BMS Part II: A Parade of Horribles

In the Mass Torts Section of the April OAJ Quarterly, I wrote about the US Supreme Court taking up the California Supreme Court's *Bristol-Myers Squibb Co. v. Superior Court* decision. I raised the concern that the result could be very detrimental to the mass torts practice.

The opinion arrived in June, and it is as bad as one could expect.

Daimler AG and BMS

In 2004, the Supreme Court sharply limited "general jurisdiction" in *Daimler AG* to only the state in which a corporation is formed and the state in which it is headquartered. (General jurisdiction is the ability to get personal jurisdiction over—and sue—a defendant, regardless of where the tort occurred.) Further, in the case of a non-US company, *Daimler AG* stands for the proposition that there is no state in which one can obtain personal jurisdiction based on general jurisdiction.

As harsh as the *Daimler AG* decision was, it did not do great damage to specific jurisdiction. (Specific jurisdiction is the ability to obtain personal jurisdiction over—and sue—a defendant in the state where the defendant's activities gave rise to the claim.)

The *BMS* Court's recent decision curtails all but the strictest view of specific personal jurisdiction: "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." The Court found that BMS' many ties to California, including its facilities and sales in the state, were insufficient for plaintiffs who were not California residents to bring claims in that state's courts.

Justice Sotomayor's Dissent

The Plaintiffs ("respondents," to be exact) warned the Court a decision for BMS could create a "parade of horribles." There are a variety of reasons why the one or two Courts in which an American company can be found to be "home" might be impractical; moreover, international companies have no "home" in which they are subject to general jurisdiction in the U.S., even where they have extensive contacts with a state.

The majority quickly dismisses this claim, but, as the lone dissenter, Justice Sotomayor points, out, "The majority chides respondents for conjuring a 'parade of horribles,' *ante*, at 12, but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not."

Talc: The First Float in the Parade of Horribles

Notwithstanding the majority's reassurance that there will be no parade of horribles, plaintiffs have already suffered the first casualty. The day *BMS* was released, a trial court judge in St. Louis declared a mistrial in the sixth talcum powder trial against Johnson & Johnson (alleging talc causes ovarian cancer and that J&J hid this fact). Four of the first five talc trials had led to plaintiffs' verdicts totaling $307 million, but even those verdicts are now in question since J&J has appealed each of its losses.

The *BMS* Court offers no explanation for how one might sue two defendants who must be joined but who are not subject to jurisdiction in the same state. For example, where a component part manufacturer knowingly mis-manufactures a component part in state 1, the final manufacturer uses that part in state 2, and the product injures someone in state 3, there may be no state in which a plaintiff could obtain personal jurisdiction over both necessary parties.

The Federal Piece

The *BMS* decision almost entirely removes state courts as a tool to bring justice for victims of bad corporate conduct. The impact this decision will have on federal courts, however, is less than clear.

On one hand, the US Supreme Court took up the *BMS* case and overturned the California Supreme Court citing a violation of constitutional due process found in the Fourteenth Amendment: "nor shall any state deprive any person of life, liberty, or property, without due process of law." The California Courts were threatening to deprive corporate citizen BMS of property (money) and the Supreme Court held such action violated due process where BMS is not at home in the state (notwithstanding its extensive contacts there) and BMS did not cause the harm there.

On the other hand, the Court left open a federal avenue: "[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."

This contrast seems to be entirely illusory, however. A federal court sitting in diversity gains personal jurisdiction over a defendant in only three ways. The first is that a federal court has the same personal jurisdiction as the state courts in the state in which it sits—the very jurisdiction now limited by *Daimler AG* and *BMS* to only where a defendant is home or caused the harm. The second is a 100-mile zone from the Court that issued the summons to join a second party. Finally, the third is where a federal statute creates personal jurisdiction. Fed. R. Civ. P. 4(k).

The application of the second (the 100-mile zone) is very rare and only applies when joining a second party, not the first. The only federal statute creating any level of personal jurisdiction is the MDL statute (28 U.S.C. § 1407), which only applies where the JPML acts to consolidate cases and then, only for pretrial purposes.

Thus, the Court's passing reference to *BMS* not restricting federal jurisdiction will probably lead nowhere in mass torts.

Ultimately, the *BMS* decision is unfortunate and represents further closing of courthouse doors to people injured by bad corporate conduct.