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U.S. Supreme Court to Decide Key Personal Jurisdictional Issue Relevant to Class Action Litigation

by Jon Michaelson

A path to the Golden State will likely be closed in the coming months for class action plaintiffs. On January 19, 2017, the U.S. Supreme Court granted a petition for writ of certiorari in *Bristol-Myers Squibb Co. v. Superior Court*, 377 P. 3d 874 (Cal. 2016), an August 2016 decision by the California Supreme Court. The question presented is whether out of state plaintiffs' claims arise out of or relate to a defendant's forum activities – sufficient to establish specific jurisdiction – when there is no causal link between those forum contacts and the claims. The case is expected to be set for argument and decided this term.

The jurisdictional landscape saw a seismic shift in 2014 as a result of the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which strictly limited the extent to which courts can exercise general jurisdiction in nationwide class actions over non-resident corporate defendants. At virtually the same time, the Supreme Court also re-affirmed that an assessment of specific jurisdiction must focus on a defendant's "suit-related conduct" and not on plaintiffs' relationship with the subject forum. *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). As explained and discussed in our recent post, Allen Garrett, *Personal Jurisdiction Over Non-Resident Class Members: An overlooked defense in nationwide class actions?* Jan. 3, 2017, in tandem these decisions should be applied to reduce the size and exposure of class claims by challenging and in many instances eliminating non-resident class members from a putative class action against a non-resident defendant.

The *Walden* court did not define what is meant by "suit-related conduct." Nor is there prior Supreme Court precedent controlling that determination. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n. 10 (1984) (declining to decide "what sort of tie between a cause of action and a defendant's contacts with the forum is necessary to a determination that either connection exists."). As a result, a split emerged among the courts, both federal and state. The vast majority (nine circuits along with the highest courts of Arizona, Massachusetts, Oregon, and Washington) have ruled that a plaintiff's case does not "relate to or arise out of" a defendant's forum contacts unless those contacts caused the injury alleged in some manner. Some of these courts express the relatedness requirement in "but for" terms, while others reference "proximate cause" or "foreseeability." But in all instances there must be a discernable connection. By contrast, however, the Federal Circuit and the highest courts of California, the District of Columbia, and Texas have followed a different route. Among them there is no uniform standard, but the underlying concept in their analyses is that there should be some sort of material or tangible relationship. *See, e.g.*, *Avocent Huntsville Corp. v. Aten Int'l Co.* , 552 F. 3d 1324 (Fed. Cir. 2008).

Avenues to establish specific jurisdiction in these courts are flexible and difficult to predict as a result. The California Supreme Court's decision in *Bristol-Myers* illustrates the point to perfection. Nearly 600 non-California residents joined 86 in-state parties to sue Bristol-Myers, a global biopharma enterprise incorporated in Delaware and headquartered in New York, along with California-based McKesson Corporation, for claims related to the drug Plavix (developed, marketed and sold by Bristol-Myers and distributed in California by McKesson). None of the non-residents' claims, however, were connected to Bristol-Myers' activities in California. Plavix was not prescribed or provided to them in the state. None was injured or received treatment in the state. Bristol Myers did not develop Plavix at a California laboratory. And none of the company's other activities relative to the drug, such as packaging, marketing, or compliance with regulatory requirements, took place in the state. Simply put, the non-residents' claims would be exactly the same if Bristol-Myers had no forum contacts whatsoever. Bristol-Myers moved to quash service and obtain dismissal for lack of jurisdiction. The trial court denied the request based on its assessment that the company was subject to general jurisdiction in the state. Denying Bristol-Myers' request for a writ of mandate, the California Court of Appeal disagreed as to general jurisdiction, but held that there was sufficient relationship between the claims and the company's California activities to establish specific jurisdiction. On review, the California Supreme Court agreed by a narrow 4 to 3 margin.

All of the California Supreme Court justices agreed that general jurisdiction was not available pursuant to *Daimler* and related decisions: "Although the company's ongoing activities in California are substantial, they fall far short of establishing that it is at home in this state …." Yet pursuant to a "sliding scale" standard of "relatedness" first articulated in *Vons Cos., Inc. v. Seabest Foods, Inc.*, 926 P. 2d 1085 (Cal. 1996), the majority held that specific jurisdiction could be established. 377 P.3d at 806, 816. Under the "sliding scale" test, the intensity of a defendant's forum contacts and the connection between those contacts and a plaintiff's claims are inversely related. In other words, the more extensive the defendant's forum contacts, the easier it is to show a connection with the claim. Additionally, forum contacts do not need to be either a "but for" or even "proximate cause" of the injuries alleged. Within this framework, four jurists held that Bristol-Myers' California activities were sufficiently extensive, ruling that because the company's national marketing and related efforts relative to Plavix included the state, because the claims of residents and non-residents were similar, and because the company conducted research in the state (even though no such effort involved Plavix), specific jurisdiction was shown. The majority thus appears to have applied a pre-*Daimler* approach to general jurisdiction to the issue of specific jurisdiction.

The dissent did not hesitate to point out that the majority had "undermine[d] an essential distinction between specific and general jurisdiction." *Id*. at 896. "By weakening the relatedness requirement, the majority's decision threatens to subject companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California, extending jurisdiction over claims of liability well beyond our state's legitimate regulatory interest." *Id*. And even more directly, "…the majority creates

the equivalent of general jurisdiction in California courts. What the federal high court wrought in *Daimler* …[the majority] undoes … under the rubric of specific jurisdiction." *Id.*

The California decision in *Bristol-Myers* is probably an extreme example of what can happen when the "relatedness" concept underlying specific jurisdiction is divorced from any causation requirement. Had the case been adjudicated by any of the courts which gauge relatedness in terms of causation, the result would have been different. Ironically, that would even be true in federal court in California. The Ninth Circuit requires "but for" causation for specific jurisdiction. *Menken v. Emm*, 503 F. 3d 1050 (9th Cir. 2007). Had plaintiffs' counsel in *Bristol-Myers* not named McKesson and thereby destroyed diversity, following removal to federal district court none of the non-residents could have proceeded with their claims in California.

Takeaway: While predicting the result of any appeal is an uncertain exercise, odds are that the Supreme Court will use *Bristol-Myers* as a vehicle to complete the fundamental restructuring of jurisdiction it initiated in *Daimler*. And if, as it appears, that will entail limiting "relatedness" for purposes of specific jurisdiction to a requirement of causation, defendants should face fewer instances of forum shopping in the future class actions.