

## The Continuing Evolution Of Personal Jurisdiction

By **Kevin Penhallegon** (February 22, 2018, 10:53 AM EST)

The personal jurisdiction doctrine has been firmly rooted in U.S. Supreme Court jurisprudence for decades. Over the past several months there has been an uptick in courts using the doctrine to dismiss claims brought by nonresident plaintiffs against foreign corporate defendants. This issue is particularly applicable in mass tort litigation where out-of-state plaintiffs are often grouped together with in-state plaintiffs for a consolidated trial setting.

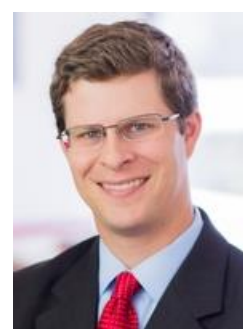
There are two forms of personal jurisdiction that may be applicable in such cases: general jurisdiction and specific jurisdiction. A court has general jurisdiction over a defendant if the defendant is considered to be “at home” in the forum state. Where a court has general jurisdiction over a defendant, that defendant may be subjected to claims in that jurisdiction whether the plaintiff’s claims are related to any activities in that state or not.

Specific jurisdiction, on the other hand, exists only where the plaintiff’s claims are connected to the defendant’s activities in the forum in which the claim is filed. On June 19, 2017, the Supreme Court addressed the application of specific jurisdiction in the groundbreaking decision *Bristol-Myers Squibb Co. v. Superior Court of California*.<sup>[1]</sup>

In its BMS decision, the Supreme Court held that state courts could not circumvent the constitutional requirements for specific jurisdiction without the plaintiff(s) (resident or nonresident) proving a connection between alleged injuries and the corporate defendant’s activities in the forum state. It was anticipated that BMS would have immediate and significant impacts nationwide. Those impacts were seen at the state level during the second half of 2017, as evidenced by several trial courts dismissing out-of-state plaintiffs’ claims where specific personal jurisdiction could not be established.

One such decision was *Estate of Fox v. Johnson & Johnson*.<sup>[2]</sup> Ms. Fox was one of 65 individual plaintiffs who alleged that she developed ovarian cancer as a result of using talcum powder sold by Johnson & Johnson. Two of the 65 individual plaintiffs were Missouri residents, while the other 63 individual plaintiffs, including Ms. Fox, bought and used the products in other states. The nonresident plaintiffs joined their claims to the Missouri resident plaintiffs’ claims pursuant to Missouri Rule 52.05.

The defendants filed a motion to dismiss the claims of the nonresident plaintiffs for lack of personal jurisdiction. The trial court denied the motion on the basis that each nonresident need not establish an



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individual basis for jurisdiction, as long as a defendant has sufficient minimum contacts with the state. In this case, the trial court found that the defendants' commercial activity in Missouri "more than adequately" satisfied minimum contacts.

Following a jury verdict for the plaintiffs, on appeal, both parties agreed that Bristol-Myers was controlling, but disagreed as to the resulting outcome. The plaintiffs sought a remand to the trial court for further factual development on the issue of personal jurisdiction, while the defendants asked the appellate court for an outright dismissal with prejudice. The Missouri Court of Appeals declined to remand the case and reversed and vacated the trial court's judgment for lack of personal jurisdiction.

The Missouri Court of Appeals was following the lead of the United States District Court for the Eastern District of Missouri in *Jinright v. Johnson & Johnson*[3]. *Jinright* was also a multiplaintiff case alleging personal injuries from the use of talc products manufactured by Johnson & Johnson. In that case, the nonresident plaintiffs did not allege that they obtained or used the product in Missouri or that they suffered any personal injuries in Missouri.

However, they did claim that Johnson & Johnson had the talc shipped to Missouri where it was processed and bottled by a third party. The court held that those contacts were insufficient to establish a connection between the plaintiffs' alleged injuries, the products at issue and Johnson & Johnson's contacts in Missouri. Therefore, the court held that there was no specific personal jurisdiction over the defendant for the nonresident plaintiffs' claims.

The United States District Court for the Eastern District of Missouri also used the BMS rationale to dismiss two other lawsuits filed by out-of-state plaintiffs alleging injuries caused by products manufactured by nonresident corporate defendants. In *Siegfried v. Boehringer Ingelheim Pharm.*, [4] 86 nonresident plaintiffs (along with eight Missouri residents) filed lawsuits in Missouri state court against Boehringer Ingelheim Pharmaceuticals Inc. claiming that they were injured by the drug Pradaxa.

None of the 86 nonresident plaintiffs claimed that they were prescribed the drug in Missouri, suffered any injuries in Missouri or received any treatment in Missouri. The only alleged connection to Missouri was that Boehringer marketed and sold the drug in the state. The court dismissed the nonresidents' claims, finding that their injuries had no connection to Missouri.

The court also reached the same result in *Jordan v. Bayer Corp.*, [5] where numerous nonresident plaintiffs brought suit in Missouri state court for injuries allegedly sustained as a result of using Essure, a medical device manufactured and sold by Bayer Corporation. In *Jordan*, of the 94 total plaintiffs, seven were citizens of Missouri, one was a resident of Illinois but had the device implanted in Missouri and the remainder were citizens of other states.

Just as in *Siegfried*, none of the nonresident plaintiffs alleged that they acquired the device in Missouri or were injured or treated in the state. Similarly, Bayer Corporation did not develop, manufacture, package or otherwise have any connection with Missouri in relation to the device. Accordingly, the court dismissed the claims brought by all of the nonresident plaintiffs, with the exception of the Illinois plaintiff who had the device implanted in Missouri.

Similarly, the United States District Court for the Southern District of Illinois dismissed lawsuits filed by nonresident plaintiffs alleging personal injury from use of the medication Xarelto, where the nonresident plaintiffs could not establish that they obtained or used the product in Illinois and did not suffer injuries in Illinois. See, e.g., *Berousee v. Janssen Research & Dev.*[6]

In that case, the plaintiffs attempted to establish personal jurisdiction by arguing that the defendants had contacts with Illinois because they targeted the state for Xarelto clinical trials. The court held that those alleged contacts with the forum were not sufficiently connected to the litigation and thus insufficient to establish specific jurisdiction.

An alternative approach was discussed in a hernia mesh multidistrict litigation case in New Hampshire, *In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig.*, in which the court allowed for further jurisdictional discovery to determine whether the court has personal jurisdiction over a holding company based in Sweden.[7] In that case, the Swedish company did not make or sell the products in question, and it was undisputed that the company had no direct contacts with the United States.

The plaintiffs raised several arguments in opposition to the Swedish company's motion to dismiss: The Swedish company waived its personal jurisdiction defense by participating in the MDL; the Swedish company was judicially estopped from asserting a personal jurisdiction defense because it had previously participated in litigation in the jurisdiction; and the other defendants' forum contacts could be attributed to the Swedish company. The court appeared to reject some of the arguments but allowed additional limited discovery before deciding whether the Swedish company would prevail on its personal jurisdiction defense.

The above-referenced decisions represent a snapshot of the significant developments relating to personal jurisdiction analysis from the past several months. What these decisions show is that the U.S. Supreme Court's recent jurisprudence, including *BMS*, will have a significant impact on the personal jurisdiction analysis undertaken by trial courts.

This will likely have the most significant impact on mass tort litigation, particularly in jurisdictions where out-of-state plaintiffs routinely join actions with in-state plaintiffs. A significant point, and one explained by Judge Odenwald in a concurring opinion in *Fox*, is that *BMS* did not present new law but rather clarified the long-established principles of personal jurisdiction established in prior precedents, including *Int'l Shoe Co. v. Washington*[8] and *Daimler AG v. Bauman*.[9] These decisions will likely have an impact at the trial court level where courts will be more cognizant of the Supreme Court's prior precedent and the rationale underlying the establishment of personal jurisdiction.

The personal jurisdiction analysis will also likely be done early in the case to avoid unnecessary litigation where personal jurisdiction is lacking. However, where the facts are not developed enough for that decision to be made, trial courts could allow for "jurisdictional discovery," as was done in the hernia mesh MDL, to develop a substantial factual record on which to make the decision.

The long-term impact of *BMS* will likely take years to develop, but in the several months since the decision, its short-term impact seems clear, and litigants should take appropriate steps to analyze whether specific personal jurisdiction exists in cases involving nonresident plaintiffs and foreign corporate defendants.

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[1] 137 S. Ct. 1773 (2017).

[2] No. ED104580 (Mo. Ct. App. Oct. 17, 2017).

[3] No. 4:17-1849 (E.D. Mo. Aug. 30, 2017).

[4] No. 4:16-1942 (E.D. Mo. June 27, 2017).

[5] No. 4:17-865 (E.D. Mo. July 14, 2017).

[6] No. 3:17-716 (S.D. Ill. Sep. 26, 2017).

[7] No. 16-md-2753 LM (D.N.H. Nov. 14, 2017).

[8] 326 U.S. 310 (1945).

[9] 134 S. Ct. 746 (2014).