The Impacts of *McIntyre* on Minimum Contacts

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ABSTRACT

The Supreme Court's June 2011 decision in J. McIntyre Machinery, Ltd. v. Nicastro *seriously unsettles the law of personal jurisdiction in suits against manufacturers of dangerous products that are delivered, through a distributor, to the jurisdiction where the product harmed a person using it. The plurality opinion not only failed to satisfy its stated goal of clarifying the law twenty years after* Asahi Metal Industry Co. v. Superior Court, *but has set the stage for a significant increase in litigation at the preliminary stage when personal jurisdiction defenses are supposed to be resolved. Both the plurality and the concurrence placed great emphasis on the lack of a factual showing of the defendant's minimum contacts with the forum state, which will almost certainly lead plaintiffs to undertake substantial nonmerits discovery of the defendant and, in cases like this, the distributor and the employer of the injured plaintiff. Although* McIntyre *involved a non-U.S. defendant, its rationale also applies when the product maker is from another state, thereby substantially increasing the ability of U.S. companies to avoid suits in jurisdictions where the injured plaintiff resides. The focus on physical contacts with the forum state also suggests that obtaining personal jurisdiction over those whose contacts with the forum state exist only via the Internet will be even less likely than under the current state of the law. And the plurality's suggestion that the solution may lie in Congress conferring broad territorial jurisdiction upon the federal courts where there is diversity of citizenship raises the possibility of a significant increase in personal injury suits in federal district court to avoid personal jurisdiction issues, even where the state court is literally across the street and all the issues involve state law.*

INTRODUCTION

Professor Todd Peterson is surely right in *The Timing of Minimum Contacts After* Goodyear *and* McIntyre[1] that the Supreme Court's 2010 Term confused, more than clarified, the law of personal jurisdiction. I agree that *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[2] was an easy case in which to find general jurisdiction missing, and that Justice Ginsburg's dictum analogizing general jurisdiction to "home" was surely

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[1] Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. ARGUENDO 1 (2011), http://groups.law.gwu.edu/LR/ArticlePDF/Peterson_Arguendo.pdf.

[2] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

not helpful and may well be wrong.[3] As Peterson recognizes, the bigger problems are in *J. McIntyre Machinery, Ltd. v. Nicastro*.[4] The incorrect outcome and problematic rationales are surely not what Peterson envisioned in his earlier article, *The Timing of Minimum Contacts*,[5] where he expressed hope that the Court would take another personal jurisdiction case, twenty-one years after *Asahi Metal Industry Co. v. Superior Court*,[6] to provide guidance to the lower courts.[7]

Peterson's article so thoroughly dissects the new opinions that it makes my life much easier. There is really nothing to add on *Goodyear* except to note that, if "home" is the key to general jurisdiction, how does one explain *Burnham v. Superior Court*?[8] The defendant's home there was indisputably in New Jersey, and his visit to his children in California was only long enough to be served with process, yet he was held to be subject to general jurisdiction there. It may be that there is no "general theory" of general jurisdiction, but that is not what most needs attention. The outcome in *Goodyear* is correct, and even the reasoning is not likely to cause serious problems, in part because most personal jurisdiction cases today involve specific, and not general, jurisdiction. Instead, I want to focus on *McIntyre*, and in particular on the impacts that it will have on personal jurisdiction litigation. Below, I discuss *McIntyre* as it implicates the future of discovery, the parties involved in litigation, the proper venues for litigation, and other scenarios—such as out-of-state U.S. manufacturers and Internet sales—which may be heavily affected by the decision.

I. MORE DISCOVERY

The one thing that seems certain about the impact of *McIntyre* is that it will significantly increase the discovery that plaintiffs will insist on taking when a defendant claims that it lacks minimum contacts with the forum state. Justice Breyer's concurring opinion, in which Justice Alito joined,

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[3] *Id.* at 2853–54.

[4] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

[5] Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101 (2010).

[6] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

[7] *See* Peterson, *supra* note 5, at 105, 159–60 (urging the Court to take a personal jurisdiction case to clarify the law).

[8] Burnham v. Superior Court, 495 U.S. 604 (1990); *see* Peterson, *supra* note 1, at 13–15 (quoting *Goodyear*, 131 S. Ct. at 2853–54) (exploring Justice Ginsburg's discussion of personal jurisdiction in *Goodyear*, especially her suggestion that "the paradigm forum for the exercise of general jurisdiction" over an individual is their "domicile," and for a corporation, is the corporation's "home").

comes down on the defendant's side in part because the plaintiff[9] did not prove that the defendant had the necessary minimum contacts.[10] Similar undercurrents appear in the plurality opinion as well,[11] and so careful lawyers will be sure to fully develop the factual records so that an appellate court does not fault them for lack of proof.

Looking at *McIntyre* with the benefit of hindsight, the plaintiff could have pursued several alternatives through discovery, and these alternatives suggest what additional discovery other plaintiffs will need to avoid similar results. The plaintiff was injured by a three-ton metal shearer that cost $24,900, was made in England, and was distributed through an Ohio company named McIntyre Machinery America, Ltd.[12] The plurality seems to assume that the machine was sent to the distributor, and then delivered to New Jersey,[13] but that makes little sense for a product of this size coming from England, especially one bound for a state with major ports, like New Jersey. Why would any sensible seller spend the money (or charge the buyer) to have the product shipped to Ohio and then sent (backwards) to New Jersey? The record shows that J. McIntyre Machinery, Ltd. ("McIntyre") did not even build these machines for shipment to the United States until it had a firm order,[14] which underscores how unlikely it is that, knowing that there was a buyer (but not knowing where the buyer was, if that can be believed), it would ship the machine to Ohio and then have its distributor deliver it to the end user. If in fact the machine never went through Ohio, the manufacturer's claim that it lacked contacts with New Jersey would be much harder to sustain. For that reason, in cases like this, discovery on these questions will become absolutely necessary.[15]

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[9] The lawsuit included Mrs. Nicastro as a plaintiff, but her husband, executor of her estate, was substituted for her. Although there were, in fact, two respondents/plaintiffs, the singular forms are used throughout this Essay for ease of reference.

[10] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791–92 (2011) (Breyer, J., concurring in the judgment).

[11] *See id.* at 2790 (plurality opinion) ("Respondent has not established that [defendant] engaged in conduct purposefully directed at New Jersey.").

[12] *Id.* at 2795–96 (Ginsburg, J., dissenting). Nowhere in the plurality or concurring opinions is the location of the distributor stated, nor the size or the price of the machine noted. It turns out that the machine was "about eight feet long and six feet high, weighs more than three tons, and uses a 25-inch blade to cut with the maximum force of 180 tons." Brief for Respondents at 2, *McIntyre*, 131 S. Ct. 2780 (No. 09-1343).

[13] *See McIntyre*, 131 S. Ct. at 2786 (plurality opinion); *see also id.* at 2792 (Breyer, J., concurring in the judgment).

[14] Brief for Respondents, *supra* note 12, at 3.

[15] There was also evidence that McIntyre shipped its products in containers, that McIntyre America had stocks of the manufacturer's products and parts, and that it sold and

The plurality treated the Ohio distributor as a truly independent entity, and the Court is correct that it was separately owned and had separate officers and employees from the manufacturer.[16] The fact that it was the exclusive U.S. distributor for the British manufacturer is of no consequence. Its name suggests, however, (and there is nothing in the record to the contrary) that it sold products for no one else. In addition, it apparently did not buy the machines and resell them, but was paid on a commission basis, after the manufacturer was paid by the buyer.[17] Although there was no finding to this effect, it thus appears that the Ohio company was functionally an agent for the manufacturer, which would undercut the claim that the defendant did not possesses the same level of contacts with New Jersey as did the distributor. The one thing that is clear is that the next case to come along will have those issues fleshed out through discovery.

The plurality also observed that McIntyre paid no taxes in New Jersey.[18] That is likely true with respect to income or property taxes. On the other hand, New Jersey almost certainly would have attempted to collect a sales or use tax on the $24,900 shearer, and a prudent plaintiff would surely want to inquire about who, if anyone, sought to collect and pay that tax for this and perhaps other sales.

The related issues of service and warranties are barely noted in the opinions. It is hard to believe that there was no warranty of any kind for a machine of this size, complexity, and price, and that there was no service agreement or even a promise of service from the manufacturer or its representative. I had always assumed that the manufacturer in *World-Wide Volkswagen Corp. v. Woodson*[19] did not contest personal jurisdiction in Oklahoma for a car sold in New York because it at least had facilities across the United States that serviced its cars, regardless of where they

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shipped the machines made by McIntyre. *Id.* at 4, 6, 19. These possible inconsistencies were never explored, but might be explained by the fact that McIntyre made machines other than the 640 model that injured respondent, including one (320 model) that injured a Kentucky worker and appears from the reported opinion to be a smaller, although also dangerous, version of the one that injured the respondent in *McIntyre*. *See Whitaker v. J. McIntyre Mach., Ltd.*, No. 2003-CA-001429-MR, 2004 WL 1586989, at *1 (Ky. Ct. App. July 16, 2004).

[16] *McIntyre*, 131 S. Ct. at 2786 (plurality opinion) (calling McIntyre "an independent company"); *see also id.* at 2796 (Ginsburg, J., dissenting) (noting that McIntyre and McIntyre Machinery America, Ltd. are "separate and independent entities with no commonality of ownership or management" (internal quotation marks omitted)).

[17] Brief for Respondents, *supra* note 12, at 4.

[18] *McIntyre*, 131 S. Ct. at 2790 (plurality opinion).

[19] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

were purchased. One possibility here was that the Ohio distributor would take care of all those arrangements, but that seems unlikely given what we know about its minimum role in the process, as compared with that of the seller. At least a plaintiff would have to inquire.

What seems much more likely is, as Justice Ginsburg suggested, that the seller would provide the service, either as part of the warranty, pursuant to a service agreement, or based on a contract to provide service on a "parts and labor" basis.[20] After all, would any buyer purchase a complicated and expensive machine like this with no idea as to what would happen if it broke or even needed routine maintenance or replacement parts? And if some kind of arrangement was in effect, then further discovery would be needed to determine whether there were any actual services rendered, and if so, by whom, and what the relationship was between that provider and McIntyre. There may be other factual issues that would need to be explored as well, such as whether a defendant had liability insurance and, if so, what it covered.[21] Whatever the answers, plaintiffs' attorneys will be compelled to seek discovery on these questions in the future.

There will be much more discovery, and that should have given the Court pause for two related reasons. First, motions to dismiss for a lack of personal jurisdiction are generally made at the start of a case, with the goal of swiftly resolving the issue before turning to the merits, thereby enabling a defendant to avoid litigation in an inconvenient location where the court lacks personal jurisdiction. Those goals will be undermined if the defendant has to submit to wide-ranging discovery in order to avoid having to respond on the merits.[22]

Second, as the discussion of *McIntyre* illustrates, discovery—especially in product liability cases—will not be limited to the actual defendant since it is the defendant's relation with others that is often the key to determining whether it was the defendant, or some other entity, that had the requisite minimum contacts with the forum state. In *McIntyre*, that would have meant obtaining information from both the Ohio distributor

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[20] *McIntyre*, 131 S. Ct. at 2795 (Ginsburg, J., dissenting).

[21] There was evidence that McIntyre was fully insured throughout the United States, that it and not the distributor was expected to handle all such losses, and that contact information affixed to the machine was all for McIntyre in England, not for the distributor in Ohio. Brief for Respondents, *supra* note 12, at 4–5, 6, 19 (noting that purchasers were to look to England for replacement parts).

[22] A similar phenomenon is occurring in class action certification motions, which now routinely require significant discovery and factfinding, especially after *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

and the plaintiff's New Jersey employer. Those entities would, in all likelihood, need to hire their own counsel, and the time of their employees and perhaps officers used to answer discovery requests would go largely uncompensated. Further, if depositions were taken, the defendant would need counsel in either Ohio or New Jersey, which is what the defendant would want to avoid by making the motion to dismiss in the first place. The trial court would also expend significant time refereeing inevitable discovery battles and perhaps presiding over a mini-trial where factual disputes over the extent of minimum contacts would be resolved. Given all these externalities, one might have expected the Court to have second thoughts about imposing an extremely burdensome test for minimum contacts.[23]

II. SUING THE DISTRIBUTOR

The plurality does not quite say it, but the implication of their opinion is that the plaintiff should have sued the distributor, instead of the manufacturer, presumably on the theory that all of the New Jersey contacts were with the distributor.[24] Leaving aside the inconvenient fact that this distributor was bankrupt[25]—a situation not necessarily unique to this case—the presence of an alternative defendant hardly solves the problem for the plaintiff. First, a solvent distributor will almost certainly try to shift the blame to the manufacturer and attempt to show that the manufacturer—and not the distributor—had most of the contacts with New Jersey. Thus, the first consequence is that all of the unwanted discovery will once again be necessary. Second, on what theory of liability would the distributor in these circumstances be substantively responsible for a defectively designed or manufactured machine? My understanding of tort law is limited, but I do not think most states would apply strict liability against a distributor, especially one with so little involvement in the accident that gave rise to the suit. Even if the case got past a motion to dismiss, convincing a jury to make the distributor pay would be an uphill battle. Most jurors would be sympathetic to the plaintiff, but would also wonder where the manufacturer was, perhaps assuming that the manufacturer had already paid its share.

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[23] Justice Kennedy did express concern about allowing the issue of foreseeability to be "contested so that significant expenses are incurred just on the preliminary issue of jurisdiction." *McIntyre*, 131 S. Ct. at 2790 (plurality opinion). However, he failed to see that his approach would significantly exacerbate the problem that he claims he was seeking to avoid.

[24] *See id.* at 2789–90.

[25] *Id.* at 2796 n.2 (Ginsburg, J., dissenting).

All in all, this is not a very encouraging alternative.[26]

III. SUING SOMEWHERE ELSE IN THE UNITED STATES

The plaintiff in *McIntyre* pushed the manufacturer either to admit that it could be sued somewhere else in the United States—in which case, why not New Jersey?—or to argue that it could not be sued at all in the United States, which ought to have seemed intolerable to the Court.[27] But the Court did not press the defendant, and the opinions of Justices Kennedy and Breyer did not address the issue. Is it possible that the Court would allow a defendant, selling a dangerous product, to avoid suit *anywhere* in the United States merely by using a distributor, even if it totally blinded itself to where its products were sold? The Court may not be fond of product liability suits, but the notion that it would approve this kind of get-out-of-jail-free card for non-U.S. defendants seems beyond what the Court is prepared to do.[28]

Assuming that McIntyre actually shipped its products to Ohio for further distribution—but knew not where—that would seem to constitute sufficient contacts with Ohio for McIntyre to be sued there. Bringing the suit in Ohio would be inconvenient for the plaintiff, but would be more convenient than bringing it in England. Leaving aside the mechanical application of minimum contacts, why is Ohio a more convenient and less unfair forum than New Jersey for McIntyre? Indeed, it is marginally farther from McIntyre's home, and it is probably more difficult and expensive to arrange air travel to the courthouse there than to one close to Newark Airport. It may also be harder to find competent counsel, especially because a distributor of products like the shearer is unlikely to be located in a large city.[29] I always thought that the purpose of due process in

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[26] A similar scenario would arise if the plaintiff sued the distributor in Ohio, and the distributor sought to implead the manufacturer. If the plaintiff had tried that approach, the distributor might well have prevailed on its motion to dismiss for failure to state a claim. The allegations of the complaint were that the machine "lacked adequate safety protections and was defectively designed," and those are matters over which the distributor has no control. Brief for Respondents, *supra* note 12, at 1. Indeed, the respondent suggested that the distributor would not likely have been liable under New Jersey law. *Id.* at 8 n.6.

[27] *See id.* at 10, 15 n.7. The defendant apparently conceded in the New Jersey Supreme Court that it could be sued in Ohio, but backed off that position in the U.S. Supreme Court. *Id.*

[28] It is, of course, possible to conceive of a scenario where the Court may come to such a conclusion, but it seems unlikely unless the law was clear that distributors were absolutely liable for such injuries, with perhaps a right of indemnity in the country where the product was manufactured.

[29] The distributor was located in Stow, Ohio, which is about thirty-five miles inland

the minimum contacts analysis was to ensure that the suit proceeds in a fairer forum for defendants, but it is unclear how this decision furthers that end.

In addition to Ohio, the manufacturer might have had minimum contacts with Nevada, where the plaintiff's employer met McIntyre's representative at a trade show where the company was hoping to generate sales.[30] A buyer might have signed a contract on the spot or might have waited until returning to its home office before signing several weeks later. Should the outcome vary depending on that factual distinction, which would be another subject for discovery? Why is Nevada a fairer place for the plaintiff to sue, just because of a sales meeting at a trade show, when the show did not occur in the same place every year?[31] Perhaps the use of a distributor wholly insulates the manufacturer from being sued anywhere, except perhaps where the distributor (or the manufacturer) is headquartered? The Court again seems unconcerned with these real-world considerations.

IV. SUING IN FEDERAL COURT

One of the most curious parts of the plurality opinion is the suggestion that the plaintiff might have been able to sue in federal court. According to the plurality, minimum contacts are based on contacts with the sovereign, which, for federal courts, is the United States.[32] The plurality does not dispute that McIntyre had significant overall contacts with the United States, even if not with New Jersey or possibly any other individual state. There would have been alienage jurisdiction under 28 U.S.C. § 1332(a)(2) in *McIntyre*, and, according to the plurality, there would be no due process bar preventing the same suit in federal court. Service requires an applicable long-arm statute, but that would not be a problem because the New Jersey statute has been construed by the New Jersey Supreme Court to extend as far as the Constitution allows (and according to the U.S. Supreme

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from the port in Cleveland. *Distance Between Stow (Summit County, Ohio) and Cleveland (Cuyahoga County, Ohio) (US)*, GLOBEFEED.COM, http://distancecalculator.globefeed.com (last visited Oct. 11, 2011) (follow "US Distance Calculator" hyperlink; then search "Stow, Ohio" to "Cleveland, Ohio"; then follow "Search" hyperlink).

30 *McIntyre*, 131 S. Ct. at 2795–96. The Las Vegas event was one of twenty-six in the United States to which McIntyre sent representatives over a fifteen-year period, with some shows drawing more than 3000 attendees. Brief for Respondents, *supra* note 12, at 2, 18.

31 *McIntyre*, 131 S. Ct. at 2796.

32 *Id.* at 2789–90 (plurality opinion).

Court, beyond that).[33]

However, there also has to be a Federal Rule allowing the use of the state long-arm statute to effect service outside the state. In cases not based on claims arising under federal law, that is Rule 4(k)(1)(A). It permits the exercise of personal jurisdiction by a federal court if the defendant is "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[34] This provision requires both a statutory basis for state court jurisdiction, which would not have been a problem in *McIntyre*, and that the state court could constitutionally exercise that jurisdiction, which would have been a problem.[35] The plurality opinion strongly suggests that Congress, or perhaps the Court through the rulemaking process, could cure the problem in *McIntyre*, and thus make it possible to bring suits like this in federal court.

There are intimations in various Supreme Court opinions about a role for fundamental fairness to defendants in personal jurisdiction cases.[36] Some scholars, including Peterson,[37] believe that the fairness requirement must be satisfied in addition to the minimum contacts test, whereas others, myself included, view the minimum contacts test as a proxy for fairness and not as an independent requirement. In my view, the lack of judicially manageable standards for weighing degrees of unfairness (including whether to focus on the specific circumstances of the actual defendant, as opposed to trying to make assumptions about classes of defendants in similar situations) makes it impossible to reach principled decisions based on fairness and convenience. But either way, lack of personal jurisdiction seems to embody a finding, or perhaps a conclusion, that it would be unfair

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[33] Many states have statutes (sometimes with the word "tortious" included) that authorize suits in their courts if the injury to the plaintiff occurred in the state, even if the conduct that caused the injury occurred outside the state. *See id.* at 2800 (Ginsburg, J., dissenting); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290 n.7 (1980) (quoting OKLA. STAT. tit. 12, § 1701.03(a)(4) (1971) (allowing suits that "caus[e] tortious injury in [Oklahoma] by an act or omission outside [the] state" to proceed against defendants if certain other conditions are met)).

[34] FED. R. CIV. P. 4(k)(1)(A).

[35] The Advisory Committee Note to the 1993 amendment that created this Rule states that it "retains the substance of the former rule [4(f)] in explicitly authorizing the exercise of personal jurisdiction over *persons who can be reached under state long-arm law*." *Id.* 4 advisory committee's note (emphasis added). By contrast, for claims based on federal law, Rule 4(k)(2) provides expansive personal jurisdiction where no state could do so, provided that it is permissible under the Constitution. *Id.* 4(k)(2).

[36] The most prominent of these are the concurring opinions of Justices Brennan and Stevens in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

[37] *See* Peterson, *supra* note 1, at 7.

to require a party to defend the claim in a specific location.

If that is so, it is quite odd, to say the least, that it is unconstitutional to sue in state court, but it is perfectly constitutional (assuming a properly written rule or statute) for the same claim against the same defendant to be brought in the federal courthouse, which is often literally across the street from the state courthouse.[38] Of course, if personal jurisdiction were, as in the days of *Pennoyer v. Neff*,[39] solely about territorial power of a jurisdiction, that result might be defensible. But if the rationale has anything to do with assuring fairness, as almost every case suggests, then the contrasting outcomes are inexplicable.[40]

Assuming that federal courts are available in situations like this, it will be very difficult to resist the pressure on the rulemakers and Congress to protect U.S. citizens from foreign companies by allowing injured plaintiffs to sue in the federal district in which they reside or in which the injury took place. It may result in a significant increase in the number of cases filed in federal court, even when the parties would have been willing to litigate in state court. Indeed, in *Mcntyre*, the defendant could have removed the case to federal court under 28 U.S.C. § 1441(b), but did not, presumably because it preferred to litigate in New Jersey state court if it had to litigate in New Jersey at all.[41] Most observers of the federal courts do not think that an influx of routine tort and contract cases is the best use of the federal court system, but if that is the only constitutional choice, that may well be the outcome.

V. SUING OUT-OF-STATE U.S. MANUFACTURERS

McIntyre involved a non-U.S. defendant, but, as Justice Kennedy recognized, a similar personal jurisdiction defense could have been raised if

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[38] Justice Ginsburg referred to a ban on a state court suit while allowing a federal court suit as "a curious limitation." *McIntyre*, 131 S. Ct. at 2800 n.12.

[39] Pennoyer v. Neff, 95 U.S. 714 (1877).

[40] With the possible except of *Asahi*, in which no opinion commanded a majority of the Court, I am aware of no case in which the Court found minimum contacts, but held that it would be unfair for the defendant to be sued there and ordered the complaint dismissed. I have always considered the outcome in *Asahi* to make sense because the California plaintiff was no longer in the case, and the remaining dispute was between two non-U.S. defendants. Thus, the case surely should have been, but was not, dismissed on grounds of forum non conveniens by the state court. *Asahi*, 480 U.S. at 105–06 (plurality opinion). As a due process case, I never thought that it would stand for much in the future, but that seems no longer to be true, if it ever was.

[41] *See* 28 U.S.C. § 1441(b) (2006) (allowing removal jurisdiction when "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought").

the manufacturer were from California, not Great Britain.[42] Would the outcome have been the same with a U.S. manufacturer, and if not, why not? The Court simply neglected the question. But if one looks at the tests the Court embraced, it would seem that a California defendant that used an Ohio distributor also could not be sued in New Jersey state court on these facts. Indeed, to the extent that a party may intend to avoid being sued in a particular jurisdiction by having no contacts with the state, it is much more likely that a California company would know about particularly unfriendly states and try to avoid being sued there, than would a British company to which the United States and all its courts are unfriendly. Or, for example, suppose that the manufacturer was from New York, but still had the same arrangement with an Ohio distributor: would the result regarding personal jurisdiction in the New Jersey state courts be the same, and if not, on what basis would the result be different?

The California defendant, like non-U.S. companies, could nonetheless be sued in federal court (because there would be diversity of citizenship) assuming an applicable state long-arm statute and a rule such as the one outlined above for suits against non-U.S. companies exist. Thus, not only would there be some increase in federal court cases in suits against non-U.S. defendants, but an even greater increase from suits against out-of-state U.S. companies. This is another area where the Court seemed oblivious to the ramifications of its ruling.

VI. SUITS ARISING FROM INTERNET ACTIVITIES

Personal jurisdiction involving activities conducted through the Internet was murky before *McIntyre*,[43] but it will now be in a state of hopeless confusion. First, the Court seems to emphasize the importance of physical contact with the forum, even for specific jurisdiction cases. Perhaps actually sending a product directly into a state will do, but if there is an intermediary—like Amazon or eBay—even if it is only a conduit, the

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[42] The New Jersey Supreme Court's approach with foreign manufacturers would cause problems that "are no less significant for domestic producers." *McIntyre*, 131 S. Ct. at 2790 (plurality opinion). Justice Breyer hinted that he may see some difference between foreign and domestic defendants, but did not explain the basis for that distinction. *Id.* at 2793–94 (Breyer, J., concurring in the judgment). He also suggested that the size of the defendant might matter, again without explaining why or how that would work. *Id.* at 2794. Distinguishing between makers of component parts and final products, as Justice Ginsburg did in her discussion of *Asahi*, at least creates manageable standards for manufacturers and courts alike, but basing personal jurisdiction on size seems quite ill-advised. *See id.* at 2802–03 (Ginsburg, J., dissenting).

[43] *See generally* Peterson, *supra* note 5, at 102 n.4.

result may mirror *McIntyre*, especially if the manufacturer is not told where its products are sent. Perhaps suing Amazon and having Amazon obtain indemnity, including a duty to show up and defend, may solve some problems, but that seems like a great deal of bother for very little benefit to anyone besides the lawyers.

Second, many Internet-related claims do not involve the physical delivery of goods, but are for defamation, copyright infringement, commercial misuse of noncopyrighted materials, trademark infringement, invasion of privacy, or hacking into the plaintiff's website, to name just a few. How are the courts supposed to deal with the newly restrictive view of minimum contacts, let alone the notion of purposeful availment, when the wrongdoer may have little or no idea where the victim is located? The defendant may have no physical presence in any place in the United States or may have never set foot on our shores, let alone "purposely availed" itself of the laws and benefits of any particular state. I barely knew what to tell students about personal jurisdiction and the Internet before *McIntyre*; now I will be at a total loss.[44]

CONCLUSION

New Supreme Court decisions often create work for civil procedure teachers, lawyers, and lower courts judges. Before *McIntyre*, the law of specific personal jurisdiction was not perfectly clear, but its core was fairly well established and most cases fit nicely within it. It is quite doubtful that the same can be said now that *McIntyre* is the law (or what purports to be the law, because no opinion had five Justices joining it). It does not seem likely that *McIntyre II* will arrive any time soon, or that if it came, it would either overturn its namesake or clarify its meaning and produce a workable and sensible solution in the process. I doubt that the Republic will topple because of *McIntyre*, but the legal world surely would have been better off if the case had never been decided or if Justice Ginsburg's views had prevailed.

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[44] Justice Kennedy's opinion twice suggests that intentional torts may be different under the Due Process Clause, but without explaining why that should be so under his purposeful availment analysis. *McIntyre*, 131 S. Ct. at 2785, 2787 (plurality opinion). Many Internet cases involve intentional torts, such as defamation, wrongful use of trademarks, and misuse of trade secrets. If Justice Kennedy is correct, those Internet cases would apply a more relaxed standard for personal jurisdiction purposes than *McIntyre*, which is rather the opposite of what I had supposed was the law and what the pre-*McIntyre* cases seemed to suggest, for reasons noted by Justice Breyer in his concurrence. *Id.* at 2793 (Breyer, J., concurring in the judgment) (suggesting problems with jurisdiction based on purchases made from a website).