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Personal Jurisdiction After Bristol-Myers Squibb: Unresolved Issues, Shifting Plaintiff Strategies

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Wystan M. Ackerman, Partner, **Robinson & Cole**, Hartford, Conn.

Anand Agneshwar, Partner, **Arnold & Porter Kaye Scholer**, New York

Michael J. Ruttinger, Counsel, **Tucker Ellis**, Cleveland

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After The BNSF Decision, There's No Place Like 'At Home'

By **Richard Dean and Michael Ruttinger**

Law360, New York (June 6, 2017, 11:20 AM EDT) --
The United States Supreme Court's decision in Daimler v. Bauman AG, 134 S. Ct. 746 (2014), sparked what some have called a "revolution" in personal jurisdiction law with its holding that courts may only exercise general jurisdiction over corporations where they are "at home" — typically, in either the corporation's place of incorporation or its principal place of business.


Richard Dean

In short order, Daimler touched off a torrent of lower court decisions restricting the practice of "litigation tourism," in which non-resident plaintiffs file suit in a foreign, plaintiff-friendly forum, even though they were not injured and have never resided in the forum.


Michael Ruttinger

Consequently, it is no surprise to see articles like the May 22, 2017, piece authored by Leslie Brueckner and Andre Mura titled The Supreme Court Puts Personal Jurisdiction On Trial, which offers plaintiff-side criticism of Daimler. As counsel coming from a defense perspective, it will come as no surprise that the authors disagree with Brueckner and Mura's position that the Supreme Court's recent personal jurisdiction precedent is fundamentally unfair to plaintiffs.

But there is one position on which we, and now the Supreme Court, agree — the outlook for plaintiffs who seek to sue outside of the forum where their injury occurred or where the defendant is "at home" is bleak. Plaintiffs have gone to great lengths to distinguish Daimler and preserve every opportunity for forum-shopping, but the 2017 Supreme Court term may close the window on their attempts.

Specifically, the Supreme Court accepted certiorari in two cases — BNSF Railway Co. v. Tyrrell, No. 16-405, and Bristol Myers Squibb Co. v. Superior Court of California, San Francisco County, No. 16-466, in which plaintiffs persuaded lower courts to construe Daimler narrowly.

In one of these cases, plaintiffs have already lost; on May 30, 2017, the U.S. Supreme Court reversed the Supreme Court of Montana and broadly held that "Daimler ... applies to all state-court assertions of general jurisdiction over nonresident defendants." BNSF Railway Co. v. Tyrrell, No. 16-405, 2017 WL 2322834, at *10 (May 30, 2017).

In BNSF Railway, the Supreme Court unequivocally rejected one attempt by plaintiffs to limit Daimler to

its narrow factual circumstances. The plaintiff filed suit against the defendant railroad under the Federal Employers' Liability Act (FELA) in Montana, even though "[n]either plaintiff alleged injuries arising from or related to work performed in Montana" and neither plaintiff lived in Montana. BNSF Railway, 2017 WL 2322834 at *3.

The Supreme Court's holding was familiar to anyone who has read Daimler — it confirmed that a Montana court could not exercise general jurisdiction over BNSF Railway because it "is not incorporated or headquartered in," and is therefore not "at home in," Montana. 2017 WL 2322834 at *2. But the Supreme Court did more than reaffirm Daimler; it rejected attempts to confine its holding to any particular set of claims.

In the underlying case before the Supreme Court of Montana, the plaintiffs had persuaded the court to distinguish Daimler "on the ground that [the Supreme Court] did not there confront a FELA claim or a railroad defendant." Id. at *10. Therefore, since it believed Daimler did not apply, the Supreme Court of Montana concluded it could exercise general jurisdiction just because the railroad "does business" in Montana. See Tyrrell v. BNSF Railway Co., 373 P.3d 1, 7 (Mont. 2016).

But the high court rejected that distinction, clarifying that "Daimler, however, applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued." Id. at *10.

The Supreme Court's holding in BNSF Railway bodes ill for the non-resident plaintiffs' hopes in the Bristol Myers case, where the court is poised to deal a further blow to litigation tourism. By confirming that it will apply its Daimler holding irrespective of "the type of claim asserted or business enterprise sued," the high court has sent an unequivocal message that Daimler applies to any kind of claim raised against any kind of defendant — from common-law to contract or statute-based.

In Bristol Myers, the California Supreme Court sought an end run around Daimler by turning to specific jurisdiction, not general, and attempted to peg specific jurisdiction to a novel test comparing the similarity of claims of California and Ohio residents. But that test is inconsistent with the U.S. Supreme Court's companion decision to Daimler in Walden v. Fiore, 134 S. Ct. 1115 (2014), in which the court reiterated its long-held rule that specific jurisdiction exists only where the defendant's conduct giving rise to the injury is specifically connected to the forum. Walden, 134 S. Ct. at 1122.

Thus, if the U.S. Supreme Court reverses the California Supreme Court, which seems likely in the wake of the BNSF Railway decision, it will cut off yet one more way in which plaintiffs seek to avoid Daimler's impact on litigation tourism.

Collectively, Daimler, Walden and BNSF Railway offer an easily followed test that provides plaintiffs with three options for where they can file a lawsuit: (1) the forum that could exercise specific jurisdiction (often the location of the injury); (2) the defendant's state of incorporation; or (3) the state in which the defendant has its principal place of business.

And yet despite that guidance, plaintiffs' counsel like Brueckner and Mura decry the Supreme Court's holdings as "deep[ly] unfair[] for plaintiffs who will have difficulty finding forums in which to seek a remedy." But finding a forum in which to seek a remedy is easy under Daimler, Walden and BNSF — the real issue is that plaintiffs want to seek out the most plaintiff-friendly forum possible, which may not be a court that can exercise jurisdiction.

Nor is the rule articulated in Daimler and BNSF Railway "especially favorable" to corporations or unfair to individual plaintiffs, as Brueckner and Mura criticize. Objectively, numerous fairness principles favor litigation either where the alleged injury occurs or where the defendant is "at home." In almost any litigation, it will favor both sides to have a forum where fact witnesses and third-party witnesses can be easily subpoenaed for trial. Common sense dictates that a critical mass of these witnesses will be located either near the defendants' headquarters or the location of the injury.

Moreover, litigation tourism prejudices defendants by allowing plaintiffs to choose forums that have peculiarly restrictive summary judgment rules, lengthy statutes of limitation for bringing claims or especially lax rules for the admission of scientific testimony.

And indeed, litigation tourism is even used to unfairly deprive defendants of the ability to litigate claims against them in federal court by lumping together out-of-state plaintiffs' claims with that of a single in-state resident of whatever state where the defendant is "at home," thus contriving to defeat diversity jurisdiction. Limiting the forums in which corporate defendants can be sued does not deprive plaintiffs of the chance to seek a remedy, but it does restore a measure of balance between the parties.

BNSF and the possible reversal in Bristol Myers Squibb will significantly curtail the future of litigation tourism, with impact on both current and future cases. Indeed, it should be noted that many of the large verdicts reported in the last few years in this publication were the result of litigation tourism to plaintiff-friendly jurisdictions. The jurisdictional issues were raised and preserved in many of these cases and several of those verdicts may be vacated in light of BNSF and Bristol Myers.

A South Dakota resident who has never set foot in San Francisco, St Louis City or Cook County won't be able to collect a huge judgment and, in the future, such plaintiffs will have to choose between suing in the place where they were injured or where defendant is "at home." In most cases, one of the parties — plaintiff or defendant — will always be "at home." How is that unfair?

Richard A. Dean is a partner, and Michael J. Ruttinger is of counsel, at Tucker Ellis LLP in Cleveland, Ohio.

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How Bristol-Myers Squibb May Transform Class Actions

By **Richard Dean and Michael Ruttinger**
October 11, 2017, 10:39 AM EDT


Richard Dean


Michael Ruttinger

Although we are only three months removed from the U.S. Supreme Court's decision in Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017), much ink has already been spilled predicting the demise of so-called "litigation tourism."

So far, the results support the hype; although Bristol-Myers won't spell the end for all mass actions, it has triggered high-profile dismissals from several jurisdictions, like the Eastern District of Missouri, which previously acted as "magnet jurisdictions" for non-resident plaintiffs' tort claims. See, e.g., Jordan v. Bayer Corp., No. 4:17-CV-865 (CEJ), 2017 WL 3006993 (E.D. Mo. July 14, 2017) (dismissing the claims of 86 different plaintiffs from 25 states).

But while the vast majority of discussion about Bristol-Myers has focused on its impact on forum shopping, the implications of the Supreme Court's decision stretch further. When Bristol-Myers is viewed in context with the high court's other recent decisions, such as its general jurisdiction companion, BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017), it seems clear that the court is constricting its personal jurisdiction jurisprudence.

Often, the best place to preview the full consequences of a decision is the dissent, and that is especially true here, where Justice Sotomayor predicted several major implications of the decision beyond its effect on litigation tourism. So while many practitioners follow the trail of no-jurisdiction dismissals in the wake of Bristol-Myers, keep an eye out for how lower courts treat personal jurisdiction disputes following Bristol-Myers. They may herald new issues that could be back before the Supreme Court soon enough.

Plaintiffs Will Be Required to Sue in Multiple Jurisdictions for the Same Underlying Injuries

In her lone dissent, Justice Sotomayor expressed sympathy towards plaintiffs' tasks following Bristol-Myers, fretting that that "[t]he majority's rule will make it difficult to aggregate the claims of plaintiffs across the country," "will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States," and "will result in piecemeal litigation and bifurcation of claims." Id. at 1784.

Her prediction reflects the concern plaintiffs expressed on page 39 of their Respondents' Brief to the Supreme Court, in which they warned that a more restrictive test for specific jurisdiction could mean that "no state court could fully and efficiently adjudicate such litigation" and "[r]ather than jointly filing their claims challenging the identical wrongful conduct in one state court, the plaintiffs must proceed before fifty, or perhaps bring the same exact joint case against two different defendants in two courts simultaneously on opposite sides of the country." 2017 WL 1207530 at *39.

The plaintiffs' concern was driven in part by the specter of Daimler AG v. Bauman, 134 S. Ct. 746 (2014), in which the Supreme Court had already constricted the places where a corporation was "at home" for purposes of establishing general jurisdiction. Indeed, the Supreme Court's decision in BNSF — which preceded Bristol-Myers by only three weeks — reaffirmed that the exercise of general jurisdiction is limited in most cases to the "corporation's place of incorporation and its principal place of business." BNSF, 137 S. Ct. at 1558.

Thus, if a plaintiff sought to sue two different corporations who were "at home" in different states, there was already only one forum in which he could aggregate his claims — the forum that could exercise specific jurisdiction. Further limiting the specific jurisdiction test could, consequently, make claim aggregation even more difficult.

Rather than allay plaintiffs' fears, it appears that the Supreme Court sent a message that less claim aggregation is exactly what the Due Process Clause requires. In the Due Process context, the court explained, the "primary focus" of the Supreme Court's fairness inquiry "is the defendant's relationship to the forum State." Bristol-Myers, 137 S. Ct. at 1779 (emphasis added).

Consequently, it seems in the wake of Bristol-Myers that the plaintiffs' concern about being required to sue defendants in multiple jurisdictions to recover for a single injury now seems not only possible, but probable.

Plaintiffs Will Have More Difficulty Bringing Nationwide Class Actions

Although Bristol-Myers did not directly implicate class actions, Justice Sotomayor foreshowed in her dissent that district courts may use the Supreme Court's recent personal jurisdiction holdings to resist certification of nationwide classes.

Although the majority opinion made no mention of class litigation, Justice Sotomayor expressly noted in a footnote that the Supreme Court left open "the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there." Bristol-Myers, 137 S.Ct. at 1789 n.4.

In the past, courts have held that they may exercise specific jurisdiction over absent class members' claims so long as they can exercise personal jurisdiction over the named plaintiffs' lawsuit. Yet the Supreme Court's holding in Bristol-Myers threatens that reasoning insofar as it held that a California court could not "assert specific jurisdiction over the nonresidents' claims" even though they obtained and ingested the same drug as the California plaintiffs. 137 S. Ct. at 1776.

Specifically, the Supreme Court has emphasized that the class action device is a procedural rule, and therefore "must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right." Amchem Prods.

Inc. v. Windsor, 521 U.S. 591, 592 (1997).

Combined with the Supreme Court's holding in Bristol-Myers, that principle poses a strong potential argument for opposing the certification of broad national classes. After all, if class certification is just another form of joinder, then it is not clear how plaintiffs can distinguish the Supreme Court's holding in Bristol-Myers that nonresidents' claims could not proceed on the theory that aggregation with the California residents' claims through joinder established personal jurisdiction.

Put simply, class certification under Rule 23 is not a substantive exception to the Due Process Clause's personal jurisdiction requirements. If fairness under the Due Process Clause precludes nonresident plaintiffs from aggregating their claims with an in-forum resident outside of the class context, it should also bar nonresident class members from doing the same.

Although no court has yet applied Bristol-Myers to class certification issues, the issue is certain to crop up in forthcoming litigation. See Broomfield v. Craft Brew Alliance Inc., No. 17-cv-01027-BLF, 2017 WL 3838453, at *15 (N.D. Cal. Sept. 1, 2017) ("Regardless of the temptation by defendants across the country to apply the rationale of Bristol-Myers to a class action in federal court, its applicability to such cases was expressly left open by the Supreme Court and has yet to be considered by lower federal courts. Indeed, this Court may be among the first to rule on the implications of the decision for nationwide class actions.").

Conclusion

The Bristol-Myers decision will continue to grab headlines for its impact on curtailing forum-shopping, but if Justice Sotomayor is correct about the wide-reaching consequences of the court's decision then that effect will be just the first symptom of a much wider contraction of personal jurisdiction jurisprudence.

It has been a long road from cases like International Shoe, 326 U.S. 310 (1945) and Worldwide Volkswagen, 444 U.S. 286 (1980) to Bristol-Myers and BNSF Railway. There may be a few interesting twists in that road yet to be revealed.

Richard A. Dean is a partner and Michael J. Ruttinger is of counsel at Tucker Ellis LLP in Cleveland, Ohio.