THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

The IDC Monograph

Gregory W. Odom
Hepler Broom, LLC, Edwardsville

James L. Craney
Craney Law Group, LLC, Edwardsville

The Supreme Court Takes on Personal Jurisdiction: What the Court's Recent Opinions Tell Us About the Future of Personal Jurisdiction

I. Introduction

Whether a court may properly exercise personal jurisdiction over a defendant is one of the most critical questions a defense attorney must answer in a civil action. The question raises a variety of procedural and substantive issues and impacts motion and discovery practice. The strategic aspects of the personal jurisdiction analysis are often overlooked. However, recent developments in personal jurisdiction precedent have made the question more important than ever.

Historically, Illinois courts employed a two-part test to determine whether the exercise of jurisdiction over a defendant was proper. Under this test, a plaintiff was required to establish (a) that the defendant committed an act enumerated by the Illinois long-arm statute, and (b) that the exercise of jurisdiction comported with the due process requirements of the United States and Illinois constitutions.[1]

The Illinois long-arm statute enumerates 14 acts that can give rise to specific jurisdiction.[2] However, the long-arm statute also contains a "catchall provision." Subsection (c) of the long-arm statute allows for the exercise of jurisdiction to the extent permitted by the Illinois and federal due process clauses.[3]

Principles of due process require a plaintiff to make a *prima facie* showing that the defendant maintained sufficient minimum contacts with the forum state such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.[4] This has been described as the "reasonableness" requirement. When addressing this issue, courts examine the following factors: 1) the burden imposed on the defendant by requiring it to litigate in a foreign forum; 2) the forum state's interest in resolving the dispute; 3) the plaintiff's interest in obtaining relief; and 4) the interests of the other affected forums in the efficient judicial resolution of the dispute and advancement of substantive social policies.[5] If the plaintiff successfully establishes a *prima facie* showing that personal jurisdiction over a non-resident defendant exists the defendant may then overcome this showing by offering uncontradicted evidence that defeats jurisdiction.[6]

There have been no decisions from the Illinois Supreme Court or the appellate courts identifying any substantive differences between Illinois and federal due process requirements for personal jurisdiction over a non-resident defendant.[7] In *Russell v. SNFA*, the court chose not to address whether the due process clauses differ because the defendant did not argue that it was afforded greater due process protections under the Illinois due process clause.[8] Thus, identifying no difference between the two due process clauses, the Illinois Supreme Court declined to use the traditional two-part test to determine whether the exercise of jurisdiction over the defendant was proper. Rather, the court analyzed whether the

exercise of jurisdiction was consistent with due process principles without separately addressing the Illinois long-arm statute.[9]

When analyzing the issue of personal jurisdiction in Illinois, defense counsel must consider both the long-arm statute and due process principles. In practice, the latter has proven to be the more mercurial aspect of the analysis. This article discusses recent developments within the case law that impact upon this personal jurisdiction analysis.

A. General Jurisdiction before *Goodyear* and *Daimler*

It is commonly understood that *International Shoe v. State of Washington* is the jumping-off point for all modern personal jurisdiction analysis. However, the contemporary distinction between "general" and "specific" jurisdiction would not emerge for many years. As discussed below, post-*International Shoe* opinions focused almost exclusively, upon what would later be known as "specific" jurisdiction. Perhaps the first Supreme Court decision to focus upon "general" or "all-purpose" jurisdiction was *Perkins v. Benguet Consol. Mining Co.*, which remains "the textbook case of general jurisdiction."[10]

In *Perkins*, a plaintiff filed suit in Clermont County, Ohio, against several defendants, including Benguet Consolidated Mining Company ("Benguet"), an entity organized under the laws of the Philippine Islands.[11] Benguet's mining properties were located in the Philippines, though its operations there were halted during Japanese occupation.[12] During the this occupation, the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio, and maintained an office where he conducted some work on behalf of the company.[13] This included maintaining files, and distributing salary checks.[14] Benguet's president maintained bank accounts carrying substantial balances in Ohio, and a bank in Ohio acted as a transfer agent for stock of the company.[15] Several directors' meetings were held at the Ohio office, and from that office, the president supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines.[16] Summarizing the facts, the *Perkins* court found that Benguet carried on a continuous and systematic supervision of the necessarily limited wartime activities of the company in Ohio.[17] However, no mining properties in Ohio were owned or operated by the company.[18]

The *Perkins* court observed that if an authorized representative of a foreign corporation is physically present in the forum state and is authorized to accept service on behalf of the corporation, there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state, "at least in relation to a cause of action arising out of the corporation's activities within the state of the forum."[19] The issue in *Perkins,* as the court observed, was one of general fairness to the corporation.[20] The Court noted that:

> [A]ppropriate tests for that are discussed in *International Shoe.*"[21] "The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful, but not a conclusive, test.…On the other hand, if the same corporation carries on, in that state, other continuous and systematic corporate activities as it did here – consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc. – those activities are enough to make it fair and reasonable to subject that

> corporation to proceedings *in personam* in that state, at least insofar as the proceedings *in personam* seek to enforce causes of action relating to those very activities or to other activities of the corporation within the state.[22]

Although the *Perkins* Court cited to *International Shoe,* there was a key distinction between the two cases. In *International Shoe*, the subject of the lawsuit arose out of the contacts between the out-of-state defendant and the forum state. In contrast, in *Perkins* the court was called to analyze personal jurisdiction in a case that did *not* arise out of the corporation's contacts with the forum.[23] The *Perkins* court noted that it found no requirement in federal due process that would either prohibit Ohio state courts from hearing the case, or compel them to do so.[24] Thus, the Court relied upon the test set out in *International Shoe*: "Whether due process is satisfied must depend, rather, upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure," and requires an analysis of whether there are "continuous corporate operations within a state … so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[25] Based upon the facts in the case, the Supreme Court held that it would not violate due process for Ohio state courts to exercise general jurisdiction over Benguet.[26]

In *Helicopteros Nacionales v. Hall*, the Supreme Court again considered what contacts were necessary for a state to exercise personal jurisdiction over a foreign corporation.[27] *Helicopteros* arose from a lawsuit brought in a Texas state court by the survivors and representatives of four U.S. citizens who died in a helicopter crash.[28] The defendants in the state-court suit included Helicopteros Nacionales de Columbia, S.A. ("Helico"), a Columbian corporation with its principal place of business in Bogota.[29] Helico was engaged in the business of providing helicopter transportation for the oil and construction industries in South America, and owned the helicopter involved in the crash.[30] Helico's contacts with Texas were limited. Helico had never been authorized to do business in Texas, never maintained an agent for the service of process in Texas, never performed any helicopter operations in Texas, never sold products in Texas, and never owned property or based employees in Texas.[31]

In 1974, at the request of a customer, the chief executive officer of Helico flew to the United States and conferred with the customer regarding a business arrangement.[32] At the meeting, prices, availability, working conditions, fuel, supplies and housing were discussed.[33] The resulting contract was written in Spanish, and signed in Peru.[34] The contract provided that controversies relating to the business arrangement would be submitted to the jurisdiction of Peruvian courts.[35] From 1970-1977 Helico purchased approximately 80% of its helicopter fleet from a company in Fort Worth, Texas.[36] During that period, Helico sent prospective pilots and other personnel to Texas for training.[37]

In the ensuing litigation, Helico moved to dismiss the plaintiffs' lawsuit for lack of personal jurisdiction.[38] Ultimately, the Supreme Court of Texas held that the state court's exercise of *in personam* jurisdiction over Helico did not violate the Due Process Clause.[39] In reaching that conclusion, the Texas Supreme Court focused upon the purchases and the related training trips to Texas.[40]

On review, the United States Supreme Court analyzed whether Helico's Texas contacts constituted "the kind of systematic and general business contacts" that the *Perkins* court concluded would support the exercise of personal jurisdiction over the out-of-state defendant.[41] Notably, the majority opinion's only mention of "specific" versus "general" jurisdiction was limited to two footnotes.[42]

Applying the facts of the case, the Court found that one trip to Houston by Helico's chief executive officer for purpose of negotiating a business deal could not constitute "continuous and systematic" contacts.[43] The Court also found that Helico's acceptance of checks from their customer—drawn on a Texas bank—was of negligible significance.[44] "Such

unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction."[45] Neither did the Court emphasize that helicopters were purchased in Texas, or that some of Helico's employees were trained in Texas.[46] The Court held that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.[47] Ultimately, the *Helicopteros* Court held that the defendant's contacts with the State of Texas were insufficient to satisfy the requirements of the Due Process Clause.[48]

Notably, through 1984, when *Helicopteros* was decided, Supreme Court jurisprudence did not generally explore "general" versus "specific" personal jurisdiction. It would be over 25 years before the Court would squarely address the two forms of jurisdiction, and clarify the differences between them.

B. Specific Jurisdiction Before *McIntyre*, *Walden*, and *Bristol-Myers*

Between 2011 and 2017, the Supreme Court analyzed specific jurisdiction on three occasions.[49] When read in conjunction with its recent opinions involving general jurisdiction, the Court's opinions on specific jurisdiction illustrate the stringent Due Process requirements plaintiffs must satisfy in order to establish personal jurisdiction. For example, in *J. McIntyre Machinery v. Nicastro*, the Court determined that placing a product into the stream of commerce, without more, will not give rise to specific jurisdiction, even where the defendant distributes its products through a nationwide distribution system and anticipates that its product will end up in the forum state.[50] In *Walden v. Fiore*, the Court explained that specific jurisdiction cannot be based solely upon the plaintiff suffering injury in the forum state, the defendant's contacts with a forum state resident, or the unilateral acts of a third party.[51] Finally, in *Bristol-Myers Squibb Co. v. Superior Ct.*, the Court concluded that in cases involving multiple plaintiffs, each plaintiff's claim must arise out of or relate to contacts the defendant maintained with the forum state.[52] In *Bristol-Myers*, the Court reiterated that specific jurisdiction cannot be based upon a defendant's unrelated contacts with the forum state.[53]

In its recent opinions, the Supreme Court provided guidance to lower courts on the extent to which the Due Process Clause limits a court's ability to exercise jurisdiction. In cases involving specific jurisdiction, the Due Process minimum contacts requirement is satisfied only if the defendant purposefully directed its activities at the forum state (also known as the "purposeful availment" requirement) and the cause of action arose out of or relates to the defendant's contacts with the forum state.[54] Prior to these opinions, some courts adopted a more expansive approach to specific jurisdiction, particularly in cases where the plaintiffs alleged that specific jurisdiction existed based upon the stream of commerce theory or because the plaintiffs' injuries occurred in the forum state. Below, we examine those prior holdings and evaluate the impact *McIntyre*, *Walden*, and *Bristol-Myers* have had on specific jurisdiction jurisprudence.

i. Specific Jurisdiction Based Upon the Stream of Commerce Theory

To establish specific jurisdiction, a plaintiff must prove "purposeful availment" by the defendant. While there is no uniform definition of "purposeful availment," it generally means that there must be some act through which the defendant has purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.[55]

The Supreme Court first recognized the "stream of commerce" theory in 1980.[56] Nearly 20 years earlier, however, the Illinois Supreme Court found that specific jurisdiction existed based upon a similar rationale.[57] In *Gray v. Am. Radiator & Standard Sanitary Corp.*, the plaintiff was injured in Illinois by a water heater.[58] The plaintiff sued Titan Valve, alleging that it negligently manufactured a safety valve used in the water heater.[59] Titan Valve argued that there was not specific personal jurisdiction over it because it did no business in Illinois.[60] Titan Valve manufactured the safety valve and sold the completed valve to the water heater manufacturer outside of Illinois.[61]

Despite Titan Valve's lack of contacts with Illinois, the Illinois Supreme Court found purposeful availment by Titan.[62] Interestingly, the court reached this opinion without evidence of the volume of Titan's business or territories in which appliances incorporating its valves were marketed.[63] Instead, the court made a "reasonable inference" that Titan's "commercial transactions, like those of other manufacturers, result[ed] in substantial use and consumption in [Illinois]," as Titan did not claim that the presence of its valve in Illinois was an isolated occurrence.[64] Because Titan Valve's products were present and used in Illinois, the court reasoned that Titan Valve indirectly benefited from the laws of Illinois.[65]

The court also placed significant importance on where the plaintiff was injured. The court explained that if a corporation, such as Titan Valve, elects to sells its products for ultimate use in another state, it is not unjust to hold it answerable for any damages caused by defects in those products.[66]

In 1979, the Illinois Supreme Court again addressed whether specific jurisdiction existed over a foreign product manufacturer.[67] In *Connelly v. Uniroyal, Inc.*, the plaintiff purchased a vehicle in Illinois and was injured in Colorado because of allegedly defective tires that were on the vehicle.[68] The tire manufacturer, Englebert, manufactured and sold the tires in Belgium, the tires were installed on the vehicle in Belgium, and the completed vehicle was shipped to the United States.[69] According to Englebert's discovery responses, over a four-year period, between 3,235 and 6,630 of the defendant's tires were mounted on vehicles delivered to Illinois.[70] Engelbert argued that it was not subject to specific jurisdiction because it had not exercised the privilege of conducting activities within Illinois. Rather, its tires only arrived in Illinois through an intermediary.

In rejecting this argument, the court relied upon a California Supreme Court opinion for the proposition that a manufacturer is subject to specific jurisdiction if the manufacturer sells its products in circumstances such that it knows, or should reasonably anticipate, that the products will ultimately be resold in a particular state.[71] The court determined that Engelbert placed its tires into the stream of commerce with "obvious contemplation" of their ultimate sale or use in other nations or states.[72] Much like in *Gray*, however, the court did not cite any evidence that Engelbert specifically targeted Illinois with its tires.

Thirteen years after *Gray*, the United States Supreme Court recognized the stream of commerce theory in *World-Wide Volkswagen*. In that case, the plaintiffs purchased a vehicle in New York and were injured while driving it through Oklahoma.[73] The plaintiffs filed suit in Oklahoma against multiple defendants, including the regional distributor and retail dealer of the vehicle.[74] The defendants contested jurisdiction because they were New York corporations who did not ship or sell any vehicles to or in Oklahoma, had no registered agents in the state, and did not advertise in the state.[75] In denying a writ of prohibition filed by the defendants, the Oklahoma Supreme Court determined that the defendants were subject to specific jurisdiction because they sold and distributed a product "so mobile" that the defendants should have foreseen the vehicle's possible use in Oklahoma.[76]

The United States Supreme Court rejected the exercise of jurisdiction based upon this rationale. According to the Court, even if the defendants should have foreseen that a mobile product such as a vehicle could cause injury in

Oklahoma, foreseeability alone is not a sufficient benchmark for the exercise of jurisdiction.[77] Rather, for jurisdiction to exist under a stream of commerce theory there must be evidence that the defendant delivered its products into the stream of commerce with the expectation the products would be purchased by consumers in the forum state.[78]

The Court next addressed the stream of commerce theory in *Asahi Metal Industry Co. v. Superior Ct.*[79] In that case, the plaintiff filed suit in California due to a motorcycle accident.[80] Asahi, the manufacturer of the motorcycle's tire valve assembly, argued that it was not subject to jurisdiction in California because it manufactured the valve assemblies in Japan and sold them in Taiwan.[81] The California Supreme Court determined that Asahi was subject to specific jurisdiction under a stream of commerce theory, despite its lack of direct contacts with California, because Asahi knew that some of its valve assemblies sold to the tube manufacturer would be incorporated into tire tubes sold in California.[82] The United States Supreme Court reversed the lower court, unanimously concluding that it would be unreasonable to allow a California court to exercise jurisdiction over Asahi in the indemnity case.[83]

The Court, however, could not reach a consensus on the proper minimum contacts analysis to apply for a case involving the stream of commerce theory. Rather, four justices concluded that to establish sufficient minimum contacts under a stream of commerce theory, the plaintiff must show that the defendant purposefully directed its contacts at the forum state through some additional conduct that evinced an intent or purpose to serve the market in the forum state.[84] Examples of such "additional conduct," including designing the product at issue for market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum, and marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.[85]

Four other justices contended that "additional conduct" is not required to exercise jurisdiction under the stream of commerce theory. Rather, they believed jurisdiction exists when a defendant places its product into the stream of commerce and is aware the final product is being marketed in the forum state.[86]

Without a uniform approach from the Supreme Court for stream of commerce cases, the Illinois Supreme Court again addressed this issue.[87] In *Wiles v. Morita*, the plaintiff's employer purchased four "air cell former" machines from Morita, a Japanese corporation.[88] Morita delivered the machines to the employer in Japan, and the employer then transported two of the machines to its facility in Alsip, Illinois.[89] The plaintiff was injured at the Alsip plant while cleaning one of the machines and sued Morita in Illinois for his injuries.[90]

Before addressing whether Morita maintained sufficient minimum contacts with Illinois, the Illinois Supreme Court discussed at length the competing stream of commerce approaches advocated by the Court in *Asahi*. Ultimately, the court declined to adopt either approach.[91] Instead, the court determined that both interpretations of the stream of commerce theory require, at a minimum, that the defendant be aware that the final product is being marketed in the forum state.[92] As to Morita, the court concluded that even under the broad stream of commerce approach, there was no evidence that Morita was aware that the products it delivered to the plaintiff's employer in Japan were going to be delivered to Illinois.[93]

In reaching its decision, the court also distinguished the facts from those involved in *Gray* and *Connelly*. According to the court, *Gray* involved a Wisconsin manufacturer, though the court stated that the product was actually manufactured in Ohio, and the court inferred from the record that a manufacturer of a commercial product that is located in a state bordering Illinois, purposefully availed itself of the Illinois market, even if it conveyed its products to Illinois through an independent middleman.[94] Regarding *Connelly*, the court noted the defendant in that case availed itself of the Illinois market "to the extent that several thousand of its tires per year were sold to the ultimate consumer in Illinois."[95] However, the court did not address the dearth of evidence that the defendants in those cases either knew their products were being shipped into Illinois or intended to serve the market for their products in Illinois.

In 2011, the Supreme Court again addressed the stream of commerce theory in *McIntyre* and rejected the exercise of specific jurisdiction based upon inferences or assumptions.[96] Instead, the Court required evidence that the defendant, at a minimum, knew its product was being marketed in the forum state.[97]

ii. Specific Jurisdiction Based Upon the Location of the Plaintiff's Injury

Another question courts have faced when addressing specific jurisdiction is whether a defendant maintained sufficient minimum contacts by harming the plaintiff in the forum state. Before the Supreme Court recently weighed in on this issue, some courts took the position that a defendant was subject to jurisdiction in the state in which the victim of its tortious conduct suffered injury. This rationale stems from the 1984 Supreme Court opinion in *Calder v. Jones*.

In *Calder*, the plaintiff, an actress, filed suit in California, alleging that she had been libeled in an article written and edited by the defendants in Florida.[98] Despite the fact that the defendants' tortious conduct (*i.e.*, writing and editing the story) occurred outside of California, the Court determined that the defendants were subject to specific jurisdiction.[99] The Court reasoned that the "effects" of the defendants' Florida conduct was felt in California.[100] Specifically, the defendants intentionally wrote and edited an article about a California resident, knowing that the brunt of the plaintiff's injury would be felt in California, the state in which she lived and worked.[101]

In *Janmark, Inc. v. Reidy*, the Seventh Circuit Court of Appeals followed, and seemingly expanded upon the holding in *Calder*, finding that specific jurisdiction existed based upon the location of a plaintiff's injury.[102] In *Janmark*, the plaintiff was based in and sold shopping carts from Illinois.[103] It alleged that the defendants were subject to jurisdiction in Illinois because they allegedly threatened to sue one of the plaintiff's customers, who was located in New Jersey, which caused the customer to stop buying carts from the plaintiff.[104] Like the defendants in the previously discussed opinions, the defendants did not commit any tortious activity in Illinois or direct any products into the State.

The Seventh Circuit determined that specific personal jurisdiction existed over the defendants based upon their threat to the New Jersey customer, which resulted in the customer cancelling its order. Relying on *Calder*, the court reasoned that the defendants committed a tort in Illinois because the plaintiff's injury – the loss of a customer – occurred in Illinois, as the plaintiff would have shipped the product from Illinois to its customer had it not canceled the order.[105] In the court's opinion, there was "no serious doubt after *Calder*" that the state in which the victim of a tort suffers injury may entertain a suit against the tortfeasor.[106]

In 2010, the Illinois Appellate Court Fourth District similarly concluded that a defendant maintained sufficient minimum contacts with Illinois based upon the plaintiff's injury occurring in the state.[107] In *Bell v. Don Prudhomme Racing, Inc.*, the plaintiff filed a retaliatory discharge claim in Illinois against a California corporation.[108] The defendant moved to dismiss for lack of jurisdiction, arguing that it had no contacts with Illinois outside of attending a couple of racing events in the state each year.[109]

The plaintiff argued that the defendant was subject to jurisdiction in Illinois because the plaintiff's injury occurred in the state. According to the plaintiff, injury in a retaliatory discharge case does not occur until the employment termination becomes final.[110] The plaintiff claimed his termination became final in Illinois when the defendant telephoned him at his Illinois residence to formally terminate him.[111] The Fourth District agreed that the plaintiff's injury occurred in Illinois.[112] Thus, because the court determined that the plaintiff's injury occurred in Illinois, it concluded that the plaintiff had stated minimum contacts sufficient to establish specific jurisdiction.[113]

Other courts have interpreted *Calder* more narrowly, requiring more than an injury in the forum state for specific jurisdiction to exist. For example, in *Wallace v. Herron*, the Seventh Circuit Court of Appeals noted that *Calder* did not dramatically change the due process analysis required to find personal jurisdiction.[114] Rather, the court believed that a defendant maintaining sufficient minimum contacts with the forum state remained the "the constitutional touchstone" required for a court to exercise jurisdiction.[115] In *Wallace*, the plaintiff filed a malicious prosecution suit in Indiana against a California law firm and several of its attorneys who had previously prosecuted a claim against the plaintiff in California.[116] The court determined that the defendants were not subject to specific jurisdiction because they did not maintain sufficient minimum contacts with Indiana. Rather, serving legal papers on the plaintiff in Indiana constituted the defendants' only contacts with the state.[117] However, those papers were served from their California office, on behalf of California clients, as part of a California lawsuit.[118]

The court distinguished the defendants' scant contacts with those at issue in *Calder*. As the court explained, the defendants in *Calder* targeted California by writing an article about a California resident, and the injury occurred primarily because California residents read the article.[119] The court also reasoned that the so-called "effects" test utilized in *Calder* did not obviate the need for a defendant to maintain minimum contacts with the forum state.[120] Instead, the court believed that the effects of a defendant's tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum state.[121]

In 2010, the Seventh Circuit again examined whether jurisdiction could be exercised based upon the plaintiff suffering injury in the forum state.[122] In *Tamburo v. Dworkin*, the plaintiff filed suit in Illinois, alleging antitrust violations and intentional torts against the defendants, all non-Illinois residents.[123] The plaintiff's claims arose from the defendants sending emails and posting content on websites regarding the plaintiff.[124] The Seventh Circuit concluded the defendants were subject to specific jurisdiction because they knowingly committed tortious acts against the plaintiff, aware that he lived and operated a business in Illinois and therefore would be injured there.[125]

In reaching its decision, the court relied upon *Calder* because each suit involved claims for intentional torts.[126] The court noted that *Calder* set forth three requirements for jurisdiction to exist in cases involving intentional torts: 1) intentional conduct; 2) expressly aimed at the forum state; and 3) with the defendant's knowledge that the effects would be felt—that is, the plaintiff would be injured—in the forum state.[127] As to the second element, the court acknowledged that it had expressed conflicting views on this issue in *Wallace* and *Janmark*.[128] However, the court stated that *Janmark* could be read more narrowly than for the proposition that jurisdiction exists wherever a tort victim is injured.[129] According to the court, *Janmark* placed importance on the fact that the defendant directed its tortious conduct at, and the plaintiff's injury occurred, in Illinois. As to the defendants in *Tamburo*, the court determined that those defendants similarly directed their tortious conduct at Illinois, with the knowledge that the plaintiff lived, worked, and would suffer the brunt of the injury there.[130]

In *Tamburo*, the court attempted to reconcile the conflicting views on whether specific jurisdiction can be based upon the location of the plaintiff's injury. In doing so, the Seventh Circuit appeared to limit the scope of *Janmark* despite the broad language used in that case. Despite this conflict, in 2014, the Supreme Court provided a seemingly definitive answer to the question of whether minimum contacts can be based upon the location of a plaintiff's injury.

THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

II. The Supreme Court Weighs In

A. General Personal Jurisdiction

i. Specific versus General Personal Jurisdiction: Disentangling the "Stream of Commerce" Conundrum

In *Goodyear Dunlop Tires Operations v. Brown*, the Supreme Court handed down a landmark decision clarifying differences between "general" and "specific" personal jurisdiction.[131] In *Goodyear*, the Court considered whether foreign subsidiaries of U.S. parent corporations are amenable to suit in state courts on claims *unrelated* to any activity of the subsidiaries in the forum state.[132]

In *Goodyear*, two teenage boys from North Carolina were killed in a bus accident that occurred outside Paris.[133] The boys' parents commenced an action in a North Carolina state court, alleging the accident resulted from a defective tire manufactured in Turkey at Goodyear Tire and Rubber Company's foreign subsidiary in Turkey.[134] The North Carolina lawsuit named as defendants Goodyear USA, an Ohio corporation, and three of its subsidiaries, organized and operating in Turkey, France, and Luxembourg.[135] The subsidiaries argued that the North Carolina state court lacked personal jurisdiction over them.[136] The subsidiaries were not registered to do business in North Carolina.[137] They did not maintain a place of business, employees, or bank accounts in North Carolina, or design, manufacturer, or advertise their products in North Carolina.[138] The subsidiaries did not solicit business in North Carolina, or ship tires to North Carolina customers.[139] However, a small percentage of the subsidiaries' tires were distributed within North Carolina by other Goodyear USA affiliates.[140] The types of tires that were distributed in North Carolina were not the type of tire involved in the accident.[141]

The state court acknowledged that the subsidiaries did not take any affirmative action to cause the tires, which they manufactured, to be shipped to North Carolina.[142] Nonetheless, the court found that the tires made by petitioners reached North Carolina because of a "highly-organized distribution process" involving other Goodyear USA subsidiaries.[143] The state court noted that the subsidiaries did not attempt to keep the tires from reaching the North Carolina market.[144] On those facts, the state court concluded that the plaintiffs had made a threshold showing that the subsidiaries engaged in "continuous and systematic contacts" with North Carolina.[145] That court reached this conclusion by noting that the subsidiaries had placed their tires in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.[146] In further support of its conclusion, the court noted a purported hardship that North Carolina plaintiffs would face were they "required to litigate their claims in France, a country to which they have no ties."[147]

The *Goodyear* opinion noted that the Due Process Clause of the Fourteenth Amendment establishes the outer boundaries of a state's authority to proceed against a defendant.[148] The opinion reaffirmed that the canonical decision on this topic is *International Shoe*, in which the Supreme Court held that a state may authorize its courts to exercise personal jurisdiction over an out-of-state defendant where the defendant has certain minimum contacts with the forum state, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[149]

The *International Shoe* opinion attempted to provide a more concrete framework for the "fair play and substantial justice" concept, by classifying cases involving out-of-state corporate defendants.[150] Writing in the *Goodyear* opinion, Justice Ginsberg noted that this classification system essentially separated examples of "specific jurisdiction" from

examples of "general jurisdiction."[151] *International Shoe* described what is now known as "general jurisdiction," as those "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[152] Engaging in such continuous and substantial operations within a state gives rise to something akin to an individual's domicile within that state.[153]

Justice Ginsberg noted that Supreme Court jurisprudence following *International Shoe* primarily clarified the circumstances that warrant an exercise of specific jurisdiction.[154] In those opinions, the Court typically inquired whether there was some act by which the defendant purposefully availed itself "of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[155] In contrast, the *Goodyear* opinion notes that only two decisions, post-*International Shoe,* had considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts: *Perkins* and *Helicopteros*.[156]

Having disentangled the distinct jurisprudential threads of "specific jurisdiction" and "general jurisdiction," the *Goodyear* decision then addressed the frequently invoked "stream of commerce" metaphor.[157] Justice Ginsburg noted that lower court decisions frequently invoked the metaphor in products liability cases, where a product traveled through an extensive chain of distribution, before reaching a consumer.[158] Typically, those cases involve a nonresident defendant placing a product in the stream of commerce *outside* the forum, which ultimately causes harm *within* the forum.[159]

The Supreme Court concluded that the "stream of commerce" metaphor was the point at which the North Carolina state court's analysis went awry in *Goodyear*.[160] "The North Carolina court's stream of commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction."[161] The introduction of a manufacturer's products into a forum state "may bolster an affiliation germane to *specific* jurisdiction."[162] In contrast, a state court may assert *general* jurisdiction over an out-of-state corporate defendant, where the corporation's contacts with the state are so continuous and systematic as to render the corporation essentially at home in the forum state.[163]

Having shed light upon the differences between specific and general personal jurisdiction, the *Goodyear* Court applied the analysis to the facts presented in that case. The Court concluded, "North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction."[164] The Court noted that under the "sprawling view" of general jurisdiction adopted by the North Carolina state court, "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed."

The *Goodyear* opinion provided a succinct overview of the historical development of general jurisdiction. Post-*International Shoe*, state courts may assert general jurisdiction over foreign corporations (corporations from other states, or corporations from other countries), when those corporations' contacts with the forum state are so "continuous and systematic" as to render them essentially at home in that state.[165]

ii. Clarifying the Interrelation Between Agency Principles and General Jurisdiction

In 2014, the Supreme Court again addressed the issue of general jurisdiction through an opinion delivered by Justice Ginsburg.[166] In *Daimler AG v. Bauman*, plaintiffs filed suit in the District Court, Northern District of California, alleging that MB Argentina, a foreign corporation, collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their family from 1976 through 1983, during the period known as Argentina's "Dirty War."[167] The lawsuit asserted claims under the Alien Tort Statute, the Torture Victim Protection Act of 1991, as well as claims for

wrongful death and intentional infliction of emotional distress.[168] The plaintiff's lawsuit alleged conduct centered on MB Argentina's facility in Argentina, and did not allege that any collaboration with Argentinian authorities took place in California.[169] MB Argentina was a subsidiary, wholly-owned by the predecessor in interest to Defendant DaimlerChrysler Aktiengesellschaft ("Daimler").[170]

Daimler moved to dismiss the action, alleging that as a foreign corporation, it was not subject to personal jurisdiction in California.[171] Plaintiffs' arguments focused upon MBUSA, a subsidiary of Daimler.[172] MBUSA was a Delaware limited liability corporation, and served as Daimler's exclusive importer and distributor of Mercedes-Benz automobiles in the United States.[173] MBUSA's principal place of business was located in New Jersey, but the company maintained facilities throughout California, including a regional office in Costa Mesa, and facilities in Carson and Irvine.[174]

The Ninth Circuit Court of Appeals ultimately accepted plaintiffs' argument that MBUSA's contacts with California —imputed to Daimler through an agency theory—were sufficient to support an exercise of general jurisdiction over Daimler.[175] The Supreme Court granted certiorari to decide whether, under the Due Process Clause of the Fourteenth Amendment, Daimler was amendable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad.[176]

Justice Ginsberg, delivering the opinion of the Court, again traced the history of general versus specific jurisdiction, post-*International Shoe*.[177] The *Daimler* opinion noted that since *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role."[178] Decisions following *International Shoe* have borne out the prediction that "specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene."[179]

The *Daimler* opinion discussed *Perkins*, *Helicopteros*, and *Dunlop Tire* as examples of the markedly different trajectories general and specific jurisdiction have followed post-*International Shoe*.[180] It noted that in recent years, the Supreme Court has increasingly trained on the "'relationship among the defendant, the forum, and the litigation,' *i.e.*, specific jurisdiction."[181]

Applying that background to the facts of *Daimler,* the Court first observed that based upon the underlying proceedings, the plaintiffs had not challenged the California district court's holding that Daimler's own contacts with California were insufficient to the justify the exercise of general jurisdiction.[182] The Court also found that based upon the nature of its contacts, MBUSA qualified as at home in California for purposes of a general jurisdictional analysis.[183] Thus, the question presented was whether a foreign corporation could be subjected to a court's general jurisdiction based upon the contacts of an in-state subsidiary.[184]

The *Daimler* court noted that the Ninth Circuit's agency finding relied upon a conclusion that MBUSA's services were "important" to Daimler because Daimler would be called upon to perform those services if MBUSA did not exist. The Court noted that "[f]ormulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: 'Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do "by other means" if the independent contractor, subsidiary, or distributor did not exist.'"[185]

The *Daimler* Court concluded that the Ninth Circuit's agency theory of jurisdiction would subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, and that this would sweep beyond even the limits of general jurisdiction that was rejected in *Goodyear*:[186]

> *Goodyear* did not hold that a corporation may be subjected to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every state in which a corporation "engages in a substantial, continuous, and systematic course of business." That formulation, we hold, is unacceptably grasping.[187]

The *Daimler* Court observed that if Daimler's California activities sufficed to allow adjudication of the Argentina-rooted case in California, the same global reach would presumably be available in every other state where MBUSA's sales were sizeable. Exorbitant exercises of personal jurisdiction such as that would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[188] As such, the Supreme Court emphasized that general jurisdiction may exist over a foreign corporation that is incorporated in the forum state, has its principal place of business in the forum state, or whose affiliations are so systemic that the forum state is basically the foreign corporation's home state.

B. Specific Jurisdiction

Between 2011 and 2017, the Supreme Court addressed specific jurisdiction on three occasions. In those opinions, the Court examined whether jurisdiction existed based upon the stream of commerce theory, the location of a plaintiff's injury, and the defendant's unrelated contacts with the forum state. Below, we examine each of those opinions.

i. J. McIntyre Machinery v. Nicastro

In *McIntyre*, the first of the three Supreme Court opinions, the Court again explored the stream of commerce theory. In that case, the plaintiff was injured in New Jersey by a metal-shearing machine manufactured by McIntyre.[189] McIntyre manufactured its machines in England and sold some of them to an independent company for distribution in the United States.[190] Importantly, the distributor was not under McIntyre's control.[191] Nevertheless, the New Jersey Supreme Court determined that McIntyre was subject to specific jurisdiction because the injury occurred in New Jersey, McIntyre knew or reasonably should have known that its products were distributed through a nationwide system that might lead to those products being sold in any of the 50 states, and McIntyre failed to take reasonable steps to prevent the distribution of its products in New Jersey."[192]

On appeal, the Supreme Court reversed the New Jersey court, finding that McIntyre was not subject to specific jurisdiction.[193] However, like in *Asahi*, a majority of the Court could not agree on a proper standard for the stream of commerce theory. Four Justices advocated for the "narrow approach" first discussed in *Asahi*.[194] Under that approach, a defendant is not subject to specific jurisdiction unless the defendant engages in some additional conduct that reveals an intent by the defendant to serve the market for its product in the forum state. Applying that standard to the facts at issue, the plurality determined that McIntyre might have revealed an intent to serve the United States market by placing its products into the stream of commerce for nationwide distribution, but it did not display an intent to serve the New Jersey market.[195] According to the Justices, the stream of commerce theory of jurisdiction could not supersede either the mandate of the Due Process Clause or the limits on judicial authority it ensures.[196] The Justices similarly concluded that New Jersey's interest in protecting its citizens from defective products did not outweigh the principles of due process.[197]

In a concurring opinion, two Justices agreed that specific jurisdiction could not be exercised based upon McIntyre's seemingly non-existent contacts with New Jersey. In particular, the Justices cited to the fact that McIntyre's American distributor sold and shipped to a New Jersey customer—the plaintiff's employer—on only one occasion.[198] The Justices explained that the Supreme Court had, in prior opinions, "strongly suggested" that a single sale of a product in a state does not constitute an adequate basis for asserting specific jurisdiction over a non-resident defendant that places its goods into the stream of commerce, even if fully aware that such a sale will take place.[199]

The concurrence disagreed with the plurality on whether the facts of the case warranted a determination of the proper stream of commerce approach. The Justices believed that the plurality's strict approach failed to account for situations where a company targets the world by selling products from its website, ships its products through an intermediary (such as Amazon), or markets its products through popup advertisements that it knows will be viewed in a forum.[200] Because the concurrence did not believe the facts of the case implicated any of those concerns, the Justices felt a "broad pronouncement" on jurisdiction was inappropriate.[201]

Although the concurring Justices indicated that they did "not agree with the plurality's seemingly strict no-jurisdiction rule", the concurrence also disagreed with the New Jersey Supreme Court's jurisdictional approach, noting that the lower court's approach abandoned the required inquiry into the relationship between the defendant, the forum state, and the litigation.[202] Rather, the New Jersey court focused on the defendant's use of a nationwide distributor.

In dissent, three Justices reasoned that where an international seller has made efforts to develop a nationwide market for its product, it is fair and reasonable to require the seller to defend itself in the forum in which its products cause injury.[203] The dissent reasoned that because McIntyre treated the United States as a single market it was sensible to permit the exercise of personal jurisdiction at the place of injury.[204]

While *McIntyre* did not resolve which approach to the stream of commerce theory is appropriate, guidance can be gleaned from the separate opinions in that case. For example, the plurality and concurrence agreed that a defendant selling its products through a nationwide distributor, without more, could not form the basis for exercising specific jurisdiction. Rather, they believed that specific jurisdiction must be based upon contacts the defendant maintains with the *forum state*. Additionally, the plurality and concurrence seemed to agree that the stream of commerce theory requires evidence of some effort by the defendant to conduct regular business in the forum state rather than mere isolated sales to the forum state. Thus, under the Justices' reasoning, a defendant that sells its products through a nationwide distribution system should not be subject to specific jurisdiction based solely upon that system or based upon an isolated sale of its product to the forum state, even if the defendant knew or should have known that its distribution system might result in its products being sold in all 50 states.

ii. Walden v. Fiore

In *Walden v. Fiore*, the Supreme Court addressed whether specific jurisdiction can be based upon the location of the plaintiff's injury. As previously discussed, some opinions issued before *Walden* supported the argument that minimum contacts could be established by the location of the plaintiff's injury. In *Walden*, however, the Court unequivocally rejected this argument, determining that specific jurisdiction cannot be based solely upon the location of the plaintiff's injury.[205]

In *Walden,* the plaintiffs filed suit in Nevada alleging that the defendant committed an unlawful search, unlawfully seized funds, and submitted a false probable cause affidavit.[206] Although the defendant committed these acts in Georgia, the

plaintiffs argued specific jurisdiction was appropriate in Nevada because that is where they suffered injury.[207] Specifically, they alleged that while living in Nevada they were unable to access funds seized from them by the defendant.[208]

In a unanimous opinion, the Supreme Court concluded that the defendant was not subject to specific jurisdiction because he formed no jurisdictionally relevant contacts with Nevada, as all of his conduct at issue occurred in Georgia.[209] In reaching its decision, the Court explained that for minimum contacts to exist in a case involving specific jurisdiction, the defendant must form a relationship with the forum state. That relationship must arise out of contacts between the defendant and the forum state, not between the plaintiff and the forum state.[210] The Court noted that it had "consistently rejected" prior attempts to prove minimum contacts by demonstrating contacts between a plaintiff, or a third party, and the forum state.[211] According to the Court, no matter how significant a plaintiff's contacts with a forum may be, those contacts cannot be "decisive" in determining whether a defendant is subject to jurisdiction.[212]

The Court further explained that minimum contacts must be based upon the defendant's contacts with the forum state, not simply with residents of the forum state.[213] Thus, a plaintiff cannot be the only link between the defendant and the forum.[214] While the Court acknowledged that a defendant's contacts with the forum state may be intertwined with its interactions with the plaintiff, specific jurisdiction cannot be based solely upon a defendant's relationship with the plaintiff.[215] Rather, due process principles require that a defendant be hauled into court based upon the defendant's own affiliations with the forum state.[216]

In *Walden*, the Court also examined its prior holding in *Calder*. The plaintiffs argued that jurisdiction was appropriate under *Calder* because they suffered their injury while residing in the forum state (*i.e.*, they felt the "effects" of the defendant's tortious conduct in Nevada). The Court referred to the plaintiffs' reliance on *Calder* as "misplaced," noting that *Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum state.[217] Instead, "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."[218]

In *Calder*, the defendants allegedly committed libel, a tort that requires publication to third persons. Because the defendants in that case published the libelous article about a California resident in California, the defendants' tort actually occurred in California.[219] The Court believed that the "effects" caused by the defendant's article—the injury to the plaintiff's reputation in the estimation of the California public—connected the defendant's conduct to California, not just to the plaintiff who lived there.[220] In other words, the defendants knew that their article about a California resident would be read by, and have an impact on, California residents.

By contrast, the *Walden* defendant's conduct did not connect it to Nevada in any meaningful way. As the Court explained, the plaintiffs experienced the effects of the defendant's tortious conduct in Nevada only because that is where they chose to be at a time when they desired to use funds seized by the defendant.[221] The plaintiffs would have experienced the same lack of access in any other state to which they might have traveled and found themselves wanting access to the seized funds.[222] Thus, unlike in *Calder*, the defendant's tortious conduct essentially was forum-neutral in that the defendant did not in any way target its tortious conduct at Nevada.

iii. Bristol-Myers

In June 2017, the Supreme Court issued its most recent opinion on specific jurisdiction. In *Bristol-Myers Squibb Co. v. Superior Ct.*, 678 plaintiffs filed suit in California against Bristol-Myers Squibb (BMS).[223] The plaintiffs, 86 of whom resided in California and 592 of whom resided in other states, alleged injuries caused by use of the drug Plavix.[224] BMS

did not develop, create a marketing strategy for, manufacture, label, or package Plavix in California.[225] It did sell Plavix in California, selling almost 187 million Plavix pills in the state between 2006 and 2012.[226]

The California Supreme Court determined that California could exercise specific jurisdiction over BMS for the claims brought by all of the plaintiffs, including the non-resident plaintiffs, based upon "BMS's extensive contacts with California."[227] The court reasoned that a connection between a defendant's forum contacts and the claims at issue can be more readily shown if the defendant has wide-ranging contacts with the forum state.[228] Given the significant contacts BMS maintained with California, albeit unrelated to the non-residents' claims, the court permitted the exercise of specific jurisdiction based upon "a less direct connection between BMS's forum activities and the plaintiffs' claims than might otherwise be required."[229] The court determined that the connection was shown because the non-residents' claims were similar to the California residents' claims. Specifically, both sets of plaintiffs' claims were based on the same allegedly defective product and purportedly misleading marketing of the product.[230]

On appeal, the Supreme Court rejected the California Supreme Court's jurisdictional analysis, noting that the lower court essentially adopted a "loose and spurious form of general jurisdiction."[231] Specifically, the California court relaxed the strength of the connection that must be shown between a defendant's forum contacts and the claim at issue where the defendant has extensive forum contacts that are unrelated to the claim.[232]

The Supreme Court noted that the California court failed to identify any link between California and the non-residents' claims.[233] The fact that the California resident plaintiffs were prescribed, obtained, and ingested Plavix in California made no difference to the Court. Rather, the Court reiterated that a defendant's relationship with a third party (*i.e.*, the California resident plaintiffs), standing alone, is an insufficient basis for personal jurisdiction.[234] The Court also deemed BMS's research in California on matters unrelated to Plavix irrelevant.[235]

The non-resident plaintiffs also argued that personal jurisdiction over BMS was proper because it contracted with a California company to distribute Plavix nationally.[236] The Court rejected this argument noting that there were no allegations that BMS engaged in jurisdictionally relevant acts together with the distributor in California. Further, the plaintiffs did not allege that BMS was derivatively liable for the distributor's conduct in California. Finally, on this issue, the Court cited a lack of evidence showing any connection between the Plavix the non-resident plaintiffs ingested and the Plavix distributed by the California distributor.[237]

Additionally, the Court rejected the plaintiffs' "parade of horribles" argument. The Court explained that its decision would not prevent all of the plaintiffs, both residents and non-residents, from joining in a consolidated action in the states that have general jurisdiction over BMS.[238] Alternatively, the Court believed that plaintiffs who are residents of a particular state, such as the 92 plaintiffs from Texas, could sue BMS together in their home states.[239]

Finally, the Court noted that since its opinion only addressed the due process limits on the exercise of jurisdiction by a state, the Court would leave open the question of whether the Fifth Amendment imposes the same restrictions on the exercise of jurisdiction by a federal court.[240] In making this point, the Court cited to a footnote from the case, *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.* In that particular footnote, the Court noted that it had "no occasion" to consider the argument that under a Fifth Amendment jurisdictional analysis, a federal court could evaluate an aggregation of a defendant's contacts with the Nation as a whole, rather than focusing only on its contacts with the state in which the federal court sits.[241]

Overall, in *Bristol-Myers*, the Court again rejected efforts to expand the scope of personal jurisdiction through broad interpretations of due process principles. Specifically, the Court reiterated that specific jurisdiction must be based upon a defendant's contacts with the forum state, not with residents of the forum. Moreover, while the Court did not define

what is meant by "arise out of or relate to," it provided support for a narrow reading of this phrase by rejecting the argument that BMS could be subject to specific jurisdiction based upon its unrelated contacts with California or its contacts with the California resident plaintiffs.

III. Impact of the Supreme Court's Opinions and the Future of Personal Jurisdiction

A. General Jurisdiction

When analyzing general personal jurisdiction issues, Illinois state courts appear to be following the trajectory carved out by *Goodyear* and *Daimler*. In *Aspen American Insurance Company v. Interstate Warehousing, Inc.*, a plaintiff-insurer brought a subrogation suit in Circuit Court of Cook County, seeking to recover losses sustained because of a warehouse roof collapse.[242] The defendant, Interstate Warehousing was incorporated and maintained its principal place of business in Indiana.[243] On its website and letterhead, the company advertised the locations of various warehouses, including one in Joliet, Illinois.[244] The defendant was a 75% member of an Illinois limited liability company that operated the Joliet warehouse, and one of its employees was responsible for the day-do-day operations of that warehouse.[245]

The defendant in *Aspen American* moved to dismiss the complaint, arguing that the court could not exercise personal jurisdiction over it. Because the warehouse collapse occurred in Michigan, general jurisdiction—rather than specific jurisdiction—was at issue. The trial court denied the defendant's motion to dismiss. On appeal, the Illinois Appellate Court First District affirmed, finding that plaintiff submitted a *prima facie* case for personal jurisdiction over the defendant.[246] The First District found that defendant failed to rebut the presumption that the Illinois court's exercise of personal jurisdiction was proper.[247] The court noted that the defendant had not presented evidence regarding the proportion of defendant's business derived from its contacts with Illinois, although defendant had access to this information.[248] Additionally, the defendant was unable to present the court with information about the volume of business transacted in Joliet, and the square footage of the Joliet warehouse.[249]

The Illinois Supreme Court, on *de novo* review, reversed the judgments of the lower courts with instructions to enter judgment dismissing the plaintiff's complaint.[250] The Illinois Supreme Court rejected the appellee's argument that a plaintiff need only establish defendant's continuous and substantial contacts with Illinois to make a *prima facie* case of general personal jurisdiction.[251] In contrast, the *Aspen American* court observed that in *Daimler*, the Supreme Court concluded that general personal jurisdiction is only established over a foreign corporation when that defendant is incorporated in the forum state, has its principal place of business in the forum state, or its "affiliations with the State are so 'continuous and systematic' as to render it *essentially at home* in the forum state."[252] The *Aspen American* court also held that the fact that a foreign corporation has registered to do business in Illinois under 805 ILCS 5/5.25(a) does not mean that the corporation has consented to general jurisdiction in Illinois.[253]

Taken together, recent case law from the Illinois and United States Supreme Courts demonstrates that, going forward, general jurisdiction will exist in only the most limited set of circumstances. Specifically, courts may find that a defendant is subject to general jurisdiction only where it is "at home," which is in its state of incorporation, the state in which it maintains its principal place of business, or only in the exceptional case, where its operations are so substantial as to render the corporation at home. In contrast, being registered to do business and maintaining a registered agent in Illinois—absent one of those "paradigm" situations—will *not* subject a defendant to general personal jurisdiction in Illinois.

Moreover, in the absence of one of the "paradigm" situations described above, simply conducting business in the state of Illinois—even a significant amount of business—is insufficient to create general jurisdiction. The Illinois Supreme Court has noted that in such situations, the nature and amount of business conducted by the foreign corporation must be sufficient to render Illinois a "surrogate principal place of business," in order to establish general jurisdiction.[254]

Ultimately, the recent opinions addressing general jurisdiction illustrate that plaintiffs must satisfy a significantly high threshold in order to make a *prima facie* showing of general jurisdiction. Despite the clear directive from the Illinois and United States Supreme Courts on this issue, however, plaintiffs' counsel might attempt to improperly shift the burden to defendants or argue that defendants should be required to present evidence on the issue of general jurisdiction. Although the burden of making a *prima facie* showing of jurisdiction rests squarely with the plaintiff, if this occurs, you might consider presenting evidence of your client's contacts with Illinois and its contacts with the state or states in which it would be considered "at home", in order to demonstrate that your client is not at home in Illinois.

Finally, because courts have expressly defined the narrow circumstances under which general jurisdiction can be exercised, you might see increased efforts by plaintiffs' counsel to establish specific jurisdiction in inappropriate cases. However, as discussed below, in such cases, you should be prepared to explain how the Supreme Court, through its *Walden* and *Bristol-Myers* opinions, rejected efforts to conflate specific jurisdiction with general jurisdiction. Specifically, the Court explained that specific jurisdiction could not be exercised based upon the defendant's conduct committed outside of the forum state or the defendant's unrelated forum contacts.

B. Specific Jurisdiction

The Supreme Court's recent opinions on specific jurisdiction have already impacted litigation in Illinois and throughout the United States. In many cases, courts have cited to these opinions when finding that defendants are not subject to specific jurisdiction. In some cases, however, plaintiffs have attempted to distinguish or argue for a limited reading of these opinions. Below, we discuss some of the opinions that have reinforced the holdings in *McIntyre*, *Walden*, and *Bristol-Myers*. We then address opinions that plaintiffs' counsel might rely upon when attempting to establish jurisdiction and that counsel should be prepared to address.

i. The Impact of McIntyre, Walden, and Bristol-Myers

In *Advanced Tactical Ordinance Systems, LLC v. Real Action Paintball, Inc.*, the Seventh Circuit revisited its *Janmark* and *Wallace* opinions, which, as discussed, appeared to reach differing conclusions on whether specific jurisdiction could be based upon the location of a plaintiff's injury. In that case, Advanced Tactical, an Indiana company that manufactured and sold "PepperBall" items, filed a trademark infringement action in Indiana against Real Action, a California company.[255] Advanced Tactical alleged that Real Action's tortious conduct included selling infringing products to Indiana customers and disseminating deceptive announcements through its website and its customer email list.[256]

The Seventh Circuit rejected the argument that Real Action was subject to specific jurisdiction because it knew Advanced Tactical was an Indiana company and therefore could foresee that its tortious conduct would harm Advanced Tactical in Indiana.[257] According to the court, this argument was rejected by the Supreme Court in *Walden* when it

explained that the "mere fact that [defendant's] conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction."[258]

The court found the question of whether actually harming a plaintiff in the forum state creates sufficient minimum contacts "more complex" due to the conflicting holdings in *Janmark* and *Wallace*.[259] However, it explained that after *Walden*, "there can be no doubt that 'the plaintiff cannot be the only link between the defendant and the forum.'"[260] The court concluded that any decision that implies otherwise could no longer be considered authoritative.[261]

Finally, the court considered the argument that Real Action maintained sufficient minimum contacts by disseminating tortious content to Indiana residents through posting on an interactive website and by sending two emails to a subscriber list that included Indiana residents. As the court pointed out, the Supreme Court has not definitively answered how a defendant's online activity translates into contacts for purposes of a minimum contacts analysis.[262] Instead, the Court in *Walden* intentionally "'le[ft] questions about virtual contacts for another day.'"[263]

In declining to adopt a categorical test, which some other courts have adopted, the court indicated that its focus would be on whether Real Action had, through its online activities, targeted Indiana somehow.[264] The court found that it had not, explaining that Real Action's maintenance of an email list that contained some Indiana residents created no substantial connection to Indiana.[265] Rather, the court deemed the connection between a lawsuit and the place where an email is opened to be entirely fortuitous.[266] The court further determined that maintaining an interactive website was "a poor proxy for adequate in-state contacts," but, even if considered, the interactivity of Real Action's website had no relation to its tortious conduct since its conduct did not depend upon the interactivity of the website.[267] The Seventh Circuit noted that a different conclusion might be warranted where a defendant somehow targets residents of a specific state, such as through geographically restricted online ads.[268]

Subsequently, the Illinois Appellate Court, First District, in an unpublished opinion, cited *Advanced Tactical* for the proposition that the Seventh Circuit abrogated its holding in *Janmark* (*i.e.*, that specific jurisdiction can be based upon the location of the injury) as a result of *Walden*.[269] The District Court, Northern District of Illinois also relied upon *Advanced Tactical* when noting that the Seventh Circuit's prior approach of attaching great weight to the effects of tortious conduct or the plaintiff's injury being felt in the forum state was "likely no longer good law" after *Walden*.[270]

The United States District Court, Central District of Illinois similarly concluded that after *Walden*, "regardless of whether Plaintiff was harmed in Illinois, Plaintiff cannot be the sole link between [the defendant] and Illinois."[271] Consequently, the court determined that plaintiffs can no longer rely upon prior cases for the proposition that specific jurisdiction exists in the state where the injury occurs.[272] In support of this proclamation, the court cited to the *Stoller* opinion, noting, "[a]s an Illinois state appellate court has recognized, such arguments are 'completely without merit' given both *Walden* and the abrogation of *Janmark*."[273]

Turning to the stream of commerce theory, in *Tile Unlimited, Inc. v. Blanke Corp.*, the District Court, Northern District of Illinois examined the impact of *McIntyre* on specific jurisdiction. In *Tile Unlimited*, the plaintiff filed suit against multiple defendants, including Blanke, a German corporation that sold mats that were manufactured in Germany, due to alleged defects in the mats.[274] After purchasing the mats in Germany, Blanke shipped the mats to an American subsidiary located in Georgia, who then sold the mats to other companies for distribution throughout the United States.[275] The plaintiff, an Illinois corporation, purchased the mats and installed them in homes located in Illinois.

The plaintiff argued that Blanke was subject to specific jurisdiction because the defendant "specifically targeted Illinois" in that it "did not care where in the United States [its mats] were sold or distributed."[276] Moreover, the plaintiff claimed that Blanke knew its mats were ending up in the Midwest because that is where one of the United States

distributors shipped the product.[277] The court, relying upon *McIntyre*, rejected this argument, noting that a defendant's expectations of where its products will be sent once they have left the defendant's control, or even its knowledge of where its product is ending up, is insufficient to establish minimum contacts.[278] According to the court, to satisfy the due process principles articulated in *McIntyre*, the plaintiff needed to show that Blanke purposefully sent the mats into Illinois or specifically targeted Illinois.[279]

Despite its reliance on *McIntyre*, however, the court indicated that the law governing the stream of commerce theory did not change because of that opinion because the Supreme Court did not reach majority opinion.[280] Rather, the court believed that *McIntyre* maintained the status quo of the Supreme Court's stream of commerce jurisprudence. The District Court, Southern District of Illinois agreed with this sentiment, noting in 2016 that the Seventh Circuit had not provided a definitive interpretation of *McIntyre* or resolved the issue of *Asahi's* dueling stream of commerce approaches.[281] The Southern District opted to "set aside" *McIntyre* because it believed that opinion left the law-governing stream of commerce unchanged.[282]

Interestingly, the United States District Court, Northern District of Illinois subsequently placed greater importance on *McIntyre*, noting that the Supreme Court used that opinion to clarify that the mere placement of goods into the stream of commerce through a distributor is not sufficient to establish specific jurisdiction without an additional showing that the defendant purposefully directed its activities at the forum state.[283] According to the Northern District, in *McIntyre*, the Supreme Court made a "controlling change of direction" for cases involving the stream of commerce theory by "explicitly repudiate[ing]" the theory set forth in *Asahi* and its holding that made foreseeability the touchstone of jurisdiction.[284]

The Northern District further concluded that the Supreme Court in *McIntyre* adopted a "stricter approach" to the stream of commerce theory, one that allows for the exercise of jurisdiction under this theory only where the defendant targeted the forum; it is not enough that the defendant might have predicted that its goods would reach the forum.[285] The court also believed that under *McIntyre*, a defendant is not subject to specific jurisdiction under the stream of commerce theory even if a distributor sold the defendant's goods in the forum state as part of the defendant's scheme to serve a nationwide market.[286]

At the state level, in *Chraca v. U.S. Battery Mfg. Co.*, the Illinois Appellate Court First District interpreted *McIntyre* as allowing specific jurisdiction under the stream of commerce theory only if the defendant "targeted" the forum state.[287] The court deemed it insufficient under *McIntyre* if a defendant merely placed its products into the stream of commerce, even if it expected that its products might be sold and used in the forum state.[288] In 2011, the Illinois Appellate Court Second District declined to adopt the narrow or broad approach to stream of commerce, given that a majority of the Supreme Court had not selected either approach.[289] Interestingly, however, the court seemed to question whether the broad stream of commerce approach remained viable following *McIntyre*.[290]

Overall, in the above-referenced cases, the courts reaffirmed the Supreme Court's holdings in *McIntyre*, *Walden*, and *Bristol-Myers* and the strict Due Process requirements articulated in those opinions. In particular, the courts rejected prior opinions that suggested specific jurisdiction could be based upon the location of the plaintiff's injury. Moreover, the courts agreed that for specific jurisdiction to exist under the stream of commerce theory, the defendant must "target" the forum state with its products. By contrast, specific jurisdiction should not be exercised simply because a defendant knows or predicts that its products might end up in the forum state. Finally, following *Walden*, and particularly *Bristol-Myers*, a plaintiff's claim must arise out of contacts the defendant maintains with the forum state and that directly relate to the

plaintiff's claim, not contacts the plaintiff maintains with the forum state, the defendant's contacts with forum state residents, or the defendant's unrelated contacts with the forum state.

ii. Specific Jurisdiction Going Forward

Although the opinion pre-dates *Walden* and *Bristol-Myers*, two years after *McIntyre*, the Illinois Supreme Court issued an opinion that some plaintiffs' counsel might rely upon when attempting to establish specific jurisdiction under a stream of commerce theory. In *Russell v. SNFA*, the plaintiff filed suit against a number of defendants as a result of a helicopter crash that occurred in Illinois. One of the defendants included SNFA, a French company that manufactured custom-made helicopter bearings for the helicopter involved in the crash.[291] The helicopter was manufactured in Italy, sold to a company in Louisiana, and eventually sold to the plaintiff's employer in Illinois.[292] SNFA manufactured the bearings at issue in France, and the Louisiana company then purchased the bearings from a wholly-owned subsidiary of the helicopter manufacturer located in Pennsylvania.[293]

As to SNFA, it had no offices, assets, property, or employees in Illinois.[294] Additionally, it had no direct United States customers for its custom-made helicopter bearings.[295] Rather, it sold various custom-made helicopter bearings to the manufacturer of the helicopter, an Italian company, including the type involved in the crash.[296] The helicopter manufacturer incorporated some of the bearings into its helicopters and kept some to be sold individually.[297] An employee of SNFA testified that he was aware that the helicopter manufacturer sold helicopters containing its bearings in the United States, but denied knowing whether any of those helicopters were sold in Illinois.[298] SNFA also manufactured bearings for airplanes and fixed-wing aircraft.[299] It sold those bearings to three customers in the United States, including to Hamilton Sundstrand in Rockford, Illinois.[300]

SNFA argued it did not maintain minimum contacts with Illinois and the plaintiff's injury did not arise from SNFA's contacts with the state. In evaluating the minimum contacts issue, the court engaged in a lengthy discussion of *McIntyre*. The court believed three points could be deciphered from the separate opinions authored in that case. First, the court recognized that the Supreme Court unanimously endorsed the continued validity of the stream of commerce theory recognized in *World-Wide Volkswagen*, although the Court could not agree on the proper application of the theory.[301] Second, the court found that a majority of the Supreme Court rejected the argument that specific jurisdiction could be based upon a single sale in a forum state, even when a manufacturer or producer knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the 50 states.[302] Finally, the court indicated that only a minority of Justices advocated for a broad approach to the stream of commerce theory.[303] Aside from these observations, the court declined to read any further into *McIntyre*, other than to reject SNFA's argument that the concurring and plurality opinions agreed that the narrow stream of commerce approach should be used.[304]

As to SNFA, the court concluded that it had maintained sufficient minimum contacts with Illinois. The court reached this decision based in part on the conduct of the helicopter manufacturer and its wholly-owned American subsidiary. According to the court, these companies "effectively operated as an American distributor for defendant's tail-rotor bearings in the United States market."[305] The court reasoned that the sole market for SNFA's custom helicopter bearings would be the helicopter manufacturer or owners of its helicopters.[306] Thus, the court believed that the only way SNFA's helicopter bearing would ever reach the final consumer, including customers in the United States and Illinois, was through the helicopter manufacturer and its American distributor.[307] The court described the helicopter manufacturer and its

distributor as the "marketer and distributor of their [SNFA, the manufacturer, and the distributor's] joint and ultimate product" because SNFA chose to leave to the manufacturer the marketing and distribution to consumers.[308] As to Illinois contacts, the helicopter manufacturer had sold 5 helicopters to Illinois within a 10-year period. Additionally, between 2000 and 2007, the American distributor had sold 2,198 bearings manufactured by SNFA.[309]

The court also found that SNFA maintained sufficient minimum contacts based upon its sale of airplane and aircraft bearings to Hamilton Sundstrand in Illinois. Invoices revealed approximately $1 million in sales by SNFA to Hamilton Sundstrand.[310] As part of SNFA's relationship with Hamilton Sundstrand, SNFA sent an employee to its Rockford location on three occasions, with one of the trips focusing on developing new business in Illinois.[311]

SNFA argued that its contacts with Hamilton Sundstrand did not give rise to the plaintiff's claims. Specifically, SNFA noted that it sold to Hamilton Sundstrand a product line completely distinct from the helicopter bearings at issue in the case.[312] While the court acknowledged that the Supreme Court had not defined what is meant by "arise out of" or "relate to," several courts had determined that the applicable standard is "lenient or flexible."[313] Although none of those courts were located in Illinois or the Seventh Circuit, the court chose to apply the "lenient or flexible" standard.[314]

Applying that standard, the court determined that SNFA was in the business of manufacturing custom-made bearings, including bearings for airplanes and helicopters. The court determined that SNFA's attempt to distinguish between subcategories of its primary product (custom-made bearings) was "too restrictive and narrow for purposes of [the court's] jurisdictional inquiry."[315] Thus, the court held that the plaintiff's claim arose from SNFA's manufacture of custom-made bearings, and the claim related to SNFA's sales of a subcategory of those bearings in Illinois.[316]

It is important to note that *Russell* pre-dates the Supreme Court's holdings in *Walden* and *Bristol-Myers*. In those cases, the Supreme Court expressly rejected the exercise of jurisdiction based upon a defendant's unrelated contacts with the forum state, instead requiring that jurisdiction be based upon a defendant's forum contacts that directly relate to the plaintiff's cause of action. Recall, in *Bristol-Myers*, the Supreme Court referred to the California Supreme Court's approach, which held that the strength of the requisite connection between the forum state and the specific claims at issue was relaxed if the defendant had extensive forum contacts that were unrelated to those claims, as a "loose and spurious form of general jurisdiction."[317] Moreover, the Supreme Court determined that specific jurisdiction could not be based solely upon a defendant's contacts with a forum resident or the contacts between a third party and the forum state. In *Walden*, the Court emphasized that sufficient minimum contacts are those "the defendant himself" creates with the forum state, while in *Bristol-Meyers*, the Court cited *Walden* when it explained that specific jurisdiction was inappropriate because all of the conduct giving rise to the non-resident plaintiffs' claims occurred outside the forum state.[318] Therefore, any argument by plaintiffs' counsel that *Russell* somehow broadened the scope of specific jurisdiction beyond a situation where the plaintiff's action arose out of the defendant's lawsuit-related contacts with the forum state should be rejected.

Given the Supreme Court's recent opinions, the issue of whether specific jurisdiction exists under a stream of commerce theory should be a straightforward analysis (*i.e.*, did the defendant maintain minimum contacts with the forum state by directing its product into the forum state as part of an effort to target the forum state and did the plaintiff's action directly arise from said contacts). However, in the event your opposing counsel argues that *Russell* warrants the exercise of jurisdiction under different circumstances, you should consider investigating your client's distribution methods in the event you need to distinguish your client's conduct from that at issue in *Russell*. For example, you might consider identifying the methods by which your client distributes its products, including its use of any third-party distributors. Does your client have multiple channels for distributing its product, such that it cannot be said to use one distributor as the "marketer and distributor" of its product? Are there multiple customer bases for your client's products, or does your

client have only one market for its products that it reaches through a distributor? In other words, does your client disseminate its products to customers through multiple means rather than relying solely upon one or two entities? Additionally, if your client manufactures or sells various types of products, you might want to thoroughly familiarize yourself with those products so you can distinguish them from the type at issue in your case.

Despite the Supreme Court's unequivocal determination that specific jurisdiction cannot be based upon the location of the plaintiff's injury, plaintiffs' counsel might cite a recent District Court opinion to support a different holding. Specifically, counsel might claim that the opinion warrants the exercise of specific jurisdiction even though the defendant's conduct did not occur in the forum state. However, as discussed below, this opinion addressed intentional torts and, therefore, involved a situation where the defendants were deemed to have intentionally directed their conduct at the forum state. Given the unique nature of the claim at issue, this opinion does not warrant a broader approach to specific jurisdiction that what was articulated in those cases.

In this particular case, *Strabala v. Zhang* the District Court, Northern District of Illinois explored what constitutes purposeful availment by a defendant accused of "virtual" tortious conduct, specifically sending emails. Before articulating a standard, the court distinguished *Walden*, noting that the Supreme Court did not speak to the issue except to the extent it specifically distinguished reputation-based torts from other torts for purposes of analyzing the "express aiming" requirement.[319] Specifically, in *Walden*, the Court determined that the defendant did not maintain minimum contacts with Nevada because all of the tortious conduct occurred in Georgia, whereas the Court reached a different conclusion in *Calder* because the defendants' conduct in that case "occurred" in the forum state given the "nature of the libel tort."[320]

Recall that in *Calder*, the Court found the defendants' libelous conduct occurred in California, despite them writing the subject story in Florida, because an injury from libel does not occur until the tortious writing is communicated to and understood by third persons. After distinguishing *Walden*, the court relied upon a California district court opinion in determining that a defendant need not have knowledge as to which geographic forum the target of its tortious Internet-based conduct resides in, so long as the defendant's conduct was aimed at and likely to cause harm in that forum.[321] According to the court, this standard prevents a defendant from avoiding jurisdiction by targeting specific individuals with tortious conduct but remaining ignorant of its victims' precise locations.[322]

Ultimately, the court indicated that the "effects test," which stems from the *Calder* opinion, continues to control the purposeful availment analysis in intentional tort cases.[323] Relying upon the Seventh Circuit's previous interpretation of *Calder* in *Tamburo*, the court determined that the purposeful availment requirement is satisfied in intentional tort cases if the defendant expressly aims intentional tortious conduct at the forum state with knowledge that the effects would be felt in the forum state.[324]

As discussed, the *Strabala* opinion speaks only to the exercise of jurisdiction in an intentional tort case and, therefore, has limited applicability given the significant differences between intentional tort claims and other types of claims. Libel, for example, does not cause injury until it is communicated to and read by third persons. Thus, courts reason that when a defendant targets an individual with libelous material, it has directed conduct not only at its victim but also at the victim's state of residence. Similarly, in *Strabala*, the defendants purposefully reached out to the forum state and, in doing so, created a relationship with the forum state. Unlike a defendant that ships its products to a third-party distributor but does not dictate the final destinations of its products, the defendants in that case knew their conduct particularly impacted the forum state. In other words, it was not the plaintiff or third-parties that connected the defendants to Illinois, but instead, the defendants who chose to take actions that created such a connection. Accordingly, even though the

defendants' tortious conduct at issue in *Strabala* occurred outside of Illinois, that case did not change the requirement that specific jurisdiction be exercised only when the defendant has maintained sufficient minimum contacts with the forum state and the action arose out of those contacts. More importantly, that case does not stand for the proposition that specific jurisdiction can be based upon the location of the plaintiff's injury.

Finally, in Bristol-Myers, the Supreme Court expressly rejected the efforts by non-resident plaintiffs to establish specific jurisdiction because their claims had no connection to the forum state. Specifically, they did not suffer injury in the forum state, and the defendant's alleged tortious conduct did not occur in the forum state. Despite the Court's unequivocal holding, plaintiffs' counsel might argue that a recent Illinois appellate court opinion warrants a different holding. If that occurs, you should be prepared to address the faults with this argument.

The case, *M.M. v. GlaxoSmithKline LLC*, involved eight plaintiffs from six states, including two Illinois residents, who filed suit in Illinois against GlaxoSmithKline (GSK), alleging injuries from use of the drug Paxil.[325] GSK moved to dismiss the non-residents claims for lack of jurisdiction, arguing that the non-residents' claims did not arise from GSK's activities in Illinois, since these plaintiffs did not serve as Paxil study subjects, receive Paxil prescriptions, ingest Paxil, or suffer injury from Paxil in Illinois.[326] As to GSK's contacts with Illinois, it employed 217 Illinois residents, maintained a registered agent for service of process in Illinois, had 184 sales representatives who marketed GSK's products in Illinois (between 79 and 121 of whom marketed Paxil in Illinois), and conducted between 18 and 21 preclinical and clinical studies on Paxil in Illinois.[327]

GSK conceded that it had purposefully directed its activities at Illinois, but it argued that the non-resident plaintiffs' claims did not arise out of or relate to its Illinois contacts. The plaintiffs argued that their injuries arose out of deficiencies in GSK's Paxil clinical trials, some of which occurred in Illinois.[328] According to the plaintiffs, their injuries occurred because Paxil's warning labels inadequately warned of the association between the drug and birth defects, and they alleged that the labels were informed, in part, by the results of the Illinois clinical trials.[329]

The Illinois Appellate Court First District concluded the plaintiffs made a *prima facie* showing that their claims arose out of GSK's Illinois contacts, pointing to the following specific contacts: 1) GSK allegedly failed to adequately track the pregnancy of women who participated in its clinical trials, a portion of which occurred in Illinois; 2) data from the Illinois clinical trials was aggregated with data from other study locations to form a single set of data upon which GSK drew its statistically significant conclusions with respect to Paxil's safety; and 3) GSK stated in an affidavit that its Illinois principal investigators had "little or no input into or control" over the study design protocol or analysis of the aggregate data collected from all study sites, which suggested that the Illinois investigators had *some* degree of input into, and control over, the clinical trials.[330] The court noted that in light of the "lenient and flexible" arising out of or relate to standard, the plaintiffs met the "low threshold" needed to make a *prima facie* showing that their claims arose from GSK's Paxil trials in Illinois.[331]

In response, GSK argued that specific jurisdiction did not exist because courts had rejected specific jurisdiction where a non-resident plaintiff sues a non-resident defendant.[332] In rejecting this argument, the court relied upon *Keeton v. Hustler Magazine, Inc.* In that case, a New York resident filed a libel suit in New Hampshire against a magazine publisher incorporated in Ohio with its principal place of business in California.[333] The Supreme Court found the publisher's regular circulation of its magazines in New Hampshire sufficient to support specific jurisdiction and determined that the plaintiff could recover in New Hampshire for damages "throughout the United States," even though the bulk of her harm occurred outside of New Hampshire.[334] The Court believed jurisdiction was appropriate because the defendant conducted a part of its "general business" (*i.e.*, magazine circulation) in New Hampshire and "the cause of

action [arose] out of the very activity being conducted, in part, in New Hampshire."[335] Finally, the Court noted that the plaintiff was not required to maintain minimum contacts with the forum state for specific jurisdiction to exist.[336] Relying upon *Keeton,* the First District concluded that GSK conducted a part of its general business in Illinois, and the plaintiffs' claims arose out of the very trials conducted, in part, in Illinois.[337] The fact that some of the plaintiffs did not reside in Illinois did not alter the court's opinion.[338]

GSK further argued that there was no "meaningful link" between the plaintiffs' claims and the "small fraction" of Paxil trials that occurred in Illinois (five percent of all trials).[339] The court believed this argument improperly framed jurisdiction as needing to be the "best" location for litigation, as opposed to a location with a significant nexus to the action.[340] GSK also argued that the plaintiffs were required to show that its Illinois contacts were the "legal cause" and "cause in fact" of their injuries. The court determined that GSK failed to meet its burden on this issue, however, agreeing with the trial court's inquiry: "What if [Illinois] had 1/10 of 1 percent [of the total trials], but it was that data that skewed the entire interpretation of the tests?"[341] GSK also argued that there was nothing unique about the Illinois clinical trials. In response, the court explained that GSK cited to no case naming "uniqueness" as a requirement for establishing jurisdiction.[342]

Subsequently, GlaxoSmithKline filed a petition for a writ of certiorari, seeking an appeal of the First District opinion. On October 2, 2017, however, the Supreme Court denied the petition. Consequently, your opposing counsel might argue this case if your client is contesting specific jurisdiction.

To the extent your opposing counsel argues that this case supports the exercise of specific jurisdiction for claims asserted by non-resident plaintiffs or for claims not arising out of a defendant's contacts with the forum state, you should be prepared to argue that this case does not control over *Bristol-Myers*. Moreover, you should highlight that in *Bristol-Myers*, the Supreme Court actually rejected the reasoning adopted by the court in *GlaxoSmithKline*. Specifically, in *GlaxoSmithKline*, the court relied upon *Keeton v. Hustler Magazine, Inc.* to conclude that injury in the forum state is not necessary. In *Bristol-Myers*, however, the Court addressed *Keeton*, noting that it found specific jurisdiction in that case primarily because of the connection between the circulation of the magazine in New Hampshire and *damage allegedly caused within the State*.[343] Again, *Keeton* involved a libel claim, which the Court felt harmed both the plaintiff and the readers of the libelous statement (*i.e.*, readers located in New Hampshire), whereas the non-California residents' claims in *Bristol-Myers* involved no harm in California or harm to California residents.[344] The Court also distinguished *Keeton* by explaining that it concerned jurisdiction to determine the scope of a claim involving in-state injury and injury to residents of New Hampshire.[345] In other words, because the plaintiff alleged libel, she and New Hampshire residents were injured *within New Hampshire* to the extent the libelous material was distributed in the state. However, whether she could recover out-of-state damages (*i.e.*, damages she suffered due to publication in other states) was a merits questioned that would be governed by New Hampshire libel law.[346]

(Endnotes)

(Endnotes)

1 *Rollins v. Ellwood*, 141 Ill.2d 244, 275 (Ill. 1990).

2 735 ILCS 5/2-209(a).

3 735 ILCS 5/2-209(c).

[4] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[5] *Asahi Metal Industry Co. v. Superior Ct.*, 480 U.S. 102, 113 (1987).

[6] *Aspen American Insurance Co. v. Inter-state Warehousing,* 2016 IL App (1st) 151876, ¶ 54 (2016).

[7] *Russell v. SNFA*, 2013 IL 113909, ¶ 32.

[8] *Russell*, 2013 IL 113909, ¶ 33.

[9] *Id.* ¶ 34.

[10] *Daimler AG v. Bauman*, 134 S.Ct. 746, 755 (2014) (discussing *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952).)

[11] *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 439 (1952).

[12] *Id.* at 447.

[13] *Id.* at 448.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 444-445.

[20] *Id.* at 445.

[21] *Id.*

[22] *Id.* at 445-446.

[23] *Id*. at 446.

[24] *Id.*

[25] *Id.* (Citing *International Shoe*, 326 U.S. 310 at 318-319.)

[26] *Id.* at 448.

[27] *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 412 (1984).

[28] *Id.* at 409.

[29] *Id.*

[30] *Id.* at 409-410.

[31] *Id.*

[32] *Id.* at 410.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 411.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 412.

[39] *Id.* at 412-413.

[40] *Id.* at 417.

[41] *Id.* at 416.

[42] *Id.* at 414.

[43] *Id.* at 416.

[44] *Id.*

[45] *Id.* At 417 (citing *Kulko v. California Superior Court*, 436 U.S. 84, 93 (1978).)

[46] *Id.* at 418.

[47] *Id.*

[48] *Id.* at 418-419.

[49] *See*, *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011); *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017).

[50] *J. McIntyre Machinery*, 564 U.S. at 873-87.

[51] *Walden*, 134 S. Ct. at 1115-26;

[52] *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1776.

[53] *Id.* at 1781.

[54] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

[55] *Russell*, 2013 IL 113909, ¶ 42 (citing *Burger King*, 471 U.S. at 474-475).

[56] *See*, *World-Wide Volkswagen*, 444 U.S. 286.

[57] *See*, *Gray v. Am. Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432 (Ill. 1961).

[58] *Gray*, 22 Ill.2d at 434.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 438.

[62] *Id.* at 442.

[63] *Id.*

[64] *Id.* at 441-442.

[65] *Id.* at 442.

[66] *Id.*

[67] *See*, *Connelly v. Uniroyal, Inc.*, 75 Ill.2d 393 (Ill. 1979).

[68] *Connelly*, 75 Ill.2d at 398.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 405 (citing *Buckeye Boiler Co. v. Superior Ct.*, 71 Cal.2d 893, 902 (Cal. 1969)).

[72] *Id.*

[73] *World-Wide Volkswagen*, 444 U.S. at 288.

[74] *Id.*

[75] *Id.* at 289.

[76] *Id.* at 290.

[77] *Id.* at 295.

[78] *Id.* at 297-298.

[79] *Asahi Metal Industry Co. v. Superior Ct.*, 480 U.S. 102 (1987).

[80] *Asahi*, 480 U.S. at 105.

[81] *Id.* at 106.

[82] *Id.* at 108.

[83] *Id.* at 116, 121.

[84] *Id.* at 112.

[85] *Id.*

[86] *Id.* at 117.

[87] *See*, *Wiles v. Morita*, 125 Ill.2d 144 (Ill. 1988).

[88] *Wiles*, 125 Ill.2d at 146-147.

[89] *Id.* at 147.

[90] *Id.*

[91] *Id.* at 159-160.

[92] *Id.* at 160.

[93] *Id.*

[94] *Id.* at 161.

[95] *Id.*

[96] *McIntyre*, 564 U.S. 873, 890-891 (2011).

[97] *Id.*

[98] *Calder v. Jones*, 465 U.S. 783, 784 (1984).

[99] *Calder*, 465 U.S. at 788-789.

[100] *Id.* at 789.

[101] *Id.* at 789-790.

[102] *Janmarkv. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997).

[103] *Janmarkv*, 132 F.3d at 1202.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *See*, *Bell v. Don Prudhomme Racing, Inc.*, 405 Ill. App. 3d 223 (4th Dist. 2010).

[108] *Bell*, 405 Ill. App. 3d at 225.

[109] *Id.* at 226.

[110] *Id.* at 232.

[111] *Id.*

[112] *Id.* at 233.

[113] *Id.*

[114] *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985).

[115] *Wallace*, 778 F.2d at 394.

[116] *Id.* at 392-393.

[117] *Id.* at 395.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See*, *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010).

[123] *Tamburo*, 601 F.3d at 697.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 702.

[127] *Id.* at 703.

[128] *Id.* at 704-705.

[129] *Id.* at 705-706.

[130] *Id.*

[131] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

[132] *Id.* at 918.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 921.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 921.

[141] *Id.*

[142] *Id.* at 922.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 922.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 923.

[149] *Id.* (Citing *International Shoe*, at 316.)

[150] *Id.*

[151] *Id.* at 923-924.

[152] *Id.* at 924.

[153] *Id.*

[154] *Id.*

[155] *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 253.)

[156] *Id.* at 925 (citing *Perkins* and *Helicopteros*).

[157] *Id.* at 925.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 927.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 919.

[164] *Id.* at 929.

[165] *Id.* (citing *International Shoe*.)

[166] *Daimler AG v. Bauman*, 134 S. Ct. 746 (2013).

[167] *Id.* at 751.

[168] *Id.*

[169] *Id.* at 751-752.

[170] *Id.* at 752.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 753.

[176] *Id.*

[177] *Id.* at 754.

[178] *Id.* at 755.

[179] *Id.* (citing von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1164 (1966).)

[180] *Id.* at 757.

[181] *Id.* at 758 (citing *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977).)

[182] *Id.* at 758.

[183] *Id.*

[184] *Id.* at 759.

[185] *Id.* citing (citing *Becker v. Williams*, 676 F.3d 774, 777 (9th Cir. 2011).)

[186] *Id.* at 760.

[187] *Id.* at 760-761 (citing Brief for Respondents 16-17, and nn. 7-8).

[188] *Id.* at 761-762 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).)

[189] *McIntyre*, 564 U.S. at 878.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 879.

[193] *Id.* at 887-888.

[194] *Id.* at 885.

[195] *Id.* at 886.

[196] *Id.*

[197] *Id.* at 886-887.

[198] *Id.* at 888.

[199] *Id.* at 888-889.

[200] *Id.* at 890.

[201] *Id.*

[202] *Id.* at 891.

[203] *Id.* 903-904.

[204] *Id.* at 904.

[205] Walden, 134 S. Ct. at 1118.

[206] *Id.* at 1120.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 1124.

[210] *Id.* at 1122.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* at 1123.

[216] *Id.*

[217] *Id.* at 1125.

[218] *Id.*

[219] *Id.*at 1124.

[220] *Id.*

[221] *Id.* at 1125.

[222] *Id.*

[223] *Bristol-Myers*, 137 S. Ct. at 1777.

[224] *Id.* at 1777-1778.

[225] *Id.* at 1778.

[226] *Id.*

[227] *Id.* at 1779.

[228] *Id.* at 1778.

[229] *Id.* at 1779 (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 1 Cal. 5th 783, 806 (Cal. 2016)).

[230] *Id.* (quoting *Bristol-Myers Squibb Co.*, 1 Cal. 5th at 804).

[231] *Id.* at 1781.

[232] *Id.*

[233] *Id.*

[234] *Id.* (quoting *Walden*, 134 S. Ct. at 1123).

[235] *Id.*

[236] *Id.* at 1783.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* at 1783-1784.

[241] *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102, n. 5 (1987).

[242] *Aspen American Insurance Co. v. Interstate Warehousing, Inc.*, 2016 IL App (1st) 151876, ¶ 1.

[243] *Aspen American Insurance Co.*, 2016 IL App (1st) 151876, ¶ 5.

[244] *Id.*

[245] *Id.*

[246] *Id.* ¶ 54.

[247] *Id.* ¶ 59.

[248] *Id.*

[249] *Id.*

[250] *Aspen American Ins. Co. v. Interstate Warehousing, Inc.*, 2017 IL 121281 ¶ 29 (2017).

[251] *Aspen American Ins. Co.*, 2017 IL 121281, ¶15.

[252] *Id.* ¶ 16.

[253] *Id.* ¶ 27.

[254] *Id.* at ¶¶17, 19 (citing *Perkins*, 342 U.S. at 447-448; *Brown*, 814 F.3d at 629.)

[255] *Advanced Tactical Ordinance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 798-799 (7th Cir. 2014).

[256] *Real Action Paintball*, 751 F.3d at 799.

[257] *Id.* at 802.

[258] *Id.* (quoting *Walden*, 134 S. Ct. at 1126).

[259] *Id.*

[260] *Id.* (quoting *Walden*, 134 S. Ct. at 1122).

[261] *Id.*

[262] *Id.* at 802.

[263] *Id.* (quoting *Walden*, 134 S. Ct. at 1125, n. 9).

[264] *Id.* at 802-803.

[265] *Id.* at 803.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Stoller v. Herbert*, 2014 IL App (1st) 122876-U.

[270] *NTE LLC v. Kenny Const. Co.*, No. 14-C-9558, 2015 WL 6407532, at *3 (N.D. Ill. Oct. 21, 2015).

[271] *Shrum v. Big Lots Stores, Inc.*, No. 3:14-CV-03135-CSB-DGB, 2014 WL 6888446, at *6 (C.D. Ill. Dec. 8, 2014).

[272] *Shrum*, 2014 WL 6888446, at *6.

[273] *Id.* (citing *Stoller*, 2014 IL App (1st) 122876-U, *3).

[274] *Tile Unlimited, Inc. v. Blanke Corp.*, 47 F. Supp. 3d 750, 754 (N.D. Ill. 2014).

[275] *Tile Unlimited*, 47 F. Supp. 3d at 754.

[276] *Id.* at 758.

[277] *Id.*

[278] *Id.*

[279] *Id.* at 758-759.

[280] *Id.* at 757, n. 6.

[281] *Hubert v. Bass Pro Outdoor World, LLC*, No. 15-CV-0047-MJR-SCW, 2016 WL 4132077, at *5 (S.D. Ill. March 16, 2016) (citing *Abelesz v. OTP Bank*, 692 F.3d 638 (7th Cir. 2012); *Minn-Chem, Inc. v. Agricum, Inc.*, 683 F.3d 845 (7th Cir. 2012); *Colo'n v. Akil*, 449 Fed. Appx. 511 (7th Cir. 2011)).

[282] *Hubert*, 2016 WL 4132077, at *5.

[283] *Walker v. Macy's Merchandising Grp., Inc.*, No. 14-C-2513, 2016 WL 6089736, at *4 (N.D. Ill. Oct. 12, 2016).

[284] *Walker*, 2016 WL 6089736, at *6.

[285] *Id.*

[286] *Id.*

[287] *Chraca v. U.S. Battery Mfg. Co.*, 2014 IL App (1st) 132325, ¶ 30.

[288] *Chraca*, 2014 IL App (1st) 132325, ¶ 30.

[289] *Soria v. Chrysler Canada, Inc.*, 2011 IL App (2d) 101236, ¶ ¶ 23-29.

[290] *Soria*, 2011 IL App (2d) 101236, ¶ 30.

[291] *Russell*, 2013 IL 113909, ¶ 1.

[292] *Id.* ¶ ¶ 5-6.

[293] *Id.*

[294] *Id.* ¶ 10.

[295] *Id.* ¶ 13.

[296] *Id.*

[297] *Id.*

[298] *Id.* ¶ 19.

[299] *Id.* ¶ 14.

[300] *Id.*

[301] *Id.* ¶ 67.

[302] *Id.* ¶ 68.

[303] *Id.* ¶ 69.

[304] *Id.* ¶ 70.

[305] *Id.* ¶ 72.

[306] *Id.* ¶ 73.

[307] *Id.*

[308] *Id.* ¶ 74.

[309] *Id.* ¶ 75.

[310] *Id.* ¶ 79.

[311] *Id.* ¶ 80.

[312] *Id.* ¶ 82.

[313] *Id.* ¶ 83.

[314] *Id.*

[315] *Id.* ¶ 84.

[316] *Id.*

[317] *Id.*

[318] *Bristol-Myers*, 137 S. Ct. at 1782.

[319] *Id.* at 110.

[320] *Id.* (citing *Walden*, 134 S. Ct. at 1124).

[321] *Id.* at 111.

[322] *Id.*

[323] *Strabala*, 318 F.R.D. at 108.

[324] *Id.* at 109.

[325] *M.M. v. GlaxoSmithKline LLC*, 2016 IL App (1st) 151909, ¶ 1.

[326] *GlaxoSmithKline*, 2016 IL App (1st) 151909, ¶ 14.

[327] *Id.* ¶ ¶ 16, 18.

[328] *Id.* ¶ 52.

[329] *Id.*

[330] *Id.* ¶ ¶ 53-55

[331] *Id.* ¶ 56.

[332] *Id.* ¶ 61.

[333] *Id.* ¶ 63 (citing *Keeton*, 465 U.S. at 772).

[334] *Id.* (citing *Keeton*, 465 U.S. at 773-774).

[335] *Id.* (quoting *Keeton*, 465 U.S. at 780).

[336] *Id.* (citing *Keeton*, 465 U.S. at 779).

[337] *Id.* ¶ 64.

[338] *Id.*

[339] *Id.* ¶ 67.

[340] *Id.*

[341] *Id.* ¶ 68.

[342] *Id.* ¶ 69.

[343] *Bristol-Myers*, 137 S. Ct. at 1782 (emphasis added).

[344] *Id.*

[345] *Id.*

[346] *Id.* (citing *Keeton*, 465 U.S. at 778, n. 9).

About the Authors

James L. Craney is the founding partner of *Craney Law Group LLC*. His areas of practice include insurance coverage litigation and general litigation with an emphasis upon trial. Mr. Craney also has extensive experience with employment law, municipal law, environmental litigation, first party insurance litigation and complex business litigation. In addition, he regularly appears before the EEOC and Illinois Department of Human Rights representing employers throughout the administrative review process. Mr. Craney obtained the Health Law Certificate from St. Louis University Law School, and previously clerked with the U.S. Department of Health and Human Services, Office of Inspector General. Prior to his legal career, he worked as a statistical data analyst with Washington University Medical School, and has published extensively in medical and psychiatric journals.

Gregory W. Odom, a Partner in the Edwardsville office of *HepleBroom LLC*, focuses his practice on commercial, premises liability, toxic tort, and product liability litigation. Mr. Odom has represented individuals, local businesses, and Fortune 500 companies in Illinois and Missouri state and federal courts. He has successfully tried multiple cases to verdict and has successfully argued before the Illinois Court of Appeals. Mr. Odom received his B.A. from Southern Illinois University in Carbondale in 2005 and his J.D. from Southern Illinois University in 2008. He is Chair of the Events Committee for the IDC and a member of the IDC Board of Directors. In addition to his membership in the IDC, Mr.

Odom is a member of the Madison County and St. Clair County Bar Associations. He also serves as an arbitrator for the Third Judicial Circuit Court-Annexed Mandatory Arbitration Program.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.