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Expanded protection for defendants on rise in location of litigation

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Location, location, location is not just a mantra applicable to real estate. Whether personal jurisdiction, venue, or forum non conveniens, in civil litigation the proper location for the litigation is a fundamental right of defendants, the protection of which has been expanding recently, and may yet expand more in both Illinois state and federal court.

Beginning with the unanimous decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US (2011), *Walden v. Fiore*, 571 US 277 (2014), and *Daimler AG v. Bauman*, 571 US 117 (2014) and continuing with the 8-1 decisions in *BNSF Railway v. Tyrrell*¸ 581 US (2017) and *Bristol-Meyers Squibb Co. v. Superior Court of California*, 582 US (2017), the U.S. Supreme Court, in opinions, all but one of which was written by Justice Ruth Bader Ginsburg, significantly narrowed where defendants could be sued for that exercise of personal jurisdiction be consistent with the due process clause of the 14th Amendment. This protection may expand yet more depending on the outcome of the recently argued case of *Ford Motor Company v. Montana Eighth Judicial District Court*, in which the question presented was, "May a state court, consistent with the Due Process Clause, exercise personal jurisdiction over a nonresident defendant when none of the defendant's contacts with the state caused the plaintiff's claims?"

Following decisions from the recent U.S. Supreme Court, both temporally and as a matter of binding precedent, the Illinois Supreme Court in *Rios v. Hamby*, 2020 IL 125020 held that it was inconsistent with due process for Illinois courts to exercise jurisdiction over an out-of-state defendant as to the claims of out-of-state plaintiffs for personal injuries suffered outside of Illinois from a device manufactured outside of Illinois.

In *Buron v. Lignar*, 2020 IL App (1st) 192152, the court reversed the denial of a motion to dismiss for lack of personal jurisdiction in a case in which the accident occurred in Indiana, the defendant driver resided in Indiana, and his employer was a Massachusetts corporation with its principal place of business in Massachusetts. The court essentially overruled *Gaidar v. Tippecanoe Distribution Service, Inc.*, 299 Ill.App.3d 1034 (1998), stating "the reasoning of the *Gaidar* court is contrary to the holding of the Supreme Court in *Daimler AG*, 571 U.S. at 139 n. 20, and the reasoning of our supreme court in *Aspen American Insurance*, 2017 IL 121281, Para. 19."

Still more recently, in *Jovanovich v. Indiana Harbor Belt*, 2020 IL App (1st) 192550-U, the court reversed the trial court and found no personal jurisdiction over a defendant in Illinois courts in a FELA case arising from an injury in Indiana, but in which the defendant had most of its railroad track and a training facility in Illinois.

Venue does not get nearly as much attention as does personal jurisdiction, but as seen in the Illinois Supreme Court decision in *Tabirta v. Cummings*, 2020 IL 124798, it can be just as powerful. The *Tabirta* court, in a decision that will likely have ramifications given how many people are working at home since March, held that the term "other office" in 735 ILCS 5/2-102(a) does not include the home office of a part-time salesman for

a foreign corporation with its principal place of business in Randolph County and a dispute arising out of an accident that occurred in Ohio. The scope of the application of this case will need to be seen as a concurrence from Justice Thomas Kilbride asserted that the decision is limited to the case's peculiar facts.

Notwithstanding that, venue should not be forgotten by defense counsel as it is a statutory right that is not based upon discretion as is forum non conveniens especially with regard to the doing business method of laying venue that requires that the company have its "usual and customary" business in the county. The Illinois Supreme Court held in *Bucklew v. G.D. Searle Company*, 138 Ill.2d 282, 290 (1990) that "doing business in a county for purposes of venue requires a greater quantum of activity than is necessary under due process to sustain jurisdiction over a foreign party." In *Buron*, we learned that 10% was not sufficient for the defendant to be "at home" for the purposes of personal jurisdiction and so the percentage of revenue from sales in the county must exceed that amount for venue to be proper. *Gardner v. International Harvester*, 113 Ill.2d 535, 541 (1986) (solicitation does not apply to the venue analysis),

The means of transferring cases that garners the most attention in Illinois is forum non conveniens, including from the General Assembly with the proposal discussed in this space on March 12, to eliminate the right to transfer a case intrastate on that basis. Recent decisions in *Brandt v. Shekar*, 2020 IL App (5th) 190137, *Pratt v. Archer Daniels Midland Company*, 2020 IL App (4th) 190476-U, and *Shaw v. Haas*, 2019 IL App (5th) 180588, all held that intrastate transfer was proper. A case recently argued before the Illinois Appellate Court, 1st District, *Evans v. Patel*, may bring still another decision of note in this area of the law.

Central to defense practice is the use of the available tools to protect the defendant from litigating in courts that do not have jurisdiction over them, in venues that are statutorily improper, and forums that are inconvenient. As they should, plaintiffs seek out favorable jurisdictions, venues, and forums, and defense counsel should use the tools available to protect their clients on this most basic of procedural rights.
