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NEWSLETTERS

U.S. Supreme Court Limits Where A Defendant Can Be Sued

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Can a company be sued in any of the 94 U.S. District Courts or in any of the hundreds of state trial courts? This question often puzzles and worries U.S. companies and non-U.S. companies with American subsidiaries. Earlier this year, the U.S. Supreme Court helped answer the question and significantly limited the places where a company can be sued in any given case. This article will provide a brief overview of that decision and then delve into its implications, focusing on the interplay between federal and state courts, how courts have treated the decision in subsequent rulings, and the possibility of discovery aimed at determining whether a defendant is subject to a particular court's jurisdiction.

The *BMS* Decision

First, a brief overview of the case. In *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. ---, 137 S. Ct. 1773 (June 19, 2017), the U.S. Supreme Court held that continuous activity in a state, alone, does not create jurisdiction; instead, there must be a link between the forum and an individual lawsuit for a court to assert jurisdiction over a nonresident defendant. In the Bristol-Myers Squibb (BMS) litigation, plaintiffs' attorneys brought hundreds of claims in California relating to Plavix, a blood-thinner drug, mostly involving plaintiffs who did not reside in California, did not take Plavix in California, and who otherwise had no connection to the state. The only connection BMS had to California relating to Plavix was that it sold the product there generally.

Under the Supreme Court's rejection of a sprawling view of general, all-purpose jurisdiction in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), simply being a "big corporation" would not allow California courts to exercise general jurisdiction over these claims. General jurisdiction occurs when a corporation is headquartered in a particular state, so it can be sued in that state no matter what the connection to the case. Typically, only one or two states could hold general jurisdiction over a company: the state where the company is incorporated and the state where its principal place of business is.

Moving on from a theory of general jurisdiction, the plaintiffs in BMS decided to claim that the California courts had specific, or "case-linked," jurisdiction over these non-resident plaintiffs. Specific jurisdiction focuses on the activities in the specific case at hand. California courts agreed, creating a "sliding scale approach" to jurisdiction where the similarities between the California plaintiffs' claims and the non-California plaintiffs'

RELATED PEOPLE

Kenneth M. Gorenberg
Partner
Chicago

P 312-214-5609
F 312-759-5646
kenneth.gorenberg@btlaw.com

Kara Kapke
Partner
Indianapolis

P 317-231-6491
F 317-231-7433
kara.kapke@btlaw.com

Christine E. Skoczylas
Partner
Chicago

P 312-214-5613
F 312-759-5646
christine.skoczylas@btlaw.com

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claims somehow affected the court's jurisdiction. In a "straightforward application . . . of settled principles," the Supreme Court rejected that approach, slamming the door to mass tort forum shopping for out-of-state residents. See BMS, 137 S. Ct. at 1783.

As the Supreme Court has now reaffirmed in BMS, specific jurisdiction requires "the ***suit***" to "arise out of or relate to the defendant's contacts with the ***forum***." Id. at 5 (cleaned up, emphasis original). Continuous activity unrelated to the suit does not create jurisdiction. Id. at 8. "The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims." Id. There must be a connection between the lawsuit and the forum; an Indiana plaintiff, for example, cannot sue in California simply because that's a more plaintiff-friendly place.

Justice Samuel Alito's decision concluded by noting that the Court's decision applying "settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up." Id. at 12. Rather, the out-of-state plaintiffs could sue in their home courts or could consolidate their matters in a state where there is general jurisdiction over BMS. Id. Mass torts can still be heard in a consolidated fashion, but only in one of two ways: either consolidated only with plaintiffs who have a genuine connection to the forum (such as resident plaintiffs or those injured there) or, for a broader consolidation, in a defendant's home jurisdiction.

Post-*BMS* Decisions

Following the BMS decision, courts have generally been receptive to motions to dismiss on BMS grounds. As with any decision, there will be courts that try to distinguish the decision. One such case is *Cortina v. Bristol Myers Squibb Co*., a case out of California. 2017 WL 2793808 (N.D. Cal. June 27, 2017). There, the U.S. District Court for the Northern District of California found personal jurisdiction despite no connection between California and the plaintiff, simply because testing had occurred on the product in California – a result seemingly contrary to the entire point of the Supreme Court's decision, which is to focus on the nexus between the case and plaintiff, instead of general activities done in a particular locale.

Plaintiffs have also attempted to argue that registration within a state for service of process constitutes "consent" to personal jurisdiction. Courts have largely rejected these arguments, explaining that registration to do business and appointment of an agent for service of process do not establish consent to jurisdiction. See, e.g., *Siegfried v. Boehringer Ingelheim Pharm., Inc*., No. 4:16-cv-1942, 2017 WL 2778107 (E.D. Mo. June 27, 2017); *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, --- A.3d ---, 2017 WL 2854420 (N.J. Super. App. Div. July 5, 2017); *JPB Installers, LLC v. Dancker*, *Sellew & Douglas, Inc*., No. 1:17-cv-292, 2017 WL 2881142 (M.D.N.C. July 6, 2017).

Rejection of the "consent" theory makes sense within the context of the *BMS* decision. Appointing an agent for service of process does not establish the broad "general jurisdiction" needed to focus solely on the company's activities; general jurisdiction is limited to the state of incorporation and principal place of business. Further, registration for

service of process purposes has nothing to do with the specific litigation at hand, so specific jurisdiction is improper. The *BMS* decision reminds courts that the inquiry for specific jurisdiction must focus on the nexus to the specific litigation and the specific plaintiff at issue.

Both the defendant's *and* the plaintiff's connection to the forum are paramount in a post-*BMS* analysis. A plaintiff is not limited to suing only in the state of her residency. However, under *BMS*, she may only sue where she and the defendant have a connection to the source of the injury. For example, an out-of-state plaintiff may still bring a suit in a state where she purchased a product or was injured, even if she does not reside in that state. In that instance, the question focuses on the traditional test of whether the defendant has placed the product into the stream of commerce. See *Everett v. Leading Edge Air Foils, LLC*, No. 14-C-1189, 2017 WL 2894135, at *4 (E.D. Wis. July 7, 2017). In fact, the plaintiff may be barred from suing in her home state if the defendant did nothing in that state to give rise to the plaintiff's alleged injury. Again, for specific jurisdiction, both the plaintiff and the defendant must have connections – relating to the facts of the case – to the state in which the lawsuit is filed.

Although BMS provides clear direction on how to address specific jurisdiction in mass tort cases involving out-of-state plaintiffs, whether BMS "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," is still an open question. 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting). At least one court has declined to extend BMS to nationwide class actions, reasoning that putative out-of-state class members are not "named plaintiffs" for the purposes of specific jurisdiction. *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017). Other courts, however, have applied BMS to class actions, rejecting the notion that constitutional due process requirements differ based on whether an action is filed individually or on behalf of a class. See, e.g., *In re Dental Supplies Antitrust Litig.*, 16 Civ. 696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017); *Spratley v. FCA U.S. LLC*, 3:17-CV-0062, 2017 WL 4023348, at *6-7 (N.D.N.Y. Sept. 12, 2017). Considering this split in authority, it remains to be seen whether nationwide class actions in which general jurisdiction is absent will survive *BMS*.

Removal to Federal Court and Remand to State Court

BMS will almost certainly have a significant impact not only on personal jurisdiction (in which particular states may a defendant be sued), but also on subject matter jurisdiction (whether the case belongs in state or federal court). Plaintiffs generally tend to prefer state court, and defendants usually would rather be in federal court. In cases above a certain minimum value, defendants can remove cases filed in state court to federal court, but only if no one plaintiff is a citizen of a state in which any one defendant is a citizen – in other words, where diversity of citizenship is "complete." In response, plaintiffs will often mount a preemptive strike against removal at the time they file their state-court complaints. For example, the fraudulent joinder of non-diverse defendants against which plaintiff have only frivolous or illegitimate claims has long been employed as a tactic to avoid diversity jurisdiction.

More recently, plaintiffs have attempted to prevent removal by procedurally misjoining non-diverse plaintiffs – citizens of states in which

the defendant is incorporated or has its principal place of business. Although the non-diverse *plaintiffs* invariably have plausible causes of action against defendants, they frequently have no connection to the diverse plaintiffs' claims and have been joined for no reason other than to defeat diversity jurisdiction. In these situations, defendants have fought back by removing the cases to federal court, seeking to have the claims against the non-diverse plaintiffs severed and remanded based on their fraudulent misjoinder to claims over which diversity jurisdiction exists.

Defendants' strategy for preserving the right of removal has met with mixed results. Courts are split on whether to adopt the fraudulent joinder doctrine with respect to misjoined plaintiffs, and courts that have adopted the doctrine are also split on the burden of proving fraudulent, or procedural, misjoinder.

The burden of proving fraudulent joinder has traditionally been a heavy one, leading many courts to reject the argument that a non-diverse plaintiff with a viable cause of action against a defendant cannot be properly joined solely to defeat diversity jurisdiction unless the misjoinder is "egregious," and not just procedurally questionable. This has been particularly problematic for pharmaceutical defendants, as the claims of all plaintiffs tend to arise from the same series of alleged wrongful conduct (e.g., failure to warn), regardless of where each plaintiff purchased and consumed the drug at issue.

Some courts, however, have found that the joinder of a non-diverse plaintiff may not prevent removal if her claims bear no relationship to the diverse plaintiff's claims and, therefore, cannot be joined procedurally as a single suit. Nevertheless, because federal courts evaluating whether a plaintiff has been fraudulently joined frequently look to state-law joinder rules, the chance of success of a misjoinder argument can be difficult to predict.

BMS is likely to dramatically reduce the uncertainty of combating diverse plaintiffs' attempts to deprive defendants of their right of removal by frivolously misjoining the claims of diversity-destroying plaintiffs. Within days of the BMS decision, defendants in several mass tort cases filed notices of removal, urging courts to dismiss all out-of-state plaintiffs, including diversity-defeating plaintiffs, as improperly misjoined due to the lack of personal jurisdiction over those plaintiffs. Plaintiffs have, of course, resisted this argument, insisting that a federal court must determine whether it has subject matter jurisdiction over a case *before* it can decide whether personal jurisdiction over any particular plaintiff is proper.

The few courts that have confronted this issue to date have been inclined to agree that, following *BMS*, the issue of personal jurisdiction should be addressed before reaching the issue of subject matter jurisdiction. After all, to remand a case for lack of complete diversity, just to have the cases removed again once the state court dismisses the claims of non-diverse, out-of-state plaintiffs for lack of personal jurisdiction, would be a waste of time and judicial resources. Those courts deciding timely filed notices of removal have then faithfully applied *BMS*'s holding, dismissed the diversity-defeating foreign plaintiffs' cases, and denied plaintiffs' motions to remand. Unfortunately for defendants with older cases, courts have strictly enforced the requirement under 28 U.S.C. § 1446(c)(1) that diversity cases "may not be removed . . . more than 1 year after the commencement of the action, unless the district court finds that the

plaintiff has acted in bad faith in order to prevent a defendant from removing the action" and rejected the argument that, under the pre-*BMS* legal landscape, the plaintiffs' manipulative misjoinder of non-diverse plaintiffs were in "bad faith."

With BMS in their quivers, defendants in future mass tort cases will be better able to prevent the manipulation of the court system by the misjoinder of non-diverse plaintiffs in state court cases. Whether courts have specific jurisdiction over out-of-state plaintiffs has become a more straightforward inquiry. Thus, under *BMS*, federal courts can eliminate diversity-defeating, out-of-state plaintiffs without having to delve into the morass of the fraudulent misjoinder doctrine.

Jurisdictional Discovery

We also anticipate that *BMS* will affect jurisdictional discovery – discovery taken by a plaintiff to establish that the court has personal jurisdiction over a defendant. All or nearly all U.S. courts allow jurisdictional discovery in some circumstances as a legitimate part of a court's procedure in determining whether it has jurisdiction over a defendant. But jurisdictional discovery can also be a dubious litigation tactic.

For example, consider a scenario that we have encountered many times. Our hypothetical client receives a lawsuit filed by a hypothetical plaintiff alleging that our client and dozens of other companies contributed to causing the plaintiff to contract an illness caused by long-term exposure to a toxic substance like asbestos or benzene. Our client is not incorporated or based in the state where the lawsuit was filed. And because the complaint does not identify any of the specific products that allegedly caused the exposures, our client has no way of determining whether it made or sold any such product, let alone whether its conduct has any connection to the state where the suit was filed.

We file a motion to dismiss for lack of personal jurisdiction, supported by an affidavit establishing that the client is incorporated and headquartered out of state. Soon after, we receive purported jurisdictional discovery requests from the plaintiff. They seek documents and information regarding the client's entire corporate history, including any parents, subsidiaries, divisions or affiliates, now or at any time in the past; manufacturing, distribution or other facilities ever owned or operated in the state where the lawsuit is pending; any employees in that state; product sales and marketing to customers in that state; and more. The requests are accompanied by a letter from the plaintiff's lawyers saying that our client need not respond to this discovery if it withdraws its jurisdictional motion. Our client is concerned about the intrusiveness and expense of responding to the discovery requests, which also could reveal information that may help support this plaintiff's case or other cases against our client. With little confidence in the court to rein in that discovery, our client may decide to withdraw its jurisdiction motion and try to defend the case successfully through a later stage.

That final sentence of our hypothetical may change significantly as a result of *BMS*. We are already seeing some courts beginning to understand that BMS and other recent Supreme Court cases on personal jurisdiction render most of the information sought in those discovery requests irrelevant. Several judges have denied plaintiffs' requests for jurisdictional discovery or at least sharply limited them. Returning to our hypothetical, once our client presents evidence of where it is incorporated

and where it is based, personal jurisdiction usually will hinge on whether our client did anything in the forum state that directly led to the plaintiff's alleged injury. Sales of other products at other times, operation of other facilities, employment of other personnel – all of this will usually be irrelevant. Therefore, we expect more defendants to file personal jurisdiction motions, to resist plaintiffs' jurisdictional discovery efforts, and to have these issues decided by the courts. Some judges will continue to allow broad jurisdictional discovery, and some will deny motions to dismiss despite the teachings of *BMS*. Some of those decisions will be appealed, and the U.S. Supreme Court may have more to say on this subject. But overall, many companies should have much more success in contesting personal jurisdiction in states with little apparent connection to the company.

Conclusion

Motivated and clever plaintiff lawyers will continue to explore ways to get their cases heard by judges and juries anticipated to be more favorable to the plaintiffs. There may be other personal jurisdiction questions that the U.S. Supreme Court chooses to address in the future. But *BMS* is undoubtedly an encouraging development for defendants. Companies doing business in multiple states – including non-U.S. companies that have American subsidiaries – may now be in much better position to resist being sued in states that appear to have little or no connection to the facts of the lawsuit.

Kenneth M. Gorenberg is a partner in Barnes & Thornburg's Chicago office and a member of the Commercial Litigation, Insurance Recovery and Counseling, Construction, Toxic Tort, and Appellate practice groups. A versatile litigator, Ken has tried cases and won appeals in state and federal courts across the country. Ken can be reached at 312-214-5609 or kgorenberg@btlaw.com.

Kara M. Kapke is a partner in the Indianapolis office and a member of the Commercial Litigation Practice Group and Logistics and Transportation Practice Group. Kara counsels clients on transportation law and regulations, First Amendment issues, contractual best practices, and other compliance issues. She also has diverse experience defending companies in product liability, defamation, and commercial litigation lawsuits. Kara can be reached at 317-231-6491 or kkapke@btlaw.com.

Christine E. Skoczylas is the co-chair of the Commercial Litigation Practice Group and a partner in the Chicago office. Christine is also a member of the Insurance Recovery and Counseling Practice Group. Christine concentrates her practice on resolving a wide variety of corporate and business disputes. Christine can be reached at 312-214-5613 or at cskoczylas@btlaw.com.