

Supreme Court Strikes Another Blow to Litigation Tourism in *Bristol-Myers Squibb*

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I. Post-*Daimler* Background

SINCE 2014, the United States Supreme Court has continued a trend of limiting personal jurisdiction states may exercise over non-resident defendants. Generally, the defendants at issue in these rulings are large domestic companies and multi-national corporations. These defendants are commonly the victims of “litigation tourism” and sometimes are subjected to numerous, identical lawsuits filed in the same plaintiff-friendly venues regardless of the personal connections plaintiffs share with those venues.¹

Prior to the Court’s landmark decision *Daimler AG v. Bauman*,² corporate and multi-national defendants had few practical defenses to personal jurisdiction in various plaintiff-friendly venues throughout the country.³ In

particular, out-of-state defendants were subjected to personal jurisdiction in forum states that were utilizing more relaxed jurisdictional standards than, apparently, the Court originally intended. In *Daimler*, the Court reiterated constitutional limitations on states exercising overly broad general personal jurisdiction over non-resident defendants.⁴

Before *Daimler*, state courts had seemingly unchecked discretion to find non-resident companies created sufficient connections with the forum State to confer general personal jurisdiction. *Daimler* continued a recent trend kick-started by *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁵ to substantially limit these possibilities. Under *Daimler*, out-of-state defendants may only be

¹ See generally *Rios v. Bayer Corp.*, et al., Case No. 17-CV-758-SMY-SCW, 2017 WL 3600374 (S.D. Ill. August 22, 2017); Hamby, et al. v. Bayer Corp. et al., Case No. 17-CV-17-SMY-DGW, 2017 WL 3327593 (S.D. Ill. August 4, 2017); similar lawsuits involving multi-plaintiff claims against pharmaceutical company based on alleged injuries caused by a birth control device, Essure. (Remand ordered).

² 134 S.Ct. 746 (2014).

³ A state’s personal jurisdiction over a defendant may exist in two forms: (1) general (“all purpose”) jurisdiction and (2) specific (“case linked”) jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2849 (2011), citing

International Shoe Co. v. Washington, 326 U.S. 310 (1945). The court in *International Shoe* recognized jurisdiction could be asserted when a corporation’s in-state activity is “continuous and systematic” and gave rise to the episode-in-suit. *International Shoe*, 326 U.S. at 317. The Court further recognized “instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. *Id.* at 318.

⁴ *Daimler*, 134 S.Ct. 746 (2014).

⁵ 131 S.Ct. 2846.

subjected to general jurisdiction in the forum state if the forum state is the state of its principal place of business, the state of incorporation, or in the exceptional case where its contacts “are so constant and pervasive as to render [it] essentially at home in the forum State.”⁶

The principle holding in *Daimler* has since been recognized in almost every State around the country, with Oregon and Illinois recently joining the trend.⁷ The Supreme Court even recently reinforced *Daimler*’s standard limiting the general jurisdiction states may exercise over non-resident defendants in *BNSF Railway Co. v. Tyrrell*.⁸ In *Tyrrell*, the Court found that a non-resident railroad company was not “at-home” in Montana, and therefore not subject to general jurisdiction there, even when the defendant operated over 2,000 miles of track and employed 2,000 employees in Montana.⁹ These factors were insufficient to show the defendant was “essentially at home” in Montana and, further, the Court ruled the *Daimler* standard does not vary with the type of claim asserted or the enterprise sued.¹⁰

As courts, and plaintiffs, reacted to *Daimler*, the focus quickly shifted to the forum state’s exercise of *specific* personal jurisdiction over non-resident plaintiffs. Although the primary focus of [the Supreme Court’s] personal jurisdiction inquiry is the defendant’s relationship to the forum State,¹¹ many states allowed for broad jurisdictional analyses that considered the similarities of a plaintiff’s claims with similarly situated plaintiffs, in addition to a non-resident defendant’s connections to the forum state, before determining whether specific jurisdiction existed over the non-resident defendant. This practice contributed to a hyper-realized form of litigation tourism recognized by some as a strategy of “jurisdiction by joinder”¹² – wherein non-resident plaintiffs would join similar claims with resident plaintiffs against non-resident defendants in order to maintain their lawsuits in plaintiff-friendly venues. Thus, non-resident plaintiffs attempted to circumvent their own jurisdictional limitations by piggy-backing their claims onto similar claims filed by similar plaintiffs in more desirable venues.

⁶ *Daimler*, 134 S.Ct. at 751.

⁷ See *Barrett v. Union Pacific Railroad Company*, 361 Or. 115, 390 P.3d 1031 (Or. 2017); *Aspen American Insurance Company v. Interstate Warehousing, Inc.*, 2017 IL 121281 (Ill. 2017).

⁸ 137 S.Ct. 1549, 1558-1559 (2017).

⁹ *Id.* at 1559.

¹⁰ *Id.* at 1558 (rejecting plaintiff’s argument *Daimler* does not apply to claims involving the Federal Employers’ Liability Act).

¹¹ See *Walden v. Fiore*, 134 S.Ct. 1115, 1121-1123 (2014).

¹² *Bristol-Myers Squibb Co. v. Superior Court (Anderson)*, Case No. S221038, 377 P.3d 895 (Ca. 2016) (Krugger, J. dissenting).

In its landmark decision *Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County, et al.*, (“BMS”) the Supreme Court rejected this approach as nothing more than a “loose and spurious form of general jurisdiction.”¹³ In doing so, the Court continued its post-*Daimler* trend limiting states’ exercise of personal jurisdiction over non-resident defendants – this time restricting the permissible exercise of specific jurisdiction over non-resident defendants in multi-plaintiff actions.

II. *Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County*

In *BMS*, the Supreme Court confirmed specific personal jurisdiction does not exist over defendants related to claims asserted by plaintiffs whose claims have no connection to the forum State, regardless of whether the plaintiffs join claims with in-forum plaintiffs.¹⁴ More than 600 plaintiffs sued Bristol Myers in California state court alleging various injuries they alleged were caused by their ingestion of the pharmaceutical drug Plavix, a drug manufactured by BMS and sold nationwide.¹⁵

Most of the 600 plaintiffs were not California residents, but joined their claims with identical claims made by California residents.¹⁶

BMS moved to quash service of summons on the nonresidents’ claims for lack of personal jurisdiction.¹⁷ The basis of BMS’s argument related to the fact that BMS was not incorporated or principally operating business in California. Thus, general jurisdiction over BMS did not exist. Further, BMS argued specific jurisdiction did not exist over the non-California plaintiffs because their claims did not arise out of their contacts with California.¹⁸

The California Supreme Court recognized general jurisdiction did not exist under *Daimler*.¹⁹ Even so, the court went on to find the “extensive contacts” BMS maintained in the State of California, combined with the similarity of the nonresidents’ allegations with the California plaintiffs, was sufficient to permit the exercise of specific jurisdiction over BMS. In particular, the California court used a “sliding scale approach to specific jurisdiction” and reasoned the more wide ranging the defendant’s forum contacts, the more readily a connection between the forum contacts and the claim is shown.²⁰

¹³ 137 S. Ct. 1773, 1781 (2017).

¹⁴ See 137 S.Ct. at 1773-1782.

¹⁵ *Id.* at 1778.

¹⁶ *Id.* at 1777.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 1779.

Applying this test, BMS's extensive contacts with California, including the sale of 187 million Plavix pills in the State for a total revenue of \$900 million from those sales, allowed for the exercise of specific jurisdiction based on a "less direct connection between BMS's forum activities and the plaintiffs' claims than might otherwise be required."²¹ By this reasoning, the California Supreme Court found that because both the "resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product," then the claims for all plaintiffs were sufficient to establish specific jurisdiction.²²

The Supreme Court overwhelmingly disagreed. Noting the California court's argument appeared to represent a "loose and spurious form of general jurisdiction", the Supreme Court reversed and remanded in an 8-1

decision.²³ The Court noted the standard of establishing specific personal jurisdiction requires "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."²⁴ The Court reiterated the purpose of jurisdictional limitations arise not only out of concern for "the burden on the defendant", but also "are a consequence of territorial limitations on the power of the respective states."²⁵ Therefore, when there are no connections between the forum and the underlying controversy, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."²⁶

For this reason, the Court criticized the California court's holding for failing to identify any link between California and the nonresidents' claims.²⁷ Instead of focusing on BMS's contacts with the

²¹ *Id.* at 1779.

²² *Id.*

²³ *Id.* at 1777.

²⁴ *Id.* at 1780.

²⁵ *Id.* citing, *inter alia*, *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

²⁶ *BMS*, 137 S.Ct. at 1781.

²⁷ *See id.* at 1781-1782; ("[N]onresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. 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.").

State of California, the Court noted “[w]hat is needed – and what is missing here – is a connection between the forum and specific claims at issue.”²⁸ The Court reaffirmed, “specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that established jurisdiction.”²⁹ This principle holds true even if “the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State.”³⁰ After all, even if the forum State has a strong interest in applying its law to the controversy and is the most convenient forum, the “Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”³¹

The Court confirmed its decision is not based on changing law, but rather based on “settled principles regarding specific jurisdiction.”³² Based on those well-settled principles, the Court noted specific jurisdiction is only proper in cases where there is a connection between the forum and specific claims at issue.³³ Notably, the Court’s ruling does not preclude actions by residents of different

states from filing lawsuits against BMS. To the contrary, the Court ensured plaintiffs can only bring lawsuits in the states with a substantial connection to the specific claims at issue or and other states that have general jurisdiction over BMS where its principal place of business is or its state of incorporation (New York or Delaware).

III. Post-*BMS* Considerations

As expected, *BMS* led to an immediate restructuring of multi-plaintiff lawsuits. *BMS* is a natural extension of the Court’s recent holding in *Walden v. Fiore* – limiting specific personal jurisdiction to only those cases with occurrences that share substantial connections with the forum state.³⁴ Not only that, *BMS* has made clear a state court’s exercise of personal jurisdiction must be related to the relationship between the defendant and the forum state *specific to the claims at issue*. Therefore, *BMS* single-handedly shut the door to plaintiffs attempting to hook their lawsuits into favorable venues based on defendant’s general, but unrelated, ties to the forum states and similar (if not identical) claims brought by similar, resident plaintiffs. However, the location of

²⁸ *Id.*

²⁹ *Id.* at 1780.

³⁰ *Id.* at 1781.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 134 S. Ct. 1115, 1121-1122 & n.6 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

injury is not always the state where the injury arises. Some courts look to other factors, such as forum-based testing and clinical trials, to determine if the injury arose from defendants' contacts with the forum.³⁵ Other courts have disagreed with this approach by finding that although plaintiffs' counsel may attempt to "seize on" language in *BMS* suggesting marketing or regulatory activities in a forum state may establish personal jurisdiction, plaintiffs must still show they personally experienced marketing or engaged in clinical trials in the forum state to meet the necessary connection between the forum and specific claims at issue.³⁶ Clearly, interpretations will vary and additional disagreements will develop related to the extent a non-resident defendant's forum-based activities meet the jurisdiction requirements

set by *BMS*. Already splits have also developed in federal district courts with regards to whether *BMS* supports removal of multi-plaintiff suits with diversity-destroying, non-resident plaintiffs.³⁷ In light of these dis-agreements, Plaintiffs will certainly continue look to the locations of these factors related to the production and development of an alleged injury related agent to possibly obtain a more favorable forum than the location of the alleged injury itself.

BMS is yet another nail in the coffin to the sometimes mercenary rationale that previously allowed litigation tourism to flourish. Already plaintiffs are attempting to circumvent *BMS* by resorting to jurisdictional arguments that have been long resolved by the courts. In some instances, for example, plaintiffs have attempted to resurrect arguments related to a

³⁵ *M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 61 N.E.3d 1026, 406 Ill.Dec. 758 (Ill. App. 2016), appeal denied, 65 N.E.3d 842, 408 Ill.Dec. 366 (Ill. 2016), cert. denied, --- S.Ct. ---, 2017 WL 1153625 (2017) (plaintiffs made *prima facie* showing that their claims directly arose from or related to the company's purposeful activities in Illinois where plaintiffs claimed that drug's warning labels, which were informed in part by the results of the Illinois clinical trials, inadequately warned the mothers of the association between the drug and birth defects, that company's Illinois data on the drug was aggregated with data from other sites to reach statistical significance, and that Illinois physicians had some degree of input into, and control over, the clinical trials).

³⁶ See *Dyson, et al. v. Bayer Corporation, et al.*, Case No. 4:17-CV-2584SNLJ, 2018 WL 534375 at *3-4 (E.D. Mo. Jan. 24, 2018) (Limbaugh, J.)

³⁷ Compare *Dyson*, 2018 WL 534375 at *3 (under *BMS*, personal jurisdiction was the more straightforward inquiry and dismissal of non-resident plaintiffs confirmed diversity between the parties and, therefore, removal was proper) with *Rios*, 2017 WL 3600374 at *2 (application of *BMS* was unavailable because "it is clear from the face of the Complaint that diversity jurisdiction is lacking" and, therefore, subject matter jurisdiction was the more straightforward inquiry and remand was proper).

defendant's stream-of-commerce connections to forum-states to establish specific jurisdiction over corporate defendants.³⁸ While such arguments have been successful in some cases, courts have clarified plaintiffs' claims must arise out of forum-state contacts under *BMS*.³⁹ Therefore, in the post-*Daimler* era, landmark decisions like *BMS* will go a long way to fence in forum-shopping plaintiffs and allow litigation to proceed only in those venues with substantial connections to the litigation itself or other forums where the defendant company is properly subject to general jurisdiction under *Daimler*.⁴⁰

While *Daimler*, and now *BMS*, have limited plaintiffs' options to argue defendant companies are subjected to general or specific jurisdiction in various favorable forums, the strength of these rulings has yet again shifted the attention of personal jurisdiction

arguments to focus on state-specific inquiries related to consent-by-registration and, more concerning, lapses in procedural formalities that give rise to arguments of waiver.

1. Update on Consent by Registration

Creative plaintiff's attorneys also tend to argue defendants are subject to general jurisdiction through "all purpose" consent by complying with state registration statutes and registering to conduct business in certain states. As discussed in both the October 2015 and the November 2016 IADC Transportation Committee newsletters, courts throughout the country have examined the issue of whether corporations are subject to general jurisdiction simply by registering to do business in the state as required by state statute.⁴¹ Most courts have answered this

³⁸ See *Kowal v. Westchester Wheels, Inc.*, et al., No. 2013 L 13309, 2017 Ill. App. (1st) 152293 (Ill. App. 2017) (analyzing a corporate defendant's stream of commerce contacts under both the broad and narrow stream-of-commerce theories).

³⁹ In *Kowal*, the court made an important distinction that the defendant's in-forum contacts were sufficient to create specific personal jurisdiction, and because the plaintiff was an Illinois-resident whose contacts with the defendant in Illinois gave rise to the suit, specific personal jurisdiction based on stream-of-commerce was proper even after *BMS*. See *Kowal*, 2017 Ill. App. (1st) 152293 at *18 (finding

"Here, plaintiff is a resident of Illinois. Accordingly, [*BMS*] is not applicable in this case.").

⁴⁰ For a corporation this is the place of incorporation or principal place of doing business. *Daimler AG*, 134 S.Ct. at 746.

⁴¹ See Mary Anne Mellow, Michele Parrish, and Nancy M. Erfle, *General Jurisdiction via State Registration Statute – Consistent with Daimler?*, International Association of Defense Counsel, Transportation Committee Newsletter (September 2015); See also Nancy M. Erfle, Amanda N. Johnson, Mary Anne Mellow, and Steve Walsh, *General Jurisdiction via State Registration Statute – Consistent with Daimler? – Part II*,

question with a resounding “No.”⁴² Courts hesitate to find companies complying with state registration statutes establish the “substantial contacts” required to hail a litigant into the court’s forum.⁴³ To allow this registration to establish general jurisdiction “would not comport with the principles of personal jurisdiction the Supreme Court established in *Daimler*.”⁴⁴

Although a minority of state registration statutes, such as Pennsylvania’s, have been construed to explicitly establish general jurisdiction due to exceptional language,⁴⁵ an overwhelming majority of courts examining other state registration statutes reject the proposition. More recently, states like Illinois have adopted *Daimler* and clarified registering an agent in the state is not enough to establish general jurisdiction over the defendant corporation by holding, “in the absence of any language to the contrary, the fact that a foreign corporation has registered to do

business under the [registration statute] does not mean that the corporation has thereby consented to general jurisdiction over all causes of action, including those that are completely unrelated to the corporation’s activities in Illinois.”⁴⁶

2. Waiver

Even in light of the clear limitations to personal jurisdiction adjudication reinforced by *Daimler* and *BMS*, some plaintiffs (and courts) have shifted focus from substantive arguments involving analysis of defendants’ contacts to forum states. Instead, defendants are attacked using purported procedural flaws that give rise to arguments of waiver. Unlike subject-matter jurisdiction, personal jurisdiction defenses can be waived under Rule 12(b) of the Federal Rules of Civil Procedure, and many identical state-

International Association of Defense Counsel Transportation Committee Newsletter (November 2016).

⁴² For example, see *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2nd Cir. 2016).

⁴³ See *Beard v. Smithkline Beecham Corp.*, No. 4:15-cv-1833, 2016 WL 1746113, at *2 (E.D. Mo. May 3, 2016).

⁴⁴ *Addelson v. Sanofi, S.A.*, No. 4:16CV01277 at 4 (E.D. Mo. Oct. 25, 2016); *State ex rel. Bayer Corporation, et al. v. Moriarty*, No. SC 96189, 2017 WL 646035 at *4 (Mo. banc Dec. 19, 2017).

⁴⁵ See *Bors v. Johnson & Johnson*, 208 F. Supp.3d 648, 652-653 (E.D. Pa. Sept. 20, 2016) (finding Pennsylvania’s registration statute conferred general jurisdiction because it notified registrants that registering under the statute “shall constitute a sufficient basis of jurisdiction to enable [Pennsylvania] tribunals to exercise general personal jurisdiction”); see also *Hegna v. Smitty’s Supply, Inc.*, 2017 WL 2563231 (E.D. Penn. June 13, 2017).

⁴⁶ *Aspen American Insurance Company v. Interstate Warehousing, Inc.*, 2017 IL 121281 (Ill. 2017).

procedural rules.⁴⁷ Some states allow for personal jurisdiction motions to be filed concurrently with pleadings,⁴⁸ while the Federal Rules and other states do not.⁴⁹ Therefore, defendants may waive otherwise strong personal jurisdiction defenses by failing to properly raise the defenses in the form and procedure required by jurisdictional and local rules.

Even when defenses to personal jurisdiction are properly raised, waiver continues to be a concern if the defendant participates in litigation without pressing its personal jurisdiction defenses with dispositive motions. Although this is not a new problem,⁵⁰ the elimination of substantive general and specific personal jurisdiction arguments naturally gives rise to the probability that courts will scrutinize waiver arguments much more closely. Waiver has been a considerable hurdle for defendants even in the post-*Daimler* era.⁵¹ A recent Missouri state-court order found a defendant corporation waived its personal jurisdiction

defenses by participating in the case through written discovery and depositions and by waiting for nearly a year after it filed its responsive pleadings (containing a personal jurisdiction affirmative defense) to file its motion to dismiss.⁵² The court noted, “the issue of waiver in this particular case is a close one”, but even so, the defendant’s delay in filing its motion to dismiss and steps taken to participate in litigation “amounts to a waiver of the defense.”⁵³

Other courts, such as the Eighth Circuit in *Aly v. Hanzada for Import & Export Company*, have lessened restrictions to personal jurisdiction waiver and found procedural formalities related to personal jurisdiction are preserved when raised in responsive pleadings and a motion to dismiss, even when the defendant ultimately litigates the case through trial.⁵⁴ In *Hanzada*, the plaintiff opposed a defendant’s personal jurisdiction arguments, in part, by claiming the defendant waived the personal jurisdiction defense by participating in the

⁴⁷ FED. R. CIV. P. 12(b)(h).

⁴⁸ Missouri, for example. See Mo. R. Civ. P. 55.27(a).

⁴⁹ FED. R. CIV. P. 12(b)(h); See Illinois Supreme Court Rule 735 ILCS 5/2-301(a).

⁵⁰ See *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (asserting a jurisdiction defense in the answer does not preserve the defense in perpetuity . . . the defense may be lost by failure to assert seasonably, by formal submission in a cause, or by submission through conduct); see also *Minemyer v. R-*

Boc Representatives, Inc., 283 F.R.D. 392, 395-396 (E.D. Ill. 2012).

⁵¹ See *Pullar v. Cappelli*, 148 A.3d 551 (R.I. 2016) (citing *Yeldell*) (defendant forfeited the right to challenge personal jurisdiction).

⁵² *Holt v. 4520 Corp., Inc.*, et al., Case No. 1622-CC00844 (Mo. 22nd Cir. August 17, 2017) (Dierker, J.).

⁵³ *Id.*, citing *Bland v. IMCO Recycling, Inc.*, 67 S.W.3d 673 (Mo. Ct. App. S.D. 2002).

⁵⁴ 864 F.3d 844 (8th Cir. 2017).

lawsuit.⁵⁵ To the contrary, the Eighth Circuit found defendant sufficiently preserved personal jurisdiction defenses by filing a motion to dismiss (which was denied by the trial court) and challenging personal jurisdiction twice in its answer and amended answer.⁵⁶ Based on these standards, practitioners are cautioned to be vigilant of venue specific practices and local rules related to the preservation of personal jurisdiction defenses. Even if personal jurisdiction defenses are properly raised, defendants should be aware too much participation in litigation (or conducting merit-based discovery) may create arguments of waiver.

Given the continued trend of jurisdictions adopting *Daimler* and (we expect) *BMS*, defendants would be remiss to allow steadfast jurisdictional defenses to slip through procedural cracks by waiver. Now, more than ever, diligence in immediately preserving jurisdictional defenses is necessary – in the wake of *BMS*, the tides appear to continue turning against the litigation tourism industry in favor of more traditional notions of fair play and substantial justice as envisioned by our United States Constitution.

⁵⁵*Id.* at 848, citing *Yeldell*, 913 F.2d at 539 (holding defendants waived personal jurisdiction by providing “no more than a

bald assertion in their answer that the court lacked personal jurisdiction over them”).

⁵⁶ *Hanzada*, 864 F.3d at 848.