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**Max Planck Institute Luxembourg
for International, European and Regulatory Procedural Law
Working Paper Series**

MPILux Working Paper 1 (2013)

**U.S. JURISDICTION IN PRODUCTS-LIABILITY IN THE WAKE OF *MCINTYRE*:
AN IMPENDING DAM ON THE STREAM-OF-COMMERCE DOCTRINE?**

CRISTINA M. MARIOTTINI

Senior Research Fellow, Max Planck Institute Luxembourg
LL.M. University of Pittsburgh
cristina.mariottini@mpi.lu

forthcoming in:

A. Lupone, C. Ricci, A. Santini (eds),
The right to safe food towards a global governance, Giappichelli, Torino, 2013

Max Planck Institute Luxembourg
Working Paper Series

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ISSN: 2309-0227

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Max Planck Institute Luxembourg
Luxembourg, 2013
Luxembourg

Cite as:

MARIOTTINI, Cristina M. (2013), 'U.S. Jurisdiction in Products-Liability in the Wake of McIntyre:
An Impending Dam on the Stream-of-Commerce Doctrine?',
MPILux Working Paper 1, available at: www.mpi.lu

ABSTRACT: By granting certiorari in *McIntyre v. Nicastro* (in which the New Jersey Supreme Court found personal jurisdiction over the manufacturer), the U.S. Supreme Court acknowledged the need to tackle the question of the stream-of-commerce doctrine, and particularly the issues left open by the lack of a majority opinion in *Asahi*. Nonetheless, on 27 June 2011, a – once again – deeply divided U.S. Supreme Court handed down its opinion in *McIntyre*, holding that, because a machinery manufacturer never engaged in activities in New Jersey with the intent to invoke or benefit from the protection of the State’s laws, New Jersey lacked personal jurisdiction over the company under the Due Process Clause.

Drawing a parallelism with the European provisions and case-law on specific jurisdiction in products-liability and providing an overview of the first reactions of the lower U.S. courts to this judgment, this article illustrates how in *McIntyre* the U.S. Supreme Court marked a strong narrowing down of the stream-of-commerce doctrine, and failed to provide a comprehensible framework for practitioners and lower courts faced with specific *in personam* jurisdiction questions.

KEYWORDS: Personal Jurisdiction; Jurisdiction; Products-Liability; Stream of Commerce Doctrine; Due Process; McIntyre; Nicastro; U.S. Constitution; 14th Amendment

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1. Introduction

Whether a person or entity is subject to the jurisdiction of a State court, despite being an out-of-forum defendant, *i.e.* despite not having been present in the State either at the time of suit or at the time of the alleged injury, and notwithstanding not having consented to the exercise of jurisdiction, is a question that frequently arises in products-liability litigation.

By granting certiorari on the petition from the New Jersey Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro et al.*,¹ the U.S. Supreme Court acknowledged the need to tackle the issues left open in its previous case law, notably since *Asahi Metal Industry Co. v. Superior Court of California, Solano Cty.*,² on the matter of specific *in personam* jurisdiction of U.S. courts over out-of-forum defendants in products-liability cases. On 27 June, 2011, a – once again – deeply divided U.S. Supreme Court handed down its opinion in *McIntyre*, holding that because a machinery manufacturer never engaged in any activities in New Jersey that revealed intent to invoke or benefit from the protection of the State’s laws, New Jersey lacked personal jurisdiction over the company under the Due Process Clause.³ As the plurality opinion held, a foreign company that markets a product only to the United States generally, but does not purposefully direct its product to an individual State, is not subject to specific jurisdiction in the State where its product causes an injury. Such an opinion abruptly narrows down the stream-of-commerce doctrine, which allows for personal jurisdiction over a manufacturer that sells its product to a distributor or to another manufacturer, which then sells the final product in the forum State. Unfortunately, the decision failed to provide a comprehensible framework for practitioners and lower courts faced with specific *in personam* jurisdiction questions. A divided Court, with no majority, held that a non-U.S. company is not subject to jurisdiction in New Jersey on any stream-of-commerce theory where it sold its products to a distributor in Ohio and never entered, advertised, or sold its products in New Jersey.

This paper will first address the facts, as well as the jurisdictional posture in

¹ *J. McIntyre Machinery, Ltd. v. Nicastro et al.*, 131 S. Ct. 2780; 180 L. Ed. 2d 765 (2011). Certiorari was granted by *Nicastro et al. v. McIntyre Machinery America, Ltd.*, 131 S. Ct. 62; 177 L. Ed. 2d 1151; 2010 U.S. LEXIS 5747 (2010).

² *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987).

³ On that same day, the Court also rendered a unanimous decision in *Goodyear Dunlop Tires Operations, S.A. et al. v. Brown*, 131 S. Ct. 2846 (2011). In *Goodyear*, the Court held that a State cannot exercise general (as opposed to specific) personal jurisdiction over a foreign company whose only contacts with the State stem from the company’s products travelling through the stream of commerce and winding up in the forum State. On general jurisdiction and specific jurisdiction cf esp. VON MEHREN & TRAUTMAN (1966), 1121, 1136.

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McIntyre. It will then address the issue of Due Process and specific *in personam* jurisdiction in the U.S. Supreme Court’s analysis, from *International Shoe* to *Asahi*. Finally, I will illustrate the impact of *McIntyre* on the jurisdiction of U.S. courts over out-of-forum defendants in products-liability cases, pointing out the reasons for the strong criticism expressed by U.S. scholars against the U.S. Supreme Court plurality opinion in *McIntyre*, as a result of its “incorrect outcome and problematic rationales”.⁴

2. Facts and Judicial Posture in *McIntyre*

Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. While the accident occurred in New Jersey, the machine was manufactured in England, where McIntyre is incorporated and operates, and it was sold to Nicastro’s employer by McIntyre America, an Ohio company that distributed McIntyre machinery in the United States. Nicastro’s employer has filed for bankruptcy in 2001 and has not participated in the lawsuit. The question was whether the New Jersey courts have jurisdiction over J. McIntyre Machinery, Ltd., notwithstanding the fact that the company at no time neither marketed the goods in New Jersey, nor shipped them there. The New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over J. McIntyre, Ltd. without contravening the Due Process Clause.⁵ As the New Jersey Supreme Court emphasized, a broader approach to specific personal jurisdiction was more aligned with recent changes in transnational commerce, and was necessary to maintain a forum for in-State plaintiffs who are injured by out-of-State defendants.⁶ By largely grounding its decision on *Asahi*, and notably on Justice Brennan’s concurrence, the Supreme Court of New Jersey held that jurisdiction was constitutionally proper based upon the following facts: (a) the injury occurred in New Jersey to a New Jersey resident; (b) McIntyre’s distributor sold and shipped one machine to a New Jersey customer, Nicastro’s employer; (c) as the record clearly showed, McIntyre permitted and wanted its independent U.S. distributor to sell its machines to anyone in America who wanted to buy them; (d) McIntyre’s representatives attended trade shows in several U.S. cities; (e) McIntyre held both U.S. and

⁴ MORRISON (2011), 2. Also expressing strong criticism PETERSON (2011), 202 *et seq.*; BORCHERS (2011), 1245 *et seq.*; BEAL (2011), 233 *et seq.*; QUICK (2011), 547 *et seq.*; MILLER (2012), 465 *et seq.*; STEINMAN (2012), 481 *et seq.*; VAIL (2012), 517 *et seq.*; COLLINS PERDUE (2012), 729 *et seq.*; BRYCE (2012), 2975 *et seq.*; KOCH (2012), 199 *et seq.*

⁵ *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 77, 987 A.2d 575, 591, 592 (2010).

⁶ *Id.*, at 52, 987 A.2d at 577.

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European patents on its recycling technology; and (f) the Court also noted that the U.S. distributor “structured [its] advertising and sales efforts in accordance with” J. McIntyre’s “direction and guidance whenever possible,” and that “at least some of the machines were sold on consignment to” the distributor.⁷

In a sharply fragmented plurality opinion – where six Justices voted to overrule the lower court’s decision, but only four joined the lead opinion, and a dissenting opinion was filed by Justice Ginsburg, joined by Justices Sotomayor and Kagan – the U.S. Supreme Court reversed, objecting that the stream-of-commerce metaphor had carried the lower court’s decision far afield, displacing the general protection granted by the Due Process Clause, which safeguards the defendant’s right not to be coerced except by lawful judicial power.

3. Due Process and Specific “In Personam” Jurisdiction: From *International Shoe* to *Asahi*

Before addressing the Court’s reasoning in *McIntyre*, it is helpful to take a step back and recount the history of the stream-of-commerce theory, illustrating the fundamental contribution provided by the U.S. Supreme Court in framing the scope of the Due Process Clause and the jurisdiction of U.S. State courts over non-resident defendants in products-liability cases.

The definition of a State court’s power to subject a defendant to jurisdiction is the result of the constitutional control over State long-arm statutes, exercised by means of the Due Process Clause under the Fourteenth Amendment to the U.S. Constitution.⁸ The Fourteenth Amendment bars a State from depriving a person of life, liberty, or property “without due process of law.” As a result, the exercise of judicial power is not lawful unless the defendant “purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws”.⁹ Nonetheless, the fact that a defendant has a contact with a State that is sufficient under the Due Process Clause does not allow, per se, a State to exert jurisdiction over that defendant. To the contrary, it is also required that the State court be authorized by statute to exercise its jurisdiction; in fact, the Fourteenth Amendment does not confer jurisdiction on

⁷ *Id.*, at 55, 56, 987 A.2d, at 579.

⁸ The constitutional limits rooted in the Fourteenth Amendment’s Due Process Clause refer to a State court’s power to exercise jurisdiction. Accordingly, the Fourteenth Amendment applies to States only, and it does not apply to the federal government. However, the Fifth Amendment contains a similar Due Process Clause that applies to the federal government and its courts, and protects against abuse of government authority in a legal procedure.

⁹ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

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the courts and, rather, it sets limits to the exercise of jurisdiction by holding that “No State shall deprive any person of life, liberty, or property without due process of law.” Accordingly, State legislatures define the power of their courts to exercise personal jurisdiction, and the court’s exercise of such a statutory authority must be constitutionally permissible under the Due Process analysis.

3.1. International Shoe (1945): Minimum Contacts Jurisdiction and the Traditional Notions of Fair Play and Substantial Justice

In *International Shoe Company v. Washington*,¹⁰ the Court acknowledged that the Due Process requirement could be based, not only on the formalistic concept of the physical presence of the defendant in the forum State, but also on the idea that the defendant, by choosing to engage in activities in the State, submitted to litigation there if claims arose out of its activities in the State.¹¹ Unlike in *Pennoyer v. Neff*,¹² where the contact of being served with process in the State subjected the defendant to suit for whatever claim the plaintiff had filed (thus establishing general person jurisdiction), in *Int’l Shoe* the “minimum contacts jurisdiction” is limited to the defendant’s in-State voluntary contacts, and accordingly it supports specific *in personam* jurisdiction only.

On the one hand, *Int’l Shoe* established the proposition that a defendant’s deliberate contacts in a State could support jurisdiction over her, even if she could not be served with process there in the action.¹³ On the other hand, where the defendant’s contacts with a State are limited, *Int’l Shoe* established an important limitation on that State’s jurisdiction: the plaintiff may only assert claims against the defendant that arise from those voluntary contacts.¹⁴ The implied principle is that the defendant, by establishing limited in-State contacts, submits to jurisdiction there for claims that arise from those contacts, and not for other, unrelated claims.¹⁵

Since *Int’l Shoe*, personal jurisdiction analysis has required that two tests be satisfied: (i) the defendant must have “minimum contacts” with the forum to justify the State courts’ jurisdiction over it; and (ii) the exercise of jurisdiction must not “offend traditional notions of fair play and substantial justice”.¹⁶

¹⁰ *International Shoe Company v. Washington*, 326 U.S. 310 (1945), hereafter *Int’l Shoe*.

¹¹ *Id.*, at 319.

¹² *Pennoyer v. Neff*, 95 U.S. 714 (1877).

¹³ 326 U.S. at 317.

¹⁴ *Id.*, at 319.

¹⁵ *Id.*, at 319 quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¹⁶ *Id.*

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Accordingly, in products-liability cases, a defendant's purposeful availment makes jurisdiction consistent with traditional notions of fair play and substantial justice.

By framing a new personal jurisdiction doctrine based on minimum contacts with the forum, in *Int'l Shoe* the Court opened the door to modern and personal jurisdictional analysis. It expanded the ability of States to provide justice for their citizens when they have been injured by non-forum defendants, and it became the foundation upon which subsequent theories of jurisdiction have been grounded.

3.2. World-Wide Volkswagen (1980): The Stream-of-Commerce Doctrine and Purposeful Availment

In a subsequent line of cases following *Int'l Shoe*, the U.S. Supreme Court attempted to shape the minimum contacts requirement in a manner consistent with Due Process. In *World-Wide Volkswagen v. Woodson*.¹⁷ the Court addressed the problematic issues that arise in products-liability actions when a plaintiff seeks to subject a product manufacturer to jurisdiction in a State that its products reached, despite no effort by the manufacturer to sell or market goods intentionally in the forum State. The Court focused on drafting guidelines for out-of-state product manufacturers. In doing so, the Court articulated the stream-of-commerce doctrine for products-liability actions, and limited the contacts required to confer jurisdiction over an out-of-State defendant to those contacts through which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State".¹⁸ Thus, in products-liability cases, a defendant's purposeful availment makes jurisdiction consistent with the traditional notions of fair play and substantial justice introduced by the Court in *Int'l Shoe*.

The transmission of goods permitted the exercise of jurisdiction only where the defendant targeted the forum; generally, it was not enough that the defendant might have predicted its goods would reach the forum State.¹⁹ Purposeful availment entails the defendant's contacts with the forum that result from actions by the defendant that create a substantial connection with the forum, or that the defendant's efforts be "purposefully directed" at the State.²⁰ The basic premise of minimum contacts jurisdiction is that defendants that choose to relate to a State – those which purposely avails themselves of the opportunity to conduct activities

¹⁷ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

¹⁸ *Id.*, at 292, citing *International Shoe Co. v. Washington*, *supra*, at 316, quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¹⁹ *Id.*, at 297, 298.

²⁰ *Id.*

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there – can expect to be sued there for claims that arise from that relationship.²¹ Accordingly, as the Court pointed out in a subsequent case, the “purposeful availment” requirement protects foreign defendants from being subjected to the authority of local courts solely as the result of random, fortuitous, or attenuated contacts over which they had no control.²²

In *World-Wide Volkswagen*, the facts are paramount in order to understand the Court’s reasoning. New York residents, who had purchased an automobile from a retailer in New York, brought a products-liability action against the retailer and its wholesale distributor, among others, in Oklahoma, claiming that injuries which they suffered in an accident involving their automobile in Oklahoma were caused by the defective design and placement of their automobile’s gas tank and fuel system. The retailer and wholesale distributor, who were incorporated in New York and did business there, entered special appearances in the litigation, asserting that Oklahoma’s exercise of jurisdiction over them would offend the limitations on State jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment.

On certiorari, the majority opinion held that under the “minimum contacts” theory the Oklahoma trial court could not, consistently with the Due Process Clause, exercise *in personam* jurisdiction over the New York automobile retailer and wholesale distributor. As the majority of the Justices pointed out, the defendants to the case closed no sales and performed no services in Oklahoma, availed themselves of none of the privileges and benefits of Oklahoma law, solicited no business in Oklahoma either through salespersons or through advertising reasonably calculated to reach Oklahoma, and did not regularly sell cars at wholesale or retail to Oklahoma customers or residents or indirectly, through others, serve or seek to serve the Oklahoma market.²³ Accordingly, since the only connection between Oklahoma and the defendants was the fortuitous circumstance that a single automobile, sold by the defendants in New York to New York residents, happened to suffer an accident while passing through Oklahoma, the Court considered it as unfair or unreasonable to require the retailer and wholesale distributor to defend in Oklahoma.²⁴

By explaining that foreseeability cannot by itself support the exercise of personal jurisdiction over a defendant, the Court dismissed the plaintiffs’ argument that because an automobile is mobile by its very design and purpose it

²¹ *Id.*

²² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

²³ 444 U.S., at 295.

²⁴ *Id.*, at 302.

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was “foreseeable” that it would cause injury in Oklahoma.²⁵ As the Court pointed out, “the foreseeability that is critical to Due Process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there”.²⁶ Accordingly, the stream-of-commerce theory supports personal jurisdiction over a non-resident defendant that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. Once a product has reached the end of the stream and is purchased, a consumer’s unilateral decision to take a product to a distant State, without more, is insufficient to confer personal jurisdiction over the manufacturer or distributor.²⁷

Moreover, and quite interestingly with reference to the Court’s ensuing decision in *McIntyre*, within the Court’s holding in *World-Wide Volkswagen* was dicta that implied that, unlike the New York automobile retailer and wholesale distributor, the foreign importer of the car and the foreign manufacturer of the car would be subject to personal jurisdiction in the forum (in fact, these latter parties had already settled their case, by the time it reached the U.S. Supreme Court). 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 for the Court to subject it to suit in one of those States if its allegedly defective merchandise has caused injury there, to its owner or to others.²⁸ Hence, 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.²⁹

3.3. *Asahi (1987): Is a “Plus Factor” Required for the Stream-of-Commerce Doctrine to Ground U.S. Jurisdiction?*

The question remained open as to which quality and quantity of contacts would prove a defendant’s expectation that her products will be purchased by consumers in the forum State, such that jurisdiction could be exercised over a non-forum

²⁵ *Id.*, at 290, 291.

²⁶ *Id.*, at 297.

²⁷ *Id.*, at 298 citing *Hanson v. Denckla, supra*, at 253.

²⁸ *Id.*, at 297.

²⁹ *Id.*, at 298. Cf also *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

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manufacturer or distributor. *Asahi*³⁰ gave the Court the opportunity to clarify the confusion over the stream-of-commerce doctrine. Unfortunately, no majority conclusion resulted from the Court's deliberations, to the detriment of clarity in the law. In fact, plurality decisions, as opposed to majority or unanimous opinions, do not provide a single line of reasoning supported by a clear majority of the Court. By posing substantial difficulties in the ascertainment the opinion's precedential value, plurality opinions affect the Supreme Court's function of providing guidance both to lower courts and to potential stakeholders as for similar future cases.³¹

In *Asahi*, following a motorcycle accident in California, in which the operator was hurt and his passenger killed, allegedly due to the failure and explosion of the rear tire, the operator filed a products-liability action in California claiming that the motorcycle tire, tube, and sealant were all defective. Notably, the operator filed the suit against the Taiwanese manufacturer of the tire tube on the motorcycle who subsequently filed a cross-claim for indemnification against Asahi Metal Industry Co., Ltd., the Japanese manufacturer of the valve assembly on the tube. By the time the claim reached the California Supreme Court, the claims against the Taiwanese manufacturer and other defendants were settled, and only the cross-claim for indemnity against Asahi remained.

Asahi argued that California could not exercise jurisdiction over it because the company did not have sufficient contacts with the forum state. While the California Supreme Court found that the trial court's exercise of jurisdiction over Asahi was proper because Asahi knew that some of its tire valve assemblies sold to the Taiwanese manufacturer of the tire would eventually be sold in California, the U.S. Supreme Court reversed but was divided on the reasoning behind that decision. Although all Justices agreed that jurisdiction over Asahi would have been unfair, as a result of the fact that it would have clashed with the "traditional notions of fair play and substantial justice" set forth in *Int'l Shoe*, the plurality opinion advanced two different views of the stream-of-commerce doctrine and the minimum contacts requirement: one view by Justice O'Connor and the other by Justice Brennan. The division was centered along basic ideological lines: while all

³⁰ *Asahi Metal Industry Company, Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

³¹ When addressing a plurality opinion, often the "narrowest grounds" approach is taken: however, this approach is only useful in cases where the plurality and concurring opinions stand in a "broader-narrower" relation to each other. See DAVIS & REYNOLDS (1974), 59 *et seq.*; HOCHSCHILD (2000), 261 *et seq.*; KIMURA (1992), 1593 *et seq.*; NOVAK (1980), 756 *et seq.* Moreover, plurality opinions can be disregarded by lower courts as the result of the fact that lower courts consider them as not binding. Cf *CTS Corp. v. Dynamics corp. of America*, 481 U.S. 69, 81, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987); *United States v. Brobst*, 558 F3d 982, 991 (9th Cir. 2009); and more recently, addressing *McIntyre*, *Surefire LLC v. Casual Home Wolrdwide, Inc.*, 2012 WL 2417313 (S.D.Cal.).

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Justices agreed that Asahi did not possess minimum contacts such that the exercise of personal jurisdiction would be consistent with fair play and substantial justice, their disagreement focused on the question of whether the company could be said to have purposefully availed itself of the privilege of doing business in California.

Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, drafted what is commonly known as the "foreseeability plus" or "stream of commerce plus" theory of minimum contacts. Justice O'Connor held that Asahi did not have the minimum contacts with California necessary to establish jurisdiction because it did not purposefully avail itself of the market in California.³² In support of this position, she pointed out that the mere knowledge that some of its component parts might end up in products that would be sold in California was not a sufficient basis for jurisdiction.³³ Additional conduct by the defendant such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" would have been necessary to support jurisdiction.³⁴ The sale of components that made their way into the forum, absent any of the other factors indicating a purposeful relationship with the forum and intent to serve the forum, were insufficient to establish the minimum contacts requirement.³⁵ Accordingly, Justice O'Connor concluded that since the company had merely placed its component products into the stream of commerce that swept the products into California, but lacked any "plus factor", the requirement of minimum contacts had not been met.³⁶

In a concurring opinion, Justice Brennan, joined by Justices White, Marshall, and Blackmun, appeared to accept the principle that sales of large quantities of the defendant's product in a U.S. State, even indirectly through the stream of commerce, would support jurisdiction in that State, depending on the nature and the quantity of those sales. In Justice Brennan's opinion, simply placing a product into the stream of commerce with knowledge that the product will eventually be used in the forum state constitutes purposeful availment.³⁷ Defining the stream of commerce as "the regular and anticipated flow of products from manufacture to distribution to retail sale", Justice Brennan stated that a company cannot be surprised by a lawsuit where their product knowingly arrives in the forum through

³² 480 U.S., at 112.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 480 U.S., at 112, 113.

³⁷ 480 U.S., at 117.

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the stream of commerce.³⁸

As a result of the two branches of the stream-of-commerce analysis in *Asahi*, inconsistency has developed among the lower courts in regards to how the foreseeability test should be applied. As for federal courts, there is a circuit split: the “stream of commerce plus” test elaborated by Justice O’Connor is being used in the First, Fourth, Sixth, Ninth, and Eleventh Circuits; the Fifth, Seventh, and Eighth Circuits use Justice Brennan’s basic stream-of-commerce analysis.³⁹ Some of the other federal circuit courts use both tests to analyze personal jurisdiction instead of picking one or the other.⁴⁰ Similar if not more division has developed between State courts over the use of *Asahi*’s jurisdictional analysis.⁴¹

4. *McIntyre v. Nicastro* (2011): Lack of Clarity and Constraint on the Stream-of-Commerce Doctrine

4.1. The Plurality Opinion

The voting pattern in *McIntyre* is deeply divided and has left lower courts, once again, with no majority opinion. Justice Kennedy has written a four-Justice plurality opinion, joined by Chief Justice Roberts and Justices Scalia and Thomas, which broadly rejected the use of the stream-of-commerce doctrine without a showing of some specific action on the part of the defendant to connect itself with the forum State. The plurality opinion holds that jurisdiction was improper, noting that “[a]t no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws”.⁴² J. *McIntyre* had not engaged in conduct purposefully directed at New Jersey: it had no office in New Jersey, neither paid taxes nor owned property there, and did not advertise in or send employees to the State; the only relevant connection to the State from a due process standpoint was the four machines that its distributor sold in New Jersey. Although the facts in *McIntyre* may reveal intent to serve the U.S. market, in the plurality’s opinion, these facts do not show that *McIntyre* purposefully

³⁸ *Id.* For an extensive analysis of Justice Brennan’s opinion in *Asahi* with respect to the U.S. Supreme Court’s decision in *McIntyre*, cf. FREER (2012), 554 *et seq.*

³⁹ LAUGHLIN (2009), 681 *et seq.*, 704 Nos 129 *et seq.*

⁴⁰ *Id.*, No 132.

⁴¹ See also Prof. Louise E. Teitz’s 2009 testimony before the U.S. Senate Committee on the Judiciary, where Prof. Teitz warned that where “the contacts are based on State lines and generally not aggregated, a foreign manufacturer with minimal but insufficient contacts with multiple States may not be able to be sued in the U.S. at all”. Retrieved on 14 December, 2012, from <http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da1496f05&wit_id=e655f9e2809e5476862f735da1496f05-1-1>.

⁴² 131 S. Ct., at 2791; 180 L. Ed. 2d 765, 778.

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availed itself of the New Jersey market. Accordingly, the facts do not support jurisdiction.⁴³ Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States, but not of any particular State. However, as the plurality holds, that would be an exceptional case.⁴⁴ If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Furthermore, as the concurrence points out, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.⁴⁵

Acknowledging that the meaning of the stream-of-commerce doctrine, beyond the descriptive purpose that refers to the movement of goods from manufacturers through distributors to consumers, is far from exact, Justice Kennedy admits that although the defendant's placement of goods into commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment; however such conduct does not amend the general rule of personal jurisdiction.⁴⁶ Under *Hanson*, the principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign.⁴⁷ The stream-of-commerce doctrine merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum itself, which is an unexceptional proposition as where manufacturers or distributors "seek to serve" a given State's market.⁴⁸ The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. Sometimes a defendant does so by sending its goods rather than its agents.⁴⁹ The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.⁵⁰ Accordingly, Justice Kennedy objects to Justice Brennan's rule in *Asahi*, as it discarded the central concept of sovereign authority in favor of fairness and

⁴³ *Id.*, at 2792; 180 L. Ed. 2d 765, 779, 780.

⁴⁴ *Id.*, at 2789; 180 L. Ed. 2d 765, 777.

⁴⁵ *Id.*

⁴⁶ *Id.*, at 2783; 180 L. Ed. 2d 765, 770.

⁴⁷ *Id.*, citing *Hanson v. Denckla*, *supra*, at 253.

⁴⁸ *Id.*, at 2788; 180 L. Ed. 2d 765, 775, quoting *World-Wide Volkswagen*, *supra*, at 295.

⁴⁹ *Id.*

⁵⁰ *Id.*

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foreseeability considerations, on the theory that the defendant's ability to anticipate suit is the touchstone of jurisdiction.⁵¹ Consistently with the foregoing, Justice Kennedy appears to agree with Justice O'Connor's lead opinion in *Asahi*, which stated that 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; it is a defendant's actions, and not his expectations, that empower a State's courts to subject him to judgment; and, in the Court's opinion, proving such expectations require a "plus factor", as opposed to the mere placing a product in the stream of commerce.⁵² Replying to the New Jersey Supreme Court's remark that, in justifying its assertion of jurisdiction, invoked the State's "strong interest in protecting its citizens from defective products," the plurality concedes that the interest is doubtless strong, but it also admonishes that "the Constitution commands restraint before discarding liberty in the name of expediency".⁵³

Apparently anticipating the confusion that the final outcome in *McIntyre* is likely to engender in lower courts, the plurality opinion advances the possibility that "assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts" in cases, such as the one in issue, where a manufacturer directed marketing and sales efforts to the United States.⁵⁴

4.2. The Concurrence

With their concurrence, Justice Breyer and joining Justice Alito provide two more votes against jurisdiction in this case. But they do not join Justice Kennedy's plurality, and adopt a more restrained view, objecting that it was not necessary to address the issue whether the stream-of-commerce theory might ever provide for a valid basis for jurisdiction where the U.S. market is targeted as a whole. In the view of the concurrence, and given the facts of this case, the contacts were too simply limited and attenuated to support jurisdiction under any existing precedent. While the concurrence agreed with the plurality opinion that the New Jersey Supreme Court's judgment must be reversed, it nevertheless concluded that because this case does not present issues arising from recent changes in commerce and communication, it is unwise to announce a rule of broad applicability – such as targeting the U.S. market as a whole does not

⁵¹ *Id.*, at 2789; 180 L. Ed. 2d 765, 776.

⁵² *Id.*

⁵³ *Id.*, at 2791; 180 L. Ed. 2d 765, 778.

⁵⁴ *Id.*, at 2790; 180 L. Ed. 2d 765, 777.

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support a constitutionally proper jurisdiction of U.S. courts over out-of-State defendants – without fully considering modern-day consequences.⁵⁵ Rather, the outcome of the case is to be determined by the Court’s precedents.⁵⁶ Justice Breyer’s concurrence criticizes the plurality’s “strict rules that limit jurisdiction where a defendant does not intend to submit to the power of a sovereign and cannot be said to have targeted the forum”.⁵⁷ Nonetheless, he cites to the Court’s precedents and expressly points out that “none of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient”.⁵⁸ Respondent Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre, and the primary facts the State high court relied on do not satisfy due process. As the concurrence maintains, the relevant facts show no “regular... flow” or “regular course” of sales in New Jersey, and – apparently embracing Justice O’Connor’s “plus factor” theory – Justice Breyer adds that there is not “something more,” such as special, State-related design, advertising, advice, or marketing that would warrant the assertion of jurisdiction.⁵⁹ Nicastro has shown no specific effort by the British Manufacturer to sell in New Jersey, and he has not otherwise shown that the British manufacturer “purposefully avail[ed] itself of the privilege of conducting activities” within New Jersey, or that it delivered its goods in the stream of commerce “with the expectation that they will be purchased” by New Jersey users.⁶⁰ The concurrence would not go further: because the incident at issue does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules without a better understanding of the relevant, contemporary, commercial circumstances.⁶¹

Since a single opinion did not gain the support of a majority of Justices, the Court’s holding is the narrowest holding that had the assent of a majority of Justices, as the U.S. Supreme Court held in *Marks v. United States*.⁶² Hence, the Court’s holding in this case is essentially Justice Breyer’s concurring opinion, to the extent that it agrees with the plurality opinion. Accordingly, Justice O’Connor’s “plus factor” stream-of-commerce theory gains strong support, although Justice Breyer’s concurrence does not embrace the “plus factor” theory as manifestly and as strongly as the plurality. The Court’s precedents have been

⁵⁵ *Id.*, at 2791; 180 L. Ed. 2d 765, 778.

⁵⁶ *Id.*

⁵⁷ *Id.*, 2792; 180 L. Ed. 2d 765, 779.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*, 2792, 2793; 180 L. Ed. 2d 765, 779, 780.

⁶¹ *Id.*, 2793; 180 L. Ed. 2 765, 780.

⁶² *Marks v. United States*, 430 U.S. 188, 193 (1977).

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interpreted as narrowing down the stream-of-commerce doctrine and excluding, for example, a one-sale transaction from supporting lawful judicial authority over an out-of-State defendant.

4.3. The Dissent

At the outset of her dissenting opinion Justice Ginsburg, joined by Justices Sotomayor and Kagan, provocatively asks:

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user? Under this Court's pathmarking precedent in *International Shoe Co. v. Washington*, and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our State courts, except perhaps in States where its products are sold in sizeable quantities.⁶³

The dissent argues that, even without direct contacts with the forum State, the upstream manufacturer's efforts to market in any of the U.S. States were, in fact, sufficient to subject it to specific personal jurisdiction. When a local plaintiff is injured by the activity of a manufacturer seeking to exploit a multistate or global market, jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury.⁶⁴ As the dissent points out, J. McIntyre, by engaging McIntyre America to promote and sell its machines in the United States, itself of the market of all States in which its products were sold by its exclusive distributor.⁶⁵ The rationale of the "purposeful availment" requirement simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts".⁶⁶ Jurisdiction is constitutionally proper where "actions by the defendant *himself*" give rise to the affiliation with the forum.⁶⁷ How could McIntyre UK not have intended, by its actions targeting a

⁶³ 131 S. Ct. 2780, 2794, 2795; 180 L. Ed. 2 765, 782.

⁶⁴ *Id.*, at 2804; 180 L. Ed. 2 765, 792.

⁶⁵ *Id.*, at 2801; 180 L. Ed. 2 765, 789.

⁶⁶ *Id.*, citing *Burger King*, 471 U.S., at 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528.

⁶⁷ *Id.*

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national market, to sell products in New Jersey, the fourth largest destination for imports among all States of the United States and the largest scrap metal market?

The dissent strongly disagrees with the concurrence, where it states that based upon the U.S. Supreme Court's precedents the exercise of jurisdiction would not be consistent with due process of law. Justice Ginsburg replies to Justice Breyer's argument that in *World-Wide Volkswagen*, the Court held that a one-sale contact does not support constitutionally proper jurisdiction, by reminding him that in *World-Wide Volkswagen* the defendants had done nothing to serve the market in the forum State and that the Court held that jurisdiction could not be based on the customer's (*i.e.*, the plaintiff's) unilateral act of driving the vehicle, which she had purchased from the defendant, to the forum State.⁶⁸ As the Court observed in that same decision, when a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable "to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury".⁶⁹ In *Asahi*, the foreign manufacturer did not itself seek out customers in the United States; it engaged no distributor to promote its wares in the U.S., it appeared at no tradeshows there, and, of course, it had no Web site advertising its products to the world.⁷⁰ Moreover, unlike J. McIntyre, *Asahi* was a component-part manufacturer with "little control over the final destination of its products once they were delivered into the stream of commerce".⁷¹ However, it was significant to the Court in *Asahi* that "those who use *Asahi* components in their final products, and sell those products in California, [would be] subject to the application of California tort law".⁷² As Justice Ginsburg emphasizes, "[t]o hold that *Asahi* controls this case would, to put it bluntly, be dead wrong".⁷³

5. Aftermath of *McIntyre*

McIntyre signals a strong narrowing down of the stream-of-commerce doctrine. Justice Kennedy's plurality made clear that the stream of commerce, per se, does not support personal jurisdiction, and that something more is required. While the concurrence did not fully endorse Justice Kennedy's opinion, they too apparently rejected Justice Brennan's view in *Asahi* that a product is subject to jurisdiction for a products-liability action, so long as the manufacturer can

⁶⁸ *Id.*, at 2802; 180 L. Ed. 2 765, 790.

⁶⁹ *Id.*, citing *Burger King*, 471 U.S., at 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528.

⁷⁰ *Id.*, at 2802; 180 L. Ed. 2 765, 790, citing *Asahi* 444 U.S., at 297, 100 S. Ct. 559, 62 L. Ed. 2d 490.

⁷¹ *Id.*, at 2803; 180 L. Ed. 2 765, 792.

⁷² *Id.*, at 2803; 180 L. Ed. 2 765, 791.

⁷³ *Id.*, citing *Asahi* 480 U.S., at 115, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (majority opinion).

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reasonably anticipate that the distribution of its products through a nationwide system might lead to those products being sold in any of the fifty States.

The U.S. Supreme Court's opinion in *McIntyre* undoubtedly marks a positive development for foreign companies, and a truly adverse outcome for U.S. plaintiffs in products-liability cases. In *McIntyre*, six Justices agreed that foreign companies can sell products in the United States through distributors without making themselves subject to personal jurisdiction for products-liability in the U.S. By unilaterally providing legal counsel with a very clear road map for advising non-U.S. manufacturers on how to avoid products-liability jurisdiction in U.S. courts, the U.S. Supreme Court's opinion in *McIntyre* will be particularly significant in transactional planning, to the inevitable detriment of U.S. plaintiffs and manufacturers.⁷⁴

The decision in *McIntyre* has also set the stage for a significant increase in litigation at the preliminary stage of the proceedings: the emphasis placed by both the plurality and the concurrence on the factual showing of the defendant's minimum contacts with the forum state is likely to increase non-meritorious discovery that plaintiffs will insist on taking as a response to defendant's assertion that it lacks minimum contacts with the forum state.⁷⁵

Quite interestingly, *McIntyre* is furthermore illustrative of the difference between the approaches to jurisdictional analysis of the United States and of the European Union, respectively. In the United States, since *Pennoyer v. Neff*⁷⁶ the jurisdictional question has been a constitutional matter based on the defendant's right to "due process of law" in questions involving life, liberty, or property. Therefore, in the U.S. the question of jurisdiction is addressed by looking at the due process rights of the defendant, and such analysis is focused on a three-way nexus among the court, the defendant, and the claim.⁷⁷ In the European Union, matters of jurisdiction are not so much matters related to the defendant's rights, and they rather address the question of which court is "competent" to hear a case.⁷⁸ Unlike the U.S. three-way nexus among the court, the defendant, and the claim, the rules of special jurisdiction provided at Article 5(3) of Regulation (EC)

⁷⁴ On the issue of jurisdiction in a transaction planning perspective cf. esp. BRAND (forthcoming).

⁷⁵ MORRISON (2011), 2 *et seq.*; MILLER (2012), at 475 *et seq.*

⁷⁶ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁷⁷ As clearly illustrated – by comparing the due process core of U.S. jurisdictional jurisprudence and the EU "access to justice" approach to jurisdiction, respectively – in BRAND (2012), 3. Cp also SILBERMAN (2012), 600 *et seq.*, 607 *et seq.* Cf. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, at 702 (1982), where the U.S. Supreme Court explicitly acknowledged that modern personal jurisdiction was no longer a state-centered doctrine and it was defendant-centered, instead.

⁷⁸ BRAND (2012), 3.

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No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)⁷⁹ rely on a two-way nexus between the court and the claim. As the European Court of Justice clearly held in *Bier BV v. Mines de Potasse d'Alsace SA*,⁸⁰ where the place of the event which gives rise to liability in tort, delict, or quasi-delict and the place where that event results in damage are not the same, the expression “place where the harmful event occurred” in Article 5(3) of the 1968 Brussels Convention (which is mirrored by Article 5(3) of the Brussels I Regulation, currently in force) must be understood as being intended to cover both the place of the tortious event and the place where the damage occurred. Accordingly, under Article 5(3) of the Brussels I Regulation, a defendant may be sued, at the plaintiff’s option and regardless of the defendant’s contacts with the forum State and her purposeful availment, in the courts of either place. As the ECJ further pointed out in *Zuid-Chemie*,⁸¹ taking account of the place where the damage occurred, other than the place of the event giving rise to the damage, enables the *court which is most appropriate to deal with the case* to take jurisdiction, in particular on the grounds of proximity and ease of taking evidence.

In her dissent, Justice Ginsburg seems to suggest that under Article 5(3) of the Brussels I Regulation the courts of the United Kingdom would have had no hesitation in asserting their jurisdiction over the case, had J. McIntyre been a U.S. manufacturer and Nicastro a UK resident and had the accident occurred in the United Kingdom.⁸² Based upon the fact that, pursuant to Article 2, the Brussels I Regulation applies to defendants domiciled in the EU and that pursuant to Article 4(1) when “the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State”, the argument could be raised that the hypothetical suggested by Justice Ginsburg (where the defendant is a U.S. manufacturer, *i.e.* a non-EU domiciliary), would not fall in the scope of application of the Brussels I Regulation.⁸³ As for England and Wales, the Civil

⁷⁹ [2001] OJ L 12/1.

⁸⁰ ECJ, *Bier v. Mines de Potasse d'Alsace*, 30.11.1976, 1748 *et seq.* On this decision cf, *i.a.*, BOUREL (1977), 568 *et seq.*; HUET (1977), 728 *et seq.*; HARTLEY (1977), 143 *et seq.* Cf also WEINTRAUB (1995), 531 *et seq.* In favor of the greater predictability of the EU legislatively created regime in jurisdiction, compared to the U.S. system, BORCHERS (2011), 1272.

⁸¹ ECJ, *Zuid-Chemie*, 16.7.2009. On this decision, IDOT (2009), 29.

⁸² 131 S. Ct., at 2803, 2804; 180 L. Ed. 2d 765, 791, 792.

⁸³ In 2010, the EU Commission issued a proposal for a recast of the Brussels I Regulation. Cf COM(2010) 748 final of 14 December 2010. As the Commission observed, the lack of harmonized rules at the European Union level and the diversity in the national laws of the Member States to determine jurisdiction over third-State defendants is one cause for unequal access to justice for EU citizens and companies in transactions with persons from third countries. Hence, the Commission suggested the extension of the jurisdictional rules directly provided by the Regulation

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Procedure Rules of England and Wales would apply, instead. In particular, CPR 6.20(8) would apply, whereby the courts of England and Wales may assume jurisdiction in tort claims where the damage was sustained in England or the damage sustained resulted from an act committed within England⁸⁴. Accordingly, the difference in the applicable statutory source does not weaken the final point made by Justice Ginsburg in her dissent; in the hypothetical put forward by Justice Ginsburg, the courts of England and Wales would have had no hesitation in asserting their jurisdiction over the U.S. manufacturer.

Moreover, the European solution in this area of law goes even further. Article 3(1) and (2) of the EEC Directive 85/374/EEC on Product Liability⁸⁵ provides: “1. ‘Producer’ means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer. 2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer”.

As a result of, respectively, Articles 2, 5 and 60 of the Brussels I Regulation,

to disputes involving third-State defendants. Draft Article 4(2) of the Commission’s Proposal ensured, in fact, uniformity by providing that “persons not domiciled in any of the Member States may be sued in the courts of a Member State only by virtue of the rules set out in Sections 2 to 8 of this Chapter”. Nevertheless, in its proposed amendments to the Commission’s Proposal, the EU Parliament has held on to the system currently in force pursuant to the Brussels I Regulation. See Committee on Legal Affairs, Rapporteur T. ZWIEFKA, Draft Report, PE467.046v01-00; Amendments 1-62, 7 October 2011, PE473.813v01-00. In keeping with this line of reasoning, a Council’s note of 1 June 2012 (10609/12 Add. 1) provided: Article 4a (ex Article 4) “1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 16(1), 19(2), 22 and 23, be determined by the law of that Member State. 2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those notified by the Member States to the Commission in accordance with point (a) of Article 88(1), in the same way as the nationals of that State”. See also Amendment 121, PE496.504v01-00 of 25 September 2012, and Report PE467.046v02-00 of 15 October 2012. On 6 December 2012, the Council adopted the recast of the Brussels I Regulation (PE-CONS 56/12): see 16599/12, PRESSE 483. The Recast was published as Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in [2012] OJ L 351/1. On the proposal for a recast of the Brussels I Regulation cf esp. POCAR *et al.* (eds) (2012); E. LEIN (ed.) (2012).

⁸⁴ Civil Procedure Rules 1998 of the Supreme Court of England and Wales, Statutory Instrument 1998 No 3132 L.17. Cf also DICEY, MORRIS & COLLINS (2006), at rule 11R-216 and esp. at rule 11-219, where the parallel between the national rules of England and Wales and the provision at Art. 5(3) of the Brussels I Regulation as construed by the European Court of Justice is highlighted.

⁸⁵ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1985] OJ L 210/29.

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there will always be a defendant domiciled in the Internal Market: the importer deemed to be the producer.

Hence, the conclusion may be drawn that with *McIntyre* the U.S. Supreme Court has consciously relinquished reciprocity in jurisdictional issues in cross-border torts and notably to products-liability to the disadvantage of United States plaintiffs who seek to acquire jurisdiction over foreign defendants who caused them an injury in the plaintiffs' forum State.

The need for legislation in this area was recognized in 2009 by the U.S. Senate Committee on the Judiciary "Leveling the Playing Field and Protecting Americans", which subsequently introduced the Foreign Manufacturers Legal Accountability Act of 2009⁸⁶. This bill required foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers, and for other purposes. The Foreign Manufacturers Legal Accountability Act of 2010 was a re-introduction of the 2009 bill,⁸⁷ but, again, it was not enacted. In 2011, the bill was re-introduced a third time as the Foreign Manufacturers Legal Accountability Act of 2011.⁸⁸ The bill is assigned to a Congressional committee, which will now consider it before possibly sending it on to the House of Representatives and then to the Senate. Hopefully, the uncertainties that stem from the U.S. Supreme Court's ruling in *McIntyre* will be taken into due consideration by the U.S. legislators when addressing the possible enactment of this bill.

5.1. The First Reactions of U.S. Courts to McIntyre. Conclusions

As expected, objections and critiques are now being raised by U.S. courts against the U.S. Supreme Court's ruling. In *Weinberg et al. v. Grand Circle Travel LLC*,⁸⁹ the estate of a Florida resident, who died in a hot air balloon crash in the Serengeti, and the deceased's fiancée, who was also a Florida resident and who sustained severe bodily injuries in the crash, brought a negligence action against the travel agent (a Massachusetts company) and the Tanzanian company

⁸⁶ S. 1606-111th Congress: Foreign Manufacturers Legal Accountability Act of 2009. (2009). Retrieved on 14 December, 2012, from <<http://www.govtrack.us/congress/bills/111/s1606>>.

⁸⁷ H.R. 4678-111th Congress: Foreign Manufacturers Legal Accountability Act of 2010. (2010). Retrieved on 14 December, 2012, from <<http://www.govtrack.us/congress/bills/111/hr4678>>.

⁸⁸ H.R. 3646-112th Congress: Foreign Manufacturers Legal Accountability Act of 2011. (2011). Retrieved on 14 December, 2012, from <<http://www.govtrack.us/congress/bills/112/hr3646>>.

⁸⁹ 2012 WL 4096611 (D.Mass.).

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that operated the hot air balloon. The balloon company moved to dismiss for want of personal jurisdiction. In drawing its conclusions, and regretfully granting the motion to dismiss, the District Court of Massachusetts stated:

It seems unfair that the Serengeti defendants can reap the benefits of obtaining American business and not be subject to suit in our country. It is perhaps unfortunate that recent jurisprudence appears to “turn the clock back to the days before modern long-arm statutes when a [business], to avoid being hailed into court where a user is injured, need only Pilate-like wash its hands of a product by having [agents] market it”, Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L. Rev. 531, 555 (1995), and that, in many circumstances, American consumers “may now have to litigate in distant fora – or abandon their claims altogether”, Arthur R. Miller, *Inaugural University Professorship Lecture: Are They Closing the Courthouse Doors?* 13 (March 19, 2012) (criticizing the plurality opinion in *J. McIntyre Mach. v. Nicastro*), but this Court must follow the law as authoritatively declared.

The fact that in *Weinberg* the accident occurred in the defendant’s State (unlike in *McIntyre*, where the accident occurred in New Jersey, where the plaintiff was also resident), inevitably weakens the constitutional soundness of the District Court’s jurisdictional power over the foreign defendant. Nonetheless, regardless of such a weakened power, it appears that the District Court – siding with Justice Ginsburg’s dissent – felt the urge to emphasize the fact that foreign defendants can benefit from American business without the risk of being brought to court in the U.S., and suggested that this issue should be reviewed in order to ensure access to justice to U.S. plaintiffs in cross-border tort claims.

Finally, in *Surefire LLC v. Casual Home Wolrdwide, Inc.*,⁹⁰ the U.S. District Court for the Southern District of California refused to apply the U.S. Supreme Court’s ruling in *McIntyre* in a patent infringement claim against an out-of-forum defendant, stating that a Supreme Court plurality opinion is not binding law.

One can only hope that it will not take a further quarter of a century for the U.S. Supreme Court to sort out – possibly with a stronger awareness of the ramifications of the assessment of jurisdiction in cross-border matters and especially with a view to international private relations – the confusing picture that the lack of a majority in *McIntyre* has left behind and with which courts and legal practitioners must cope.

⁹⁰ 2012 WL 2417313 (S.D.Cal.).

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