon was already required to collect sales tax on FBA sellers' sales in Pennsylvania starting April 1, 2018.

<sup>42</sup> Respondent's Brief in Support of Application for Summary Relief, Exhibit E, *Online Merchants Guild*, Case No. 179 MD 2021.

<sup>43</sup> *Id.* at Exhibit D, Kevin Milligan Deposition Transcript at 170, 173, 179, 181.

<sup>44</sup> *Id.* at 179-181.

<sup>45</sup> *Id.* at Exhibit G, Declaration of Suzanne Tarlini.

<sup>46</sup> *Online Merchants Guild v. Hassell*, Case No. 1:21-CV-0369.

<sup>47</sup> The Online Merchant's Guild's Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum in Support at 11, *Online Merchants Guild*, Case No. 179 MD 2021.

<sup>48</sup> Memorandum Opinion at 14.

<sup>49</sup> Moody testimony at 32-33.

<sup>50</sup> Moody's statement is inconsistent with para. F-3.4 of the BSA, which required Amazon to track the FBA seller's inventory.

<sup>51</sup> Moody testimony at 50-51.

<sup>52</sup> *Id.* at 31-32.

<sup>53</sup> *Id.* at 31.

<sup>54</sup> *Id.* at 53.

<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.* at 18.

<sup>57</sup> Memorandum Order at 21, attached to The Online Merchant's Guild's Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum in Support, *Online Merchants Guild*, Case No. 179 MD 2021.

its members' constitutional rights and the Internet Tax Freedom Act. The parties thereafter filed cross-motions for summary judgment.<sup>58</sup> The guild's motion included as an exhibit the transcript of Moody's testimony at the evidentiary hearing in the federal district court case. Both the guild (citing the link to the Amazon website displaying the terms of the BSA) and the DOR (including the BSA as an exhibit to its summary judgment motion) referenced the BSA provisions in their briefs and pleadings.<sup>59</sup>

The guild raised two arguments in its motion: (1) nonresident FBA sellers with inventory in Amazon's Pennsylvania facilities lacked nexus with Pennsylvania under the due process clause because Amazon controls where that inventory is stored, so there is no purposeful availment conduct by FBA sellers; and (2) the DOR's enforcement activities against FBA sellers violated the ITFA. The commonwealth court resolved the case on due process grounds, agreeing that there was a lack of purposeful availment conduct by FBA sellers. The commonwealth court apparently assumed that guild members had inventory in Amazon facilities in Pennsylvania, without regard to how much or how long. Although the DOR presented evidence<sup>60</sup> that it sent questionnaires to 11,263 nonregistered FBA sellers identified by Amazon as having inventory in Amazon's Pennsylvania facilities valued at \$10,000 sometime during 2019, the opinion apparently discounted that. Amazon's placement of at least \$10,000 of an FBA seller's inventory in its Pennsylvania facilities clearly indicated that Amazon expected sales of that inventory to occur in proximity to those facilities.

Although Moody testified that he did not know whether he had any inventory in Amazon's facilities in Pennsylvania, the fact that he received a questionnaire from the DOR indicated that he had inventory worth at least \$10,000 in those facilities sometime in 2019. It is not clear from his

testimony whether he ever asked Amazon for a report on his inventory location. Under the terms of the BSA, that information should have been available to him if requested.<sup>61</sup> Moody testified that the FBA program gave him the opportunity to reach the North American market (including Pennsylvania) by listing his products on the Amazon website.<sup>62</sup> That activity should show purposeful availment conduct in Pennsylvania, whether Moody chose to know that he had inventory in Amazon's facilities there or not.

In its due process analysis, the commonwealth court quoted<sup>63</sup> *McIntyre*,<sup>64</sup> a products liability personal jurisdiction decision that drew a distinction between a seller placing goods into the stream of commerce with the expectation that they will be purchased in the forum state (purposeful availment) *versus* merely a prediction that they may be purchased there (no purposeful availment). Relying on Amazon's control of FBA seller inventory location, Amazon's shipment of the product to the customer, and Amazon not disclosing to the FBA seller the identity or location of the purchaser, the commonwealth court concluded:

We are hard pressed to envision how, in these circumstances, an FBA Merchant has placed its merchandise in the stream of commerce with the expectation that it would be purchased by a customer located in the Commonwealth, or has availed itself of the Commonwealth's protections, opportunities, and services.<sup>65</sup>

As will be discussed later, the commonwealth court's reliance on *McIntyre* is misplaced.<sup>66</sup> Under the BSA, FBA sellers owned the inventory while it sat in Pennsylvania warehouses, and they paid Amazon storage fees. FBA sellers accepted the proceeds from sales and delivery on their behalf of that inventory to Pennsylvania customers. FBA

<sup>58</sup> *Online Merchants Guild Memorandum Opinion* at 2.

<sup>59</sup> The Online Merchants Guild's Petition for Declaratory and Injunctive Relief at 7; Ex. C of Respondent's Brief in Support of Application for Summary Relief, *Online Merchants Guild*, Case No. 179 MD 2021.

<sup>60</sup> Milligan deposition at 179-180.

<sup>61</sup> See BSA, para. F-3.4.

<sup>62</sup> Moody testimony at 13, 18.

<sup>63</sup> Memorandum Opinion at 17.

<sup>64</sup> "As a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum [s]tate." *McIntyre*, 564 U.S. at 882.

<sup>65</sup> Memorandum Opinion at 19-20.

<sup>66</sup> See discussion of *McIntyre*, *infra*.

seller inventory storage and delivery required public infrastructure. FBA sellers sought and accepted the jurisdiction's protections and benefits and should be subject to personal jurisdiction there, whether they chose to know the location of their inventory or not.

The commonwealth court viewed FBA sellers' inventory presence as their only connection<sup>67</sup> with Pennsylvania, ignoring the many other FBA seller connections to Pennsylvania related to that inventory through the contractual relationship with Amazon, as discussed above. The decision also ignored FBA sellers' contractual assumption of risk for products liability and state and local tax liabilities in Pennsylvania, where FBA sellers' inventory was stored and would be sold.

The commonwealth court's determination that the DOR's act of sending questionnaires to FBA sellers with inventory in the state constituted a due process violation thwarted the DOR's efforts to obtain specific information showing the full extent of FBA sellers' contacts with Pennsylvania: their inventory amounts and sales made in the state, as well as the time periods. Without that information, the commonwealth court's determination was a foregone conclusion. The DOR's presentation of evidence that the questionnaires went to 11,263 nonregistered FBA sellers identified on Amazon's list as having inventory in Amazon's Pennsylvania facilities valued at \$10,000 or more should have at least been sufficient for the DOR to seek from those FBA sellers their specific inventory and sales amounts in Pennsylvania.

### Jenson

During 2016 to 2018, the Washington State DOR sent Washington business activities questionnaires to four out-of-state FBA sellers.<sup>68</sup> Three of them responded, indicating they made retail sales to Washington customers. The DOR obtained Amazon inventory event detail reports for each of the four FBA sellers listing all shipments and warehouse transfers of their inventory that occurred in Amazon-owned

warehouses in Washington during certain periods between 2010 and 2018. The DOR thereafter issued assessments for Washington sales tax and B&O tax against each of them on their Washington sales, asserting nexus with Washington based on the presence of their inventory in Amazon facilities in the state. The four FBA sellers consolidated their assessment appeals to the BTA, arguing: (1) under Washington sales tax law, they were consignors of their inventory to Amazon as consignee, and Amazon had the legal obligation to collect sales tax and pay B&O tax; and (2) the assessments violated the ITFA as well as their constitutional rights under the due process and commerce clauses. The four FBA sellers argued lack of personal jurisdiction because Amazon controlled the location of their inventory. The parties filed cross-motions for summary judgment.

The BTA held that (1) the BSA was not a consignment agreement, and even if it was, the four FBA sellers were obligated under Washington law to collect sales tax on their FBA sales and pay B&O tax;<sup>69</sup> (2) the assessments did not violate the ITFA because there was no discriminatory tax imposed on electronic commerce; and (3) the assessments did not violate the due process or commerce clause. The BTA said the FBA sellers acknowledged that: Amazon stored some of their inventory in Washington warehouses; the FBA sellers provided the product information shown on the listings for their products on the Amazon website; the listings indicated they were the "sellers"; and sales of their goods were made to Washington customers.<sup>70</sup>

In finding no due process violation with the assessments, the BTA relied on *Quill's*<sup>71</sup> holding that the due process clause did not require physical presence to impose a use tax collection duty on an out-of-state seller purposefully availing itself of the forum state's economic market through extensive solicitation efforts. The

<sup>67</sup> Memorandum Opinion at 2.

<sup>68</sup> Jenson Online Inc., S&F Corp., Blue Bargain Inc., and Orthotic Shop Inc.

<sup>69</sup> The BTA noted that the Washington Legislature's enactment of SSB 5581 in 2019 imposed a sales tax collection requirement on marketplace facilitators effective after the periods for the assessments at issue. *Jenson* at 27.

<sup>70</sup> *Id.* at 21.

<sup>71</sup> *Quill*, 504 U.S. at 308.



BTA analogized *Quill's* finding that Quill Corp.'s "deluge of catalogs"<sup>72</sup> sent to North Dakota constituted "purposefully directed" activities there with the FBA sellers' purposefully directing their activities at Washington by deliberately using Amazon's website to list their products to reach a national audience (including Washington), selling thousands of dollars of products to Washington purchasers, and having inventory stored in Amazon's Washington warehouses and shipped to Washington buyers. In further support of its conclusion, the BTA pointed out the provisions in the BSA explicitly stating that the FBA sellers were responsible for their own taxes and that putting inventory into the FBA system could lead to tax liabilities in other states.<sup>73</sup>

The BTA clearly had more factual information than the commonwealth court did in *Online Merchants Guild*: Amazon inventory event detail reports for each FBA seller showing the amount of inventory in Amazon facilities in Washington and sales to Washington purchasers during specific periods. The commonwealth court's determination that the questionnaires sent to FBA sellers violated their due process rights prevented that information from being obtained. Also, unlike the commonwealth court in *Online Merchants Guild*, the BTA carefully considered all of the FBA sellers' activities that were "purposefully directed" at Washington.<sup>74</sup>

### 'Stream of Commerce' Analysis Applied to FBA Sellers

Contrary to the commonwealth court's conclusion in *Online Merchants Guild*, stream of commerce analysis drawn from recent U.S. Supreme Court decisions supports personal jurisdiction over FBA sellers with inventory regularly stored in the forum state. Those decisions are discussed below and compared with the FBA seller facts.

In *World-Wide Volkswagen Corp.*,<sup>75</sup> a husband and wife purchased an Audi automobile from a

dealer in New York and later suffered serious injuries while driving the vehicle through Oklahoma when rear-ended by another motorist. They initiated a products liability suit in Oklahoma state court against the German automobile manufacturer (Audi), foreign importer (Volkswagen), regional distributor (World-Wide), and retail dealer (Seaway). The regional distributor and retail dealer entered special appearances and contested personal jurisdiction, claiming due process violations in that they lacked any contacts with Oklahoma. The regional distributor distributed automobiles to dealers only in Connecticut, New Jersey, and New York, and the retail dealer sold automobiles only in New York. The manufacturer and importer did not contest personal jurisdiction. The Oklahoma state courts upheld personal jurisdiction, but the U.S. Supreme Court reversed, finding a lack of "minimum contacts."<sup>76</sup> The Court distinguished the manufacturer's and importer's nationwide marketing efforts, which were sufficient for personal jurisdiction in Oklahoma, from those of the regional distributor and retail dealer:

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen 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.<sup>77</sup>

The Court articulated the stream of commerce personal jurisdiction theory:

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 [citation omitted].<sup>78</sup>

<sup>72</sup> *Id.*

<sup>73</sup> *Jenson* at 24.

<sup>74</sup> *Id.*

<sup>75</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>76</sup> *Id.* at 291.

<sup>77</sup> *Id.* at 297.

<sup>78</sup> *Id.* at 297-298.

The Court found no basis for Oklahoma jurisdiction for the regional distributor and retail dealer, since the retail dealer sold only in New York and the regional distributor sold only to dealers in Connecticut, New Jersey, and New York. Their only connection to the forum was “the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.”<sup>79</sup>

Amazon and its FBA sellers compare well to the distributor Volkswagen and manufacturer Audi that directly and indirectly pursued the national automobile market in *World-Wide Volkswagen*, as distinguished from the regional distributor and local dealer, who pursued only local or regional markets. FBA sellers directly pursue the national market by listing their products on Amazon’s website. When FBA sellers regularly place their products into the stream of commerce by sending inventory to Amazon for storage and sale, Amazon locates that inventory in warehouses in close proximity to FBA sellers’ markets for quick delivery, benefiting both FBA sellers and Amazon. Amazon tracks the location of FBA sellers’ inventory so that information should be available to FBA sellers if requested. Those inventory reports should show the regularity with which FBA sellers have inventory located in Amazon warehouses in specific states and the volume of sales made in each.

In *Asahi Metal Industry Co.*,<sup>80</sup> a Japanese tire valve assembly manufacturer (Asahi) sold large quantities of tire valves to a Taiwanese tire tube manufacturer (Cheng Shin), in addition to other tire manufacturers. Cheng Shin sold its tire tubes worldwide, including in the United States and California. A products liability lawsuit was filed in California against Cheng Shin, arising from a fatal motorcycle accident involving a Cheng Shin tire tube containing an Asahi tire valve. Cheng Shin filed a cross-complaint seeking indemnification from Asahi. The main lawsuit was settled. Only the indemnification claim remained between the two foreign companies. Asahi objected to personal jurisdiction, arguing a

due process violation. Although it knew some of its valves might be installed in tires that ended up in California, it did not contemplate that it would be subject to suit in California based on its sales of tire valves to Cheng Shin in Taiwan. The California Supreme Court upheld personal jurisdiction. The U.S. Supreme Court reversed unanimously but without a majority opinion. Justice Sandra Day O’Connor’s plurality opinion (joined by Chief Justice William Rehnquist and Justices Lewis Powell and Antonin Scalia) rejected the stream of commerce theory expressed in *World-Wide Volkswagen*, stating:

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. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State.<sup>81</sup>

O’Connor’s opinion also identified other grounds for finding personal jurisdiction unreasonable under “traditions of fair play and substantial justice.”<sup>82</sup> Given that this case concerned an indemnification claim between two foreign entities following settlement of the California resident’s personal injury lawsuit, convenience of forum concerns influenced the Court’s decision. O’Connor’s opinion added: “Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.”<sup>83</sup> If Asahi had sold its valves to a U.S. tire tube manufacturer instead of a Taiwanese manufacturer, and had Asahi been a direct defendant in the personal injury case rather than a party to an indemnification claim, O’Connor’s plurality opinion might have viewed the personal jurisdiction issue differently.

Justice William Brennan’s concurring opinion (joined by Justices Harry Blackmun, Thurgood Marshall, and Byron White) agreed that the exercise of personal jurisdiction over Asahi would not comport with fair play and substantial

<sup>79</sup> *Id.* at 295.

<sup>80</sup> *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986).

<sup>81</sup> *World-Wide Volkswagen*, 480 U.S. at 112.

<sup>82</sup> *Id.* at 113 (citations omitted).

<sup>83</sup> *Id.* at 114.

justice,<sup>84</sup> but disagreed with O'Connor's opinion that Asahi's "regular and extensive sales of component parts" to a manufacturer that it knew was making regular sales of the final product in California were insufficient to establish purposeful availment and minimum contacts with California.<sup>85</sup> Brennan saw no need for any showing of "additional conduct" by the defendant directed toward the forum,<sup>86</sup> saying:

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.<sup>87</sup>

Justice John Paul Stevens (joined by Blackmun and White), concurring in part and concurring in the judgment, agreed that asserting personal jurisdiction would be unreasonable under the circumstances<sup>88</sup> but said that examination of minimum contacts was unnecessary to determine whether personal jurisdiction was constitutional and saw no need to articulate a "purposeful direction" test, as O'Connor's plurality opinion attempted to do.<sup>89</sup> Stevens said that even if a "purposeful direction" test were devised and applied in this case:

a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.<sup>90</sup>

Five of the justices in *Asahi* thought that Asahi's large sales volume of tire valves to Cheng Shin, the Taiwanese tire tube manufacturer, and

its knowledge that those tire tubes would be marketed and sold in California sufficiently established purposeful availment — even though Asahi had no presence or sales and conducted no marketing in California.

Under either O'Connor's "purposefully directed" standard or Brennan's stream of commerce standard, FBA sellers with inventory regularly placed in Amazon facilities in the forum state should be subject to personal jurisdiction. FBA sellers purposefully direct their activities at the forum state by accessing the national market through the Amazon website and setting in motion the process for their inventory to be regularly stored, sold, and delivered in the forum state when they ship that inventory to Amazon. FBA sellers pay Amazon fees for those fulfillment services performed in the forum state and benefit from the sales. FBA sellers acknowledge in the BSA that storage of inventory in Amazon's facilities may create tax obligations in those jurisdictions. FBA sellers should not be surprised to receive a tax inquiry from a forum state where FBA sellers' products are regularly stored and sold.

In *McIntyre*, a worker injured by a metal-shearing machine manufactured by a British company, McIntyre, filed a products liability suit against the manufacturer in New Jersey. McIntyre had engaged a U.S. distributor to market its machines in the United States. At the time of the injury, four of the foreign manufacturer's metal-shearing machines were located in New Jersey. However, the foreign manufacturer had no contacts with New Jersey, other than the machine that it had manufactured being involved in the New Jersey worker's injury. None of its employees had visited New Jersey. It did no advertising, had no property, and shipped no goods there. McIntyre's employees, along with the U.S. distributor, attended trade shows in the United States, but none in New Jersey. McIntyre objected to personal jurisdiction, raising due process. The New Jersey Supreme Court, applying the stream of commerce theory, held that personal jurisdiction existed in that the manufacturer knew or reasonably should have known that its products were distributed through a nationwide distribution system that might lead to sales in any of the states.

<sup>84</sup> *Id.* at 116 (citation omitted).

<sup>85</sup> *Id.* at 121.

<sup>86</sup> *Id.* at 117.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 121.

<sup>89</sup> *Id.* at 121-122.

<sup>90</sup> *Id.* at 122.

The U.S. Supreme Court reversed, finding no personal jurisdiction and insufficient “minimum contacts.” There was no majority opinion, only Justice Anthony Kennedy’s plurality opinion (joined by Chief Justice John Roberts and Justices Scalia and Clarence Thomas), Justice Stephen Breyer’s concurring opinion (joined by Justice Samuel Alito), and Justice Ruth Bader Ginsburg’s dissent (joined by Justices Elena Kagan and Sonia Sotomayor).

Kennedy’s opinion, consistent with O’Connor’s “additional conduct” requirement in *Asahi*, found that the foreign manufacturer had not “engaged in conduct purposefully directed at New Jersey,”<sup>91</sup> determining that the manufacturer’s only contact with New Jersey was the manufacturer’s machine involved in the injury and located in that state.

Breyer’s concurring opinion<sup>92</sup> agreed with the result, given that a single isolated sale did not show that *McIntyre* had any regular flow and course of sales in New Jersey.<sup>93</sup> Breyer disagreed with Kennedy’s plurality opinion to the extent that it imposed strict rules limiting jurisdiction where the defendant did not intend to submit to the power of the sovereign or target the forum.<sup>94</sup> Breyer raised the following questions concerning such rules:

But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders?<sup>95</sup>

<sup>91</sup> *Asahi*, 564 U.S. at 886.

<sup>92</sup> The Oregon Supreme Court in *Willemssen v. Invacare Corp.*, 352 Or. 191, 200, 282 P.3d 867, 873 (2012) (personal jurisdiction upheld in Oregon products liability suit against Taiwanese manufacturer selling defective battery charger to Ohio motorized wheelchair manufacturer; Taiwanese manufacturer knew its battery chargers were installed on wheelchairs marketed nationally by Ohio manufacturer that sold more than 1,100 wheelchairs containing those battery chargers in Oregon within two-year period), in reliance on *Marks v. United States*, 430 U.S. 188, 193 (1977), applied the rationale of Justice Breyer’s concurring opinion as the holding of *McIntyre*, since it represented the position of justices concurring in the judgment on the narrowest ground.

<sup>93</sup> *Id.* at 888.

<sup>94</sup> *Id.* at 890.

<sup>95</sup> *Id.*

If an FBA seller makes only one sale in a state or its activity of shipping inventory to Amazon is only occasional or sporadic and in de minimis amounts, then under *McIntyre*, that may be insufficient to show purposeful availment. In answer to Breyer’s questions, FBA sellers who access the national market by listing their products on Amazon’s website, ship their inventory to Amazon for placement in proximity to purchasers, and accept the sale proceeds have availed themselves of the benefits and protections provided by the jurisdictions in which that inventory is regularly stored, sold, and delivered.

*Ford Motor Co.*<sup>96</sup> involved two products liability lawsuits, one in Montana and one in Minnesota, in which residents injured in motor vehicle accidents in those states sought recoveries from Ford, the manufacturer. Ford moved to dismiss for lack of personal jurisdiction, arguing that it had no causal connection to the injuries because it had not designed, manufactured, or sold the vehicles involved in the accidents in either of those states. The state courts denied the motions, and the U.S. Supreme Court affirmed, determining that Ford had cultivated and systematically served markets for its vehicles in those states by advertising, selling, and servicing the same models of vehicles involved in the accidents.

Justice Kagan wrote the majority opinion (joined by Chief Justice Roberts and Justices Breyer, Ginsberg, Brett Kavanaugh, and Sotomayor). Justice Alito wrote a concurring opinion, as did Justice Neil Gorsuch (joined by Justice Thomas). Both the majority opinion and Gorsuch’s concurring opinion speculated on whether an out-of-state defendant’s virtual presence could establish personal jurisdiction in a particular state. In a footnote, the majority opinion raised the following scenario:

So consider, for example, a hypothetical offered at oral argument. “[A] retired guy in a small town” in Maine “carves decoys” and uses “a site on the Internet” to sell them [citation omitted]. “Can he

<sup>96</sup> *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. \_\_\_ 141 S. Ct. 1017 (2021).



be sued in any state if some harm arises from the decoy?" [citation omitted].<sup>97</sup>

Using that same example, Gorsuch's concurring opinion questioned whether the "purposeful availment" due process requirement was still a sufficient jurisdictional limitation in the internet marketing age:

Today, even an individual retiree carving wooden decoys in Maine can "purposefully avail" himself of the chance to do business across the continent after drawing online orders to his e-Bay "store" thanks to Internet advertising with global reach [citation omitted]. A test once aimed at keeping corporations honest about their out-of-state operations now seemingly risks hauling individuals to jurisdictions where they have never set foot.<sup>98</sup>

Although the *Ford* majority and Gorsuch had concerns for the multijurisdictional litigation exposure of a Maine retiree selling a defective duck decoy on eBay, no such concerns exist for the FBA seller that accesses the national market by listing its products on Amazon's website, ships inventory to Amazon for regular storage in Amazon facilities in a forum state, has sales of that inventory facilitated by Amazon and delivered to purchasers there, pays Amazon's service fees, and accepts the sales proceeds. The Maine retiree selling a defective duck decoy on eBay may resemble the foreign manufacturer with one sale of a defective product in *McIntyre*. The FBA seller purposefully directs its activities at the jurisdictions in which Amazon regularly positions its inventory. The FBA seller places its products in the stream of commerce with the expectation that they will be purchased by customers in those jurisdictions and should be subject to personal jurisdiction for tax purposes there.

## Conclusion

FBA sellers should not be surprised by tax obligations arising in jurisdictions where they have regular inventory presence. FBA sellers purposefully avail themselves of the economic markets as well as the protections and benefits of those jurisdictions. Under the BSA, FBA sellers list their products on Amazon's website to access the national market, ship inventory to Amazon, pay inventory storage and sales fulfillment fees, and accept the proceeds of sales made on their behalf — whether FBA sellers choose to know the jurisdictions where that inventory is stored or not. The commonwealth court in *Online Merchants Guild* reached a questionable result by ignoring FBA sellers' connections to Pennsylvania through the BSA, erroneously focusing only on Amazon's control of FBA seller inventory and ruling that the DOR's questionnaires violated due process. This prevented the DOR from obtaining information showing the extent of the inventory presence and sales in Pennsylvania. The BTA in *Jenson* correctly affirmed the tax assessments against FBA sellers with inventory in Amazon's facilities in Washington by considering the full extent of FBA seller activities under the BSA and relying on reports showing significant inventory presence and sales in Washington. Stream of commerce analysis under recent U.S. Supreme Court decisions supports FBA sellers' personal jurisdiction for tax purposes where their inventory is regularly located. ■

<sup>97</sup> *Id.* at fn. 4.

<sup>98</sup> *Id.* at 1038.