

## Why The Supreme Court Must Revisit Personal Jurisdiction

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*Law360, New York (February 1, 2017, 10:57 AM EST)* -- In its most recent decisions on personal jurisdiction, the U.S. Supreme Court has reiterated the distinction between general personal jurisdiction on the one hand and specific personal jurisdiction on the other.

As to the former, courts may exercise general or “all-purpose” personal jurisdiction over a defendant “to hear any and all claims against it” only when the defendant’s affiliations with the forum state “are so constant and pervasive as to render it essentially at home in the forum State.” *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (internal quotation marks and brackets omitted).

In practice, this means corporations will be subject to general jurisdiction where they are incorporated and have their principal place of business.

By contrast, specific personal jurisdiction comports with due process only where “the defendant’s suit-related conduct” creates “a substantial connection with the forum state.” *Walden v. Fiore*, 134 S. Ct. 1115, 1121-22 (2014); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion).

The standards are clear, but the results they produce apparently remain troubling to some state courts. The Supreme Court’s recent grant of certiorari in two personal jurisdiction cases will provide the latest chapters in this ongoing saga: *BNSF Railway Company v. Tyrrell* (which involves general personal jurisdiction) and *Bristol-Myers Squibb Company v. Superior Court of California* (which involves specific personal jurisdiction).

### **BNSF Railway Company v. Tyrrell**

In *BNSF Railway Company v. Tyrrell*, the Supreme Court will review two questions on the scope of general personal jurisdiction arising from a decision of the Montana Supreme Court.



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The first should be straightforward: whether the Supreme Court's recent decision in *Daimler AG v. Bauman* — which held that defendants are subject to general personal jurisdiction only where they are “at home” — applies to cases involving domestic parties and domestic injuries.

In *Daimler*, Argentinian plaintiffs sued a German defendant in federal court in California based on injuries suffered in Argentina. Because the foreign defendant had no connection to California or the United States more generally, the high court held that due process protected the defendant from being subject to specific or general personal jurisdiction in California.

In *BNSF*, the Montana Supreme Court “declined” to apply *Daimler* to suits between domestic plaintiffs and a domestic railroad on the theory that *Daimler*'s “at-home” rule for general personal jurisdiction does not apply in the domestic context.

The Montana Supreme Court is the only state or federal court to adopt this narrow reading of *Daimler*. For good reason: the U.S. Supreme Court has expressly held that a corporation is “foreign” for personal jurisdiction purposes if it is being sued in a “sister state” or a “foreign country.” *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919). As a result, *Daimler*'s holding and rationale seem unlikely to be limited only to transnational defendants, as the Montana court opined.

The second issue *BNSF* will address is whether Congress can authorize state courts to exercise general personal jurisdiction over defendants who are not “at home” in the forum state. The Montana Supreme Court disregarded *Daimler* by concluding that the Federal Employers' Liability Act (FELA) authorized state courts to exercise general jurisdiction over railroads simply because they are “doing business” in the forum state.

On this point, too, the Montana court's reasoning seems dubious. At most, the text of FELA appears to confer concurrent subject matter jurisdiction on state courts — i.e., the ability to resolve suits under FELA.

Nothing in the text unambiguously authorizes state courts to exercise general personal jurisdiction. But even if it did, the Montana court overlooked that Congress cannot override the constitutional principles underlying *Daimler* and the Supreme Court's personal jurisdiction precedent.

A decision in *BNSF* is expected by the end of June 2017.

### ***Bristol-Myers Squibb Co. v. Superior Court of California for the County of San Francisco***

In *Bristol-Myers Squibb Company v. Superior Court of California*, the Supreme Court will attempt to further clarify the doctrine of specific personal jurisdiction.

It is black-letter law that state courts cannot exercise specific personal jurisdiction over out-of-state defendants unless, among other things, the plaintiff's claims “arise out of or relate to” the defendant's activities or “minimum contacts” in the forum state. The question presented in *Bristol-Myers* is whether a plaintiff's claims must be caused by a defendant's activities in the forum state in order for those claims to “arise out of or relate to” the defendant's forum-directed activities.

In a divided 4-3 opinion, the California Supreme Court answered that question in the negative. The court held that California had specific jurisdiction over *Bristol-Myers* even though its drug was prescribed, distributed, sold, ingested and allegedly caused injuries to plaintiffs outside of California.

The court based that conclusion on Bristol-Myers's California sales representatives, distributor and research and development facilities unrelated to the drug at issue in the case. Indeed, applying a "sliding scale" approach to personal jurisdiction under which a defendant's contacts need not "be either the proximate cause or the 'but for' cause of the plaintiff's injuries," the California court held that plaintiffs could establish a "nexus" between their claims and the defendant's forum activities because the plaintiffs' suit was "based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product."

In other words, the more wide-ranging the defendant's contacts are with the forum state, the more likely the state court would presume a connection between those contacts and the claim, regardless of whether any such connection exists. The California court thus held that the plaintiffs' claims could "arise out of or relate to" Bristol-Myers's activities in California, even if plaintiffs' injuries were not caused by those in-state activities.

The consequences of Bristol-Myers could be far-reaching. In the event the Supreme Court adopts California's sliding scale approach to personal jurisdiction, plaintiffs likely will argue that manufacturers should be subject to specific jurisdiction in every state where they sold their products, regardless of whether the specific claims directly relate to the defendant's contacts in the forum state.

The California court's broad application of the "relate to" standard also threatens to undo the Supreme Court's strict division between general and specific jurisdiction by seemingly creating a nebulous intermediate category of personal jurisdiction. Given these broad consequences, Bristol-Myers is likely to garner significant attention from stakeholders and amici on both sides of the issue.

Bristol-Myers likely will be argued in fall 2017, with a decision expected by the end of June 2018.

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