No. 16-15569

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES J. WAITE, JR. and SANDRA WAITE,

Plaintiffs-Appellants,

v.

AII ACQUISITION CORP., et al.

Defendants-Appellees.

On appeal from the United States District Court
for the Southern District of Florida
No. 0:15-cv-62359-BB

BRIEF OF *AMICUS CURIAE* THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to the Eleventh Circuit Rules 26.1-1, 26.1-2, and 28-1(b) and Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* provides the following list of interested persons, firms, corporations and entities with any known interest in the outcome of this appeal:

1. American Association for Justice
2. Dawn Besserman
3. The Honorable Beth Bloom
4. Ryan S. Cobbs
5. Matthew J. Conigliaro
6. Dow Chemical Company ("DOW")
7. M. Derek Harris
8. Julie Braman Kane
9. Robert S. Peck
10. Jonathan Ruckdeschel
11. Union Carbide Corporation
12. James J. Waite, Jr.
13. Sandra Waite
14. The Honorable Alicia O. Valle
15. Rebecca Vinocur

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amicus Curiae* hereby provides the following disclosure statement:

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10 percent or more of this entity's stock.

Date: October 19, 2016

Respectfully submitted,

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ"),[1] formerly the Association of Trial Lawyers of America, is a voluntary national bar association. AAJ members try cases and handle appeals daily in every circuit of the nation, including the Eleventh Circuit, affording AAJ a keen interest in how the courts approach issues of personal jurisdiction.

AAJ is committed to principles underlying the right of access to justice and the right to trial by jury. AAJ appears here to address the critical importance of assuring those who require redress in the courts the opportunity to present their case in a single forum where no defendant can rightfully be called a stranger, even though the parties the plaintiff seeks to hold responsible for the harm that underlies the lawsuit are found in different jurisdictions.

In this brief, AAJ will limit its argument to the applicability of specific jurisdiction to this set of facts. Doing so, however, should not be taken as disagreement with the Plaintiff's other arguments concerning consent or general

[1] All parties have consented to the filing of this *amicus curiae* brief. The undersigned counsel for *Amicus Curiae* affirms, pursuant to Federal Rule of Appellate Procedure 29(c)(5), that no counsel for a party authored this brief in whole or in part and no person or entity other than AAJ, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

jurisdiction. *Amicus Curiae* has little to add to those arguments and thus instead limits itself to the issue on which it believes it can make a unique contribution.

By applying the wrong standard that governs specific jurisdiction, the District Court has adopted an approach at odds with modern jurisprudence and closes the courthouse door to meritorious actions. AAJ further details some of the countervailing due-process considerations that lie on plaintiffs' side of the ledger and further assure that traditional notions of fair play and substantial justice decisively favor the assumption of jurisdiction in this matter.

STATEMENT OF THE ISSUE

Did the District Court err by applying a "but-for" and geographically limited test to determining whether it had specific jurisdiction over Union Carbide?

SUMMARY OF ARGUMENT

This is a case about maintaining access to the courts for redress of injuries. In successively finding general jurisdiction, then, upon reconsideration, denying it in favor of specific jurisdiction, and then, upon additional reconsideration, denying that, the District Court evinced confusion over the requirements of personal jurisdiction and erroneously returned to a geographic-based approach that is closer to the defunct standard that prevailed under *Pennoyer v. Neff*, 95 U.S. 714 (1877), rather than apply the one that operates today and is derived from *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The reach of personal jurisdiction is analyzed today in terms of due process and is examined flexibly and not mechanically. Yet, the District Court mistakenly applied a rigid causation standard—"but for"—and a defunct geographic requirement to reach its disposition. Beyond using the wrong tools to examine the appropriate due-process considerations, the decision below also ignored the competing due-process concerns that weigh heavily in favor of assuming jurisdiction. In the most seminal case in all of American constitutional law, the Supreme Court of the United States declared that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (citing 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)). A century later, the Court emphasized the fundamental importance of that access because the "right to sue and defend in the courts is the alternative of force. In an organized society it is the Right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

To comport with due process, the access afforded must be meaningful access. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Meaningful access is more than a right to appear in court; it requires an opportunity to have the rights and liabilities at

issue heard completely and fairly so that a successful lawsuit results in appropriate redress. In a case like this one, that means compensatory damages, as courts have also long recognized that the "'cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty.'" *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (quoting 2 Fowler V. Harper & Fleming James, Jr., *Law of Torts* § 25.1, at 1299 (1956)).

The access imperative enjoys constitutional status[2] and is fully embraced in our jurisdictional jurisprudence, which mandates that corporations engaged in profitmaking interstate activities not "escape having to account for . . . consequences that arise proximately from such activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985).

In this matter, the issue is whether jurisdiction may be exercised over Union Carbide. Union Carbide is engaged in like activities in Florida as it was in Massachusetts, where James Waite was first exposed to asbestos. Asbestos diseases, such as the inevitably fatal mesothelioma that afflicts Waite, are injuries based on continuing exposure and manifesting themselves after long latency periods. A person who contracts an asbestos disease generally may not bring an action until it manifests itself. *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA

[2] The Supreme Court of the United States has recognized "a separate and distinct right to seek judicial relief for some wrong" is guaranteed by the federal Constitution. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

1985), *rev. denied*, 492 So. 2d 1331 (Fla. 1986); *cf. Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997) (collecting cases). In Florida, that requirement is codified in the Asbestos and Silica Compensation Fairness Act, which requires actual physical impairment and specifies the necessary diagnosis before suit may be brought. Fla. Stat. § 774.201 *et seq.*

Here, the plaintiff suffered asbestos exposure in both Massachusetts and Florida, resides in Florida, and developed and manifested the disease in Florida. Given Union Carbide's more than minimum contacts and its liability for asbestos-related injuries in Florida to other Florida plaintiffs, there is no affront to "traditional notions of fair play and substantial justice," the standard set by *International Shoe*, in requiring Union Carbide to defend in Florida. In fact, Union Carbide's presence in Florida is so manifest, and the claims at issue here mirror the activities that foreseeably exposes the corporation to liability within the state without even a hint of jurisdictional objection, that the issue of specific jurisdiction is an easy one.

On the other hand, adopting the position taken by the District Court in this case will work a hardship on plaintiffs that is at odds with due process, the touchstone upon which the jurisdictional decision rests. It would force the plaintiff to maintain multiple actions in a host of different states to seek redress for a single, indivisible injury. Asbestos plaintiffs usually must bring actions against multiple defendants whose places of business and incorporation span numerous states. A

geographically limited jurisdictional reach would obligate plaintiffs with a single indivisible injury to bring separate actions in a number of states, litigating the same issues over and over, including disputes over apportionment of those damages each time.

Logic indicates that such a course does not just bring a real danger of inconsistent results, but a high likelihood that variations in assessments of liability, damages, and proportional responsibility would occur. Because due process assures fairness to both plaintiffs and defendants, and because the burden of adjudicating its liability in Florida is *de minimis* to Union Carbide, the due-process scales tilt decisively in Waite's favor. The District Court should be reversed.

ARGUMENT

I. Union Carbide is Subject to Specific Jurisdiction in Florida.

A. Florida's long-arm statute establishes jurisdiction for injuries incurred outside the state.

The first step in determining whether jurisdiction exists over an out-of-state defendant requires an examination of the forum state's long-arm statute. *Burger King*, 471 U.S. at 471-76 (affirming that approach and indicating that the second and last step is to assure the exercise of jurisdiction comports with due process). Florida's long-arm jurisdiction statute subjects persons to jurisdiction within the state for injuries to persons or property within the state arising out of an act or omission by the defendant outside the state, if, at the time of the injury, "the defendant was

engaged in solicitation or service activities within this state;" or its products or services "were used or consumed within this state in the ordinary course of commerce, trade, or use." Fla. Stat. § 48.193(1)(a)(6). It further provides that a "defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity." *Id*. at § 48.193(1)(b)(2).

To reach the conclusion that the District Court did here, it would have to find that these very traditional and commonplace declarations of long-arm jurisdiction are unconstitutional as violations of due process for it precisely covers the circumstances of Waite's claim. Such a remarkable and novel conclusion is neither warranted nor correct. It might have been apropos during the 67 years that *Pennoyer*, 95 U.S. 714, held sway and limited a State's jurisdictional reach to the limits of its territorial borders. Physical presence determined jurisdiction. But long-arm statutes came into vogue after *International Shoe* and redefined the reach of a State's legitimate jurisdictional authority.

Unlike the rationale that undergirded *Pennoyer*'s wooden approach, we no longer depend upon sheriffs to capture an individual to assure an appearance in court for a civil action. In abandoning the rigidity of *Pennoyer*, the Supreme Court recognized that "capias ad respondendum has given way to personal service of

summons or other form of notice." *Int'l Shoe Co.*, 326 U.S. at 316. In its place, the Court adopted a standard consistent with due process, which "requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id*. *See also Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993).

B. Union Carbide satisfies the constitutional touchstone of minimum contacts with Florida.

Despite claims by Union Carbide and others of changes in more recent cases, the "'canonical opinion in this area remains *International Shoe*,'" and minimum contacts and traditional notions remain the standards that Due Process requires. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011)). Rather than retreat from *International Shoe*'s approach, contemporary jurisprudence employs it with gusto and recognizes "'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" *Burger King*, 471 U.S. at 474 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). It therefore "usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id*. Today, it is even less inconvenient today than in 1957, when the Court

first made that statement about modern conveniences, with the modern advent of on-line research, face-to-face communications, and ubiquitous travel options.

Ever since *International Shoe*, the due-process test focuses "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. at 319. It does so through an assurance that minimum contacts and traditional notions of fair play.

Here, there is no dispute that Union Carbide satisfies the minimum contacts requirement. As the District Court found, Union Carbide "has been registered to do business in Florida and maintained a registered agent to receive service of process in Florida since 1949." *Waite v. All Acquisition Corp. ("Waite I")*, No. 15-cv-62359-BLOOM/Valle, 2015 WL 9595222, at *4 (S.D. Fla. Dec. 29, 2015). It grew to be the largest supplier of asbestos for drywall compound and targeted the Florida market for its product and continues to have "dozens of Florida customers who purchased its asbestos." *Id*. Union Carbide owned and operated a plant in Brevard County, Florida until 1987. *Id*. Its shipping terminal in Tampa has now becomes an environmental Superfund site. *Id*.

Union Carbide is also no stranger to asbestos litigation in Florida. As the District Court detailed:

> Union Carbide has been a defendant in numerous, recent cases litigated in Florida, including asbestos cases

> involving exposures to its "Calidria" brand asbestos, as implicated here. *See, e.g.*, *Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42 (Fla. 4th Dist. Ct. App. 2004); *McConnell v. Union Carbide Corp.*, 937 So. 2d 148 (Fla. 4th Dist. Ct. App. 2006). Indeed, the Florida Supreme Court recently affirmed the lower court's decision finding liablity [sic] for Union Carbide for the very same conduct alleged in the present case. *See Aubin v. Union Carbide Corp.*, 2015 WL 6513924, at *17-18 (Fla. Oct. 29, 2015).

Id. at *5.

This wide array of connections to the State of Florida satisfies the "constitutional touchstone" of purposefully established minimum contacts by the defendant in the forum State. *Burger King*, 471 U.S. at 474. Unquestionably, Union Carbide "purposefully directed" its activities into Florida. *Cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). Union Carbide has "purposefully 'reach[ed] out beyond' [its] State and into another by, for example, entering a contractual relationship that "envisioned continuing and wide-reaching contacts" in the forum State," or by distributing its product to "'deliberately exploi[t]' a market in the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (citations omitted). Jurisdiction, based on these contacts, does not constitute the type of "random, fortuitous, or attenuated" contacts made with other persons affiliated with the State that has proven fatal in other cases. *See Burger King*, 471 U.S. at 475. Instead, they constitute the type of purposeful availment that seeks the "privilege of conducting activities within the forum . . ., thus invoking the benefits and protections

of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The minimum contacts requirement is satisfied.

C. Union Carbide's Florida conduct is related to Waite's injury.

Once the minimum contacts requirement is established, the remaining inquiry involves whether the litigation results from alleged injuries that "arise out of or relate to" those activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). This second requirement assures that a defendant's "conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

This relatedness requirement has never been defined by the Supreme Court, *see Helicopteros*, 466 U.S. at 415 n.10, and this Circuit has "not developed or adopted a specific approach to determining relatedness; instead, we have heeded the Supreme Court's warning against using 'mechanical or quantitative' tests." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222 (11th Cir. 2009). For that reason, "each case must be decided on its own facts." *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055, 1058 (11th Cir. 1986) (citation omitted).

In *Oldfield*, this Court discussed a "but for" standard for examining the "direct causal relationship among 'the defendant, the forum, and the litigation.'" 558 F.3d

at 1222 (quoting *Helicopteros*, 466 U.S. at 414). However, that causal talisman was rejected as being without "'limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.'" *Id*. at 1223, approvingly quoting *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996). The District Court erred in deciding it was required to undertake a "but for" analysis. *Waite v. All Acquistion Corp. ("Waite III")*, No. 0:15-cv-62359-BLOOM/Valle, 2016 WL 2346743, at *3 (S.D. Fla. May, 4, 2016) ("the Eleventh Circuit has made clear that '[n]ecessarily, the contact must be a 'but-for' cause of the tort.'") (quoting *Fraser v. Smith*, 594 F.3d 842, 850 (11th Cir. 2010)) (citing *Oldfield*, 558 F.3d at 1222-23). The *Fraser* Court's misreading of *Oldfield*, however, should not be perpetuated. As *Oldfield* pointed out, the "problem with this but-for approach is that it is over-inclusive, making any cause of action, no matter how unforeseeable, necessarily 'related to' the initial contact." 558 F.3d at 1223. It was error to employ a "but for" standard.

Moreover, requiring a plaintiff-specific "but for" test to connect an injury to a forum disregards how our society operates today. Consumers no longer have personal contact with the manufacturers of the products they use as the old abandoned privity requirements assumed. When those products are sold on a nationwide basis with the same defect and the same failure to warn, there is nothing unfair about having jurisdiction over suits brought in the forums targeted by the

manufacturer. Should the court find that the case would better be pursued elsewhere, transfer by traditional procedural means and choice of law considerations ensure fairness to all parties.

Yet, the but-for approach is not mandated here. In place of but-for analysis, the *Oldfield* Court examined "whether the injury Oldfield suffered—while aboard a fishing vessel that [Defendant] neither owned nor operated—was a foreseeable consequence of his viewing [its] website, reserving a room at the resort, and arranging for a fishing trip run by someone else." *Id*. at 1223. It condemned the claim of relatedness before it because of the "tenuous relationship between [Defendant]'s relevant contacts[3] and the negligence of the captain who was not employed or controlled by [Defendant]." *Id*. at 1223.

Even so, *Oldfield* did not "establish[] a definitive relatedness standard—as flexibility is essential to the jurisdictional inquiry." *Id*. at 1224. Instead, this Court recognized the propriety of a "fact-sensitive inquiry [that] must hew closely to the foreseeability and fundamental fairness principles forming the foundation upon which the specific jurisdiction doctrine rests." *Id*. Here, the District Court failed to engage in the same fact-sensitive approach. Instead, it employed a rigid *Pennoyer*-

[3] The contacts in the case consisted of a website viewable in the forum state that allowed a person to "reserve[e] a room at the resort, and arrang[e] for a fishing trip run by someone else." *Oldfield*, 558 F.3d at 1223.

like geographic-based test. *Waite III*, 2016 WL 2346743, at *3 ("Mr. Waite's cause of action (his malignant mesothelioma) did not arise from Defendant's 'actions within the forum.'").

Significantly, in every case where relatedness was at issue, the Supreme Court has consistently found that a corporation's purposeful presence in a state sufficient to satisfy specific jurisdiction's relatedness requirement precisely because relatedness can connect to a defendant's furtherance of its general, interstate, economic activities to an injury. For example, in *Burger King*, the Court held specific jurisdiction existed because the company's general "economic activities" in the state assured that it would not be "unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." 471 U.S. at 474 (quoting *McGee*, 355 U.S. at 223 (internal quotations omitted)). It further held that

> where individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; *the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.*

Id. (emphasis added).

Where this Court and the U.S. Supreme Court have denied jurisdiction, it the common denominator is highly attenuated connections to the forum state. For example, in *Daimler*, 134 S. Ct. 746, the case involved Argentinian plaintiffs who

sued Daimler for actions taken by Daimler's Argentine subsidiary by asserting the California presence of the German company's independently incorporated, indirect U.S. subsidiary. The "Rube Goldberg" approach to connecting a U.S. company to an Argentine one through a German parent was what doomed the enterprise in the U.S. Supreme Court. What the recent Supreme Court decisions mean is that "[c]ompanies that are neither incorporated nor headquartered in the United States likely can no longer be subject to general jurisdiction in this country, no matter what contacts they have with a particular state." Pamela K. Bookman, *Litigation Isolationism*, 67 Stan. L. Rev. 1081, 1092-93 (2015).

Neither the Supreme Court nor this Court have found any constitutional concerns in upholding jurisdiction in matters where the defendant has decades of substantial and ongoing operations in the state, including actions identical to the tortious conduct for which they are being sued in the case at bar. This case simply has no similarity to the attenuated causal chain that doomed the plaintiffs in *Fraser* or *Oldfield.*

Here, there is no unfairness in subjecting Union Carbide to potential liability in Florida when it regularly litigates the same liability (asbestos diseases) in that forum. Assuming jurisdiction does not comprise an instance of haling a Defendant into a forum that it is neither prepared to litigate in nor lacked expectation of litigation exposure.

State courts dealing with the relatedness issue have had little difficulty in finding the second requirement of specific jurisdiction met. For example, Illinois held it had jurisdiction over a French company that manufactured custom tail-rotor bearings for a helicopter involved in a fatal crash. *Russell v. SNFA*, 987 N.E.2d 778 (Ill.), *cert. denied*, 134 S. Ct. 295 (2013) (Mem.). The French company had no offices, assets, property, or employees in Illinois and was not licensed to do business in the state. *Russell*, 987 N.E.2d at 782. It did, however, sell different bearings for different aircraft, not helicopters, to a Rockford, Illinois company. Given that connection, the Illinois court examined four questions:

> (1) the burden imposed on the defendant by requiring it to litigate in a foreign forum; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in obtaining relief; and (4) the interests of the other affected forums in the efficient judicial resolution of the dispute and advancement of substantive social policies.

Id. *See also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (describing the four elements).

In answering those questions, the court found Illinois had an "indisputable interest in resolving litigation" involving one of its citizens, grounds for its own citizen's interest in resolving it, and the lack of any other forum with a similarly predominant interest. *Id.* at 797-98. With respect to the burden of defending in Illinois, the court found that burden minimal given that the "record demonstrates that multiple sales of defendant's products were made in Illinois over the past 10 years,

including business between defendant and the Rockford, Illinois, location of [an aerospace customer]." *Id*. at 798. The Supreme Court denied a petition for certiorari in the case. 134 S. Ct. 295.

Similarly, and quite recently, the California Supreme Court examined the same question in the context of whether out-of-state plaintiffs could have their claims adjudicated against a pharmaceutical manufacturer, along with California plaintiffs. The court held that after "minimum contacts with the forum state [are established], the burden then shifts to the defendant to show that the assertion of specific jurisdiction is unreasonable because it does not comport with 'traditional notions of fair play and substantial justice.'" *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 891 (Cal. 2016) (citation omitted). To make that determination, it relied on similar factors to those the Illinois court cited in *Russell:* the "burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Id*. (citing *Asahi*, 480 U.S. at 113). It concluded that

> the addition of 592 nonresident plaintiffs is a significant added burden, but the alternative is to litigate the claims of these other 592 nonresident plaintiffs in a scattershot manner in various other forums, in potentially up to 34 different states. Such an alternative would seem to be a far more burdensome distribution of BMS's resources in defending these cases than defending them in a single, focused forum.

Id. at 891-92 (footnote omitted).

Amicus Curiae respectfully suggests that the questions posed and answered by the Illinois and California Supreme Courts in *Russell* and *Bristol-Myers Squibb*, respectively, were the correct criteria to be applied. They fall well in line with this Court's prior jurisprudence that holds, after minimum contacts, a court should "next consider whether the exercise of personal jurisdiction over them comports with 'fair play and substantial justice.'" *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 631 (11th Cir. 1996) (quotation marks and citations omitted). In *Sculptchair*, this Court enumerated the *Asahi* factors utilized in *Russell* and *Bristol-Myers Squibb* as the relevant considerations. *Id*.

Here, the defendant has a substantial presence in Florida, and Waite's claims that are closely related to the defendant's activities in the state. Waite's claims involve Union Carbide's asbestos, which is produced, marketed, and sold by nationwide, including in Florida. This is not an instance where the forum State is exerting jurisdiction over an absent defendant. Plainly, Waite's injuries arise from Union Carbide's nationwide economic activities with respect to asbestos that include Florida and ought to be litigated within the jurisdictional reach of that state.

II. Denying Jurisdiction Would Place a Substantial Due Process Burden on the Plaintiff.

A. Due Process protects Plaintiff's rights, as well as those of Defendants.

Due process is not a one-way concept that only considers the reasonableness of an adjudication to a defendant. It protects all parties in a legal action. The Supreme Court "has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Weighing these frequently opposing values requires a court to undertake a complex evaluation for the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (citations omitted). Unlike some legal principles, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* (citations omitted). Instead, the due-process guarantee "expresses the requirement of 'fundamental fairness,'" which mandates a court "first consider[] any relevant precedents and then . . . assess[] the several interests that are at stake." *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 24-25 (1981). Doing so in the instant matter decisively favors the Plaintiff.

B. Multiple adjudications in different forum states would disadvantage the Waites and advantage UCC, in violation of Due Process.

Waite was exposed to asbestos in Massachusetts and Florida, with different defendants responsible for the different exposures. Typically, a cause of action for injuries from exposure to asbestos requires a plaintiff to prove that the defendant's asbestos was the cause of the injury. *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 513 (Fla. 2015). Given the nature of the professions exposed to asbestos and the regularity that multiple jobsites and employers are involved, most plaintiffs name multiple defendants, who, in turn, seek to apportion liability among the various potential defendants from whom the plaintiff may also have received exposure to asbestos. *See* Anita Bernstein, *Asbestos Achievements*, 37 Sw. U. L. Rev. 691, 709 (2008). *See also Restatement (Second) of Torts* § 433B (1965); *Restatement (Third) of Torts: Apportionment of Liability* § A19 (2000). Florida law holds that a defendant in such a case is entitled to present evidence of a plaintiff's other asbestos exposures as part of its defense, even when those defendants are not present in the case. *See Honeywell Int'l, Inc. v. Guilder*, 23 So. 3d 867, 870 (Fla. 3d DCA 2009).

Waite brought suit in his state of residence, where he developed his terminal cancer and one of the two states in which he suffered the exposure. If he, or asbestos plaintiffs more generally, must litigate against defendants separately in each of the jurisdictions in which an asbestos defendant is located, defendants will be entitled

to raise this "empty chair" defense, pointing the blame, in whole or in part, on the absent defendants in each case litigated. This, in turn, would place plaintiffs in the awkward position of having to litigate on behalf of the absent defendants, seeking to limit their liability in order to assure that the defendant in court is held responsible for its proper proportionate share.

In such circumstances, when the issue is likely to arise only in the late stages of a trial, a plaintiff would be forced to prepare a defense for nonparties, examining examine jury instructions, marshalling evidence, making objections, arguing the case, and examining witnesses from the standpoint of unrepresented adverse parties. In a leading case, the Montana Supreme Court held a statute that placed plaintiffs in such a position violated due process because "plaintiffs may not receive a fair adjudication of the merits of their claims." *Newville v. State, Dep't of Family Servs.*, 883 P.2d 793, 802 (Mont. 1994). The Montana court held the statute "clearly unreasonable as to plaintiffs" and lacking in necessary procedural safeguards. *Id*.

The difficulties presented by a requirement that plaintiffs engage in piecemeal litigation on a state-by-state basis to seek a remedy for an indivisible injury provide a due-process basis for recognizing jurisdiction over Union Carbide here. The U.S. Supreme Court has instructed that "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent." *Burger King*,

471 U.S. at 478. A failure to assume jurisdiction over the entire dispute plainly creates the dilemma that *Burger King* condemned and makes litigation "gravely difficult and inconvenient" for the plaintiff, while placing the plaintiff at a "severe disadvantage" compared to his opponent. *Cf. Keeton*, 465 U.S. 770 (holding that defamation action could proceed in New Hampshire, where publication was among the places it was circulated and still permit action covering nationwide liability).

Instead, considerations of due process require an assumption of jurisdiction. The doctrine of jurisdiction by necessity additionally supports jurisdiction here. For example, the Supreme Court of the United States held that a State may exercise jurisdiction over a foreign corporation as to causes of action that do not arise from the business done by a foreign corporation in the State where the corporation's business activities in the State are so continuous and substantial as to make exercise of such jurisdiction reasonable. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). In *Perkins*, the forum most connected with the defendant and with the disputed transaction was not Ohio, where plaintiff brought suit, but the Philippines, which was under Japanese occupation at the time. Ohio, however, was the most logical related forum in the United States. Jurisdiction was upheld under the circumstances, and *Perkins* arguably is a decision implicitly employing the doctrine of jurisdiction by necessity.

The Supreme Court has not formally adopted the doctrine of jurisdiction by necessity, finding no instance where the record supported its full consideration. The doctrine applies when no other forum exists to adjudicate the matter fully. *See Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977) (*cited in Helicopteros*, 466 U.S. at 419). In *Helicopteros*, the Court found it unnecessary to decide its applicability because "respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum." 466 U.S. at 419 n.13.

Here, a decision that jurisdiction does not exist under traditional jurisdictional jurisprudence necessarily holds that no forum exists where Waite's full set of claims as initially pleaded may be fully adjudicated with all possible defendants. Because all defendants are necessary to a full and fair determination of liability, damages and apportionment, both fundamental principles undergirding due process and jurisdiction by necessity combine to make a compelling case for the assumption of jurisdiction.

CONCLUSION

Union Carbide's longstanding, continuous, and robust presence in Florida, its registration to do business, and its history and ability to litigate asbestos-related injuries like those that befell Waite provides the basis for specific litigation in this case. The company's position, asserting that it insists on a separate trial in a court of its preference separate from other culpable parties in asbestos litigation implicates

plaintiffs' due-process rights and ought not be grounds for a denial of jurisdiction. Instead, the scales of due process tip strongly in favor of adjudicating a plaintiff's entire claim in a single forum. Jurisdiction over Union Carbide is warranted.

For the foregoing reasons, the trial court's order denying jurisdiction should be reversed.

Date: October 19, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 32(a)(7)(B). This brief contains 5,500 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 2016, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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