Litigation Post *Daimler* & *Bristol-Myers Squibb* –
Open Jurisdictional Issues

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I. Background and the Supreme Court's General Jurisdiction Decision in *Daimler AG v. Bauman*

Since *International Shoe* was decided in 1945, the general view among courts was that a corporation was subject to general personal jurisdiction wherever it continuously did business. *See, e.g.*, Alan M. Trammell, A Tale of Two Jurisdictions, 68 Vand. L. Rev. 501, 511 (2015). Accordingly, personal jurisdiction was simply not a hotly contested issue in many cases. This history is laid out in more detail in the attached IADC Defense Counsel Journal article, Moldoveanu & Scott, *Personal Jurisdiction Post-Daimler-As Plaintiffs Test Exceptions to Daimler's Narrow Path, All Eyes on Appellate Courts*, 84 Def. Couns. J. 1 (2017), Appendix A.

The tide started to turn, however, with the Supreme Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), where the Court indicated that personal jurisdiction was more restrictive than many had thought. And in 2014, the Supreme Court resolved the question definitely with *Daimler AG v. Bauman*, 134 S. Ct. 746, 776 (2014), affirming that the old "continuously and systematically doing business" test was no longer the law.

In *Daimler*, the Supreme Court made clear that a defendant is "at home"—and thus is subject to general personal jurisdiction—*only* in (1) the state of its principal place of business, or (2) its state of incorporation, except in the "exceptional case."

Despite the clear language of *Daimler*, pockets of lower courts still found personal jurisdiction in cases where unrelated plaintiffs from across the country joined together to file suit in their chosen forum—primarily, California, Illinois, and Missouri. Even though the out-of-state plaintiffs' claims had no connection to the forum, they would join one or more in-state plaintiffs to "anchor" their suits in the desired forum. *See* Appendix A.

II. 2017 Supreme Court decisions in *BNSF* and *Bristol-Myers Squibb*

In 2017, the Supreme Court issued two decisions again addressing the issue of personal jurisdiction, this time directly addressing the "jurisdiction by joinder' theory still lingering post-*Daimler*.

The first decision, ***BNSF Railway Co. v. Tyrrell,*** 137 S. Ct. 1549 (2017), was not so much a sea change in the law, but it is important because it reaffirmed the test for general jurisdiction stated three years earlier in *Daimler AG v. Bauman*.

In *BNSF*, the plaintiffs—one a North Dakota resident and the other an estate administrator appointed in South Dakota—had filed suit against BNSF under the Federal Employers' Liability Act (FELA) in Montana, even though the plaintiffs did not live in Montana, did not work in Montana, and did not allege any injuries related to Montana. BNSF is incorporated in Delaware with its principal place of business in Texas.

In the opinion authored by Justice Ginsburg, the Court found there was no personal jurisdiction over the claims. With *BNSF*, the Supreme Court made clear that *Daimler*'s holding is not limited to its facts. Rather, *Daimler* "applies to all state-court assertions of general jurisdiction

over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued."

In short, the decision shows that *Daimler* means what *Daimler* says: that a corporation is only subject to general personal jurisdiction in the state of its incorporation or its principal place of business, except in the exceptional case.

The second decision, ***Bristol-Myers Squibb v. Superior Court of Calif.,*** 137 S. Ct. 1773 (2017), finally addressed the issue of specific jurisdiction and "jurisdiction by joinder." In this 8-1 decision authored by Justice Alito, the Supreme Court reversed the California Supreme Court's finding of specific personal jurisdiction over non-California residents' claims in that state.

In *Bristol-Myers Squibb*, more than 600 plaintiffs from around the country joined together to file suit in California, all alleging injuries related to the drug Plavix, sold by defendant Bristol-Myers Squibb. Bristol-Myers Squibb is incorporated under the laws of the State of Delaware and has its principal place of business in New York. Plaintiffs also sued McKesson Corporation, a California distributor of Plavix.

The California Supreme Court ruled that there was no general personal jurisdiction over Bristol-Myers Squibb under *Daimler*, but found that there was specific jurisdiction based on the company's activities in the state.

The Supreme Court reversed, finding that "settled principles regarding specific jurisdiction control this case." The Court rejected California's "sliding scale" test for specific jurisdiction, instead reaffirming the traditional test: "In 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.'"

The Court also clearly established that personal jurisdiction must be established by *each* plaintiff as to *each* defendant. Thus, the fact that the non-California plaintiffs had joined with California plaintiffs to file suit did not extend personal jurisdiction: Each plaintiff had to establish jurisdiction independently. Nor did the presence of McKesson Corporation create jurisdiction, as the requirements of personal jurisdiction must be met as to *each* defendant.

III. The remaining battlegrounds

Despite the early promise of *Daimler* and *Bristol-Myers Squibb*, the case law has shown that the battle is not yet over, as plaintiffs try different avenues to evade those decisions. We will examine three remaining battlegrounds for the personal jurisdiction issue: (1) specific jurisdiction, (2) consent jurisdiction, and (3) class actions.

A. Specific Jurisdiction

Though *Bristol-Myers Squibb* undoubtedly rejected the "sliding scale" approach to personal jurisdiction, it declined to articulate a specific test for personal jurisdiction. Thus, the circuits remain split over whether to apply a "but-for" causation test (Ninth Circuit) or a "proximate cause" standard (First and Sixth Circuits), while still other circuits decline to adopt a

specific test, though acknowledging that "but-for" causation is not enough (*e.g.*, Seventh and Third Circuits).

Perhaps because of this ambiguity, some courts have found specific personal jurisdiction post-*Bristol Myers Squibb* in cases with the most tenuous connections to the forum.

Pre-*Bristol Myers Squibb*, the Illinois Court of Appeals had found specific jurisdiction based on a defendant manufacturer's clinical trial activity in the state in *M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 61 N.E.3d 1026, 1031 (Ill. Ct. App. 2016). In that case, only 17 of the 361 Paxil trials were conducted in Illinois (involving 100 of the 4272 total clinical trial patients). The court found that plaintiffs had "made a prima facie showing that their claims directly arose from or related to ... acts of omission during the clinical trials and the resulting inadequate warning labels," irrespective of the fact that only a small fraction of the studies occurred in Illinois. The Illinois Supreme Court denied review of this decision and the U.S. Supreme Court denied certiorari.

Soon after *Bristol Myers Squibb*, the *M.M.* reasoning was followed in two nearly identical decisions in the Northern District of California. Just as in *M.M.*, only a small fraction of the clinical trial activity was performed in California, but the court found that sufficient to confer specific personal jurisdiction under the Ninth Circuit's "but-for" test.

- *Dubose v. Bristol-Myers Squibb Co.*, 2017 WL 2775034 (N.D. Cal. June 27, 2017)
- *Cortina v. Bristol-Myers Squibb Co.* , 2017 WL 2793808 (N.D. Cal. June 27, 2017)

Similarly, in California state court, a court found personal jurisdiction where the defendants had entered into consulting contracts with two California surgeons regarding the design of the hip implant device. *See DellaCamera et ux. v. DePuy Orthopaedics Inc. et al.*, No. CJC-10-004649, Proceeding No. 4649 (Calif. Super. Ct., San Francisco Cty. Nov. 1, 2017).

Personal jurisdiction has also been a key issue in the talcum powder products liability litigation, which had resulted in some of the largest verdicts of 2016 and 2017. Pre-*Bristol-Myers Squibb*, state and federal courts in Missouri had routinely rejected defendants' personal jurisdiction arguments, finding jurisdiction by joinder. After *Bristol-Myers Squibb*, federal courts in Missouri have dismissed hundreds of plaintiffs (in the talc litigation and other litigation) on personal jurisdiction grounds. *See, e.g., Gallardo v. Johnson & Johnson*, 2017 WL 3128911 (E.D. Mo. July 24, 2017). In October of 2017, the Missouri Court of Appeals reversed a $72 million verdict in a talcum powder case on personal jurisdiction grounds. *See Fox v. Johnson & Johnson*, ___ S.W.3d ___, 2017 WL 4629383 (Mo. Ct. App. Oct. 17, 2017). However, the next month, a trial court denied defendants post-trial relief in a talcum powder case with similar facts, finding the claims had sufficient connection to the state for personal jurisdiction purposes because the products had been manufactured, at least in part, in Missouri. *Slemp v. Johnson & Johnson*, No. 1422-CC-09326-02 (Mo. Ct. Ct. 22nd Judicial Cir. Nov. 29, 2017).

Thus, while *Bristol Myers Squibb* was a victory for defendants, so long as plaintiffs can find some connection to the forum—however tenuous—personal jurisdiction may still be a contested issue depending on the jurisdiction.

B. Consent Jurisdiction – Jurisdiction by Registration

By limiting general jurisdiction over corporate defendants to the two forums in which they are at home ((a) the state in which corporation is incorporated; and (b) the state in which it maintains its principle place of business), the Supreme Court has severely curtailed the number of jurisdictions wherein corporations may be sued. In response, plaintiffs' counsel nationwide are now pulling another jurisdictional argument out of their quiver: consent jurisdiction, also known as jurisdiction by registration.

Under a jurisdiction by registration theory, a foreign corporation would be subject to general jurisdiction within a state because the corporation "consented" to such jurisdiction when it registered to do business in the state. By registering and appointing an agent for service of process, plaintiffs contend that corporations have consented to the same duties, restrictions, penalties, and liabilities as a domestic corporation, and one such duty/liability is general jurisdiction in the states' courts.

It is curious that this theory survives after *Daimler* since such reasoning would seem to gut the holdings of that case. However, plaintiffs argue that consent jurisdiction continues to exist because the Supreme Court expressly distinguished jurisdiction based on contacts and jurisdiction based on consent. 134 S.Ct. at 755-756. As such, plaintiffs argue that *Daimler* stands only for the proposition that in the absence of consent, a corporate defendant is subject to general personal jurisdiction only where it can fairly be regarded as being "at home." As such, plaintiffs generally argue along the following lines:

1. Only foreign corporations have to register to do intrastate business in states;

2. When a state graciously allows a foreign corporation to come in and conduct intrastate business, nothing prevents the state from insisting the nonresident corporation be subject to the full jurisdiction of the state (similar to domestic corporations);

3. As such, when a corporation chooses to conduct intrastate business in an state, it subjects itself to general jurisdiction of that state and is on notice to conduct itself accordingly; and

4. Due process is not violated – a corporation's voluntary action of submitting itself to jurisdiction does not invoke due process concerns.

We now take this opportunity to survey some recent, post-*Daimler* consent jurisdiction decisions. Subject to the language of the specific registration statutes, plaintiffs' jurisdiction by registration arguments are generally met with limited success.

1. Majority of Courts Reject Consent Jurisdiction

California: *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 377 P.3d 874 (Cal. 2016), rev'd on other grounds, 137 S.Ct. 1773 (2017).

Before reaching the United States Supreme Court via certiorari, the Supreme Court of California analyzed whether Bristol-Myers consented to general jurisdiction in California by registering to transact business there. Plaintiffs demonstrated that Bristol-Myers had a long history of being registered to do business in California and in doing so, had maintained an agent for service of process within the state. In registering to do business, Plaintiffs argued that BMS had consented to jurisdiction within California's borders.

The Supreme Court of California disagreed. The court noted that California law (Corp. Code, § 2105, subd. (a)(5)) requires foreign corporations transacting business to name an agent in the state for service of process. "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies *growing out of transactions within the State." Id.* citing *Morris & Co. v. Ins. Co.*, 48 S.Ct. 360 (1927). "Accordingly, a corporation's appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions." *Bristol-Myers*, 377 P.d at 648. The highest court in California went on to hold that the "designation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction." *Id.* (internal citations omitted).

Of note, the United States Supreme Court did not address this issue in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773 (2017). Instead, it focused on specific personal jurisdiction following *Daimler*.

Delaware: *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016).

This lawsuit stems from a former employee suing his former employer for alleged wrongful exposure to asbestos. Plaintiffs were Georgia residents. Genuine Parts Co. is a Georgia corporation. And the employee's alleged asbestos exposure took place in a warehouse in Florida. The Georgia based employer moved to dismiss the lawsuit on a personal jurisdiction basis. However, at the trial level, the Superior Court held that notwithstanding the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, the foreign corporation consented to Delaware's general jurisdiction because it registered to do business in Delaware. The trial court based its ruling largely on a Delaware supreme court case, *Sternberg v. Gencorp Inc.*, 550 A.2d 1105 (Del. 1988).

An interlocutory appeal ensued raising a single issue: "whether Delaware may exercise general jurisdiction over a foreign corporation for claims having nothing to do with Delaware, as a price for the corporation agreeing simply to be able to do business in Delaware." *Cepec*, 137 A.3d at 125-26. In answering this question, Delaware's Supreme Court focused on the specific language found within the state's registration statutes. To do any business in Delaware, foreign companies must comply with Delaware Code Annotated sections 371 and 376. Section 371 provides in relevant part:

> No foreign corporation shall do any business in this State, through or by branch offices, agents or representatives located in this State, until it shall have ... filed in the office of the Secretary of State ... [a] statement ... setting forth [ ] the name and address of its registered agent in this State...."

Moreover, section 376 of the Delaware Code provides:

> All process issued out of any court of this State, all orders made by any court of this State, all rules and notices of any kind required to be served on any foreign corporation which has qualified to do business in this State may be served on the registered agent of the corporation designated in accordance with § 371 of this title, or, if there be no such agent, then on any officer, director or other agent of the corporation then in this State.

Prior to *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011) and *Daimler*, the Supreme Court of Delaware used the above statutes to hold that a defendant foreign corporation consented to Delaware's general jurisdiction by registering to do business in Delaware and appointing an in-state agent for service of process. *See Sternberg*, 550 A.2d at 1113-16. After *Daimler*, the *Cepec* court went through great lengths to distance itself from this *Sternberg* holding, while at the same time, treading lightly on its predecessors.

The court reasoned, "what's most important is not whether *Sternberg* was somehow incorrect," rather after *Goodyear* and *Daimler*, a narrower reading of section 376 provides an "intuitively sensible effect of not subjecting properly registered foreign corporations to an 'unacceptably grasping' and 'exorbitant' exercise of jurisdiction." *Cepec*, 137 A.3d at 141. "In light of *Daimler*, § 376 can be given a sensible reading by construing it as requiring a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases, but not as a consent to general jurisdiction. . . . This reading accords with *Daimler* and *common sense*." *Id.* at 142 (emphasis added).

On the topic of common sense, the Delaware's highest court pointed out:

> Delaware is a state of fewer than one million people. Our citizens benefit from having foreign corporations offer their goods and services here. If the cost of doing so is that those foreign corporations will be subject to general jurisdiction in Delaware, they rightly may choose not to do so.

Id. at 142.

Missouri: *State Ex Rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017).

This case concerns a railroad company, which necessarily "conducts business" in states its trains pass through. Here, the plaintiff/employee was an Indiana resident. He attempted to sue his employer, Norfolk Southern Railway Company, a Virginia corporation, in the state of Missouri, for injuries he suffered in Indiana. The railroad moved to dismiss the complaint for lack of

personal jurisdiction. The trial court denied the motion and the case came before the Supreme Court of Missouri following the filing of a writ of prohibition. The railway alleged that Missouri had no personal jurisdiction over it where the injury occurred in another state (Indiana), to an employee that resided in another state (Indiana), as a result of the employee's work in another state (Indiana).

Plaintiff initially argued that the railway's "continuous and systematic" business in Missouri supported a finding that Missouri had general jurisdiction. The court quickly dispatched with this reasoning, stating "[p]rior to *Daimler*, this would have been a valid argument. But it is no longer the law." *See Dolan*, 512 S.W.3d at 46.

Thereafter, Plaintiff tried to circumvent *Daimler* completely by arguing that the railroad consented to personal jurisdiction over any case filed against it in Missouri by complying with Missouri's foreign corporation registration statutes, obviating the need to meet the criteria for general or specific jurisdiction. In particular, Plaintiff relied on Missouri Revised Statutes section 506.150.1(3), which provides in relevant part that service shall be had "[u]pon a domestic or foreign corporation . . . by delivering a copy . . . to any other agent authorized by appointment or required by law to receive service of process," in combination with section 351.594.1, which provides in relevant part that "[t]he registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation." *See id.* at 51. Plaintiff argued that by registering to do business in Missouri and appointing a registered agent, the railroad consented through the application of these statutes to jurisdiction in Missouri over any cause of action against it. *See id.* at 51.

The Court reviewed the plain language of Missouri's registration statutes and found that they did not mention consent to personal jurisdiction for unrelated claims, nor purport to provide an independent basis for jurisdiction over foreign corporations that register in Missouri. Instead, the statutes provide the type of service an agent for service of process can receive: "The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand *required or permitted by law to be served on the foreign corporation.*" *Id.* at 52. What type of service is "*required or permitted*" to be served on foreign corporations? Answer: Missouri's long-arm statute.

No Missouri statutes provide that suit may be brought in Missouri against non-resident corporations for suits unrelated to the corporation's activities in that state. *Id.* at 52. Wherefore, the court held that "the registration statute does not provide an independent basis for broadening Missouri's personal Jurisdiction to include suits unrelated to the corporation's forum activities when the usual bases for general jurisdiction are not present." *Id.* at 52. Plaintiff was not permitted to sidestep *Daimler* with a consent jurisdiction argument.

Wisconsin: *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 898 N.W.2d 70 (Wis. 2017).

This June 2017 opinion from the Supreme Court of Wisconsin is interesting in that the entire opinion concerns consent jurisdiction.

Countrywide Home Loans is a New York corporation with its principal place of business in California. Countrywide had been authorized to do business in Wisconsin for 30 years and as of 2017, had appointed a Wisconsin corporation as its registered agent for service of process. Countrywide did not maintain any offices, employees, or business presence within Wisconsin prior to the commencement of this action.

Ambac Assurance Corporation, is a Wisconsin corporation that insured against losses stemming from mortgage-backed securities. The securities contained Countrywide mortgage loans. Neither the policies nor the contracts were negotiated in Wisconsin, but the underlying securities did include some mortgage loans made to Wisconsin residences and secured to real property in Wisconsin. When homeowners defaulted during the "Great Recession" of 2008, Ambac, was obligated to pay hundreds of millions of dollars in claims. Ambac filed this lawsuit against Countrywide and served its Wisconsin agent, alleging Countrywide fraudulently misrepresented the quality of the mortgages underlying the securities that Ambac insured. Countryside moved to dismiss for lack of personal jurisdiction and Ambac opposed, arguing that Countrywide consented to general jurisdiction in Wisconsin when it appointed a registered agent under local statutes.

At the trial level, the circuit court concluded that it could not exercise general jurisdiction over Countrywide, reasoning that "merely having a registered agent and merely having . . . one or two foreclosure actions [does] not make you a resident of this state in the same sense that [anyone] . . . from Wisconsin could be sued in Wisconsin and could not be heard to complain." *Countrywide*, 898 N.W.2d at 74. The appellate court reversed, holding that the appointment of a registered agent for service of process constituted consent to general jurisdiction in Wisconsin. Countrywide petitioned the Supreme Court of Wisconsin for review.

The supreme court posed the question before it as follows: "whether compliance with Wis. Stat. § 180.1507 [which requires foreign corporations to maintain a registered office and registered agent], without more, constitutes consent to general jurisdiction in Wisconsin." *Countrywide*, 898 N.W.2d at 76. The court concluded "[c]onsent to general jurisdiction cannot be read into [the Wisconsin statutes] without expanding the meaning of the statutes to the point that we engage in rewriting the statutes, not merely interpreting them. We will not rewrite the statute[s] to create jurisdiction where the legislature has not." *Id.* (internal citations omitted). Delving into statutory interpretation, the court opined that the cited statute "is devoid of any language regarding either consent or jurisdiction. . . . [it] merely requires that every foreign corporation authorized to do business in Wisconsin maintain a registered office and registered agent in the state." *Id*. at 77. "Because chapter 180 in no way telegraphs that registration equals consent to general jurisdiction, a foreign corporation would be understandably surprised to learn, perhaps before it even conducts any business here, that registration automatically subjects it to being hauled into a Wisconsin court in a case having no connection whatsoever to Wisconsin." *Id.* at 77.

In support of this position, the Supreme Court of Wisconsin looked to how courts in other jurisdictions have applied *Goodyear* and *Daimler*. It took particular interest in the Delaware case of *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016), *supra.* It noted similarities in the

states' statutes requiring foreign corporations to maintain registered offices and agents and took note of Delaware's observance that

> [i]f mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler 's* ruling would be robbed of meaning by a back-door thief.

See Cepec, 137 A.3d at 145 n.119 citing *Brown v. Lockheed Martin Corp*., 814 F.3d 619, 640 (2d Cir. 2016).

Two justices dissented from the majority opinion. The dissent raised two issues: (1) the majority's statutory interpretation was wrong; and (2) the majority failed to recognize the distinction between cases where general jurisdiction is conferred by consent and cases that looked instead to contacts with a forum state to establish such jurisdiction. *Countrywide*, 898 N.W.2d at 84. According to the dissent, "Countrywide consented to personal jurisdiction in Wisconsin when it appointed a registered agent to accept service of process pursuant to Wis. Stat. §§ 180.1507 and 180.1510(1).

Regarding the statutory interpretation issue, the dissent reasoned as follows: What reason exists for the appointment of a registered agent to receive service of a summons and complaint other than the purpose of being subject to a lawsuit? *Countrywide*, 898 N.W.2d at 85. Moreover, Wis. Stat. § 180.1505(2) provides that a foreign corporation has the same rights, privileges, duties, restrictions, penalties and liabilities imposed on domestic corporations. Significantly, the duties of domestic corporations include being subject to general jurisdiction in Wisconsin.

Concerning the second point, the dissent argued that *Goodyear* and *Daimler* were inapplicable to the present situation. It opined that *Goodyear* and *Daimler* are "non-consensual" cases. Because this was a consensual case, *Daimler* was inapplicable.

> The majority fails to recognize that cases like *Int'l Shoe* and *Daimler* maintained a clear distinction between consenting and nonconsenting defendants. There is nothing outdated or disfavored about the approach taken in *Pennsylvania Fire* [and its progeny]. Instead, they address an entirely separate issue from the question presented in the cases relied on by the majority.

Id. at 90 citing *Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co.*, 243 U.S. 93, 37 S.Ct. 344, (1917) (If by a corporate vote [the defendant] had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt."). Wherefore, the dissent concluded that even after *Goodyear* and *Daimler*, a corporation could be subject to jurisdiction in every state that it maintains an agent pursuant to statutory obligations. In such situations, corporations are found to have bypassed jurisdictional case law and specifically consented to jurisdiction.

Illinois: *Aspen American Ins. Co. v. Interstate Warehousing, Inc.*, 2017 IL 121281 (Ill. 2017) (not released for publication).

This unreleased opinion concerns a subrogation action. The insurer sued out-of-state warehouse owner, seeking losses sustained by insured when roof of warehouse collapsed. Defendant filed a motion to quash service and dismiss the complaint for lack of personal jurisdiction. The trial court denied the motion and the appellate court affirmed. The Supreme Court of Illinois allowed defendant's petition for leave to appeal.

After determining that this case did not comport with the federal due process standards laid out in *Daimler*, plaintiff argued that because defendant registered to do business in Illinois under the Business Corporation Act of 1983 (the "Act"), and because defendant had a registered agent in Illinois for service of process, it "subjected itself to the jurisdiction and laws of Illinois." *Aspen American Ins. Co.*, at *4. The Illinois Supreme Court disagreed.

The court reviewed the Act and the specific language therein, and determined that it requires: (1) a foreign corporation to procure authority from the Secretary of State before transacting business within the state; (2) that all corporations having authority to transact business in Illinois maintain a registered office and agent in the state; and (3) that foreign corporations may be served with process on the registered agent appointed by the corporation or upon the Secretary of State. *See id.* at *5. However, "[n]one of the foregoing provisions require foreign corporations to consent to general jurisdiction as a condition of doing business in Illinois, nor do they indicate that, by registering in Illinois or appointing a registered agent, a corporation waives any due process limitations". *Id.*

Finally, contrary to the dissent's reasoning in *Countrywide*, the court reasoned that the fact that a foreign corporation registered to do business in Illinois is subject to the same duties as a domestic one, "in no way suggests that the foreign corporation has consented to general jurisdiction." *Id.* This is because personal jurisdiction is not a duty, but instead "refers to the court's power to bring a person into its adjudicative process." *Id.* (internal citations omitted).

2. State Statutes Specifically Authorizing Consent Jurisdiction

As you can see from the discussion above, the "consent" decisions have been based at least in part, on the text of the applicable registration statutes. Thus, while post-*Daimler*, the trend has generally been to interpret such jurisdictional consent statutes to not confer general jurisdiction, it is important to be cognizant of the state statutes' language. For example, what would happen if a state's statute specifically provided that a registrant specifically consented to personal jurisdiction through registration? For this hypothetical, we need look no further than Pennsylvania.

Pennsylvania statutory law specifically imposes a basis for personal jurisdiction over foreign corporations that elect to register to do business within the state:

> The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the

> tribunals of this Commonwealth to exercise *general personal jurisdiction* over such person . . . (2) Corporations (i) Incorporation under or *qualification as a foreign corporation* under the laws of this Commonwealth (ii) *Consent*, to the extent authorized by the consent. (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa.C.S.A. § 5301 (emphasis added).

Post-*Daimler*, the United States District Court for the Eastern District of Pennsylvania has had occasion to re-test personal jurisdiction pursuant to this statute.

***Bors v. Johnson & Johnson*, 208 F.Supp.3d 648 (E.D. Pa. 2016).**

In *Bors*, Plaintiff sued Imerys Talc America, Inc. and Johnson & Johnson, alleging negligent, willful, and wrongful conduct in connection with the design, development, manufacturing, testing, packaging, promoting, marketing, distribution, labelling, and/or sale of baby power, which allegedly caused ovarian cancer in plaintiff's decedent. Imerys Talc is a Delaware corporation, with its principal place of business in California. On the heels of *Daimler*, Imerys Talc moved to dismiss the complaint for lack of personal jurisdiction, arguing that registering as a foreign corporation in Pennsylvania does not constitute consent necessary to invoke personal jurisdiction after the Supreme Court's *Daimler* decision.

The district court started with the premise that jurisdiction could be had in three ways: consent to general jurisdiction, general jurisdiction, or specific jurisdiction. *Id.* at 651. Here, the court concentrated on consent. "The law of the state determines whether a corporation consents to the personal jurisdiction of the courts." *Bors*, 208 F.Supp.3d at 652. The court was quick to conclude that by the very language of 42 Pa.C.S.A. § 5301, Pennsylvania most certainly imposes such a basis for personal jurisdiction.

Prior to *Daimler*, the Third Circuit Court of Appeals, whose jurisdiction includes Pennsylvania, held that where a defendant registered to do business in Pennsylvania under the Pennsylvania statute, said party "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws". *Bane v. Netlink, Inc.*, 925 F.2d 637 (3rd Cir. 1990). Imerys Talc argued that constructive consent to personal jurisdiction in Pennsylvania by simply registering to do business as a foreign corporation ran afoul of the due process guaranteed under the Fourteenth Amendment following *Daimler*. *See id.* at 652-53. After all, post-*Daimler*, a foreign defendant's substantial, continuous, and systematic contacts with a state alone is not sufficient to establish personal jurisdiction. The Pennsylvania court in *Bors* did not agree.

"The ruling in *Daimler* does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania. . . . The Supreme Court in *Daimler* referenced jurisdiction by consent [only] when discussing general jurisdiction to distinguish between 'consensual' jurisdiction and 'non-consensual bases for jurisdiction,' not to 'doubt the validity of consent-based jurisdiction." *Id.* at 653. Following *Daimler*, general jurisdiction may be established in showing that a corporation is "at home" as explained in *Daimler*, or separately

general jurisdiction may be established by a corporation's consent to such jurisdiction, for which *Daimler* is silent.

The court concluded:

> Pennsylvania's statute specifically advises the registrant of the jurisdictional effect of registering to do business. In 2007, long after Pennsylvania enacted its specific notice statute and after our Court of Appeals confirmed personal jurisdiction based on registration, Imerys elected to register to do business in Pennsylvania as a foreign corporation. Imerys' compliance with Pennsylvania's registration statute amounted to consent to personal jurisdiction.

Id. at 655.

3. The Model Registered Agent Act

If the Pennsylvania consent jurisdiction statute is the "heads" side of the coin, the "tails" side of the coin must be the Model Registered Agent Act. This Act provides states with one registration procedure for registered agents no matter the kind of business entity represented by the agent, simplifying the registration procedures by providing one registered agent database in each state. *See* Model Registered Agents Act (Unif. L. Comm'n 2015) ("Model Act"). The Model Act provides as follows:

> SECTION 15. JURISDICTION AND VENUE. The designation or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state. The address of the agent does not determine venue in an action or a proceeding involving the entity.

Id.

Eleven states have chosen to enact this Model Act limitation:

1. Arkansas. *See* Ark. Code Ann. § 4-20-115 (2016);
2. District of Columbia. *See* D.C. Code § 29-104.14 (2016);
3. Idaho. *See* Idaho Code § 30-21-414 (2016);
4. Indiana. *See* 2017 Ind. ALS 118, SECTION 12 (Apr. 21, 2017);
5. Maine. *See* Me. Stat. tit. 5, § 115 (2016);
6. Mississippi. *See* Miss. Code Ann. § 79-35-15(2016);
7. Montana. *See* Mont. Code Ann. § 35-7-115(2017);
8. Nevada. *See* Nev. Rev. Stat. § 77.440 (2016);
9. North Dakota. *See* N.D. Cent. Code § 10-01.1-15 (2015);
10. South Dakota. *See* S.D. Codified Laws § 59-11-21 (2015); and
11. Utah. *See* Utah Code Ann. § 16-17-401 (2016).

While it seems clear that registration does not equate consent to general jurisdiction in these states, which have adopted the Model Act, at least one state court justice has opined that the lack of adoption of the Model Act could create a presumption that the state legislature did not

intend to foreclose consent jurisdiction. *See Countrywide*, 898 N.W.2d at 86 (dissent). But for now, in light of *Daimler* and the Model Registered Agent Act, the eleven states listed above are the most secure in disallowing jurisdiction by consent merely by maintaining a registered agent in the state.

C. Class Actions

The *Bristol-Myers* decision did not directly address class actions. In Justice Sotomayor's dissent she noted: "The Court today does not confront the question whether its opinion here 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." *Bristol-Myers,* 137 S.Ct. at 1789 n.4.

Courts have long held that they may exercise specific jurisdiction over absent class members' claims so long as they can exercise personal jurisdiction over the named plaintiffs' lawsuit. However, the reasoning pervasive in *Bristol-Myers* leaves us to ponder whether nationwide class actions can proceed in jurisdictions where a defendant is not subject to general jurisdiction – after all, the Supreme Court held that California could not "assert specific jurisdiction over the nonresidents' claims" despite the fact that they were identical to the California plaintiffs. *Id.* at 1776. Post-*Bristol-Myers*, it is conceivable that class actions could be pushed to states where defendants are unquestionably citizens, and away from the preferred jurisdictions of plaintiffs' counsel.

In the brief history post-*Bristol-Myers*, there have been a small sampling of courts that have analyzed whether to extend the *Bristol-Myers Squibb* jurisdictional reasoning to class actions. To date, the outcomes have been mixed.

***In re Dental Supplies Antitrust Litigation*, Case No. 16 CIV. 696 (BMC)(GRB), 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017).**

A group of dental practices and dentists sued distributors of dental supplies and equipment, alleging that defendants engaged in conduct leading to higher prices for dental supplies and eliminated competition. Defendants were alleged to have blocked new competitors entry into the market, which would have lowered prices for dental supplies. One of the defendants, Bunkhart, moved to dismiss plaintiffs' class action complaint for lack of personal jurisdiction. The court noted that Bunkhart is a regional company with a geographic footprint exclusively in the western United States. Bunkhart has offices in 11 states and regularly services customers in 17 states, none of which are New York, and all of which are west of the Mississippi River.

Plaintiffs conceded that Burkhart was not "at home" in New York and the court did not have general jurisdiction under *Daimler*. However, plaintiffs argued that the court had specific jurisdiction over Burkhart. The court concluded that there was no statutory basis for personal jurisdiction under New York's long-arm statute and noted that it was not required to consider the next step of analyzing whether jurisdiction comported with due process. Although not required to do so, the court continued to examine the case in light of *Bristol-Myers*. The District Court for the Eastern District of New York reasoned as follows:

> The Supreme Court's decision in *Bristol-Myers* is very instructive on the issues at bar. There, the Court held that 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. When there is no such connection, specific jurisdiction is lacking *regardless of the extent of a defendant's unconnected activities in the State.* The activities of plaintiffs or third parties alone will not confer jurisdiction, and the court's analysis is directed to the defendant's contacts with the forum itself and not the defendant's contacts with persons who reside there.

In re Dental Supplies Antitrust Litigation at * 9. (internal citations omitted).

The court went on to reason that plaintiffs cannot "side-step the due process holdings in *Bristol-Myers* by arguing that the case has no effect on the law in class actions because the case before the Supreme Court was not a class action." *Id.* Such an argument is flawed because the "constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case." *Id.* Regardless of whether a case is a mass-tort or class-action, "[d]ue process to assert personal jurisdiction requires that there be a direct 'connection between the forum and the specific claims". *Id.* citing *Bristol-Myers*, 137 S.Ct. at 1780.

However, at least one court in a traditionally plaintiff friendly jurisdiction has declined to extend the Supreme Court's reasoning to class action context.

> ***Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, Case No. 17-cv-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017).**

Named plaintiffs filed putative class action in California's "food court" based on their mistaken belief that Dr. Pepper Snapple Group, Inc.'s ("Dr. Pepper") product, Canada Dry Ginger Ale, contained ginger root. After filing in Santa Cruz County Superior Court, defendants removed the action to the United States District Court for the Northern District of California. Thereafter, Dr. Pepper moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction and under 12(b)(6).

Central to Dr. Pepper's motion was *Bristol-Myers* – Dr. Pepper argued that the court should read *Bristol-Myers* as a bar to the class action. The California court examined the *BMS* decision and noted as follows:

> The *Bristol-Myers* litigation was not a class action; it was a mass tort action. . . . Bristol-Myers did not address the precise issue before this Court: whether the Supreme Court's opinion '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.'"

Fitzhenry-Russell, at *5; 137 S.Ct. at 1789 n.4 (Sotomayor, J., dissenting). The *Fitzhenry-Russell* court took this opportunity to distinguish class and mass tort actions.

"In a mass tort action, like the one in *Bristol-Myers*, each plaintiff was a real party in interest to the complaints, meaning that they were named as plaintiffs in the complaints." *See Bristol-Myers Squibb Co. v. Superior Court*, 228 Cal. App. 4th 605 (2014), *rev'd by Bristol-Myers*, 137 S. Ct. 1773. Conversely, in a putative class action, one or more plaintiffs seek to represent other similarly situated plaintiffs, and the named plaintiffs are the only plaintiffs actually named in the complaint. *See* Fed.R.Civ.P. 23.

The court acknowledged that (1) 88 percent of the class members were not California residents; and (2) the fact that the named plaintiffs were both California residents "was undoubtedly done to distinguish this case from *Bristol-Myers.*" *Fitzhenry-Russell*, at *5. Moreover, the court understood that plaintiffs "manipulated the complaint" so as to not run afoul of *Bristol-Myers. Id.* However, there was no "persuasive argument – much less binding law – compelling the extension of *Bristol-Myers. Id.* As such, the court found that it had personal jurisdiction over Dr. Pepper as to the putative nationwide class claims.

In the following case, the Northern District of Illinois seemingly turns the tide back in favor of applying *Bristol-Myers* to class actions.

***McDonnell v. Nature's Way Products, LLC*, Case No. 16 C 5011, 2017 WL 4864910 (N.D. Ill October 26, 2017).**

Plaintiff filed putative class action against a manufacturer defendant after finding out that Alive! Women's Energy Supplements contained substantial ingredients that were not "Made in the USA" as advertised. The supplement manufacturer filed a motion to dismiss, arguing that the court did not have personal jurisdiction over it for named plaintiff's claims related to sales of Women's Alive made outside the state of Illinois and the sale of other Nature's Way products (sold both within and outside Illinois) that the named plaintiff never bought.

Here, plaintiff did not argue general jurisdiction; she instead contended that the court had specific jurisdiction over Nature's Way for her multi-state and non-Women's Alive claims. As such, the court only evaluated specific jurisdiction. In relying on *Bristol-Myers*, the court noted that "a state may not assert specific jurisdiction over a nonresident's claim where the connection to the state is based on the defendant's conduct in relation to a resident plaintiff, and not the nonresident plaintiff." 137 S.Ct. at 1781 (the "mere fact that *other* [resident] plaintiffs" took defendant's drugs in the state and sustained the same injuries as nonresident plaintiffs did not provide the required "connection between the forum and the specific claims at issue" for the Court to exercise jurisdiction over the nonresidents' claims against defendant). The court specifically took note of the Northern District of California's decision in *Fitzhenry-Russell*, but contrarily held that it found "the analysis used in *Bristol-Myers Squibb Co.* . . . instructive in considering whether the Court has personal jurisdiction over the claims [named plaintiff] asserts on . . . behalf [of residents of Illinois and seven other states for products that the named plaintiff never purchased] against Nature's Way." *McDonnell*, at *4.

> Because the only connection to Illinois is that provided by McDonnell's purchase of Women's Alive, which cannot provide a basis for the Court to exercise personal

> jurisdiction over the claims of nonresidents where Nature's Way has no other connection to this forum, the Court dismisses all claims pertaining to Women's Alive and the products mentioned in paragraphs 22 and 24 brought on behalf of non-Illinois residents or for violations of Florida, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington law without prejudice. *See Bristol-Myers Squibb Co.*, 137 S.Ct. at 1781-83.

McDonnell, at *4. In the end, the court did allow the named plaintiff to proceed with a putative class action on her ICFA and unjust enrichment claims with respect to the Women's Alive product that she did actually purchase.

Understanding *In re Dental Supplies Antitrust Litigation*, *Fitzhenry-Russell* and *McDonnell* stem from different jurisdictions, it is difficult to reconcile their treatment of *Bristol-Myers*. In determining whether personal jurisdiction existed in *Fitzhenry-Russell*, the court did not specify whether it was considering general or specific jurisdiction or both. *In re Dental Supplies Antitrust Litigation* and *McDonnell*, on the other hand, specifically said they were only considering specific jurisdiction. However, this distinction may be without a difference given the fact that *Fitzhenry-Russell* specifically determined that *Bristol-Myers* simply does not apply to class actions and *In re Dental Supplies Antitrust Litigation* opined that it does. Whether and how courts in different states decide to apply *Bristol-Myers* to class action settings is a topic to monitor closely.