Geographic Case Evaluation
Case Evaluation – The Geographical Perspective

The evaluation and resolution of a personal injury claim hinges upon many factors. When a significant personal injury case commences, the motor carrier will be evaluating the geographical landscape of the claim. The necessity for this information is obvious, as each jurisdiction differs in application of liability, damages, and most importantly, local practice and procedures. So, the first question is, “where did ‘it’ happen?” Then, “what happened?” Finally, “what is the law in ______ [state]?”

This article provides an overview of recent developments to combat forum shopping so that your case proceeds in the correct geographical location, a reference point on states that have legalized marijuana and the challenges from that geographical perspective, and a state by state overview of the admissibility standards on medical damages for purposes of the case evaluation.

Combat the Bad Forum

The case evaluation process begins with a discussion on where the claim is [or will be] anchored. The jurisdiction may be a blessing or a curse. States with tort caps offer protection, but many do not. Whether fact or fiction, there is a perception that some locations welcome litigation tourism and other geographical locations have judges that operate by their own rules, and without regard to the state and/or federal rules. Notably, one county may be considered a plaintiff friendly hotspot, while the neighboring county is conservative. A skilled practitioner familiar with these nuisances is critical to ensuring that the local practices are part of the case evaluation. You may consider parts of Florida, California, St. Louis, New York City, Philadelphia, New Jersey, Chicago, and Louisiana
as such hotspots. As this audience well knows, plaintiff attorneys will file in incorrect venues based upon perceptions of the jurors and/or judge. From the defense side, we are forced to litigate improper forum issues so we can ensure the case is evaluated within the correct geographical location.

There is good news! Recent U.S. Supreme Court decisions in 2017 should limit the ability of plaintiff lawyers to forum-shop their cases. These decisions offer welcome relief for industry clients that may cringe when being hauled into a plaintiff-friendly jurisdiction across the United States to which neither they nor the plaintiff suing them has any connection.

In 2017, the United States Supreme court issued two significant jurisdictional rulings related to railroad and toxic tort claims. The hope is that these ruling will benefit commercial motor carriers where plaintiffs sue carriers based upon their “connections” to the jurisdiction. Regardless of whether the motor carrier conducts any significant business in the jurisdiction (e.g. service centers, drop yards, terminals, etc.), the argument is that there is no principal place of business in that location. This does not deter the plaintiffs. In May 2017, the Supreme Court ruled in BNSF Railway Co. v. Tyrrell, 581 U.S. __ (2017) that the proper forum for the exercise of general personal jurisdiction over a corporation is its state of incorporation or its principal place of business. “A corporation that operates in many places can scarcely be deemed at home in all of them.” Plaintiffs sued BNSF in Montana alleging that they developed a fatal cancer. BNSF was not incorporated and did not have a principal place of business in Montana, but did employ 2000 employees in the state. The reaffirmed standard is that a state court may exercise general jurisdiction over out of state corporations only when their “affiliations with the
State are so ‘continuous and systematic’ as to render them essentially at home on the forum State.” Bottom line, courts should only be able to exercise personal jurisdiction where the corporation is incorporated or has its principal place of business.

Notably, the Supreme Court ruled on a toxic tort case a couple of weeks later in *Bristol-Myers Squibb Co. v. Superior Ct. of California*, 582 U.S.___ (2017). The Court clarified the scope of when a court can exercise specific personal jurisdiction over a corporate defendant. This state court California case involved a drug sold by Bristol-Myers in California. However, Bristol-Myers did not develop, manufacture, label, package, or seek regulatory approval for the drug in California. Large quantities were sold in California. None of the non-California plaintiffs were injured in California, obtained the drug through any California source or obtained treatment for their injuries in the state. The California Supreme Court exercised specific personal jurisdiction over Bristol-Myers. The Supreme Court ruled that an out-of-state plaintiff cannot sue in California simply because other plaintiffs, who were California residents, could.

The rulings in *BNSF* and *Bristol-Myers* should assist commercial motor carriers in defending lawsuits filed in plaintiff-friendly jurisdictions where (1) the accident did not occur in that particular jurisdiction; (2) the plaintiff does not live in that particular jurisdiction; (3) the trucking company is not incorporated in that particular jurisdiction; and, (4) the trucking company does not have its principal place of business in that particular jurisdiction. Taking this one step further, there is an argument that this approach is valid even where the trucking company conducts business. Plaintiffs should only be limited to assert general personal jurisdiction against a corporate defendant where the defendant is incorporated or has its principal place of business. Plaintiffs should not be able to
establish specific personal jurisdiction based on a defendant’s contacts with a state, even if substantial, when there is no connection between the alleged injury and defendant’s actions in the jurisdiction.

Now that you have determined where the case will proceed and as you begin the evaluation process, you must assess the statutory requirements, existing case law, and jurisdictional attitudes that exist in that forum. For example, the country’s landscape in the areas of legalized marijuana and the admissibility of medical damages is ever changing. The remainder of this article outlines the current snapshot of the United States on these issues.

**Marijuana**

Now that you are in the proper forum, carriers and counsel should be mindful of the changing legislation regarding the legalization of marijuana and whether there is an impact on the case value depending upon what state the case is venued. At the present time, two forms of marijuana usage are legal in various states – recreational and medicinal:

- **Recreational use of marijuana is legal in 8 states:** Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington (plus the District of Columbia).\(^1\) However, Vermont will join this group when the law legalizing marijuana use comes into effect of July 1, 2018.\(^2\)

- **Medicinal marijuana is legal in 29 states:** Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New


Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, (and D.C.)³


There has been an increase in the number of fatal accidents in states that permit recreational use of marijuana. In the two years after marijuana was legalized in Colorado, fatal crashes from marijuana-positive drivers rose 10%. The researchers found no major changes over the same time in the proportion of drivers in fatal crashes in which drivers were alcohol-impaired. For comparison purposes, Columbia University’s Mailman School of Public Health gathered data from six states – California, Hawaii, Illinois, New Hampshire, Rhode Island, and West Virginia – that perform toxicology tests on drivers involved in fatal car accidents. This data included over 23,500 drivers that died within one hour of a crash between 1999 and 2010. Drugged driving accounted for more than 28 percent of traffic deaths in 2010, which is 16 percent more than it was in 1999. With the increase in vehicular accidents that involve marijuana, the complexity of evaluating a case in a legalized marijuana state continues to evolve.

While marijuana may be legal in certain states, there are competing interests for the trucking industry. Carriers have drug and alcohol free policies and the FMCSRs prohibit drivers from performing “safety-sensitive functions, including driving a commercial motor vehicle,” if the driver has violated a controlled substance rule. See §382.505. The DOT drug test includes marijuana metabolites as a “controlled substance” as defined by §40.85. This means challenges for carriers to create company-wide policies on usage and drug testing, especially for those carriers that employ non-drivers.

in legalized marijuana states. This also creates retention and hiring concerns for carriers. DOT prohibits medical and recreational consumption. This means a driver who uses marijuana legally in a state like Colorado or Alaska could be at risk of termination should they test positive for the drug. While legislation continues to expand, the ability to defend a positive drug test in a legalized state remains challenging with the regulations. In comparison, carriers and counsel can expect the number of accidents with “drugged” drivers and passengers that ride with “drugged” drivers to increase in these states.

From a case evaluation standpoint, we can still expect both sides to advocate over the impact of a positive drug test, regardless of the legality. From a verdict standpoint, it remains to be seen whether jurors in legalized states will punish “drugged” claimants in the form of fault allocations.

**Damages**

Another geographical consideration is the admissibility standard for damages. There are three approaches that have surfaced amongst the country – billed, paid, and both. The “billed” approach adheres to the traditional collateral source rule, so the jury only hears the amount billed by the medical provider, before adjustments/write-offs. The “paid” approach means that the jury will hear the amount of medical expenses paid after adjustments/write-offs in satisfaction of the billed amounts. In some states, the admissibility of “who” paid the expenses is of critical importance – e.g. government vs. private insurance considerations. Under the “both” category, or perhaps better stated as the hybrid approach, the jury will hear the amount billed and the amount paid in
satisfaction of the amounts billed and the jury is left to determine which figures to utilize for an award. The following depicts the current landscape of the United States:

The case value will differ depending on which state the claim is pending. States that permit a jury to hear only “billed” expenses is likely to yield a higher case value, since the amount billed is always greater than the amount ultimately paid. In the same vein, a state where the jury only hears the “paid” expenses is going to have a lesser case value, since the “paid” figure is less than the “billed” expenses. For states that permit “both,” the jury is free to adopt either approach. Finally, there are states that allow the Judge to issue post-verdict judicial setoffs based upon adjustments/write-offs after the jury has heard the amount billed and rendered a verdict; these states have been categorized as “billed” since the jury only hears the amount billed in accordance with the collateral source rule. The admissibility standard on damages is constantly evolving within the judiciary of each state.
Therefore, the ability to evaluate cases in various jurisdictions will differ depending upon the admissibility standard for medical expenses.