

Purposeful
Availment
Conduct for
Internet
Sellers

MTC Nexus Committee

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Richard D. Pomp
Alva P. Loisel Professor of Law
and Board of Trustees Distinguished Professor
University of Connecticut School of Law
richard.pomp@uconn.edu

Richard Cram
Director, National Nexus Program
Multistate Tax Commission
rcram@mtc.gov
(202) 695 8139

Reference:

**Richard Cram, “Marketplace Seller Inventory:
Purposeful Availment Aplenty,” *Tax Analysts Tax
Notes State*, Vo. 107 (March 20,2023)**

World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 280 (1980)

Stream of commerce:

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.

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.

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1986)

J. O'Connor:

The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product in the stream of commerce by defendant is not enough to show purposeful availment. Additional conduct indicating intent to serve the market in the forum state is needed.

J. Brennan:

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.

J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873 (2011)

J. Kennedy:

McIntyre had not engaged in conduct purposefully directed at New Jersey.

J. Breyer:

Single isolated sale did not show that McIntyre had any regular flow and course of sales in New Jersey.

Ooma, Inc. v. Oregon Department of Revenue,
369 Or. 95 (2021)

Nationwide VOIP service provider w/o physical presence in Oregon required to pay its E-911 tax.

Its nationwide advertising, promoting, marketing included Oregon.

It shipped products to Oregon, serviced 6,000-13,000 Oregon customers, generated \$2.2 million in revenue from Oregon sales: “purposeful availment” conduct.

Texas v. Volkswagen Aktiengesellschaft, Supreme Court of Texas, No. 21-0133 (May 5, 2023)

In state action to enforce state environmental laws against foreign car manufacturer Volkswagen for intentionally evading compliance with federal emission standards, foreign car manufacturer had contracts with local dealers requiring them to schedule vehicle recalls for installation at dealerships of foreign car manufacturer's software updates that embedded illegal, emissions-beating technology in those vehicles.

Foreign car manufacturer showed purposeful availment conduct by contractually controlling the recall process and requiring installation of its illegal software in the recalled vehicles at the local dealerships.