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PERSONAL JURISDICTION

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PERSONAL JURISDICTION

A client’s first question to her lawyer is often about forum choice: “Can I sue at home?” To answer that question, the lawyer must first consider whether the defendant is subject to personal jurisdiction in the state where the plaintiff seeks to file suit.

Because states (including Texas) have enacted long-arm statutes that reach as far as Due Process, the question of personal jurisdiction in a particular case is almost always a constitutional one.¹ And the United States Supreme Court’s jurisdictional jurisprudence has led to narrow, fact-based decisions that defy predictability. Thus, the answer to the client’s threshold question of whether the defendant can be sued in a particular state is often astonishingly difficult to answer.

The United States Supreme Court has issued six personal jurisdiction opinions in the last six years, after a hiatus of over 30 years. In three of these opinions, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,² *Daimler AG v. Bauman*,³ and *BNSF Railway Co. v. Tyrrell*,⁴ the Court addressed general (or “all-purpose”) jurisdiction and substantially limited the circumstances under which a state may constitutionally exercise general jurisdiction over non-resident corporations to instances in which the corporation is “at home”—i.e. where it is incorporated and where its principal place of business is located. As a result, it has become fairly easy to predict general jurisdiction cases, and there are fewer of them.

The other three cases addressed specific (or “case-linked”) jurisdiction, where the defendant does not have general contacts with the state, but the suit arises out of or relates to the defendant’s contacts with the forum. Specific jurisdiction is especially contentious in tort cases where a foreign defendant’s out-of-state tortious conduct injures forum plaintiffs. Lawyers, judges and academics held high hopes that the Supreme Court would provide some guidance in these three opinions, but it did not. *J. McIntyre Mach., Ltd. v. Nicastro*⁵ leaves us with no agreed upon analysis for stream-of-commerce jurisdiction. *Walden v. Fiore*⁶ suggests the “effects” theory of specific personal jurisdiction may be more limited than some had interpreted it to be. And *Bristol Myers Squibb Co., v. Superior Court of California*⁷ rejects the “sliding scale” approach but provides no guidance as to the proper approach for the “nexus” requirement in the specific jurisdiction analysis. The Supreme Court granted certiorari in two cases that raise the nexus requirement—*Ford Motor Co. v. Montana Eighth Judicial District Court*⁸ and *Ford Motor Co. v. Bandemer*.⁹ These cases were to be argued together in April 2020, but due to COVID-19, argument has been postponed until sometime next Term. So, for now, the specific jurisdiction opinions provide little guidance for future cases, leaving many questions unanswered.

¹ TEX. CIV. PRAC. & REM. CODE § 17.042; see *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 412-413 (1984) (“[T]he Texas Supreme Court first held that the State’s long-arm statute reaches as far as the Due Process Clause of the Fourteenth Amendment permits.”).

² 564 U.S. 915 (2011).

³ 134 S. Ct. 746 (2014).

⁴ 137 S. Ct. 1773 (2017).

⁵ 564 U.S. 873 (2011).

⁶ 134 S. Ct. 1115 (2014).

⁷ 137 S. Ct. 1773 (2017).

⁸ Case No. 19-368.

⁹ Case No. 19-369.

The Texas Supreme Court has also been busy with appeals of special appearance orders involving personal jurisdiction issues. In 2016, the court decided three specific jurisdiction cases. *TV Azteca, S.A.B. de C.V. v. Ruiz*,¹⁰ and *Searcy v. Parex Resources, Inc.*¹¹ involve *Walden*'s "effects" theory for defendants with indirect contacts with Texas; and *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*,¹² involves jurisdiction over parent and subsidiary corporations. In 2017, the court decided one more, *M&F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Company, Inc.*,¹³ where the court found no specific jurisdiction in a complex factual situation where defendants entered a settlement agreement with Texans to settle a New York lawsuit. In 2020 the court heard oral argument in *Luciano v. Sprayfoampolymers.com, LLC*¹⁴ which raised issues of stream of commerce. That case has been abated and removed from the court's docket, however.

I. A BRIEF HISTORY OF PERSONAL JURISDICTION JURISPRUDENCE.

Traditionally, defendants could be sued in the state of their domicile, and in any state in which they were "present."¹⁵ *Pennoyer*'s limitation on a states' assertions of jurisdiction over nonresidents was justified under notions of sovereignty—a state had to respect the rights of its sister states as co-equal sovereigns in a federal system.¹⁶ Over time, however, the notions of "presence" expanded, and notions of sovereignty were replaced by notions of fairness. Under the fairness notions of *International Shoe*, non-resident defendants could be sued in the forum state if they had "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁷

Ultimately, the Court developed two subsets of personal jurisdiction under the *International Shoe* rubric—"specific" and "general."¹⁸ General or "all-purpose" jurisdiction permits a court to assert jurisdiction over a defendant based on forum contacts unrelated to the cause of action (such as domicile). Specific or "case-linked" jurisdiction requires that the cause of action "arise from" or be "related to" the defendant's forum contacts. As the Court most recently said, specific jurisdiction requires an "affiliatio[n]" between the forum and the underlying controversy, principally [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."¹⁹ When a court exercises general jurisdiction, the court may entertain *any* claim filed against the defendant. The jurisdictional inquiry is

¹⁰ *TV Azteca, S.A.B. de C.V. v. Ruiz*, 494 S.W.3d 109 (Tex. App.—Corpus Christi-Edinburg 2014) (mem. op.), *affirmed*, 490 S.W.3d 29 (Tex. 2016)

¹¹ 496 S.W.3d 58 (Tex. 2016).

¹² 493 S.W.3d 65 (Tex. 2016).

¹³ 512 S.W.3d 878 (Tex. 2017).

¹⁴ No. 18-0350.

¹⁵ *See Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

¹⁶ *Id.*

¹⁷ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹⁸ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, nn.8, 9 (1984).

¹⁹ *Goodyear Dunlop Tires Operations, SA v. Brown*, 564 U.S. 915, 919 (2011), quoted in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017).

“dispute-blind” and focuses on all of the defendant’s activities in the forum, which the Court has said must be “continuous and systematic” and “substantial.”²⁰

The Court uses a three-prong analysis for assertions of specific jurisdiction.²¹ The first prong examines the “minimum contacts”—did the nonresident purposefully direct contacts with the forum state? The second considers whether those contacts are sufficiently related to the claims asserted in the litigation. And the third examines “fair play and substantial justice,” and requires an analysis of five factors: (1) “the burden on the defendant,” (2) “the forum State’s interest in adjudicating the dispute,” (3) “the plaintiff’s interest in obtaining convenient and effective relief,” (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and (5) “the shared interest of the several States in furthering fundamental substantive social policies.”²²

The Court’s jurisdiction opinions through the years primarily explored the first prong—the “minimum contacts” required for the exercise of specific jurisdiction. Among other requirements, the contact must be “purposeful,”²³ and it must be the defendant’s—the plaintiff’s “unilateral acts” does not establish minimum contacts between a defendant and the forum state.²⁴

The reasoning and the results achieved in the specific jurisdiction opinions were seldom entirely consistent, however. In some opinions the Court seemed to rely upon notions of “fairness,” “foreseeability,” and “the relationship among the defendant, the forum and the litigation.”²⁵ In another opinion, the Court declined to provide a convenient forum for the plaintiff, and talked, not about fairness, but about “state sovereignty,” which prevents States from reaching “beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”²⁶ In one case, the Court held that a New York father could not be sued for child-support in California, despite his acquiescence to a daughter’s moving there with her mother, because it would not be fair.²⁷ But in another, *Burnham v. Superior Court*,²⁸ it held that the out-of-state father *could* be sued for child support in California, because he was personally served with process there while visiting. Some Justices approved this assertion of “tag jurisdiction” because it was “traditional,” while others thought it was “fair.” But a unanimous Court held that physical presence within the forum state is sufficient for a constitutional exercise of personal jurisdiction.

In *Asahi Metal Industry Co. v. Superior Court*,²⁹ one of the last opinions decided before the 30-year hiatus in addressing personal jurisdiction issues, the Court unanimously agreed that the fairness prong

²⁰ *Helicopteros*, 466 U.S. at 416; see also Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 612 (1988) (“In *Helicol*, the Supreme Court took the first step toward resolving [the] inconsistent applications of general and specific jurisdiction analysis by restoring the original dispute-blind focus of general jurisdiction.”).

²¹ The Court, in *Daimler*, rejected the application of the fairness prong to general jurisdiction. See discussion *infra*.

²² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

²³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

²⁴ *World-Wide Volkswagen Corp.*, 444 U.S. at 298.

²⁵ *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); see also *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957).

²⁶ *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

²⁷ *Kulko v. Superior Court*, 436 U.S. 84, 100-01 (1978).

²⁸ 495 U.S. 604, 627-28 (1990).

²⁹ 480 U.S. 102 (1987).

prevented the California court from exercising jurisdiction over a Taiwanese valve manufacturer, which supplied valves to a Japanese tire manufacturer that had supplied tires to California, which allegedly injured a California citizen, who had settled out of the suit. But the opinion is also important for its failure to resolve the question of what contacts are required to constitutionally exercise jurisdiction over a seller of goods whose products reach consumers in the forum indirectly through the stream of commerce. Four Justices, in an opinion by Justice Brennan, held that merely putting the products into the stream of commerce, with awareness that they would be marketed in the forum state, was sufficient.³⁰ Four others, in an opinion by Justice O'Connor, required more—proof of efforts showing that the defendant was seeking to serve the market in the forum state, 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.”³¹ Justice Stevens refused to join either side, but agreed with all the other Justices that the exercise of jurisdiction in this case over an overseas defendant was unfair.

II. THE RECENT GENERAL JURISDICTION OPINIONS: *GOODYEAR, DAIMLER, & BNSF*

A. General jurisdiction, generally

The Supreme Court addressed general jurisdiction only twice before 2011. First, in *Perkins v. Benguet Consolidated Mining Co.*,³² the Court upheld general jurisdiction over a Philippine corporation in Ohio because the corporation had temporarily moved its headquarters there during World War II. And in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,³³ the Court declined to find that a Colombian corporation’s rather limited contacts with Texas were sufficient for general jurisdiction. With this limited guidance, the lower courts came to irreconcilable conclusions as to when general jurisdiction was available, disagreeing as to the degree of contacts required.

The Texas Supreme Court’s experience with general jurisdiction before 2011 is instructive. In *Schlobohm v. Schapiro*,³⁴ the Texas Supreme Court held that a New York physician was subject to general jurisdiction in Texas because his activities related to his two-year involvement with his son’s dry cleaning business was “continuous and systematic.” The court said that Dr. Schlobohm “was investor, stockholder, director, advisor, lender, and guarantor” for the business, and concluded that he would not be surprised at being called to litigation in Texas despite the limited nature of the contacts.³⁵ Elsewhere, I have argued that finding general jurisdiction over Dr. Schlobohm was misguided, and the case would have been better analyzed as one of specific jurisdiction.³⁶

³⁰ *Id.* at 116-17.

³¹ *Id.* at 112.

³² 342 U.S. 437, 477 (1952).

³³ 466 U.S. at 416 (“The one trip to Houston by Helicol’s chief executive officer for the purpose of negotiating the transportation-services contract...cannot be described or regarded as a contact of a “continuous and systematic” nature, as *Perkins* described it. . .”).

³⁴ 784 S.W.2d 355, 356 (Tex. 1990).

³⁵ 784 S.W.2d at 359.

³⁶ See Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 378, 381 (1992) (arguing that his Texas contacts were not so numerous that Texas

The Texas Supreme Court’s general jurisdiction analysis evolved in subsequent opinions. In *American Type Culture Collection, Inc. v. Coleman*,³⁷ the court declined to exercise general jurisdiction over a nonresident corporation that had sold its products to Texas residents for “at least eighteen years” and had substantial purchases from Texas vendors and long-term contracts with Texas residents. The court grounded general jurisdiction on notions of “consent” and emphasized that “what constitutes continuous and systematic contacts can only be determined on a case-by-case basis.”³⁸ And in *PHC-Minden, L.P. v. Kimberly-Clark, Corp.*³⁹ the court again declined to exercise general jurisdiction despite the substantial payments to Texas vendors and contracts with Texas entities over several years, noting that general jurisdiction was available when a non-resident defendant had a “home base” or was an “insider” in Texas.⁴⁰

B. Twenty-first century general jurisdiction

The three recent United States Supreme Court general jurisdiction opinions have made this detailed fact-based inquiry largely superfluous because the Court’s “at home” inquiry for corporate parties limits general jurisdiction to the corporation’s state of incorporation or headquarters in all but some unidentified “exceptional” cases. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁴¹ the Court first enunciated the new test. The plaintiffs in that case sought compensation for the deaths of two North Carolina boys involved in a bus accident in France. The accident was allegedly caused by a defect in tires manufactured by one of several foreign subsidiaries of the American tire manufacturer, Goodyear. The only relationship to the North Carolina forum was that it was the plaintiffs’ home state, and Goodyear USA, the American parent corporation, had substantial contacts there. The foreign subsidiaries challenged the exercise of personal jurisdiction. Goodyear USA did not—although it was headquartered and incorporated in Ohio, it had three manufacturing plants employing hundreds of people in North Carolina, so apparently it assumed it was subject to general jurisdiction in North Carolina.

Justice Ginsburg’s unanimous opinion held that the foreign subsidiaries were not subject to general jurisdiction in North Carolina—not a surprising result. But in so holding, the Court enunciated a new test for general jurisdiction applicable to all—a defendant’s “continuous and systematic contacts” with the state must render it “essentially at home.”⁴² “Paradigms” of “essentially at home” were identified as states where an individual was domiciled, or where a corporation was headquartered or incorporated.⁴³ But the Court did not tell us whether other “continuous and systematic contacts” with the forum, such as retail

became his second home, and that “[s]pecific rather than general jurisdiction is the better place for courts to make jurisdictional decisions based upon concepts of fairness.”)

³⁷ 83 S.W.3d 801 (Tex. 2002).

³⁸ *Id.* at 810.

³⁹ 235 S.W.3d 163 (Tex. 2007)

⁴⁰ *Id.* at 168, citing Lea Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 742 (1988); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 635 (1988)). The Fifth Circuit emphasized that general jurisdiction requires a “business presence in Texas.” *Johnston v. Multidata Sys. Int’l Corp.*, 523 F.3d 602, 611 (5th Cir. 2008) (emphasis in original).

⁴¹ 564 U.S. 915 (2011)

⁴² *Id.* at 919.

⁴³ *Id.* at 922-23.

stores, regional headquarters, and other brick and mortar presence were sufficient to allow the exercise of general jurisdiction, and it certainly did not address situations where nonresident corporations had significant virtual presence in a state.

The second general jurisdiction case, *Daimler AG v. Bauman*,⁴⁴ was decided three years later, and it made clear that the Court intended the *Goodyear* test to be interpreted narrowly. Again, the case was not difficult—the plaintiff sued the Argentinian subsidiary of Daimler AG, which was a German corporation that had allegedly violated the rights of Argentinians in Argentina. The Argentinian plaintiffs also sued the German parent corporation in California. The plaintiffs’ assertion of jurisdiction over the German parent was a stretch at best, seeking to impute the contacts of an American subsidiary, which had substantial contacts in California, to the German parent.⁴⁵

Justice Ginsburg again wrote the majority opinion—Justice Sotomayor was the lone hold-out, concurring in the judgment and writing a separate opinion—and quickly dismissed the general jurisdiction argument, citing *Goodyear*. To be subject to general jurisdiction, the defendant must be “at home,” omitting the modifier “essentially,” and a corporation is generally “at home” where it is incorporated or where it has its principal place of business.⁴⁶ Although the opinion did not foreclose the possibility that a corporation could be “at home” in a state other than its place of incorporation or principal place of business, it was emphatic that such cases would be “exceptional,” citing *Perkins*.⁴⁷ And when such an assessment is made, the court must look at “a corporation’s activities in their entirety, nationwide and worldwide.”⁴⁸ Under this test, it was not conceivable that the German parent was “at home” in California—its headquarters were in Germany, it was incorporated there, and its continuous and systematic activities in California, even if one imputed MB USA’s activities to it, were not significant when considering its worldwide business.

When a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary remains an unsettled jurisdictional issue that was not resolved in *Daimler*. The *Daimler* opinion noted, however, that “several Courts of Appeals have held[] that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.”⁴⁹ Furthermore, the Court rejected the Ninth Circuit’s less rigorous “agency theory” of imputing a parent’s contacts to its subsidiary, because it “appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’ we rejected in *Goodyear*.”⁵⁰ The Texas Supreme Court has held for some time that “contacts of distinct legal entities, including parents and subsidiaries, must be

⁴⁴ 134 S. Ct. 746 (2014).

⁴⁵ *Id.* at 759.

⁴⁶ *Id.* at 751. The Texas Supreme Court has acknowledged this new test for general jurisdiction. *Searcy*, 496 S.W.3d at 72; *TV Azteca*, 494 S.W.3d, at 114-15.

⁴⁷ 134 S. Ct. at 761 n.19.

⁴⁸ *Id.* at 762 n.20.

⁴⁹ *Id.* at 759. The Texas Supreme Court and the Fifth Circuit adopted this view. See *PHC-Minden*, 235 S.W.3d at 172, citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983).

⁵⁰ *Daimler*, 134 S. Ct. at 760.

assessed separately for jurisdiction purposes unless the corporate veil is pierced,” without distinguishing between general and specific jurisdiction.⁵¹

Justice Sotomayor agreed that Daimler was not subject to jurisdiction in California, but for different reasons.⁵² First and foremost, she disagreed with the majority’s pronouncement, based on a footnote in Daimler’s brief “that was neither argued nor passed on below,” that the *Asahi* fairness factors are not applicable in general jurisdiction cases.⁵³ Apparently, the majority concluded that if a defendant were “at home,” it could not complain that the exercise of jurisdiction was “unfair.” After all, general jurisdiction is to provide the single place where any defendant can sue for any injury, regardless of where it arose. Accordingly, it could never be “unfair” to sue the defendant there. Justice Sotomayor would treat this case like *Asahi*, and find that California’s assertion of jurisdiction over Daimler, the German corporation, for the claims arising in Argentina was unfair, regardless of the contacts assessment.⁵⁴

But Justice Sotomayor also appears to have a broader view of general jurisdiction than the other Justices, consistent with her notion of jurisdiction as a “concept of reciprocal fairness.” She explains it as follows: “When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts.”⁵⁵ So, instead of the majority’s focus on the foreign corporation’s contacts “in their entirety, nationwide and worldwide,” to determine where the corporation’s “home” is located, she would focus on the defendant’s level of activities in the forum to determine if its contacts were “akin to those of a local enterprise that actually is ‘at home’ in the State.”⁵⁶ This is important. Under the majority’s rule, many corporations that do business with Americans are only “at home” in foreign countries. Thus, they would never be subject to general jurisdiction in the United States, regardless of the presence of significant offices here.

After another three years the Court decided *BNSF Railway Co. v. Tyrell*,⁵⁷ Justice Ginsberg again writing the majority opinion and Justice Sotomayor concurring and dissenting. Once again, the general jurisdiction argument was quickly dismissed. Here railroad employees sued their employer, BNSF, in Montana state court for damages suffered from an on-the-job injury under FELA. The employees did not reside in Montana and the injuries did not occur there. BNSF was not incorporated there, nor did it maintain its principal place of business there. But BNSF does maintain lots of track in Montana and employs lots of Montana workers. The Montana Supreme Court had held that BNSF was subject to general jurisdiction in Montana because it held that the FELA statute authorized personal jurisdiction over defendants “doing business” in the state.⁵⁸ The Supreme Court disagreed, holding that the statute addressed venue and subject-matter jurisdiction, not personal jurisdiction. It then moved to the

⁵¹ *Cornerstone Healthcare*, 493 S.W.3d at 71, citing *PHC-Minden*, 235 S.W.3d at 172-73. *Cornerstone* held that a parent entity was subject to specific jurisdiction because of its own contacts with Texas.

⁵² *Daimler*, 134 S. Ct. at 763 (Sotomayor, J., concurring).

⁵³ *Id.* at 764.

⁵⁴ *Id.* at 765 (“We held in *Asahi* that it would be ‘unreasonable and unfair’ for a California court to exercise jurisdiction over a claim between a [foreign] plaintiff and a [foreign] defendant that arose out of a transaction in [a foreign country] *Asahi* thus makes clear that it would be unreasonable for a court in California to subject Daimler to its jurisdiction.”).

⁵⁵ *Id.* at 768.

⁵⁶ *Id.* at 762 n.20, 769.

⁵⁷ 137 S. Ct. 1773 (2017).

⁵⁸ 45 U.S.C. § 56.

constitutional issue of whether Montana could exercise general jurisdiction over BNSF under its long-arm statute, and held that it could not because BNSF is not incorporated in Montana and does not maintain its principal place of business there. Justice Sotomayor’s opinion chastises the majority for granting a “jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions.” She fears that the majority pays “only lipservice” to the possibility of an “exceptional case” of general jurisdiction outside the *Daimler* paradigm, abandons any considerations of fairness and reasonableness, and violates *International Shoe*. The majority responds in a footnote, observing that Justice Sotomayor once again renews the debate she lost long ago, and that *International Shoe* addressed specific jurisdiction, not general.

C. General jurisdiction from corporate registration?

An important question that remains unanswered in these cases is whether corporations can consent to general jurisdiction by “doing business” in a state under a state’s corporate registration statutes. For example, in *Daimler*, MBUSA is Daimler’s subsidiary, incorporated in Delaware, with its principal place of business in New Jersey. It is not incorporated in California, nor does it have its principal place of business there. Thus, it does not fit into the “at home” test that the Court articulates, and presumably is not subject to general jurisdiction in California. The Court does not address the issue, however, because MBUSA, like Goodyear USA in *Goodyear*, did not challenge jurisdiction. Daimler has substantial and continuous and physical contacts with California—it distributes Mercedes-Benz automobiles to numerous independent dealerships in California, and has multiple California-based facilities, including a regional office, a Vehicle Preparation Center, and a Classic Center in California. It is also registered to do business in California and has an agent for service of process in California. MBUSA probably thought it bordered on frivolous to contest general jurisdiction in California. But after *Daimler*, similarly situated defendants should challenge assertions of contact-based general jurisdiction, and they will be successful.

But courts now are confronted with alternate general jurisdiction arguments, such as whether registration under a state’s corporate registration statutes confers general jurisdiction.⁵⁹ The typical corporate registration statute requires non-resident corporations to register with the state’s Secretary of State if the corporation is “transacting business” in the state. And registration requires the appointment and registration of an agent for service of process in the state.⁶⁰ The Supreme Court has never addressed the question, and there is a “decades-old split among the federal courts” that has never been resolved

⁵⁹ In fact, the issue was raised in *BNSF*, but the Court did not reach it because the Montana Supreme Court had not addressed it. *BNSF*, 137 S.Ct. at 1559. Interestingly, two federal district courts in Delaware have addressed the question and come to directly contrary conclusions concerning the same corporate defendant. Compare *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp.3d 549 (D. Del. 2014) (rejecting consent-by-registration as basis for general jurisdiction), with *Acorda Therapeutics v. Mylan Pharm. Inc.*, 78 F. Supp.3d 572 (D. Del. 2015) (accepting consent-by-registration as basis for general jurisdiction).

⁶⁰ *E.g.* TEX. BUS. ORG. CODE §§ 9.001, 9.004 (“To transact business in this state, a foreign entity must register under this chapter if the entity is a foreign corporation A foreign entity . . . must maintain the entity’s registration while transacting business in this state The application must state . . . the address of the principal office . . . [and] the name and the address of the initial registered agent for service of process that Chapter 5 required”). Other district courts have addressed the issue, with differing conclusions.

because it was not especially important before *Daimler*.⁶¹ Neither the Fifth Circuit nor the Texas Supreme Court has addressed the issue after *Daimler*.⁶²

Before *Daimler*, several courts held that in-state service upon an appointed agent for service confers general jurisdiction under the jurisdictional doctrines of “consent” and “presence.”⁶³ Although these doctrines find their roots in *Pennoyer* and its progeny, the argument remains credible because the doctrines are resurrected fairly often in modern opinions. For example, in 1990, the United States Supreme Court held that an individual personally served with process in a state, even while on a brief visit, was subject to general jurisdiction there.⁶⁴ Four Justices argued that the exercise of “tag jurisdiction” was constitutional because it was “traditional” and accepted at the time of the adoption of the 14th Amendment.⁶⁵ Four others argued that it was acceptable because it was “fair,” regardless of the historical tradition.⁶⁶ The last Justice agreed with both rationales.⁶⁷ Thus, the “traditional notion” of jurisdiction conferred by presence in the forum has continued viability in modern opinions. And because some current Justices continue to explain their jurisdictional philosophy in terms of the traditional notion of “sovereignty,” it is hard to dismiss it as a justification for the exercise of general jurisdiction.⁶⁸

But other courts, including the Fifth Circuit,⁶⁹ have concluded that the registration statutes confer general jurisdiction only when the corporation’s contacts are sufficient to confer general jurisdiction under the constitutional standard.⁷⁰ These courts conclude that any consent to suit obtained through those statutes is only for causes of action arising in that state. Under this analysis, the Due Process Clause would not condone the exercise of general jurisdiction on a non-resident corporation simply because it was served through its registered agent.

⁶¹ Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV 1609 (2015) (containing an excellent review of the relevant law in all states, and concluding that “consent-by-registration” is not constitutional).

⁶² As of this writing, one court of appeals, the Second Circuit, has addressed the issue after *Daimler*, declining to construe Connecticut’s registration statute as including consent to general jurisdiction. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 626 (2d Cir. 2016).

⁶³ Benish, *supra* note 52 (citing opinions from the Third and Eighth Circuits so holding, and opinions from the Second and Ninth Circuits with dicta consistent with the constitutionality of general jurisdiction).

⁶⁴ *Burnham v. Superior Court*, 495 U.S. 604 (1990).

⁶⁵ *Id.* at 622.

⁶⁶ *Id.* at 623.

⁶⁷ *Id.* at 640.

⁶⁸ See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (Kennedy, J., concurring) (plurality opinion) (advocating a “forum-by-forum, or sovereign-by-sovereign, analysis” in assessing whether a party’s conduct is directed at the society or economy within that jurisdiction such that “the sovereign has the power to subject [the party] to judgment. . .”).

⁶⁹ *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992).

⁷⁰ See *Fidrych v. Marriott Int’l, Inc.*, 952 F.3d 124, 135-39 (4th Cir. 2020) (holding that South Carolina statute did not confer general jurisdiction and citing to opinions from the Second, Fifth, Ninth and Eleventh Circuit opinions discussing the issue). The Benish note cited above notes that when it was published, the Fourth, Fifth, Seventh and Eleventh have held that consent-based general jurisdiction violates due process.

It may be tempting for some courts to adopt consent-based general jurisdiction because it allows a local plaintiff to sue a defendant with “continuous and substantial” contacts with the state in the plaintiff’s home forum. But, by definition, general jurisdiction would also allow any plaintiff to sue that defendant in the state where the defendant was registered to do business for any claim arising anywhere. *Asahi*’s “fairness” escape valve provided an argument that the assertion of jurisdiction over such cases, which are entirely unrelated to the forum or its domiciliaries, could not be condoned under notions of Due Process. *Daimler* took that argument off the table, however, making broad assertions of general jurisdiction less palatable.

At least four state supreme courts have addressed the issue after *Daimler*. The Illinois, Montana, and Delaware supreme courts have refused to interpret their state’s business registration statute in such a way that registration would automatically equate to consent to general personal jurisdiction because it would be inconsistent with *BNSF*, *Daimler*, and *Goodyear*.⁷¹ But the New Mexico Supreme Court has interpreted New Mexico’s business registration statute in the opposite manner—relying on the pre-*Daimler* opinion in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*,⁷² which interpreted Missouri’s business-registration statute for insurance companies, the court held that Ford Motor Company had consented to general personal jurisdiction in New Mexico merely by registering to do business there.

III. THE SPECIFIC JURISDICTION CASES: *NICASTRO*, *WALDEN* AND *BRISTOL-MYERS*

A. *Nicastro* and the stream of commerce

When defendants are not subject to general jurisdiction in the forum state, the plaintiffs must rely on specific jurisdiction arguments. As discussed above, the defendant must have significant contacts with the forum state that are sufficiently related to the plaintiff’s claim. Courts have had little difficulty dealing with defendants who enter a state and injure, contract with or sell products to a citizen of that state. But cases where the defendant’s contacts with the state are less direct are more troublesome.

In *World-Wide Volkswagen v. Woodson*,⁷³ the Supreme Court found no jurisdiction in Oklahoma over a New York retailer and its New York distributor who had sold the Audi to the plaintiffs. The facts were compelling—the plaintiffs were driving the Audi from their home in New York to their new home in Arizona, when they were rear-ended by a drunk driver and the car burst into flames. But the Supreme Court refused to find specific jurisdiction because the retailer and distributor directed no activities towards Oklahoma. Like MBUSA in *Daimler* and Goodyear USA in *Goodyear*, Audi, the German manufacturer, and its importer, Volkswagen of America, did not contest jurisdiction. The Audi had been brought into Oklahoma by the plaintiffs, and the court held that a plaintiff’s unilateral activity cannot create a contact on behalf of the defendant. The Court distinguished this case from those where an out-of-state manufacturer or distributor put a product into the stream-of-commerce, and the product ultimately is sold to the plaintiff in the plaintiff’s home state and causes injury there.

As discussed above, the Supreme Court later in *Asahi* famously splintered on the details of stream-of-commerce jurisdiction. And in 2011, the Court was presented with the same issues, and splintered once

⁷¹ See *Aspen American Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440 (Ill. 2017); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016); *DeLeon v. BNSF Ry. Co.*, 392 P.3d 1 (Mont. 2018).

⁷² 243 U.S. 93, 95 (1917).

⁷³ 444 U.S. 286, 292 (1980).

more. *J. McIntyre Mach., Ltd. v. Nicastro*,⁷⁴ presented a fairly ordinary products liability action: an injured worker sued the English manufacturer of an allegedly defective machine that caused the injury-producing accident. The accident occurred in New Jersey, and the plaintiff lived in New Jersey. But the manufacturer had not sold the machine directly to the New Jersey employer. Instead, it had sold it to a distributor based in Ohio, who sold it to the employer.

Justice Kennedy authored a four-vote plurality opinion that is similar to Justice O'Connor's "stream-of-commerce plus" opinion in *Asahi*—there was no jurisdiction over the English manufacturer because it made no direct effort to target the New Jersey market.⁷⁵ Justice Ginsburg dissented, seeming to follow Justice Brennan's opinion in *Asahi*, emphasizing that the English manufacturer saw the US as a single market, and that a sale to New Jersey was entirely foreseeable, which was sufficient to justify the exercise of jurisdiction under the due process clause.⁷⁶ Justice Breyer wrote the controlling concurring opinion, joined only by Justice Alito, which mirrors Justice Steven's *Asahi* opinion, noting that the record showed that only one machine had been sold in New Jersey, the defendant had made no effort to serve the forum state's market, and any assertion of jurisdiction was ultimately unfair.⁷⁷

The *Nicastro* opinions also highlight the continuing disagreement between the Justices on the philosophical underpinnings of jurisdictional jurisprudence under the Due Process Clause. The plurality opinion relies upon state sovereignty—the notion that the minimum contacts analysis prohibits a state from exercising authority over a defendant whose behavior is not directed at the forum state and protects states and individuals from the over-reach of other states. Justice Ginsburg's dissent vehemently disagrees with the sovereignty rationale, instead emphasizing the plight and inconvenience of the injured American plaintiff who must unfairly pursue his case in England (an option that is highly unlikely) since he is unable to establish specific or general jurisdiction in the US over the manufacturer.

The Court's inability to come to a majority opinion in stream-of-commerce cases is disappointing at best. The lower federal courts and state supreme courts have adopted one test or the other, often resulting in interesting conflicts of law, which leads to flagrant forum shopping. For example, Texas has adopted the "stream-of-commerce plus" test of Justices O'Connor and Kennedy.⁷⁸ But the Fifth Circuit adopted Justices Brennan and Ginsburg's stream-of-commerce test years ago,⁷⁹ and has refused requests to reconsider the question after *Nicastro* was decided because *Nicastro* changes nothing.⁸⁰ Therefore, a Texas plaintiff suing a foreign manufacturer, distributor or retailer must carefully consider the pros and cons of joining an in-state defendant and making the federal forum unavailable.

⁷⁴ 564 U.S. 873 (2011).

⁷⁵ *Id.* at 873.

⁷⁶ *Id.* at 905.

⁷⁷ *Id.* at 891-93.

⁷⁸ *TV Azteca*, 490 S.W.3d at 46 ("mere knowledge" is insufficient to establish purposeful availment); *Spir Star AG v. Kimich*, 310 S.W.3d 868, 873 (Tex. 2010).

⁷⁹ See *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989) (rejecting Justice O'Connor's stream-of-commerce test).

⁸⁰ *Ainsworth v. Moffett Engineering, Ltd.*, 716 F.3d 174 (5th Cir. 2013).

B. *Walden* and directing torts towards a plaintiff’s home forum

The Supreme Court’s fourth recent personal jurisdiction case, *Walden v. Fiore*,⁸¹ was decided by a unanimous opinion, authored by Justice Thomas. Like *Nicastro*, it presents a question of specific jurisdiction over a defendant whose contacts with the forum are indirect, rather than direct. Specifically, the question presented in the case was whether directing tortious activity toward plaintiffs who are located in a different state subjects the defendant to personal jurisdiction in that state.

The Court first addressed this issue in *Calder v. Jones*, a libel case—the Court found that National Inquirer reporters, who lived and worked in Florida, were subject to jurisdiction in California where the publication had a significant readership, where the plaintiff resided, and where the plaintiff would feel the “brunt” of injury from the libelous article.⁸² *Calder*’s holding that jurisdiction was proper because the defendants’ “intentional conduct in Florida [was] calculated to cause injury to Respondent in California,” was used to find jurisdiction in other cases where defendants “targeted” or “aimed” intentional conduct towards plaintiffs located in another state.⁸³ The example used often in law school civil procedure classes to illustrate the *Calder* “effects” test is the terrorist who throws a bomb across a river or sends poison through the mail to another state, injuring plaintiffs there. Some courts used *Calder* to obtain jurisdiction over defendants who intentionally dumped pollutants in a stream, which they knew would reach another state downstream, causing damage. Whether *Calder*’s reasoning was available for torts other than intentional torts remained unclear.⁸⁴

In *Walden*, the plaintiffs claimed that the defendant, a Drug Enforcement Agency Deputy working at Customs in Atlanta, was subject to jurisdiction in the plaintiff’s home state of Nevada because he had knowingly caused harm to them there. The plaintiffs alleged that the defendant had violated their constitutional rights by seizing cash from them as they passed through the Atlanta airport on their way from Puerto Rico to Nevada. The defendant suspected it might be drug money, and helped draft an affidavit supporting a forfeiture action. In fact, the plaintiffs were two professional gamblers, not drug dealers. Ultimately, the forfeiture complaint was not filed and the money was returned. Plaintiffs then filed a tort claim against the Deputy in Nevada. Defendants successfully challenged the jurisdiction and the trial court dismissed. The Ninth Circuit upheld jurisdiction under *Calder*’s effects test, because the tortious conduct was “aimed” at Nevada, where he knew the plaintiffs had a “significant connection.”⁸⁵ The Supreme Court reversed, concluding that the defendant did not have minimum contacts with Nevada: none of the conduct occurred in or had any jurisdictionally relevant contact with Nevada.

The Court took great pains in *Walden* to restrict *Calder*’s reach. The *Walden* opinion justifies the result in *Calder*, not because the defendants’ activities were directed towards Shirley Jones who happened to live in California, but because the defendants directed many activities towards California. This conduct—the defendant reporters called sources there, wrote an article widely circulated there, caused injury there, and knew the “brunt” of the injury would be felt there—connected the defendants to the state

⁸¹ 134 S. Ct. 1115 (2014).

⁸² *Calder v. Jones*, 495 U.S. 783, 789-90 (1984).

⁸³ *Id.*

⁸⁴ See, e.g. *Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 789-90 (Tex. 2005) (refusing to recognize jurisdiction where defendant “directed a tort”).

⁸⁵ *Walden v. Fiore*, 134 S. Ct. 1115, 1120 (2014).

itself, not just the plaintiff. California was the “focal point” of the defendants’ story and the plaintiff’s harm.⁸⁶

Walden, the Court says, is different. The defendant Deputy directed no activities towards Nevada. All of his tortious conduct occurred in Georgia. The plaintiffs suffered injury there only because they went through Georgia, where they encountered the defendant, and then traveled to Nevada, where they claim to have suffered the injury, because they “chose to be” there (at home) when they wanted to use the funds.⁸⁷ The Texas Supreme Court agrees: “Mere knowledge that the ‘brunt’ of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction.”⁸⁸

The *Walden* opinion is interesting because, like *Nicastro*, it makes a home forum more unlikely for plaintiffs suing defendants with only indirect contacts with the forum. First, the opinion makes clear that in all cases, including intentional tort cases, the defendants’ contacts must be “with the forum State itself, not . . . with persons who reside there. . . . And although physical presence in the forum is not a prerequisite to jurisdiction, physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact.”⁸⁹ The Court is clear that when a defendant purposefully enters into a business transaction with a resident of a foreign state, he may be subject to jurisdiction there.⁹⁰ And defendants who deliver goods directly to a resident of the forum, or who throw or mail a bomb to the forum appear to be subject to jurisdiction there as well. But when a defendant only has indirect contacts, jurisdiction remains unclear.

The *Walden* opinion is also interesting because even the Justices who usually favor a convenient forum for the plaintiffs joined the opinion. Therefore, *Walden* may not be terribly significant. Ultimately, I believe this case is a “unilateral activity of the plaintiff” case, and the defendant’s contacts with Nevada were “random, fortuitous, or attenuated.”⁹¹ The DEA agent’s injurious actions were entirely in Atlanta, and occurred because plaintiffs travelled through the Atlanta airport. The agent had no Nevada contacts, direct or indirect, so requiring him to defend in Nevada simply did not make sense.

Again, recent Texas opinions are instructive. The Texas Supreme Court applied *Calder* and *Walden* in *TV Azteca*, where it held that a Mexican television broadcaster would not be subject to jurisdiction in Texas merely because the plaintiff who alleged she was defamed by a broadcast resided in Texas and felt the brunt of her injuries there.⁹² But the court did find specific jurisdiction in that case because the broadcaster conducted “additional activity” in Texas—it “took specific and substantial actions to take advantage of the fact that the signals reach into Texas and to financially benefit from that fact.”⁹³ Thus, the defendants “purposefully availed themselves of Texas in connection with their actionable conduct.”⁹⁴

⁸⁶ *Id.* at 1123.

⁸⁷ *Id.* at 1125.

⁸⁸ *Searcy*, 496 S.W.3d at 68-69 (noting that in *Michiana*, it had interpreted *Calder* in the same way as *Walden* did).

⁸⁹ *Walden*, 134 S. Ct. at 1122.

⁹⁰ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985).

⁹¹ *Walden*, 134 S. Ct. at 1123.

⁹² *TV Azteca*, 490 S.W.3d at 42.

⁹³ *TV Azteca*, 490 S.W.3d at 51-52.

⁹⁴ *Id.* at 54-55.

In these cases, the analysis is excruciatingly fact-intensive, making it difficult to articulate any general statements about the direction of the opinions. In *Searcy*, the Texas Supreme Court held that a Canadian entity that communicated with a Bermudian entity through employees in Texas about purchasing assets that held Colombian oil and gas properties was not subject to jurisdiction in Texas. As in *Walden*, the court concluded that any connection with Texas was “fortuitous” because “the mere accident of a Bermudian firm, who turned out to own such Colombian assets, having some Houstonian executives involved in the sale.”⁹⁵ Likewise, in *M&F Worldwide*,⁹⁶ the court found that defendants who partially negotiated in Texas a settlement agreement of New York litigation that was the basis of the plaintiff’s tortious interference claim was not sufficient to justify personal jurisdiction in Texas. But in *Cornerstone Healthcare*, the defendants who targeted Texas assets in which to invest and sought a Texas seller were subject to Texas jurisdiction.⁹⁷

C. The nexus standard and *Bristol-Myers*.

The United States Supreme Court has decided no case establishing the proper legal standard for determining when a defendant’s purposeful contacts with a state are sufficiently related to the plaintiff’s claims to support the exercise of specific personal jurisdiction (the “nexus” requirement). The federal circuits and the state courts of last resort are deeply divided over it, and there was hope that the United States Supreme Court might resolve that division last term in *Bristol-Myers*. It did not. The division continues.

1. The “sliding-scale” standard, rejected in *Bristol-Myers*.

California, the District of Columbia and the Second Circuit had adopted a broad nexus standard called the “sliding scale.”⁹⁸ Courts applying this test were concerned with “the intensity of forum contacts,” and as the defendant’s contacts become “more wide ranging,” the court could “more readily” find the required connection with the claim. Thus, these courts could find jurisdiction when a defendant had substantial contacts with the forum state, even though the relationship between those contacts and the claim was quite tenuous.

In *Bristol-Myers*, the California Supreme Court was faced with products liability claims filed by California residents and non-residents against a New York/Delaware corporate defendant that had a significant permanent presence in California (e.g. research and lab facilities, sales representatives). But the only connection between the non-residents’ claims and California was the similarity between their claims and those filed by the California residents. The California Supreme Court applied the sliding-scale standard and decided that California had jurisdiction over the non-residents’ claims.

The United States Supreme Court reversed and, in an opinion written by Justice Alito, clearly rejected the sliding scale standard, expressing concern that it would allow for a “loose and spurious form of general jurisdiction.” Justice Sotomayor again dissents, complaining about what she sees as a contraction in specific jurisdiction, preventing nationwide mass action in state court against defendants

⁹⁵ *Searcy*, 496 S.W.3d at 77. .

⁹⁶ 512 S.W.3d at 890.

⁹⁷ *Cornerstone Healthcare*, 493 S.W.3d at 73.

⁹⁸ See *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998); *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 335 (D.C. 2000); *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 885 (Cal. 2016), *reversed*, 137 S. Ct. 1773 (2017).

who engage in a nationwide course of conduct, and noting that the majority’s “animating concern” is federalism, not fairness.

In short, the Court decided that for specific jurisdiction there must be “a connection between the forum and the specific claims at issue” regardless of how significant the defendants’ contacts are with the forum. The nature of that connection between the forum and the claims at issue remains unclear, however, and the confusion continues.

2. The causation standards: “but-for,” “but-for-plus,” and proximate-cause/substantive-relevance.”

After the demise of the sliding scale, the broadest nexus standard articulated is the “but-for” causation standard. The Fifth Circuit adopted it and, therefore, the federal district courts of Texas must apply it.⁹⁹ The “but for” standard is satisfied when the plaintiff’s claim would not have arisen in the absence of (“but-for”) the defendant’s contacts.¹⁰⁰ The court considers “‘jurisdictional contacts that occur over the entire course of events’ of the relationship between the defendant, the forum and the litigation.”¹⁰¹

Some circuits have tightened this standard a bit, resulting in a “but-for-plus” standard, which one Texas federal district court has suggested that the Fifth Circuit might adopt.¹⁰² This standard is consistent with the United States Supreme Court’s emphasis on federalism, making the scope of a state’s regulatory power an important concern in determining specific jurisdiction. Thus, this version includes “a concept of reciprocity between the ‘benefits and protection’ defendants receive from a forum and their corresponding jurisdictional obligations.”¹⁰³

The “but for” standard can be contrasted with the “more structured” “proximate cause” or “substantive relevance” standard.¹⁰⁴ The “proximate cause” version of the standard examines whether the defendant’s contacts with the forum are the legal cause of the injury, adding foreseeability to the but-for causation inquiry, while the “substantive relevance” version examines whether the contacts are “relevant to the merits of the claim.”¹⁰⁵ A recent reported California court of appeal decision held that California

⁹⁹ See *Trinity Indus., Inc. v. Myers & Assocs., Ltd.*, 41 F.3d 229, 231-32 (5th Cir. 1995) (applying “but-for” test).

¹⁰⁰ This test “is satisfied when the plaintiff’s claim would not have arisen in the absence of the defendant’s contacts.” *Breathwit Marine Contractors, Ltd. v. Deloach Marine Services, LLC*, 994 F. Supp. 2d 845, 851-52 (S.D. Tex. 2014) (quoting *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312 (3d Cir. 2007), internal quotation marks omitted).

¹⁰¹ *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 580 (Tex. 2007) (discussing and quoting *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 384 (9th Cir. 1990), *rev’d on other grounds*, 499 U.S. 585, 111 S. Ct. 1522, 113 L.Ed.2d 622 (1991)).

¹⁰² *Breathwit*, 994 F. Supp. 2d at 852 (written by Judge Gregg Costa, now on the Fifth Circuit). This approach, adopted by the Third Circuit in *Sandy Lane*, 496 F.3d at 323, and by the Seventh Circuit in *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010), is consistent with the United States Supreme Court’s signal that the scope of a state’s regulatory power may be an important concern in determining specific jurisdiction. See *Walden*, 134 S. Ct. at 1121 n.6; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851, 180 L.Ed.2d 796 (2011) (stating that specific jurisdiction “depends on an ‘affiliatio[n] between the forum and the underlying controversy,’ principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation”).

¹⁰³ *Breathwit*, 994 F. Supp. 2d at 852.

¹⁰⁴ *Moki Mac*, 221 S.W.3d at 581-82.

¹⁰⁵ *Breathwit*, 994 F. Supp. 2d at 851 (internal quotation marks omitted), quoting *Sandy Lane*, 496 F.3d at 319; see *TV Azteca*, 490 S.W.3d at 52-53; *Moki Mac*, 221 S.W.3d at 582.

precedent rejecting the “proximate cause” standard remained viable after *Bristol-Myers* because the Court “did not address the strength of the causal link required.”¹⁰⁶

3. Texas’s “substantial connection to operative facts” standard.

The Texas Supreme Court has adopted its own standard, rejecting the “but-for” test because it was “too broad and conceptually unlimited in scope”, rejecting the “substantive relevance/proximate-cause” test because it “poses too narrow an inquiry,” and, like the United States Supreme Court, rejecting the sliding scale test because it “conflates the fundamental distinction between general and specific jurisdiction that is firmly embedded in our jurisprudence.”¹⁰⁷ Instead, it adopted a “middle ground, more flexible than substantive relevance but more structured than but-for relatedness” that it calls the “substantial connection to operative facts” test,¹⁰⁸ which it finds to be “just right.”¹⁰⁹

The Texas standard is not concerned with the relative strength of the defendant’s forum contacts or any causal connection between them and the plaintiff’s claim. Instead, the it considers “what the claim is ‘principally concerned with,’ whether the contacts will be ‘the focus of the trial’ and ‘consume most if not all of the litigation’s attention,’ and whether the contacts are ‘related to the operative facts’ of the claim.”¹¹⁰ The Texas approach focuses on whether the defendant’s actionable conduct and the harm occurred in Texas. “When the defendant’s contacts are merely peripheral to a cause of action, specific jurisdiction is lacking[.]”¹¹¹

There are two Texas Supreme Court opinions that are especially important in understanding in the “substantial connection to operative facts” standard. The standard was adopted in 2007, in *Moki Mac v. Drugg*. Moki Mac was an Arizona river raft outfitter that had purposeful contacts with Texas, including advertising in Texas that included representations about the safety of its Grand Canyon trips. The plaintiffs were parents of a teenager who had died on one of Moki Mac’s Grand Canyon trips, and they sued Moki Mac for negligence and for intentional and negligent misrepresentation. Despite the plaintiffs’ alleged reliance upon Moki Mac’s representations, the court concluded that the “operative facts” of the litigation were Moki Mac’s negligent activities in the Grand Canyon in Arizona, not the representations in Texas. As the court later explained, “In Moki Mac the actionable conduct occurred and caused harm outside of the forum state, so the defendant’s liability arose from conduct outside of the forum state, not its additional conduct within the state.”¹¹² Thus, because there was no substantial connection between the representations in Texas and the operative facts in Arizona, the court rejected specific jurisdiction.

In 2016, in *TV Azteca v. Ruiz*,¹¹³ The Texas Supreme Court applied *Moki Mac*’s substantial connection standard in a libel case brought by Mexican citizens residing in Texas claiming injury from a Mexican television stations broadcasts in Mexico. There was evidence that the signals bled over to Texas,

¹⁰⁶ *David L. v. Superior Court*, 29 Cal.App.5th 359, 374 at n. 8 (Cal. Ct. App. 2018).

¹⁰⁷ *Moki Mac*, 221 S.W.3d at 584.

¹⁰⁸ *Id.* at 584-85. *See also Walden*, 134 S. Ct. at 1121 (“For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.”), quoted in *TV Azteca*, 490 S.W.3d at 52; *Searcy*, 496 S.W.3d at 70 n.47.

¹⁰⁹ *See Goldilocks and the Three Bears* (comparing bowls of porridge, chairs, and beds).

¹¹⁰ *TV Azteca*, 490 S.W.3d at 53 (internal citation omitted).

¹¹¹ *Searcy*, 496 S.W.3d at 90.

¹¹² *TV Azteca*, 490 S.W.3d at 53–54.

¹¹³ *Id.*

and that TV Azteca knew they did and used the access to South Texas as a marketing tool. The opinion concluded that TV Azteca’s Mexican broadcasts were not purposeful Texas contacts, despite the bleed over to Texas; but the “additional conduct” (promotional activities) in Texas were purposeful, satisfying the purposeful availment prong of the jurisdictional inquiry.¹¹⁴ But the promotional activities had no relationship to the plaintiff’s libel claims. Nevertheless, the court found a “substantial connection” that justified specific jurisdiction because the libelous broadcasts (not themselves purposeful contacts), “occurred and caused harm in Texas.”¹¹⁵ Thus, the court seemed to find that it was the harm occurring in Texas that was decisive, but it is not entirely clear that it applied its standard consistently with *Moki Mac*.

Again, the Texas Supreme Court and the Fifth Circuit may differ in their interpretations of the constitutional law of personal jurisdiction, which could lead to forum shopping and inconsistent results. Further guidance from the United States Supreme Court is sorely needed.

D. The nexus standard and the *Ford* cases.

The Supreme Court has granted certiorari in two cases involving Ford Motor Company that may clarify an important issue left open in *Bristol-Myers*: must a defendant’s actual contacts within the forum state *cause* the plaintiff’s injury?

In the first case, *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*,¹¹⁶ the Montana Supreme Court found personal jurisdiction over Ford in Montana even though there was not link between the plaintiff’s injuries and the defendant’s conduct in Montana. The automobile accident occurred in Montana, but the vehicle was not designed, manufactured, assembled or sold in Montana—the Montana resident plaintiff purchased the vehicle out of state. The Montana Supreme Court found jurisdiction over Ford relying on a “stream of commerce plus” theory—Ford introduced the vehicle into the stream of commerce and engaged in additional conduct to serve the market in Montana. It advertised in Montana, was registered to do business in Montana,¹¹⁷ and operated subsidiaries in Montana. The court said, “due process does not require a *direct connection*” between the defendant’s actions and the injury, but only that the claims “arise out of” or “relate to” the defendant’s forum related activities.¹¹⁸ It found a sufficient connection in this case.

The second case, *Ford Motor Co. v. Bandemer*,¹¹⁹ is remarkably similar—the accident occurred in Minnesota, but the vehicle was not designed, manufactured, assembled, or originally sold in Minnesota. The Minnesota Supreme Court also found jurisdiction by defining the nexus prong broadly: it rejected Ford’s invitation to adopt a “giving rise to” standard under which the defendant’s contacts with the forum must have caused the plaintiff’s claims, and stayed with its previously articulated “relating to” standard. Ford’s “actions in targeting Minnesota for sales of passenger vehicles, including the type of vehicle at issue in this case” were sufficient.¹²⁰

¹¹⁴ *Id.* at 51.

¹¹⁵ *Id.* at 55.

¹¹⁶ *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 443 P.3d 407 (Mont. 2019).

¹¹⁷ The Montana Supreme Court had previously held that merely registering to do business in Montana is not sufficient for general jurisdiction. *DeLeon v. BNSF Ry. Co.*, 392 P.3d 1 (2018).

¹¹⁸ *Ford Motor Co.*, 443 P.3rd at 415.

¹¹⁹ *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744 (Minn. 2019) (emphasis added).

¹²⁰ *Id.* at 751.

Of course, it is difficult for a local court to deny a forum to a resident injured at home by a defendant with significant and substantial local contacts. Because the defendant is not “at home” in the forum, there is no general jurisdiction. And a narrow nexus standard would deny specific jurisdiction as well. As a California court of appeal bluntly put it while finding jurisdiction, “the claims alleged in this case specifically involve harm in California suffered by a California resident.”¹²¹ But the Supreme Court has told us many times that due process hinges on the defendant’s contacts with the forum, not the plaintiff’s. The Supreme Court has also evolved away from *International Shoe* questions of “fairness” to questions of “federalism.” Although while notions of federalism might not approve of a California court adjudicating the claims of a Tennessee resident in *Bristol-Myers*, Montana and Minnesota state courts certainly have an interest in providing a forum for plaintiffs injured in their states, especially when those plaintiffs are residents.

In January 2020, the Texas Supreme Court heard argument in *Luciano v. Sprayfoampolymers.com, LLC*¹²² where the Texas plaintiffs sought to recover damages to their Texas home related to the installation of an insulation product manufactured by the defendant in Connecticut. The Austin Court of Appeals had reversed the trial court’s denial of the defendant’s special appearance.¹²³ There was evidence that the defendant had a distribution center and a sales representative in Texas, but there was no evidence that the product installed at the plaintiff’s home had anything to do with these Texas connections. The evidence showed only that the plaintiffs had hired an installer of foam insulation, who happened to use this product. Certainly, Sprayfoam’s contacts with Texas were far less than Ford’s in Montana or Minnesota. At oral argument the discussion concerned “stream of commerce plus” and whether the additional conduct of the “plus” had to be directly related to the actionable conduct to pass due process muster. Alas, the case was abated and no longer appears on the court’s docket, so an answer must wait for the next case—and it does not appear that the Texas Supreme Court has one on its current docket.

E. More unanswered questions.

1. Virtual contacts.

The Supreme Court has decided no case that rests entirely on virtual contacts. Other courts often deal with them, but again the analysis and results are not uniform. Several federal circuits, including the Fifth Circuit, have adopted a “sliding scale” test based on the interactivity of a website (different from the sliding scale rejected in *Bristol-Myers*) adopted in *Zippo Mfg. Co. v. Zippo DOT Com, Inc.*,¹²⁴ which has a rather outdated view of Internet commerce. Other courts have not applied any particular test but

¹²¹ *Jayone Food, Inc. v. Aekyung Industrial Co., Ltd.*, 31 Cal.App.5th 543, 563 (Cal. Ct. App. 2019). This case involved claims against a Korean manufacturer of a cleaning agent that was sold to a California distributor who sold the product in the US, although there was no evidence the bottles that caused the injury in California were distributed or purchased there.

¹²² No. 18-0350.

¹²³ *Sprayfoampolymers.com, LLC v. Luciano*, 584 S.W.3d 44 (Tex. App.—Austin 2018, pet. granted and abated).

¹²⁴ 952 F. Supp. 1119 (1997). See also *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (adopting the *Zippo* analysis).

evaluated the defendant's purposeful activity with the forum and their relationship to the plaintiff's cause of action.¹²⁵

Neither *Walden* nor *Nicastro* were Internet cases, and the Court made clear that it was not deciding Internet issues in these opinions. In *Walden* the Court dismisses worries about the potential unfairness caused by intentional torts committed via the Internet or other electronic means, and distinguishes the defendant's tenuous Nevada contacts from "the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular state."¹²⁶ In *Nicastro*, Justice Breyer does not go beyond "adhering to our precedents" because the case "does not implicate modern concerns."¹²⁷ He questions:

[What rules would apply] when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?"¹²⁸

Many of us have the same questions and await the Court's guidance.

In *TV Azteca*, the Texas Supreme Court said it was not directly addressing jurisdiction in the Internet context,¹²⁹ but the opinion, in a case involving over-the-air transmission of television broadcasts, gives us some clues about its likely direction if faced with Justice Breyer's examples. The court held that the signals' travel into Texas and the defendants' knowledge that they did so was not purposeful availment.¹³⁰ Thus, it appears unlikely that a signal's travel to Texas through the Internet, with the knowledge that the Internet goes everywhere including Texas, would alone provide a basis for specific jurisdiction in Texas. Instead, the court in *TV Azteca* looked to the stream-of-commerce cases, and required "additional conduct" demonstrating "an intent or purpose to serve the market in the forum state."¹³¹ As in *TV Azteca*, it appears that jurisdiction over Internet sellers will require some evidence of efforts to promote their product to their Texas audience. The opinion also discusses sales through an intermediary: a defendant who made no efforts to purposefully avail itself of Texas and merely contracted with a third party who did is not subject to jurisdiction in Texas; but a defendant who intentionally targets Texas as a marketplace is subject to specific jurisdiction, and using a distributor-intermediary for the actual sales "provides no haven."¹³²

¹²⁵ See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002). See also Zoe Niesel, #*Personal Jurisdiction: A New Age of Internet Contacts*, 94 IND. L. J. 103 (2019) (Prof. Niesel teaches at St. Mary's Law School in San Antonio).

¹²⁶ *Walden*, 134 S. Ct. at 1126 n.9.

¹²⁷ *Nicastro*, 564 U.S. at 890.

¹²⁸ *Id.*

¹²⁹ See *TV Azteca*, 490 S.W. 3d at 44 n.8 ("this case does not present an Internet-based jurisdictional issue, so any discussion of that would be advisory").

¹³⁰ *Id.* at 44-45.

¹³¹ *Id.* at 46-47, quoting *Moki Mac*, 221 S.W.3d at 577. In doing so, the court held that its inquiry was broader than the Fifth Circuit's "subject and sources test" used to determine whether a defendant "aimed" the communication to the forum state under *Calder*. *TV Azteca*, 490 S.W. 3d at 47-48.

¹³² *Id.* at 51, quoting *Spir Star*, at 871.

Searcy, however, did involve twenty-first century electronic communications, and the majority and dissent disagreed about how they are to be treated in the jurisdictional analysis. In *Searcy*, the Canadian defendant had communicated with a Bermudian entity through its employees in Houston via emails and cell phone. The majority held that because the Canadian defendant did not seek a Texas seller or Texas assets, the “coincidental presence” in Houston of the employees with which it was dealing did not justify jurisdiction.¹³³ The dissenters characterized the majority opinion as improperly requiring a physical presence in Texas for jurisdiction.¹³⁴ Instead, they saw the electronic communications as being purposefully directed to Houston, and the location of the negotiated assets non-determinative: “Although bidding for Nabors’s Colombian assets could have occurred anywhere, it actually occurred in Texas, subjecting parties to the jurisdiction of Texas courts for claims arising from the bidding activities.”¹³⁵

F. Class actions.

Does Bristol-Myers mean the end of nationwide mass torts suits and class actions? Perhaps the stricter personal jurisdiction standards are another means of “tort reform,” at least if the goal is to provide a means of eliminating nationwide mass and class actions and to provide a means of resolving cases sooner. The question, though, is whether the defense bar might have “cut off its nose to spite its face” with successes in cases like *Daimler* and *Bristol-Myers*. Will the plaintiffs’ bar stop bringing products-liability suits altogether when courts close off the option of a mass action like in *Bristol-Myers*, or will the plaintiffs’ bar instead adapt, in cases like *Bristol-Myers*, by filing 50 separate suits in all 50 states?

In March 2020, several federal courts of appeals dealt with the relationship between personal jurisdiction and class actions in the wake of the *Bristol-Myers* decision. Only one addressed the issue of whether all class members must establish personal jurisdiction in the forum state. The others held that the issue was premature. All three cases involved Texas or Texans.

The Seventh Circuit, in *Mussat v. IQVIA*¹³⁶ (the opinion was written by Chief Judge Diane Wood, a Texan), held that “the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute.” Thus, it reversed the trial court’s order striking the class definition because non-Illinois members of the class could not establish personal jurisdiction.

Just the day before, the D.C. Circuit in *Molock v. Whole Foods*,¹³⁷ dodged the issue, saying that because the class is not yet certified it was too early to consider jurisdictional limits. The district court had denied Whole Foods’ motion to dismiss all nonresident putative class members for lack of jurisdiction. The court of appeals affirmed, but on alternate grounds—the motion was premature because the class was not yet certified. But the dissenting judge wrote that he “would reach the *Bristol-Myers* question and hold that class claims unrelated to Whole Foods’ contacts with the District of Columbia cannot proceed.”

The Fifth Circuit touched on the issue two weeks later in *Cruson v. Jackson National Life Insurance Co.*,¹³⁸ also declining to address the merits of the personal jurisdiction issue because it was premature. The district court had held that the defendant waived its objection to personal jurisdiction concerning class members who were non-residents of Texas by filing a Rule 12 motion to dismiss before asserting lack of jurisdiction. The court of appeals reversed, holding that because the class was not certified, the only live claims belonged to the named plaintiffs. Thus, “a personal jurisdiction objection respecting merely putative class members was not ‘available,’ as Rule 12(g)(2) requires for waiver.”

¹³³ *Searcy*, 496 S.W.3d at 73.

¹³⁴ *Id.* at 80-81.

¹³⁵ *Id.* at 90 (Guzman, J. dissenting and concurring, joined by Boyd, J.).

¹³⁶ 953 F.3d 441 (7th Cir. 2020).

¹³⁷ 952 F.3d 293 (D.C. Cir. 2020).

¹³⁸ 954 F.3d 240 (5th Cir. 2020).

IV. CONCLUSION

The Court's limitations on the exercise of general jurisdiction make sense. Because general jurisdiction carries with it the decision that any plaintiff can bring any action arising anywhere in the world against the defendant in that state, another decision could bring about absurd results. But narrow general jurisdiction requires a broader application of specific jurisdiction, especially in our "flat world" of 21st century communication and transportation. Lower courts are split, and the United States Supreme Court is split on the philosophical underpinnings of the doctrine. Thus, we continue to wait, we hope not for another generation, for clarification.