

## **The U.S. Supreme Court’s Recent Personal Jurisdiction Decisions: *Federalism and Restriction on Forum Shopping, or a “Parade of Horribles”?***

Jill Gerdrum, September 2017

In May and June 2017, the U.S. Supreme Court issued two decisions which bolster a corporate defendant’s ability to challenge personal jurisdiction when sued outside its home state and which significantly limit plaintiffs’ ability to shop around for the friendliest forum. Together, the pair of decisions address the assertion of both general and personal jurisdiction.

This article will provide an overview of what corporate defendants and their attorneys need to know to apply these decisions in future cases and will touch on the subject of retroactive application in pending cases.

### **General Personal Jurisdiction - *BNSF Railway Co. v. Tyrrell***

Marking the first time the U.S. Supreme Court has addressed the application of its 2014 decision in *Daimler AG v. Bauman*, 571 U.S. \_\_\_, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), in a general personal jurisdiction case, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), refined the law concerning assertion of general jurisdiction over nonresident defendants.<sup>1</sup>

In the 2014 *Daimler* decision, the Court shifted the focus of a general personal jurisdiction inquiry from whether the defendant has substantial “continuous and systematic” contacts with the forum state to whether the defendant’s affiliations are so “continuous and systematic” as to render it essentially “at home” in the forum state. There, Argentine residents sued a German corporation, DaimlerChrysler Atiengesellschaft, in California, alleging the company’s subsidiary committed crimes and torts against the subsidiary’s workers in Argentina years earlier. In the underlying appeal, the Ninth Circuit held California could assert personal jurisdiction over Daimler based on contacts another one of its subsidiaries had with California. However, the U.S. Supreme Court rejected the concept, holding that Daimler’s U.S. subsidiary contacts with California were insufficient to support general jurisdiction. The Court held that only “exceptional circumstances” would justify assertion of general jurisdiction outside of where a defendant is incorporated and has its principal place of business.<sup>2</sup>

The Court applied and refined the *Daimler* decision in *Tyrrell*, a case which involved the question of whether Montana state courts could exercise personal jurisdiction over railroads sued

---

<sup>1</sup> *Tyrrell* was the first opinion Justice Neil Gorsuch participated in since his appointment to the Court.

<sup>2</sup> The question of what constitutes “exceptional circumstances” remains unclear, but the *Tyrrell* Court looked to *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as one example. In subsequent cases, courts have looked to the facts of *Tyrrell* and *Perkins* to determine if “exceptional circumstances” allow the finding of general jurisdiction outside the company’s home state and have answered the inquiry in the negative. See *N. Frac Proppants, II, LLC v. 2011 NF Holdings, LLC*, 05-16-00319-CV, 2017 WL 3275896, at \*23 (Tex. App.--Dallas July 27, 2017); *Guaranteed Rate, Inc. v. Conn.*, 17-CV-3289, 2017 WL 3704845, at \*4 (N.D. Ill. Aug. 28, 2017); *Antonini v. Ford Motor Co.*, 3:16-CV-2021, 2017 WL 3633287, at \*2 (M.D. Pa. Aug. 23, 2017).

in the state by nonresident employees whose claims have no connection to Montana. In the underlying cases, a North Dakota resident injured on the job brought a Federal Employer's Liability Act (FELA) suit against BNSF Railway Company in Montana. Similarly, the widow of a South Dakota resident sued BNSF under FELA in Montana on grounds her husband was exposed to carcinogenic chemicals while working for BNSF and ultimately died of kidney cancer as a result. Neither complaint alleged the employees worked or were injured in Montana, and there were no other indications the claims had anything to do with the state. BNSF is not incorporated in Montana and does not have its principal place of business there.

In a consolidated appeal, the Montana Supreme Court addressed BNSF's challenge to personal jurisdiction and held Montana courts have general jurisdiction over BNSF under FELA. The Montana Court relied on the following FELA provision:

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56.

The Montana Court interpreted § 56 to authorize jurisdiction. It went on to hold that Montana state courts could assert general personal jurisdiction over BNSF on grounds BNSF does business in Montana and is "found within" the state by virtue of the fact it has over 2,000 miles of railroad tracks and 2,000 employees there.

The U.S. Supreme Court disagreed. In an opinion by Justice Ginsburg and joined by all the justices except Justice Sotomayor, the Court held Section 56 of FELA is not a personal jurisdiction statute, but rather, a venue statute governing proper locations for FELA suits filed in federal courts and a clarification that both state and federal courts have subject matter jurisdiction to hear the suits. Further, Justice Ginsburg stated that because the statute does not authorize state courts to exercise personal jurisdiction over a railroad solely on the grounds that the railroad does some business there, personal jurisdiction "must rest on [the state's long-arm statute]." *Tyrell* at 1558.

The Court went on to address the issue of whether BNSF was "at home" in Montana such that Montana could assert general personal jurisdiction to adjudicate claims that had nothing whatsoever to do with the forum. The Court emphasized application of *Daimler*, even though *Daimler* did not involve a FELA case, holding that the due process constraint described there applies to all state court assertions of general jurisdiction over nonresident defendants, no matter the type of claim. When applied to the facts of *Tyrell*, the Court held that Montana's assertion of general personal jurisdiction over BNSF violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution because "BNSF is not incorporated or

headquartered in Montana and its activity there is not ‘so substantial and of such a nature as to render the corporation at home in that state.’” *Id.* at 1553.

The takeaway is clear – the Court will apply the Due Process Clause in questions as to the validity of general personal jurisdiction, and when it does, forum shopping will not stand.

### **Specific Personal Jurisdiction - *Bristol-Myers Squibb v. Superior Court of California***

The exercise of specific personal jurisdiction – which generally allows a court to assert jurisdiction over a nonresident defendant when the plaintiff’s claim arose in the forum or has a particular nexus to it – was addressed and limited by the U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). In this case, hundreds of plaintiffs sued Bristol-Myers Squibb in California state court alleging the company’s drug, Plavix, injured them, even though most were not California residents and did not allege they obtained the drug in California.

Bristol-Myers Squibb is neither incorporated nor headquartered in California, but the plaintiffs maintained California should have personal jurisdiction over it because it has research centers, laboratory facilities and employees there and because it had hundreds of millions of dollars’ worth of Plavix sales in the state.

The California Supreme Court ruled that California courts could exercise specific personal jurisdiction over Bristol-Myers Squibb based on what it called a “sliding scale” approach to specific personal jurisdiction.<sup>3</sup> According to the California Supreme Court, “the strength of the requisite connection between the forum and specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims.” *Bristol-Myers Squibb* at 1781. Applying its “sliding scale,” the California Supreme Court held it did not violate due process for Bristol-Myers Squibb to be haled into court there, even though the specific claims at issue arose in states other than California. *Id.*

Just as in *Tyrrell*, the U.S. Supreme Court overturned the state court in an 8-1 decision, with Justice Sotomayor dissenting. Justice Alito characterized the “sliding scale” test as “loose and spurious” with “no support” in the jurisprudence of the Supreme Court. *Id.* at 1781. The Court reiterated that specific jurisdiction can only be had when the specific claims at issue arise out of the defendant’s forum-related activities. In other words, the defendant’s general connections with the forum are not enough – the connections must relate to the claims at issue.<sup>4</sup> The Court

---

<sup>3</sup> The California appeals court initially upheld the exercise of general jurisdiction, but reversed its decision after applying the rule set forth in *Daimler*.

<sup>4</sup> The Court noted that the opinion was limited in application to the exercise of specific jurisdiction by a **state** court, leaving open “the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” *Id.* at 1783-84. Other courts have since picked up on the distinction. See, e.g., *Lindsley v. Am. Honda Motor Co., Inc.*, CV 16-941, 2017 WL 3217140, at \*2 (E.D. Pa. July 28, 2017).

also rejected the plaintiffs' contention that personal jurisdiction over Bristol-Myers Squibb could be based on its distributor's contacts with California.

The Court reiterated that the Due Process Clause, at times, acts as an "instrument of interstate federalism," which may sometimes divest the state of its power to render a decision, even where the state may have some interest in the claims. *Id.* at 1776.

In a dissenting opinion, Justice Sotomayor argued specific jurisdiction was appropriate because Bristol-Myers Squibb "purposely availed itself" in California, the plaintiffs' claims related to the company's nationwide marketing and distribution of Plavix, and the conduct that injured the California plaintiffs was identical to the conduct that injured plaintiffs in other states. *Id.* at 1784-88. Justice Sotomayor also expressed concern that the decision "will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action" and "may make it impossible to bring certain mass actions at all." *Id.* at 1788-89.

Justice Alito, writing for the majority, stated the personal jurisdiction principles set forth in *Bristol-Myers Squibb* "will not result in the parade of horrors" conjured up by the plaintiffs and noted the decision does not prevent the plaintiffs from filing a joint suit in the defendant's home state or prevent groups of plaintiffs from the same state from bringing suit where they reside (and presumably where their claims arose). *Id.* at 1777.

Attorney for Bristol-Myers Squibb, Neal Katyal, echoed the Court's federalism reasoning, stating the "decision was about basic principles of federalism and fairness in our legal system." Mr. Katyal also stated his client is hopeful the decision will provide companies more certainty regarding where lawsuits can be heard.<sup>5</sup>

No matter your perspective, the decision will no doubt have a great impact on litigation against national corporations, especially in products liability, mass tort, and class action cases. Grouping plaintiffs and shopping for the most favorable forum is no longer a viable option, at least not when some of the plaintiffs' claims have little to do with the forum.

### **Practical Considerations for Defendants**

*Tyrrell* and *Bristol-Myers Squibb* provide corporate defendants additional quivers with which to challenge personal jurisdiction. Attorneys defending new suits should be aware of the recent decisions and take care to assert the defense where appropriate so as not to waive it under Fed.R.Civ.P. 12(g).

---

<sup>5</sup> See Debra Cassens Weiss, *Supreme Court limits jurisdictional reach of state courts in Plavix class action*, ABA Journal (June 19, 2017, 12:19 PM), [http://www.abajournal.com/news/article/supreme\\_court\\_limits\\_jurisdictional\\_reach\\_of\\_state\\_courts\\_in\\_plavix\\_class\\_a](http://www.abajournal.com/news/article/supreme_court_limits_jurisdictional_reach_of_state_courts_in_plavix_class_a).

In pending suits, it may be worthwhile to evaluate whether to take another run at motions to dismiss that were denied prior to these decisions. Motions for reconsideration and *sua sponte* reviews are already underway in cases where defendants unsuccessfully challenged personal jurisdiction prior to the Court's recent holdings. For example, when *Bristol-Myers Squibb* was issued, a Missouri state court promptly applied the ruling and declared a mistrial in a talcum powder case involving plaintiffs with no connection to Missouri.<sup>6</sup> Similarly, the U.S. District Court for the Northern District of Illinois, Eastern Division, reconsidered its earlier denial of a motion to dismiss for lack of personal jurisdiction, re-analyzed the entire matter, applied *Bristol-Myers Squibb* and *Tyrrell*, and partially granted the defendant's motion to dismiss. *MG Design Associates, Corp. v. CoStar Realty Info., Inc.*, 16 C 5166, 2017 WL 3070848, at \*4-10 (N.D. Ill. July 19, 2017). On the other hand, the U.S. District Court for the Western District of Oklahoma denied a motion for reconsideration on grounds that personal jurisdiction was based on the "stream of commerce doctrine," which was not explicitly addressed in *Bristol-Myers Squibb*. *Tarver v. Ford Motor Co.*, CIV-16-548-D, 2017 WL 3527710, at \*3 (W.D. Okla. Aug. 16, 2017).<sup>7</sup>

Similar motions to reconsider were made after *Daimler* with mixed success, often depending on whether the defense was adequately preserved or otherwise waived in advance before the law was clarified. For example, in *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 241-42 (D.D.C. 2015), the court reversed its earlier denial of a motion to dismiss for lack of personal jurisdiction on grounds that *Daimler* represented an intervening change in the law of personal jurisdiction. Likewise, in *Neeley v. Wyeth LLC*, 4:11-CV-00325-JAR, 2015 WL 1456984, at \*1 (E.D. Mo. Mar. 30, 2015), the court granted a motion to reconsider and reversed its earlier denial of a motion to dismiss for lack of personal jurisdiction. In other cases, including *Am. Fid. Assur. Co. v. Bank of New York Mellon*, CIV-11-1284-D, 2014 WL 8187951, at \*1-2 (W.D. Okla. Dec. 12, 2014) and *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 8 F. Supp. 3d 9, 12-13 (D.D.C. 2014), courts have refused to consider motions to dismiss for lack of personal jurisdiction on grounds the defendants failed to raise the defense earlier and therefore waived it. In *Gilmore*, the court held the defense was waived because it was available to the defendant under *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), even though it was not as developed as it became in *Daimler*.

Whether addressing current cases or the defense of newly filed lawsuits, it would be beneficial to take a closer look at how these decisions fit in to the defense.

---

<sup>6</sup> See Jim Salter, *High Court ruling may hurt claims of talc link to cancer*, ABC News (June 20, 2017, 5:46 PM), <http://abcnews.go.com/US/wireStory/high-court-ruling-hurt-claims-talc-link-cancer-48164606>

<sup>7</sup> See also, *Swann v. Johnson & Johnson*, Case No. 1422-CC09326-01, (Cir. Ct. Mo., June 20, 2017).