

What to Expect from the Supreme Court's Consideration of *BMS*

The US Supreme Court will soon decide where a corporation can be sued. The result could turn the mass torts world on its head.

It All Started with a Shoe

In 1945, the US Supreme Court said a corporation (or, for that matter, an individual) could be sued in any state in which it had “sufficient minimum contacts.”¹ The Court described those contacts as falling into one of two categories: the corporation needed only the bare minimum of “casual” contacts with the forum state if the complaint arises from those limited contacts. On the other hand, if the complaint does not arise from the contacts with the state, the corporation could still be sued there if its contacts with the forum state were systematic and continuous.

Many people looked at the balance this way: if a shipping company from another state sends its truck through Ohio and the truck causes an accident in Ohio, then the company can be sued there because even though the contact with the forum state was casual (just driving through), the complaint arises from that casual contact. On the other hand, that same company could not be sued in Ohio for events that happened elsewhere, unless the company had systematic and continuous contact—much more than casual contact—with Ohio.

Daimler AG: “Bad Facts Make Bad Law”

In 2004, a group of survivors sued German automaker Daimler AG, alleging that during a 1976 labor dispute at a Mercedes Benz factory in Argentina, the company had turned over a list of labor leaders to the right-wing junta, identifying them as “subversives.” The labor leaders were kidnapped and tortured, some to death.

The survivors sued Daimler AG in the Northern District of California, premising personal jurisdiction on the fact that Daimler AG's subsidiary, Mercedes Benz USA did business in California. The Ninth Circuit allowed the suit to go forward, but the US Supreme Court reversed.²

The *Daimler AG* decision—authored by Justice Ruth Bader Ginsburg—has sent shock waves through the mass torts practice because it appears to curtail all general jurisdiction to only (1) the state in which the company is headquartered, and (2) the state in which the company is incorporated. Read strictly, this limits domestic companies to a maximum of two forums and international companies to none.

Seven Justices joined Justice Ginsburg's decision, but Justice Sonia Sotomayor wrote a concurrence, sharply criticizing the breadth of the majority opinion. When asked about it during an interview, she pointed out that “bad facts make bad law.” She is correct; the facts are bad, at least for personal jurisdiction purposes: A group of foreign nationals sued a German company in a California federal court over the actions of the company's subsidiary that took place two decades prior in Argentina. She is also correct that *Daimler AG* has made bad law. In her concurrence, Justice Sotomayor warned this decision would make some international companies “too big for general jurisdiction.” Lower court decisions have borne this out.

Bristol-Myers Squibb Co. v. Superior Court

¹ For those of us who cannot find our Civil Procedure notes: *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

² *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

Post-*Daimler AG* sharply limiting general jurisdiction, the California Supreme Court has taken an expansive view of specific jurisdiction. Plaintiffs—some who were California residents and some who were not—brought suit against Bristol-Myers Squibb Co. (BMS) in California state court, alleging they were injured by the drug Plavix. The suits were consolidated in California’s JCCP (the state’s mass torts mechanism) and BMS, which is neither headquartered nor incorporated in California, sought dismissal of all plaintiffs who were not California residents.

None of the out-of-state plaintiffs claimed that BMS’ sale of Plavix in California was the cause of their injury, such as the way a shipping company’s truck might cause an accident.

Nevertheless, the California Supreme Court ruled in favor of the out-of-state plaintiffs, finding specific (not general) jurisdiction because said there was a “substantial nexus” between BMS’ sale of Plavix in California, BMS’ sale of Plavix nationwide, the injuries of the California residents, and the injury to the residents of other states.³

To be clear, *BMS* is not a repudiation of *Daimler AG*; the California Supreme Court expressly found that, because of *Daimler AG*, there was no general jurisdiction over BMS. Where *Daimler AG* curtailed most assertions of *general* jurisdiction, *BMS* allowed specific jurisdiction against a non-resident company based on the company’s acts in the state having a nexus with the company’s acts out of the state.

BMS Will Dictate the Future of Personal Jurisdiction

The US Supreme Court granted certiorari to hear BMS’ appeal from the California Supreme Court. The Court will hear the case this term with its eight justices. Oral arguments are set for April 27.

Since the US Supreme Court limited—arguably eliminated, in some cases—general jurisdiction in *Daimler AG*, it may double down on that position and find the California Supreme Court’s stance in *BMS* to be an unallowable end-run around the general jurisdiction restriction. Doing so could spell the end of a lot of mass torts practice, finally limiting injured plaintiffs to only the following venues:

- The state where the injury occurred, assuming the plaintiff can show a causal relationship between the defendant corporation’s contact with that state and the injury; and either:
- if the defendant is a domestic company, either in its state of incorporation or the state in which its headquarters are located; or,
- if the defendant is a foreign company, theoretically only in the foreign court where the company is incorporated or headquartered (if that court allows such a suit).

On the other hand, the Court could use its consideration of *BMS* as an opportunity to consider whether *Daimler AG*’s “bad facts” should be circumscribed to just situations where the plaintiff, the defendant, and the events have little or no relationship to the forum state. This would restore the prior status quo and allow courts to return to the practice of recognizing personal jurisdiction in all but the cases with the worst personal jurisdiction facts.

Look for a decision in the June 2017 term.

³ *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 877 (Cal. 2016).