

Personal Jurisdiction After Bristol-Myers Squibb: Unresolved Issues, Shifting Plaintiff Strategies

TUESDAY, NOVEMBER 7, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Wystan M. Ackerman, Partner, **Robinson & Cole**, Hartford, Conn.

Leah Kelman, Esq., **Herrick Feinstein**, Newark, N.J.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-869-6667** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 35.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Personal Jurisdiction After *Bristol-Myers Squibb*

Leah Kelman, Esq.

Herrick, Feinstein LLP
New York /Newark, N.J.

212-592-1400

lkelman@herrick.com

www.herrick.com



HERRICK

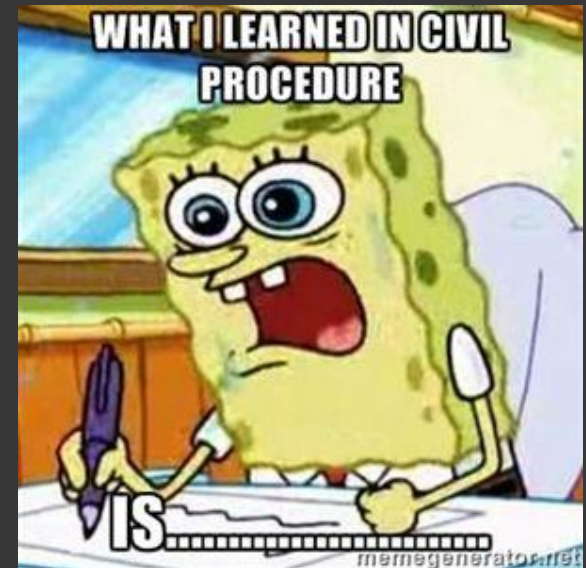
Prelude to *Bristol-Myers Squibb & BNSF Railway Co.*

- Goodyear Dunlop Tires Operations v. Brown (2011)
- J. McIntyre Mach., Ltd. v. Nicastro (2011)
- Daimler v. AG Bauman (2014)
- Walden v. Fiore (2014)



1L Civil Procedure

- *Pennoyer v. Neff* (1877)
- *International Shoe Co. v. Washington* (1945)
- *Perkins v. Benguet Consol.* (1952)
- *Hanson v. Denckla* (1958)
- *World-Wide Volkswagen v. Woodson* (1980)
- *Helicopteros v. Hall* (1984)
- *Burger King Corp. v. Rudzewicz* (1985)
- *Asahi Metal Indus. V. Sup. Ct. of Cal.* (1987)



Judicial Hellholes

1. St. Louis, Missouri
2. California
3. NYC Asbestos Litigation
4. Florida Supreme Court and S. Florida
5. New Jersey
6. Cook, Madison, St. Clair, IL
7. Louisiana
8. Newport News, VA
9. Hidalgo Cty., TX

JUDICIAL
HELLHOLES



Goodyear Dunlop v. Brown (2011)

- The Stats:
 - Full citation: *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)
 - Decided June 27, 2011
 - Vote: 9-0
 - Opinion authored by Justice Ginsburg
 - Arising from the Court of Appeals of North Carolina



HERRICK

Goodyear Dunlop v. Brown (2011)

- Question Presented: Are foreign subsidiaries of a U.S. parent corporation amenable to suit in state court on claims unrelated to activity of the subsidiaries in the forum State?
- “[f]low of a manufacturer’s products into the forum . . . may bolster an affiliation germane to *specific* jurisdiction. . . . But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction.”
- The stream-of-commerce theory cannot serve as a basis for a state court’s exercise of general jurisdiction.
- Finding that “petitioners are in no sense at home in North Carolina”.



J. McIntyre Mach., Ltd. V. Nicastro (2011)

- The Stats:
 - Full citation: *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011)
 - Decided June 27, 2011
 - Vote: 6-3
 - Opinion authored by Justice Kennedy
 - Concurrence: Justices Breyer & Alito
 - Dissent: Justices Ginsburg, Sotomayor, Kagan
 - Arising from Supreme Court of New Jersey



J. McIntyre Mach., Ltd. V. Nicastro (2011)

- Question Presented: Whether a foreign manufacturer could be subject to specific jurisdiction arising out of products sold within the forum by an independent distributor.
- Holding that the manufacturer had not engaged in “conduct purposefully directed” at New Jersey; focusing on the defendant’s lack of an “intent to invoke or benefit from the protection of [New Jersey’s] laws.”
- A court may not exercise jurisdiction over a defendant that has not purposefully availed itself of doing business in the jurisdiction or placed goods in the stream of commerce with the expectation they would be purchased in the jurisdiction.



Daimler v. AG Bauman (2014)

- The Stats:
 - Full citation: *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014)
 - Decided January 14, 2014
 - Vote: 9-0
 - Opinion authored by Justice Ginsburg
 - Concurrence: Justice Sotomayor
 - Arising from United States Court of Appeals for the Ninth Circuit



Daimler v. AG Bauman (2014)

- Question Presented: Whether foreign nationals could sue a foreign parent corporation in California federal court based on the forum contacts of a U.S. subsidiary under a general jurisdiction theory.
- “Continuous and systematic” is insufficient to establish general jurisdiction -- “that formulation...is unacceptably grasping.”
- Courts may exercise general personal jurisdiction over a defendant when the defendant’s affiliations with the forum state “are so constant and pervasive as to render it essentially at home in the forum State.”



Walden v. Fiore (2014)

- The Stats:
 - Full citation: *Walden v. Fiore*, 134 S.Ct. 1115 (2014)
 - Decided February 25, 2014
 - Vote: 9-0
 - Opinion authored by Justice Thomas
 - Arising from United States Court of Appeals for the Ninth Circuit



Walden v. Fiore (2014)

- Question Presented: Whether a court in Nevada may exercise personal jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada.
- Specific personal jurisdiction comports with due process only where “the defendant’s suit-related conduct” creates “a substantial connection with the forum state.”
- Holding that petitioner lacked minimum contacts with Nevada for a Nevada court to exercise jurisdiction.





The Prequels to *BMS* and *BNSF*

- *Goodyear*: Stream of commerce theory is insufficient to establish **general jurisdiction**; defendant must be “at home” in the forum.
- *Daimler*: “continuous and systematic” contacts with a forum are insufficient to establish **general jurisdiction**. Defendant’s contacts must be “so constant and pervasive as to render it essentially at home.”
- *Nicastro*: **Specific jurisdiction** requires defendant conduct “purposefully directed” at the forum.
- *Walden*: **Specific jurisdiction** requires that “suit related conduct” create a substantial connection to the state.



Robinson+Cole

**Personal Jurisdiction After
Bristol-Myers Squibb:
Unresolved Issues, Shifting
Plaintiff Strategies**

Wystan Ackerman

wackerman@rc.com

860-275-8388

Blog: classactionsinsider.com

Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773 (2017)

- mass action brought by 678 plaintiffs in California Superior Court (86 of them were CA residents)
- personal injuries allegedly caused by Plavix
- drug developed and manufactured in New York and New Jersey
- sold and marketed nationwide
- Bristol-Myers (DE corp. headquartered in NY) not subject to general jurisdiction in California
- issue: whether California state courts had specific jurisdiction over non-California residents' claims

Bristol-Myers Squibb Co. v. Superior Ct.

- Bristol-Myers had 160 employees in CA
- 250 sales representatives in CA
- Small state-government advocacy office in Sacramento
- Plavix was not developed, manufactured or packaged in CA, marketing strategy not developed in CA
- From 2006-2012, Bristol-Myers sold \$900M of Plavix in CA (approx. 1% of nationwide revenue)

Bristol-Myers Squibb Co. v. Superior Ct.

- Cal. Supreme Court – Bristol-Myers’ “extensive contacts with California” allowed exercise of specific jurisdiction under Due Process Clause of Fourteenth Amendment
- U.S. Supreme Court reversed
- 8-1 opinion by Justice Alito

Bristol-Myers Squibb Co. v. Superior Ct.

- Specific jurisdiction depends on whether the claims alleged arose out of or relate to the defendant's contacts with California
- specific 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” (quoting Goodyear)
- “When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.”

Bristol-Myers Squibb Co. v. Superior Ct.

- “What is needed – and what is missing here—is a connection between the forum and the specific claims at issue.”
- non-California residents could not demonstrate that they sustained any harm in California
- Not relevant that Bristol-Myers conducted research in CA on matters unrelated to Plavix

Bristol-Myers Squibb Co. v. Superior Ct.

- Merely because other plaintiffs were injured in California was not enough for the California court to have jurisdiction over the nonresidents' claims
- “the nonresidents' claims involve no harm in California and no harm to California residents”
- Fact that Bristol-Myers contracted with CA company to distribute Plavix nationally was not sufficient – no allegation that Bristol-Myers and distributor engaged in relevant acts in CA, or that Bristol-Myers was liable for distributor's conduct.

Bristol-Myers Squibb Co. v. Superior Ct.

- Plaintiffs seeking to bring a mass action could bring it in a state where the defendant is subject to general jurisdiction.
- Alternatively, plaintiffs could bring separate, smaller mass actions in their home states.

Bristol-Myers Squibb Co. v. Superior Ct.

- open question at Supreme Court level as to whether it is constitutional for a federal court to exercise personal jurisdiction based on contacts with the nation as a whole rather than a specific state
- Due Process Clause of the Fifth Amendment, rather than the Fourteenth Amendment, would govern this issue in the federal courts
- Federal courts, however, have long evaluated these jurisdictional issues in the same manner.

Bristol-Myers Squibb Co. v. Superior Ct.

- Justice Sotomayor was the lone dissenter.
- described majority opinion as “holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State”
- Justice Sotomayor believed it was sufficient under Supreme Court precedent that the claims of the California residents and nonresidents arose out of the essentially the same acts by the defendant.

Bristol-Myers Squibb Co. v. Superior Ct.

- “the upshot of today’s opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured”
- “The effect of the Court’s opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is ‘essentially at home.’”

Bristol-Myers Squibb Co. v. Superior Ct.

- may not be possible to bring nationwide mass action if there is more than one defendant and they are not “at home” in one state, or one of them is foreign
- footnote suggested that the Court’s opinion might not apply to a class action if absent class members were not treated as parties for purposes of personal jurisdiction

BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017)

- claims under Federal Employers' Liability Act – makes railroads liable for employee injuries
- suits brought in Montana state court
- neither employee was injured in Montana or ever worked for BNSF in Montana
- BNSF incorporated in DE with principal place of business in TX
- Montana Supreme Court found jurisdiction
- Supreme Court reversed – opinion by Justice Ginsburg for nearly-unanimous Court

BNSF Railway Co. v. Tyrrell

- Court held that Federal Employers' Liability Act only governed venue and subject matter jurisdiction, not personal jurisdiction
- Court then addressed whether personal jurisdiction in MT complied with Due Process Clause of Fourteenth Amendment
- “Because neither [plaintiff] alleges any injury from work in or related to Montana, only the propriety of general jurisdiction is at issue here”

BNSF Railway Co. v. Tyrrell

- *International Shoe v. Washington* “minimum contacts” and “traditional notions of fair play and substantial justice” test applies only to specific jurisdiction, not general jurisdiction
- General jurisdiction – *Goodyear* and *Daimler* test – “affiliations with the State are so ‘continuous and systematic’ as to render [the defendant] essentially at home in the forum State”

BNSF Railway Co. v. Tyrrell

- Corporate defendant is “at home” where it is incorporated and where it has its principal place of business
- In an “exceptional case” a corporate defendant may be “at home” in another state
- Example of that – *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) – defendant temporarily relocated from Phillipines to Ohio due to war

BNSF Railway Co. v. Tyrrell

- The *Daimler* rule “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”
- Need to look at “corporation’s activities in their entirety” (quoting *Daimler*)
- “[a] corporation that operates in many places can scarcely be deemed at home in all of them” (quoting *Daimler*)

BNSF Railway Co. v. Tyrrell

- BNSF had 2,061 miles of railroad track in MT (6% of total)
- 2,100 workers in MT (<5% of total)
- < 10% of total revenue from MT
- 1 of 24 automotive facilities in MT (4%)
- This would be sufficient for specific jurisdiction over claims related to business activities in MT.
- Not sufficient for general jurisdiction over claims unrelated to activities in MT.

BNSF Railway Co. v. Tyrrell

- Justice Sotomayor concurred in part and dissented in part
- She continues to disagree with *Daimler's* rule limiting general jurisdiction to states where a corporate defendant is “essentially at home”
- Views majority’s approach as departure from *International Shoe*

BNSF Railway Co. v. Tyrrell

- “The majority’s approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts with the United States.”
- Plaintiffs will “be forced to sue in distant jurisdictions with which they have no contacts or connection.”

BNSF Railway Co. v. Tyrrell

- Reads majority opinion as restricting the “exceptional case” too narrowly – majority “sends a signal to the lower courts that the exceptional-circumstances inquiry is all form, no substance”

Unresolved Legal Issues After *BMS*

Leah Kelman, Esq.

Herrick, Feinstein LLP
New York /Newark, N.J.

212-592-1400

lkelman@herrick.com

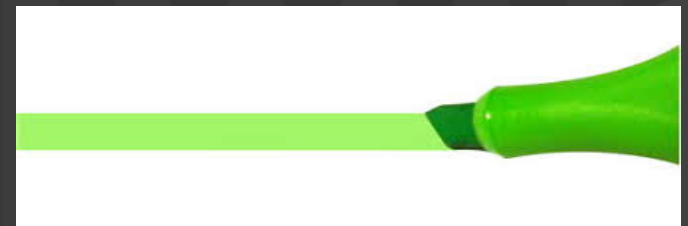
www.herrick.com



HERRICK

“Arise out of or Relate To”

- Specific Jurisdiction requires plaintiff to establish that the claim arises out of or relates to the defendant’s contacts with the forum state.
- Court declined to establish a bright line test defining this rule.
- Is proximate cause required?



The Closer Jurisdictional Calls

BMS: The non-California plaintiffs:

- Did not purchase Plavix in California
- Were not prescribed Plavix in California
- Did not use Plavix in California
- Did not suffer injury from Plavix in California



HERRICK

United States Constitution: 14th v. 5th Amendment

- The Court's decision in *BMS* was limited to consideration of due process under the Fourteenth Amendment.
- Do Fifth Amendment due process principles apply differently to federal courts?



HERRICK

Class Actions

- “[t]he mere fact that other plaintiffs” could invoke case-specific jurisdiction in California—because they obtained and ingested the drug in California—“does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”
- Rule 23 cannot alter the substantive legal rights.



Class Actions

“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. Cf. *Devlin v. Scardelletti*, 536 U.S. 1, 9-10, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002) (“Nonnamed class members ... may be parties for some purposes and not for others”)”



- *Bristol Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S.Ct. 1773, 1789 fn. 4 (2017) (Justice Sotomayor, dissenting).

Foreign Defendants

- Where can a U.S. plaintiff commence an action against a foreign manufacturer?
 - General Jurisdiction Unavailable
 - Specific Jurisdiction Must Satisfy *Nicastro*



...unresolved issues remain.

- *No bright line test for specific jurisdiction.*
- *Application to federal courts.*
- *Application to class actions.*
- *Jurisdiction over foreign defendants.*

Leah's crystal ball...



Robinson+Cole

**Personal Jurisdiction After
Bristol-Myers Squibb:
Unresolved Issues, Shifting
Plaintiff Strategies**

Wystan Ackerman

wackerman@rc.com

860-275-8388

Blog: classactionsinsider.com

Evolving Plaintiff Tactics

- arguing waiver in case where personal jurisdiction issue not timely raised before the new decisions
- filing suit in jurisdiction where defendant engaged in significant activity relevant to the claims asserted - *Cortina v. Bristol-Myers Squibb Co.*, 2017 U.S. Dist. LEXIS 100437 (N.D. Cal. June 27, 2017) (clinical trials for different drugs occurred in CA, drugs developed in CA)
- filing suit in defendant's home jurisdiction (principal place of business or state of incorporation)

Evolving Plaintiff Tactics

“The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

Evolving Plaintiff Tactics

- pursuing jurisdictional discovery to establish basis for specific jurisdiction
- conspiracy jurisdiction
- consent to jurisdiction based on contract?
- *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, 164 A.3d 435, 444 (N.J. Super. Ct. App. Div. 2017) (“Most, if not all of the fifty states include some requisite for a foreign corporation to obtain a certificate of authority to conduct business in the state. We cannot agree business registration rises to consent to submit to the general jurisdiction in the forum.”).

Evolving Plaintiff Tactics

- testing the boundaries of the “exceptional case” exception to *Daimler* and *BNSF*? See *Grabowski v. Northrop Grumman Sys. Corp.*, 2017 U.S. Dist. LEXIS 120750 (D. Md. June 30, 2017) (“sector headquarters” with 17% of employees insufficient to confer general jurisdiction; principal place of business in nearby Virginia)
- bringing multiple mass actions in jurisdictions with large numbers of plaintiffs, then seek an MDL

Evolving Plaintiff Tactics

- need to pursue some cases against foreign companies in foreign courts? if no purposeful availment?
- nationwide or multi-state class actions (if viable) – are absent class members parties for personal jurisdiction purposes? pre-certification? post-certification? Rules Enabling Act impact? See *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, 2017 U.S. Dist. LEXIS 155654 (N.D. Cal. Sep. 22, 2017) (*Bristol-Myers* not applicable to class action).

Evolving Plaintiff Tactics

- focus on jurisdictions with large numbers of plaintiffs and courts perceived as more plaintiff-friendly
- argue that general jurisdiction law should be different in federal court under the Fifth Amendment's Due Process Clause
- efforts to use offensive collateral estoppel
- sharing of discovery, attempts to “blow up” protective orders