Legal Backgrounder

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US Supreme Court Curtails Forum Shopping

by Andrew Tauber and Gary Isaac

Toward the end of its most recent Term, the US Supreme Court issued a pair of personal-jurisdiction decisions reaffirming the constitutional limit on where corporations may be sued. The two decisions—*BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 159 (2017) and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017)—are a matched set. *Tyrrell* addresses the limits of "general" personal jurisdiction, and *BMS* the limits of "specific" personal jurisdiction. Together, *Tyrrell* and *BMS* will make it harder for plaintiffs to sue corporations in plaintiff-friendly jurisdictions unconnected to the conduct at issue.

As explained in a previous WLF Legal Backgrounder,[*] a defendant may be sued in a particular state only if it is subject to personal jurisdiction there. If subject to "general" personal jurisdiction, the defendant can be sued there on any claim, regardless where the conduct giving rise to the claim occurred. If not subject to general personal jurisdiction, the defendant can be sued only on claims that "arise from or relate to" the defendant's contacts with the state, as to which there is "specific" jurisdiction. Thus, the broader the scope of either "general" or "specific" personal jurisdiction, the easier it is for plaintiffs to engage in forum shopping.

Tyrrell confirms that the Supreme Court meant what it said in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), which held that a corporate defendant is—as a matter of constitutional law—subject to general personal jurisdiction only when it is "essentially at home in the forum State," and in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which held that, absent "exceptional" circumstances, a corporation is "at home" only where it is incorporated or has its principal place of business. *BMS* further clarifies that the constitutional limit on "general" personal jurisdiction cannot be evaded through an unduly expansive conception of "specific" personal jurisdiction.

Tyrrell: The Constitutional Limit on Personal Jurisdiction Applies to All Claims

Since *Daimler* was decided, plaintiffs and some sympathetic lower courts have sought to evade the Supreme Court's holding that a corporation is ordinarily subject to general personal jurisdiction only where it is incorporated or has its principal place of business. *Tyrrell* emphatically rebuffed one such attempt.

In *Tyrrell*, the plaintiffs had sued the defendant railroad in Montana although they were not injured in the state and the defendant neither was incorporated nor had its principal place of business there. Concluding that Montana courts could nonetheless exercise general personal jurisdiction over the defendant, the Montana Supreme Court allowed the suit to proceed. It explicitly "decline[d]" to apply *Daimler* on

[*] Dan Himmelfarb, Gary Isaac, and Andrew Tauber, *Personal Jurisdiction over Corporate Defendants: Debunking Plaintiffs' Post-Daimler Dodges*, WLF Legal Backgrounder, Apr. 7, 2017, http://www.wlf.org/upload/legalstudies/legalbackgrounder/040717LB_HimmelfarbIsaacTauber.pdf.

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two grounds: (i) the limitations imposed by the Due Process Clause were trumped by the Federal Employers' Liability Act (FELA), the federal statute under which the plaintiffs were suing; and (ii) *Daimler*, which involved injuries to foreigners suffered outside the United States, was limited to its facts and therefore does not govern suits between American parties involving injuries allegedly sustained in the United States.

The US Supreme Court squarely rejected both grounds.

First, the Court concluded that, as a matter of statutory interpretation, FELA did not confer personal jurisdiction over any defendants and that therefore the only possible basis for personal jurisdiction was Montana state law, which purports to give Montana courts general personal jurisdiction over all "persons found" in the state. 137 S. Ct. at 1555–58. Given its extensive operations in the state, there was no dispute that the defendant was a "person[] found" in Montana and was thus subject to general personal jurisdiction there under state law.

Second, reaffirming that even substantial "in-state business" is not sufficient to establish general personal jurisdiction over a corporation, the Court held that Montana courts could not constitutionally exercise general personal jurisdiction over the defendant because it "is not incorporated in Montana and does not maintain its principal place of business there." 137 S. Ct. at 1559. Dismissing the lower court's purported distinction of *Daimler*, the Court emphasized that "the Fourteenth Amendment due process constraint described in *Daimler* … applies to all state-court assertions of general jurisdiction over nonresident defendants" and that "the constraint does not vary with the type of claim asserted or business enterprise sued." *Id.* at 1559–60.

***BMS:* The Constitutional Limit on Personal Jurisdiction Cannot Be Evaded Through an Expansive Conception of "Specific" Personal Jurisdiction**

Given the clear limit on general personal jurisdiction established by *Daimler*, plaintiffs seeking to avoid its stricture have tried to expand the scope of specific personal jurisdiction. *BMS* put an end to one of those efforts.

In *BMS*, hundreds of individuals brought suit in California state court for injuries allegedly caused by Plavix, a drug that Bristol-Myers Squibb sold nationwide but neither developed nor manufactured in California. At issue was whether Bristol-Myers Squibb was subject to specific personal jurisdiction in California with respect to the claims of non-California residents allegedly injured by the sale of Plavix outside of California. The Court held that it was not.

The Court stated that its decision was controlled by "settled principles regarding specific jurisdiction," 137 S. Ct. at 1781, namely, that "[i]n order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" *Id.* at 1780 (citation omitted). Moreover, "[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781.

"For this reason," the Court rejected "the California Supreme Court's 'sliding scale approach'" to specific jurisdiction, under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." 137 S. Ct. at 1781. "Our cases," the Court noted, "provide no support for this approach, which resembles a loose and spurious form of general jurisdiction." *Ibid.*

The Court also rejected the plaintiffs' "nationwide marketing" argument, *i.e.*, the contention that California could exercise specific jurisdiction over claims that arose outside of California because Bristol-Myers Squibb sold Plavix nationwide. It explained, "The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the non-residents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." 137 S. Ct. at 1781 (emphasis in original). That holding reaffirmed the principle that personal jurisdiction over a defendant must be established by each plaintiff individually.

BMS likewise effectively rejected the argument that due-process constraints on specific jurisdiction should be relaxed in "mass tort" cases where plaintiffs have allegedly suffered injury at the hands of multiple defendants not all of whom are "at home." Plaintiffs have argued in mass-tort cases that defendants should be subject to general jurisdiction in the plaintiffs' chosen forum because plaintiffs otherwise might be required to file suit in multiple forums to obtain personal jurisdiction over all defendants. The Court thus reaffirmed the principle that personal jurisdiction must be established as to each defendant individually.

Indeed, in *BMS*, the plaintiffs had sued not just Bristol-Myers Squibb, but also McKesson, a California corporation. And in finding Bristol-Myers Squibb subject to specific personal jurisdiction for the claims of all of the plaintiffs (including the non-resident plaintiffs who allegedly ingested Plavix elsewhere), the California Supreme Court cited efficiency considerations of the sort raised by the plaintiffs, noting that "[w]ere BMS dismissed from nonresident plaintiffs' cases, California courts would be required to hear their claims against McKesson Corporation while the same plaintiffs litigated the same claims arising from the same facts and the same evidence against BMS in a forum potentially on the opposite side of the country." *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 893 (Cal. 2016).

The US Supreme Court, however, was not persuaded, explaining that due-process requirements "'must be met as to *each defendant* over whom a state court exercises jurisdiction.'" 137 S. Ct. at 1783 (emphasis added). "The bare fact that" Bristol-Myers Squibb had "contracted with a California distributor," the Court held, was "not enough to establish personal jurisdiction in the State," when it was "not alleged that" Bristol-Myers Squibb had "engaged in relevant acts together with McKesson in California" or that it was "derivatively liable for McKesson's conduct in California." *Ibid.*

Finally, the Court rejected the plaintiffs' "parade of horribles" argument—*i.e.*, the suggestion that a decision in favor of Bristol-Myers Squibb would lead to great inefficiency by preventing plaintiffs' counsel in "mass tort" cases from joining, and litigating, the claims of multiple plaintiffs in a single forum. 137 S. Ct. at 1783. The Court noted that its "decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS" and, alternatively, "the plaintiffs who are residents of a particular State … could probably sue together in their home States." The Court noted as well that "since [its] decision concerns the due process limits on the exercise of specific jurisdiction by a State," it expressly "leave[s] 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.

In the wake of the decision, plaintiffs in some cases have argued that *BMS* authorizes the assertion of specific jurisdiction so long as there is a connection between the *plaintiff* and the forum. But that argument cannot be squared with *BMS* and its reliance on *Walden v. Fiore*, 134 S. Ct. 1115 (2014). *Walden* held that the "necessary relationship" between the litigation and the forum "must arise out of contacts that the 'defendant *himself*' creates," and "mere injury to a forum resident is not a sufficient connection." *Id.* at 1122, 1125 (emphasis in original). *BMS* cited *Walden* for this very point, explaining that, in *Walden*, "[w]e held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and 'suffered

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foreseeable harm in Nevada' … [b]ecause the '*relevant* conduct'"—*i.e.*, the defendants' conduct—"occurred entirely in Georgi[a]." 137 S. Ct. at 1781–82 (emphasis in original) (quoting *Walden*).

The Court went on to observe that in *BMS* "the connection between the nonresidents' claims and the forum is *even weaker*" than in *Walden* because "[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in that State." *Id.* at 1782 (emphasis added). But the Court has made absolutely clear that "the mere fact" that a defendant's conduct *outside* the forum "affected plaintiffs with connections to the forum State" does "not suffice to authorize jurisdiction." *Id.* at 1782 (quoting *Walden*, 134 S. Ct. at 1126).

In short, the Court's holding that there must be "a connection between the forum and the specific claims at issue," 137 S. Ct. at 1781, should be enormously helpful to defendants in plaintiff-friendly jurisdictions, where plaintiffs' counsel have historically filed numerous cases that have no connection whatsoever to the forum.

An Open Question: Whether Registering to Do Business in a State Constitutes "Consent" to General Personal Jurisdiction in that State

Tyrrell, *BMS*, *Walden*, and *Daimler* have significantly curtailed plaintiffs' ability to forum shop. There remains, however, one forum-shopping tactic that has yet to be considered by the Supreme Court—namely, the contention that by registering to do business in a state (as is required of foreign corporations in most if not all states) a corporation "consents" to general jurisdiction there.

As explained in the aforementioned WLF Legal Backgrounder, there are strong statutory and constitutional arguments why registering to do business in a state does not constitute consent to general personal jurisdiction in that state. Indeed, every circuit and every state court of last resort to have reached the issue have concluded that registration to do business does *not* constitute consent to general personal jurisdiction.

In *Tyrrell*, the plaintiffs advanced a general-jurisdiction-by-consent argument, but, because the lower court did not address the issue, the US Supreme Court expressly declined to reach it. And the issue was not before the Supreme Court in *BMS* because the California Supreme Court had already rejected the "consent" argument as a matter of California law. But with only one justice, Justice Sotomayor, having dissented from any of the Court's recent decisions narrowing the scope of personal jurisdiction (*i.e.*, *Goodyear*, *Daimler*, *Walden*, *Tyrrell*, and *BMS*), it seems unlikely that plaintiffs would be able to persuade a majority of the current Court to effectively eviscerate *Daimler* by adopting the jurisdiction-by-consent theory. In any event, definitive resolution of that issue awaits another day.

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