"DON'T COME AROUND HERE NO MORE": NARROWING PERSONAL JURISDICTION OVER NON-RESIDENT CORPORATIONS IN ILLINOIS

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Don't come around here no more
Don't come around here no more
Whatever you're looking for
Hey! Don't come around here no more
~Tom Petty & Dave Stewart[1]

I. INTRODUCTION

An April 2015 headline on the *U.S. Chamber Institute for Legal Reform*'s website pronounced: "Madison County's 'No. 1!' Ranking Has Out of State Plaintiffs' Lawyers Cheering, Local Taxpayers Footing the Bill."[2] A study by the Illinois Civil Justice League had produced a *Litigation Index* placing Madison County, Illinois first as having the most lawsuits per 1000 people who live in the county.[3] The study found that Madison County had 8.255 lawsuits per thousand people living in the county, while most other Illinois counties were at about 1.26 lawsuits per thousand.[4]

Part of the reason for Madison County's high *Litigation Index* was that the county handles many of the nation's massive asbestos cases; about one-third of all asbestos cases filed in the U.S. are filed in Madison County,

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1. Tom Petty & Dave Steward, *Don't Come Around Here No More*, SOUTHERN ACCENTS (MCA Records 1985).
2. Bryan Quigley, *Madison County's "No. 1!" Ranking Has Out of State Lawyers Cheering, Local Tax Payers Footing the Bill*, U.S. CHAMBER OF COM. INSTIT. FOR LEGAL REFORM (Apr. 15, 2015), http://www.instituteforlegalreform.com/resource/madison-countys-no-1-ranking-has-out-of-state-plaintiffs-lawyers-cheering-local-taxpayers-footing-the-bill (last visited Mar. 19, 2018).
3. Ill. Civil Justice League, LITIGATION IMBALANCE III 12 (2015), http://www.icjl.org/icjl-litigationindex3.pdf (last visited Mar. 19, 2018). In addition, the 2017–2018 Judicial Hellholes Report placed Illinois's Madison and Cook (Chicago) Counties seventh in their ranking of jurisdictions that are perceived to be plaintiff-friendly. St. Louis, Missouri, which neighbors Madison County, Illinois, was ranked third—down from first in 2016; the explanation for the lower ranking was that "by virtue of a change in gubernatorial leadership, a good start by state lawmakers on an agenda of much needed statutory reforms and a powerful U.S. Supreme Court decision curbing forum shopping in 2017, the City of St. Louis can no longer be fairly ranked as the nation's worst Judicial Hellhole . . . ." *2017/2018 Executive Summary*, JUD. HELLHOLES REP., http://www.judicialhellholes.org/2017-2018/executive-summary/ (last visited Mar. 19, 2018).
4. Quigley, *supra* note 2.

Illinois.[5] About ninety-eight percent of the asbestos cases filed in Madison County in 2013–14 were by plaintiffs who did not reside in Illinois.[6] Lured by Madison County's "rocket docket"—which expedites cases involving terminally ill plaintiffs—many out-of-state plaintiffs bring suit there in asbestos and other mass tort and personal injury cases.[7]

As a result, Madison County's mass tort litigation industry thrived and became an economic driver in the local community. Between 2005 and 2015, lawsuits generated a $14 million surplus for Edwardsville—the County seat with a population of around 25,000.[8] In addition, the town benefited from private investment in the community in ways ranging from the construction of downtown law firms, to support for local business development, to philanthropic investment in local non-profits, and all the other ways a community benefits from a thriving local economy.[9]

Traditionally, in mass tort litigation as in other litigation, the plaintiffs' choice of forum is respected—with certain notable exceptions such as when removal from state to federal court is permitted—as long as there is a basis for the court to exercise its power over the defendants (personal jurisdiction). Many factors might affect plaintiffs' forum choices, including where they live, where their lawyers are, whether a particular court has experience in

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5. *Id.*

6. *Id.* According to the Institute for Legal Reform, more cases were filed in Madison County by non-Illinoisans in 2013–14 than by Illinois residents. *Id*. In addition, Cook County, Illinois, which encompasses Chicago, was ranked as the most litigious county in the U.S. because it contains "41 percent of the state's population, but 63 percent of Illinois's lawsuits seeking more than $50,000 in damages." Lisa A. Rickard & Todd Maisch, *Guest View: Illinois' Lawsuit Climate Is Yet Another Weight on its Economy*, THE ST. J.-REG. (Oct. 10, 2017), http://www.sj-r.com/opinion/20171010/guest-view-illinois-lawsuit-climate-is-yet-another-weight-on-its-economy (last visited Mar. 19, 2018).

7. Rachel Lippman, *It's Called a "Hellhole." But Madison County Defense Attorneys Say Better the Devil You Know*, ST. LOUIS PUB. RADIO (Jan. 15, 2014), http://news.stlpublicradio.org/post/its-called-hellhole-madison-county-defense-attorneys-say-better-devil-you-know#stream/0 (last visited Mar. 19, 2018). Terminally ill plaintiffs can get a case from filing to trial in six months. *Id.*

8. Alan Scher Zagier, *Illinois' Madison County a Center for Asbestos Lawsuits*, INS. J. (Apr. 30, 2015), https://www.insurancejournal.com/news/midwest/2015/04/30/366468.htm (last visited Mar. 19, 2018).

9. *Id.* For an excellent description of a Texas town that has attracted and cultivated a cottage industry in patent litigation and how that small town is likely to be impacted by the Supreme Court's opinion in TC Heartland LLC v. Kraft Foods Group Brands LLC, 137 S. Ct. 1514 (2017), which substantially limited the number of patent suits that may be filed there in the future, see Melissa Repko, *How patent suits shaped a small East Texas town before Supreme Court's ruling*, DALLAS MORNING NEWS (May 23, 2017), https://www.dallasnews.com/business/technology/2017/05/24/east-texas-supreme-court-ruling-setback-towns-final-verdict-locals-say (last visited Apr. 8, 2018). *See also* Adam Liptak, *Supreme Court Considers Why Patent Trolls Love Texas*, NEW YORK TIMES (Mar. 27, 2017), https://mobile.nytimes.com/2017/03/27/business/supreme-court-patent-trolls-tc-heartland-kraft.html (last visited Apr. 8, 2018); Joe Nocera, *The Supreme Court ruled that patent holders can no longer choose where to file infringement suits. That's bad news for Marshall, Texas*, BLOOMBERGVIEW (May 25, 2017), https://www.bloomberg.com/view/articles/2017-05-25/the-texas-town-that-patent-trolls-built-j34rlmjc (last visited Apr. 8, 2018).

dealing with the type of case, whether there are economic or other benefits to joining together with other plaintiffs, and where they perceive they might receive the best outcome. Madison County's success in attracting mass tort cases was attributable to its satisfying several of these factors, such as an active and engaged Bar on both the plaintiff and defense side, courts that are knowledgeable about the subject matter of the cases and have developed efficient procedures for moving the cases through to judgment (such as the rocket docket), and a perception by plaintiffs and defendants that they will get a fair shake in Madison County courts.[10]

In the U.S., we rely almost entirely on private tort litigation to identify dangerous products, compensate victims, and coerce corporations to attach economic value to safety and responsibility.[11] The enormous cost of litigating mass torts[12] on an individual basis has led to increasing emphasis on finding economical and efficient ways to manage numerous cases relating to the same or similar injuries from the same or similar products.[13] This in turn has resulted in both formal and informal consolidation procedures, such as liberalized joiner and consolidation rules, including multi-district consolidation of cases, with the goal of achieving litigation economies when possible, while maintaining a process that is fair to both the plaintiff and defendant.[14]

However, tort reform advocates have pointed to the high cost of maintaining a judicial forum for cases having little or no connection to Illinois as a justification for stricter venue statutes[15] and other reforms that would make it more difficult for non-Illinoisans to file non-Illinois-related

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10. *See* Lippman, *supra* note 7.
11. Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 780 (1985) ("[O]ur justice system relies almost exclusively on private litigation to compensate mass tort victims.").
12. Mass torts occur when many people are harmed by the same product (such as asbestos or tobacco) or disastrous occurrence (such as an airplane crash or building collapse), but the injuries might occur in different places or manifest in very different ways and the plaintiffs might live in different states.
13. Transgrud, *supra* note 11, at 781.
14. *See* FED. R. CIV. P. 18, 19, 20, & 42; *see also* 28 U.S.C.A. § 1407 (2012). Federal Rules of Civil Procedure 18, 19, and 20 provide for joinder of parties and claims. Federal Rule of Civil Procedure 42 provides a trial court with discretion to partially or completely consolidate actions that "involve a common question of law or fact" and to separate for trial if separate trials would be "convenient, . . . avoid prejudice, . . . expedite and economize." FED. R. CIV. P. 42. Of course, no provision of the civil procedure rules establishes a basis for personal jurisdiction over any defendant; the civil procedure rules only relate to conducting litigation of the parties and claims properly before the court. *See also* John F. Keenan, *Methods of Joinder in Mass Tort Litigation*, 11 BUS. & COM. LITIG. FED. CTS. §110:4 (4th ed. 2017) (stating that "proper methods of joinder in mass tort cases will . . . be ones that best allow for common issues to be pursued and decided in common . . . , while giving individual treatment to individual issues . . . ."); Donald R. Cassling & E. King Poor, *Scope Note*, 2 BUS. & COM. LITIG. FED. CTS. § 13:1 (4th ed. 2017).
15. *See, e.g.*, Quigley, *supra* note 2. The ILR estimates that the cost of maintaining Madison County's court system is about $20 million each year. *Id.*

cases in Illinois.[16] They argue that liberal venue statutes and the willingness of Illinois courts to entertain cases with no connection to Illinois drives business and investment out of Illinois.[17]

Higher jurisdictional hurdles result in serious access to justice implications for plaintiffs and for the efficient litigation of multi-party disputes.[18] In some cases, plaintiffs will be deprived of a U.S. forum entirely; in other cases, obtaining personal jurisdiction over corporate defendants will be prohibitively inconvenient and expensive.[19] If a plaintiff is unable to join the necessary defendants in one location, it will be more costly and time consuming—and maybe even impossible—to conduct the litigation.[20] In addition, efficiency is lost when multiple plaintiffs cannot join together to bring common claims against common defendants.[21] It is also potentially more expensive, duplicative, and inconvenient for defendants who must defend separate suits in multiple jurisdictions without being able to join all the supply chain defendants in one action.[22] This inefficiency thwarts the basic policy underlying the Federal Rules of Civil Procedure and state civil procedure rules to encourage the efficient resolution of disputes.[23]

Personal jurisdiction over corporations has long been recognized as implicating a due process analysis that recognizes the unique characteristics of corporations conducting business in a forum state, but that satisfies the basic tenets of the *International Shoe* minimum contacts test. Personal jurisdiction jurisprudence relating to corporations has distinguished between general (or all-purpose) jurisdiction and specific (case-linked) jurisdiction. *International Shoe* itself was a specific jurisdiction case, and specific jurisdiction has, over the years since *International Shoe*, drawn more judicial

16. Rickard & Maisch, *supra* note 6.

17. *Id.* IRL's Lawsuit Climate survey, conducted in 2015, showed that "67% of respondents (senior attorneys and major U.S. employers) said a state's legal climate impacts important decisions such as where to locate or do business." *Id.* The 2017 Legal Climate survey showed that 85% of respondents believed that a state's legal climate impacts decisions about whether to do business in that state. *Survey: Illinois' Lawsuit Climate Again Ranks Among Nation's Worst,* U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Sept. 12, 2017), http://www.instituteforlegalreform.com/resource/survey-illinois-lawsuit-climate-again-ranks-among-nations-worst (last visited Mar. 19, 2018). According to the Lawsuit Climate survey, Illinois ranked forty-eighth out of fifty states in 2017 and 2015, and forty-sixth in 2012. *Id.; see also* Becky Yerak, *Illinois Among Worst States for Litigation for Businesses, Survey Says*, CHI. TRIB. (Sept. 11, 2015), http://www.chicagotribune.com/business/ct-illinois-lawsuit-climate-0911-biz-20150911-story.html (last visited Mar. 19, 2018).

18. Transgrud, *supra* note 11, at 779.

19. *See infra* notes 284–302 and accompanying text.

20. *Id.* at 781.

21. *Id.* at 781–82.

22. *See infra* note 302.

23. *Id.* at 783; *see* FED. R. CIV. P. 1 ("Scope and Purpose. These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

attention by the U.S. Supreme Court,[24] which has often undertaken review of the numerous theories that have percolated through the lower state and federal courts to define the circumstances in which specific jurisdiction will be found.[25]

General jurisdiction developed as an application of the *International Shoe* minimum contacts test to permit courts to exert power over non-resident corporations that were deemed to have continuous and systematic contacts with the forum, even when the suit was unrelated to the corporation's activities in the forum.[26] The doctrine has frequently been used over the years to attach personal jurisdiction over corporations, particularly in mass tort suits arising from allegations that are unrelated to the corporations' business activities in the forum state.[27]

Then, in 2011, the U.S. Supreme Court began to raise the bar on personal jurisdiction.[28] In a series of cases, the Court has articulated a much more limited view of general personal jurisdiction over corporations.[29] Applying and building upon this precedent, the Illinois Supreme Court interpreted Illinois law relating to personal jurisdiction, and in so doing, further narrowed the situations in which a non-resident corporate defendant may be subjected to *in personam* general jurisdiction in Illinois.[30]

In particular, in *Aspen American Insurance Co. v. Interstate Warehousing, Inc.*, the Illinois Supreme Court held that where the lawsuit was unrelated to the non-resident corporation's Illinois activities, an Illinois court did not have jurisdiction over the corporation even though the corporation had registered to do business in Illinois and had an agent for service of process in Illinois.[31] The Illinois Supreme Court further interpreted the Illinois Business Corporation Act of 1983 and concluded that the registration provision for non-resident corporations to do business in Illinois does not establish consent by the non-resident corporations to general jurisdiction in Illinois.[32]

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24. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 925 (2011) ("Specific jurisdiction has become the centerpiece of modern jurisdictional theory.").
25. For an excellent overview of the Supreme Court's personal jurisdiction jurisprudence, beginning with *Pennoyer* and continuing through the 2014 *Daimler* and *Walden* cases, see William V. Dorsaneo, III, *Pennoyer Strikes Back: Personal Jurisdiction in a Global Age*, 3 TEX. A&M L. REV. 1 (2015).
26. Perkins v. Benguet Consol. Mining Co., 343 U.S. 917 (1952); Helicopteros Nacionales De Colombia S.A. v. Hall, 466 U.S. 408 (1984)*; see also* Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 2017 IL 121281, ¶ 27.
27. *See Helicopteros Nacionales De Colombia S.A.*, 466 U.S. at 414.
28. *See Goodyear*, 564 U.S. at 920.
29. *See generally id.*; Daimler AG v. Bauman, 134 S. Ct. 746 (2014); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).
30. *See generally Aspen*, 2017 IL 121281.
31. *See id.* ¶ 27.
32. *Id*.

This series of cases limiting personal jurisdiction over non-resident corporate defendants will almost certainly have an impact on the number and types of cases filed in Illinois, particularly in mass tort cases. In order to establish the foundation for understanding the scope, significance, and implications of these decisions limiting personal jurisdiction over non-resident corporations—particularly in mass tort litigation—this article will review relevant aspects of the U.S. Supreme Court's personal jurisdiction jurisprudence, including specific jurisdiction and the expansion and contraction of general jurisdiction.[33] Then, this article will analyze the Illinois Supreme Court's opinion regarding general jurisdiction in *Aspen*, and discuss some of the implications for mass tort litigants in Illinois and elsewhere.

II. THE MINIMUM CONTACTS TEST AND THE EMERGENCE OF THE DISTINCTION BETWEEN SPECIFIC AND GENERAL JURISDICTION OVER CORPORATIONS

In the seminal *International Shoe Co. v. Washington*[34] case, the United States Supreme Court expanded on the geographic presence-based *Pennoyer*[35] test for personal jurisdiction and established that a court could exercise personal jurisdiction over a non-resident corporation that had "certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[36] By the time the *International Shoe* case reached the Supreme Court, courts had begun to recognize that the *Pennoyer* physical presence test did not fit well for corporations[37] since, unlike individuals, corporations have no physical presence. Corporations are legal entities established in accordance with the laws of a state, but they might have operations in many different states. Moreover, corporations only act through individuals, such as employees, officers, shareholders, or others.[38] Consequently, variations on the *Pennoyer* physical presence test had developed to enable courts to exercise personal jurisdiction over corporations.

A corporation that is incorporated in the forum state or has its principal place of business there is deemed to be present there for purposes of *in*

33. It is not the intended purpose of this article to provide an in-depth primer on personal jurisdiction. However, it is useful to briefly summarize the law of personal jurisdiction to provide a framework for understanding the recent Supreme Court cases limiting the circumstances in which states may exercise personal jurisdiction over non-resident corporations that operate within the state's borders.
34. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
35. Pennoyer v. Neff, 95 U.S. 714 (1877).
36. *See International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
37. *See generally* Philip B. Kurland, *The Supreme Court, The Due Process Clause and the* in Personam *Jurisdiction of State Courts—From* Pennoyer *to* Dencla*: A Review*, 25 U. CHI. L. REV. 569 (1958).
38. *See International Shoe*, 326 U.S. at 316.

personam general jurisdiction. This concept, which is consistent with both *Pennoyer* and *International Shoe*, has been reiterated in the recent Supreme Court cases, and is a matter of settled law.[39]

For non-resident corporations—that is, corporations incorporated and having their principal place of business in a state *other than* the forum state—two theories had developed under *Pennoyer* to justify a court's exercise of jurisdiction. The first was a consent-based theory which posited that a state could require a corporation to consent to an exercise of jurisdiction as a prerequisite to permitting the corporation to do business in that state.[40] The second was a fictional presence test which assessed whether an out-of-state corporation was "doing business" in the forum such that it could be deemed to be present.[41] Thus, the doing business test became somewhat of an amalgamation of an implied consent test and a fictional presence test for personal jurisdiction in the post-*Pennoyer*, pre-*International Shoe* personal jurisdiction due process doctrine.[42]

In the seminal *International Shoe* case, the Court was faced with the question of whether a Washington court could exercise *in personam* jurisdiction over the International Shoe Company to enforce an order and notice of assessment for delinquent unemployment compensation fund contributions, when personal service of process had been made on a person who sold International Shoe's products in the state, with a copy of the process mailed to the corporation.[43] International Shoe argued that the exercise of jurisdiction violated the Due Process Clause of the Fourteenth Amendment because it was not incorporated in Washington, was not doing business in the state, and had no agent there authorized to receive service of process.[44]

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39. *See generally* Pennoyer v. Neff, 95 U.S. 714 (1877); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) (calling the place of incorporation and principal place of business the "paradigm" forums for personal jurisdiction over the corporation).

40. *See International Shoe*, 326 U.S. at 318 (observing that "some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to the service and suit, consent being implied from its presence in the state through the acts of its authorized agents")*; see also* Lafayette Ins. Co. v. French, 59 U.S. 404 (1855); St. Clair v. Cox, 106 U.S. 354 (1882); Commercial Mut. Accident Co. v. Davis, 213 U.S. 245 (1909); Washington v. Superior Court, 289 U.S. 361 (1933).

41. *See* Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917).

42. *See, e.g.*, *id.* at 265 ("A foreign corporation is amenable to process … if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there."). While the "doing business" test clearly did not survive the Supreme Court's recent line of general jurisdiction cases, whether a coerced consent theory is still viable is an open question. *See generally* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014); BSNF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

43. *See International Shoe*, 326 U.S. at 311–12.

44. *Id.* at 312. *International Shoe* also argued that the sales person was an independent contractor and not an employee, and thus that the corporation was not liable for the unemployment compensation fund contributions. *Id.*

The *International Shoe* Court took the opportunity to reframe the analysis for *in personam* jurisdiction as relating to contacts and fairness rather than physical presence, setting out the new minimum contacts test: "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[45] The Court noted that,

> [w]hether due process is satisfied must depend . . . 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. . . .
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> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[46]

In addition, the *International Shoe* Court identified a due process distinction between suits related to a defendant's activities in the forum (specific jurisdiction) and suits unrelated to a defendant's activities in the forum (general jurisdiction):

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also *give rise to the liabilities sued on*, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on *causes of action unconnected with the activities there*.[47]

Later, in *Shafer v. Heitner*, the Court explained that the proper focus of a minimum contacts analysis is on "the relationship among the defendant, the forum, and the litigation."[48] This important relationship gained even greater

45. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
46. *Id.* at 319.
47. *Id.* at 317 (emphasis added).
48. Shaffer v. Heitner, 433 U.S. 186, 186 (1977).

significance in subsequent cases as courts began to expand the circumstances under which corporations could be haled into court and jurisdictional doctrine began to split into two categories: specific jurisdiction—sometimes called "case-linked" jurisdiction—in which the defendant's contacts with the forum give rise to or are related to the plaintiff's claims; and general jurisdiction—sometimes called "all purpose" jurisdiction—in which the defendant's contacts with the forum are unrelated to the plaintiff's claims. While courts have routinely upheld the exercise of personal jurisdiction even when the non-resident defendant's activities in the forum were sporadic or isolated but related to the cause of action (specific jurisdiction), courts required that the defendant's contacts with the forum be extensive, continuous, and systematic in order to satisfy the minimum contacts test in suits unrelated to the defendant's contacts with the forum (general jurisdiction).[49]

Over the years since *International Shoe*, the focus of the application of the minimum contacts test has been on assuring fairness to the defendant while providing flexibility and promoting convenience. As modern technology has expanded the ways corporations do business and the mobility of consumers, courts have adapted the minimum contacts test to fit new situations. Specific jurisdiction over non-resident corporate defendants—in particular—has expanded as technology, transportation, and globalization have enabled corporations to grow, expand, and become multinational in their operations, but also general jurisdiction expanded to permit the exercise of jurisdiction in multiple states over companies that were conducting business on a national and international scale. In 2014, in her concurring opinion in *Daimler AG v. Bowman*, Justice Sotomayor observed:

> In the era of *International Shoe*, it was rare for a corporation to have such nationwide contacts that it would be subject to general jurisdiction in a large number of States. Today, that circumstance is less rare. But that is as it should be. What has changed since *International Shoe* is . . . the nature of the global economy.[50]

A. Specific Jurisdiction Over Corporations

The doctrine of specific jurisdiction is grounded in the holding of *International Shoe* itself, in which the court noted that International Shoe's contacts with Washington were related to the cause of action.[51] Most states,

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49. *Compare* Perkins v. Benguet Consol, Mining Co., 342 U.S. 437 (1952), *with* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984).

50. Daimler AG v. Bauman, 134 S. Ct. 746, 771 (2014) (Sotomayor, J., concurring).

51. *International Shoe*, 326 U.S. at 320.

including Illinois, have adapted their long arm statutes to take advantage of the expanded jurisdictional doors that *International Shoe* opened.[52]

State and federal courts are in agreement that specific jurisdiction requires the three factors identified by the United States Court of Appeals for the Seventh Circuit:

> (1) the defendant must have purposefully availed himself of the privilege of conducting business in the forum state or purposefully directed his activities at the forum state; (2) the alleged injury must have arisen from the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with traditional notions of fair play and substantial justice.[53]

As the Supreme Court explained in *Hanson v. Denckla*, "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[54] The Supreme Court later emphasized in *Walden v. Flore* that the relationship between the nonresident defendant's conduct and the forum state "must arise out of contacts that the 'defendant *himself*' creates with the forum state."[55]

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52. *See* 735 ILCS 5/2-209(c) (West 2016); *see also* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961) (holding that Illinois's long arm authorizes the exercise of personal jurisdiction to the limits of what due process will permit).

53. Felland v. Clifton, 682 F.3d 665, 673 (7th Cir. 2012) (citations omitted). The Illinois Supreme Court has held that "[s]pecific jurisdiction requires a showing that the defendant purposefully directed its activities at the forum state and the cause of action arise out of or relates to the defendant's contacts with the forum state." Russell v. SNFA, 2013 IL 113909, ¶ 40 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). *See also* HollyAnne Corp. v. TFT, Inc., 199 F.3d 1304, 1307–08 (Fed. Cir. 1999) (holding that specific jurisdiction requires an inquiry into "(1) whether the defendant purposefully directed its activities at the residents of the forum; (2) whether the claim arises out of or is related to those activities, and (3) whether assertion of personal jurisdiction is reasonable and fair").

54. Hanson v. Denckla, 357 U.S. 235, 253 (1958). In *Hanson*, a Pennsylvania resident had established a trust in Delaware and appointed a Delaware bank as trustee. *Id.* at 238. The trustor subsequently moved to Florida, where she later died. *Id.* at 239. In Florida, prior to her death, she had exercised her right to change the beneficiaries of her Delaware trust. *Id.* After her death, two of her three daughters brought suit in Florida to challenge the change in beneficiaries to the Delaware trust. *Id.* at 240. The defendants challenged the Florida court's jurisdiction over the Delaware bank, an indispensable party under Florida law. *Id.* at 241. The Supreme Court concluded that, even under the flexible minimum contacts test, the Delaware bank did not have sufficient contacts with Florida to permit maintenance of the suit against it there. *Id.* at 251. The Delaware bank had no office in Florida, had never solicited or done business there, and had never distributed trust assets there. *Id.* So, despite the clear relationship between the bank's management of the trust and the litigation, the bank simply lacked even the minimal contacts required to satisfy due process. *Id.* at 253.

55. Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

Courts have continued to expand the circumstances in which non-resident corporate defendants were found to have purposefully availed themselves of the privilege of conducting activities within a particular forum in satisfaction of the minimum contacts test. As modern technology has expanded the ways corporations do business and the mobility of consumers, courts have faced new challenges as they adapt the minimum contacts test to new situations. Courts developed various theories to permit the exercise of specific jurisdiction over non-resident corporations.[56] Two such theories are most relevant to mass tort cases. The first is the *Calder v. Jones* "effects test." The second, and more common, is the "stream of commerce" theory, which has generated more attention by the Supreme Court, although the Court has not managed to issue a full majority opinion on the topic since *World-Wide Volkswagen Corp. v. Woodson* in 1980. Most recently, in 2017, the Court issued an opinion in *Bristol-Myers Squibb Co. v. Superior Court* that rejected an expansive view of specific jurisdiction in mass torts cases.[57]

1. Effects Test

In *Calder v. Jones*, the Supreme Court held that a court could exercise specific jurisdiction over a non-resident corporation if the effects of the defendant's intentional tortious act were felt in the state.[58] *Calder* involved a California libel claim brought by a California resident—actress Shirley Jones—against the National Enquirer magazine, which was located in Florida.[59] Since the impact of the allegedly libelous article was felt in California by Jones, who was known by the defendant to live and work in California, the Court held that California was the "focal point" of the allegedly libelous article and of the harm to the plaintiff, and consequently,

56. *See, e.g.*, J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2001) (plurality opinion) (holding that British machine manufacturer was not amenable in New Jersey in suit for New Jersey plaintiff's injury caused by machine in New Jersey); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (holding that California courts did not have jurisdiction over Chinese parts manufacturer despite the manufacturer's knowledge that the parts might end up in California); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (holding that a non-resident corporation was subject to personal jurisdiction when it "deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State"); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) (holding that a non-resident corporation was amenable to suit brought by a non-resident plaintiff based on "regular monthly sales of thousands of magazines" in the forum, which sales "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous"); Calder v. Jones, 465 U.S. 783, 790-91 (1984) (establishing the "effects test," and holding that a non-resident corporation was amenable in the forum even though the defendant's only contact with the forum was that the effects of the defendant's tortious conduct were felt there).

57. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).

58. Calder v. Jones, 465 U.S. 783, 783 (1984).

59. *Id.*

that the defendant's "intentional, and allegedly tortious actions were expressly aimed at California."[60]

The Supreme Court has emphasized that "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum."[61] A typical formulation of the *Calder* effects test was articulated by the United States Court of Appeals for the Fourth Circuit:

> (1) The defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.[62]

The emphasis on the intentional nature of the tortious act makes this theory often a difficult one to satisfy in mass tort cases,[63] many of which are based on allegations of negligent conduct rather than intentional conduct. Nevertheless, where there are allegations of intentional conduct, the *Calder* effects test can be used to establish specific personal jurisdiction over a non-resident corporate defendant.

2. Stream of Commerce

A more common and often-used theory for attaching specific jurisdiction to a non-resident corporation in mass tort cases is the "stream of commerce" theory. This theory was first recognized in *World-Wide Volkswagen Corp. v. Woodson*[64] and just what conduct it requires continues to be debated today. *World-Wide Volkswagen* recognized that a state may exercise personal jurisdiction over a non-resident corporation that "delivers

60. *Id.* at 783–84.
61. Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014).
62. Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 398 n.7 (4th Cir. 2003).
63. *See Walden*, 134 S. Ct. at 1123–24 (emphasizing the unique nature of *Calder* as a libel case: "The crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons."); Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122 (9th Cir. 2003) (explaining that the "effects test" is satisfied only in the more narrow circumstances where the defendant's intentional act was expressly aimed at the forum state and the "brunt of [the harm] is suffered—and which the defendant knows is likely to be suffered—in the forum state").
64. World-Wide Volkswagen Corp. Woodson, 444 U.S. 286 (1980).

its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[65] The Court reasoned that,

> [i]f the sale of a product of a manufacturer or a distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[66]

The Court again considered the stream of commerce theory of specific personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court*.[67] There, the Court concluded that a California court could not exercise jurisdiction over a Japanese tire valve manufacturer on an indemnification claim by a Taiwanese manufacturer, even though it knew that its parts were manufactured for and sold and delivered to the Taiwanese manufacturer, which put the valves into motorcycle tires and sold the tires in California.[68] There was no agreement by the Court as to what the stream of commerce test should be, but a majority of the Court agreed that—irrespective of minimum contacts with the forum—"traditional notions of fair play and substantial justice" would not be served by an exercise of personal jurisdiction because of the inconvenience to the defendant of having to defend in a distant jurisdiction, the state's limited interest in the case since neither party to the indemnification claim was a California resident, the fact that the Taiwanese manufacturer could bring the indemnification action in Japan or Taiwan without inconvenience, and interests in international comity that would be undercut by the California court's exercise of jurisdiction over the claim.[69] It is important to note that Asahi had not had any contact with California other than selling its valves to a Taiwanese manufacturer with the knowledge that they would go into tires that would be eventually sold in California.

Justice O'Connor's plurality opinion argued that, in order to satisfy minimum contacts, there must be some additional conduct aimed at the forum beyond simply placing the product in the stream of commerce with knowledge that the product will wind up in the forum: "[t]he placement of a

65. *Id*. at 297–98 (holding that Oklahoma courts did not have jurisdiction over a regional Audi distributor, World-Wide Volkswagen, that distributed Audis in Connecticut, New York, and New Jersey, in a suit brought by a plaintiff injured in an accident that occurred in Oklahoma in a car purchased in New Jersey; and that the Oklahoma courts did not have jurisdiction over the New York car dealership, Seaway, where the plaintiff had purchased her Audi).

66. *Id*. at 297.

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

68. *Id*. (O'Connor, J., joined by Rehnquist, C.J. and Powell and Scalia, JJ.).

69. *Id*. at 113 (citing Milliken v. Meyer, 311 U.S. 457 (1940)).

product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[70] Examples given by Justice O'Connor of the types of additional conduct that might bring a non-resident corporation within the jurisdictional reach of a court under a stream of commerce theory included "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state."[71] Justice Brennan, writing for himself and three other justices, posited that no additional conduct was required to invoke specific jurisdiction beyond putting a product into the stream of commerce with knowledge it would end up in the forum.[72]

The Supreme Court again addressed the stream of commerce theory in 2011 in *J. McIntyre Machinery, Ltd. v. Nicastro*, and again did not produce a majority opinion.[73] *McIntyre* was a products liability case in which the plaintiff "seriously injured his hand while using a metal-shearing machine manufactured by" J. McIntyre, a British company operating in England.[74] The plaintiff was a New Jersey resident, was injured by the machine at work in New Jersey, and brought suit against J. McIntyre in New Jersey. A majority of the Court agreed that J. McIntyre was not subject to the jurisdiction of New Jersey courts, but there was no agreement on the requirements for stream of commerce jurisdiction.[75] Justice Kennedy, writing for a plurality that included himself, Chief Justice Roberts, Justice Scalia, and Justice Thomas, noted the lack of clear direction from the *Asahi* case, and then articulated a narrow view of when "stream of commerce" jurisdiction may be found:

> a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors seek to serve a given State's market. . . . The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must 'purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.' . . . Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of

70. *Id.* at 112 (plurality opinion).
71. *Id.*
72. *Id*. at 117 (Brennan, J., concurring in part and concurring in the judgment, joined by White, Marshall, and Blackmun, JJ.).
73. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011) (plurality opinion).
74. *Id.* at 878.
75. *Id*. at 882–83.

> goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; *as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State*.[76]

Justice Breyer, concurring in an opinion on behalf of himself and Justice Alito, disagreed with Justice Kennedy's articulation of the requirements for stream of commerce jurisdiction.[77] He would have decided the case simply based on the fact that J. McIntyre's alleged contacts with New Jersey were too attenuated.[78] The American distributor of J. McIntyre's machine had sold one machine into New Jersey—the one on which the plaintiff was injured; J. McIntyre had wanted its American distributor to sell its machines to anyone and everyone in the U.S. who wanted to buy; and J. McIntyre representatives attended trade shows in the United States, but not in New Jersey.[79] These facts, in Justice Breyer's view, did not amount to sufficient contacts to subject J. McIntyre to jurisdiction in New Jersey.[80]

On the other hand, Justice Breyer also did not agree with the New Jersey Supreme Court's view that New Jersey could assert personal jurisdiction in a products liability action so long as the defendant "'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 fifty states.'"[81] In a theme that appeared in the Court's opinions in *Goodyear*, *Daimler*, and *BSNF* (the general jurisdiction cases), Justice Breyer expressed concern that the New Jersey Supreme Court's expansive rule would subject too many defendants to jurisdiction in all fifty states:

> A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large

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76. *Id*. at 882 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (citations omitted) (emphasis added).
77. *Id.* at 888–89.
78. *Id.*
79. *Id*. at 888 (Breyer, J., concurring).
80. *Id.*
81. *Id*. at 891 (quoting Nicastro v. McIntyre Machinery America, Ltd., 201 N.J. 48, 76–77 (N.J. Sup. Ct. 2010) (emphasis added by Breyer, J.).

> distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach."[82]

Justice Ginsburg dissented in an opinion in which she was joined by Justice Sotomayor and Justice Kagan. Justice Ginsburg expressed concern that the Court's holding effectively exempts J. McIntyre from liability altogether for its allegedly tortious conduct:

> [S]ix Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributers market it."[83]

Justice Ginsburg would have found that J. McIntyre had sufficient contact with New Jersey since it sought out U.S. buyers through its American distributor, and manufactured and sold to a New Jersey company the machine that injured the New Jersey plaintiff in New Jersey.[84] Justice Ginsburg distinguished *Asahi* since Asahi's contacts with California were more attenuated and California lacked the strong interest in adjudicating the Asahi indemnification dispute that New Jersey had in *McIntyre* directly relating to the manufacture of the machine that harmed the plaintiff.[85]

The Illinois Supreme Court considered the reach of stream of commerce jurisdiction in *Russell v. SNFA*.[86] The *Russell* court, in reviewing the *McIntyre* opinion, drew three conclusions:

> First, the Court unanimously endorsed the continued validity of the stream-of-commerce theory from *World-Wide Volkswagen* to establish specific personal jurisdiction, although the proper application of that theory is not settled. . . . Second, a clear majority of the Court [believed that] specific jurisdiction should *not* be exercised based on a single sale in a forum, even when a

82. *Id*. at 891–92.
83. *Id.* at 893–94 (Ginsburg, J., dissenting, joined by Kagan and Sotomayor, JJ.) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)).
84. *Id*.
85. *Id*. at 906–08.
86. Russell v. SNFA, 2013 IL 113909 (2013).

> 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 fifty states." . . . Finally, a minority of the Court believes a broader stream-of-commerce theory should be applied to adapt to modern globalized commerce and is warranted under *International Shoe*'s focus on "notions of fair play and substantial justice."[87]

In *Russell*, the court held that Illinois had jurisdiction over French company that manufactured a custom tail-rotor bearing for a helicopter that crashed, resulting in the death of the pilot.[88] The plaintiff's complaint focused on allegations that the cause of the helicopter crash was the malfunction of the tail-rotor bearings manufactured by the French manufacturer.[89] Although the pilot was a Georgia domiciliary, he was living in Illinois at the time of the helicopter crash, working for an Illinois air ambulance service.[90] The helicopter was manufactured in Italy and had multiple owners over the twenty-four years after it was manufactured.[91] A German company had sold the helicopter to a Louisiana owner, which had twice replaced the tail-rotor bearings with bearings purchased from a Pennsylvania aerospace company.[92] The original and replacement tail-rotor bearings had been manufactured by the same French manufacturer that was now the defendant.[93]

In holding that the French company had sufficient contacts with Illinois to justify the exercise of specific jurisdiction, the Illinois Supreme Court noted that, while the French company did "not have any offices, assets, property, or employees in Illinois, and . . . [was] not licensed to do business in Illinois," it "manufactur[ed] custom-made bearings for the aerospace industry" and for helicopters, and "conduct[ed] business internationally, with customers in Europe and the United States."[94] The French company sold bearings to the Italian helicopter manufacturer, which in turn sold numerous helicopters into the United States, including many to customers located in Illinois.[95] The French company had a business relationship with a company in Illinois, and sold bearings for other aircraft that were manufactured in the United States (although not in Illinois).[96] These contacts, according to the *Russell* court, amounted to sufficient minimum contacts to permit Illinois to

87. *Id.* ¶¶ 67-69 (citations omitted) (quoting *McIntyre*, 564 U.S. at 891).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* ¶ 10.
95. *Id.* ¶¶ 12-13.
96. *Id.* ¶¶ 14-15.

exercise jurisdiction over the French company in the suit related to the helicopter crash that killed the pilot in Illinois.[97]

Although this line of cases does not clarify the extent of contact needed to support an exercise of specific jurisdiction based on a stream of commerce theory, a few conclusions can be drawn. First, as the court in *Russell* noted, a majority of justices of the Supreme Court in *McIntyre* believed that more than one sale was required.[98] Second, *Asahi* established that when foreign corporations are involved—corporations established and headquartered outside the United States—special international comity concerns are implicated, which require consideration by the court seeking to exercise jurisdiction over the foreign corporation.[99] Third, in both *Asahi* and *McIntyre*, a majority of the justices reaffirmed the basic premise of *World-Wide Volkswagen* that "[i]f the sale of a product of a manufacturer or a distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States," a state may exercise personal jurisdiction over that non-resident manufacturer or distributor.[100]

3. New Limits on Specific Jurisdiction over Corporations: Bristol-Myers Squibb

The Supreme Court's recent opinion in *Bristol-Myers Squibb Co. v. Superior Court* adopted a narrowed view of the grounds upon which a state can exercise personal jurisdiction when it rejected the California Supreme Court's expansive view of specific jurisdiction in a mass tort case.[101] *Bristol-Myers* potentially signals a willingness of the Court to further narrow the due process limits on specific jurisdiction.[102] In an opinion by Justice Alito, the Court held that California did not have personal jurisdiction over the drug-manufacturing giant, Bristol-Myers Squibb, in a suit brought by over 600 plaintiffs—most of whom were not California residents[103]—relating to injuries resulting from Plavix, a drug manufactured by Bristol-Myers Squibb.[104]

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97. *Id.* ¶78.
98. *Id.* ¶ 68*; see also McIntyre*, 564 U.S. at 873.
99. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987).
100. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); s*ee also Asahi*, 480 U.S. at 110; *McIntyre*, 564 U.S. at 888.
101. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).
102. *See id.*
103. *Id.* at 1778. Eighty-six of the plaintiffs were California residents, and the other 592 were from 33 other states. Specific jurisdiction was uncontested as to the claims of the 86 California residents. *Id.*
104. *Id.*

Bristol-Myers Squibb was a Delaware corporation with its headquarters in New York and most of its operations in New York and New Jersey.[105] However, the company had significant contact with California. In addition to selling over $900 million worth of Plavix in California,[106] Bristol-Myers Squibb maintained five research laboratories and a state government lobbying office in California and had over four hundred employees in the state.[107]

Specific jurisdiction was present over the claims of the California plaintiffs because their claims were related to Bristol-Myers Squibb's distribution of Plavix in California.[108] The California courts concluded that general jurisdiction over the non-California plaintiffs' claims did not lie because Bristol-Myers Squibb neither was incorporated nor maintained its principal place of business in California.[109] However, both the California Court of Appeal and the California Supreme Court found that specific jurisdiction was present over the non-California plaintiffs' claims and, consequently, that the California courts could exercise personal jurisdiction over all the plaintiffs' claims against Bristol-Myers Squibb.[110] The California Supreme Court's majority had applied a sliding scale test that considered Bristol-Myers Squibb's extensive California contacts along with the similarity of the non-residents' claims to the California residents' claims and found that there was a sufficient basis on which to conclude that specific jurisdiction existed as to all of the claims.[111] After all, they were the same claims against the same defendants; the only difference was the residence of the plaintiffs and where they had purchased and consumed Plavix.[112]

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105. *Id.* at 1777–78.

106. *Id.* at 1778 (noting that the $900 million revenue amounted to approximately one percent of the company's overall sales revenue).

107. *Id.*

108. *Bristol-Myers*, 137 S. Ct. at 1778.

109. *Id. See* Daimler AG v. Bauman, 134 S. Ct. 746, 760-61 (2014) (noting that the paradigm forums for general jurisdiction are the defendant's principal place of business and state of incorporation and setting a nearly insurmountable bar for finding an exception that would justify an exercise of general jurisdiction in other than the paradigm forums).

110. *Id.*

111. *Id.* at 1778–79; *but see* In re Plavix Related Cases, 2014 WL 3928240 (Ill. Cir. Ct. 2014) (Cook County, Illinois court dismissing Plavix claims of 486 non-Illinois residents against Bristol-Myers Squibb, Sanofi-Aventis U.S., Sanofi U.S. Services, Inc., and Sanofi-Synthelaba, Inc., despite the presence of sixteen Illinois plaintiffs).

112. *Bristol-Myers*, 137 S. Ct. at 1779. Prior to *Bristol-Myers*, it was common for courts to exercise personal jurisdiction under these circumstances. Indeed, the Supreme Court had recognized six years earlier in Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 926 (2011), that "[m]any States [had] enacted long-arm statutes authorizing courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum state." The Court quoted the North Carolina long-arm as authorizing "North Carolina courts to exercise personal jurisdiction in 'any action claiming injury to person or property within this State arising out of [the defendant's] act or omission outside this State,' if, 'in addition[,] at or about the time of the injury,' '[p]roducts . . . manufactured by the defendant were used or consumed, within this State

The U.S. Supreme Court rejected both the analysis and conclusion of the California Supreme Court. The Court reiterated that the personal jurisdiction analysis focuses on the relationship of the defendant to the forum, and reaffirmed the distinction between specific—case-linked—and general—all-purpose—personal jurisdiction.[113] The Court noted the very limited circumstances in which general jurisdiction may be asserted, and stressed that in order for specific jurisdiction to exist, the issues in the case must derive from or be connected with the particular contacts with the forum.[114] Here, none of the circumstances were present to justify either general or specific jurisdiction, according to the Court.[115] Justice Alito stressed that "the nonresidents were not prescribed Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California . . . does not allow the state to assert specific jurisdiction over the nonresidents' claims."[116]

The Court explained that although the state's interest in adjudicating the proceeding and the plaintiff's interest in selecting the forum are relevant considerations, "the 'primary concern' is 'the burden on the defendant.'"[117] Yet, according to Justice Alito's opinion, the burden on the defendant is to be measured—at least in significant part—not by the actual inconvenience to the defendant, but by the territorial limitations on states and principles of interstate federalism.[118] The Court quoted *World-Wide Volkswagen* to make this point:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient for the litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[119]

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in the ordinary course of trade.'" *Goodyear*, 564 U.S. at 926 (quoting N.C. GEN. STAT. ANN. § 1-75.4(4)(b) (2009). *See also id.* at 926, n. 3 (quoting D.C. CODE § 13-423(a)(4) (2001) as "providing for specific jurisdiction over defendant who 'caus[es] tortious injury in the [forum] by an act or omission outside the [forum]' when, in addition, the defendant 'derives substantial revenue from goods used or consumed . . . in the [forum].'").

113. *Id.* at 1779–80.

114. *Id.* at 1780 (noting that "'only a limited set of affiliations with a forum will render a defendant amenable to' general jurisdiction in that State." (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014))).

115. *Id.*

116. *Id.*

117. *Id.* at 1780 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

118. *Id.* at 1780–81.

119. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

This rationale is problematic for two reasons. First, it does not account for the defendant's prerogative to waive challenges to personal jurisdiction. If the due process limitations on personal jurisdiction—whether general or specific—are related to other states' sovereignty and interstate federalism, then it would be antithetical to permit a defendant to waive the jurisdictional challenge or consent to personal jurisdiction. Surely such structural limits on a state's power may not be waived by a party. Yet, none of the Court's personal jurisdiction opinions go so far as to suggest that a defendant does not still retain the power of waiver and consent.[120] Indeed, the Supreme Court has stated the requirement of personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[121]

Second, this rationale fails to respect the forum state's own authority and interest in adjudicating disputes against corporations that operate in the forum state. As Justice Sotomayor pointed out in her concurring opinion in *Daimler*, the majority's emphasis on the jurisdictional reach of states other than the forum state "unduly curtails the [forum] State['s] sovereign authority to adjudicate disputes against corporate defendants who have engaged in

120. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (noting that "because the personal jurisdiction requirement is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court'" (quoting Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982))). *See generally* Gilbert v. Burnstine, 174 N.E. 706, 708 (N.Y. 1931) (gathering and summarizing settled U.S. Supreme Court precedent regarding consent to personal jurisdiction, and quoting AUSTIN W. SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 39–41 (1922): "'Jurisdiction over the person of the defendant may be acquired by his consent. This consent may be given either before or after action has been brought. Jurisdiction is conferred when the defendant enters a general appearance in an action, that is, an appearance for some purpose other than that of raising the objection of lack of jurisdiction over him. A stipulation waiving service has the same effect. The defendant may, before suit is brought, give a power of attorney to confess judgment or appoint an agent to accept service, or agree that service by any other method shall be sufficient. The defendant in all these cases has submitted to the control of the state and of the court over him.'"). In *Goodyear*, the Court accepted that Goodyear USA's decision not to challenge jurisdiction amounted to consent to general jurisdiction. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011) (noting that "Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it"). Also, in *Daimler*, the Court accepted Mercedes-Benz USA's acquiescence to general jurisdiction. Daimler AG v. Bauman, 134 S. Ct. 746, 758 (2014) (noting that defendant did not object to California's assertion of general jurisdiction over Mercedes-Benz USA, and assuming, on that basis, "that MBUSA qualifies as at home in California"); *see also Daimler*, 134 S. Ct. at 763 (Sotomayor, J., dissenting) (noting that "Daimler has conceded that California courts may exercise jurisdiction over" Mercedes-Benz USA).

121. *Insurance Co. of Ireland*, 456 U.S. at 702; *see also* Commercial Cas. Ins. Co. v. Consolidated Stone Co., 278 U.S. 177, 179 (1929) (noting that personal jurisdiction is a "personal privilege respecting the venue, or place of suit, which [the defendant] may assert, or may waive, at [its] election").

continuous and substantial business operations within their boundaries."[122] States have a strong interest in regulating the business activities of corporations that conduct business within the state. This is especially true in mass tort cases such as *Bristol-Myers*. To elevate the interests of other states in the convenience analysis to the level that the other states' interests become a constitutional jurisdiction-cancelling factor amounts to an infringement on the sovereign authority of the forum itself.

For example, in *Russell v. SNFA*, the Illinois Supreme Court, in assessing the reasonableness of exercising jurisdiction over a foreign corporation in a case involving a helicopter accident in Illinois, recognized the strong interest Illinois has in adjudicating cases relating to corporations that do business within Illinois:

> Illinois has an indisputable interest in resolving litigation stemming from a fatal Illinois helicopter accident causing plaintiff's death, particularly when plaintiff was living and working in Illinois for an Illinois employer. Aside from Illinois and the foreign forum of France, there does not appear to be any other forum that would have an interest in this controversy. Because the incident occurred in Illinois and involved an individual living and working in Illinois for an Illinois-based employer, Illinois has a substantial interest in this dispute that implicates the societal concerns of products liability and occupational safety. In addition, the underlying accident involved the provision of ambulatory services in Illinois, an issue that undoubtedly is of interest to Illinois and its citizens.[123]

In her *Bristol-Myers* dissent, Justice Sotomayor argued that the *Bristol-Myers* Court had unnecessarily and improperly narrowed the grounds for specific jurisdiction, as it had done with general jurisdiction in *Goodyear*, *Daimler*, and *BNSF*.[124] She raised the important concern that "the Court's

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122. *Daimler*, 134 S. Ct. at 772 (Sotomayor, J., concurring). Justice Sotomayor's point was that the new and limiting general jurisdiction rule—emphasizing the principal place of business and state of incorporation as the only available general jurisdiction forums—"unduly curtails" the sovereign authority of other states to exercise power over corporations "engaged in continuous and substantial business operations" in the state. *Id.*

123. Russell v. SNFA, 2013 IL 113909, ¶ 88 (Ill. 2013). The court held that a French helicopter tail-rotor bearing manufacturer was subject to specific jurisdiction in Illinois. *Id.* ¶ 91. The lawsuit followed an accident that occurred in Illinois, causing an Illinois pilot's death. *Id.* ¶ 4. The French manufacturer custom-made tail-rotor bearings for a U.S. market, and used a U.S. distributor to market and distribute its products in the U.S. and, in particular, in Illinois. While the bearings at issue were made for a Pennsylvania-based company, the manufacturer had a business relationship with a company in Rockford, Illinois. *See generally id.* ¶¶ 73-75.

124. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784–89 (2017) (Sotomayor, J., dissenting). *See generally Goodyear*, 564 U.S. at 915; *Daimler*, 134 S. Ct. at 746; *BSNF*, 137 S. Ct. at 1549; *see also infra* notes 165–218 and accompanying text for an extensive discussion of *Goodyear*, *Daimler*, and *BNSF*.

opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action."[125] She expressed concern that the majority's holding has given "one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions,"[126] and she derided the majority for dismissing this concern with the observation that the plaintiffs could have brought their suit in New York or Delaware; "could 'probably' have subdivided their separate claims in to 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an 'open question')."[127]

In addition, Justice Sotomayor pointed out the resulting difficulty of bringing any mass tort case at all because of the difficulty of joining the necessary defendants in one forum.[128] Unless by happenstance, the multiple defendants are incorporated or have their principal places of business in the same state where general jurisdiction can be invoked, she argued, bringing one suit will be impossible.[129] Justice Sotomayor predicted that the benefits of aggregation will not survive the majority opinion.[130]

B. General Jurisdiction Over Corporations

1. Expansion—continuously and systematically doing business

Between 1945—when *International Shoe* was decided—and 2011, the Supreme Court considered only two general jurisdiction cases: *Perkins v. Benguet Consolidated Mining Co.*[131] and *Helicopteros Nacionales de Columbia, S.A. v. Hall*.[132] In *Perkins*, the Supreme Court held that due process would permit the exercise of personal jurisdiction over a non-resident corporate defendant for claims unrelated to the defendant's contacts with the forum as long as the contacts were extensive.[133] There, a non-resident

125. *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).
126. *Id.*
127. *Id.* (quoting the majority opinion at 1783–84).
128. *Id.* It is unclear whether the Court's holding will impact personal jurisdiction in class actions. There is an argument that it should not since the class representative would be the only relevant plaintiff for purposes of determining jurisdiction. However, it is possible that the Court's ruling in *Bristol-Myers* will impact class certification, causing courts to be reluctant to certify nationwide classes when the suit is not brought in the defendant's "at home" forum. Justice Sotomayor noted in her *Bristol-Myers* dissent that she "would expect that class action defendants will use this decision to seek dismissal of the individual claims of some class members." *Id.*
129. *Id.*
130. *Id.*
131. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
132. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).
133. *Perkins*, 342 U.S. at 444–45.

plaintiff—a stockholder in defendant corporation—sued a Philippine corporation in Ohio for claims arising from activities that occurred outside of Ohio.[134] The Supreme Court held that the defendant corporation was subject to the personal jurisdiction of the Ohio court even though the corporation's mining activities were all conducted outside of Ohio, because the president of the company was located in Ohio for an extended period during which he conducted all of the corporation's business from Ohio.[135] During the World War II Japanese occupation of the Philippines, all of the corporation's limited operations had been conducted from Ohio.[136] Thus, the Court concluded, the defendant's contacts with Ohio were "sufficiently substantial and of such a nature to permit Ohio to entertain" the claim against it.[137] The Court found that Ohio was Benguet's principal place of business, even if only for a temporary period.[138]

Then, in 1984, in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, the Supreme Court reaffirmed the basic concept of general jurisdiction: when a non-resident corporation has "continuous and systematic general business contacts" with the forum, due process is satisfied even if the contacts with the forum are unrelated to the cause of action.[139] The court stated that,

> [e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.[140]

However, in *Helicopteros*, the Court held that the non-resident defendant did not have sufficient contacts with the forum to justify an exercise of general jurisdiction.[141] *Helicopteros* involved a Columbian corporation that provided helicopter services for oil and construction ventures in South America.[142] One of Helicopteros's helicopters crashed in South America, killing four Americans.[143] The families of the four Americans brought suit against Helicopteros in Texas, alleging wrongful

134. *Id.* at 438–39.
135. *Id.* at 440.
136. *Id.* at 447–48.
137. *Id.* at 447 (emphasis omitted).
138. *See id.* at 448*; see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780, n.11 (noting that "Ohio was the corporation's principal, if temporary, place of business" in *Perkins*).
139. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).
140. *Id.* at 414.
141. *Id.* at 419.
142. *Id.*
143. *Id.*

death.[144] The defendant moved to dismiss the suit for lack of personal jurisdiction.[145]

Helicopteros had purchased helicopters, equipment, and training from Bell Helicopter in Fort Worth, Texas, negotiated contracts in Texas, sent employees to Texas for training, received consulting services from a person in Texas, and been paid by checks drawn on a Texas bank.[146] These contacts with Texas were, according to the Supreme Court, unrelated to the wrongful death and insufficient to justify an exercise of general jurisdiction.[147]

In the years following *Helicopteros*, numerous state and federal courts applied this principle of general jurisdiction to assess whether the minimum contacts test was satisfied in situations when a non-resident corporation's activities in the forum were unrelated to the cause of action.[148]

Even before *International Shoe* and after it until 2011, courts recognized a jurisdictional distinction between corporations and individuals, and the jurisdictional impact of enhanced mobility created by modern transportation on a corporation's ability to do business in many locations. General and specific jurisdiction became more and more complicated as courts grappled with the jurisdictional quandaries that resulted as technology enabled more and more companies—ranging from very small companies with limited resources to huge companies with significant resources—to do business on a national and international basis.

Although the advent of the internet put tension on the "doing business" personal jurisdictional doctrine, until relatively recently, the focus of general jurisdiction inquiries was on the extent to which the non-resident corporate defendant was doing business in the forum. Courts would look at various factors to determine if the defendant could be deemed to be doing business in the forum, such as whether it had employees in the forum, whether it owned and maintained property in the forum, whether it had offices or a retail

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 409–19.
148. *See, e.g.*, Frummer v. Hilton Hotels Int'l., Inc., 227 N.E.2d 851 (N.Y. 1967) (holding that a New York court had jurisdiction over an English corporation in a suit brought by a New York resident who fell and was injured in the London Hilton hotel; the Hilton Reservation Service—a corporate entity separate from defendant—had an agency relationship with the defendant and the extensive New York contacts of the Hilton Reservation Service justified a conclusion that the London Hilton did continuous and systematic business in New York); *but see* Fisher Governor Co. v. Superior Court, 347 P.2d 1 (Cal. 1959) (holding that more than sales and sales promotion by non-exclusive, independent sales representatives was required to justify the exercise of general jurisdiction over a non-resident corporation); Ratliff v. Cooper Labs., Inc., 444 F.2d 745 (4th Cir. 1971) (holding that drug manufactures that were Delaware corporations with principal places of business in New York and Connecticut were not subject to general jurisdiction in South Carolina in a suit brought by a non-resident plaintiff who brought suit in there primarily to take advantage of a long statute of limitations where the specific drugs alleged to be defective were both manufactured and consumed outside of South Carolina).

presence in the forum, whether it advertised in the forum, how much revenue it had received from the forum, and other factors that indicated that it would be fair to subject the defendant to litigation in the forum on a matter unrelated to these contacts.[149]

For example, the Illinois Supreme Court held, in *Cook Associates v. Lexington United Corp*., that "the doing-business standard [is] used in determining questions of jurisdiction over foreign corporations not licensed in Illinois . . . . [I]f a foreign, unlicensed corporation is found to be doing business in this State, it is amenable to the jurisdiction of courts of Illinois *even for causes of action not arising from the defendant's transactions of business in Illinois*."[150] The *Cook* court indicated that there was no single test for when a foreign corporation was doing business in Illinois, but said that generally, courts should determine that "the corporation is conducting business in Illinois 'of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process.'"[151]

The *Cook* court acknowledged that it was following *Pennoyer*-era precedent in its application of the "doing business" test for general jurisdiction over a non-resident corporation, but it reasoned that this was acceptable post-*International Shoe* because *International Shoe* liberalized, rather than narrowed, the basis upon which due process would permit an exercise of personal jurisdiction.[152]

The *Cook* court summarized the circumstances in which Illinois had determined that a corporation was doing business in Illinois.[153] Among the examples cited was *Hertz Corp. v. Taylor*.[154] In *Hertz*, the Illinois Supreme Court addressed a claim by a foreign corporation that the Illinois courts lacked personal jurisdiction over it.[155] The plaintiff's claim related to a car rental agreement between plaintiff Hertz and a resident of Mobile,

149. *See* International Shoe Co. v. Washington, 326 U.S. 310, 324 (1945); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 286 (1980).

150. Cook Assocs., Inc. v. Lexington United Corp., 87 Ill. 2d 190 (1981) (emphasis added) (holding that defendant's minimal, sporadic activities in Illinois—having a display in a Chicago trade show and conducting an employment interview—did not amount to "doing business" as would subject it to the general jurisdiction of the Illinois courts).

151. *Id*. at 201 (quoting Pembleton v. Illinois Commercial Men's Assoc., 289 Ill. 99, 104 (1919)).

152. *Id*. at 199-200. This is consistent with the Supreme Court's holding in Burnham v. Superior Court, 495 U.S. 604, 628 (1990).

153. *Id.* at 201*; see also* St. Louis-San Francisco Ry. Co. v. Gritchoff, 68 Ill. 2d 38 (1997); Hertz Corp. v. Taylor, 15 Ill. 2d 552 (1959); American Hyde and Leather Co. v. Southern Ry. Co., 310 Ill. 524 (1923); Connelly v. Uniroyal, Inc., 75 Ill. 2d 393 (1979); Braband v. Beech Aircraft Corp., 72 Ill. 2d 548 (1978).

154. Hertz Corp. v. Taylor, 15 Ill. 2d 552 (1959).

155. *Id*. at 554.

Alabama.[156] The car rental agreement was entered in Louisiana and the rented car was involved in an accident somewhere between New Orleans, Louisiana and Mobile, Alabama.[157] Hertz sued in Chicago both the Alabama man who rented the car and his employer, Alcoa Steamship Company (Alcoa), seeking to garnish the Alabama man's wages for the damages.[158] Alcoa moved to dismiss the suit for lack of personal jurisdiction, arguing that the suit was not related to any of its activities in Illinois and it did not have sufficient contacts with Illinois to support jurisdiction over the unrelated suit.[159] The *Hertz* court found that Illinois did have personal jurisdiction over Alcoa based on the court's conclusion that Alcoa was doing business in Illinois.[160] The court acknowledged that Alcoa was a non-resident corporation that was not licensed to do business in Illinois, but found that it had an office in Chicago, had seven employees who were Illinois residents, conducted freight and passenger business from the Chicago office, and sold tickets in Illinois for its ships that operated outside of Illinois.[161] The court held that these contacts "adequately show[ed] a course of business [in Illinois] sufficient to subject the corporation to the jurisdiction of [Illinois] courts."[162] The court noted that its analysis and conclusion were supported by both *International Shoe* and *Perkins*.[163]

By 2011, when the Supreme Court began contracting general jurisdiction, the availability of general jurisdiction had become an important tool in the tort litigation toolbox—often providing the basis for a court's personal jurisdiction over large corporate defendants in multi-party and multi-claim lawsuits, enabling courts to resolve mass tort disputes in one or a few cases, rather than hundreds and sometimes thousands of separate cases. The emphasis by courts on continuous and systematic business activity in the forum that tended to show that a non-resident corporation was "doing business" there meant that large corporations that conduct substantial business activities in every state could likely be sued in every state, though smaller corporations doing business on a more limited scale might be deemed to have sufficient contacts to justify a general jurisdiction suit in some states and not in others. Most large, multi-national corporations that were doing extensive business nationwide simply did not contest courts' general jurisdiction over them.[164]

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156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id*.
163. *Id.*
164. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011) (noting that "Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity

2. Contraction—shifting the analysis from "doing business" to "at home"

Then, in a series of cases beginning with *Goodyear Dunlop Tires Operations, S.A. v. Brown*[165] in 2011, the Supreme Court changed the analysis and narrowed the availability of general jurisdiction over non-resident corporations. In *Goodyear*, Justice Ginsburg, writing for a unanimous Court, rejected the distinction between individuals and corporations in personal jurisdiction analysis, stating that "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as *at home*."[166]

Goodyear involved a lawsuit in North Carolina relating to a bus accident that occurred in France killing two boys from North Carolina.[167] The plaintiffs—North Carolina residents who were parents of the decedents—brought suit in North Carolina against Goodyear Tire and Rubber Company, an Ohio corporation, and three of its European subsidiaries, alleging that the accident resulted from the failure of tires manufactured or distributed by the three subsidiaries.[168] While Goodyear USA did not challenge the North Carolina court's jurisdiction over it, the three European subsidiaries did challenge the court's personal jurisdiction, and the Supreme Court agreed that due process would be violated by an exercise of personal jurisdiction over the three European subsidiaries.[169] The Court held that the European subsidiaries did not have "'the kind of continuous and systematic general business contacts' necessary" to justify an exercise of general jurisdiction.[170] Justice Ginsburg noted that the European subsidiaries manufactured tires only for European and Asian markets; were "not registered to do business in North Carolina"; did not have a "place of business, employees, or bank accounts" there; did "not design, manufacture,

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there, did not contest the North Carolina court's jurisdiction over it"); Daimler AG v. Bauman, 134 S. Ct. 746, 758 (2014) (noting that Mercedes-Benz USA had not objected to the California court's assertion of general jurisdiction, and thus assuming for "purposes of [the] decision . . . that MBUSA qualifies as at home in California"); *see also* Perez v. Air & Liquid Sys. Corp., 2016 WL 7049153, at *6-9 (S.D. Ill., Dec. 2, 2016) (noting that the plaintiff had argued that General Electric—a giant corporation doing extensive business in all fifty states—had previously defended at least thirty general jurisdiction law suits in Illinois before ever raising a jurisdictional challenge).

165. *Goodyear*, 564 U.S. at 915; *Daimler*, 134 S. Ct. at 746; BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).

166. *Goodyear*, 564 U.S. at 924 (emphasis added).

167. *Id.* at 920. The thirteen-year-old boys were soccer players aboard the bus traveling to Paris's Charles de Gaulle airport to begin their journey home to North Carolina. One of the bus's tires failed, causing it to roll, killing the boys.

168. *Id.*

169. *Id.* at 920–21.

170. *Id.* at 929 (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 416 (1984)).

or advertise their products" there; and did "not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers."[171]

The North Carolina court had relied on a stream of commerce theory to attach personal jurisdiction because some of the European subsidiaries' tires—though of a different type—had ended up in North Carolina through other distributers.[172] In reversing, Justice Ginsburg clarified that this contact was insufficient to justify a lawsuit in North Carolina unrelated to the tires that had been distributed to North Carolina.[173] A stream of commerce theory alone, the Court explained, might justify only an exercise of specific jurisdiction.[174] Citing *World Wide Volkswagen*, the court explained that the "[f]low of a manufacturer's products into the forum . . . may bolster an affiliation germane to *specific* jurisdiction. But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant."[175]

Goodyear itself was an easy case. It was much more like *Helicopteros* than it was like *Perkins*. Indeed, the European subsidiaries' contacts with North Carolina were even more attenuated than Helicopteros's contacts with Texas had been. However, the Supreme Court was not content to simply conclude that there were insufficient contacts present to justify general jurisdiction over the subsidiaries, instead taking the opportunity to fundamentally shift the focus of the analysis from considering whether the defendant could be considered "doing business" in the forum to whether the defendant could be considered "at home" in the forum.[176]

Certainly, the Court noted, a corporation would be "at home" in the place of incorporation and principal place of business; Justice Ginsburg identified these places as the "paradigm . . . bases for general jurisdiction.[177]

If there was any doubt that *Goodyear* had raised the bar on general jurisdiction, those doubts were put to rest in 2014 with Justice Ginsburg again writing for the Court in *Daimler AG v. Bauman.*[178] *Daimler* held that a German company—DaimlerChrysler Aktiengesellschaft—was not amenable to suit in California based on allegations that its wholly owned subsidiary—Mercedes-Benz Argentina—had violated U.S. federal and state law by collaborating with Argentinian state security forces to commit human rights

171. *Id.* at 921.
172. *Id.* at 921–22.
173. *Id.*
174. *Id.*
175. *Id.* at 927 (emphasis in original).
176. *Id.*
177. *Id.* at 735; *see also* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) ("Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as ascertainable. . . . These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.").
178. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

violations during Argentina's Dirty War.[179] Although none of the alleged acts occurred in California—or even in the U.S.—and none of the victims or perpetrators had any connection to California, the plaintiffs based personal jurisdiction on the California activities of Daimler's subsidiary, Mercedes-Benz USA, LLC, a Delaware corporation with its principal place of business in New Jersey that distributes Daimler vehicles to dealerships in California and throughout the United States.[180] Plaintiff's theory was that Daimler's activities through its subsidiary were so substantial in California, that it could be sued for any claim there regardless of where in the world the acts occur giving rise to the claim.[181]

The Court rejected such a broad reading of the due process clause, reiterating that *Goodyear* had held that "a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially *at home* in the forum State.'"[182] Though specifically rejecting a "doing business" test in favor of an "at home" test, Justice Ginsburg suggested that *Pennoyer*'s territorial-based analysis might still be apposite in the general jurisdiction context.[183] The Court concluded that Daimler was not *at home* in California.[184]

As it had done in *Goodyear*, the *Daimler* Court reaffirmed the holding in *Perkins*, making clear that the concept of general jurisdiction was still valid, but clarifying that it would require a finding that the non-resident corporation was essentially "at home" in the forum state.[185] Justice Ginsburg specifically rejected an interpretation of *International Shoe* that would condone a "continuous and systematic" contacts test for general jurisdiction, noting that the *International Shoe* Court used those words together with "but

179. *Id.* at 751 (2014). Specifically, the plaintiffs alleged violations of the Alien Tort Statute and the Torture Victim Protection Act of 1991, both codified in 28 U.S.C § 1350, and intentional infliction of emotional distress in violation of California and Argentina law.

180. *Id.*

181. *Id.*

182. *Id.* (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (emphasis added)).

183. *Daimler*, 134 S. Ct. at 757–58. The opinion states, "[a]s is evident from *Perkins*, *Helicopteros*, and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized." *Id.* However, the "doing business" test was a physical presence substitute that developed after *Pennoyer* and before *International Shoe*. Yet, in a *Daimler* footnote, Justice Ginsburg warns that reliance on *Pennoyer*-era precedent is misplaced: "[*Pennoyer*-era cases cited in *Perkins*] indeed upheld the exercise of general jurisdiction based on the presence of a local office which signaled that the corporation was 'doing business' in the forum. *Perkins*' unadorned citations to these cases, both decided in the era dominated by *Pennoyer*'s territorial thinking . . . should not attract heavy reliance today." *Id.* at 761, n.18.

184. *Id*. at 751.

185. *Id.* at 755–56; *see also Goodyear*, 564 U.S. at 929.

also give rise to the liabilities sued on," indicating that continuous and systematic contact should be associated with specific jurisdiction rather than general jurisdiction.[186]

The Court reiterated that the paradigm bases for general jurisdiction are where the corporation is incorporated and where it has its principal place of business.[187] Permitting a more expansive view of general jurisdiction, Justice Ginsburg cautioned, would thwart predictability and "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]

In both *Goodyear* and *Daimler*, the Court articulated concern that the defendant be able to predict where it would be amenable to suit to enable it to structure its activities. However, predictability alone could not have been the Court's only rationale. Predictability could be achieved by a holding that a multi-national corporation doing extensive business in all fifty states and internationally would be subject to jurisdiction in every state, for example.[189] It might be inconvenient or otherwise problematic, but a rule that permits the exercise of general jurisdiction over corporations doing extensive business in a state is predictable.[190]

Yet, the opinions in both cases specifically rejected a test that would subject a corporation to jurisdiction everywhere. In a footnote, Justice Ginsburg stressed that "[a] corporation that operates in many places can scarcely be deemed at home in all of them."[191] In addition, the *Daimler* opinion rejected as "grasping," an argument that a corporation ought to be amenable to suit in every state where it "engages in a substantial, continuous, and systematic course of business."[192] Justice Sotomayor's concurring

186. *Daimler*, 134 S. Ct. at 761 (discussing *International Shoe*, 326 U.S. at 318, and citing Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 184 (2001)).

187. *Id.* at 761.

188. *Id.* at 761–62 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

189. *See id.* at 770 (Sotomayor, J., concurring).

190. *See id.* (Sotomayor, J., concurring) ("The majority may not favor that rule as a matter of policy, but such disagreement does not render an otherwise routine test unpredictable.").

191. *Id.* at 762, n.20 (Ginsburg, J. writing for the majority) (noting that "[n]othing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of . . . activity' having no connection to any in-state activity" (quoting Meir Feder, Goodyear, *"Home" and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 694 (2012))).

192. *Id.* at 761 (quoting Brief for Respondents 16-17, and nn.7-8). In her concurring opinion, Justice Sotomayor stated that "[r]eferring to the 'continuous and systematic' contacts inquiry that has been taught to generations of first-year law students as 'unacceptably grasping' . . . the majority announces a new rule that in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must also surpass some unspecified level when viewed in comparison to the company's 'nationwide

opinion chided the majority for deeming Daimler "too big for general jurisdiction."[193]

Moreover, some uncertainty about when a corporation might be deemed "at home" for general jurisdiction purposes lingered after *Daimler*. Justice Ginsburg stressed in a footnote that the Court has not "foreclose[d] the possibility that in an exceptional case, . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that state."[194] The opinion cited *Perkins* as an example of such an "exceptional case,"[195] and explained that *Perkins* turned on the fact that "[a]ll of Benguet's activities were directed by the company's president from within Ohio."[196] However, Justice Ginsburg's opinions in both *Goodyear* and *Daimler* made clear that *Perkins* had its principal place of business in Ohio, albeit temporarily.[197] The question lingering after *Daimler*, then, is whether there are states other than the principal place of business—whether permanent or temporary—and the state of incorporation in which a corporation may subject to general jurisdiction. While the opinion leaves open the possibility of "exceptional circumstances" that might justify an exercise of general jurisdiction in other than the principal place of business and the state of incorporation, this possibility is so narrowly defined that it is difficult to imagine a situation in which circumstances will be present to enable a plaintiff to assert general jurisdiction in any state other than the one where the corporation has its principal place of business—permanently or temporarily—or is incorporated.[198]

The Supreme Court again took up the issue of general jurisdiction in 2017 in *BNSF Railway Co. v. Tyrrell*[199] and Justice Ginsburg again delivered the opinion of the Court. The opinion reads like an admonition that the Court meant what it said the first two times,[200] reiterating the "at home" rule for general jurisdiction: "[o]ur precedent . . . explains that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-

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and worldwide' activities." *Id*. at 770 (Sotomayor, J., concurring) (quoting the majority opinion at 760 & 762, n.20).

193. *Id*. at 764 (Sotomayor, J., concurring) (observing that none of the Court's previous personal jurisdiction opinions—including its general jurisdiction opinions in *Goodyear*, *Helicopteros*, and *Perkins*—had focused on the defendant's activities in forums other than the one in question).

194. *Id*. at 761, n.19 (Ginsburg, J. writing for the majority).

195. *Id*.

196. *Id*. at 756, n.8 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952)).

197. *Id*. at 756; Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 928 (2011).

198. *See generally* Daimler AG v. Bauman, 134 S. Ct. 746, 756, 761, n.19 (2014); *Goodyear*, 564 U.S. at 928.

199. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

200. One imagines that Justice Ginsburg would have liked to have invoked Dr. Seuss to press the point: "I meant what I said and I said what I meant." DR. SEUSS, HORTON HATCHES THE EGG (Random House 1940).

state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere."[201]

BNSF was a Federal Employers' Liability Act (FELA) suit filed in Montana by non-Montana plaintiffs regarding work injuries that did not occur in Montana.[202] The plaintiffs had never lived or worked in Montana.[203] BNSF was a Delaware corporation with its principal place of business in Texas.[204] The Court began by pointing out some of BNSF's extensive contacts with Montana: BNSF owned over 2,000 miles of railway track in Montana, had over 2,000 employees in the state, received about 6% of its revenue from Montana, and maintained an automotive facility in Montana.[205] BNSF was not, according to the Court, at home in Montana despite its extensive contacts with the state.[206]

The Montana Supreme Court had concluded that Montana could exercise personal jurisdiction over BNSF due to its extensive contacts with the state.[207] The Montana court noted that Montana law authorized general jurisdiction over "[a]ll persons found within" Montana.[208] The Montana court concluded that BNSF was found within the state, within the meaning of the jurisdictional long arm statute, and consequently could be subjected to the Montana courts' jurisdiction.[209]

The U.S. Supreme Court disagreed, however, and found that Montana's long arm statute authorized an unconstitutional exercise of personal jurisdiction over BNSF.[210] The Court reiterated what it had said in *Goodyear* and *Daimler*:

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201. *BNSF*, 137 S. Ct. at 1554 (citing *Daimler*, 134 S. Ct. at 754).
202. *Id*.
203. *Id*.
204. *Id*.
205. *Id*.
206. *Id*. at 1559.
207. Tyrrell v. BNSF Ry. Co., 383 Mont. 417, 428-29 (Mont. 2016).
208. *Id*. at 427 (quoting MONT. R. CIV. P. 4(b)(1)).
209. *Id.* at 428–29. The Montana Supreme Court also discussed a federal statute, applicable in FELA cases, that provided that an "action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56 (2012). As an alternative basis for its holding that Montana had personal jurisdiction over BNSF, the Montana Supreme Court concluded that this provision provided personal jurisdiction over a non-resident corporation "doing business" in Montana and that it followed that, since BNSF was doing business in Montana, it was subject to general personal jurisdiction in accordance with this provision as well. *Tyrrell*, 383 Mont. at 426. However, the U.S. Supreme Court disagreed with this characterization and interpretation of the FELA provision, holding that it was a venue provision and did not purport to act as a long arm statute that would authorize the exercise of personal jurisdiction in this or any other case. *BNSF*, 137 S. Ct. at 1553.
210. *BNSF*, 137 S. Ct. at 1559.

> *Goodyear* and *Daimler* clarified that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." . . . The "paradigm" forums in which a corporate defendant is "at home," we explained, are the corporation's place of incorporation and its principal place of business. . . . The exercise of general jurisdiction is not limited to these forums; in an "exceptional case," a corporate defendant's operations in another forum "may be so substantial and of such a nature as to render the corporation at home in that State." . . . We suggested that *Perkins* . . . exemplified such a case.[211]

The Court declined to recognize an exception to the "at home" rule based on either the nature of the action—FELA—or the type of defendant—a railroad.[212] Nor was the Court willing to extend an exception for a hybrid case—a case in which some of the plaintiffs' claims were related to the defendant's contacts with the forum and some were not. Less than a month after the *BNSF* opinion was released, *Bristol-Myers Squibb Co. v. Superior Court*[213] was decided.

Bristol-Myers was a specific jurisdiction case; the California Supreme Court had held, based on *Goodyear* and *Daimler*, that it lacked general jurisdiction but that it had specific jurisdiction over the action.[214] Consequently, the U.S. Supreme Court focused on specific jurisdiction principles.[215] However, *Bristol-Myers* relates to general jurisdiction in two important ways. First, the U.S. Supreme Court held that specific jurisdiction was not present, meaning that despite having the same claim as resident plaintiffs who were harmed inside the state—and thus able to establish specific jurisdiction—out of state plaintiffs who were injured in their own home states may not consolidate their cases with the in-state plaintiffs unless the "at home" test for general jurisdiction can be satisfied.[216] Second, the case signals that there is not a specific jurisdiction "loophole" to the "at home" requirement of *Goodyear, Daimler*, and *BSNF*; there is no getting around the Court's ante-upping due process standards by casting what is essentially a general jurisdiction case as a specific jurisdiction case.[217]

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211. *Id*. at 1558 (citations omitted).
212. *Id*. at 1558–59.
213. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).
214. *Id.*
215. *Id*. at 1778–79.
216. *Id*. at 1781.
217. *Id*. at 1781–82.

Bristol-Myers means that *all* the rules of the game have completely changed, especially for mass tort litigation. *Bristol-Myers* confirms that courts may not expand the parameters of specific jurisdiction as a surrogate for lack of grounds to exercise general jurisdiction.[218]

III. THE NEW GENERAL JURISDICTIONAL LANDSCAPE "AT HOME" IN ILLINOIS

In the years since *Goodyear* and *Daimler* were decided, litigants have been scrambling to try to adjust to the new litigation environment. As is obvious by the lower court decisions in the *BNSF* and *Bristol-Myers* cases, courts too have been struggling to "secure the just, speedy, and inexpensive determination of every action and proceeding,"[219] while still respecting the due process rights of defendants.

The Illinois Supreme Court entered the discussion about general jurisdiction with its recent opinion in *Aspen American Ins. Co. v. Interstate Warehousing, Inc*.[220] Relying on *Daimler*, the Illinois Supreme Court unanimously held that general jurisdiction did not lie in a case against a corporation incorporated and with its principal place of business in Indiana when none of the events giving rise to the cause of action occurred in Illinois, even though the defendant had registered to do business, maintained property, and conducted business in Illinois.[221]

Aspen was an insurance subrogation case. The insurer—Aspen American Insurance Company (Aspen)—had paid a claim after its insured's property was destroyed in the defendant's warehouse.[222] Aspen's insured, Eastern Fish Company (Eastern), had contracted with the defendant, Interstate Warehousing Inc. (Interstate), to store seafood in one of Interstate's refrigerated warehouses in Grand Rapids, Michigan.[223] Interstate's Grand Rapids warehouse's roof collapsed, rupturing gas lines and causing an ammonia leak that spoiled Eastern's seafood.[224] Aspen paid Eastern's insurance claim and then filed a subrogation claim against Interstate in Cook County, Illinois.[225]

In addition to the Michigan warehouse, Interstate owned and operated warehouses in several states, including a 12,077,000 cubic-foot warehouse

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218. *Id*.
219. FED. R. CIV. P. 1 (providing that the civil procedure rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").
220. Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 2017 IL 121281.
221. *Id*. ¶ 27.
222. *Id*. ¶ 3.
223. *Id*.
224. *Id*.
225. *Id*. ¶ 4.

in Joliet, Illinois.[226] The company advertised a Chicago presence, and it had a registered agent in Chicago.[227] The corporate headquarters was located in Fort Wayne, Indiana, and the Indiana address was on the company's letterhead and the warehouse storage contract it entered with Eastern.[228] The Joliet warehouse facility was also listed on the letterhead and contract and on the company's website. Interstate was "'a 75% member of' Interstate Warehousing of Illinois, LLC, a limited liability company organized under Indiana law" with its principal place of business in Indiana, which operated the Joliet warehouse.[229] Interstate was registered to do business in Illinois, in accordance with the state's corporate registration statute, and had been since 1988.[230] Aspen argued that Interstate was "at home" in Illinois because it had been "doing business" in Illinois by operating the Joliet warehouse and because it had registered to operate in Illinois.[231]

The *Aspen* case received a lot of attention both inside Illinois and nationally, primarily because of the potentially far-reaching impact of the court's holding on mass tort litigation in Illinois. An *amicus* brief on behalf of Aspen stated,

> The [c]ourt's decision in this seemingly innocuous subrogation appeal could have wide-ranging impact on innumerable personal injury actions, ranging from strict product liability claims to claims involving asbestos manufacturers, to claims arising under . . . FELA . . . . Clearly, that is why three asbestos manufacturers have filed a joint *amicus* brief on behalf of the defendant warehouse manufacturer and the Illinois Trial Lawyers Association . . . and the American Association for Justice . . . are filing a joint brief on behalf of an insurance company![232]

The Illinois circuit court had denied Interstate's motion to dismiss for lack of personal jurisdiction, and the Illinois appellate court had affirmed.[233] The Illinois Supreme Court began its analysis by reaffirming that the burden is on the plaintiff to make a prima facie case of personal jurisdiction.[234] In *Aspen*, the plaintiff had produced evidence about the extent of Interstate's business in Illinois and Interstate had produced no refuting evidence.[235]

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226. *Id*. ¶ 5.
227. Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 2016 IL App (1st) 151876, ¶ 26 n.5.
228. *Aspen*, 2017 IL 121281, ¶ 5.
229. *Id*. ¶ 7.
230. *Id*. ¶ 8.
231. *Id*.
232. Brief for Illinois Trial Lawyers Association and American Association for Justice as Amici Curiae Supporting Appellee at 1, Aspen Am. Ins. Co. v. Interstate Warehousing, Co., 2017 IL 121281.
233. *Aspen*, 2017 IL 121281, ¶ 1.
234. *Id*. ¶ 12 (citing Russell v. SNFA, 2013 IL 113909).
235. *Id*. ¶ 7.

Although the lower courts had concluded that the plaintiff had succeeded in satisfying its evidentiary burden, the supreme court, reviewing *de novo*, disagreed.[236]

Illinois's long arm statute provided, in relevant part:

> (b) A court may exercise jurisdiction in any action arising within or without this State against any person who: . . . (4) [i]s . . . a corporation doing business within this State.
>
> . . .
>
> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States. [237]

First, the court addressed the plaintiff's arguments that this case falls within section (c) of the Illinois long arm statute.[238] This section, the Illinois Supreme Court had previously held, permits Illinois courts to exercise personal jurisdiction to the limits permitted by the U.S. Constitution.[239] Thus, the Illinois Supreme Court embarked on a review of the jurisdictional parameters of the due process clause of the fourteenth amendment to the United States Constitution, as those would be the same parameters of section (c) of the Illinois long arm statute.

In a fairly obvious misreading of *Goodyear*, *Daimler*, and *BNSF*, Aspen argued that a court may exercise general jurisdiction "where the defendant has continuous and systematic general business contacts with the forum state."[240] The Illinois Supreme Court reviewed the U.S. Supreme Court's general jurisdiction jurisprudence and explained:

> [I]n this case, to comport with the federal due process standards laid out in *Daimler* and, in doing so, comply with [the Illinois] long-arm statute, plaintiff must [show] that defendant is essentially at home in Illinois. This means that plaintiff must show that defendant is incorporated or has its principal place of business in Illinois or that defendant's contacts with Illinois are so substantial as to render this an exceptional case.[241]

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236. *Id*. ¶ 29.
237. 735 ILL. COMP. STAT. 5/2-209(b)(4) & (c) (2016).
238. *Aspen*, 2017 IL 121281, ¶ 13.
239. Russell v. SNFA, 2013 IL 113909, ¶ 33 (Ill. 2013).
240. *Aspen*, 2017 IL 121281, ¶ 15 (citing Brief for Appellee at 7, *Aspen*, 2017 IL 121281).
241. *Id*. ¶ 18.

Identifying *Perkins* as the prototypical "exceptional case,"—as the U.S. Supreme Court had in *Goodyear*, *Daimler*, and *BNSF*—the Illinois Supreme Court instructed that the plaintiff would have to show that the defendant's activities in Illinois were so substantial that Illinois could be fairly called a surrogate home.[242]

Finding that the plaintiff would be unable to make such a showing, at least in part because to find the defendant amenable to suit in Illinois would mean the defendant would be amenable to suit in every state in which it owned a warehouse—a result clearly at odds with the spirit and letter of the U.S. Supreme Court opinions—the Illinois Supreme Court concluded that section (c) of the Illinois long arm would not give Illinois courts general personal jurisdiction over Interstate.[243]

The Illinois Supreme Court then addressed the argument that section (b)(4) of the Illinois long arm would bring Interstate within the jurisdictional reach of Illinois courts.[244] That section provided that Illinois courts could exercise personal jurisdiction over corporations doing business in Illinois.[245] The court simply held that "[i]n light of Daimler, subsection (b)(4) cannot constitutionally be applied to establish general jurisdiction where, as here, there is no evidence that defendant's contacts with Illinois have rendered it 'essentially at home' in this state."[246] In so holding, the court effectively overruled years of Illinois precedent to the contrary.[247]

IV. CORPORATE REGISTRATION TO DO BUSINESS IN ILLINOIS DOES NOT AMOUNT TO CONSENT TO GENERAL JURISDICTION IN ILLINOIS

On the long arm issues, *Aspen* was a fairly straightforward and easy case.[248] Interstate was not incorporated in Illinois and did not have its principal place of business in the state, and there were no circumstances that

242. *Id.* ¶ 19.
243. *Id*. ¶¶ 19-20.
244. *Id*. ¶ 21.
245. 735 ILL. COMP. STAT. 5/2-209(b)(4).
246. *Aspen*, 2017 IL 121281, ¶ 21.
247. *See* Cook Assocs., Inc. v. Lexington United Corp., 429 N.E.2d 847, 849 (Ill. 1981) (holding that the "doing business" doctrine empowered Illinois courts to exercise general jurisdiction over foreign corporations doing business in Illinois).
248. Indeed, one might deduce that the *amicus* on behalf of Aspen realized that Aspen had a weak position on the facts since the lead argument was a plea for the Illinois Supreme Court to issue a very narrow ruling applicable only to the facts of the *Aspen* case. Reading between the lines, it appears the interested organizations were concerned about the case setting precedent harmful to their interests and future plaintiffs. *See* Brief for Illinois Trial Lawyers Association and American Association for Justice as Amici Curiae Supporting Appellee at 1, Aspen Am. Ins. Co. v. Interstate Warehousing, Co., 2017 IL 121281 (Ill. 2017) (citations omitted).

would make the case exceptional;[249] indeed, Interstate had fewer contacts with Illinois than BSNF had with Montana.

However, *Aspen* also raised an issue of first impression in the Illinois Supreme Court and one left open by the U.S. Supreme Court cases on general jurisdiction: whether by registering to do business in Illinois pursuant to the Illinois Business Corporation Act of 1983, the defendant had consented to Illinois courts' exercise of general jurisdiction over it.[250] The Illinois Supreme Court concluded that it had not, effectively closing a door that might have existed post-*Daimler* to exercise general jurisdiction over non-resident corporations.[251]

In the years since *Daimler* was decided, a large body of literature accumulated opining on whether state corporate registration statutes amounted to consent to general jurisdiction in the state.[252] Different states' courts came to different conclusions about the jurisdictional impact of their

249. *Aspen*, 2017 IL 121281, ¶ 18.

250. *See* Reply Brief for Appellant, at 13, *Aspen* ("No published decision by any Illinois court has ever held that registration to transact business as a foreign corporation constitutes consent to general jurisdiction.").

251. *Aspen*, 2017 IL 121281, ¶¶ 24, 27 (citing two federal cases agreeing with its interpretation of the Illinois registration statute on the question of consent to jurisdiction); *see* Surita v. AM General, LLC, 2015 WL 12826471, at *3 (N.D. Ill. 2015) (dismissing an asbestos case and finding that the statute "does *not* contain a provision with jurisdictional consent language" (emphasis in original)); Perez v. Air & Liquid Systems Corp., 2016 WL 7049153, at *6-9 (S.D. Ill. 2016) (dismissing case against GE because it was not "at home" in Illinois and the corporate registration statute does not amount to consent to general jurisdiction).

252. *See, e.g.*, Tanya J. Monesteir, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015); Craig Sanders, Note, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 NW. U. L. REV. 1323 (2017); Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643 (2015); *see also* Acorda Therapeutics, Inc. v. Mylan Pharms., Inc., 817 F. 3d 755, 767–68 (Fed. Cir. 2016) ("*International Shoe* and *Daimler* did not overrule [the] historic and oft-affirming line of binding precedent [that] the appointment of an agent by a foreign corporation for service of process could subject it to general personal jurisdiction.") (O'Malley, J., concurring), *cert. denied sub nom*. Mylan Pharms., Inc. v. Acorda Therapeutics, 137 S. Ct. 625 (2016).

state's corporate registration statutes[253] and businesses were warned to think twice before registering in a state if they did not want to be sued there.[254]

The *Aspen* plaintiff argued that by registering to do business in Illinois and having an agent for service of process in Illinois, Interstate had consented to the general jurisdiction of the Illinois courts. The Illinois Business Corporation Act of 1983 provided that "a foreign corporation organized for profit, before it transacts business in this State, shall procure authority to do so from the Secretary of State," and it required that a registered corporation maintain a registered office and agent for service of process in the state.[255]

The Illinois Supreme Court concluded that these statutory provisions did not provide a basis for concluding that a registered corporation had consented to jurisdiction because the statute did not mention personal jurisdiction or consent thereto whatsoever.[256] The court stated that "[n]one of the . . . provisions require foreign corporations to consent to general jurisdiction as a condition of doing business in Illinois, nor do they indicate that, by registering in Illinois or appointing a registered agent, a corporation waives any due process limitations on this state's exercise of general jurisdiction."[257] In addition, the court reasoned, the statute specifies that service on the non-resident corporation's agent may be made "in accordance with law," which the court interpreted to limit the authority for service of process to those situations when due process will permit the exercise of jurisdiction.[258]

Another provision of the Illinois Business Corporation Act of 1983 provided that a non-resident corporation "shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a

253. *Compare* AstraZeneca AB v. Mylan Pharms., Inc., 72 F.Supp.3d 549, 556 (D. Del. 2014) (rejecting consent-by-registration interpretation of Delaware's corporate registration statute on grounds that to imply consent under the statute would be inconsistent with *Daimler*); Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir. 1971) (holding that "[t]he principles of due process require a firmer foundation that mere compliance with state domestication statutes"); Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) (stating that "[n]ot only does the mere act of registering an agent not create Learjet's general business presence in Texas, it also does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter"); *with* Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991) (holding that authorization to do business in Pennsylvania "carries with it consent to be sued in Pennsylvania courts); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990) (holding that appointing an agent for service of process in Minnesota "gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state").

254. *See, e.g.*, John Lyons, Joseph Blum, & Sean Wajert, *Corporations: Are You Voluntarily Consenting to General Jurisdiction in Pennsylvania?*, 1 WESTLAW J. CORPORATE OFFICERS & DIRECTORS LIABILITY 2 (2017).

255. 805 ILL. COMP. STAT. 5/13.05 & 5/5.05 (West 2016).

256. *Aspen*, 2017 IL 121281, ¶ 24 (citing Surita v. AM General LLC, 2015 WL 12826471, at *3 (N.D. Ill. 2015) as being in accord).

257. *Id.*

258. *Id.* ¶ 25 (quoting 805 ILCS 5/5.25(a) (West 2012)).

domestic corporation of like character."[259] The *Aspen* court held that this provision did not operate to subject a registered corporation to general jurisdiction in Illinois courts.[260] The court adopted Interstate's argument that personal jurisdiction relates to the power of the court to subject a person to a binding judgment, and not a legal obligation owed to another.[261] So, while a registered non-resident corporation would have duties under the statute that mirror a resident corporation, the statutory provision imposing those duties does not mean that the corporation has consented to the exercise of general jurisdiction in Illinois.[262]

The Illinois Supreme Court summed up its holding rejecting the registration statute as amounting to consent to general jurisdiction as follows:

> Under the Act, a foreign corporation must register with the Secretary of State and appoint an agent to accept service of process in order to conduct business in Illinois. We hold, however, that in the absence of any language to the contrary, the fact that a foreign corporation has registered to do business under the Act does not mean that the corporation has thereby consented to general jurisdiction over all causes of action, including those that are completely unrelated to the corporation's activities in Illinois.[263]

Therefore, with the door closed on consent implied through the Illinois Business Corporation Act's current registration provision, the only window to expanding the general jurisdiction of Illinois courts over foreign corporations is a legislative amendment that specifies that consent is a prerequisite to authority to do business in Illinois.[264] Such a statute would need to explicitly provide that consent is a prerequisite to the privilege of conducting business in Illinois. *Aspen American*'s holding rejected the argument that the Illinois Business Corporation Act's registration provision amounted to consent because it failed to explicitly provide that registration and appointment of an agent for service of process was a prerequisite to being permitted to register and do business in Illinois:

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259. 805 ILL. COMP. STAT. 5/13.10 (West 2016).
260. *Aspen*, 2017 IL 121281, ¶ 27.
261. *Id.* ¶ 26.
262. *Id.* ¶ 27.
263. *Id.*
264. Currently, Pennsylvania is the only state that has a statute providing explicitly that non-resident corporations that do business in the state are presumed to have consented to personal jurisdiction for all purposes, and it is a provision of the state's long arm statute. 42 PA. CONS. STAT. § 5301(a)(2)(i) provides that "[t]he existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise *general personal jurisdiction* over such person . . . and to enable such tribunals to render personal orders against such person . . . Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth."
(Emphasis added.)

> None of the . . . provisions require[d] foreign corporations to consent to general jurisdiction as a condition of doing business in Illinois, nor [did] they indicate that, by registering in Illinois or appointing a registered agent, a corporation waives any due process limitations on this state's exercise of general jurisdiction. Indeed, the Act makes no mention of personal jurisdiction at all.[265]

Critics of a statute requiring non-resident corporations to consent to jurisdiction argue that such a statute would push businesses away from the state by imposing onerous conditions and an undesirable risk of litigation. For example, the Delaware Supreme Court has stated that:

> In our republic, it is critical to the efficient conduct of business, and therefore to job- and wealth-creation, that individual states not exact unreasonable tolls simply for the right to do business. Businesses select their states of incorporation and principal places of business with care because they know that those jurisdictions are in fact "home" and places where they can be sued generally. An incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state's market.[266]

Conversely, proponents view requiring consent as a prerequisite to doing business in a state as a way to protect plaintiffs' access to courts to adjudicate claims. In addition, proponents argue that requiring consent would enable the state to protect its interests in regulating the activities of businesses that operate continuously and extensively in Illinois.[267]

Also, there is an open question about whether a forced consent statute would be constitutional after *Daimler*.[268] Such a provision was certainly constitutional before *Daimler*.[269] The Court in *Burger King Corp. v. Rudzewicz* stated that "because the personal jurisdiction requirement is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the

265. *Aspen*, 2017 IL 121281, ¶ 24.

266. Genuine Parts Co. v. Cepec, 137 A.3d 123, 127–28 (Del. 2016).

267. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 772 (2014) (Sotomayor, J., concurring).

268. *Aspen*, 2017 IL 121281, ¶ 27. The *Aspen* court held only that the statute before it—which did not mention consent to jurisdiction or purport in any way to require it as a prerequisite to registration—did not give rise to an implication that a non-Illinois corporation had consented to jurisdiction in cases unrelated to its activities in Illinois. It did not reach the question—nor was the question before the court—of whether a statute that did specifically require consent would be constitutional. *See generally id*.

269. *See* Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Mill. Co., 243 U.S. 93 (1917).

court.'"[270] In 1877, the Supreme Court held that states could require corporations to consent as a prerequisite to being permitted to conduct business in the state, and the Court has never issued an opinion retreating from that position.[271] In *Ex parte Schollenberger*, the Court stated:

> [I]f the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent.[272]

However, courts have disagreed on whether *Daimler* impacted the constitutionality of statutes that condition doing business in the forum on consent to general jurisdiction.[273] Some courts have suggested that the due process analysis of *Daimler* should apply even to statutes that explicitly require consent to general jurisdiction as a prerequisite to doing business in a state.[274] This conclusion is inconsistent with the language of *Daimler*, which identifies *Perkins* as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum."[275] Additionally, a long line of precedent has recognized that states can impose conditions on the privilege of conducting business within the state and that consent to the jurisdiction of the state's courts can be among those conditions.[276]

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270. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (quoting Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)).
271. *Ex parte* Schollenberger, 96 U.S. 369 (1877).
272. *Id.* at 377.
273. *Compare* Acordia Therapeutics, Inc. v. Mylan Pharm., Inc., 78 F. Supp. 3d 572, 583-92 (D. Del. 2015) ("*Daimler* does not eliminate consent as a basis for a state to establish general jurisdiction over a corporation which has appoint an agent for service of process in that state, as is required as part of registering to do business in that state."); Acorda Therapeutics, Inc. v. Mylan Pharm., Inc., 817 F.3d 755 (Fed. Cir. 2016) (holding that a state may constitutionally require a non-resident corporation to consent to general jurisdiction as a condition to doing business in the state); *with* AstraZeneca AB v. Mylan Pharm., Inc., 72 F. Supp. 3d 549, 555-58 (D. Del. 2014) ("In light of the holding in Daimler, the court finds that Mylan's compliance with Delaware's registration statutes—mandatory for doing business within the state—cannot constitute consent to jurisdiction, and the Delaware Supreme Court's decision [holding that it does] can no longer be said to comport with federal due process."); Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016) (holding that the Delaware corporation registration statute, which requires appointment of an agent for service of process, does not require consent to general jurisdiction, and overruling previous Delaware Supreme Court precedent to the contrary).
274. *See AstraZeneca*, 72 F. Supp. 3d 549 (D. Del. 2014).
275. Daimler AG v. Bauman, 134 S. Ct. 746, 755–56 (2014) (emphasis added).
276. *See* Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Mill. Co., 243 U.S. 93 (1917).

V. ADJUSTING TO THE NEW FRAMEWORK FOR PERSONAL JURISDICTION

Before the U.S. Supreme Court's opinions in *BNSF* and *Bristol-Myers* and the Illinois Supreme Court's decision in *Aspen*, some courts continued to apply old jurisdictional doctrine to permit some exercises of jurisdiction that were inconsistent with the new jurisdictional framework established in *Goodyear* and *Daimler*.[277] Many courts, such as the state courts in *BNSF* and *Bristol-Myers*, looked for ways to continue to conduct multi-party litigation in the same way it had been done in the pre-*Goodyear* era—focusing on convenience, liberal joinder, and efficient resolution of cases raising the same or similar claims against the same defendants.[278] However, in the months following the Court's issuance of its *BNSF* and *Bristol-Myers* opinions, there has been a flurry of dismissals as courts and litigants adjust to the new jurisdictional landscape, leaving no question but what the new personal jurisdiction framework will have an impact on mass tort litigation in Illinois and other states.

In particular, the new jurisdictional rules have resulted in the dismissal of many cases against large multinational corporations doing substantial business in the Illinois.[279] For example, an asbestos case against General Electric Company (GE) was dismissed for lack of general jurisdiction,[280] despite GE's extensive business contacts with Illinois. GE's contacts included being licensed and registered to do business in Illinois since 1897, maintaining over 8,800 supplier jobs, and being named an "outstanding corporate citizen" by Chicago's mayor.[281] In addition, the United States District Court for the Southern District of Illinois recently dismissed fifty-

277. For example, in a 2014 case, Moore v. Lake States Dairy Ctr., Inc., 2014 IL App (1st) 140149-U, ¶ 25, the Appellate Court of Illinois found that Illinois had personal jurisdiction over Lake States Dairy, which managed Dairy Adventure, an agricultural education center in Jasper, Indiana. *Id.* Plaintiff, a second-grader in Homewood, Illinois, visited Dairy Adventure on a school field trip and was injured in a playground accident at Dairy Adventure in Indiana. *Id.* ¶¶ 4-5. The court found that there were insufficient grounds to support a finding of specific jurisdiction, but that Lake States Dairy's connections with Illinois were sufficient for an exercise of general jurisdiction. *Id.* ¶ 24. In a fairly typical pre-*Goodyear/Daimler* "doing business" analysis, the court gave weight to the fact that Lake States Dairy "repeatedly and systematically enter[ed] into contracts with Illinois schools to provide tours to Illinois school children" and therefore it [was] "doing business" in Illinois. *Id.* ¶ 25. In fact, the court held, "the frequency and nature of its contacts in Illinois are so substantial such that Lake States is considered 'at home' in this forum." *Id.* ¶26. However, Lake States Dairy was incorporated in Indiana and had its principal place of business in Indiana. *Id.* at ¶ 28. There were no "exceptional circumstances" such as those in *Perkins*. *Id.* ¶ 22. It is hard to see why this case is not a clear misapplication of the *Goodyear/Daimler* standard.

278. *See* Tyrrell v. BNSF Ry. Co., 383 Mont. 417, 428–29 (Mont. 2016); Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874 (2016).

279. *See* Rozumek v. General Elec. Co., 2015 WL 12829795 (S.D. Ill. 2015) (asbestos case).

280. *Id.* at *1.

281. *Id.* at *2.

five plaintiffs from seven suits against Bayer Corporation and Johnson & Johnson Pharmaceuticals related to the drug Xarelto.[282] A Madison County, Illinois circuit judge dismissed two separate talcum powder cases against Imerys Talc America, Inc.—which sold its talc to Johnson & Johnson to be used in talcum powder products that would be distributed all over the country—for lack of specific personal jurisdiction, and an appeals court in nearby Missouri vacated a $72 million verdict against Johnson & Johnson in a talcum powder case after finding that the St. Louis trial court lacked personal jurisdiction.[283]

The new personal jurisdiction framework poses significant access to justice hurdles for plaintiffs and makes it more difficult to achieve the benefits of aggregation and consolidation of similar claims against the same defendants. As Justice Sotomayor pointed out in her *Bristol-Myers* dissent, the Court's new personal jurisdiction rules "will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different states."[284] Additionally, the new rules "will result in piecemeal litigation and the bifurcation of claims."[285] Justice Sotomayor also pointed out that the new rules "will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone."[286] The new rules impose new burdens and expenses on plaintiffs and deprive them of the opportunity to select the forum that is most convenient and where the

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282. Douthit v. Janssen Research & Dev., LLC, 2017 WL 4224031 (S.D. Ill. Sept. 22, 2017) (four non-Illinois plaintiffs dismissed; one Illinois plaintiff not dismissed); Pirtle v. Janssen Research & Dev., LLC, 2017 WL 4224036 (S.D. Ill. Sept. 22, 2017) (one non-Illinois plaintiff dismissed; one Illinois plaintiff not dismissed); Woodall v. Janssen Research & Dev., LLC, 2017 WL 4237924 (S.D. Ill. Sept. 22, 2017) (one non-Illinois plaintiff dismissed; one Illinois plaintiff not dismissed); Bandy v. Janssen Research & Dev., 2017 WL 4224035 (S.D. Ill. Sept. 22, 2017) (three non-Illinois plaintiffs dismissed; one Illinois plaintiff not dismissed); Braun v. Janssen Research & Dev., LLC, 2017 WL 4224034 (S.D. Ill. Sept. 22, 2017) (one non-Illinois plaintiff dismissed; one Illinois plaintiff not dismissed); Berousse v. Janssen Research & Dev., LLC, 2017 WL 4255075 (S.D. Ill. Sept. 26, 2017) (thirty-two non-Illinois plaintiffs dismissed; one Illinois plaintiff not dismissed); Roland v. Janssen Research & Dev., LLC, 2017 WL 4224037 (S.D. Ill. Sept. 22, 2017) (thirteen non-Illinois plaintiffs dismissed; one Illinois plaintiff not dismissed).

A defendant in another case pending in the Southern District of Illinois has asked the court to dismiss 3,966 plaintiffs from twenty-one suits relating to Just for Men hair products. *BMS decision impacts more out of state plaintiffs in Just For Men litigation*, MADISON – ST. CLAIR RECORD (Sept. 26, 2017), https://madisonrecord.com/stories/511228837-bms-decision-impacts-more-out-of-state-plaintiffs-in-just-for-men-litigation (last visited Mar. 19, 2018).

283. *See* Heather Isringhausen Gvillo, *Mudge dismisses talc cases for lack of personal jurisdiction; Cites BMS decision*, MADISON – ST. CLAIR RECORD (Mar. 9, 2018), https://madisonrecord.com/stories/511358771-mudge-dismisses-talc-cases-for-lack-of-personal-jurisdiction-cites-bms-decision (last visited Apr.8, 2018). The reduction in the number and size of cases will almost certainly impact the local economy in Madison County, Illinois, which has been fueled by mass tort litigation. *See supra* notes 8– 9 and accompanying text.

284. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (Sotomayor, J., dissenting).

285. *Id.*

286. *Id.*

law is most favorable to their case. In her concurrence in *Daimler*, Justice Sotomayor observed that the result of the Court's narrowing of personal jurisdiction doctrine is to "shift the risk of loss from multinational corporations to the individuals harmed by their actions."[287]

In her *Daimler* concurrence, Justice Sotomayor noted two instances when U.S. plaintiffs would be deprived of a U.S. forum entirely: (1) when an American citizen who is injured by the negligence of a foreign multinational corporation that neither has its principal place of business nor is incorporated in the United States, even if the multinational corporation is conducting substantial business in multiple U.S. states; and (2) when an American business has contracted with a foreign multinational company to sell its products to the foreign company, even if the foreign company has extensive business operations in the U.S.[288]

This concern has become a reality in an Illinois case against a Chinese manufacturer.[289] In *Young v. Ford Motor Company*, the Appellate Court of Illinois held that Illinois did not have personal jurisdiction over a Chinese custom wheel manufacturer.[290] *Young* involved a roll-over car accident caused by a tire coming off, resulting in the death of one passenger and injuries to the driver and four other passengers.[291] The plaintiffs conceded that the Illinois courts could not exercise general jurisdiction over the Chinese corporation since it was not incorporated in Illinois, did not maintain its principal places of business in Illinois, and was not registered to do business in Illinois.[292] After reviewing U.S. and Illinois Supreme Court precedent,[293] as well as the details of the Chinese corporation's activities and contacts with Illinois,[294] the appellate court held that the Chinese corporation was not subject to specific jurisdiction because it "did not direct [its] business activities at the state of Illinois or have longstanding business relationships with companies in Illinois."[295]

Based on the *Young* appellate court's analysis, it is unlikely that the plaintiffs could obtain personal jurisdiction over the Chinese corporation in any American court; yet there were allegations that it negligently designed

287. Daimler AG v. Bauman, 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring).
288. *Id.*
289. Young v. Ford Motor Co., 2017 IL App (4th) 170177.
290. *Id.* ¶43.
291. *Id.* ¶ 5.
292. *Id.* ¶ 29.
293. The Illinois appellate court analyzed the United States Supreme Court's opinions in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); and J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873 (2011). In addition, the court analyzed the Illinois Supreme Court's opinions in Wiles v. Morita Iron Works Co., 125 Ill. 2d 144 (1988), and Russell v. SNFA, 2013 IL 113909.
294. *Young*, 2017 IL App (4th), ¶¶ 14-18.
295. *Id.* ¶ 44.

and manufactured wheels that caused a fatal accident in Illinois.[296] Surely, no other state would have specific jurisdiction over the Chinese corporation since the accident happened in Illinois, the plaintiffs were all Illinois residents, and the wheels were purchased and installed in Illinois; no other state had a greater connection to the case. Similarly, it is unlikely that any of the other defendants could sue the Chinese corporation for subrogation or indemnification in the United States should any of the other defendants be held liable for the plaintiffs' injuries.

As demonstrated by the *Young* case, non-U.S. companies may be able to avoid suit altogether when specific jurisdiction cannot be established.[297] Thus, U.S. plaintiffs might need to look abroad for courts to adjudicate their claims against non-U.S. corporations. Even before the recent line of Supreme Court cases narrowed the grounds upon which a non-U.S. corporation could be sued in a U.S. court, commentators recognized the need for an international form of jurisdiction, and this need is even more acute now.[298] Indeed, at least one international court was recently formed specifically to provide just such a forum. France's Ministry of Justice created a new English-language court that will specialize in international disputes and is "[a]imed at making Paris an attractive place for cross-border disputes."[299] Other countries have developed procedures for multinational litigation, including making proceedings available for collective actions for common claims.[300]

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296. *Id.* ¶ 6.

297. This point is also illustrated by *McIntyre*. The British company sued in that case would not likely be subject to the jurisdiction of the courts of any U.S. state if it was not subject to specific jurisdiction in New Jersey. *See generally McIntyre*, 564 U.S. at 873.

298. *See, e.g.*, Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661 (1999).

299. Shayna Posses, *Paris Launches New International Dispute Division*, LAW360 (2018), https://www.law360.com/articles/1012042/paris-launches-new-international-dispute-division (last visited Mar. 19, 2018).

300. For an overview of the availability of other countries' courts for resolving disputes with non-U.S. corporations, including collective actions, see David Kistenbroker, Joni Jacobsen, & Anglela Liu, *A New Era in Global Securities Litigation: Part 1*, LAW360 (2018), https://www.law360.com/articles/1013222 (last visited Mar. 19, 2018) (discussing difficulties in maintaining securities fraud litigation against foreign corporations in U.S. courts after the U.S. Supreme Court's decision in Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010)); David Kistenbroker, Joni Jacobsen, & Angela Liu, *A New Era in Global Securities Litigation: Part 2*, LAW360 (2018), https://www.law360.com/securities/articles/1013238/a-new-era-in-global-securities-litigation-part-2 (last visited Mar. 19, 2018) (discussing developments in the European Union and The Netherlands); David Kistenbroker, Joni Jacobsen, & Angela Liu, *A New Era in Global Securities Litigation: Part 3*, LAW360 (2018), https://www.law360.com/articles/1013256/a-new-era-in-global-securities-litigation-part-3 (last visited Mar. 19, 2018) (discussing developments in the United Kingdom and Germany); David Kistenbroker, Joni Jacobsen, & Angela Liu, *A New Era in Global Securities Litigation: Part 4*, LAW360 (2018), https://www.law360.com/articles/1013262/a-new-era-in-global-securities-litigation-part-4 (last visited Mar. 19, 2018) (discussing developments in Canada, Australia, Hong Kong, Japan, and India); *see also* Friedrich Juenger, *Judicial Jurisdiction in the United States and the European Communities: A Comparison*, 82 MICH.

However, U.S. citizens—particularly those possibly suffering from crushing economic loss and debilitating injuries—and small- to medium-sized U.S. businesses are unlikely to be able to maneuver another country's legal system, secure representation, and recover against negligent multinational corporations in another country. Indeed, such relief might not even be available in the courts of another country. If it is available, only the wealthiest American citizens and corporations will likely have access to relief.

Even when all the plaintiffs and defendants are domestic, the new jurisdictional framework makes aggregation and consolidation of similar cases more difficult and increases the burden on plaintiffs in mass tort cases to bring together all parties and claims in one suit. In addition, while the Court's new jurisdictional requirements limit where corporations can be sued, they do not mean that corporations will necessarily be subject to fewer suits for mass torts.[301] Corporations may be sued in aggregated suits in either their place of incorporation or their principal place of business. Additionally, they may be sued in every state in which a court has specific jurisdiction—which, in most cases, includes each state in which injury actually occurred. While the law in some of these states might be more favorable to defendants' interests than others, large corporations doing extensive business in all fifty states will potentially now be called to defend separate specific jurisdiction suits in all fifty states, making the management of the litigation potentially much more inconvenient, duplicative, and expensive for both the plaintiffs and the defendants.[302]

L. REV. 1195 (1984) (comparing theories of personal jurisdiction in the U.S. with those in European civil law countries).

301. See Richard Levick, *The Game Changes: Is* Bristol-Myers Squibb *the End of an Era?*, FORBES (July 11, 2017), https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/#eb513052e831 (last visited Mar. 19, 2018) ("The plaintiff's bar is creative and resourceful and will find a way to bring these claims . . . . *Bristol-Myers* simply makes it more difficult in the short term but it may actually result in more, if smaller, mass actions in multiple jurisdictions," quoting Andrew Downs, a partner at law firm Bullivant Houser Bailey).

302. For an opinion about the impact on corporations of narrowed personal jurisdiction in asbestos cases, see Heather Isringhausen Gvillo, *Napoli: Personal jurisdiction arguments could be asbestos defendants 'own worst nightmare'*, MADISON–ST. CLAIR RECORD (May 4, 2016), https://madisonrecord.com/stories/510722718-law-courts-napoli-personal-jurisdiction-arguments-could-be-asbestos-defendants-own-worst-nightmare (last visited Apr. 8, 2018) (quoting New York asbestos attorney Paul Napoli: "cases could be spread out over a wide number of jurisdictions in multiple states. So one plaintiff could have claims against several defendants in several states for the same case. Defendants will then have to either countersue other defendants or find a way to show that other defendants belong in a certain court in order to keep litigation in one courthouse instead of several. Usually the defendants want to have coordinated jurisdictions because you go to one judge and you do depositions once and you disclose documents once and you get rulings once. With plaintiffs being all over the place, they get 100 bites of the apple. The defendants usually rush to consolidate. In their rush to move the cases, they've ended up creating their own worst nightmare. Be careful what you wish for.").

However, U.S. corporations benefit from having greater control over the forums in which they are sued when specific jurisdiction is lacking. They also have the power to consent to suits in states that otherwise would not have jurisdiction. This gives corporate defendants much greater control over choice of law issues and they can agree to consolidation and aggregation when that is beneficial to the corporations' management of litigation.

Defense-side tort reform advocates laud the new restrictions as important steps that limit forum shopping by plaintiffs.[303] Various tort reform advocacy organizations have sought to limit where and how mass tort law suits are litigated through changes to venue rules, changes to the civil procedure rules, damages caps and other substantive law limitations on liability, and other reforms.[304] Having forum-limiting rules constitutionalized through incorporation into the due process limitations on personal jurisdiction furthers this agenda.

Courts and litigants will face challenges in figuring out how to maneuver within the current civil procedure rules and statutes that envision joinder of claims and parties that simply might not be possible now. There will be challenges for courts and litigants not only in managing litigation currently pending, but in the coming years as lower courts grapple with the questions left open. For example, there is likely to be additional litigation about the issue of registration statutes and forced-consent statutes, as well as whether and how joinder rules should be adjusted.

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303. *See, e.g.*, *Supreme Court Limits Personal Jurisdiction Over Out-of-State Defendants*, JONES DAY PUBL'NS (July 2011), http://www.jonesday.com/supreme_court_limits_personal_jurisdiction/ (last visited Mar. 19, 2018) (noting that "at a minimum, *Goodyear* presents significant new obstacles to forum-shopping plaintiffs and significant new opportunities for defendants to resist jurisdiction in circumstances where that would not have been viable under prior law").

304. *See, e.g.*, *About*, JUDICIAL HELLHOLES, http://www.judicialhellholes.org/about/ (last visited Mar. 19, 2018). (In addition to an annual ranking of so-called "judicial hellholes," the American Tort Reform Association publicly chastises judges who, in its view, "systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil law suits," and lists other organizations focusing on tort reform from a defendant's perspective); LAWYERS FOR CIVIL JUSTICE, http://www.lfcj.com (last visited Mar. 19, 2018) (stating that "LCJ has a strong record and has been honored by the Institute of Legal Reform at the U.S. Chamber for its success reforming current rules that require businesses of all sizes to retain massive amounts of information irrelevant to their cases"); *see also* RAND INST. FOR CIVIL JUSTICE, https://www.rand.org/jie/justice-policy/civil-justice/about.html (last visited Mar. 19, 2018) (stating that "[s]ince 1979, the RAND Institute for Civil Justice has been dedicated to making the civil justice system more efficient and more equitable by supplying government and private decisionmakers and the public with the results of objective, empirically based, analytic research. Its research analyzes trends and outcomes, identifies and evaluates policy options, and brings together representatives of different interests to debate alternative solutions to policy problems. The Institute [emphasizes] an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence").

VI. CONCLUSION

The U.S. Supreme Court opinions limiting the circumstances under which states may exercise personal jurisdiction over non-resident corporations, combined with the *Aspen* decision by the Illinois Supreme Court effecting further limitations on the exercise of Illinois courts' jurisdiction, will certainly result in closing the courthouse door to many claims that previously could be adjudicated in Illinois, particularly in mass tort cases. As courts and litigants navigate the new framework for personal jurisdiction, it is important to keep an eye on the big picture to ensure that our civil justice system continues to be able to provide access to justice and adjudicate disputes in a fair, impartial, efficient, and accurate manner.