Farewell to Extreme Litigation Tourism
A Summer of Personal Jurisdiction Narrowing by the Supreme Court

By Brett A. Tarver and Anthony J. Martucci

Defense attorneys are already deploying these cases and have secured dismissals of claims with suspect personal jurisdiction, even in the midst of trials.

In May and June of 2017, the United States Supreme Court dealt a double blow to litigants seeking to bring their claims in a more favorable jurisdiction than the one where they reside.

Two decisions, *BNSF Ry. Co. v. Tyrrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017) (*BNSF*), and *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty*., 582 U.S. ___, 137 S. Ct. 1773 (2017) (*Bristol-Myers*), narrowed the scope of both general and specific personal jurisdiction.

In the first blow, the Court overturned Montana's highest court's ruling that BNSF Railway Co. (BNSF Railway) may be subject to personal jurisdiction for claims brought by nonresidents in Montana under the Federal Employers' Liability Act, (FELA). 45 U.S.C. §§51, 56. The Court held that Montana did not have personal jurisdiction over BNSF Railway under FELA because the language of section 56 was not intended to address personal jurisdiction over railroads. The Court also rejected the Montana Supreme Court's alternative ruling that Montana Rule of Civil Procedure 4(b)(1) granted the state personal jurisdiction over BNSF Railway because the company was "found within" the state. The Court held that state long-arm statutes such as Montana's must comport with the due process limits established in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and Montana's did not.

Bristol-Myers was the second blow. The Court held that Bristol-Myers Squibb (BMS), a large, multinational corporation, may not be subject to personal jurisdiction for claims brought in California by plaintiffs who were allegedly injured by BMS products consumed outside of California, even though BMS marketed and sold those products nationally. The plaintiffs in *Bristol-Myers* filed their claims that arose out of state along with the claims of other plaintiffs who allegedly were prescribed and used the same products and sustained the same injuries inside California. The California Supreme Court had found that personal jurisdiction existed for both sets of plaintiffs. In evaluating whether the Due Process Clause of the Fourteenth Amendment permitted specific personal jurisdiction to be exercised, the Court stressed the need for a connection between the forum and the specific claims at issue and criticized the California Supreme Court's "sliding scale approach" of relaxing the requisite connection where the defendant had extensive forum contacts unrelated to those claims.

This article reviews these two decisions and looks ahead to how defense counsel can use these decisions in obtaining dismissal of actions from less favorable jurisdictions. These decisions will have a significant effect on claimants' ability to use specific personal jurisdiction and states' long-arm statutes to bring national manufacturers into whatever court the claimants find the most favorable, and they potentially spell the end of "litigation tourism," one of the most abused methods of forum shopping. Indeed, defendants are already deploying this new tool and have obtained dismissals of claims with suspect personal jurisdiction, even in the midst of trials.

Montana and California Set Up the Challenge

In May 2016, the Montana Supreme Court expanded general personal jurisdiction over national corporations based on its interpretation of procedural language in a federal law and its own state long-arm statute. *Tyrrell v. BNSF Ry. Co*., 383 Mont. 417 (Mont. 2016) (*Tyrell*). Then, in August 2016, the California Supreme Court drastically expanded the scope of personal jurisdiction that the state may assert over a manufacturer that markets and sells products nationwide, in *Bristol-Myers Squibb Co*. v. S.C., 377 P.3d 874 (Cal. 2016).

Montana Supreme Court Extends the "Track" of General Personal Jurisdiction

BNSF Railway Company is incorporated in Delaware and has its principal place of business in Texas, while operating railroad lines in 28 states. *BNSF v. Tyrrell*, 137 S. Ct. at 1554. In Montana, BNSF Railway has over 2,000 miles of railroad track and employs more than 2,000 workers. *Id*. It also has invested hundreds of millions of dollars within Montana since 2010, building an economic development office in 2013, and establishing over 40 new facilities throughout the state. *Tyrrell*, 383 Mont. at 420.

The case stems from a consolidation of two cases brought under FELA, which makes railroads liable to employees or their estates, or both, for on-the-job injuries. The first action was brought in 2011, by Robert Nelson, a North Dakota resident, who allegedly suffered knee injuries as a result of working as a fuel truck driver for BNSF Railway. *Id*. at 419. The second was brought in 2014, by Kelli Tyrrell, a South Dakota resident, who claimed that her husband developed kidney cancer and died as a result of being exposed to carcinogenic chemicals while working for the railway. *Id*. at 419–20. Neither complaint alleged that Mr. Nelson or Mr. Tyrrell ever worked for the railway in Montana or that any of their injuries occurred in Montana. *Id*. Because of this fact, "only the propriety of general jurisdiction [was] at issue here," rather than specific jurisdiction. *BNSF*, 137 S. Ct. at 1558. BNSF Railway filed motions to dismiss for lack of general personal jurisdiction in both cases. The motion was granted in Mr. Nelson's case but denied in Mrs. Tyrrell's case.

In granting an appeal on the matter, the Montana Supreme Court sought to address the following two, seemingly simple, questions: "(1) Whether Montana courts have personal jurisdiction over BNSF Railway under the FELA, and (2) Whether Montana courts have personal jurisdiction over BNSF Railway under Montana law." *Tyrrell*, 383 Mont. at 419. In its ruling, the Montana Supreme Court answered "yes" to both questions.

The Montana Supreme Court stated that FELA was unique in that it was created specifically to deal with the special needs of railroad workers and thus must be construed liberally to accomplish that purpose. *Id.* at 421. Soon after the law's enactment in 1908, Congress noticed deficiencies in railroad workers' ability to bring lawsuits under FELA and added the following two sentences to section 6 of FELA, 45 U.S.C. §56:

> Under this chapter an action *may be brought* in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Id. (emphasis added) (citing *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941)). The Montana Supreme Court interpreted this language as concerning both venue and personal jurisdiction, and therefore, as extending to states the ability to hale railroad companies into their courts as long as the company was "doing business" within the state. *BNSF*, 137 S. Ct. at 1556. In support of this interpretation, the Montana Supreme Court pointed to "a quartet of cases" that it believed evidenced a consistent interpretation by the United States Supreme Court in line with its own. *See id*. at 1557.

BNSF Railway contended that *Daimler* "overruled prior U.S. Supreme Court precedent holding FELA conferred jurisdiction to state courts where the railroad does business," but the Montana Supreme Court disagreed. *Tyrrell*, 383 Mont. at 423. The Montana Supreme Court distinguished BNSF Railway's contention by noting that *Daimler* "did not involve a FELA claim or railroad defendant," which, as stated previously, the court viewed as a unique situation in which Congress constructed the law liberally to benefit railroad workers. *Id.* at 421, 424, 426. Further, the Montana Supreme Court noted that *Daimler* was not "novel law" and only emphasized prior Court rulings requiring "continuous and systematic" affiliations so as to make a corporation "at home." *Id*. at 425 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)). The court held that BNSF Railway had the proper affiliations to make it "at home" in Montana and thus answered "yes" to its first question.

The Montana Supreme Court answered "yes" to its second question as well. The court held that in Montana it was customary to "conduct a two-step inquiry to determine whether the exercise of personal jurisdiction over a nonresident defendant is appropriate." *Id*. at 427. The first step was whether jurisdiction existed under Montana Rule of Civil Procedure 4(b)(1) over BNSF Railway. The Montana Supreme Court found that it did because the company's substantial and continuous contact within Montana deemed it "found within" the state under the rule. *Id*. at 427–28. The second step was to determine whether exercising general personal jurisdiction over BNSF Railway "comports with traditional notions of fair play and substantial justice embodied in the due process clause." *See id*. at 427 (quoting *Simmons Oil Corp. v. Holly Corp*., 244 Mont. 75, 83 (1990)). The Montana Supreme Court found that it was fair for Montana courts to exercise general personal jurisdiction over BNSF Railway, and under the correct interpretation of FELA, "Montana courts necessarily must have personal jurisdiction over BNSF for FELA cases brought by nonresidents." *Id*. at 429.

California Uses a "Sliding Scale" to Extend Specific Personal Jurisdiction

Bristol-Myers Squibb Co. v. Superior Court was a prime example of mass tort litigation tourism. The case was brought by a group of plaintiffs who claimed that they had been injured by ingesting Plavix, a pharmaceutical product manufactured, nationally marketed, and sold by defendant Bristol-Myers Squibb (BMS). 377 P.3d at 878. Of 678 plaintiffs, only 86 lived in California. *Id*. The other 592 plaintiffs also did not sustain any injury there. *Id*. at 878–79. Plavix

was not manufactured in California, and BMS did not maintain its headquarters or principal place of business within California. *Id*. at 879. For these reasons, BMS moved to quash service of summons on the claims brought by those who were not from California, asserting that California did not have personal jurisdiction over BMS to adjudicate these nonresident claims. *Id*. at 878–879. The superior court denied BMS's motion. *Id*. at 879.

In granting an appeal on the matter, the California Supreme Court sought to address the following two questions: "(1) whether after *Daimler AG v. Bauman*, 571 U.S. ____, 134 S. Ct. 746, 187 L.Ed.2d 624 (2014), general jurisdiction exists; and (2) whether specific jurisdiction exists." *Bristol-Myers Squibb Co. v. S.C*., 337 P.3d 1158 (Cal. 2014). The California Supreme Court answered "no" to the first question and "yes" to the second.

On the first question, the court unanimously agreed that general jurisdiction could not lie under *Daimler*. *Bristol-Myers*, 377 P.3d at 884. Looking at BMS's activities in California, the California Supreme Court concluded that "[a]lthough the company's ongoing activities in California are substantial, they fall far short of establishing that is it at home in this state for purposes of general jurisdiction." *Id.* at 883. The court reasoned that merely being a corporation marketing products, selling products, and conducting business operations in every state was not enough for general jurisdiction to exist under *Daimler*. *Id*. at 884.

However, the California Supreme Court did find that specific jurisdiction existed to support claims by nonresidents against BMS in California. *Id*. at 894. The court reasoned that specific jurisdiction is based on a "minimum contacts" analysis. *Id*. at 885. California uses a "sliding scale" to determine "relatedness" for whether the exercise of specific jurisdiction is "fair." *Id*. at 885. Under this approach, "[a] claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction." *Id*. at 887.

Using this "sliding scale" approach, the California Supreme Court found specific jurisdiction existed to subject BMS to suit in California for claims made by nonresidents. *Id*. at 890. Because it purposely advertised and sold its products in California to California residents, that was sufficient for the court to find that BMS, due to its purposeful activities, could be sued by nonresidents in California. *Id.* at 886–87. In regard to the "relatedness" requirement, the California Supreme Court reasoned that if a resident plaintiff has brought a similar suit, any "substantial connection" between the defendant's activities and the forum is enough. *Id*. at 888.

The Outcomes

In January 2017, the United States Supreme Court granted certiorari on both the *BNSF* and the *Bristol-Myers* matters to determine whether the Montana and California courts' decisions comported with constitutional limits, congressional intent, and Court precedent.

The Court Rejects the Montana Court's Interpretation of FELA §56

The Court issued its opinion in *BNSF* on May 30, 2017, overturning the ruling of the Montana Supreme Court. The Court held the Montana Supreme Court's interpretation of FELA §56 was incorrect and broke down the meaning of both sentences comprising §56 individually. *BNSF*, 137 S. Ct. at 1552.

The Court stated that the first relevant sentence from §56 "does not address personal jurisdiction over railroads." *Id*. at 1533. Instead, the "sentence is a venue prescription governing proper locations for FELA suits filed in federal court." *Id*. Section 56 was designed to "expand venue beyond the limits of the 1888 Judiciary Act" and nothing further. *Id*. at 1555. As the Court explained, "[n]owhere in *Kepner* or in any other decision did [the Court] intimate that §56 might affect personal jurisdiction," and none of the "quartet of cases" cited by the Montana Supreme Court "resolved a question of personal jurisdiction." *Id.* at 1555, 1557. Importantly, the Court also stated that traditionally Congress "uses the expression, where suit 'may be brought,' to indicate the federal districts in which venue is proper," and "authorize[s] service of process" when discussing personal jurisdiction. *Id*. at 1555–56. For these reasons, the Court deemed the first sentence of §56 to refer to venue only.

In response to the plaintiffs' argument that the second sentence of §56 extended to state courts the first sentence's grant of personal jurisdiction, the Court simply stated that it only referred to "concurrent subject-matter jurisdiction of state and federal courts over FELA actions." *Id*. at 1552 (citing *Second Employers' Liability Cases*, 223 U.S. 1, 55–56); *see also Tyrell*, 383 Mont. at 436 (McKinnon, J., dissenting) (correctly acknowledging that "[t]he phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction.")).

Having determined that FELA did not grant states the power to hale out-of-state railroad companies into court, the Court turned its attention to whether Montana Rule of Civil Procedure 4(b)(1) comported with the Due Process Clause of the Fourteenth Amendment. The Court held that it did not. The Court noted that *Goodyear* and *Daimler* established that for a state to exercise general personal jurisdiction over a defendant, the defendant must be "at home" within the state, a much higher threshold to achieve than [Montana] Rule 4(b)(1)'s "found within." *BNSF*, 137 S. Ct. at 1558. The only ways for a corporation to be considered "at home" in a state, the Court posited, was for the corporation to be incorporated in the state or to have its principal place of business within the state, except for in "an 'exceptional case'." *Id*. (citing *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437 (1952) as a good example of an exceptional case because "war had forced the defendant corporation's owner to temporarily relocate the enterprise from the Philippines to Ohio."). BNSF Railway was not incorporated in Montana, did not have its principal place of business in Montana, and did not come close to being considered "an exceptional case." As a result, the Court concluded that BNSF Railway could not be determined to be "at home" in Montana and overruled the Montana Supreme Court's opinion finding it so.

The Court Rejects the California Court's Extension of Specific Personal Jurisdiction

The Court issued its opinion in *Bristol-Myers* on June 19, 2017, overturning the ruling of the California Supreme Court. The Supreme Court held that California's expansion of specific personal jurisdiction to cover claims by nonresident plaintiffs against a nonresident defendant for injuries that did not occur in California violated the Due Process Clause of the Fourteenth Amendment. 582 U.S. ___, 2017 WL 2621322, at *11 (2017).

In evaluating whether specific personal jurisdiction should be exercised, the Court stressed that the "primary concern" is "the burden on the defendant." *Id.* at *7. This burden, the Court explained, not only requires courts to take into consideration the "practical problems" of litigating in a certain jurisdiction, but also to acknowledge the burden that a defendant may experience due to being forced to litigate a matter in a forum "that may have little legitimate interest in the claims in question." *Id.*

The Court also criticized the California court's finding of specific personal jurisdiction "without identifying any adequate link between the State and non-residents' claims." *Id.* at *8. Noting that the nonresident claimants were not prescribed, did not purchase, did not ingest, and were not injured by BMS's products in California, the Court concluded that "what is missing here… is a connection between the forum and the specific claims at issue." *Id*. Despite the lack of this link between the forum and the claims by the nonresidents, the California court held that this requirement is "relaxed if the defendant has extensive forum contacts unrelated to those claims." *Id.* Describing the California Supreme Court's "sliding scale approach" as "a loose and spurious form of general jurisdiction," the U.S. Supreme Court rejected this standard as unsupported by any precedent. *Id*.

Instead, the Court found that the lack of connection between California and the specific claims brought by the nonresident plaintiffs against Bristol-Myers Squibb was fatal to California's exercise of specific personal jurisdiction over the nonresidents' claims. *Id*. at *11. In conclusion, the Court noted that its decision did not preclude the claimants from suing together within a state that does have general jurisdiction over Bristol-Myers Squibb, but they could not use specific personal jurisdiction for such claims to be heard in California. *Id.*

The Takeaway

Although the Supreme Court's decisions in *BNSF* and *Bristol-Myers* are unsurprising in some respects—given the Court's recent decisions in *Goodyear* and *Daimler* clarifying and limiting the extent to which claimants can use general personal jurisdiction to hale defendants into court—these decisions will affect significantly claimants' ability to use general and specific personal jurisdiction to bring national manufacturers into whatever court the claimants find the most favorable.

The Court's opinion in *BNSF* goes a long way in clarifying (1) how to interpret language contained within federal laws, specifically as the language relates to procedural issues such as general personal jurisdiction, and (2) the reach and overall effect of state long-arm statutes. Regarding the former, the Court made clear that when Congress uses language about "where suit may be brought," it is an indication of proper venue for a lawsuit, whereas when it discusses

authorization of service of process, it is establishing where general personal jurisdiction may be exercised. As for state long-arm statutes, the *BNSF* ruling makes clear that due to the requirements of due process, such a statute may not allow general personal jurisdiction over a defendant that cannot be considered "at home" in the state. Likewise, in *Bristol-Myers*, the Court's opinion solidifies its earlier precedent that for specific personal jurisdiction to be exercised by a state, there must be a connection between the forum state and the specific claims being brought in the matter. Without this, specific personal jurisdiction cannot be found.

Courts have already begun to grapple with the *BNSF* and *Bristol-Myers* decisions—some to the benefit of defendants and some not. Within just a few weeks of its release, appellate courts in multiple states began citing *BNSF* as a reason to forgo granting general jurisdiction over out-of-state corporate defendants. *See, e.g., Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, A-0922-15T4, 2017 WL 2854420, at *1 (N.J. Super. App. Div. July 5, 2017) ("[T]he United States Supreme Court has recently clarified and reaffirmed the limits of a state's ability to exercise general jurisdiction over foreign corporations… and in accord with considerations of due process, we conclude mere registration to do business and acceptance of service of process in this state, absent more, does not bestow our courts with general jurisdiction."); *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, ¶ 31 (Wis. June 30, 2017) ("We hold that appointing a registered agent… does not signify consent to general personal jurisdiction… the Supreme Court has made clear that the Due Process Clause proscribes the exercise of general jurisdiction over foreign corporations beyond exceptional circumstances not present here.").

Further, on the same day that the Court issued its opinion in *Bristol-Myers*, June 19, 2017, a Missouri judge overseeing a trial brought by three women who died of ovarian cancer after using Johnson & Johnson's talcum powder products declared a mistrial because two of the three plaintiffs were not residents of Missouri, but actually residents of Virginia and Texas. *Michael Blaes et al. v. Johnson & Johnson et al.,* Case No. 1422-CC09326-01 (Mo. 22nd Cir.). In moving for mistrial, Johnson & Johnson successfully argued that personal jurisdiction could not be had over the defendant for the nonresident claims.

Other nonresident defendants have also been successful in obtaining motions to dismiss on claims brought by nonresident plaintiffs. *See, e.g., Hernandez-Denizac v. Kia Motors Corp*., No. CV 15-2625 (GAG), 2017 WL 2857038, at *1 (D.P.R. July 5, 2017); *Siegfried v. Boehringer Ingelheim Pharm., Inc.*, No. 4:16 CV 1942 CDP, 2017 WL 2778107, at *1 (E.D. Mo. June 27, 2017) (dismissing claims brought in Missouri by "eighty-six non-Missouri plaintiffs"); *Ergon Oil Purchasing, Inc. v. Canal Barge Co., Inc.,* No. CV 16-5884, 2017 WL 2730853, at *1 (E.D. La. June 26, 2017) (citing both *Bristol-Myers* and *BNSF* in granting the defendant's motion to dismiss for lack of personal jurisdiction).

On the flip side, a handful of decisions issued from the Northern District of California have continued to find that specific personal jurisdiction may be extended over Bristol-Myers Squibb for claims brought by nonresidents in California regarding the ingestion of a different drug, Saxagliptin. *See Dubose v. Bristol-Myers Squibb Co*., No. 17-CV-00244-JST, 2017 WL 2775034, at *1 (N.D. Cal. June 27, 2017); *Cortina v. Bristol-Myers Squibb Co*., No. 17-CV-00247-JST, 2017 WL 2793808, at *1 (N.D. Cal. June 27, 2017). Focusing on language in the *Bristol-Myers* decision that the defendant "did not develop Plavix in California, did not create a marketing

strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California," the district court found that the cases at issue were distinguishable because Bristol-Myers Squibb did test and develop the drug Saxagliptin in California. *Cortina*, 2017 WL 2793808, at *4. The district court concluded that this constituted sufficient contacts for specific personal jurisdiction to exist over the claims, summarizing, "Surely, if the drug at issue had never been developed, tested, or approved, Plaintiff would not have been harmed by it." *Id*. at *3.

Forum shopping by claimants and defending against such behavior has become an area of litigation almost unto itself. As a result, nonresident claimants have brought numerous claims in favorable jurisdictions such as California, and St. Louis, Missouri. The *Bristol-Myers* decision will have far-reaching influence in forum-shopping litigation and is a mighty tool to be used by defendants to eradicate nonresident claims in dangerous jurisdictions. With *Goodyear* and *Daimler*, and now *BNSF* and *Bristol-Myers*, the Court has made clear that a national corporation that markets and sells its products to all four corners of the United States is not vulnerable to litigation in any jurisdiction purely for those reasons. Defense counsel should continue to press trial and appellate courts to uphold these Supreme Court decisions and to block claims brought by nonresidents against non-resident defendants.