



The IDC Monograph

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The Evolution of Specific Personal Jurisdiction and Impact on Toxic Tort Litigation

I. Introduction

Illinois continues to be a preferred jurisdiction for mass tort plaintiffs. Plaintiff-friendly laws, high damages awards, and loose application of personal jurisdiction and venue laws contribute to the volume of mass tort lawsuits involving out-of-state plaintiffs seeking a favorable forum. Consequently, it has become common practice for non-resident companies to find themselves defending suits involving out-of-state plaintiffs for injuries that may have also occurred outside of Illinois.

Evaluating whether the court has personal jurisdiction over non-resident companies involves two important concepts: general and specific personal jurisdiction. While the concept of general jurisdiction appears to be more settled, the battle between the parties has turned to specific jurisdiction. Most recently the Supreme Court of the United States (“SCOTUS”) weighed in on the concept and bounds of specific jurisdiction in *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*.¹ It is beneficial for corporations and their legal counsel to understand these concepts, as well as the legal precedents and theories relied on by plaintiffs, as these issues continue to evolve.

II. Overview of Personal Jurisdiction

Personal jurisdiction is defined as the ability of a court to exercise its power over a particular defendant or item of property. It is an implicit right guaranteed to every defendant in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 2 of the Illinois Constitution.² SCOTUS first outlined the limits of the doctrine of personal jurisdiction in *Pennoyer v. Neff*. In *Pennoyer*, the Court determined that a state court could not exercise personal jurisdiction over a non-resident defendant when the defendant is not personally served with process

while physically present in the state.³ As the industrial revolution progressed and the frequency with which business was conducted across multiple states by non-residents, *Pennoyer's* mandate that a defendant be personally served within a state to be subject to personal jurisdiction there became more impractical and unworkable. Consequently, *Pennoyer* was overruled by the Supreme Court's seminal personal jurisdiction case in *International Shoe Co. v. State of Washington*.⁴

International Shoe is the starting point for any personal jurisdiction analysis today. In *International Shoe*, the Court held that for a state to exercise personal jurisdiction over a defendant, the defendant must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁵ Over time, the "minimum contacts" referenced in *International Shoe* to establish personal jurisdiction over a defendant transformed into a two-prong jurisdictional analysis of whether a defendant was subject to general or specific personal jurisdiction.

A. General Personal Jurisdiction

General jurisdiction is a court's ability to hear *any* claim against a defendant, regardless of where the acts or incidents giving rise to the claim occurred. For an individual, SCOTUS has determined the "paradigm forum for the exercise of general jurisdiction is the individual's domicile."⁶ Likewise, the Court has determined that the paradigm forums for the exercise of personal jurisdiction over a corporation are "one[s] in which the corporation is fairly regarded as at home."⁷ Forums in which a corporation could be considered "at home" include its state of incorporation and principal place of business.⁸

In *Daimler AG v. Bauman*, SCOTUS clarified that a corporation could also be subject to general jurisdiction in forums in which that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."⁹ Nonetheless, the Court has repeatedly stressed "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there."¹⁰

B. Specific Personal Jurisdiction

Specific jurisdiction describes a court's power to adjudicate a *particular* claim against a defendant. Unlike general jurisdiction—where the claims against the defendant need not relate to the defendant's contacts or affiliations with the forum state—specific jurisdiction requires "an affiliation between the forum and an underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State."¹¹

For a defendant to be subject to specific jurisdiction in a forum, the suit must "arise out of or relate to" the defendant's contacts with the forum.¹² If the suit does not arise or relate in any way to the defendant's contacts or affiliations with the forum specific jurisdiction is lacking, *regardless* of the extent of a defendant's unconnected activities in the State.¹³ Accordingly, as it relates to corporations in particular, the SCOTUS has conscientiously recognized since *International Shoe* that "continuous activity of some sorts within a state...is not enough to support the demand that the corporation be amenable to suits unrelated to that activity."¹⁴

III. Exercising Specific Jurisdiction Over Non-Resident Corporate Defendants

In the post-*Daimler* world, plaintiffs have found the options for establishing personal jurisdiction over non-resident corporate defendants through general jurisdiction limited to a few well-defined sets of circumstances. For a number of

mass tort plaintiffs, the *Daimler* Court's limitations on general jurisdiction effectively closed one of the most commonly utilized paths to establishing personal jurisdiction over non-resident corporate defendants. With general jurisdiction over non-resident defendants routinely unavailable, plaintiffs often turn to specific jurisdiction in attempt to establish personal jurisdiction over non-resident corporate defendants. In the immediate period after *Daimler*, plaintiffs pursued jurisdictional arguments focused on expanding the scope of specific jurisdiction over non-resident corporate defendants.¹⁵ These attempts at expanding the scope of specific jurisdiction lead to SCOTUS' issuance of a seminal decision on standard for specific jurisdiction.

A. Bristol-Myers Squibb Co. v. Superior Court of California: Setting the Standard

In *Bristol-Myers Squibb Co. v. Superior Court of California*, the issue before SCOTUS was whether California's exercise of specific jurisdiction over Bristol-Myers Squibb ("BMS") violated the Due Process Clause of the Fourteenth Amendment.¹⁶ Plaintiffs in the case were a group of 678 individuals who allegedly were injured by Plavix, a drug manufactured by BMS.¹⁷ They filed suit against BMS in California state court, alleging products liability, negligence, and misrepresentation claims, among others.¹⁸

Notably, of the 678 plaintiffs, only 86 were California residents; the other 592 plaintiffs were residents of other states.¹⁹ Moreover, evidence submitted in the case demonstrated that BMS was incorporated in Delaware, headquartered in New York, and maintained substantial operations in both New York and New Jersey.²⁰ Evidence presented in the case indicated that BMS never: i) developed Plavix in California; ii) manufactured, labeled, packaged, or sought regulatory approval for Plavix in California; and iii) did not develop a marketing strategy for Plavix in California.²¹ However, evidence adduced in the case did show that BMS owned five research facilities in California that employed 160 individuals, employed 250 sales representatives throughout California, and generated roughly \$900 million from sales of Plavix in California.²²

BMS moved to quash service of summons of the non-residents' claims for lack of personal jurisdiction at the trial court level.²³ The superior court denied BMS' motion on the grounds that California had general jurisdiction over BMS due to its extensive activities in California.²⁴ The appellate court reversed the superior court's decision regarding general jurisdiction, but held that California had specific jurisdiction over BMS concerning the non-residents' claims.²⁵

The California Supreme Court affirmed and held that BMS was subject to specific jurisdiction as to the non-resident plaintiffs' claims.²⁶ The majority based its opinion on a "sliding scale approach to specific jurisdiction" by stating "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."²⁷ Thus, the California Supreme Court held specific jurisdiction had been shown because of the similarity between the non-residents' and residents' claims and that significant research and development was done by BMS in California, even though Plavix itself was never designed or developed in California.²⁸

SCOTUS reversed the decision of the California Supreme Court and held that California's exercise of specific jurisdiction over BMS related to the non-resident plaintiffs' claims was improper.²⁹ The Court noted its settled standards regarding asserting specific jurisdiction over a non-resident defendant controlled this case, which is that:

In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or occurrence that takes place in the forum State"

...When there is no such connection, specific jurisdiction is lacking regardless of the extent of the defendant's unconnected activities in the State.³⁰

In particular, the Court also noted that, in determining whether specific jurisdiction is present, “a defendant’s relationship with a...third party, standing alone, is an insufficient basis for jurisdiction...[and] [t]his remains true even when third parties...can bring claims similar to those brought by the nonresidents.”³¹

SCOTUS held that Plaintiffs had failed to meet the foregoing test in this case due to the fact that the non-residents were: i) never prescribed Plavix in California; ii) never purchased Plavix in California; iii) never ingested Plavix in California; and iv) never injured by Plavix in California.³² The Court stressed that the simple fact that the other California plaintiffs (i.e. third parties) suffered harm in California from Plavix was not enough to assert specific jurisdiction over BMS for the non-residents’ claims.³³

Further, the non-resident plaintiffs presented evidence that BMS contracted with a California company (McKesson) to distribute Plavix nationally and that this fact supported an exercise of specific jurisdiction by California over BMS.³⁴ The Court disagreed, emphasizing that, even though McKesson was a California company, there was no evidence to show: i) BMS engaging in relevant acts with McKesson in California; ii) BMS maintaining liability for McKesson in California; or iii) the Plavix ingested by the non-resident plaintiffs were distributed from California by McKesson.³⁵ As such, the mere fact that BMS interacted with a third party based in California was not enough to show a relationship to the non-resident plaintiffs’ claims to establish specific jurisdiction.³⁶

The decision in *Bristol-Myers* is important because it sets forth specific certain criteria a court will examine and allows a corporate defendant to plan contacts among certain states to avoid subjecting the corporation to personal jurisdiction in that state. For example, although a corporate defendant may sell its product nationally, including in a plaintiff-friendly forum, it would not be subject to specific jurisdiction in that plaintiff-friendly forum for other non-residents if it maintained its main operations (marketing, production, development, etc.) for that product line in other states. Thus, a corporation can appropriately plan these activities in forums that offer greater liability protections under tort law and minimize the risk of liability from a greater number of claims in a plaintiff-friendly forum.

B. Rios v. Bayer Corporation: **Illinois Supreme Court Adopts *Bristol-Myers*’ Specific Jurisdiction Analysis**

In *Rios v. Bayer Corp.*, the Illinois Supreme Court explicitly adopted the SCOTUS’ specific jurisdiction analysis in *Bristol-Myers*.³⁷ Similar to *Bristol-Myers*, *Rios* involved a class action lawsuit in Illinois state court by two Illinois residents and roughly 180 non-residents against Bayer Corporation and several of its affiliated entities.³⁸ Plaintiffs were allegedly injured by a type of permanent birth control, Essure, and sought damages under negligence, products liability, breach of warranty, and fraud theories of liability.³⁹

None of the *Rios* defendants were incorporated in Illinois, nor were their principal places of business located in Illinois.⁴⁰ They moved to dismiss plaintiffs’ complaint at the trial court level due to lack of specific personal jurisdiction.⁴¹ The trial court denied the *Rios* defendants’ motion and found Illinois had specific jurisdiction over plaintiffs’ claims.⁴² The trial court found that the *Rios* defendants, on a general basis, conducted clinical trials on Essure in Illinois, held a physician training program for Essure in Illinois, and developed a marketing strategy for Essure in Illinois; as such, the trial court found a specific connection between Illinois and the non-resident plaintiffs’ claims.⁴³ On appeal, the Fifth District affirmed the trial court’s finding that Illinois had specific jurisdiction over the *Rios* defendants.⁴⁴

The Illinois Supreme Court reversed the judgment of the appellate, which affirmed the decision of the circuit court, and held that Illinois did not have specific personal jurisdiction over the non-resident plaintiffs' claims.⁴⁵ The court first explained that Illinois' long-arm statute, 735 ILCS 5/2-209, grants Illinois courts the power to exercise personal jurisdiction over a non-resident defendant "on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."⁴⁶

Consequently, the court determined that SCOTUS' analysis regarding specific jurisdiction in *Bristol-Myers* was applicable to Illinois state courts determining issues related to specific jurisdiction.⁴⁷ The court reasoned that:

A state may assert specific personal jurisdiction over an out-of-state defendant only "if the defendant has purposefully directed [its] activities at residents of the forum" and if "the litigation results from alleged injuries that arise out of those activities."⁴⁸

As a result, the court held that *Bristol-Myers* foreclosed the theory that the non-resident plaintiffs in *Rios* could subject the defendants to personal jurisdiction.⁴⁹ Although the court found Bayer purposefully directed activities at Illinois, it still determined there was no connection between the non-resident plaintiffs' claims and Illinois due to the fact that those plaintiffs: i) never alleged the Essure that injured them was manufactured in Illinois; ii) never alleged they or their physicians received false information in Illinois related to Essure; iii) never alleged the Essure devices that injured them were implanted in Illinois; and iv) never resided in Illinois, nor did their physicians reside in Illinois.⁵⁰ As such, the court explicitly determined "*Bristol-Myers* resolved that state courts lack specific personal jurisdiction over nonresident plaintiffs under similar circumstances."⁵¹

Given the Illinois Supreme Court's adoption of *Bristol-Myers* specific jurisdiction analysis in *Rios*, a lack of personal jurisdiction affirmative defense may be one of the best avenues for dismissal of out-of-state corporate defendants litigating in Illinois state courts, especially in multi-defendant litigations. This is especially true given that the *Rios* Court still found specific personal jurisdiction lacking when some activities of Bayer related to the drug Essure (e.g. marketing, physician training) occurred in Illinois, as opposed to the *Bristol-Myers* case where there was no marketing or physician training alleged to have occurred in California. Thus, the Illinois Supreme Court has demonstrated a strict adherence to the specific jurisdictional principles set forth in *Bristol-Myers* such that it may offer one of the most viable affirmative defenses to a corporate defendant in Illinois state court.

IV. Ford Motor Co. v. Montana Eighth Judicial Dist. Court: The Strict Causal Link Requirement

The issue of specific personal jurisdiction was recently revisited by SCOTUS in *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*.⁵² Although Ford had sought to extend *Bristol-Myers*, which rejected personal jurisdiction over claims by out-of-state plaintiffs against out-of-state defendants for out-of-state injuries, SCOTUS disagreed, rejecting a strict causal link standard and distinguishing *Bristol-Myers* from the claims in *Ford* by in-state plaintiffs for in-state injuries.

In this case, SCOTUS consolidated two matters in which Ford was sued as a manufacturer of vehicles involved in car accidents.⁵³ Plaintiffs filed their claims in their home states: Montana and Minnesota.⁵⁴ Neither was a home state for Ford. Ford did not challenge that it had purposefully availed itself of Montana and Minnesota by conducting business in both states.⁵⁵ Instead, it argued each state court lacked personal jurisdiction because there was "no causal link" between

Ford's conduct in those states and plaintiffs' claim.⁵⁶ Namely, Ford had not designed, manufactured or first sold the cars in plaintiffs' states.⁵⁷

Justice Kagan delivered the majority opinion. She was joined by Chief Justice Roberts, and Justices Breyer, Sotomayor, and Kavanaugh. SCOTUS equally rejected Ford's proposed "causal link" test, which would raise plaintiffs' bar to meet jurisdictional threshold. Ford urged the Court to adopt a rule that specific jurisdiction must be found only if the defendants' actions in the forum state led to the plaintiffs' claim.⁵⁸ Ford further argued that specific jurisdiction should be found after determining whether the case "arise[s] out of or relate[s] to" forum conduct.⁵⁹ The majority emphasized that term "relates to" incorporates real limits, as it must adequately protect defendants foreign to forum.⁶⁰ Based on that, Ford's activities in Montana and Minnesota were sufficiently related to create specific jurisdiction over each lawsuit as it had "systematically served" markets in both states for "the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there [was] a strong 'relationship among the defendant, the forum, and the litigation,'—the 'essential foundation' of specific jurisdiction."⁶¹ In short, the fact that the plaintiff was harmed in the state by the same type of vehicle marketed in the forum "relates to" the creation of the market and triggers specific jurisdiction as to Ford in each state.

This holding makes clear that plaintiffs do not need to show causation to overcome constitutional threshold. However, it also demonstrates that relatedness is key. What matters is the location of an injury and residency of a plaintiff. Of course, a California court could not have jurisdiction over Ford in a claim filed by an Ohio plaintiff for an injury that occurred in Ohio.⁶²

Justice Alito, concurring in the judgment, stated that these cases could be resolved "without any alteration or refinement of our case law on specific personal jurisdiction."⁶³ The rule since *International Shoe* has been that personal jurisdiction exists if the defendant has minimum contacts "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁴ "That standard is easily met here," Justice Alito wrote while agreeing with the majority and rejecting Ford's causal link.⁶⁵ However, he differed with the majority opinion's explanation of the phrase "arise out of or relate to" as if it were a statute.⁶⁶ Justice Alito worried that the Court had effectively recognized a new category of cases in which personal jurisdiction is permitted even when there is *no* causal connection between the defendants' contacts and the plaintiff's claims. Justice Alito considered this innovation both unnecessary and, in his view, unwise.⁶⁷ He stated:

The common-sense relationship between Ford's activities and these suits, in other words, is causal in a broad sense of the concept, and personal jurisdiction can rest on this type of link without strict proof of the type Ford would require. When "arise out of" is understood in this way, it is apparent that "arise out of" and "relate to" overlap and are not really two discrete grounds for jurisdiction. The phrase "arise out of or relate to" is simply a way of restating the basic "minimum contacts" standard adopted in *International Shoe*.⁶⁸

Justice Gorsuch shared Justice Alito's concern and elaborated on the issue. In his own concurrence, joined by Justice Thomas, Justice Gorsuch stated that that traditional personal jurisdiction jurisprudence is evolving and the "new" relate to test for specific jurisdiction may add "new layers of confusion to our personal jurisdiction jurisprudence."⁶⁹ Justice Gorsuch recognized:

The majority stresses that the Montana and Minnesota plaintiffs before us "might" have purchased their cars because of Ford's activities in their home States. They "may" have relied on Ford's local advertising. And they "may" have depended on Ford's promise to furnish in-state servicers and dealers. If the majority is right about

these things, that would be more than enough to establish a but-for causal link between Ford’s in-state activities and the plaintiffs’ decisions to purchase their allegedly defective vehicles. Nor should that result come as a surprise: One might expect such causal links to be easy to prove in suits against corporate behemoths like Ford. All the new euphemisms—“affiliation,” “relationship,” “connection”—thus seem pretty pointless.⁷⁰

It appears Justice Gorsuch would be willing to recognize personal jurisdiction over nationwide corporations like Ford in any state on any claim despite former restrictions in our jurisprudence.

Are *International Shoe* and *Bristol-Myers* to be forgotten? Certainly not. These two pillars are firmly standing and will likely be around for a while. Ford and similarly situated defendants may continue to “enjoy[] the benefits and protections of their laws.”⁷¹ The “minimum contacts” test remains the law and plaintiffs’ must demonstrate “the maintenance of the suit” is reasonable in the context of our federal system of government and “does not offend ‘traditional notions of fair play and substantial justice.’”⁷²

Equally, *Ford Motor* does not disturb the Court’s rejection in *Bristol-Myers* of specific jurisdiction over claims by non-resident plaintiffs against a non-resident company whose product allegedly injured the plaintiffs. In fact, SCOTUS, distinguished *Bristol-Myers* by stating that there the plaintiffs were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to that state.⁷³ Unlike, in *Bristol-Myers*, plaintiffs in *Ford Motor* were residents of forum state and they sustained alleged injuries in the state where their claims were filed. Consequently, nothing in *Ford Motor* suggests a deviation of well settled jurisdictional jurisprudence and (arguably) does not expand plaintiffs’ jurisdictional scope in states where defendants are not at home.

V. Looking Ahead: Stream of Commerce Theory and Toxic Tort Litigation

Although SCOTUS did not specifically address the “stream of commerce” theory of personal jurisdiction in the *Ford Motor* decision, it is that theory that remains unsettled and rife with potential for future battles. Counsel representing non-resident manufacturers in toxic tort litigation face challenges as Illinois trial courts struggle to analyze the application of personal jurisdiction principles, particularly with respect to stream of commerce theories. Accordingly, product liability defendants in toxic tort litigation should be aware of the “stream of commerce” theory as an additional analysis in the application of specific personal jurisdiction. The principle allows the exercise of personal jurisdiction over a manufacturer who places a product into the marketplace and who, by virtue of other conduct to create a connection with the forum, reasonably would expect a consumer in that forum to come into contact with its product. In other words, not only does the product itself have to find its way into the forum, but the manufacturer must have created some “minimum contacts” with that forum before jurisdiction may be proper. It is that latter prong that remains unsettled as two theories have been advanced to analyze the measure of “minimum contacts” with a jurisdiction: the broad and narrow stream of commerce theories.

It remains unsettled in Illinois as to whether the broad or narrow stream theory is more appropriate for the analysis of specific jurisdiction over a non-resident manufacturer. As a result, many trial judges find themselves analyzing both the broad and narrow stream of commerce theories in the absence of explicit guidance from Illinois higher courts. However, as this Monograph suggests, it is the narrow application that should be embraced both based upon precedent as well as notions of fairness. As discussed previously, SCOTUS has articulated two ways to assess specific personal jurisdiction with respect to non-resident product manufacturers: the narrow stream of commerce and broad stream of commerce theories. While both tests require the defendant know its product is being marketed or sold in the forum state, under the narrow stream of commerce theory, the defendant must have engaged in some additional conduct. This

“additional conduct” standard requires the defendant to have targeted the forum state in some way and that those forum contacts directly relate to plaintiff’s cause of action. In the toxic tort arena this would require the defendant to do something more than merely place its product in the stream of commerce by selling to consumers with a national distribution network.

Instead of relying on the customers’ national distribution chain that is not within its control to determine where the defendant may have to litigate, the non-resident manufacturer can assess its own conduct relative to Illinois when anticipating the application of specific jurisdiction by Illinois courts. If an entity has not targeted the state in some way, under the narrow stream of commerce theory, it is unlikely that the entity will be subject to specific personal jurisdiction of that state. In contrast, the broad stream of commerce theory essentially creates no meaningful limitations to jurisdiction. Thus, the narrow stream of commerce theory is the better theory to prevent offending “traditional notions of fair play and substantial justice” and should be favored by Illinois courts.

A. The Evolution of Minimum Contacts

The narrow stream of commerce theory respects SCOTUS precedent. The “minimum contacts” test for specific jurisdiction was first put forth in a 1980 case known to nearly every law student and legal practitioner in the county—*World-Wide Volkswagen Corp. v. Woodson*. In *World-Wide Volkswagen*, a couple purchased a car on the East Coast, and were involved in an accident while driving through Oklahoma.⁷⁴ In the ensuing products liability action filed by the drivers of the car, the Court held that the Oklahoma state court did not have personal jurisdiction over the East Coast car dealer and a wholesale distributor because the non-resident defendants had not “deliver[ed] its products into the stream of commerce with the expectation that they [would] be purchased by consumers in the forum State.”⁷⁵ The fact that an in-state consumer purchased a car and drove it through Oklahoma was not enough to rise to the level of minimum contacts required to establish specific personal jurisdiction.⁷⁶

While *World-Wide Volkswagen* set the groundwork for the evolution of specific personal jurisdiction with respect to the stream of commerce theory, it was a subsequent case that permanently altered the landscape. Seven years later, in 1987, SCOTUS revisited the issue of specific jurisdiction in *Asahi Metal Industry Co. v. Superior Court of California*. There, a man in California lost control of his motorcycle and collided with a tractor while driving down the highway.⁷⁷ His wife died and he was severely injured.⁷⁸ The man filed a products liability lawsuit, alleging a tire tube on the motorcycle was the defective cause of the collision.⁷⁹ The Taiwanese manufacturer of the tube filed a cross complaint against the tube valve assembler—a Japanese company.⁸⁰ While the Court unanimously held it would be unfair to exercise personal jurisdiction over the Japanese company, the Court was split on how to conduct the minimum contacts analysis.⁸¹

I. Asahi: Narrow Stream of Commerce Theory

Justice O’Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, argued for the application of a narrow stream of commerce theory.⁸² Under this theory, placing a product into the stream of commerce, without more, does not satisfy the minimum contacts test because, without more, it is not an act of the defendant purposefully directed toward the forum State.⁸³ For jurisdiction to attach, the defendant must do something additional such as “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”⁸⁴ The Japanese company did not meet any of these additional requirements and thus,

could not be subjected to personal jurisdiction in California as such would exceed the limits of due process.⁸⁵ Without “something more” a non-resident defendant should not expect to litigate in a foreign jurisdiction to which it has no ties.

2. Asahi: Broad Stream of Commerce Theory

In contrast, concurring in part and concurring in the judgment, Justice Brennan, joined by Justices White, Marshall, and Blackmun, advocated for a broad stream of commerce theory.⁸⁶ Under this theory, a state may exercise personal jurisdiction over an out-of-state defendant if the defendant is involved in the “regular and anticipated flow of products from manufacture to distribution to retail sale” and “is aware that the final product is being marketed in the forum State.”⁸⁷ This theory omitted the additional requirements of the narrow stream of commerce theory and based the exercise of specific personal jurisdiction on whether the defendant knew the product, vis-a-vis the distribution system, would end up in the forum state and whether the defendant knew “it would benefit economically from the sale.”⁸⁸ Under this theory, the power to subject a selling entity to personal jurisdiction lies with the customer. If the customer sells through a national distribution network, the selling entity could find itself subject to nationwide jurisdiction.

3. J. McIntyre Machinery, Ltd.

Over 20 years later, SCOTUS revisited the stream of commerce issue once again after a man was seriously injured in New Jersey while using a metal shearing machine, which was manufactured in England.⁸⁹ The plurality rightly adopted the narrow stream of commerce theory stating that the appropriate inquiry when assessing specific jurisdiction is whether the defendant has “purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”⁹⁰ Under the narrow theory, the non-resident defendant must target the forum in some way.⁹¹ It is not enough that it is predictable that the goods will reach the forum State.⁹² Since the defendant had not marketed its products in New Jersey (though it did use an independent U.S. distributor), had no office or employees in the state, did not pay taxes in the state, did not own property in the state, and did not have any contacts in the state, the Court would not subject the entity to the jurisdiction reach of New Jersey.⁹³ Further, the Court opined that a single sale of a single product was not enough to establish specific personal jurisdiction.⁹⁴ Although *McIntyre* did not fully resolve the issue of whether a broad or narrow analysis is more appropriate, it certainly does suggest that a “something more” analysis is appropriate. In *McIntyre*, the plurality of four justices rejected the notion that the reasonable foreseeability that that a product could end up in any state should be sufficient to fix jurisdiction; rather, the opinions taken as a whole suggest that there should be something additional to support the proper Due Process analysis.

B. How Illinois Courts Assess Minimum Contacts

Despite the plurality of SCOTUS adopting the narrow stream of commerce theory, as demonstrated below, Illinois appellate courts have refused to opine on which theory is the proper one to follow leaving trial courts to struggle with making that determination. Even prior to *McIntyre*, the Illinois Supreme Court, in *Wiles v. Morita Iron Works Co.*, stated that to meet the test for minimum contacts, “purposeful availment of a forum’s market requires, at a *minimum*, that the alien defendant [be] ‘aware that the final product is being marketed in the forum State.’”⁹⁵ Following SCOTUS’ opinions it should not be surprising that the Illinois Supreme Court suggested that there be some additional conduct within or connected to Illinois to find jurisdiction.

The Illinois Supreme Court has not explicitly adopted either the broad or narrow stream of commerce theories; accordingly, in many instances, Illinois courts have conducted both analyses.⁹⁶ In *Russell v. SNFA*, a man died in a helicopter crash.⁹⁷ The crash was alleged to have been caused by a faulty custom tail-rotor bearing, manufactured by a French company.⁹⁸ In the suit by the man’s estate against the French company, the Illinois Supreme Court explicitly stated it would not adopt either theory without further guidance from SCOTUS.⁹⁹ However, in conducting its analysis, the Illinois court found that under both theories, the French manufacturer had the minimum contacts required for the exercise of personal jurisdiction.¹⁰⁰

Under the broad theory, the French company had minimum contacts because it repeatedly supplied its parts to an Italian company who sold its helicopters through its United State subsidiary.¹⁰¹ The French manufacturer’s parts reached the United States through the distribution system and that distribution system was known to the manufacturer.¹⁰² Under the narrow theory, minimum contacts were satisfied because the French manufacturer had a business relationship with another manufacturer located in Illinois, to whom it had sold over \$1 million dollars in goods.¹⁰³ This “regular and anticipated flow” of product sales showed that the French manufacturer had specifically targeted the forum.¹⁰⁴ This conduct was the “additional conduct” articulated by Justice O’Connor that was needed to establish specific jurisdiction under the narrow stream of commerce theory.

Most recently, the Illinois Appellate Court in *Levy v. Gold Medal* examined the issue of specific personal jurisdiction, once more conducting both the broad and narrow stream of commerce analyses in reaching its decision.¹⁰⁵ In this toxic tort action, Plaintiff Karen Levy filed a negligence and strict liability action against Defendant Gold Medal Products (“Gold Medal”) seeking recovery for damages allegedly suffered after Gold Medal sold butter and other flavorings containing diacetyl and acetyl propionyl to her popcorn shop.¹⁰⁶ She attributed her lung disease to prolonged exposure to the flavoring agents.¹⁰⁷ Gold Medal filed a contribution claim against various other defendants, including Third Party Defendant Ventura Foods, LLC (“Ventura”).¹⁰⁸ Ventura filed a motion to dismiss alleging lack of personal jurisdiction.¹⁰⁹

The court, analogizing the case to *Russell*, held that under the narrow theory Ventura had engaged in the “additional conduct” required to establish specific personal jurisdiction.¹¹⁰ In addition to Ventura’s voluminous 25 year sale history to Gold Medal, who had a nationwide distribution network, Ventura had engaged in the “additional conduct” required because it labeled the 200,000-400,000 products it sold to Gold Medal per year with the Gold Medal brand names for sale in Illinois and had also made multiple sales per year of products in 6000 pound increments to other customers in the State.¹¹¹ The court held that Ventura did more than “simply place its popcorn products into the nationwide stream of commerce” and opined that it had “engaged in conduct purposefully directed at Illinois.”¹¹² By targeting customers in Illinois, Ventura had subjected itself to the jurisdictional reach of the state.

Consistent with its refusal to “pick a side,” the court also conducted a broad stream of commerce analysis. Under the broad theory, personal jurisdiction was proper if Ventura was “involved in ‘the regular and anticipated flow of products from manufacture to distribution to retail sale’ and [was] ‘aware that the final product [was] being marketed in’ Illinois.”¹¹³ The court opined that Ventura had “regularly manufactured products for Gold Medal” that were sold and distributed in Illinois and that Ventura knew the products were being sold in the state.¹¹⁴

This finding was based on the fact that Gold Medal had purchased products from Ventura for around 25 years, that Ventura sold its popcorn products to Gold Medal in 40,000-pound increments five to ten times per year, that Ventura had 99% of the market in concession oils, that one of its products was distributed to all “contiguous states including Illinois,” that its awareness that Gold Medal redistributed the products it purchased from Ventura, and that it knew Gold Medal had a nationwide distribution network.¹¹⁵ Further, various high level Ventura employees testified that they had viewed Gold Medal’s website and products catalog, knew the website listed two locations in Illinois, and were aware of Gold

Medal's distribution channels.¹¹⁶ On these facts, the court found the assertion of specific personal jurisdiction was proper.¹¹⁷

Because the *Levy* Court found jurisdiction was proper under both narrow and broad stream of commerce theories, a non-resident defendant is left with little guidance as to which theory will subject it to jurisdiction in Illinois. Following *Russell* and *Levy*, a non-resident manufacturer is left to speculate the result should there be a conflict in the conclusion following application of both theories—what happens where the broad theory suggests jurisdiction should follow, but the narrow theory suggests otherwise? These authors believe that Illinois courts would, and should, come down on the side of embracing the narrow stream of commerce which requires something more of the manufacturer than the knowledge that its products may end up in Illinois. A non-resident manufacturer should not have to expect to litigate in a foreign jurisdiction to which they have no ties. In *Levy*, the court determined that Ventura had targeted the forum state. However, a defendant who does not target a forum state but who merely knows its customer sells in other states should not have to litigate in a wholly foreign jurisdiction. The defendant should have the power to choose to which state's laws they avail themselves and should not be wholly at the mercy of its customer and that customers' resale of its products.

C. Illinois Courts Should Only Consider Narrow Stream of Commerce

Subjecting non-resident manufacturers to specific personal jurisdiction under the broad stream of commerce theory is unfair because such defendants have no control over where its customers redistribute their products. There is no escaping nationwide personal jurisdiction under the broad stream of commerce theory. Under the broad stream of commerce theory, merely knowing that a repeat customer uses a nationwide distribution network could be enough to give every state in the country personal jurisdiction over an entity who has never specifically targeted the state in any way. This foreseeability-based argument is exactly what *World-Wide Volkswagen* cautioned against because it allows a state to assert personal jurisdiction even though an entity never directly targeted the forum.¹¹⁸ The only way for a business to avoid nationwide personal jurisdiction would be to never sell to the same customer twice or to refuse to do business with anyone that has a nationwide distribution network or aspires to a nationwide distribution network—neither of which, for many entities, is a practical (or desirable) business model. Under the broad theory, an entity could be hauled into court in a state where they have never conducted business and where they have no ties. Their only act is supplying to the same customer who redistributes the product.

Under the broad stream of commerce theory, there is no way for the supplying entity to temper its exposure to nationwide personal jurisdiction. In *Levy*, when the court conducted its broad stream of commerce analysis, it focused on the volume of sales over a 25-year period.¹¹⁹ Ventura manufactured its products in Alabama and Louisiana and delivered the products to Gold Medal in Cincinnati, Ohio.¹²⁰ Under the broad theory, the only way for Ventura to escape the jurisdictional reach of Illinois would be to forego doing business with Gold Medal altogether. The broad minimum contacts theory asks entities to make illogical business decisions in order to escape the jurisdictional reach of the states in which its customers conduct business.

The narrow theory leads to a much more logical result—where an entity targets a state, it avails itself of the laws and protections of that state and should be subject to specific personal jurisdiction there. An entity who creates a plan to target and sell to consumers in the forum state has affirmatively done something. They have chosen to subject themselves to the jurisdictional reach of that state. They are not merely swept under the jurisdictional power of the forum by selling to customers with a nationwide distribution network. The narrow theory does not ask an entity to choose between its customer base and where it wishes to litigate a dispute. The narrow theory as espoused lays out clearly definable criteria that might allow an entity to reasonably predict if its conduct is sufficient to warrant the exercise of personal jurisdiction.

If an entity designs a product for the forum state, advertises in that state, provides customer service, markets through a sales agent, or in any way purposefully targets the state, they may expect to litigate in the state.¹²¹ The narrow theory does not leave personal jurisdiction dependent upon the conduct of some third party, like a downstream customer, and instead relies solely on conduct of the entity. The “additional conduct” requirement of the narrow stream of commerce theory ensures that the entity can control where it is subject to jurisdiction. Thus, Illinois courts should apply only the narrow stream of commerce theory when assessing the minimum contacts required for specific personal jurisdiction.

Conclusion

For courts and litigants in toxic tort cases, the issue of personal jurisdiction presents complex legal and factual scenarios. These issues come to the forefront in jurisdictions like Illinois, where out-of-state plaintiffs find favorable forums to bring their claims irrespective of where the injury occurred or where plaintiffs reside. Understanding the evolving legal precedent, challenges, and defenses will assure out-of-state companies the ability to analyze and make strategic decisions to achieve favorable outcomes.

(Endnotes)

¹ *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021).

² U.S. Const. amend. XIV, § 1; Ill. Const. art. 1, § 2.

³ *Pennoyer v. Neff*, 95 U.S. 714 (1878).

⁴ *Int’l Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945).

⁵ *Id.* at 316.

⁶ *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

⁷ *Id.*

⁸ *Id.*

⁹ *Daimler AG v. Bauman*, 571 U.S. 117, 138-39 (2014).

¹⁰ *Id.* at 137.

¹¹ *Goodyear*, 564 U.S. at 919 (internal quotation marks and brackets omitted).

¹² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

¹³ *Goodyear*, 564 U.S. at 931 n. 6. (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”).

¹⁴ *Goodyear*, 564 U.S. at 927 (quoting *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 318 (1945)) (internal quotation marks omitted).

- ¹⁵ *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773, 1780 (2017).
- ¹⁶ *Id.*
- ¹⁷ *Id.* at 1779.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.* at 1778-79.
- ²¹ *Id.* at 1779.
- ²² *Id.*
- ²³ *Id.* at 1778.
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.* at 1779-80.
- ²⁸ *Id.* at 1780.
- ²⁹ *Id.* at 1784.
- ³⁰ *Id.* at 1781 (citing *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919, 931 n.6 (2011)).
- ³¹ *Bristol-Myers Squibb*, 137 S.Ct. at 1781 (citing *Walden v. Fiore*, 571 U.S. 277, 286 (2014)).
- ³² *Bristol-Myers Squibb*, 137 S.Ct. at 1781-82.
- ³³ *Id.* at 1782.
- ³⁴ *Id.* at 1783-8.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Rios v. Bayer Corp.*, 2020 IL 125020, ¶ 29.
- ³⁸ *Rios*, 2020 IL 125020, ¶ 5.
- ³⁹ *Id.* at ¶ 5.
- ⁴⁰ *Id.* at ¶ 3.
- ⁴¹ *Id.* at ¶¶ 5-8.
- ⁴² *Id.* at ¶¶ 9-10.

⁴³ *Id.* at ¶ 10.

⁴⁴ *Id.* at ¶¶ 11-13.

⁴⁵ *Id.* at ¶¶ 28, 34.

⁴⁶ *Id.* at ¶ 17 (*citing* 735 ILCS 5/2-209(c) (West 2016)).

⁴⁷ *Rios*, 2020 IL 125020, ¶¶ 29, 32.

⁴⁸ *Id.* at ¶ 20 (*quoting* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

⁴⁹ *Rios*, 2020 IL 125020, ¶ 22.

⁵⁰ *Id.* ¶¶ 25-27.

⁵¹ *Id.* ¶ 29.

⁵² *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021).

⁵³ *Id.* at 1022.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1023.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1026.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1028.

⁶² *Id.* at 1027 n.3.

⁶³ *Id.* at 1032 (Alito, J., concurring opinion).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1033 (Gorsuch, J., concurring opinion).

⁶⁸ *Id.*

⁶⁹ *Id.* at 1035.

⁷⁰ *Id.* at 1035-36.

⁷¹ *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 319 (1945).

⁷² *Id.* at 316.

⁷³ *Ford Motor*, 141 S. Ct. 1017, 1031 (2021).

⁷⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

⁷⁵ *Id.* at 298.

⁷⁶ *Id.* at 298-99.

⁷⁷ *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 105 (1987).

⁷⁸ *Id.*

⁷⁹ *Id.* at 106.

⁸⁰ *Id.*

⁸¹ *Id.* at 114.

⁸² *Id.* at 112 (plurality opinion).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 112-13.

⁸⁶ *Id.* at 117.

⁸⁷ *Id.*

⁸⁸ *Id.* at 121.

⁸⁹ *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011).

⁹⁰ *Id.* at 882.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 886-87.

⁹⁴ *Id.*

⁹⁵ *Wiles v. Morita Iron Works Co.*, 125 Ill. 2d 144, 160 (1988).

⁹⁶ *See, e.g., Russell v. SNFA*, 2013 IL 113909; *Levy v. Gold Medal Products Co.*, 2020 IL App (1st) 192264.

⁹⁷ *Russell*, 2013 IL App (1st) 113909, ¶ 1.

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 71.

¹⁰⁰ *Id.* ¶ 93.

¹⁰¹ *Id.* ¶¶ 74-75.

¹⁰² *Id.* ¶ 74.

¹⁰³ *Id.* ¶ 79.

¹⁰⁴ *Id.* ¶ 76.

¹⁰⁵ *Levy v. Gold Medal Products Co.*, 2020 IL App (1st) 192264, ¶ 50.

¹⁰⁶ *Id.* ¶ 1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ¶ 55.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at ¶ 50 (quoting *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117 (1987)).

¹¹⁴ *Levy*, 2020 IL App (1st) 192264, ¶ 50.

¹¹⁵ *Id.*

¹¹⁶ *Id.* ¶ 50-51.

¹¹⁷ *Id.* ¶ 51.

¹¹⁸ *World-Wide Volkswagen*, 444 U.S. at 298-99.

¹¹⁹ *Levy*, 2020 IL App (1st) 192264, ¶ 50.

¹²⁰ *Id.*

¹²¹ *Asahi* 480 U.S. at 112.

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