IN A SERIES OF PERSONAL-JURISDICTION CASES, THE SUPREME COURT GIVES BUSINESSES TOOLS AGAINST FORUM SHOPPING

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Complex Commercial Litigation and Disputes Alert

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The 2016–2017 U.S. Supreme Court term will be remembered for decisions on splashier subjects, but for the business community, the personal-jurisdiction decisions in *BNSF Railway Co. v. Tyrrell*[1]and *Bristol-Myers Squibb Co. v. Superior Court of California*[2]will likely be among the most important.

In those cases, the Court almost unanimously emphasized in emphatic terms that the constitutional limits on state courts exercising jurisdiction over out-of-state defendants are considerable and must be respected. For any business that finds itself sued outside its home state — perhaps because the plaintiff's lawyer perceives a particular state's courts to be more plaintiff-friendly, those limits can be critical.

The Supreme Court long ago divided personal jurisdiction into two categories: specific or "case-linked" jurisdiction, which applies when a defendant has sufficient contacts with the state *and* the lawsuit arises from those contacts, and general or "all-purpose" jurisdiction, which applies when the lawsuit does not arise from the defendant's contacts with the state *but* those contacts are so pervasive that the defendant is generally subject to suit in the state. These contacts are necessary, the Court has held, because the Fourteenth Amendment right to due process prevents a state from dragging an out-of-state defendant into the state's courts without them.

In the last decade, the Court has focused on general personal jurisdiction, and *BSNF* is the most recent of a series of cases in which the Court has made clear that, if the defendant is neither incorporated in a state nor has its principal place of business there, general personal jurisdiction will be appropriate only in "exceptional cases" in which the defendant has contacts "so substantial and of such a nature" that the defendant is "at home" in the state. Only Justice Sotomayor dissented from that strict holding.

In *Bristol-Myers Squibb,* the Court has now turned its attention to specific personal jurisdiction. While Justice Alito's 8–1 majority opinion sets out no new legal principles, it makes clear that the due-process concerns underlying personal jurisdiction rules are real, and the Court means to enforce them.

In *Bristol-Myers Squibb,* a group of plaintiffs—most not from California — sued a pharmaceutical company in California state courts and alleged that the company's medication, Plavix, had harmed them. Bristol-Myers Squibb does significant business in California, but it did not develop, manufacture, label, or ship Plavix from there, and none of the marketing strategy or regulatory compliance work for Plavix was done in California. The non-California plaintiffs did not buy Plavix from California sources, and they did not allege they were injured in California.

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The plaintiffs originally argued that Bristol-Myers Squibb, which is incorporated in Delaware and based in New York, was subject to general personal jurisdiction in California, and the California courts agreed. After the U.S. Supreme Court decided *Daimler AG v. Bauman* in 2014 and made clear how high a bar a plaintiff must meet to prove general personal jurisdiction, the California courts changed their earlier decisions, held that there was no general personal jurisdiction, and considered specific personal jurisdiction.

The California Supreme Court applied what it referred to as a "sliding scale" in its consideration of specific personal jurisdiction. Under that approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." The court held that Bristol-Myers Squibb had significant contacts with California and that, even though those contacts did not give rise to the Plavix claims, they supported the exercise of specific personal jurisdiction in the Plavix case. The state court also found it significant that Bristol-Myers Squibb does non-Plavix-related research in California and that the Plavix claims brought by non-California plaintiffs were based on the same facts as the Plavix claims brought by California plaintiffs. (Because the California plaintiffs alleged they were injured by Plavix in California, they could make out a claim for specific personal jurisdiction.)

The U.S. Supreme Court rejected the California court's sliding-scale approach, noting that it "is difficult to square with our precedents." Indeed, given the Court's previous decisions on the two types of personal jurisdiction, it is unsurprising that the Court's majority found fault with an approach that seemed, at best, to allow a plaintiff to succeed with a sort of general personal jurisdiction "light." And, while the result in *Bristol-Myers Squibb* might have been preordained by precedent, the decision importantly underscores the Supreme Court's insistence on real proof before a state court may exercise personal jurisdiction over an out-of-state defendant.

All of that is good news for defendants—often businesses—that are frequently the subject of cases in plaintiff-chosen states. In fact, the *Bristol-Myers Squibb* holding is likely to be useful to defendants not only with respect to as-yet-unfiled suits but also with respect to ongoing suits.

But there are limits, including one that might be significant. The *Bristol-Myers Squibb* case dealt with the Fourteenth Amendment due-process implications of state courts exercising jurisdiction, and Justice Alito noted in the majority opinion that "we leave open the question whether the Fifth Amendment imposes the same restrictions of the exercise of personal jurisdiction by a federal court." He was referring to hints in other cases that, under the Fifth Amendment, federal courts might have a broader jurisdictional reach than state courts have under the Fourteenth Amendment. The Supreme Court has not expressly addressed whether that is so, but it seems probable that it will have to do so soon.

In the meanwhile, though, defendants would do well to give renewed attention to personal jurisdiction when they are sued in state courts other than where they are incorporated or have their headquarters because the string of personal-jurisdiction cases from the Supreme Court might well provide ammunition to defend against forum shopping.

Notes:

[1] No. 16-405 (May 30, 2017).

[2] No. 16-466 (June 19, 2017).

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