

PRODUCT LIABILITY

NOVEMBER 2017

IN THIS ISSUE

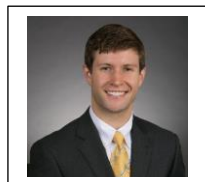
This article explores the Supreme Court's recent personal jurisdiction jurisprudence and discusses its impact on venue and joinder principles. The article will also address the immediate aftermath of the Supreme Court's decisions, including the impact the Court's rulings have had on dismissal and removal of pending products liability litigation.

Supreme Court Narrows the Landscape for Personal Jurisdiction

ABOUT THE AUTHORS



Neville H. Boschert is a Partner in the Business and Commercial Litigation group of Jones Walker LLP. Mr. Boschert has extensive experience in litigating products liability matters, including consumer products, industrial equipment, medical devices and pharmaceuticals. Mr. Boschert also has considerable trial experience in matters involving antitrust, intellectual property, business torts and insurance issues. He practices in the Jackson, Mississippi office. He can be reached at nboschert@joneswalker.com.



Andrew S. Harris is an Associate in the Business and Commercial Litigation group of Jones Walker LLP. Mr. Harris has experience in litigating products liability, intellectual property and other commercial matters. He practices in the Jackson, Mississippi office. He can be reached at aharris@joneswalker.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Janelle L. Davis
Vice Chair of Newsletter
Thompson & Knight LLP
janelle.davis@tklaw.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

The United States Supreme Court has significantly narrowed the scope of personal jurisdiction with two recent rulings. First, on May 30, 2017, in *BNSF Ry. v. Tyrell*, 137 S. Ct. 1549 (2017), the Court held that general jurisdiction is generally limited to the states where the defendant is incorporated or where the defendant's principal place of business is located. Second, on June 19, 2017, in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), the Court held that specific jurisdiction cannot be based solely upon a defendant's general connections with or activities in a particular forum. Specific jurisdiction is proper only in a state where there is a connection between the forum and the particular underlying controversy, with some conduct or activity specific to the plaintiff's claims occurring in that state. For most plaintiffs, these decisions limit the choice of forum to where the actionable conduct occurred, where the defendant is incorporated, or where the defendant's principal place of business is located.

BNSF Ry. v. Tyrell

In *Tyrell*, the Supreme Court addressed personal jurisdiction in a Federal Employers' Liability Act (FELA) claim brought in state court in Montana. Neither of the two plaintiffs was a resident of Montana or injured in Montana. The defendant, BNSF Railway Company, was incorporated in Delaware and had its principal place of business in Texas. BNSF maintained about 6% of its track in Montana and had less than 5% of its workforce in Montana.

The Montana Supreme Court relied on Montana law that purported to assert jurisdiction over companies "found" within

Montana. The Montana Court concluded that because BNSF had 2000 employees and over 2000 miles of track in Montana, it could exercise general jurisdiction over BNSF in a FELA suit. The Montana Court also relied upon a section of FELA that considered a railroad to be "at home" wherever it does business. Previously the United States Supreme Court had held in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), that, absent exceptional circumstances, courts can only exercise general jurisdiction in a forum where a defendant is incorporated or has its principal place of business. The Montana Court distinguished *Tyrell* from *Bauman*, however, because *Bauman* did not involve a FELA claim.

The United States Supreme Court reversed, finding that the ruling in *Daimler* "applies to all assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued." *Tyrell*, 137 S. Ct. at 1559.

Bristol-Myers Squibb Co. v. Superior Court

In *Bristol-Myers*, the Supreme Court addressed personal jurisdiction in a products liability claim filed by multiple plaintiffs in California state court involving the drug Plavix. The group of plaintiffs consisted of 86 California residents and 592 residents from other states. The non-resident plaintiffs did not allege that they were provided Plavix in California, or that they were treated or injured in California. *Bristol-Myers* moved to dismiss for lack of personal jurisdiction, but the California Court of Appeal found that it had general jurisdiction over *Bristol-Myers* because of its considerable business activities in California.

After the Supreme Court's decision in *Daimler*, the California Supreme Court ordered the California Court of Appeal to revisit its ruling that the court could exercise general jurisdiction over Bristol-Myers. The Court of Appeal ruled that while it could not exercise general jurisdiction over Bristol-Myers, it could exercise specific jurisdiction because Bristol-Myers' extensive business contacts in California meant that the plaintiffs' claims did not need as strong of a connection to the state as traditionally required. The California Supreme Court held that the non-residents' claims were based on the same product and actions as the claims of the California residents, and that this connection was sufficient for specific jurisdiction.

The United States Supreme Court reversed. It found that in order for there to be specific jurisdiction over a plaintiffs' claims, those claims must arise out the connection between the defendant and the forum. The Court held that this requirement applied to each of the individual plaintiff's claims, even though the resident plaintiffs were bringing similar claims. The Court further held that a defendant's unrelated business activities are irrelevant to the specific jurisdiction analysis. *Bristol-Myers*, 137 S. Ct. at 1781.

Distinction between Personal Jurisdiction, Venue and Joinder Principles

As a result of *Tyrell* and *Bristol-Myers*' narrower interpretation of the scope of personal jurisdiction, it is now more difficult to join the claims of multiple plaintiffs together under Rule 19 of the Federal Rules of Civil Procedure (or a comparable state court rule) in an attempt to select a venue

that would not otherwise be a proper venue for the claims of all of the plaintiffs. The ruling in *Bristol-Myers* has made clear that for specific jurisdiction the claims of each individual plaintiff must have a connection to the defendant's conduct or activities in the forum. This requirement is independent of existing joinder and venue considerations. The defendant's general activities in a state or its conduct that is specific to some of the claims of the plaintiffs are insufficient for personal jurisdiction over the claims of the other plaintiffs that lack a relationship with the forum. On the contrary, if the plaintiff files suit where the court has general jurisdiction—where the defendant is incorporated or where the defendant has its principal place of business—there is no requirement that a specific plaintiff's claim be based on the defendant's actions or conduct occurring in the forum state.

The Aftermath

The Supreme Court ruling in *Bristol-Myers*, has significantly affected ongoing mass tort products liability litigation. For example, there is currently significant litigation pending in Missouri involving talc. In *Estate of Fox v. Johnson & Johnson*, --- S.W.3d ---, No. ED104580, 2017 Mo. App. LEXIS 1043, 2017 WL 4629383 (Mo. Ct. App. Oct. 17, 2017), the Missouri Court of Appeals reversed and vacated a jury award of \$10 million in compensatory damages and \$62 million in punitive damages against Johnson & Johnson for lack of personal jurisdiction.

Missouri rules allow joinder of non-resident plaintiffs' claims with the claims of a resident plaintiff when the claims arise out of the same transaction or occurrence or series of transactions or occurrences. In such cases,

Missouri courts would typically exercise personal jurisdiction over non-resident plaintiffs' claims if the court had jurisdiction over a resident plaintiff's claims. But based on *Bristol-Myers* the Missouri Court of Appeals in *Fox* vacated the judgment awarded to non-resident plaintiff Fox for lack of personal jurisdiction over Johnson & Johnson for those claims.

Recently filed litigation has also resulted in additional removal of cases to federal court, which raises several issues. For example, in *Covington v. Janssen Pharms., Inc.*, No. 4:17-cv-1588 SNLJ, 2017 U.S. Dist. LEXIS 126641, 2017 WL 3433611 (E.D. Mo. Aug. 10, 2017), 54 plaintiffs from 26 states asserted in one suit products liability claims involving the drug Risperdal. Under Missouri court rules, the plaintiffs were properly joined because the claims arose out of the same series of occurrences and transactions, and the state court could (under pre-*Bristol-Myers* law) exercise specific personal jurisdiction. The presence of some of the non-resident plaintiffs in the suit destroyed completely diversity and the ability to remove the suit. After the Supreme Court published the *Bristol-Myers* decision, however, the defendant timely removed the suit to federal court on diversity ground and moved to dismiss the non-resident plaintiffs for lack of personal jurisdiction. The plaintiffs moved to remand for lack of complete diversity for subject matter jurisdiction.

The *Covington* Court decided to rule on the personal jurisdiction issue first based on the Supreme Court's decision in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). The court granted the motion to dismiss and dismissed all of the non-resident plaintiffs' claims for lack of personal jurisdiction. This

ruling created complete diversity, and the Court denied the motion to remand.

In a talc case, *Jinright v. Johnson & Johnson, Inc.*, No. 4:17-cv-01849 ERW, 2017 U.S. Dist. LEXIS 139270, 2017 WL 3731317 (E.D. Mo. Aug. 30, 2017), the court followed the same procedure by granting a motion to dismiss the non-resident plaintiffs' claims for lack of personal jurisdiction and denying a motion to remand.

Cases removed based on the *Bristol-Myers* ruling after the 30-day period for removal have addressed timeliness issues. In *Farrar v. Johnson & Johnson*, No. 4:17-cv-1854 CDP, 2017 U.S. Dist. LEXIS 121405 (E.D. Mo. Aug. 2, 2017), and *Turley v. Janssen Research & Dev., LLC*, No. 4:17-cv-2010 SNLJ, 2017 U.S. Dist. LEXIS 122364 (E.D. Mo. Aug. 3, 2017), the defendants removed based on the recently-published *Bristol-Myers* decision and then moved to dismiss for lack of personal jurisdiction. In these cases, however, the 30-day period for removal had already expired. The defendants argued that in a diversity case, 28 U.S.C. § 1446(c)(1) allowed removal for up to one year after filing if the plaintiff acted in bad faith to prevent removal. The court rejected this argument and found a lack of bad faith on the part of the plaintiffs. The court denied the motions to dismiss and remanded the cases because the removals were untimely. See also *Schmitz v. Johnson & Johnson*, No. 4:17 CV 1860 JMB, 2017 U.S. Dist. LEXIS 126918, 2017 WL 3433628 (E.D. Mo. Aug. 10, 2017) (collecting similar cases).

In other cases removed after the 30-day removal period, defendants have contended that the opinion in *Bristol-Myers* is an "other paper" under 28 U.S.C. § 1446(b)(3), which

starts a new 30 day period for removal. This strategy has succeeded in some cases where a ruling from a different action can constitute an “other paper.” In *Pirtle v. Janssen Research & Dev., LLC*, No. 3:17-cv-00755-DRH, 2017 U.S. Dist. LEXIS 155351, 2017 WL 4224036 (S.D. Ill. Sept. 22, 2017), and *Bandy v. Janssen Research & Dev., LLC*, No. 17-cv-00753-DRH, 2017 U.S. Dist. LEXIS 155352, 2017 WL 4224035 (S.D. Ill. Sept. 22, 2017), both cases involving the drug Xarelto, the defendants removed to federal court and moved to dismiss the non-resident plaintiffs’ claims for lack of personal jurisdiction. The plaintiffs moved to remand on the basis that the defendants failed to timely remove. The plaintiffs argued that opinions in unrelated cases could not constitute the basis for an “other paper” removal. The court rejected the plaintiffs’ argument and agreed with the defendants that, under Seventh Circuit precedent, the opinion in *Bristol-Myers* was a proper basis for removal. But in *Erhart v. Bayer, Corp.*, No. 4:17-CV-1996-SNLJ, 2017 U.S. Dist. LEXIS 158630, 2017 WL 4280635 (E.D. Mo. Sept. 27, 2017), the court rejected an “other paper” removal based on the *Bristol-Myers* opinion. That court applied Eighth Circuit precedent and found that a document must be involved in the case at issue in order to constitute an “other paper.”

anticipate ongoing legal developments from these decisions.

Conclusion

The Supreme Court’s decisions narrowing the scope of personal jurisdiction will have a significant effect on how and where products liability cases will be brought and how they will be defended. This article discusses only a few of the effects of the Supreme Court’s rulings so far, but we

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

OCTOBER 2017

Satellite Witnesses Part II: Strategic Considerations Before and During Trial
Sherry A. Knutson

The Bad Faith Exception to the One Year Bar to Removal Based on Diversity Jurisdiction
Mark A. Prost and Steve Walsh

SEPTEMBER 2017

How the Internet of Things is Changing Litigation
Janelle L. Davis

Alabama Supreme Court Evaluates Ala. R. Evid. 702(b)/Daubert in the Context of Crashworthiness Cases
David L. Brown, Jr. and J. Patrick Strubel

AUGUST 2017

Satellite Witnesses: MDL Courts Increasingly Require Corporate Witnesses to Testify Live Via Satellite, but Other Courts Do Not
Michelle Ramirez

MAY 2017

What a Tangled Web We Weave When First We Practice to Deceive: Transparency in Asbestos Trusts
Kay Baxter and Justin Glenn

DECEMBER 2016

Immunizing Pharma Liability: Maternal Vaccination and Manufacturer Risk
Meredith B. Redwine and Allison L. Murphy

NOVEMBER 2016

Reaching Critical Mass: Adverse Event Reports and the Duty to Warn in Pharmaceutical Product Liability Litigation
Jaime E. Davis and Lauren R. McClurg

SEPTEMBER 2016

New Jersey Judge Tosses Ovarian Cancer Talc Cases Based on "Narrow and Shallow" Testimony of Plaintiffs' Experts
George R. Talarico, Eric Alvarez and Aileen E. McTiernan

NOVEMBER 2015

Depositions Overseas or Deposities in Het Buitenland
Alan Schwartz

OCTOBER 2015

Take-Home Asbestos and Toxic Tort Litigation – Bringing Home More than the Bacon
William L. Anderson