

Addressing Personal Jurisdiction Limits At The High Court

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Law360, New York (April 27, 2017, 11:44 AM EDT) -- Once again, the U.S. Supreme Court heard oral argument in cases involving lower court attempts to expand personal jurisdiction. In recent terms, the Supreme Court has curtailed those efforts — but some courts still have not gotten the message. Consider, for example, the state court decisions under review in *Bristol-Myers Squibb Company v. Superior Court of California for the County of San Francisco* and *BNSF Railway Company v. Tyrrell*, both of which adopted an expansive view of personal jurisdiction that is seemingly at odds with the Supreme Court's most recent efforts to cabin that doctrine. And as much as one should not read too much into what was said at argument, if the oral arguments in these cases are any indication, the state courts will probably lose again.

Broadly speaking, personal jurisdiction refers to the circumstances under which a court may exercise power over an out-of-state defendant consistent with the due process clauses of the U.S. Constitution's Fifth (where the claim is grounded in a federal law providing nationwide service) and 14th (for claims arising out of state law) Amendments. In its most recent decisions, the Supreme Court has reemphasized its long-standing, bifurcated framework for addressing personal jurisdiction. On one hand, courts may exercise general or "all-purpose" personal jurisdiction over an out-of-state 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 that corporations will be subject to general jurisdiction only where they are incorporated and have their principal place of business. On the other hand, courts may exercise specific personal jurisdiction over an out-of-state defendant 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 SA v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion).



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Although the Supreme Court's standards for personal jurisdiction are clear, certain issues have divided state and federal courts. BNSF and Bristol-Myers present several such issues. Indeed, despite arising in

purely private litigation, the jurisdictional questions in Bristol-Myers and BNSF caught the attention of the federal government, which filed amicus briefs and presented oral argument supporting reversal in both cases. The court is expected to render its decisions in Bristol-Myers and BNSF by the end of June 2017.

Bristol-Myers Squibb Co. v. Superior Court of California

Bristol-Myers presents a potentially far-reaching issue of specific personal jurisdiction that arises from a California state court suit between nonresident plaintiffs and an out-of-state pharmaceutical manufacturer involving an allegedly defective drug (Plavix). 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 was 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 no — causation is not required. Instead, applying a "sliding scale" approach, the California court found that the defendant's "nationwide marketing, promotion and distribution" of the challenged product created a "substantial nexus" between the nonresident plaintiffs' claims and defendant's forum activities given that the suit was "based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product," which led to related litigation in California where personal jurisdiction was not contested.

The oral argument in Bristol-Myers brought a few surprises. First, several justices wrestled with the practical problem of efficiently administering mass tort actions filed in state courts. These justices questioned how it could be "unfair" for Bristol-Myers to litigate this case in California when it fully expected it would have to do so with a proper set of plaintiffs and in fact was currently doing so. Indeed, some justices asked whether Bristol-Myers' proposed approach requiring a causal nexus for each claim brought in a suit could conflict with well-settled legal rules permitting claims to be combined to promote judicial efficiency (e.g., pendent jurisdiction).

At the same time, however, some of the justices' questions appeared directed to whether efforts to solve the practical problem of administering mass tort actions were best forged by Congress, not through an expansion of personal jurisdiction jurisprudence, and noted that cases filed in federal court could be efficiently managed through multi-district litigation treatment. Several justices also appeared concerned that the respondent plaintiffs' position would not only undermine principles of federalism, but also, by collapsing the distinction between general and specific jurisdiction into an amorphous all-things-considered fairness inquiry, would lead to less predictability for all litigants, and thereby cause more problems than it solved. Thus, although the justices looked to be tilting in Bristol-Myers' favor by the end of the argument, the causation issue turned out not to be the foregone conclusion that many anticipated.

Also surprising was that the plaintiffs offered no explicit defense of the California court's "sliding scale" approach. Their counsel said nothing at all about the state court's rationale, even after Justice Neil Gorsuch noted that "we took this, I thought, to decide the legal question whether we have some sort of causation requirement or permit this sliding-scale business that California engages in, as a legal matter."

Predictions are always a hazardous enterprise when it comes to the Supreme Court. And Bristol-Myers is no exception. But the court appeared inclined to rule in favor of Bristol-Myers and vacate the California Supreme Court's decision.

BNSF Railway Company v. Tyrrell

BNSF presents two questions regarding general personal jurisdiction. The first issue is whether the court's rule in *Daimler AG v. Bauman* — subjecting "foreign" defendants to general personal jurisdiction only where they are "at home" — applies only in the transnational context (as the Montana Supreme Court held below), or whether it also applies in a suit between domestic plaintiffs and a domestic, out-of-state defendant (as every other court has held). The second issue is whether Congress can, by statute, authorize state courts to exercise general personal jurisdiction over defendants who are not "at home" in the forum state (as the Montana Supreme Court held with regard to the Federal Employers' Liability Act (FELA)).

The debate in BNSF was not nearly as robust. There was (and could be) no defense of the ruling below that general jurisdiction principles do not apply to domestic companies. On the second issue, the court largely avoided any constitutional concerns about whether FELA could expand the general jurisdiction of state courts, and instead focused on the narrower, statutory issue of whether FELA did in fact do that.

On that statutory issue, the court seemed overwhelmingly in favor of the petitioner BNSF's view that FELA did not have any effect on the personal jurisdiction of state courts, but rather that it established only venue and concurrent subject-matter jurisdiction in state courts. The court also seemed overwhelmingly opposed to the plaintiff's proposal to fashion a new rule of general personal jurisdiction specifically for railroads. The plaintiff attempted to invoke the question left over in *Daimler*, as to whether a defendant could be subject to general personal jurisdiction in a forum that was not where it is incorporated or has its principal place of business, arguing that railroads are "unique" and have a long and storied history in Montana. But the justices seemed skeptical of such arguments, suggesting further that it will indeed be a very rare circumstance when general jurisdiction can cover a third forum.

In sum, the argument in BNSF strongly indicates that the court will reverse an obviously wrong decision on the application of general personal jurisdiction and hold that FELA provides no basis for expanding personal jurisdiction.

A final observation on what we did not hear during argument in either case. None of the counsel appeared to address head-on the issue of forum shopping, despite several invitations from the court. Indeed, at one point Justice Elena Kagan began a question to Bristol-Myers' counsel by noting: "I'm feeling a little bit stymied here because I thought you were going to come at me with saying, look, the juries in California are different or there's punitive damages in California when there's not someplace else or the substantive rules might be different. And I'm not hearing any of that." Thus, whether plaintiffs, or their counsel, perceived a benefit from the chosen fora appeared to be on the minds of the court.

Given the unassailable proposition that forum shopping is improper, and that fights over the location of litigation waste resources and cause unnecessary delays in resolving disputes, an observer could be forgiven for lamenting that an opportunity to admonish the bar for dilatory, wasteful tactics was missed. To be sure, plaintiffs who lose these jurisdictional challenges pay a heavy price: time and money they can never recover. In some cases, statutes of limitation run, precluding any kind of relief. But these skirmishes impose additional costs on an already overly taxed judicial system and for that we all suffer.

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