Personal Jurisdiction Post-*Daimler* – As Plaintiffs Test Exceptions to *Daimler's* Narrow Path, All Eyes on Appellate Courts

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IN July of 2015, the Defense Counsel Journal published a report of the Supreme Court's watershed personal jurisdiction decision in *Daimler AG v. Bauman* and the immediate aftermath.[1] Here, we provide an update on the continued impact of *Daimler*, including two important pending appeals to watch: (1) the appeal of the California Supreme Court's decision in *In re Bristol Myers Squibb*, which is now under certiorari review at the U.S. Supreme Court; and (2) *Robinson v. Pfizer*, now pending in the Eighth Circuit Court of Appeals.

[1] *See* Phillip S. Sykes and Laura McCarthy, *Are You Defending Your Clients Where They Don't Belong? Corporate Defendants' New Potent Defense Is Personal (Jurisdiction, That Is)*, 82 DEF. COUNS. J. 282 (2015).

I. The Supreme Court's Personal Jurisdiction Precedent and *Daimler AG v. Bauman*

Personal jurisdiction is a concept grounded in the Due Process Clause of the Fourteenth Amendment. Soon after the Fourteenth Amendment's passage in 1868, the Supreme Court held in 1878 in *Pennoyer v. Neff* that a court's authority "is necessarily restricted by the territorial limits of the State in which it is established."[2] More than 60 years later, the Supreme Court issued its landmark opinion of *International Shoe*, which remains the touchstone authority today.[3] In *International Shoe*, the Court clarified that a court may exercise personal jurisdiction over a non-resident defendant, but only if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[4]

International Shoe laid the groundwork for the two categories of personal jurisdiction we know today: specific jurisdiction and general jurisdiction.

Specific jurisdiction, as the name suggests, is based on a connection between the forum and the specific cause of action. As explained by the Supreme Court in *International Shoe*, personal jurisdiction arises in this instance where the defendant's activities in the state "ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on."[5] In *International Shoe*, the defendant had engaged in business in the state, and"[t]he obligation which is here sued upon arose out of those very activities," making it "reasonable and just . . . to permit the state to enforce the obligations which [the defendant] ha[d] incurred there."[6]

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[2] Pennoyer v. Neff, 95 U.S. 714, 720 (1878); *see also* Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (holding that under *Pennoyer* "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

[3] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[4] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 131 S.Ct. 2846 (2011) (quoting *Int'l Shoe*, 326 U.S. at 316).

[5] *Int'l Shoe*, 326 U.S. at 317.

[6] *Id*. at 320.

More recently, the Supreme Court in *Goodyear* explained that specific jurisdiction exists only in two instances: (1) where a defendant engages in continuous activity in the state "and that activity gave rise to the episode-insuit," or (2) where the defendant commits "'single or occasional acts' in a State [that are] sufficient to render [it] answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections."[7] Lower courts are split in how they determine whether a plaintiff's claims "arise out of or relate to" a defendant's forum contacts.[8]

General jurisdiction, on the other hand, is not grounded in the contacts underlying the cause of action, but rather functions as a form of "all-purpose" jurisdiction. Over the years, lower courts applying this general jurisdiction test were quite lenient, essentially permitting the exercise of general jurisdiction any time a corporation did business continuously in a state.[9] In 2011, the Supreme Court clarified that the test for general jurisdiction is whether the defendant's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[10] Following *Goodyear*, however, lower courts were still not entirely clear about what "at home" means.[11]

In 2014, the Supreme Court resolved this question definitively in *Daimler AG v. Bauman*.[12] In *Daimler*, the Supreme Court made clear that a defendant is "at home"—and thus is only subject to general personal

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[7] *Goodyear*, 564 U.S. at 923 (quoting *Int'l Shoe*, 326 U.S. at 318).

[8] *See, e.g.,* Tamburo v. Dworkin, 601 F.3d 693, 708 (7th Cir. 2010) (noting "conflict among the circuits"); O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 318-320 (3d Cir. 2007) (noting "lack [of] any consensus" and describing "[t]hree approaches").

[9] Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 511 (2015) ("Lower courts' tests for general jurisdiction often were quite lax and, even more frequently, bereft of any sound theoretical justification. A number of courts continued to invoke the old pre-*International Shoe* metaphors of 'presence' and 'doing business.'").

[10] *Goodyear*, 131 S. Ct. at 2851 (citing *Int'l Shoe*, 326 U.S. at 317).

[11] Trammell, *supra* n. 9, at 517 (noting that following *Goodyear* "a minority of courts ha[d] clung to the idea that *Goodyear* left lower court jurisprudence completely undisturbed" and that "some courts continue[d] to rely solely on a high volume of forum sales to justify asserting general jurisdiction").

[12] Daimler AG v. Bauman, 134 S. Ct. 746, 776 (2014).

jurisdiction—in (1) the state of its principal place of business, or (2) state of incorporation, except in the "exceptional case."[13] "Although the placement of a product into the stream of commerce 'may bolster an affiliation germane to *specific* jurisdiction,' . . . such contacts 'do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.'"[14]

Commentators deemed *Daimler* a sea change.[15] As the Fifth Circuit has explained, following *Daimler*, "[i]t is, therefore, *incredibly difficult* to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.'"[16]

Daimler has also provided strong support for removal.

Under the Supreme Court's *Ruhrgas* decision, where a district court has before it "a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question," the court may properly address the personal jurisdiction issue before proceeding to subject matter jurisdiction.[17] Accordingly, when plaintiffs file suit in a state-court jurisdiction where personal jurisdiction is lacking (but where diversity may be defeated by

[13] *Id*. The Court explained that its decision in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), provides the "textbook" example of an exceptional case. *Daimler*, 134 S.Ct. at 761 n.19. In *Perkins*, the defendant was a Philippines-based corporation that had to temporarily relocate to Ohio due the Japanese occupation of the Philippines during World War II. *See* 342 U.S. at 447-448. The Court held that an Ohio court could exercise jurisdiction over the defendant because "[g]iven the wartime circumstances," Ohio "was the corporation's principal, if temporary, place of business." *Daimler*, 134 S. Ct. at 756 & n.8.

[14] *Daimler*, 134 S. Ct. at 757 (quoting *Goodyear*, 131 S. Ct. at 2857) (emphasis in original).

[15] *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1346 (2015) ("In early 2014, however, the Supreme Court issued a game-changing decision . . . . In the aftermath of *Daimler*, it is unlikely that any state other than these will be able to assert general jurisdiction over a corporation based on the corporation's continuous and systematic business contacts with the forum").

[16] Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014)) (emphasis added).

[17] Ruhrgas v. Marathon Oil Co., 526 U.S. 574, 588 (1999).

joinder of non-diverse plaintiffs), defendants may remove, requesting the court consider the question of personal jurisdiction before deciding fraudulent joinder.

Once improper defendants are dismissed for lack of personal jurisdiction, complete diversity exists, as does subject matter jurisdiction. Since *Daimler* was decided, numerous courts have followed this reasoning, dismissing the out-of-state plaintiffs and retaining jurisdiction over the remaining, in-state, diverse plaintiffs.[18]

II. Personal Jurisdiction and the Problem of Litigation Tourism

There have been a few jurisdictions, however, where *Daimler* has not been so applied, and these venues have been prime locations for litigation tourism.

In recent years, it has become commonplace—particularly in the products liability arena—for numerous unrelated plaintiffs from across the country to join together and file suit in their chosen forum. Even though the out-of-state plaintiffs' claims have no connection to the forum, they will join with one or more in-state plaintiffs to serve as an "anchor" to tie their suits there.

Frequent locations for this practice are California, Illinois, and Missouri. These are oft-watched venues; all three were declared "judicial hellholes" in the American Tort Reform Foundation's most recent report.[19] By September 2016, three of the top six products liability verdicts in the United States—$173.5 million in total—were from the St. Louis City circuit court. [20] According to a recent study of more than 2,900 cases filed in Los Angeles and San Francisco counties against pharmaceutical companies showed

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[18] *See In re* Bard IVC Filter Products Liability Litigation, No. CV-1602442, 2016 WL 6393595 (D. Ariz. Oct. 28, 2016); Addelson v. Sanofi, S.A., No. 4:16-CV-01277, 2016 WL 6216124 (E.D. Mo. Oct. 25, 2016); *In re* Zofran (Ondansetron) Prods. Liab. Litig., No. 1:15-md-2657, 2016 WL 2349105, at *2 (D. Mass. May 4, 2016); *In re* Testosterone Replacement Therapy Prods. Liab. Litig., No. 14 C 1749, 2016 WL 640520, at *3 (N.D. Ill. Feb. 18, 2016); Torres v. Johnson & Johnson, No. 2:14-cv-29741, 2015 WL 4888749, at *3 (S.D. W. Va. Aug. 17, 2015); Seymour v. Johnson & Johnson, No. 2:15-cv-01542, 2015 WL 1565657, at *4 (S.D. W. Va. Apr. 8, 2015); Evans v. Johnson & Johnson, No. H:14-cv-2800, 2014 WL 7342404, at *3 (S.D. Tex. Dec. 23, 2014); Locke v. Ethicon, Inc., 58 F. Supp.3d 757, 759–760 (S.D. Tex. 2014).

[19] *See* American Tort Reform Foundation, *2015-2016 Judicial Hellholes*, available at http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf and *2016-2017 Judicial Hellholes*, available at www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf .

[20] *See* Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists,* BLOOMBERGBUSINESSWEEK (Sept. 29, 2016), available at http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis (last accessed Feb. 21, 2017).

that of the more than 25,000 plaintiffs involved, only 10.1% of them were California residents.[21]

How do these plaintiffs escape *Daimler*? By two primary theories.

Some plaintiffs have claimed that registration to do business the state constitutes consent to personal jurisdiction—placing the situation outside the scope of *Daimler*. Though this argument has been accepted by some courts, it runs headlong against the reasoning of *Daimler*. As the Second Circuit explained in rejecting this argument, it would "creat[e] precisely the result that the Court so roundly rejected in *Daimler*."[22] Because "it appears that every state in the union -- and the District of Columbia, as well -- has enacted a business registration statute," if this argument were accepted "*Daimler*'s ruling would be robbed of meaning by a back-door thief."[23] Similarly, in April 2016, the Delaware Supreme Court reversed course on this issue.[24] Though it had previously held that registration to do business in Delaware constituted consent to personal jurisdiction in that state, it subsequently held that this "far-reaching interpretation of [the registration statute] collides directly with the U.S. Supreme Court's holding in *Daimler*."[25]

Another common argument by plaintiffs is that personal jurisdiction is established for the out-of-state plaintiffs by virtue of their joinder with the in-state plaintiffs. Again, though this has been accepted by some courts,[26] many more courts have rejected this proposition.[27] As stated by Wright &

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[21] Ryan Tacher, Civil Justice Ass'n of Cal., *Out-of-State Plaintiffs: Are Out-of-State Plaintiffs Clogging California Courts?* 2 (2016), available at http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf (last accessed Feb. 21, 2017).

[22] Brown v. Lockheed Martin Corp., 814 F.3d 619, 640 (2d Cir. 2016).

[23] *Id.* (citation omitted).

[24] Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016).

[25] *Id.* at 127.

[26] *See* Bradshaw v. Mentor Worldwide, LLC, No. 4:15-CV-332 SNLJ, 2015 WL 3545192, at *2 (E.D. Mo. June 4, 2015) (Limbaugh, J.) (finding specific jurisdiction over the defendant with respect to the claims asserted by out-of-state plaintiffs on the grounds that their claims supposedly arose "from the same or substantially related acts" as the claims asserted by the Missouri plaintiffs.).

[27] *See, e.g.*, Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 274 (5th Cir. 2006) (holding that "[a] plaintiff bringing multiple claims that arise out of different forum contacts of the defendant must establish personal jurisdiction for each claim"); Arnold v. Goldstar Fin. Sys., Inc., 2002 WL

Miller, "[t]here is no such thing as supplemental specific personal jurisdiction; if separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim."[28]

However, a third, more novel theory recently found acceptance with the California Supreme Court in *In re Bristol-Myers Squibb*.

III. The California Supreme Court's *In re Bristol-Myers Squibb* Decision

In re Bristol-Myers Squibb involves a number of products liability actions all alleging injuries from the use of Bristol-Myers Squibb's ("BMS") Plavix, an FDA-approved drug for use in preventing blood clots. *In re Bristol-Myers Squibb* involves eight separate lawsuits, totaling 661 plaintiffs. Of those 661 plaintiffs, 575 (87%) were from outside the State of California. The remaining 86 plaintiffs were California residents. The 575 non-California plaintiffs' claims had nothing to do with the State of California or with BMS's activities in the State of California. BMS is a global company incorporated under the laws of the State of Delaware with its headquarters in New York. It has five California offices (four research facilities and a government-affairs office) that do not have any direct involvement with the production or marketing of Plavix. BMS employed a little more than 400 employees in California, a small fraction of their global workforce.[29]

After the BMS cases were filed in 2012, BMS moved to quash the summons and dismiss the claims for lack of personal jurisdiction. The trial court denied BMS's motion, holding that BMS's sales and activities in the State of California established general personal jurisdiction there. BMS then filed a petition for the California Court of Appeal for a writ of mandate.

On the very same day that the U.S. Supreme Court issued its opinion in *Daimler*, the California Court of Appeal summarily denied

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1941546, at *3 (N.D. Ill. Aug. 22, 2002) ("Each plaintiff has his or her own claims against Goldstar. The personal jurisdiction analysis therefore must be plaintiff-specific."); Shafik v. Curran, 2010 WL 2510194, at *4 (M.D. Pa. June 17, 2010) (stating that "the Court will independently assess not only whether specific jurisdiction exists as to the claims raised by each Plaintiff, but also whether specific jurisdiction exists as to all claims brought by each Plaintiff"); Executone of Columbus, Inc. v. Inter-Tel, Inc., No. 2:06-cv-126, 2006 WL 3043115, at *6 (S.D. Ohio Oct. 24, 2006) (allowing plaintiffs to obtain personal jurisdiction through joinder "would unfairly allow Plaintiffs to bypass the requirements of personal jurisdiction").

[28] 5B WRIGHT & MILLER, FED. PRAC. & PROC. CIV. 3d § 1351, n. 30.

[29] By way of comparison, BMS has 6,475 employees in the New York-New Jersey metropolitan area alone.

BMS's petition for writ of mandate. The California Supreme Court granted review and transferred the matter back to the California Court of Appeal to issue an order to show cause in light of *Daimler.* After briefing and oral argument on *Daimler*, the Court of Appeal again denied BMS's petition for writ of mandate, this time finding that even though there was no general personal jurisdiction under *Daimler*, the court could exercise specific personal jurisdiction over BMS.

On August 29, 2016, a sharply divided California Supreme Court affirmed, finding there was specific personal jurisdiction over BMS in the matter.

Writing for the four-judge majority, Justice Cantil-Sakauye first assessed the question of general personal jurisdiction. Like the Court of Appeal, the Supreme Court found no general personal jurisdiction under *Daimler*. The Court rejected Plaintiffs' argument that BMS's sales of and contracts related to Plavix and other activities in California established general personal jurisdiction, concluding that "[a]lthough the company's ongoing activities in California are substantial, they fall far short of establishing that it is at home in this state for purposes of general jurisdiction."[30] The Court also rejected the plaintiffs' argument that BMS was subject to general personal jurisdiction in California because it maintained a registered agent for service of process in the state. The Court found this act to subject corporations to jurisdiction in controversies growing out of their transactions in the state - "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."[31]

The Court did, however, find specific jurisdiction under a "sliding scale" theory of personal jurisdiction whereby the more contacts, the connection to the state. More specifically, the Court found that BMS had purposefully availed itself to the benefits of California on the basis of its marketing, sales, employees, contracts, and other operations in the State of California. The Court further found plaintiffs' suit "arose from or related to" those contacts because both the California plaintiffs' claims and the non-California plaintiffs' claims arose from the same allegedly defective product and same nationwide marketing, promotion, and distribution. Further, even though BMS's research and development facilities did not relate to Plavix, the Court found that the research and

[30] Bristol-Myers Squibb Co. v. Superior Court (Anderson), S221038, slip op. at 14 (Cal. Aug. 29, 2016).

[31] *Id.* at 15.

development activity in the state provided an additional connection between the non-California plaintiffs' claims and BMS's activities in the state.

The California Supreme Court's decision in *In re Bristol-Myers Squibb* is an extreme expansion of personal jurisdiction case law, and it plainly undermines the U.S. Supreme Court's recent pronouncements in *Daimler*. In addition, given the outrageous result of this "sliding scale" approach, the decision also exposes the need for the U.S. Supreme Court to resolve the split in jurisdictions regarding how to assess specific jurisdiction.

BMS filed a petition for writ of certiorari with the U.S. Supreme Court on October 7, 2016. The question presented by the petition was:

> Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

Plaintiffs' response was filed December 9, 2016, and amicus curiae briefs were filed by the Washington Legal Foundation and Allied Educational Foundation; Product Liability Advisory Council, Inc.; the Chamber of Commerce of the United States; Pharmaceutical Research and Manufacturers of America; and GlaxoSmithKline, LLC.

The Supreme Court's ruling on BMS's cert. petition will be highly anticipated by product manufacturers and defense counsel across the country. If certiorari is denied or the decision affirmed, *In re Bristol-Myers Squibb* will pave the way for even more litigation tourism in the State of California, and plaintiffs elsewhere are likely to try to expand its reasoning to other jurisdictions.

IV. Robinson v. Pfizer

Another closely watched appeal is *Robinson v. Pfizer*, now pending in the U.S. Court of Appeals for the Eighth Circuit.[32]

Robinson involves claims from 64 women arising from the use of the drug Lipitor, a cholesterol-lowering medication. The 64 unrelated plaintiffs are from 29 different states—only four from the State of Missouri. Pfizer removed the case, in reliance on *Ruhrgas* and *Daimler* and the authorities cited above. The district court remanded the action, finding personal

[32] No. 16-2524 (8th Cir. Sept. 8, 2016).

jurisdiction based on the novel theory of "jurisdiction by joinder" — a theory routinely rejected by other courts as described above.

Typically, as set out in 28 U.S.C. §1447(d), "[a]n order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise." But in *Robinson*, in addition to remanding the case, the district court also awarded plaintiffs $6,200. Though there is no appellate jurisdiction over the remand order, there is jurisdiction over the sanction order.[33] Such a review entails a determination of whether the underlying remand order was legally correct.[34] Attempting to evade appellate review, Plaintiffs disclaimed a monetary interest in the fee award and sought to have the appeal dismissed as moot. Whether that defeats appellate jurisdiction is an issue on appeal.

Robinson presents a unique opportunity for appellate review of an issue that has plagued defendants in the U.S. District Court for the Eastern District of Missouri. Though one court in the Eastern District of Missouri recently denied remand in a removal under *Ruhrgas* and *Daimler*,[35] there are many more orders of remand in that jurisdiction. These have all been against *Daimler* and the great weight of authority, but have been unreviewable. For this reason, *Robinson* will be closely watched by defendants who have repeatedly battled multi-plaintiff lawsuits filed in Missouri state court.

V. Conclusion

With the *Daimler* decision, the Supreme Court set a clear standard for general personal jurisdiction, finding a defendant to be "at home" only in its principal place of business or in its state of incorporation – and not by placing a product into the stream of commerce. The viability of the "sliding scale" personal jurisdiction theory at issue in *In re*

[33] *See* Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006).

[34] *See* Dahl v. Rosenfeld, 316 F.3d 1074, 1077 (9th Cir. 2003).

[35] *Addelson,* 2016 WL 6216124, at *4.

Bristol-Myers Squibb and the "jurisdiction by joinder" theory in *Robinson v. Pfizer* strike at the heart of the Court's reasoning in *Daimler*. These two appeals will go a long way in defining the personal jurisdiction landscape in mass torts across the country.