

ORAL ARGUMENT - 01-16-96
95-0954
CMMC V. SALINAS

EADY: May it please the court. This is a case that needs to be reversed because my client, the petitioner and nonresident defendant CMMC, does not have sufficient minimum contacts with the State of Texas. And the exercise of personal jurisdiction over CMMC in this case does not comport with traditional notions of fair play and substantial justice. There are 3 reasons why the CA's judgment should be reversed. The first one is: did the CA improperly reject the US SC decision in Asahi Metal as the controlling case law. That's the first reason. The second reason is that the CA misapplies the stream of commerce test announced in World Wide Volkswagen by not examining whether or not there is a stream in the first place. Third, and lastly, the CA improperly concludes that the exercise over personal jurisdiction over CMMC is reasonable under the facts of this case.

Ambrosia Salinas was an employee of Hill Country Cellars. He injured his arm while he was cleaning the grape press, that grape press was manufactured by CMMC in France. Now CMMC doesn't have employees in the US. They don't have employees in Texas. They don't have a marketing force in Texas. They don't market goods in Texas. They don't advertise goods in Texas. And they never anticipated or intended to be hailed into a court in Texas.

SPECTOR: Was there warranty repairs done in Texas?

EADY: No, the warranty repair work was done out in California at the request of KLR Machines.

SPECTOR: Had it already been sent to Texas and it was sent back to California?

EADY: Right. The motor had to be taken out and sent to California where it was sent to a motor work shop in California and they did the repair to the motor itself. Now the repairs to the motor had to do...it burnt out after the first use of the first grape press. And there is no contention that this particular cause of action arises out of anything to do with the warranty work.

ABBOTT: Isn't there a lot of evidence showing that your client knew that this product was coming to Texas?

EADY: It's true. I am not going to deny that they knew it was coming to Texas. There's correspondence going from CMMC and KLR Machines. And this correspondence says references. Under re it says: Hill Country Cellars. And when it comes time to ship it they know that it's going to the port in Houston. However, that fact in and of itself is not important to analyze the jurisdictional issue.

ABBOTT: Isn't the Kawasaki case and the King case weighing against you?

EADY: No that one doesn't weigh against us. The principle distinction is here on the stream of commerce you know that you must have a stream. In that case and in almost all of these other cases that the CA cites there is a stream.

Now let me give you a real good example here. If you take the World Wide Volkswagen case...

ABBOTT: See that's a different case because there they had no idea that that product was

going to Oklahoma. That's a situation where a consumer just happened to drive through Oklahoma and there was the accident. That's not the situation here because they knew this product was going to Texas. So World Wide Volkswagen doesn't apply to this case.

EADY: The analysis in World Wide Volkswagen should apply to this case because it is a stream of commerce case. Just knowing where the product is going mere awareness of where it is going even under World Wide Volkswagen is not enough. Now what gets you in Middleton where it gets personal jurisdiction in that type of a case is the volume of goods that's going through. And that's the distinction that comes out in World Wide Volkswagen and comes out more clearly in Brennan's concurrence in Asahi Metals. What he says in his concurrence in Asahi Metals is: That the stream of commerce refers not to an unpredictable _____ or _____ but to a regular and anticipated flow of products. Regular and anticipated flow.

HECHT: Well this was anticipated.

EADY: But it sure wasn't regularly. And he says he won't join the majority opinion in Asahi because he says: I cannot join the determination in part 2a, that Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California is insufficient to establish minimum contacts. Regular and extensive.

HECHT: In _____ Ascalon(?) we said: A defendant's delivering of its product into the stream of commerce with the expectation the product will enter the foreign state will ordinarily satisfy due process. Is that just wrong, or overly broad? How would you characterize it?

EADY: I would characterize it as over-broad. There is just not enough facts about Asahi's conduct in that case to make a clear decision on even whether the court is following Asahi or following just straight stream of commerce tests. There is this curious footnote #2 in that opinion, which indicates that the distinction here is that you have a representative for Asahi who comes out and says: You know look we never thought we would end up in California. Now that's the way the court distinguishes Asahi Metals, and if that's the distinguishing point, then we need it in this case because that's what the representative at CMMC said. However, I have to concede I don't think that's probably the right test. There is just not enough facts in King to do anything with. We can't tell what the distribution was. We can't tell the volume. We can't tell whether or not it was regular in extensive sales. We would presume that that's the case but we cannot tell.

ABBOTT: So your position is that since this is a one-shot deal, there is no jurisdiction. But if they had done this on 10 or 20 separate occasions, then perhaps it would lie to the level of jurisdiction?

EADY: That's basically true. To reinforce that let's look at the Asahi Metals case. If you read Justice Stephenson's concurrence he says that here there is 100,000 units annually over a period of several years - 100,000 annually over several years. Contrast our facts...

HECHT: Surely CMMC anticipates being sued in California?

EADY: That's right.

HECHT: And perhaps they don't anticipate being sued in Alaska?

EADY: That's right.

HECHT: But Texas is a wine producer and they know that their products are being

advertised throughout the US. Why wouldn't they anticipate being sued in Texas?

EADY: I don't think they know that their products are being advertised. That's unclear. Ivan Linderman says: We advertise. I would think they know. But you know I don't know that they know, but I don't know if they know that we are advertising their goods. But mere advertising across the US of course is not something that is purposefully directed towards Texas.

SPECTOR: When you talk about regular as being definitive this is a large piece of machinery is that correct?

EADY: Yes it is. About 20 feet long.

SPECTOR: And you would probably not sell more than 1 or 2 in an area is that right?

EADY: Well it all depends on the size of the winery. A large winery can have several presses. You can have several different types of presses as I've learned and they are all different types. And depending on what kind of wine you want to make you may use a different press.

SPECTOR: Well I think my point is does it make a difference if the type of product it is it's not a toaster where you would anticipate thousands. You would only anticipate a very small number in any state.

EADY: I think I can answer this question this way. The record reflects that in North America, and that's Canada and the US, there is 1300 wineries. In the champaign region of France alone, just the champaign region, there are 10,000 wineries. Clearly that's where the market is and you can sell a lot of presses.

SPECTOR: Is your argument that this type of machinery if it were one nuclear reactor sold in one state, that that's not sufficient for jurisdiction?

EADY: That's right. If it's an isolated sale, it does not result from the activities of a nonresident defendant to purposefully to avail themselves of doing business in this state, but it's merely an isolated example, then there is not personal jurisdiction.

CORNYN: Your briefs suggest because of your concern about the factual statement in the CA's opinion, that if CMMC had directly shipped the press here you might have a different outcome. Do you agree or disagree? You say on page 2 of your application: CMMC did not sell, ship or market this grape press or any other CMMC product to a Texas resident. In laying aside perhaps opposing counsel's view of things, if that's true is that definitive, is that determined minimum contacts in this case?

EADY: It really does not. It makes the case a little closer. When you read the opinion it makes it look like that CMMC was the driving force behind all of this. And that's not true at all. CMMC's only involvement in this case is sitting the package press out on its loading dock in Chalones France. At that point it was up to KLR, KLR was the owner of the press, they had to get it, and did get it all the way there to Cedar Park, Texas. KLR Machines was the owner of that press. And that's what their contract with Hill Country clearly indicates.

CORNYN: Just to hopefully clarify what I perhaps muddled, if KLR had sent an order on Hill Country's behalf to CMMC and they directly shipped the press to Hill Country Cellars, would there be a different outcome or not?

EADY: I would still contend that that situation is an isolated sale.

CORNYN: Well wouldn't that be a purposeful act done to or consummate a transaction of foreign state, which would get the plaintiff over the hump?

EADY: No, it's not. There is nothing in that situation where CMMC is purposely availing itself for the right to conduct to activities in Texas. What they have done in that situation is agreed to sell the press and at the customer's direction put it on its way. Fortunately, I don't have that situation because this party, KLR Machines, which is unrelated to CMMC is in there. They sell on behalf of a lot of different manufacturers, and they take care of all the shipments and they do it.

CORNYN: So if KLR was out of the picture, it was just a direct order, there would be minimum contacts here?

EADY: No.

CORNYN: Direct order from Hill Country Cellars and a shipment to their winery?

EADY: There we go. That would be. The best example would be: is someone from CMMC comes to Texas and goes to Hill Country and says: Don't y'all know that we have the best presses in the world and here they are, and they select one of them. And it's bought and paid for to ship. That's the best scenario. Because there we have a purposeful availment. We are sending someone there to do it. In the scenario that you created there's still that situation where you still have the unilateral activity of the customer going and getting the press and bringing it to Texas. Under World Wide Volkswagen that's not supposed to be enough to confer personal jurisdiction. There's one case that I came across that's not in the brief that I found to be a pretty good case for analyzing this issue. This is called Damoo(?) Rodriguez v. The Hughes Aircraft Co., and just the Hughes Aircraft Co. case. It's out of the 1st Circuit in 1986 and it's at 781 F2, pg. 9. The context is that this case is before the Asahi Metal case, and so the court is applying the World Wide Volkswagen. In this case Hughes Aircraft Co. is the nonresident defendant. There is an intervening middle party that is called Aircraft Rental. Aircraft Rental submits a bid to the Puerto Rican police dept. to sell them 2 huge aircraft. That bid is ultimately accepted and the Puerto Rican police dept. gets 2 huge helicopters. Well one of the helicopters crashes and so there is a wrongful death action and the question is: do you get personal jurisdiction over Hughes Aircraft? And what the 1st circuit says and again using the World Wide Volkswagen background says: We do not think that the sale of 2 helicopters to a police department can be the source of the stream of commerce. The sale here was not a stream or the beginning of one. It was an isolated splash. It was not the type of a transaction that could reasonably lead a manufacturer to believe would be the basis of hailing them into a court in Puerto Rico.

And then the court goes on to say: We don't think that whether Hughes knew that the helicopters were being sold to the Puerto Rican police dept. has any jurisdictional significance. The test is whether or not the defendant purposely avails themselves through their marketing activities to do business in the foreign state.

* * * * *

RESPONDENT

MCNEAL: May it please the court. This case is very important to the jurisprudence of this state because under the Keen v. Ashot Ascalon(?) case, this is a case of specific jurisdiction as opposed to minimum contacts. The Keen case set forth the difference and the distinction between imposing jurisdiction of Texas courts on a foreign defendant not arising out of the specific conduct or a specific occurrence. But in general terms based on minimum contacts. That is a specific number of sales or sales contacts or services within the state. But in Keen this court made clear that there is another category that involves what is called specific jurisdiction in which the cause of action of the plaintiff is alleged to arise out

of a specific act in this state by a foreign defendant. In this case that is the situation. The plaintiff's case is a product liability case. He was injured while washing out this machine. The machine drug his arm into it, almost ripped it off, and the allegations in the plaintiff's pleadings which are taken as true for jurisdictional purposes are that this was due to a product defect in the very product that was sold in this case.

PHILLIPS: But in Keen as in any other case in this area, our court follows what the US SC said. And really to look at our interpretation from 8 years ago of US SC cases seems to be almost a waste of time. It seems to me we should be focusing on what the court has written.

MCNEAL: If the US SC has in fact overruled or differed with that view. And I submit to the court that the Asahi case does not do that. The Asahi case says at page 1032, I think the important language is this: The placement of a product into the stream of commerce without more is not an act, it doesn't talk about minimum contacts, of the defendant purposely directed toward the foreign state. And then the real important language: Additional conduct of the defendant may indicate an intent or purpose to serve the market in the foreign state.

I believe that's what the evidence in the Kawasaki Steel case really related to. Not a question of minimum contacts or number of occurrences or a number of sales contacts, but the question of evidence of intent to serve the market. In the Kawasaki Steel case the court will remember that Kawasaki had an agent in the port of Houston, that was designed to in effect advertise, do product service and help with their customers throughout the US, not just Texas. It just happened to be located in Houston. There have been more than 1 sale in that case. But in that case the specific defect that was alleged was for drilling pipe and it was alleged that this defective drilling pipe had caused problems with the well. It was a third-party claim as I recall against the manufacturer. So that again was specific conduct.

CORNYN: Counsel do you agree that with your opposing counsel that CMMC did not sell this grape press to Hill Country Cellars?

MCNEAL: Your honor technically they sold it to its distributor, who paid for it, KLR, and then it was shipped through KLR. That I think does not answer the question though.

GONZALEZ: You say distributor. Were they more of a broker than a distributor?

MCNEAL: Well your honor there is a curious response to our request for admissions about that. It's not a complete admit, but it's not a deny. KLR Machines, Inc. with offices in Sebaso(?) California and _____ New York are the exclusive North American representatives of defendant in selling and distributing defendant's products in the US. And the response was: Admit that a person or business may purchase CMMC products either directly from CMMC or through KLR Machines, Inc. and that the latter is the only entity in the US with CMMC products available for sale. I take that as being an admission that they are their exclusive North American distributor. The following one asked whether KLR Machines, Inc. is authorized by defendant to advertise defendant's products to wineries and other prospective purchasers within the US? And the response to that is: admit that promotional material on CMMC products including Vaslin wine presses is available through KLR Machines, Inc. deny that CMMC directly markets its products or advertises in the US or more particularly Texas. So in other words I take those to mean that KLR does its advertising for it, takes it orders for it, and they ship through this exclusive distributor.

CORNYN: If CMMC did not sell this wine press directly to Hill Country Cellars how did it purposely do so _____ or consummate some transaction in Texas?

MCNEAL: Because the evidence is clear that it was selling through a distributor. Now that is that even though technically the sale may have occurred to KLR, which was the distributor who resold,

it is clear from the evidence in a lot of the documentary evidence that is in plaintiff's Ex. 1 that I summarized for the TC, indicates that it was known at the time of the shipment that the machine was definitely going to Hill Country Cellars. That that was the ultimate consumer. And I take it that purposeful does not require that a sale be direct, that it doesn't require direct privity. There's never been any indication of that in the case law. But purposeful means that even through an independent distributor the manufacturer is intentionally directing this product to Texas.

CORNYN: So there's nothing that a foreign manufacturer can do to arrange a sales transaction through an intermediary or some other way to avoid Texas acquiring specific jurisdiction over a personal injury claim involving that product is that correct?

MCNEAL: I think that what a manufacturer could do is say we don't want to know where it's going.

CORNYN: That's the only way they can avoid it?

MCNEAL: I believe that in the Asahi case in a case where the manufacturer is selling a component that's going to Taiwan I don't think you ever get to that question. But in a case where there's a direct shipment to the State of Texas I believe that that's what the due process analysis is all about.

CORNYN: So there is no way that a foreign manufacturer can avoid a lawsuit in the State of Texas by structuring the transaction through an intermediary?

MCNEAL: I don't believe so unless they have no knowledge that it's going to the State of Texas and they therefore remove the purposeful aspect of it. The Kawasaki Steel case also involved an independent distributor. The steel was not purchased directly from Kawasaki but through a distributor, and I don't think that's been in any way affected by the US SC rulings. I believe this court's view of that case is sound. The fact in the modern business world as to whether or not an independent distributor is used is really of no moment. If a manufacturer of a product is intentionally selling its products in the State of Texas, could this court in good conscience truly say that they are not subjected to jurisdiction if they sell through a distributor, but they are subjected to the jurisdiction of Texas courts if they do not, if they sell directly. That does not appear to me to be a reasonable result.

ENOCH: As I understand My Eady's argument he really says where the CA messed up is they give the statement of what they are looking at, but what they fail to see is there is no stream of commerce here. Taking everything that you have said that I manufacture these presses, the vast majority of the markets are in France, but if I could sell it to the US I would be happy to sell it to the US. And some distributor comes up and says we would be happy to distribute it. Fine, I will give you an exclusive. You go distribute it. And they go to the US. Mr. Eady would say well that's all well and good, but if they only sell one, there is no stream of commerce to begin the inquiry as to whether or not there's minimum contacts either specific or otherwise. In other words I sell one to Alaska, I sell one to California, I sell one to New York, it would seem according to his argument, that that wouldn't give them jurisdiction in any of those places simply because there is not a stream of products moving through the broker into any particular _____.

MCNEAL: In mind that gets the cart before the horse. I believe that the stream of commerce doctrine was a doctrine that was designed to submit foreign manufacturers or other defendants to jurisdiction who had not made a direct contact such as in this case. For example in the early cases in which the manufacturer simply placed a product in the stream of commerce not directed toward Texas but with the reasonable expectation as stated in Kawasaki which has been affected by the Asahi case, with the reasonable expectation that it would arrive in Texas because it was known at the time that it was placed

into the stream of commerce that Texas was a potential market. So in essence I believe Mr. Eady is getting it backwards. You don't need stream of commerce in a case in which the product was shipped directly to Texas because it got here directly from France. It didn't go to New York and then through the stream of commerce happened to get here. And I don't think stream of commerce therefore is an argument that the plaintiff needs in this case.

And I also think that also bears a little bit on the distinction between the specific jurisdictional analysis and minimum contacts analysis which I would submit council is confusing. I believe that the Kawasaki Steel case is still good law, that a specific instance arising out of as in this case, a product defect in which the plaintiff is injured, is enough without there being evidence of multiple or continued sales. In this case for example, the wine maker of Hill Country Winery used to live in California. Probably because of this wine industry developing in Texas she first moved here to West Texas and then was hired by Hill Country Cellars. Because of having attended trade shows and also seeing advertisements in magazines she knew about the products involved that were sold by KLR, including this particular Vaslin product as well as some others that KLR distributes that are manufactured by different manufacturer _____ presses.

So to say that a certain number of minimum contacts is necessary when as a result of this advertising and general knowledge trade show in which this distributor puts on, a Texas company buys one of these machines and it is shipped directly to Texas from France I don't see that the stream of commerce is an argument that we really need to get into. That's my personal view but that's the way I see the cases.

In addition in this case I want to call the court's attention to certain parts of the statement of facts regrading post-sale activities.

BAKER: Are there findings of facts of conclusions of law in this case?

MCNEAL: No your honor there are not. Volume 3 of the Statement of Facts is numbered by the face stamps and the written deposition of KLR, the distributor. And at page 144 there is a request for the manual directions for utilization and maintenance of a CUP 700 from KLR to the manufacturer. On 2 pages prior to that there is an answer. It references Hill Country Cellars as all of these documents or most of the documents do from CMMC knowing that this is the ultimate consumer, that this is the user of the product and it says: We are pleased to let you know that the manual has been already sent to you last week. Then there's a memo to the wine maker enclosing the manual from KLR. There is another series of memos at about page 180 which involves hooking up the press. Apparently it was not hooked up right and the factory had to tell the distributor in a memo at page 181, there is a memo from K _____ to Peter Allen who's with KLR saying: I asked for confirmation to the technical department regarding the cable; they told me that when you hook up the cable, cable 14 to terminal 6 and 8, the safety switch is in series to other safety switches and not in parallel. There is a request at page 192 for that information. My only point is is that the manufacturer knew before the sale occurred. There is actually an acknowledgment in a memo that is part of plaintiff's exhibit 1 that is on page 66 that says: Thank you very much for providing us with your outstanding sales probability. I would like to let you know the availability regarding these prospects. And one of them listed as Hill Country. The knew about it before. They knew about it during. At the time that it was shipped they knew it was going to Hill Country Cellars and afterwards they knew when there was some problem about hooking up the machine.

It's not in the record in this case because for economic reasons I have not developed the liability facts and in fact had little cooperation from the winery to even get access to see the machine for a long time. But it may very well be that there were electrical problems because the machine did not cutoff as the manual said when Mr. Salinas stuck a water hose in it. The manual said: Don't stick

anything into the machine because it will cause the automatic shutoff device to activate. That didn't happen. It pulled his arm in.

And my only point in getting into this is that to say that a manufacturer who knows its product is going to be used particularly Justice Spector as you mentioned, it's not like selling toasters. This is a product that requires correct setup. The manufacturer was involved in that setup as far as the wiring is concerned. They knew that it was going to be used in a winery. They were intimate with the operations of it. Obviously far more than the distributor in this case. So to say that merely by using a distributor, that the jurisdictional power of the Texas courts in including only the distributor is being fairly unreasonably exercised I think is wrong.

ABBOTT: Clarify one thing for me if you would and that is did CMMC ship it only to a location in France and then someone else was responsible for shipping it from there to Houston?

MCNEAL: It's my understanding from the documents that are here, that CMMC placed it FOB at their factory to a French carrier who carried it to the port of _____. There it was placed on a Mexican ship, the Jalisco, and shipped to the port of Houston.

ABBOTT: And who was responsible for that?

MCNEAL: If you mean legally responsible probably the sales made FOB at the factory as Mr. Eady says. But the truth is and you can look at memos instructing sending KLR messages that the Jalisco is delayed until July 22 for example. So the factory was making these arrangements even though the shipment was going through the distributor and the product did belong to the distributor legally once it got on the truck in France. There's a memo which refers to as I recall without looking at it, the fact that the product would be ready on a certain date, would be picked up by and it names I think it's Germann(?) is the name of the carrier that will truck it to the port. So they knew exactly how it was going to get to Texas.

ABBOTT: So before the product left France it was already the property of the distributor?

MCNEAL: Legally I believe that's correct. It was the property of the distributor before it left France. But the manufacturer knew where it was going. Now I think it's very important to keep in mind that if that is enough to escape the jurisdiction of the Texas courts, that Texas residents and companies and entities will have to litigate in foreign courts any time that situation arises. The question under due process is: Is it fair? does this afford the manufacturer due process? Reasonable expectation was used as the standard in the Kawasaki case. The Asahi case and subsequent cases I think do not affect that except insofar as it requires purposeful conduct. To say that the manufacturer knows that this machine is going to be shipped to Texas and used by a Texas company with Texas workers working on it and subjecting themselves to any risks that a defect would raise and yet would not be subject to the jurisdiction of Texas courts in the event of an injury or in the event of some other cause of action by a Texas company, or a Texas individual merely because they were smart enough to structure it so that they sold it to a distributor and the actual sale occurred in France so that legal title passed first I would submit to the court is not a fair analysis, or not a fair application of due process. Is it reasonable for them to expect to be hauled into a Texas court in the language used in one of the cases? There was one response by I think in the application in which CMMC says: We didn't expect to be hauled into a Texas court. The question is: Was that lack of expectation reasonable?

HECHT: But you say they shouldn't be allowed to use a distributor to get out of personal jurisdiction.

MCNEAL: Yes.

HECHT: But they could just sort of stay ignorant. And so how is that any less reprehensible staying ignorant to using a distributor?

MCNEAL: I agree. That's sort of a devil's advocate position that I took.

HECHT: But really there would not be any way out in answer to Judge Cornyn's question. In your view there really wouldn't be one. You couldn't use that any more than you could use a distributor?

MCNEAL: Not only wouldn't there be, but there shouldn't be is my point. Because when they are actually knowing that their product is going into a certain market, the question back in Kawasaki and also in Asahi is an intent to serve the market. And the question before this court is: Can that intent to serve the market be shown through an isolated one single transaction? I think the answer is yes. And I think in this case the fact that that was purposeful is not affected by the fact that it was sold through a distributor.

* * * * *

REBUTTAL

SPECTOR: Do you think there is a distinction between a foreign manufacturer and another state? In other words if they were a California manufacturer and shipped this one wine press.

EADY: There's a distinction on that second part of the jurisdictional analysis when you are trying to determine whether or not the exercise of jurisdiction is fair. I mean clearly there's a higher jurisdictional barrier to roping in an international defendant. Because what we are doing in this situation is we are taking our notions of personal jurisdiction and we're interjecting it into the international field. And clearly there has to be a more compelling reason to do that and the term is "great care and reserve to do so."

SPECTOR: So probably there is no state where jurisdiction would be proper in this kind of case?

EADY: In this particular case arguably California may be.

HECHT: Because of general contacts with California?

EADY: Yes.

ENOCH: Something that bothers me a little bit about this why shouldn't CMMC be sued in Texas? And I ask that question from this: suppose you are a manufacturer of a big product for which there are very few customers; they pay an awful lot of money for it. It's a world-wide product. I mean it's something that can be used in any number of different countries. I have virtually no distribution system, but I will sell it to anybody who asks to buy the product. And I sell it to Cedar Park, Hill Country Cellars, and the product causes injury to a resident of Texas in Texas. What is the life of due process for this manufacturer wherever they existed to have to go to the site where their product caused an injury?

EADY: Due process is supposed to be a limitation on those circumstances where you can structure your primary conduct to where you can avoid this situation happening. There has to be some type of activity that we can all agree upon, that if you engage in this activity you can be expected to show up in that state and appear before their courts. The question is under the facts of this case you have to exclude all the activity of the consumer, of Hill Country, and you have to exclude the activity of the distributor. Now if you exclude all of that and you isolate just CMMC's conduct, this French corporation's conduct in agreeing to sell this product to KLR Machines, a California company, and to sit it out on the dock in

France, if you view it in that light, that's clearly unfair to require them to come defend an action in Texas.

ENOCH: Why is it unfair? What's the unfairness about...I mean we are talking about specific jurisdiction here. We are not talking about just hauling them in for any claim you've got against them. We are talking about their product causes injury. What's unfair to make them come to where the injury occurred and where the product is defend?

EADY: Minimum contacts means that you as defined by the US SC means you must have engaged in some type of purposeful activity in the foreign. Now the stream of commerce test is kind of a substitute. If you purposefully put your product into a stream of commerce and it is a full stream not a splash, or a trickle, then you can also...you will know where the product is going and that's purposeful activity. But in this case it's unfair for CMMC to be hailed into the court of Texas because they didn't try to sell this to anyone in Texas. They didn't market it. People came to them and asked to buy the product. They didn't do any of the purposeful conduct.

HECHT: Do you agree that CMMC knew Hill Country was in Texas?

EADY: Your honor I am not going to disagree with that. No.