12. Judicial jurisdiction and forum access: the search for predictable rules

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1. INTRODUCTION

Private international law in the United States is comprised of three general categories: (1) judicial jurisdiction; (2) choice of law; and (3) recognition and enforcement of judgments. The well-documented revolution in choice of law in the United States in the 1960s–70s that moved from black-letter rules to more flexible standards[1] is in retreat. More recently, there has been a counter-revolution in private international law in the United States that is critical of that "new" regime of "standards" and is seeking to adopt more predictable rules. This counter-revolution can be seen, even if to a somewhat lesser extent, in the area of judicial jurisdiction; and these jurisdictional developments have mitigated the rampant forum shopping that often characterized the prior judicial jurisdictional regime in the United States.

In this chapter, I track these jurisdictional developments generally and take up another area – internet defamation and privacy – where the Supreme Court has not yet spoken, but where I suggest that jurisdictional developments in the United States are likely to result in a more predictable and efficient system than the case law that has emerged in both the European Union and Canada.

2. FROM "REASONABLENESS" TO RULES: A BIT OF BACKGROUND

Any reader of this chapter is well aware that a unique feature of any assertion of judicial jurisdiction by a state or federal court in the United States[2] is that it is subject to the constitutional limitations of the Due Process Clauses (the Fifth and Fourteenth

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[1] *See* Linda Silberman, *US Report on Conflict of Laws*, *in* 3 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 2637 (Jurgen Basedow et al. eds., 2017).

[2] State statutes or common law rules usually constitute authority for the assertion of jurisdiction in the state and federal courts. In some instances, federal statutes or federal rules govern the assertion of jurisdiction in the federal courts.

Amendments) of the United States Constitution. Since the mid twentieth century and the Supreme Court's decision in *International Shoe v. Washington*,[3] the constitutional standard required that the defendant have "minimum contacts" with the forum state such that the maintenance of the suit did not "offend traditional notions of fair play and substantial justice."[4]

To some degree, the jurisdictional bases for general jurisdiction (i.e. claims that did not necessarily have any connection with the forum) antedated the *International Shoe* case and were rooted in earlier theories of sovereignty and territoriality. Under those theories, domicile and/or residence was a sufficient basis for the forum to exercise jurisdiction over an individual defendant, and indeed a defendant's temporary physical presence in the forum state was sufficient for jurisdiction if service of process were made upon the defendant while there. By analogy, a corporation was subject to jurisdiction wherever it was incorporated or "present" in the forum; presence was established when the corporation was said to be "doing business" in the forum; and "doing business"/presence was satisfied when the defendant carried on systematic and continuous activities in the forum state. Post-*International Shoe*, however, the requirement that the corporation have "systematic and continuous activities" sufficient to subject the corporation to jurisdiction was also measured by the constitutional standard or "minimum contacts,"[5] and the case law was inconsistent and unpredictable, with limited Supreme Court guidance.[6]

International Shoe also ushered in the development of a more expansive role for specific (or what Europeans often refer to as special) jurisdiction. Even prior to *International Shoe*, some states had enacted statutes asserting jurisdiction over corporate defendants that did business in the state where the claim arose from the in-state business or against non-resident motorists who caused an accident in the forum state. Courts in these early cases adopted theories of implied consent to justify the assertion

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[3] 326 U.S. 310 (1945).

[4] *Id*. at 316.

[5] *International Shoe* was itself a case of specific jurisdiction involving a tax claim arising from the non-resident defendant's sales activities within the forum state. However, language in the case addressed both general and specific jurisdiction:

> While it has been held, in cases on which appellant relies, 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, … there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

Id. at 318.

[6] On one end of the spectrum was Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), where the entire operations of a Philippines corporation had been closed down during the Japanese occupation and moved to Ohio. The Supreme Court found that Ohio's exercise of general jurisdiction over the corporation in that case was constitutional. At the other end of the spectrum was Helicopteros v. Hall, 466 U.S. 408 (1984), where the defendant Colombian helicopter company's activity consisted of purchases of helicopters and equipment from a Texas company along with sending pilots to Texas for training and some contract negotiations there. The Supreme Court held that the Texas courts' attempt to assert jurisdiction was unconstitutional.

of such jurisdiction.[7] But with the jurisprudence of *International Shoe* indicating that jurisdiction was constitutionally appropriate over any matter that bore a reasonable and substantial connection to the forum, states enacted statutes that asserted jurisdictional authority over non-residents where the claim arose from minimal activity, including even a single act that took place within the forum state. When the Supreme Court, in *McGee v. International Life Insurance Co*.,[8] embraced the "minimum contacts" approach of *International Shoe* to sustain jurisdiction over a non-resident corporation that sold a single life insurance contract to a resident plaintiff, it appeared that this expansive approach to specific jurisdiction by the courts would follow. For a period it did, but the next case taken by the Supreme Court introduced certain constitutional limits by adding the requirement that the defendant itself engage in purposeful conduct in the forum state in order to satisfy the "minimum contacts" standard. This formulation of the constitutional "due process" test has often meant that a defendant whose product causes injury in the forum state was not necessarily subject to jurisdiction on the basis of the injury alone. In *World-Wide Volkswagen Corp. v. Woodson*,[9] the Supreme Court held that neither the New York dealer nor the New York distributor, who sold an Audi vehicle to the plaintiff in New York, was constitutionally subject to jurisdiction in Oklahoma, the state to which the plaintiff had driven the car when the gas tank exploded after an accident. The Court emphasized that an affiliation between the *defendant* and the *forum* is a critical requirement, and not merely the connection between the defendant and the subject matter of the litigation. In *Asahi Metal Industry Co. v. Superior Court*,[10] a case involving a foreign-country defendant, the Court left open the question of whether the defendant's placement of goods into the stream of commerce would satisfy "minimum contacts," and then added a second tier to the analysis that required courts to determine whether jurisdiction would also be "reasonable." Critical to the Court's finding that jurisdiction was not reasonable on the *Asahi* facts was that the main personal injury claim by the California plaintiff had been settled and the remaining litigation involved an indemnity claim by one foreign manufacturer against another foreign manufacturer. The Court noted that the "unique burdens placed upon one who must defend oneself in a foreign legal system" should be given weight in determining the constitutionality of an assertion of jurisdiction.[11] Continuing to narrow the exercise of specific jurisdiction, the Supreme Court, in *J. McIntyre Machinery, Ltd. v. Nicastro*,[12] held that a New Jersey plaintiff injured by a metal-shearing machine in a work-related accident in New Jersey could not constitutionally assert jurisdiction over an English manufacturer that distributed its machines in the United States, including

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[7] *See*, *for example*, Hess v. Pawloski, 274 U.S. 352 (1927). *See also* Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 576–77 (1958).

[8] 355 U.S. 220 (1957).

[9] 444 U.S. 286 (1980).

[10] 480 U.S. 102 (1987).

[11] For further discussion of the differences between the analysis under the *International Shoe* test and analysis under the *Asahi* framework, *see* Linda J. Silberman, *"Two Cheers" for International Shoe (And None for Asahi): An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAV. L. REV. 755 (1995).

[12] 564 U.S. 873 (2011).

this particular one to the plaintiff's employer in New Jersey, through an independent Ohio distributor. Although a four-person plurality accepted the English manufacturer's argument that the state of New Jersey was not individually targeted and thus the defendant could not be said to have purposefully availed itself of New Jersey, three Justices dissented, emphasizing that the defendant had attempted to sell its machines in the U.S. market, including New Jersey. In a concurring opinion, two Justices appeared to rest the conclusion that jurisdiction was unconstitutional on the specific facts in the record that only one machine had been sold in New Jersey.

One might be tempted to view *McIntyre* as setting forth a rule that the use of a distributor for the entire territory of the United States is not, by itself, sufficient to satisfy the minimum contacts requirement, but that conclusion is undercut by the particular facts of *McIntyre*. At least in situations where regular sales are made in the forum state by such a distributor, jurisdiction is still likely to satisfy the constitutional standard.[13] Moreover, although Supreme Court cases such as *Volkswagen*, *Asahi* and *McIntyre* have clearly restricted jurisdiction over defendants, it would be a stretch to claim that they offer clear and predictable rules. Nonetheless, the cases provide a set of guidelines that help to translate the amorphous concept of "minimum contacts" into identifiable principles for assessing the constitutional standard for jurisdiction.

As for the "reasonableness" prong of the due process analysis of jurisdiction, in domestic/interstate cases, "reasonableness" plays a less significant role than the concept might initially indicate. A recent article analyzing some 400 cases argued that "reasonableness" is usually decisive as a limitation on jurisdiction only in cases involving foreign country defendants.[14] And that sample of cases indicated that, even for cases involving foreign defendants, a dismissal for "unreasonableness" occurred in only about one-quarter of the cases.[15]

3. THE NEW ERA OF GENERAL JURISDICTION – *DAIMLER AG V. BAUMAN*

Notwithstanding that specific jurisdiction in the United States has been more restrictive than that in many other countries, general jurisdiction in the U.S. continued to be the subject of much criticism because of the broad opportunities for forum shopping it presented with respect to cases with little or no connection to the U.S. Overlooked, perhaps, was the fact that the existence of *forum non conveniens* provided some relief

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[13] *See*, *for example*, Polar Electro Oy v. Suunto Oy, 829 F.3d 1343 (Fed. Cir. 2016); Ainsworth v. Moffett Engineering, Ltd., 716 F.3d 174 (5th Cir. 2013); Willemsen v. Invacare, 282 P.3d 867 (Or. 2012). *See generally* Samuel P. Baumgartner, *Specific Jurisdiction in Products Liability Cases after McIntyre v. Nicastro and Bristol-Myers Squibb v. Superior Court*, in US LITIGATION TODAY: STILL A THREAT FOR EUROPEAN BUSINESS OR JUST A PAPER TIGER? at 59–82. (Andrea Bonomi and Krista Nadakavukaren Schefer, eds., 2018).

[14] *See* Linda J. Silberman and Nathan D. Yaffe, *The Transnational Case in Conflict of Laws – Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMP. & INTL. LAW 405, 413–14 (2017).

[15] *Id*. at 408–09.

for egregious cases of general jurisdiction, particularly when a non-U.S. plaintiff was involved, but the U.S. regime was nonetheless an outlier in jurisdictional practice.

Indeed, the new era of general jurisdiction came about somewhat surprisingly.[16] Up until 2011 the Supreme Court had decided only two general jurisdiction cases since the landmark *International Shoe* case. But in 2011, in *Goodyear Dunlop Tires v. Brown*,[17] the Court in a unanimous holding reversed an intermediate lower North Carolina state court which had asserted jurisdiction over foreign tire manufacturers for an accident that took place in France; the alleged basis for jurisdiction was that the defendants had sold similar tires in North Carolina. The conclusion that such an assertion of general jurisdiction was unconstitutional was not at all surprising, since it was clear that under Supreme Court (as well as state and federal lower court) precedents, mere sales by a corporate defendant into a state were outside the parameters of general "doing business" jurisdiction and did not meet the constitutional standard.[18] However, the Supreme Court's opinion by Justice Ginsburg went much further, stating in dicta that a corporation's affiliation with a forum must be "so continuous and systematic" as to render it "at home." Moreover, she added that the paradigm for "at home" is "the place of incorporation and principal place of business of the corporation." Post-*Goodyear*, scholars debated whether the "at home" language was merely superfluous and did not alter the existing doctrine, or whether the Court was dramatically changing the constitutional parameters for general jurisdiction. The answer finally came several years later in *Daimler AG v. Bauman*,[19] where Justice Ginsburg in the opinion for the Court stated, "we really meant what we said" in *Goodyear*. The holding and the comment were somewhat unexpected because the standard for general jurisdiction was not the issue on which the Supreme Court had taken the case.

3.1 The *Daimler* Facts and Decision

In *Daimler*, Argentine workers brought a lawsuit in California against German company Daimler AG for alleged human rights violations committed in Argentina by its Argentine subsidiary, Mercedes-Benz Argentina: the claims against the German parent Daimler were based on a theory of vicarious liability. The basis for jurisdiction

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[16] I have characterized these developments in earlier articles. *See* Linda J. Silberman, Daimler and Bristol-Myers: *What's Next for (Personal) Judicial Jurisdiction in the United States*?, in US LITIGATION TODAY: STILL A THREAT FOR EUROPEAN BUSINESSES OR JUST A PAPER TIGER? 35–57 (Andrea Bonomi and Krista Nadakavukaren Schefer, eds., 2018). (hereinafter "*What's Next for (Personal) Judicial Jurisdiction?*); Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675 (2015) (hereinafter "*The End of Another Era*"); Linda J. Silberman, Daimler AG v. Bauman: *A New Era for Judicial Jurisdiction in the United States*, 16 YBK PRIV. INT. L. 1 (2015).

[17] 131 S.Ct. 2846 (2011).

[18] *See*, *for example*, Helicopteros v. Hall, 466 U.S. 408, 418 (1984) ("[M]ere purchases, even if occurring at regular intervals, are not enough to warrant a state's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.").

[19] 134 S.Ct. 746 (2014).

over the German company was the existence of its indirect U.S. subsidiary, Mercedes-Benz USA, which is a Delaware corporation with its principal place of business in New Jersey and with various facilities in California. Mercedes USA is Daimler's exclusive importer and distributes cars to independent dealerships throughout the United States, including California. Indeed, Mercedes' California sales accounted for 2.4 percent of Daimler's worldwide sales. However, there were no allegations that Mercedes USA had any connection to the events in Argentina that gave rise to the claims.

The issue of whether the activities of Mercedes USA were sufficient to establish general jurisdiction over Mercedes itself in California had been conceded by Daimler in the district court because the *Goodyear* case had not yet been decided and Mercedes' activities, which included the presence of an office, clearly met the pre-*Goodyear* standard of continuous and systematic activities. But the issue before the court was whether the activities of Mercedes USA could be attributed or imputed to Daimler itself. The Court of Appeals for the Ninth Circuit ruled that because Mercedes' services were "important" to Daimler, and had Mercedes not performed those services, Daimler would have undertaken those activities itself. Thus, the Ninth Circuit held that Mercedes was Daimler's agent for general jurisdiction purposes. It was on that issue that Daimler filed a petition for certiorari to the Supreme Court asking, "Whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state."

The Supreme Court rejected the Ninth Circuit's view of agency and reversed, stating that the Ninth Circuit's view "stacked the deck" and created an "outcome that would sweep beyond even the sprawling view of general jurisdiction" the Supreme Court had already rejected in *Goodyear*. However, the Court did not indicate whether and/or when jurisdictional contacts of a subsidiary might be attributed to a corporate parent.[20]

More significant in the Supreme Court's *Daimler* opinion is what it went out of its way to say about general jurisdiction. It reinforced its prior dicta in *Goodyear* that for general or "all-purpose" jurisdiction, a corporation's affiliations with the state must be so continuous and systematic as to render it essentially "at home" in the forum state, pointing to the paradigm situations of place of incorporation and principal place of business.[21] It made explicit what it had only hinted at in *Goodyear*: that "continuous and systematic activities" alone are not sufficient for jurisdiction over claims unrelated to those activities. In a footnote, the Court stated that in an exceptional case, a corporation's operations in a state other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render it essentially at home in that state.[22] But in *Daimler*, the Court emphasized that the corporation's activities did not approach that level.

Justice Sotomayor wrote a concurring opinion in which she agreed that the case should be dismissed for lack of jurisdiction. However, her reasoning was quite different. She noted that the "continuous and systematic contacts" standard as the

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[20] The Supreme Court did refer to the possibility of classic veil-piercing via an alter-ego theory. *Id.* at 759, n.13, but just how such an exception would operate is unclear.

[21] *Daimler*, 134 S.Ct. at 760–61.

[22] *Id*. at 761, n.19.

ground for asserting general jurisdiction over a corporate defendant had been "taught to generations of first-year law students."[23] That the case involved foreign plaintiffs, foreign defendants and foreign conduct was a sufficient reason to find the assertion of jurisdiction "unreasonable."

Interestingly, Justice Ginsburg's opinion for the majority expressly rejected the role of "reasonableness" with respect to assertions of general jurisdiction, stating that such an inquiry would be "superfluous" and would compound the jurisdictional analysis. Justice Ginsburg's opinion expressed concern not only about the transnational implications of jurisdictional reach, but also about the need to establish clear and predictable rules.

3.2 The Role of Specific Jurisdiction Post-*Daimler*

Justice Ginsburg's opinion in *Daimler* rested in part on her view that specific jurisdiction can fill any gaps created by the narrowing of general jurisdiction. In responding to Justice Sotomayor's concurrence in *Daimler* that the restriction on general jurisdiction would result in injustice,[24] Justice Ginsburg wrote: "Remarkably, Justice Sotomayor treats specific jurisdiction as though it were barely there."[25] The difficulty for Justice Ginsburg, however, is that Supreme Court decisions such as *Asahi* and *McIntyre*[26] with their requirement of purposeful conduct by the defendant have imposed obstacles to the assertion of specific jurisdiction, particularly in situations where a foreign country defendant causes an injury to a U.S. plaintiff in the United States.

Under the European regime,[27] general jurisdiction basically mirrors the newly minted U.S. rule. Indeed, in *Daimler* Justice Ginsburg invoked the European Regulation in explaining the perspective of other countries on the question of general jurisdiction. Citing to the EU Regulation, Justice Ginsburg noted that a corporation may generally be sued only in the nation in which it is domiciled, which is defined as the corporation's "statutory seat," "central administration" or "principal place of business." However, she neglected to add that under the European regime, "special" (i.e., specific) jurisdiction often reaches further than the constitutional limits permitted by U.S. due process and thus does a better job of compensating for the limited assertion of general

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[23] *Id*. at 770.

[24] Justice Sotomayor would have decided the case on the ground that the assertion of jurisdiction over Daimler would be been unreasonable. *Id*. at 764, 773 (Sotomayor, J., concurring). The majority, however, rejected that framework for general jurisdiction, noting that in light of its rule that a corporation should be sued only where it is genuinely at home, a reasonableness inquiry would be "superfluous". *Id*. at 762, n.20.

[25] *Id*. at 758, n.10.

[26] It should be noted that Justice Ginsberg, along with Justices Kagan and Sotomayor, dissented in *McIntyre*. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 893 (2011).

[27] *See* Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (hereinafter EU Regulation (Recast)), Art. 4, Art. 63. Under the Regulation, general jurisdiction is based on the domicile of the defendant, and the domicile of an entity other than an individual is defined as its statutory seat, central administration or principal place of business.

jurisdiction. For example, under the EU Regulation, the occurrence of particular events in the forum – such as the place of the commission of the tortious act or the effect of the injury in a tort case – is a sufficient basis for the exercise of special jurisdiction.[28] The relevant touchstone under the European (and other systems) is the relationship between the subject matter of the litigation and the forum, rather than the requirement in the United States for a purposeful connection between the defendant and the forum. Other provisions of the Regulation reflect additional concerns such as efficiency. Such values are found in provisions of the EU Regulation such as Article 8(1), which permits jurisdiction over other defendants when one of the defendants is domiciled in the forum state, so long as the claims are closely connected and it is expedient to hear them together to avoid irreconcilable judgments; and Article 8(2), which permits a person to be sued as a third party in an action in a warranty or other third-party proceedings in the court seized of the original proceeding, unless the proceedings were instituted with the object of undermining the jurisdiction of the otherwise competent court.

In addition to the constitutional requirement that the defendant engage in purposeful conduct in the forum to establish specific jurisdiction in the United States, another element of U.S. due process is also required for such jurisdiction: that the claim arise out of the activity or event that creates the contact with the forum – that is, the nexus requirement. In a tort case, nexus is easily satisfied when the tortious act or injury giving rise to the claim takes place in the forum state. Other fact scenarios present greater difficulty. Several recent cases have been brought in the United States against foreign banks that carry on banking activity in the United States and are alleged to have funneled money to terrorist groups who committed terrorist acts in various countries.[29] Jurisdiction is asserted on the basis of the bank's business activity in the United States, but the question is whether the particular claim bears a sufficiently close nexus to that activity – that is, whether the claims for aiding and abetting a terrorist act "arise out of" the bank's U.S. activity. In a number of cases, lower courts have held that the bank defendants' activity was sufficiently related to the alleged claims to constitutionally satisfy due process,[30] thus providing a relatively broad reach to bring claims against foreign defendants into U.S. courts and potentially mitigate some of the effect of *Daimler*.

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[28] EU Regulation (Recast), Art. 7

[29] *See*, *for example*, Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161 (2d Cir. 2013).

[30] *See*, *for example*, *Licci*, *id*. *See also* Strauss v. Credit Lyonnais, 175 F. Supp. 3d 3 (E.D. N.Y. 2016); Weiss v. Nat'l Westminster Bank PLC, 176 F. Supp. 3d 264 (E.D.N.Y. 2016). For further discussion of these cases, *see* Linda J. Silberman, *What's Next for (Personal) Judicial Jurisdiction in the United States?*, *supra* note 16, at 42–46.

4. SPECIFIC JURISDICTION – THE IMPACT OF *BRISTOL-MYERS SQUIBB*

4.1 The *Bristol-Myers Squibb* decision

The Supreme Court had little to say about the "arising out of" requirement until the recent decision in *Bristol-Myers Squibb v. Superior Court*,[31] which involved not so much the classic "arising out of" paradigm, but a joinder situation involving parallel claims by multiple plaintiffs injured in multiple states.[32] In *Bristol-Myers*, plaintiffs from various states had purchased drugs from a Delaware corporation (BMS), headquartered in New York, with its principal place of operations in New York and New Jersey, and with extensive business activities and offices in California. California residents who purchased their drugs in California and suffered injury there and residents of other states who purchased their drugs outside California and were injured outside California brought product liability claims in California state court. The California Supreme Court, in a four-to-three decision, upheld jurisdiction over BMS with respect to all the plaintiffs' claims, characterizing even the claims brought by non-California purchasers as giving rise to specific jurisdiction.[33] The California majority described the claims by both the California and non-California plaintiffs as based on a "single, coordinated nationwide course of conduct"; therefore, the majority found that even the claims of the non-California purchasers could be said to "arise out of or relate to" the California activities.[34] The majority adopted a "sliding scale" standard for specific jurisdiction, by which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[35] Given BMS's activities in California, the majority concluded that all of the claims, including those of the non-resident purchasers, had a substantial connection to California and could be said to "relate to or arise out of the California activities" of BMS. The dissent disagreed, stating that the claims of the non-California plaintiffs were merely "parallel" and that the majority had undermined the relatedness requirement that provides the essential distinction between general and specific jurisdiction.[36]

The Supreme Court granted certiorari and reversed the California Supreme Court in an eight-to-one opinion by Justice Alito.[37] The Court rejected any "sliding scale" approach to general jurisdiction and attempted to articulate a more predictable line between general and specific jurisdiction. The U.S. Supreme Court criticized the

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[31] 137 S.Ct. 1773 (2017).

[32] I had commented on the difference in an earlier article when the case was before the California Supreme Court. *See* Linda J. Silberman, *The End of Another Era*, *supra* note 16, at 684–88.

[33] Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874 (Cal. 2016).

[34] *Id*. at 888.

[35] *Id*. at 889.

[36] *Id*. at 898–99 (Werdegar, J., dissenting). The dissent, citing my article, Silberman, *The End of Another Era*, *supra* note 16, argued that the majority's approach was so overly broad as to reintroduce general jurisdiction by another name.

[37] Bristol-Myers Squibb v. Superior Court, 137 S.Ct. 1773 (2017).

California Supreme Court for blurring the lines between general connections to the forum and the type of connection necessary for specific jurisdiction, thereby creating a "loose and spurious form of general jurisdiction." In reconfirming that there is a strict line between general and specific jurisdiction, the U.S. Supreme Court emphasized that an "adequate link" must exist between the specific claims and the forum state.[38]

Justice Sotomayor dissented. She first set forth the three requirements for the exercise of specific jurisdiction over a non-resident defendant: (1) the defendant must have purposefully availed itself of the forum; (2) the claim must "arise out of or relate to" the defendant's forum conduct; and (3) the exercise of jurisdiction must be reasonable.[39] On the issue of "relatedness," Justice Sotomayor argued that the fact that the injuries arose in states other than California "does not mean that the claims do not 'relate to' the advertising and distribution efforts that Bristol-Myers undertook in California."[40] Justice Sotomayor expressed particular concern about the piecemeal litigation that is created by the majority position in that multiple plaintiffs may be unable to join their claims in a single action. Of course, plaintiffs with multiple claims can join together in a forum where the defendant is "at home," and the plaintiffs in *Bristol-Myers* could have brought their claims in Delaware or New York. Indeed, Justice Sotomayor appears to have overlooked the point that the *Bristol-Myers* plaintiffs engaged in a deliberate forum-shopping strategy by structuring the lawsuit to try to keep the case in California state court.[41]

4.2 The *Bristol-Myers* Impact on the "Arising under" Requirement

Although the *Bristol-Myers* decision is one of the only Supreme Court cases to address the "arising out of/related to" prong of the due process jurisdictional analysis, it did so in the unusual context of multiple claimants injured in multiple states. Thus, it is not clear that *Bristol-Myers* sheds much light on the more traditional type of case where a defendant's contacts with the forum have some type of link with the plaintiff being injured elsewhere. The question in cases such as the bank cases discussed earlier[42] is

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[38] However, as to what constitutes such an "adequate link", the Court said only that "principally, an activity or occurrence [must] take … place in the forum state." *Id*. at 1781.

[39] *Id*. at 1785–86 (Sotomayor, J., dissenting). Curiously, the majority never referred to the three-part framework in its due process analysis. Moreover, by stating that Walden v. Fiore, 134 S.Ct. 1115 (2014) "illustrates" the requirement that forum contacts be related to the specific claims, Justice Alito's opinion appeared to conflate the purposeful availment prong (on which *Walden* turned) with the "arising from/related to" requirement. *Bristol-Myers*, 137 S.Ct. at 1781–82. Alternatively, it is possible that the failure to mention the three-part framework combined with dicta that treats the first two prongs interchangeably presages a move to merge or combine prongs one and two.

[40] *Bristol-Myers*, 137 S.Ct. at 1786 (Sotomayor, J., dissenting).

[41] The strategy was to join as a defendant the distributor McKesson, a citizen of California, in order to prevent removal of the case to the federal court, per 28 U.S.C. §1441(b)(2). The strategy also included limiting the number of California plaintiffs to fewer than 100 to avoid treatment of the proceeding as a mass action under 28 U.S.C. §1332(d)(11)(B), thus preventing removal to federal court under 28 U.S.C. §1453.

[42] *See supra* text accompanying notes 29–30.

whether the connection must be a "proximate cause" or whether a "but-for" connection will suffice. The issue came before the Supreme Court in *Carnival Cruise Lines v. Shute*,[43] where a Washington plaintiff brought suit in Washington federal court for injuries suffered in waters off the coast of Mexico. The plaintiff had purchased her tickets as the result of the defendant's advertising activities in Washington. After certifying the question of the interpretation of the Washington statute to the Washington Supreme Court, which determined that the plaintiff's claim "arose from" the defendant's business advertising in Washington, the Ninth Circuit ruled that such an exercise of jurisdiction was consistent with due process. The Supreme Court granted certiorari, but decided the case based on a forum selection clause requiring that the case be adjudicated in Florida.

4.3 The Impact of *Bristol-Myers* on Nationwide Class Actions

The types of cases potentially more directly impacted by the *Bristol-Myers* decision are nationwide class actions. Indeed, in footnote 4 of her dissenting opinion in *Bristol-Myers*, Justice Sotomayor questioned whether a plaintiff injured in the forum state would be able to represent a nationwide class of plaintiffs who were injured elsewhere.[44] The majority did not really address the precise point, but Justice Alito, responding to the "parade of horribles" envisioned by the plaintiffs, observed that *Bristol-Myers* concerned the due process limits of the exercise of specific jurisdiction by a state and "leaves open the question of whether the Fifth Amendment imposes the same requirements on the exercise of such jurisdiction by a federal court."[45]

Nationwide federal class actions might be distinguished from *Bristol-Myers* in several ways, in particular with respect to absent class members. However, as to named class representatives, the district courts have consistently found that this situation is much the same as *Bristol-Myers* and requires that each named class member be able to assert jurisdiction over the defendant.[46] The one exception is a federal court case, *Sloan v. General Motors LLC*,[47] which involved resident and non-resident plaintiffs asserting federal (Magnuson Moss Warranty Act) claims and various state law consumer fraud claims on behalf of a nationwide class. Although personal jurisdictional defenses were held to have been waived with respect to various non-resident plaintiffs,[48] five additional out-of-state named plaintiffs had been added after the *Bristol-Myers* decision, and the court thus addressed the jurisdictional objections raised as to these recently added claims. The California district court first ruled that certain concerns identified in *Bristol-Myers* did not apply to litigation involving a federal question case in federal court, explaining that the "due process analysis does not incorporate the

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[43] 499 U.S. 585 (1991).

[44] *Bristol-Myers*, 137 S.Ct. at 1789, fn. 4.

[45] *Id*. at 1783–84.

[46] *See*, *for example*, Spratley v. FCA US LLC, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017).

[47] 287 F. Supp. 3d 840 (N.D. Cal. 2018).

[48] The defendant had failed to raise any objection that these existing named plaintiffs lacked jurisdiction over it, even though the Supreme Court had recently decided *Bristol-Myers*.

interstate sovereignty concerns that animated *Bristol-Myers*."[49] The court relied on language in *Bristol-Myers* that focused on requiring a defendant to submit to the "coercive power of a State that may have little legitimate interest in the claims in question," and a concern that could be "decisive," irrespective of whether the assertion of jurisdiction by a state imposed a burden on the defendant. However, in the instant case, because the court was a federal court, there was no risk of exceeding the bounds of state sovereignty and subjecting residents of another state to the coercive power of its courts. Nonetheless, the court still believed it necessary to analyze the traditional prongs of the due process test and focused on whether the non-resident plaintiffs' claims could be said to "arise out of" GM's forum-related contacts. Acknowledging that there was no independent connection between the out-of-state plaintiffs' claims and the defendant's California contacts, the court resorted to what it conceded was an extension of pendent personal jurisdiction.[50] Notwithstanding that the plaintiffs asserting the new claims were not the same plaintiffs that could assert jurisdiction over the defendant, the court found that the claims did arise out of a common nucleus of operative facts and that there were special factors that contributed to the finding of a sufficient nexus to justify pendent personal jurisdiction. First, the court was likely to be able to assert jurisdiction on behalf of absent non-resident class members in any event and thus could even include the named out-of-state plaintiffs. Second, because of the waiver point, other non-California plaintiffs could assert their claims under various state laws, so the burden on the defendant of adding five addition plaintiffs under the law of two additional states was minimal. Finally, the court found it desirable to avoid the piecemeal litigation that would otherwise likely occur.

The *Sloan* case is an outlier with respect to the impact of *Bristol-Myers* on named plaintiffs in a class action. However, the application of *Bristol-Myers* to require unnamed class members – that is, absent class members – to obtain personal jurisdiction over the defendant is more complicated, and the court decisions are divided. Courts that find *Bristol-Myers* inapplicable in the context of absent class members note that in various other contexts, absent class members are not considered to be parties at all.[51] For example, in *Feller v. Transamerica Life Ins. Co*.,[52] the plaintiffs sought to certify a nationwide class of Transamerica life insurance policy holders. Although the named plaintiffs were from California, the defendant argued that the class should also be limited to plaintiffs who were in California when they purchased the policy or who purchased their policy before Transamerica moved its headquarters from California, because the court lacked personal jurisdiction over

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[49] *Sloan*, 287 F. Supp. 3d at 859.

[50] The Ninth Circuit Court of Appeals had previously accepted the more traditional application of pendent personal jurisdiction whereby a nationwide service of process statute for plaintiff's claims justifies the court hearing related state claims for which there is no independent basis of jurisdiction.

[51] *See* Devlin v. Scardelletti, 536 U.S 1, 9–10 (2002) (stating that non-named class members "may be parties for some purposes and not for others"). *See also* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (holding that for diversity of citizenship purposes, only the citizenship of the parties acting as representatives of the class is to be considered).

[52] 2017 WL 6496803 (C.D. Cal. Dec. 11, 2017).

Transamerica as to the claims of putative class members outside those groups. The court rejected the argument, noting that there are important differences between a class action and a mass tort action for purposes of personal jurisdiction over the defendant and emphasizing that the proposed class representatives were the only plaintiffs actually named in the complaint.

As *Feller* suggests, if unnamed class members are not considered parties, then jurisdiction over the defendant will be required only with respect to the named class representative (or representatives). The remaining question, perhaps to be considered at the later certification stage, might then be whether the named class member(s) can adequately represent a class consisting of out-of-state absent class members.[53]

In further explaining why absent class members in a putative class action should be treated differently than formal plaintiffs in a mass tort action, one court noted that a class qualifies for class action treatment only when it meets the Rule 23 requirements of numerosity, commonality, typicality, adequacy of representation, predominance and superiority, and these elements supply due process safeguards not applicable in the mass tort context of *Bristol-Myers*.[54] Also, as another court pointed out, the economies achieved by aggregating claims under Federal Rule 23 would be compromised if courts in class actions had to ascertain whether specific jurisdiction could be asserted over each absent class member's claims.[55]

Recently, several courts have taken the position that they should not determine whether non-resident class members have jurisdiction over the defendant until a class is certified. In one such case, *Chernus v. Logitech*,[56] New Jersey and Pennsylvania residents had brought a nationwide (except California consumers)[57] class action against a California corporation, alleging claims under New Jersey, Pennsylvania and California state consumer fraud statutes and state common law for misrepresentations relating to sales of its digital home security systems. The court dismissed the named Pennsylvania plaintiff (asserting claims under Pennsylvania law) for lack of specific jurisdiction, but retained the claims of the named New Jersey plaintiff and the nationwide putative class members. With respect to the unnamed class members, the court stated: "because the class members are not yet parties to this case – and they may not be – absent class certification, I need not analyze specific jurisdiction with respect to their claims."[58] At the same time, the court noted that the ability of the named plaintiff to represent non-New Jersey class members was likely to depend on the choice of law determination, and if California law (the home state of the defendant) did not

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[53] Under Rule 23 of the Federal Rules of Civil Procedure, the named class member(s) must be able to satisfy requirements of numerosity, commonality, typicality, adequacy of representation and predominance and superiority, and questions of the applicable law could present obstacles, particularly with respect to issues of adequacy and predominance.

[54] Molock v. Whole Foods Mtk., Inc., 297 F. Supp. 3d 114 (D.D.C.2018), motion to certify appeal granted, 317 F.Supp. 3d 114 (D.D.C. 2018).

[55] Haj v. Pfizer, 2018 WL 3707561 (N.D. Ill. 2018).

[56] 2018 WL 1981481 (D.N.J. Apr. 27, 2018).

[57] A state-wide class action on behalf of California consumers had previously been filed in California. Porath v. Logitech Inc., No. 3:18cv3091 (N.D. Cal. May 23, 2018).

[58] *Chernus*, at *8.

apply, the named New Jersey plaintiff would likely not be a proper class representative for out-of-state class members.

Although somewhat cryptic in its analysis, the court seems to suggest that putative class members themselves need not satisfy specific jurisdiction over the defendant, so long as the named plaintiffs can establish specific jurisdiction over the defendant. At the same time, if the named plaintiff(s) in a nationwide class cannot establish the prerequisites for certification – here, for example, because of differences in the applicable law governing the claims – then the absent class members will be dismissed in any event because the class cannot be certified.

Other district courts have applied *Bristol-Myers* strictly to reach unnamed class members as well as named class representatives. Indeed, in *Anderson v. Logitech, Inc*.,[59] an Illinois plaintiff filed a nationwide class action against the same California corporation and involving the same facts as the earlier-filed New Jersey *Chernus* action, discussed above. Rather than stay the entire action, the district court in Illinois dismissed the putative class members for lack of specific jurisdiction over the defendant, stating that "a nationwide class action is not significantly different from a mass tort suit involving a multitude of individual claims." The court noted earlier Illinois district court cases that had also applied *Bristol-Myers* to a nationwide class action.[60] For example, in *De Bernardis v. NBTY, Inc*.,[61] that court opined that it was:

> more likely than not based on the Supreme Court's comments about federalism that the courts will apply *Bristol-Myers* to outlaw nationwide class action in a form [sic], such as in this case where there is no general jurisdiction over the Defendants. There is also the issue of forum shopping … but possible forum shopping is just as present in multi-state class actions.

The court in *DeBernardis* also rejected the plaintiffs' argument that the *Bristol-Myers* restriction on specific jurisdiction applied only in a state court action and not one brought in federal court. Acknowledging that it was an "open question" whether the Fifth Amendment imposed the same restrictions on the exercise of personal jurisdiction as the Fourteenth Amendment, the court pointed out that in this case the federal court's jurisdiction was based on diversity over state law claims, and those cases have traditionally been understood as implicating the jurisdictional limits of the Fourteenth Amendment.[62]

Also in federal question cases where there is no nationwide process, several courts have refused to limit *Bristol-Myers* as pertaining only to state courts and state law claims,[63] explaining that "in order to exercise personal jurisdiction over FedEx, not

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[59] 2018 WL 1184729 (N.D. Ill. Mar. 7, 2018).

[60] *See* Bernardis v. NBTY, Inc., 2018 WL 461228 (N.D. Ill. Jan. 18, 2018); McDonnell v. Nature's Way Prod. LLC, 2017 WL 486 4910 (N.D. Ill. Oct. 26, 2017).

[61] 2018 WL 461228 (N.D.Ill. Jan. 18, 2018).

[62] *Id*. at 125–26.

[63] *See*, *for example*, Roy v. FedEx Ground Package Systems, Inc., 2018 WL 2324092 (D.Mass., May 22, 2018).

only must the Fifth Amendment be satisfied, but so, too, must the requirements of Fed. R. Civ. P. 4, which indirectly bring the strictures of the Fourteenth Amendment into play."[64]

Eventually, the Supreme Court will have to resolve the issue as to whether named or unnamed absent class plaintiffs (or both) must obtain personal jurisdiction over the defendant, or whether class actions are sufficiently different from mass torts to warrant a result different than *Bristol-Myers*. In the interim, one strategy for plaintiffs may be the option of multi-district litigation – where individual plaintiffs can bring their own suits in a forum that has specific jurisdiction over a defendant because the defendant has caused injury to plaintiffs in that state. Such actions can later be transferred to a single forum under 28 U.S.C. §1407 and consolidated for pretrial purposes.[65]

5. THE CHALLENGE OF THE INTERNET: U.S., CANADIAN, AND EUROPEAN PERSPECTIVES

5.1 Purposeful Conduct for Intentional Torts

In the United States, the assertion of jurisdiction over defendants based on internet activity has created additional complexities. Cases arise in a variety of contexts: online defamation, trademark and copyright infringement, takedown notices and online marketplaces where commercial activity gives rise to liability.

Even outside the internet context, jurisdiction in intentional tort cases seemingly warranted special treatment. In the 1984 Supreme Court decision *Calder v. Jones*,[66] jurisdiction in a libel action was upheld over a writer and editor of the *National Inquirer* who had written a story about the actress Shirley Jones, who the defendants knew lived in California and where the magazine had its largest circulation. In sustaining jurisdiction, the Court pointed to the fact that the defendants had "expressly aimed" and targeted their actions to the forum state where the effects of that conduct might be felt.

A more recent decision, *Walden v. Fiore*,[67] emphasized that it is not the injury to a forum resident caused with the defendant's knowledge that suffices for jurisdiction; rather, the defendant's suit-related conduct must create a substantial connection with the forum state.[68] In *Walden*, Drug Enforcement Agency (DEA) agents carried out a search of the professional gambler plaintiffs, who were flying back from Puerto Rico to their home in Nevada, but landed in Atlanta, Georgia to take their connecting flight.

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[64] *Id*. at *9.

[65] In In re Chinese-Manufactured Drywall Product Liability Litigation, 2017 WL 5971622 (E.D.La., Nov. 30, 2017), actions were consolidated in a multi-district litigation in Louisiana, and the court certified a multi-state class of plaintiffs. The court ruled that the defendant had the necessary minimum contacts with each state where each of the plaintiffs initially brought a claim. *See generally*, Andre Bradt, *The Long Arm of Multidistrict Litigation*, 59 WILLIAM & MARY L. REV. 1 (2017).

[66] 465 U.S. 783 (1984).

[67] 134 S.Ct. 1115 (2014).

[68] *Id*. at 1125.

Believing the plaintiffs were involved in drug trafficking, the defendant agents seized the plaintiffs' money at the airport in Atlanta, promising the funds would be returned if they turned out to be legitimate. Notwithstanding that the plaintiffs once back in Nevada submitted documents showing the legitimate source of their funds, the agents filed a probable cause affidavit, later judged to be misleading, that resulted in forfeiture of the funds. The plaintiffs filed an action against the DEA agents in federal court in Nevada, alleging that their Fourth Amendment rights had been violated. The Ninth Circuit upheld jurisdiction, relying on *Calder* and holding that the defendants had committed an intentional act expressly aimed at Nevada, where the defendants knew the plaintiffs would suffer harm. The Supreme Court reversed in a unanimous opinion by Justice Thomas. The Court held that none of the defendants' actions connected them to Nevada and emphasized that mere injury to a forum resident was not a sufficient connection by the defendant to the forum. The fact that the defendants directed conduct at plaintiffs whom they knew had Nevada connections was insufficient, because it would improperly attribute the plaintiffs' forum connections to the defendant. The effect of the loss of the use of funds in Nevada was the result of where the plaintiffs chose to be and not any meaningful connection by the defendant. Distinguishing *Calder*, the Court de-emphasized Shirley Jones' connection to California and highlighted the other activity of the defendant with the forum: phone calls to California sources for information, writing a story they knew would be circulated in the state and the brunt of the reputational injury.

5.2 The Internet Defamation Cases

Not surprisingly, the *Calder/Walden* standard has been the focus in defamation cases involving statements made on the internet. In the absence of "express aiming" at the foreign state (and not just the forum plaintiff), courts have rejected jurisdiction.[69]

A second aspect of the U.S. internet defamation cases is the scope of a court's jurisdiction in a case where there has been sufficient purposeful activity to warrant jurisdiction. That issue is the result of the "single publication rule" adopted in most states of the United States. The single publication rule is a rule of tort law that requires a plaintiff suing for defamation to bring a single suit to recover for damages caused in all 50 states and prevents any further suit once an initial action has been brought.[70] The single publication rule has the advantage of preventing the fragmentation of a claim in multiple forums, but the disadvantage of creating forum-shopping opportunities if the number of potential forums is not limited.

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[69] *See*, *for example*, Griffis v. Luban, 646 N.W. 2d 527 (Minn. 2001) ("[W]hile the record supports the conclusion that [defendant's] statements were intentionally directed at [plaintiff], whom she knew to be an Alabama resident, we conclude that the evidence does not demonstrate that [defendant's] statements were 'expressly aimed' at the State of Alabama."); Scott v. Lacky, 587 Fed. Appx. 712 (3d Cir. 2014) (rejecting jurisdiction where defendant had no jurisdictionally relevant contacts with the forum other than discussion group comment about plaintiff who resided there).

[70] RESTATEMENT (SECOND) OF TORTS, § 577A (1979).

The Supreme Court of the United States addressed these questions in the context of traditional print distribution in *Keeton v. Hustler Magazine.*[71] In *Keeton*, a New York resident sued Hustler Magazine, an Ohio corporation with its principal place of business in California, in federal court in New Hampshire based on the substantial sales of its magazine there. The plaintiff had chosen New Hampshire because it was the only forum in which the statute of limitations had not yet run. In upholding jurisdiction, the Supreme Court rejected the appellate court's view that New Hampshire was an unfair forum in that the plaintiff could recover for damages caused in all 50 states and New Hampshire had only an attenuated interest in the controversy. The Supreme Court explained that New Hampshire had an interest in redressing injury to reputation that occurred within its borders, and in "cooperating with other States, through the 'single publication rule', to provide a forum for efficiently litigating all issues and damages arising out of a libel in a unitary proceeding."

The Supreme Court's approach in *Keeton* prevents the fragmentation of a defamation claim in multiple forums, but at the same time creates vast forum-shopping opportunities since a single claim for full damages may be brought in any forum where even minimal damage has occurred. The ubiquitous nature of the internet exacerbates the problem and has led to a strategy known as "libel tourism"[72] that could have further repercussions in the internet context.

However, the "purposeful conduct" or "express aiming" requirement developed in *Walden* and applied by the lower courts in various types of internet cases may mean that the mere accessibility of the website in a particular state will still fall short of that constitutional requirement.[73] Thus, it may be that the number of forums will be limited and most likely it will be the home state of the plaintiff (if directed there) – along with the home state of the defendant per *Daimler* – that will ultimately have jurisdiction to hear a case and recover for all the harm under the single publication rule.[74]

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[71] 465 U.S. 770 (1984).

[72] Where defamation occurs transnationally across borders, both U.S. and foreign plaintiffs often choose to file a defamation action in a foreign jurisdiction where the foreign law is more favorable to the victim than U.S. law. A foreign court is likely to assert jurisdiction and apply its own law, notwithstanding the fact that the defendant is located and the publication took place in the United States.

[73] *See*, *for example*, be2LLC v. Ivanov, 642 F.3d 555 (7th Cir. 2011) (accessible website in plaintiff's home state not sufficient for jurisdiction over defendant if defendant did not purposefully target the forum state); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 415 (9th Cir. 1997) (finding no personal jurisdiction over defendant internet service provider who had "no contacts with Arizona other than maintaining a home page that is accessible to Arizonans, and everyone else, over the Internet"). *Compare* Rilley v. MoneyMutual, LLC, 863 N.W.2d 789 (Minn. 2015) (finding personal jurisdiction in action by Minnesota plaintiff for violations of Minnesota consumer protection laws against Nevada corporation engaged in online money lending where defendant had done business with 1000 customer it knew to be Minnesotans.

[74] *See*, *for example*, Panavision Int'l, Ltd. Pship v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (finding personal jurisdiction in trademark dilution case where defendant knew the harm would likely be felt in plaintiff's home state and purposefully interjected into the state by sending plaintiff a demand letter); Blumenthal v. Drudge, 992 F. Supp. 44, 57 (D.D.C. 1998) ("By targeting the Blumenthals who work in the White House and live in the District of Columbia, Drudge knew that the primary and most devastating effects of the statements he made would be

The single publication rule also has relevance to the question of the applicable law. In multistate defamation cases, the effect of providing a single cause of action also means there is a single choice of law on most issues. The Restatement (Second) of Conflict of Laws §150(1) applies the law of the state which has the "most significant relationship to the occurrence and the parties" in a multistate defamation case and provides in §150(2) that this state will usually be "the state where the person was domiciled at the time, if the matter complained of was published in that state."[75] That rule would seem to apply in the internet context as well.

It is interesting to compare the approach to jurisdiction and choice of law in Europe and Canada when defamation occurs over the internet. In interpreting the earlier Brussels Convention provision authorizing jurisdiction in the courts "for the place where the harmful event occurred"[76] in a traditional print defamation case, the European Court of Justice (ECJ) held in *Shevill v. Press Alliance*[77] that a plaintiff who sued for harm caused by the distribution of an alleged defamatory publication could sue only for the harm suffered in that state, even where the plaintiff sued in the court of the Member State where the plaintiff was habitually resident; full damages could be recovered only if the lawsuit were brought in the place where the publisher was established. The *Shevill* rule, unlike the *Keeton* approach, opens the door for a multiplicity of forums to recover for limited harm. Moreover, even if the plaintiff sued at home (as she did in *Shevill*), the damages were limited to the harm suffered in that Member State. In a later decision, the ECJ slightly modified its rule in the context of online defamation. In *eDate Advertising and Others*,[78] the ECJ held that in the event of an infringement of personality rights that takes place on a website, the person harmed has the option of bringing a suit for damages for all the harm caused in the courts of the Member State in which the "centre of his interests" is based, as well as the place where the publisher is established. At the same time, the victim of online defamation can also sue the defendant for damages in any Member State where the website was accessible, but only for the damages suffered in that respective state. In expanding the forums in which the plaintiff may bring a single action for all damage suffered by an online infringement of personality rights, the ECJ observed that the alleged infringement of personality rights is felt most keenly where the plaintiff's interests are centered, since that is where his or her reputation will be affected. The ECJ reasoned

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felt in the District of Columbia. He should have had no illusions that he was immune from suit here.") (internal citations omitted); Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010) (finding personal jurisdiction where "defendants specifically aimed their tortious conduct at [plaintiff] and his business in Illinois with the knowledge that he lived, worked, and would suffer the brunt of the injury there") (internal citations omitted).

[75] With respect to a corporate plaintiff, the state with the "most significant relationship" will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §150(3) (1971).

[76] Article 5(3) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, now Article 7(2) of the EU Regulation (Recast).

[77] [1995] E.C.R. I-415.

[78] [2011] E.C.R. I-10269.

that those courts are best placed to assess the impact of how particular content has affected the rights of a person and also accord with the aim of predictability, since both the applicant can identify the court in which suit might be brought and the defendant can foresee the court before which he or she could be sued. In *eDate*, where the plaintiff was a natural person, the ECJ concluded that the "centre of interests" was the Member State of the person's habitual residence. Thus, to the extent *Shevill* remains good law, a plaintiff suing for print defamation can sue for the entire damage only in the Member State in which the publisher is established; whereas for internet defamation, the plaintiff can sue for all damage in the Member State where the publisher is established (probably overlapping with the ability to sue a defendant at its domicile) or in the Member State of the plaintiff's habitual residence. Even in the internet context, however, the alternative of multiple suits for injury suffered in particular Member States remains.

Moreover, in an even more recent case, *Bolagsupplysningen OU v. Svensk Handel AB*,[79] the ECJ modified the rule yet again for a corporate plaintiff that brought suit to rectify incorrect information on the defendant's website and to collect damages for the harm caused. The ECJ held that the "centre of interests" of the Estonian corporate plaintiff was not necessarily Estonia, its place of registration, because as to a legal personality "regard must be had to all of the circumstances, such as its seat and fixed place of business, the location of its customers and the way and means in which its transactions are concluded." The ECJ explained that giving a plaintiff the option to bring an action before the court of the Member State in which the center of interests is located for all the alleged damages is justified "in the interests of the sound administration of justice and not specifically for the purposes of protecting the applicant." Accordingly, the ECJ ruled that a legal person has its center of interests at the "place where its commercial reputation is most firmly established," which must be "determined by reference to the place where it carries out the main part of its economic activities." In this case, the plaintiff carried out its main business in Sweden, where the site that featured the incorrect information and defamatory content was operated. Also, the website was available only in Sweden and the content was written in Swedish. In addition, the ECJ ruled that, to the extent a victim of defamatory material has brought an action for removal or rectification, that claim must be made before a court which can rule on the entirety of the action (i.e. a court in the Member State which is the "centre of interest of the plaintiff or a court in the Member State where the publisher is established"). The ECJ explained that information and content placed online is of a "ubiquitous nature," and that only a single and indivisible application for removal can be made. Although the ECJ appeared to accept the "mosaic" approach – permitting a suit for damage for the particular harm suffered in the Member State where the website is accessible and has caused harm in that state – it rejected that regime in the context of injunctive relief.

The Advocate General had urged the ECJ to take a more ambitious step and reject the mosaic approach for both damage and injunctive relief in internet defamation cases. The Advocate General argued that the "place giving rise to the harm" and "the place

[79] [2018] Case C-194/16.

where the harm occurred" in cases involving infringements of personality rights over the internet, such as *eDate* and *Bolagsupplysningen*, should be reinterpreted. The Advocate General noted that the event giving rise to the harm (Article 7(2)) was construed in *Shevill* to take place in the Member State where the publisher was established, thus often overlapping with the rule in Article 4(1) that also permits the defendant to be sued for all damage suffered in the court of the Member State where the defendant is domiciled. The Advocate General argued that the parallel place in the internet context should be the place where whoever is in charge of publishing and altering the content of the online information is located. As for the other aspect of Article 7(2) – the place where the harm occurred – the Advocate General urged that the mosaic approach as developed in *Shevill* and extended in *eDate* be abandoned for internet cases. In *eDate*, Article 7(2) had already been interpreted to permit a plaintiff suing for infringement of personality rights in the internet context to sue for all its damage in the courts of the Member State where its interests are centered. Thus, the Advocate General argued that there was no need to permit any other actions for partial harm. The Advocate General pointed out that cases involving print distribution, such as *Shevill*, involve a limited distribution of printed copies in a particular Member State, and thus permitting an action with a territorially based limit on damages makes sense. However, information published online is accessible instantly and everywhere, often in multiple translations. Thus, a large number of Member States can have jurisdiction simultaneously for the harm suffered in a state, resulting in a multiplicity of forums and a resulting fragmentation of claims within these forums.

Were the Advocate General's approach adopted, only two forums would be open to the claimant in an internet defamation action, and both would confer upon the competent court full jurisdiction to award damages for all the harm suffered and all available remedies under the respective national laws. The first would be the domicile of the defendant and the second would be the center of interests of the claimant. No other action would be permitted, to that extent mirroring the U.S. single publication rule. However, the ECJ in *Bolagsupplysningen* rejected that view and took a different path that continues to allow the fragmentation of damage claims in any Member State where a website is accessed and causes injury there but limits injunctive relief to the court of the Member State where the website is controlled and the Member State where the applicant has its center of interests. Those two Member States are also forums in which a claim for the entire damage can be asserted.

The Supreme Court of Canada, in a recent decision, also addressed issues of jurisdiction and applicable law in an online defamation case. In *Haaretz.com v. Goldhar*,[80] Canadian businessman Goldhar, who also owned an Israeli soccer team, brought a defamation suit in the Ontario courts against Israel's oldest daily newspaper, *Haaretz*, which publishes in print and online. The alleged defamatory article was written and edited in Israel and discussed Goldhar's business and his approach to management generally, and in particular, the way in which he treated the Israeli soccer club. Defendant *Haaretz* brought a motion to stay the action, arguing that the Ontario courts lacked jurisdiction or, alternatively, that Israel was a clearly more appropriate

[80] 2018 S.C.C 28.

forum. The judge dismissed the motion, holding that Ontario not only had jurisdiction, but also was the appropriate forum. The judge noted that Goldhar had agreed he would only seek damages for harm suffered in Canada and had also agreed to pay for the travel and accommodation expenses of *Haaretz*'s witnesses. The Ontario Court of Appeal dismissed the appeal, with one judge dissenting. The dissenting judge accepted the majority view that jurisdiction was proper, but argued that Israel was clearly the more appropriate forum and that the case should be dismissed on grounds of *forum non conveniens*.

The Canadian Supreme Court, in a six-to-three decision, reversed the lower courts and dismissed the case. Three Justices issued a plurality opinion with three other Justices concurring in separate opinions and with a vigorous dissent by three Justices. Writing for the three Justices in the plurality, Justice Côté agreed that under the Canadian approach of identifying presumptive factors that establish a relationship between the subject matter of the litigation and the chosen forum, the situs of the tort is well established.[81] In an internet-based defamation, the situs of the tort is the place where the defamatory statements are read, accessed or downloaded. Noting that in internet defamation cases a presumptive connecting factor is easily established, Justice Côté emphasized that under Canadian case law, a presumption of jurisdiction may be rebutted by a showing that it would "not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction."[82] In an internet defamation case, she suggested that factors such as an absence of reputation in the chosen forum might also rebut the presumption. However, in the present case, where the plaintiff lived and operated his businesses in Ontario and these facts were known to the defendants, Justice Côté concluded that the presumption was not rebutted. She then proceeded to consider whether the lower court had erred in finding that Israel was not a clearly more appropriate forum than Ontario under the doctrine of *forum non conveniens*. In particular, Justice Côté quoted the view of the dissenting judge in the Court of Appeal: "given the ease with which jurisdiction *simpliciter* may be established in a defamation case, a motion judge must conduct a robust and carefully scrutinized review of the issue of *forum non conveniens*."[83] Justice Côté pointed out that because the rebuttal stage of jurisdiction fails to address all consequences of the "virtually automatic" presumption of jurisdiction in defamation cases, courts must be particularly attuned to concerns about fairness and efficiency on a *forum non conveniens* motion. Specifically, Justice Côté observed that "where a plaintiff enjoys a reputation in multiple forums, publication may allow jurisdiction to be properly assumed in all of them, without regard to how fair or efficient it may be to proceed in the chosen forum."[84] Accordingly, she concluded that there should be a greater role for *forum non conveniens* in these cases.[85]

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[81] *Id*. at para. 37. For a summary of the Canadian approach, see Linda J. Silberman, Goodyear *and* Nicastro: *Observations from a Transnational and Comparative Perspective*, 63 S. CAR. L. REV. 591, 599 (2012).

[82] Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 S.C.R. 572.

[83] Haaretz.com v. Goldhar, 2018 S.C.C 28, para. 18 (internal quotations omitted).

[84] *Id*. at para. 48.

[85] *Id*.

Although acknowledging that the decision by the motion judge was entitled to deference, Justice Côté identified various errors made by the motion judge in evaluating various fairness aspects of having a trial in Canada, including whether witnesses in Israel could be compelled to testify by video conferencing. In addition, Justice Côté found that the motion judge had erred in focusing solely on the plaintiff's reputation in Ontario. Justice Côté also criticized the motion judge for relying too heavily on the fact that Ontario law would be applied by the Ontario court and failing to consider the applicable law in the alternative forum – here Israel. More generally, she argued that applicable law should be accorded little weight in the *forum non conveniens* analysis where jurisdiction is established on the basis of the situs of the tort.[86] At the end of the day, Justice Côté concluded that the defendant faced substantial unfairness and inefficiency if a trial were held in Ontario; and because the plaintiff had a reputation in both Ontario and Israel, the interests of the defendant argued for a trial in Israel.[87]

Two Justices joined Justice Côté's opinion and three others wrote separate concurring opinions, raising particular disagreements to specific issues discussed by Justice Côté. Justice Karakatsanis, although agreeing that the case should be dismissed on *forum non conveniens* grounds, stated that she did not believe that a comparative choice of law analysis was appropriate;[88] moreover, she did not accept that the plaintiff's Israeli reputation should be a material factor in analyzing the fairness factors.[89] Justice Abella also wrote separately to urge that the choice of law analysis in defamation cases be modified by replacing the *lex loci delicti* rule with a test based on the place where the most substantial harm to the plaintiff's reputation occurred.[90] In this case, she concluded that the place of most substantial harm to Goldhar's reputation was Israel, and that as a result, Israeli law should apply. She also suggested that "it is worth considering whether the same approach should be applied to determining jurisdiction."[91] In her view, because an internet tort is theoretically committed anywhere there is a single download, the presumption of the situs of the tort in this context should be able to be rebutted if the defendant can show that the most harm to the plaintiff's reputation occurred elsewhere.[92] However, returning to the *forum non conveniens* analysis which was the basis of the plurality's ruling, Justice Abella relied on her view that Israeli law should apply, and "on that basis," Israel was the "clearly more appropriate" forum.[93] Justice Wagner also concurred and agreed with Justice Abella

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[86] *Id*. at para. 90.

[87] *Id*. at para. 95.

[88] *Id*. at para. 100 (Karakatsanis, J., concurring).

[89] *Id*. at para. 101.

[90] *Id*. at para. 109 (Abella, J., concurring). A similar suggestion had been made by various commentators in the past. *See* J-G. Castel, *Multistate Defamation: Should the Place of Publication Be Abandoned for Jurisdiction and Choice of Law Purposes?*, 28 OSGOOD HALL J. J. 153, 168 (1990); C. Martin, Tolofson *and Families in Cyberspace: The Changing Landscape of Multistate Defamation*, 31 U.B.C. L. REV. 127, 157 (1997).

[91] *Id*. at para. 120.

[92] *Id*. at para. 129.

[93] *Id*. at para. 136. Justice Abella added that the remaining factors in a *forum non conveniens* analysis, such as comparative convenience and expense to the parties, juridical advantage, fairness and enforcement, also favored Israel as the forum.

that the choice of applicable law in an internet defamation case should be based on the place where the most substantial harm to the plaintiff's reputation occurred.[94] Accordingly, he also agreed with her that Israel was the "clearly more appropriate" forum. However, he added that a Canadian court should not conclude that it does not have jurisdiction over a dispute with a significant connection to Canada simply because greater reputational harm occurred elsewhere. He emphasized that concerns raised by the unique nature of internet defamation were best addressed by changes to the choice of law rule, rather than by changes to the jurisdiction analysis.[95]

Chief Justice McLachlin, joined by Justices Moldaver and Gascon, dissented. Their essential argument was that a Canadian citizen who is allegedly defamed for Canadian business practices in an article published online in his home province (Ontario) is entitled to vindicate his or her reputation in that home province.[96] The dissent explained that predictability is enhanced with the use of the presumptive connecting factors and the situs of the tort is an appropriate presumptive rule.

Although a presumptive rule may be rebutted with a showing by the defendant, the introduction of the rebuttal rests on concern for the foreseeability of the defendant in responding to proceedings in the plaintiff's choice of forum. The dissenters acknowledged that the concern was particularly acute in an internet defamation case where forum shopping was often possible, but emphasized that in this case it was entirely foreseeable that a Canadian citizen and resident would choose to vindicate his Canadian reputation in a Canadian court.[97] As for *forum non conveniens*, the dissenters offered a point-by-point response to both the plurality and concurrences. First, the dissenters criticized their colleagues for interfering with the motion judge's exercise of his discretionary power, noting that the essence of their ruling was that they would have weighed the evidence differently.[98] The dissenters also rejected Justice Côté's view that a more robust and carefully scrutinized version of *forum non conveniens* was necessary in internet defamation cases. The dissenters argued that this new standard would frustrate the predictability and stability that are at the core of the present framework.[99] In disputing that Israel was a clearly more appropriate forum than Ontario, the dissenters stated that only the factor of comparative convenience for the parties and witnesses favored Israel. Moreover, they agreed that the applicable law should be given "due weight" in a *forum non conveniens* analysis, but rejected the suggestion that the Court adopt the "place of most substantial harm" as the choice of law rule, arguing that it is highly subjective, would lead to complex preliminary motions and has only limited academic support in Canada.[100] They explained that the *lex loci delicti* rule operates correctly in defamation cases, since it is logical that a court of a jurisdiction in which

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94 *Id*. at paras. 144–45 (Wagner, J., concurring).
95 *Id*. at paras. 147–48.
96 *Id*. at para. 151 (McLachlin, C.J., Moldaver, J., and Gascon, J., dissenting).
97 *Id*. at paras. 170–73.
98 *Id*. at para. 179.
99 *Id*. at para. 174.
100 *Id*. at para. 198.

the publication occurred should be permitted to apply its own law, even if a tort took place simultaneously in another jurisdiction.[101]

The conflicting opinions in the Canadian Supreme Court highlight not only the jurisdictional question of the appropriate court in an internet defamation case, but also the related questions of applicable law and *forum non conveniens*. I find both the European Union and Canadian approaches to internet defamation cases flawed, for different reasons. In the EU, apparently the mosaic approach will continue as to damages (but not injunctive relief), although a plaintiff will be able to sue for the entire damage suffered in the Member State of its habitual residence as well as the defendant's domicile and the place where the publisher is in control of the information (which will often be the same). Still, the potential for a multiplicity of forums remains. In Canada, for internet defamation cases the Canadian Supreme Court appears to have diminished the impact of its system of "presumptions" that enhanced predictability. It has not only opted for a more robust role for *forum non conveniens*, but also introduced confusion about the role for choice of law on the issue of forum access.

If I am correct about how courts in the United States will handle internet defamation cases, that solution is a more attractive one. The potential number of forums will be limited and will include: (1) the state where the defendant is "at home," most likely overlapping with the place where the alleged conduct has occurred; (2) the place where the plaintiff is domiciled (or perhaps a place where the plaintiff enjoys a substantial reputation), to the extent that the statements are "expressly aimed" there.[102] In any of these forums, the plaintiff must bring a single claim for damages. And so far, the issue of *forum non conveniens* has not emerged as playing a significant role in these cases.[103] Such a framework has the advantages of predictability, limited forum shopping and efficiency.

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[101] *Id.* at paras. 208–209.

[102] An interesting and comprehensive proposal with respect to "Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments" has been put forward by Reporters Erik Jayme and Symeon Symeonides for the Institut de Droit International. With respect to jurisdiction, the following states are proper forums: (1) the home state of the person claimed to be liable for the injury caused by the posted material; (2) the state in which the critical conduct of the person claimed to be liable occurred; (3) the home state of the person who suffered injury if the posted material was accessible in that state or the person suffered injury there, unless the defendant took active measures to prevent access to the material in that state and did not derive any pecuniary or other significant benefit from the accessibility of the material in that state; or (4) the state in which most of the injurious effects occurred or may occur, unless the defendant took active measures to prevent access to the material in that state; and a reasonable person could not have foreseen that its conduct would cause any injury in that state. In addition, the proposal rejects the "mosaic principle" and adopts instead the "holistic principle" (similar to the "single publication rule"), and provides for one action and one law for all injuries. Finally, a state that has jurisdiction under these provisions may not refuse to exercise it on the ground that the action should be brought in another state. See Institut de Droit International, Eighth Commission, Final Report (November 21, 2018).

[103] *See*, *for example*, Batzel v. Smith, 2001 WL 1893843 (C.D.Cal., June 5, 2001); Nordlicht v. Discala, 139 So. 3d 951 (Fla.App. 2014).

5.3 U.S. Internet Jurisdiction Cases in Other Contexts

As noted earlier, in the United States the question of what activity of an internet provider constitutes purposeful availment arises in cases outside the intentional tort of defamation. In a recent trademark infringement case, *Plixer Int'l, Inc. v. Scrutinizer GmbH*,[104] a Maine firm brought suit under the Lanham Act against a German company that offered cloud-based services[105] through an interactive website attracting customers from around the world, including the United States. The Maine company, which provided similar services, claimed that the defendant's use of the name "Scrutinizer" infringed its mark, diverted customers and confused the public. The German defendant – which did not have employees in the United States, did no advertising directed toward the United States, maintained no servers in the United States and accepted payment only in euros – objected to personal jurisdiction. The district court, looking to the defendant's contacts with the United States as a whole under Federal Rule 4(k)(2), determined that the defendant could be said to "have wanted, if not targeted" business from the United States and accepted transactions that resulted in both a substantial number of customers and a sturdy revenue stream from the United States.[106] The Court of Appeals for the First Circuit affirmed the assertion of jurisdiction even while acknowledging that the mere operation of a commercial interactive website should not subject the operator to jurisdiction anywhere in the world. But the Court of Appeals noted that the district court had concluded that the defendant had used that website to engage in "sizable and continuing commerce with United States customers." The appeals court then distinguished the instant situation from traditional "stream-of-commerce" cases, noting that the defendant's service goes only to customers it has accepted and thus there is a "clearer picture" of an intent to serve the forum. The Court of Appeals noted that Scrutinizer could have limited access to its website by U.S. users, but did not. As a result, it concluded that the defendant had voluntarily serviced U.S. customers and in this context rejected the argument that specific targeting is necessary to constitute purposeful availment. Noting Justice Breyer's concurrence in *McIntyre*, the Court of Appeals pointed to the defendant's "regular flow or regular course of sales" in the United States to conclude that Scrutinizer had purposefully availed itself of the U.S. market and "could reasonably have anticipated" being hauled into a U.S. court. The Court of Appeals found these factors consistent with decisions by other appellate jurisdictional decisions involving internet activities. Finally, in assessing the "reasonableness" prong for the exercise of jurisdiction, the court gave some weight to the German defendant's burden of defending in a foreign legal system, but concluded that it was outweighed by the U.S. interest in the scope and application of U.S. trademark law and the U.S. plaintiff's interest in obtaining relief in a U.S. forum.

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104 905 F.3d 1 (1st Cir. 2018).

105 The defendant is described as an information technology company that provides its customers with a "self-service platform" to help customers build better software. The defendant purports to "provide a controlled cloud environment in which customers can run open-source and proprietary software analysis tools and their own automated tests." See Plixer Int'l v. Scrutinizer Gmbh, 293 F. Supp. 3d 232 (D.C. Maine 2017).

106 293 F. Supp. 3d at 241.

Other types of cases, such as product liability and commercial contract cases, may also involve internet activity. For the most part, the standards for the exercise of specific jurisdiction as expressed in *Asahi* and *McIntyre* have been applied in these types of cases. Thus, when a manufacturer ships a product directly through its own website to a plaintiff and that product causes injury, a court in a plaintiff's home state can exercise specific jurisdiction.[107] When an intermediary website is used, the jurisdictional question may turn on the amount of website use[108] or the knowledge of where the products are actually shipped to.[109] Thus, these cases appear to track the analyses in the traditional jurisdiction cases.

6. CONCLUSION

The most recent Supreme Court decisions – *Daimler* and *Bristol-Myers* – reflect the U.S. Supreme Court's attempt to provide more predictable rules for the exercise of personal jurisdiction and to curb the broad forum-shopping opportunities that previously existed. *Daimler* may be the more groundbreaking of the two decisions by changing the age-old understanding of what was necessary for general jurisdiction. As a result, attention turned to consideration of whether there might be an expansion of specific jurisdiction; but the Supreme Court in *Bristol-Myers* resisted any blurring of the lines between general and specific jurisdiction. The Court held that specific jurisdiction continues to require a firm connection between a defendant's forum activity and a plaintiff's claim in order to satisfy due process. Left open for the moment, however, is the impact of *Bristol-Myers* on nationwide class actions and whether named and/or unnamed plaintiffs will be required to have an independent basis of jurisdiction over a defendant.

This survey of recent U.S. jurisdictional developments is part of an overall theme I am developing for my 2020 Hague Academy general course lectures—that there has been a counter-revolution in U.S. private international law that exhibits a preference for a rule-oriented approach to issues rather than the adoption of broad, open-textured standards. One might think that the topic of judicial jurisdiction – which has had a constitutional overlay of "minimum contacts" and "reasonableness" – would not fit comfortably into that thesis. However, in the area of general jurisdiction, the Supreme Court in *Daimler* has set forth a predictable and specific constitutional limitation that puts the U.S. in an approximate line with the European Union rule and that of many other countries. Even with respect to specific jurisdiction, where my thesis is most vulnerable, I think it can be argued that the Supreme Court has generated more

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[107] *See*, *for example*, Cataraha v. Elemental Prism, LLC, 2018 WL 3448283 (D. Mont. July 17, 2018).

[108] *Compare* Boschetto v. Hansing, 539 F.3d 1011 (9th Cir. 2008) (where the transaction in question constituted the defendant's only use of eBay, there was insufficient purposeful availment of the forum state *with* Guffey v. Ostonakulov, 321 P.3d 971 (Okla. 2014).

[109] *See*, *for example*, Davis v. USA Nutra Labs, 2016 WL 9774945 (D.N.M. Dec. 21, 2016) ("Due to the existence of several intermediaries, it cannot be demonstrated that manufacturer knew its product was being shipped to the forum.").

predictable guidelines as to the constitutional limitations than what had come earlier. Finally, although a final word from the Supreme Court is awaited, the internet defamation cases in the U.S. appear to reflect an efficient rule-based principle that delivers greater predictability than the approaches undertaken in either the European Union or Canada. It is a wonderful irony, I think, that it is a new jurisdictional regime in the United States that might lead the way for a rule-based approach to judicial jurisdiction and forum access in such cases.