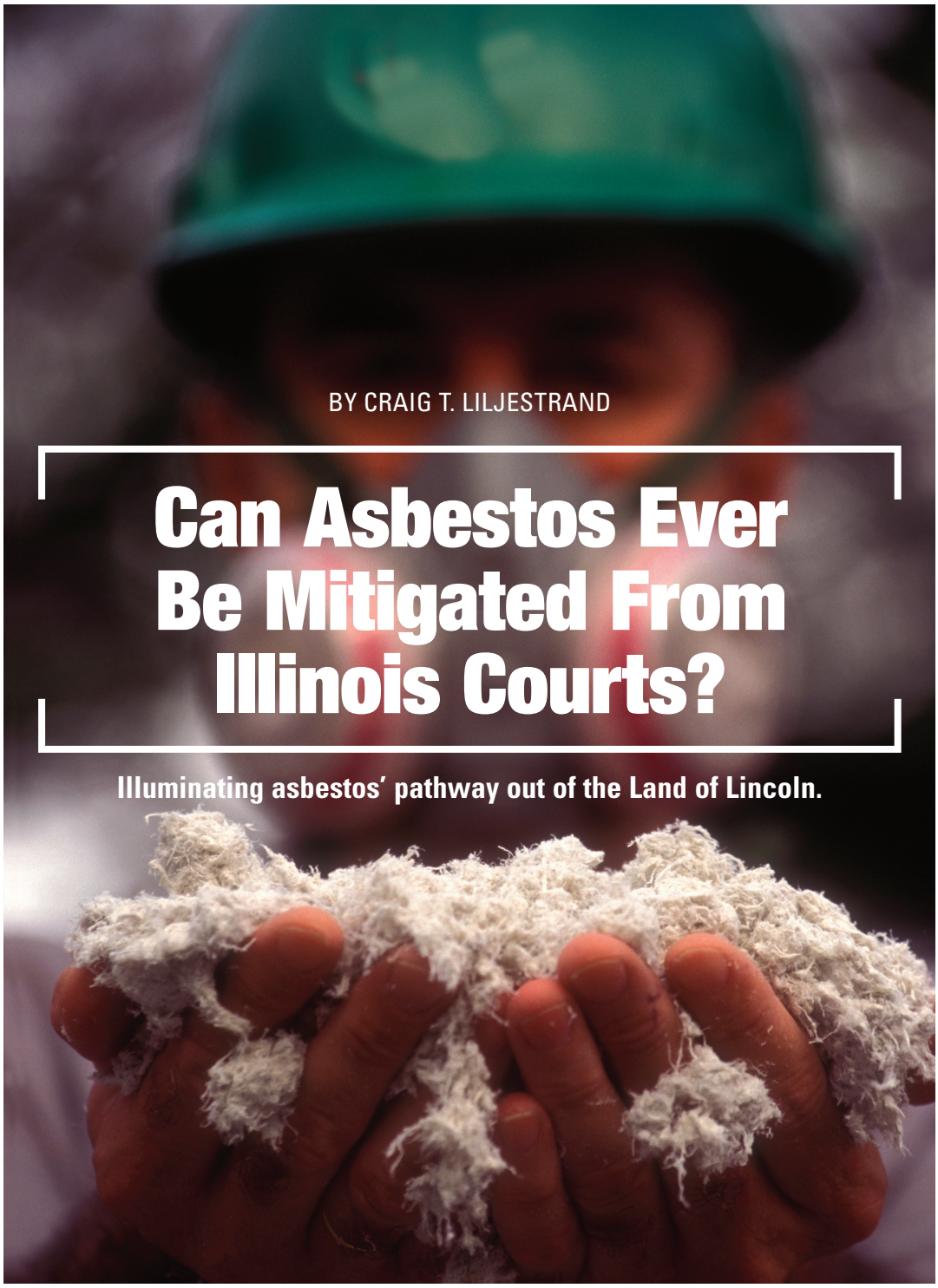

BY CRAIG T. LILJESTRAND

Can Asbestos Ever Be Mitigated From Illinois Courts?

Illuminating asbestos' pathway out of the Land of Lincoln.

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FOR DECADES, ILLINOIS HAS BEEN A POPULAR LEGAL DESTINATION FOR plaintiffs' counsel looking to litigate their respective toxic tort cases and take advantage of what they believe are plaintiff-friendly exposure laws and sympathetic juries in certain venues. Many asbestos claims are filed on behalf of plaintiffs without any connection to Illinois. Most of these plaintiffs live, work, and claim to have been exposed in Indiana, Michigan, or Wisconsin; some plaintiffs come from farther away. Despite Illinois' *forum-non-conveniens* stance having been settled by the Illinois Supreme Court since 2012, plaintiff firms continue to file case after case in Illinois courts.

In addition to the out-of-state plaintiff filings, plaintiff firms have also brought many out-of-state defendants into Illinois asbestos litigation—"the name first ask questions later" approach, which raises more than a few eyebrows from the defense bar familiar with Illinois Supreme Court Rule 137(a). Both the U.S. Supreme Court in *Daimler AG v. Bauman*[1] and the Illinois Supreme Court in *Aspen American Insurance Co. v. Interstate Warehousing, Inc.*,[2] discussed below, make clear that there are obvious impediments to obtaining personal jurisdiction in Illinois courts over out-of-state companies. But the overall numbers of defendants named in Illinois asbestos cases do not seem to be coming down.

Recent rulings from the U.S. Supreme Court provide defense counsel with precedent for raising personal-jurisdiction issues in asbestos cases. Using these rulings, defense counsel for any foreign corporate defendant served in Illinois must be prepared to raise a personal-jurisdiction defense and have their client dismissed. The decisions from the U.S. Supreme Court should be utilized by defense counsel to put an end to forum shopping. These cases also provide a sense of predictability as to how Illinois courts should rule when counsel for corporate defendants challenge personal jurisdiction in Illinois.

U.S. Supreme Court

Daimler AG v. Bauman. Unless "exceptional circumstances" are found, then due process does not permit general jurisdiction in states where a corporation is not "at home," defined as the state either of its incorporation or principal place of business.[3] Accordingly, a corporation is "at home" where it "engages in a substantial, continuous, and systematic course of business."[4]

BNSF Railway Co. v. Tyrrell. A railroad's employing 2,000 employees (or half of its workforce) and maintaining 2,000 miles of track in the state were insufficient factors for it to be "at home."[5] The railroad was neither incorporated in nor maintained its principal place of business in the state, and, accordingly, there was no jurisdiction.

Bristol-Meyers Squibb, Co. v. Superior Court. Each plaintiff in a multiplaintiff lawsuit must establish jurisdiction for its individual claim.[6] There was no personal jurisdiction for a multiplaintiff suit filed by mostly nonresident

1. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).
2. *Aspen American Insurance Co. v. Interstate Warehousing, Inc.*, 2017 IL 121281.
3. *Daimler AG*, 571 U.S. at 138.
4. *Id.*
5. *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).
6. *Bristol-Meyers Squibb, Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

TAKEAWAYS >>

- U.S. Supreme Court opinions in *Daimler AG and Aspen American Insurance Co.* present impediments to forum shopping and obtaining personal jurisdiction in Illinois courts.
- Expect plaintiffs to aggressively find ways to legitimate a defendant's business connections to Illinois to support specific jurisdiction.
- Defense attorneys may employ numerous counter-strategies challenging a defendant's claim to a particular Illinois-based forum via various motions, filings, and affidavits.

RECENT RULINGS FROM THE U.S. SUPREME COURT PROVIDE DEFENSE COUNSEL WITH PRECEDENT FOR RAISING PERSONAL JURISDICTION ISSUES IN ASBESTOS CASES. USING THESE RULINGS, DEFENSE COUNSEL FOR ANY FOREIGN CORPORATE DEFENDANT SERVED IN ILLINOIS MUST BE PREPARED TO RAISE A PERSONAL-JURISDICTION DEFENSE AND HAVE THEIR CLIENT DISMISSED.

plaintiffs. The most substantial factor was the nonresident plaintiffs claimed injury from a drug they did not purchase, obtain, or ingest in the forum state. It was insufficient that other plaintiffs (who were residents) purchased, obtained, or ingested the drug in the forum state; the claims of the resident plaintiffs could not support the claims of the nonresident plaintiffs. The defendant employed more than 100 people, sold 187 pills of the drug for more than $900 million in revenue, and employed more than 100 people in the state, but its regulatory work, marketing, manufacturing, labelling, and shipping of the drug occurred elsewhere.

Illinois courts

The most recent decisions from the Illinois Supreme and Appellate courts also provide support for defendants challenging personal jurisdiction in Illinois.

Aspen American Insurance Co. v. Interstate Warehousing, Inc. The court held the existence of an unrelated warehouse in Illinois fell "far short of showing" Illinois was "a surrogate home" for a foreign corporation.[7] If operating a warehouse was by itself sufficient, then a corporation would be "at home" wherever its warehouses were located. Although a foreign corporation registered to do business was subject to the same duties as a domestic corporation, registration "in no way suggests" a corporation consents to general jurisdiction.

Campbell v. Acme Insulations, Inc. General personal jurisdiction is not automatic wherever a company performs a "substantial, continuous, and systematic course of business."[8] GE was incorporated in New York and maintained its principal place of business in Massachusetts, but employed 3,000 people at 30 facilities in Illinois and conducted business there since 1897. GE contended it was not "at home" because only 2 percent of its U.S. operations income and 2.4 percent of its U.S. workforce involved Illinois. The court agreed and denied jurisdiction.

Jeffs v. Ford Motor Co. Ford was incorporated in Delaware and maintained its principal place of business in Michigan.[9] Accordingly, it would be "at home" in Illinois only if "exceptional circumstances" were found. Seven-and-a-half percent of its employees were based in Illinois, 5 percent of its independent dealerships were located in Illinois, and 4.5 percent of its sales occurred in Illinois. The court found those contacts were insufficient for Ford to be "at home" in Illinois. Similarly, maintaining an agent to receive service of process, which was required for Ford as an out-of-state corporation to do business in Illinois, did not constitute consent to jurisdiction.

Cebulske v. Johnson & Johnson. Jurisdiction must be based on the defendant's own affiliations with the state;[10] the defendant's relationships with another party are insufficient for jurisdiction. The plaintiff sued a trade association whose members sold products that allegedly injured the plaintiff. The court found the ties between the defendant and its members were insufficient for jurisdiction, stating: "Due process requires that a defendant be brought into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the state."[11]

Denton v. Air & Liquid Systems Corps. Despite not working at a DuPont location in Illinois, the plaintiff argued DuPont's "substantial, continuous, and systematic contacts" created jurisdiction.[12] The court disagreed, finding the plaintiff "concede[d] that decedent's alleged injuries do not arise out of or relate to DuPont's contacts with Illinois."[13] Further, DuPont was neither incorporated in nor maintained an Illinois principal place of business.

Cook County trial courts

There have been very few rulings on motions to dismiss for personal jurisdiction in Cook County asbestos cases. Cook County Circuit Court Judge Clare E. McWilliams had typically determined

ISBA RESOURCES >>

- Jeffrey Gordon, *Illinois Supreme Court Clarifies Legal Standard in Asbestos Civil Conspiracy Litigation*, Bench & Bar (Jan. 2020), law.isba.org/2vkroCh.
- Cameron Turner & Sean Phillips, *Remove or Remain? Trying Asbestos in Illinois*, 106 Ill. B.J. 38 (Dec. 2018), law.isba.org/2QzKQVx.
- Don R. Sampen, *A Guide to Illinois Interlocutory Appeals*, 106 Ill. B.J. 42 (Mar. 2018), law.isba.org/2NWj9Tn.

7. *Aspen American Insurance Co.*, 2017 IL 121281, ¶ 19. See also *Hamby v. Bayer Corp.*, 2019 IL App (5th) 180279-U, for which the Illinois Supreme Court is, at the time of this publication, deciding whether state courts have personal jurisdiction over nonresident consumer claims that Bayer defectively made and marketed a contraception device.
8. *Campbell v. Acme Insulations, Inc.*, 2018 IL App (1st) 173051.
9. *Jeffs v. Ford Motor Co.*, 2018 IL App (5th) 150529.
10. *Cebulske v. Johnson & Johnson*, No. 14-cv-627-DRH-SCW (S.D. Ill. Mar. 25, 2015).
11. *Id.*
12. *Denton v. Air & Liquid Systems Corps.*, No. 13-cv-1243-SMY-DGW (S.D. Ill. Feb. 19, 2015).
13. *Id.*

whether jurisdiction was proper over a nonresident defendant by analyzing whether the defendant had certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.[14]

However, we also see from more recent rulings that the court is now following *Aspen*, which articulated and applied *Daimler* for its analysis as to general jurisdiction: A defendant is at home in Illinois if it is headquartered or has its principal place of business in Illinois or meets a rare exception, such as essentially relocating its center of business to the forum on a temporary basis. Merely doing continuous and systematic business within Illinois is no longer enough to subject a corporate defendant to general jurisdiction in Illinois. In these recently decided motions to dismiss, the defendants were not subject to general jurisdiction as they did not meet the requirements of the "at home" test.

Instead, the hurdle for some defendants has been defeating the application of specific jurisdiction. Defendants need to show that their clients did not purposely direct their activities to Illinois and the causes of action did not arise out of or relate to the defendants' contacts with Illinois.[15] The Cook County Circuit Court conceded that the U.S. Supreme Court has not clarified what is meant by "arising out of" or "relating to" in the context of a jurisdiction question and Judge McWilliams stated clearly that her rulings will be in line with Illinois precedent.

Shaw v. A.W. Chesterton Co. The plaintiff alleged injury through exposure to asbestos-containing brakes in Michigan.[16] He testified the brakes were assembled by a manufacturer that purchased them from another manufacturer in Illinois. The court dismissed, finding the timeline for exposure from another manufacturer's asbestos-containing brakes did not comport with the plaintiff's exposure allegations. Without specific dates corresponding to exposure, the court would be forced to connect the plaintiff's injury to an Illinois-affiliated manufacturer. The connection was too attenuated for exercising specific jurisdiction, even taking a lenient interpretation of "arising out of" or "relating to" the plaintiff's injury.

Zachara v. A.W. Chesterton Co. The plaintiff alleged injury from exposure to asbestos-containing brakes while working as a mechanic in Michigan.[17] There are two relevant rulings:

Ruling 1: Kelsey-Hayes' motion to dismiss. Kelsey-Hayes' motion was initially denied, because its division ran a foundry in Illinois that allegedly purchased asbestos-containing brakes from another manufacturer's plant in Illinois. The court initially agreed that a division of Kelsey-Hayes that then became a subsidiary constituted a long-term contact with Illinois during a time when the foundry allegedly produced the asbestos-containing brakes that allegedly injured the plaintiff. Because of that connection, the court held it was not illogical to consider the plaintiff's testimony regarding his work as a mechanic on vehicles estimated to be manufactured during the time the defendant's asbestos-containing brakes were manufactured—the plaintiff alleged injury by exposure to asbestos-containing brakes through his work as a mechanic. The fact that the plaintiff alleged exposure in another state around two decades after the asbestos-containing brakes were manufactured did not materially affect the court's analysis. The vehicles that the plaintiff worked on in Michigan contained the asbestos-containing brakes and were manufactured close to the same time the brakes were manufactured. But the court eventually reversed and dismissed, finding the denial order erroneously misconstrued facts concerning Kelsey-Hayes' affiliations with Illinois.

Ruling 2: American Honda's Motion to Dismiss. Maintaining a facility in Illinois was held not to be an "exceptional case." American Honda ("AH") stated it was incorporated, headquartered, and had its principal place of business in California, yet it also maintained a training facility in Illinois. The existence of the training facility was insufficient for jurisdiction. Furthermore, the court stated only speculation could connect the plaintiffs' exposure to AH's purposeful contacts with Illinois. The plaintiff alleged only vague instances (without dates or locations) where he may have handled products affiliated with AH. The connection between exposure and those purposeful contacts was too attenuated, even under a lenient interpretation.

NOW THAT *DAIMLER* AND *ASPEN* ENDED THE ARGUMENT THAT MAINTAINING A REGISTERED AGENT FOR SERVICE OF PROCESS CONSTITUTED CONSENT TO JURISDICTION, PLAINTIFFS' COUNSEL ARE TESTING NEW WAYS TO MAINTAIN CASES AGAINST OUT-OF-STATE CORPORATIONS.

Madison and St. Clair counties

***Mackey v. Murco Wall Products* (Madison).** A franchising agreement was insufficient and there was insufficient evidence the franchisee had sufficient contacts with Illinois.[18] The plaintiff relied on evidence that exposure-causing materials were manufactured by a Murco franchisee. The court ruled that while the defendant and its franchisee entered into the franchise agreement for the purposes of manufacturing, selling, and distributing a product, evidence of that relationship was insufficient to "impute personal jurisdiction" on the defendant.

14. See *International Shoe Co. v Washington*, 326 U.S. 310, 316 (1945).
15. See *Russell v. SNFA*, 2013 IL 113909, ¶ 40.
16. *Shaw v. A.W. Chesterton Co.*, No. 17-L-010044 (Ill. Cir. Ct. 2019).
17. *Zachara v. A.W. Chesterton Co.*, No. 17-L-0009779 (Ill. Cir. Ct. 2019).
18. *Mackey v. Murco Wall Products*, No. 15-L-55 (Ill. Cir. Ct. 2015).

Cirkles v. Asbestos Corp. **(Madison).** The court dismissed this case because the defendant was incorporated in New Jersey, headquartered in Connecticut, and had no contacts with Illinois and stated that jurisdiction "would offend traditional notions of fair play and substantial justice."[19]

St. Clair County. Although St. Clair County has experienced a 200 percent increase in filings, there have not been any relevant local rulings or orders.

As plaintiffs adjust their strategies, so should defendants

Before *Daimler*, plaintiffs' counsel often argued an out-of-state corporation's continuous and systematic business contacts in Illinois established general jurisdiction. Defendants with substantial national presence could anticipate the possibility of a lawsuit in each state.

Now that *Daimler* and *Aspen* ended the argument that maintaining a registered agent for service of process constituted consent to jurisdiction, plaintiffs' counsel are testing new ways to maintain cases against out-of-state corporations. Plaintiffs are aggressively pursuing a wide variety of alleged connections to Illinois—such as a defendant's past subsidiaries, insurance carriers, business partners, warehouse and storage facilities, and sales and shipping records—to support specific jurisdiction. Counter-strategies include:

Raising jurisdiction motions. Jurisdictional defenses should be made immediately to avoid the possibility of waiver. 735 ILCS 5/2-301 illustrates how to make a personal jurisdiction challenge.

Objecting to jurisdiction. Under Illinois law, defense counsel may object to jurisdiction on the ground that the party is not amenable to process of an Illinois court by filing a motion requesting dismissal.[20] The motion may be made by itself or combined with other motions, but the parts of a combined motion must be identified in the manner described in section 2-619.1. Unless facts supporting the jurisdictional objection are apparent from papers already filed, the motion must be supported by an affidavit setting forth those facts.

Attaching supporting affidavits. When deciding a jurisdictional objection, the court will consider all matters apparent from previously filed papers, affidavits submitted by any party, and any evidence adduced upon contested issues of fact.[21] An affidavit must assert personal knowledge of the affiant; set forth the particular facts of the claim or defense; and contain facts both admissible into evidence and affirmatively showing the affiant, if sworn as a witness, can testify to them.[22]

Affidavits should include the following, where applicable (and certified copies of any documents upon which the affiant relies should also be attached to the affidavit):[23]

- ✓ Signature by corporate representative;
- ✓ State the corporation's incorporation and its principal place of business;
- ✓ State the nature of the corporation's business;
- ✓ State the date it ceased operations;
- ✓ State that the corporation has neither registered to do business in nor applied for a license to do business in Illinois and does not pay taxes in Illinois;
- ✓ State that the corporation has not owned property or financial accounts in Illinois and does not have a phone line, website, or mailing address in Illinois; and
- ✓ State that the corporation neither solicits business nor has contracts with customers in Illinois.

Waiver warning. A party that files a motion or pleading prior to a jurisdictional objection will waive its objection unless its initial filing was a request for: 1) an extension of time to answer or otherwise plead; 2) default judgment; or 3) relief from judgments.[24] Where a party files a motion asserting a jurisdictional objection "simultaneously" with another responsive motion, the jurisdictional challenge is not forfeited.[25]

Set the jurisdiction motion for hearing soon. Motions must be immediately heard to preserve the objection. If denied, defense counsel should state their continued involvement is subject to denial of its personal jurisdiction argument. Defense counsel should move to reconsider, if applicable. Illinois statutory law does not prescribe a time to notice a motion up for hearing. A motion on which an order is entered or is never called to the court is presumably waived or abandoned.[26] There are no timing requirements governing when a jurisdictional objection must be heard, and either party may request disposition of a jurisdictional objection before or after the expiration of the filing period.[27] In practice, however, a motion must be brought to the attention of the court, which should be asked to rule on it.[28] Motions should be made promptly and should be ruled on without deciding any issue of fact or considering the merits of the claim. If denied, the defendant may file an appeal or proceed with defending the case.[29]

File a motion to stay. Defense counsel may move the court to stay the case until the jurisdictional motion to dismiss is decided.

File an appearance. Section 5/2-301 contains an explicit waiver provision that is narrower than the prior rule that waiver occurred if a party made a general appearance. Filing a written general appearance and paying an appearance fee does not waive an objection to personal jurisdiction, since neither involves a responsive pleading or a motion—the only kinds of acts that can cause a waiver under section 2–301(a–5).[30] According to *KSAC*, since section 2–301 no longer requires the filing of a special appearance, it does not

19. *Cirkles v. Asbestos Corp.*, No. 13-L-940 (Ill. Cir. Ct. 2014).
20. 735 ILCS 5/2-301(a).
21. *Id.* at § 5/2-301(b).
22. Ill. S.Ct. R. 191(a).
23. *Id.*
24. 735 ILCS 5/2-301(a-6).
25. See *OneWest Bank, FSB v. Topor,* 2013 IL App (1st) 120010.
26. See, *e.g., City National Bank v. Langley,* 161 Ill. App. 3d 266 (4th Dist. 1987).
27. Ill. S.Ct. R. 184.
28. See *Verlinden v. Crafton*, 351 Ill. App. 511 (1st Dist. 1953).
29. 735 ILCS 5/2-301; Ill. S.Ct. R. 103, 201.
30. See K. Beyler, *The Death of Special Appearances*, 88 Ill. B.J. 30, 32 (2000).

follow that filing "a general appearance waives the issue of personal jurisdiction."[31] Notably, there is no provision that a "general appearance," as such, results in waiver.[32] Many defendants, however, continue to file special and limited appearances.

Discovery pursuant to personal-jurisdiction motion. Defense counsel challenging personal jurisdiction may receive interrogatories. Most judges will not allow a defendant to proceed with a personal-jurisdiction motion until the interrogatory has been answered. The interrogatories should be answered while being mindful that a personal-jurisdiction challenge may be waived by engaging in discovery.

Illinois law states that when filing a jurisdictional motion, a party may obtain discovery only for jurisdiction, unless the parties agreed otherwise or by court order.[33] Should a hearing become necessary, then an objecting party's participation in discovery does not waive that party's jurisdictional objection.[34] This section was added to negate any possible inference from 735 ILCS 5/2-301 that participation in discovery proceedings after making a special appearance to contest personal jurisdiction waives jurisdictional objections, since they constitute a general appearance so long as discovery is limited to personal jurisdiction.

Many peripheral defendants with very limited asbestos exposure are reluctant to engage in jurisdictional-motion practice due to the time and effort often needed to answer discovery. Despite being named in hundreds of lawsuits of no merit, they continue to spend thousands if not millions of dollars to merely obtain the inevitable dismissal. (Indeed, most defendants in Illinois are eventually released without any loss payment and thus threats by plaintiffs that they will refile cases dismissed on personal-jurisdiction grounds are typically not pursued.) These defendants should thoughtfully prepare, in advance of the motion practice, to respond to the more-limited discovery answers related solely to jurisdictional issues and resist attempts by plaintiffs to expand discovery beyond what is appropriately related to personal jurisdiction. In the end, these defendants will save significant amounts of money in engaging in a thoughtful jurisdictional-motion practice.

Jurisdictional discovery should be objected to on all grounds because it is overly burdensome. In asbestos litigation, when a defendant is sued repeatedly by the same plaintiffs' firms, it is assumed that answers given to one interrogatory will be used as evidence in future cases and even potentially shared with other plaintiffs' firms.

While Illinois permits discovery in response to a jurisdictional objection, discovery must still satisfy Illinois rules—and objections may still need to be raised.

Know your court's standing case management order, local rules, and practice. Madison County's Standing Case Management Order for All Asbestos Personal Injury Cases specifies that a defendant's participation in motion practice, depositions, or discovery shall not constitute waiver of any defenses, especially regarding service, jurisdiction, or venue.[35]

Conclusion

Defendants should consider jurisdictional challenges whenever they are not "at home." Illinois law provides a comprehensive method for jurisdictional challenges and courts have provided clear precedent. By challenging personal jurisdiction, the number of suits against out-of-state defendants should decline.

31. *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill. App. 3d 593 (2d Dist. 2006).
32. *Cardenas Manufacturing Network, Inc. v. Pabon*, 2012 IL App (1st) 111645.
33. Ill. S.Ct. R. 201(l).
34. *Id.*
35. *In re All Asbestos Litigation*, Standing Case Management Order for All Asbestos Personal Injury Cases 50 (Ill. Cir. Ct. Madison County, Aug. 19, 2016).