Supreme Court Changing Where You Can Be Sued

By Mark Kressel and Jacob McIntosh

The first question a general counsel should ask when informed of a lawsuit against his or her company is whether the court in question has personal jurisdiction over the corporation. After years of aggressive expansion by states and federal appellate courts of the exercise of personal jurisdiction over out-of-state and international defendants, in three decisions over the past five years, the United States Supreme Court has curtailed the power of courts over out-of-state and international defendants by restricting both general personal jurisdiction (all-purpose jurisdiction) and specific personal jurisdiction (case-specific jurisdiction). These decisions implicitly recognize the rapid growth and increasing societal benefits of interstate and global commerce.

This article explains the Court's opinions, reviews how lower courts have subsequently responded and explores some potentially surviving theories that plaintiffs may rely on going forward to assert personal jurisdiction over non-resident corporate defendants.

JURISDICTIONAL SHIFT

In *Daimler AG v. Bauman*, Argentinian plaintiffs sued a German holding company in California, alleging the company's Argentinian subsidiary had committed human rights violations in Argentina. The plaintiffs contended jurisdiction existed in California because the company's American subsidiary did substantial business in California that was vital to the German parent's business. The United States Supreme Court held that the subsidiary's contacts with California were not sufficient to support general jurisdiction over its German parent. Instead, the Constitution permits general jurisdiction in a court only where a company is incorporated or has its principal place of business. Beyond that, it will require an exceptional case where a corporation's operations are "so substantial and of such a nature as to render the corporation at home in that State."

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In *BNSF Railway Co. v. Tyrrell*, two workers from outside Montana sued a railroad in Montana for injuries that occurred in other states. The Montana Supreme Court ruled there was jurisdiction because the railroad was "doing business" in Montana. The court reasoned *Daimler* did not apply because it dealt with a different type of claim against a foreign corporation. The United States Supreme Court reversed, clarifying that *Daimler's* bright-line "at home" standard applies to all assertions of general jurisdiction over out-of-state defendants. Although the railroad had thousands of employees and miles of railroad track in Montana, the Court made clear that a corporation doing business — even a substantial amount of business — in many states cannot "be deemed at home in all of them."

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The Court turned its attention to specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court*. There, a group of plaintiffs brought a mass tort action against a pharmaceutical company in California over the drug Plavix. Some plaintiffs were California residents injured by the drug in California, but the vast majority were non-residents injured in other states. The California Supreme Court permitted specific jurisdiction over the non-residents' claims because they arose from the same defective product and same national marketing scheme as the California claims. The United States Supreme Court again reversed, holding that specific jurisdiction exists only where there is a "connection between the forum and the specific claims at issue." Even though the company had extensive contacts with California, none of those contacts gave rise to the non-residents' claims. And the Constitution does not permit jurisdiction over out-of-state defendants for out-of-state claims merely because they are similar to claims brought by others that would support specific personal jurisdiction.

Viewed together, these three cases likely reflect a consensus that the benefits that flow from facilitating the technologically driven growth in interstate and global commerce outweigh the challenges posed to individual plaintiffs who may have fewer choices of forums where they can bring suit. While society benefits from the free flow of goods and services across state and national borders, those benefits will be chilled if companies fear being hauled into court in every state where they do business. It is sufficient if litigation occurs where the claim arose or on the corporation's home turf. Looking ahead, this approach offers a useful rule of thumb: If a plaintiff asserts a theory of jurisdiction in the plaintiff's chosen state that would also result in jurisdiction in all 50 states, that theory is probably unconstitutional.

These decisions also demonstrate the court's focal shift from practical fairness to the parties to more abstract constitutional and societal concerns. Although earlier decisions were more aggressive in asserting jurisdiction where the marginal burden on the defendant of having to litigate in the plaintiff's chosen state was minimal — such as for corporations that already did substantial business in the forum state even if that business was unrelated to the plaintiff's claims — the Supreme Court's recent cases limit jurisdiction based on notions of constitutional due process, international comity and federalism limits on the power of states to decide claims properly brought elsewhere.

Some courts have concluded that states retain power to force "consent" to general jurisdiction in exchange for the privilege of doing business there.

LOWER COURTS RESPONSE

The impact of these decisions is readily apparent in state and federal appellate courts. For the most part, after a few false starts, these courts understand the import of the Supreme Court's new decisions and have applied them broadly.

For instance, courts have found *Daimler's* bright-line "at home" test for general jurisdiction hard to satisfy in a forum that is not a corporation's place of incorporation or principal place of business, even when that corporation generates substantial revenue or employs hundreds of workers there. The courts, for the most part, have resisted plaintiff's inevitable claims that they bring the "exceptional case" where general jurisdiction is warranted elsewhere.

Further, lower courts have indicated that the Supreme Court's decisions implicitly undermine several other, long-held theories of jurisdiction:

Stream of commerce: This theory permitted specific jurisdiction where a company places its products into the marketplace with the mere expectation they might be sold within the forum state. Multiple courts have noted "stream of commerce" is at odds with *Bristol-Myers*, which requires that the defendant has affirmatively reached out to the forum state in ways that substantially relate to the plaintiff's claims. *Bristol-Myers* also stated that the mere fact that an out-of-state defendant contracts with an in-state distributor is not enough to establish jurisdiction.

Sliding-scale jurisdiction: Under this theory for specific jurisdiction, the more extensive and wide-ranging a defendant's contacts were with the forum, the less a connection had to be shown between those contacts and the plaintiff's claim. The Supreme Court rejected this theory in *Bristol-Myers* as resembling "a loose and spurious form of general jurisdiction."

Multiple courts have since struck down or called into question similar tests used in their respective jurisdictions. This may have a significant impact in the online and e-commerce spaces, where the dominant Zippo test — in

which a higher level of website interactivity increases the likelihood of specific jurisdiction — may have been undermined by *Bristol-Myers*.

Agency/representative services: This theory allowed general jurisdiction when a corporation uses an agent or representative entity to conduct activities that are so important the corporation would do them itself if there were no agent available. The Supreme Court in *Daimler* expressed doubt as to this theory and, subsequently, several lower courts have held that a court cannot exercise general jurisdiction over a non-resident parent corporation based solely on its agent's or subsidiary's actions in the forum state. One court has noted the inverse rule is also true: A court cannot establish general jurisdiction over a foreign subsidiary purely based on the activities of a domestic parent corporation.

Importantly, however, a court can still exercise specific jurisdiction if an out-of-state corporation purposefully avails itself of a forum by directing its agent to take action there that harms the plaintiff.

United States as forum for litigating global human rights abuses: Various federal statutes provide causes of action for human rights abuses and acts of terrorism primarily occurring outside of the United States, and some federal appellate courts welcomed these claims. But the stringent requirements of the Supreme Court's recent decisions likely foreclose the United States as a forum to adjudicate most claims for harms occurring entirely outside of the United States, even when the victims are United States citizens.

FUTURE OF PERSONAL JURISDICTION

In the future, defendants can expect to see plaintiffs develop new jurisdictional theories, or creative extensions of existing theories, still left open by the Supreme Court.

Consent: Traditionally, a corporation can be sued where it has voluntarily submitted to the jurisdiction of the forum. Consequently, a forum selection clause within a freely negotiated contract can still create specific jurisdiction over a dispute arising from that contract.

The question is less clear regarding the "consent" that some states mandate as a condition of doing business in the state through registration statutes. Courts are split as to whether these statutes are still constitutional. Some courts have concluded that states retain the power to force "consent" to general jurisdiction in exchange for the privilege of doing business there. Other states have reasoned that such statutes swallow the due process constraints laid out by the Supreme Court by effectively replacing the "at home" test for general jurisdiction with the now-rejected "doing business" test.

Research and development: At least one court has hypothesized that clinical trials or market research for a pharmaceutical drug conducted within a forum may be a basis for specific jurisdiction in that forum over claims by non-residents injured by that drug in other states.

Alter ego: Personal jurisdiction may still arise over an out-of-state parent corporation if it is merely the alter ego of its in-state subsidiary. This "alter ego" relationship requires that the out-of-state corporation exercise control of the subsidiary's internal affairs or daily operations.

Conspiracy: In some states, an out-of-state defendant who lacks any contacts with the forum participating in a civil conspiracy may be subject to jurisdiction based on the actions of an in-state co-conspirator. Plaintiffs are likely to allege creative theories of "conspiracy" between target out-of-state defendants and in-state defendants to obtain jurisdiction over the former.

In conclusion, the Supreme Court has interpreted the Constitution to favor global commerce and local litigation. Despite some resistance from various courts and plaintiffs, most lower courts are implementing this directive and limiting defendants' exposure to suit in far-flung locales. ■

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