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SCOTUS Finally Ends Litigation Tourism In Product Liability Suits

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The United States Supreme Court fundamentally changed the practice of product liability litigation in the United States by finally doing away with the "litigation tourism" industry – the common practice of out-of-state residents seeking a perceived advantage by suing pharmaceutical and medical device manufacturers in states where the plaintiff and the manufacturer had little or no connection. In an 8-1 decision in *Bristol-Meyers Squibb Co. v. Superior Court of California, et al.* ("BMS"), the Court held that state courts do not have jurisdiction to hear cases brought by non-resident plaintiffs against manufacturers whose only tie to the chosen forum is the sale of their product in that state. The Court's decision will affect thousands of pending cases and has had an immediate and striking effect. Hours after the *BMS* opinion was released, a Missouri judge declared a mistrial in an action against Johnson & Johnson involving product liability claims brought by out-of-state plaintiffs related to their alleged use of talcum powder.

The *BMS* case overturned a controversial California Supreme Court decision that permitted nearly 600 non-residents of California to sue Bristol-Myers Squibb in California state court for injuries allegedly caused by the company's blood thinner Plavix, even though the company's only contact with the forum state related to that product was that the product was sold in California. As the U.S. Supreme Court recognized, BMS is incorporated in Delaware and headquartered in New York, and did not develop, manufacture, label, package or work on regulatory approval for Plavix in California. The non-resident plaintiffs did not purchase Plavix in California, nor did they claim they were injured or that they sought treatment in California. As a result, the Court held that California did not have jurisdiction to hear the claims of these out-of-state residents.

The Court also made it clear that the fact that a company does business in a given state in ways unrelated to the product at issue is insufficient to create jurisdiction there. The Court rejected plaintiffs' argument that BMS had "wide ranging" contacts with the state of California generally, even if not specific to Plavix or their alleged injuries, based on facts including that (1) BMS contracted with California-based distributor McKesson to distribute Plavix nationally; (2) BMS maintains five R&D facilities in California; (3) BMS employs about 250 sales representatives in California and maintains a small state-government advocacy office in California; and (4) BMS sells Plavix in CA and generated over $900 million in revenue from those sales between 2006 and 2012. The California court reasoned that: "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct

connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." Slip Op. at 3 (quoting 1 Cal. 5th 783, 803–806 (2016)). The U.S. Supreme Court rejected this "sliding scale" approach for establishing jurisdiction.

Several key points can be deduced from the Supreme Court's reasoning in this case:

- **"Close enough" is not enough.** "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.' When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." Slip Op. at 7 (internal citation omitted).

- **There is no general/specific jurisdiction hybrid.** The Court distinguished between conduct arising from connections to the forum, and conduct which affects a defendant who has connections to the forum. "What is needed—and what is missing here—is a ***connection between the forum and the specific claims at issue.***" Slip Op. at 8 (emphasis added). "In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them…. ***The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.***" Slip Op. at 11-12 (emphasis added).

- **Courts cannot bridge the specific jurisdiction gap in product liability cases by reference to the claims of resident plaintiffs in similar lawsuits.** "The mere fact that ***other*** plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." Slip Op. at 8.

The *BMS* decision profoundly changes the landscape for litigation of product liability claims in ways that should make litigation more fair and predictable for manufacturers:

- Out-of-state plaintiffs should no longer be able to shop for "favorable" state-court jurisdictions that have no connection to the facts of their case. This will impact thousands of cases and prevent plaintiffs' lawyers from loading up dockets in perceived "plaintiff-friendly" states.

- Plaintiffs commonly file lawsuits in remote state court jurisdictions in order to take advantage of that state's longer statute of limitations, often because their claim would be time barred in their home state. That practice should come to an end in most cases. The same type of shopping in state courts for favorable punitive damages law should decrease.

- Establishing the place of injury will not merely affect choice-of-law. It will now be a critical factor in determining whether the state court can hear the case at all.

- It may prove difficult for plaintiffs to consolidate cases a single state court when those cases involve multiple manufacturers if one or more of the manufacturers does not have the requisite connections in that state relating to the product at issue.

- Attempts at litigation tourism may not disappear entirely – it remains to be seen how the Court's recent jurisdiction precedent will impact the federal courts and how they apply state law to claims involving out-of-state plaintiffs.

- It also remains to be seen whether the Court's jurisdiction decisions affect the ability of state courts to award punitive damages to in-state residents for conduct, such as the design, manufacture, regulatory decisions, and labeling of a product, that occurred entirely outside the state. As the Supreme Court put it, jurisdiction requires "a connection between the forum and the specific claims at issue." Where the "relevant conduct" did not occur in the forum state – such as the design, manufacturing, labeling, marketing, or seeking of regulatory approval – that connection is lacking.

Although the *BMS* decision changes the landscape, as the Court's opinion notes, it hardly ends the ability of plaintiffs to file suit. Plaintiffs still should be able to file suit in their home state, if that is where they were injured, and will likely be able to file suit in the manufacturer's state of incorporation and where the manufacturer maintains its principal place of business, or perhaps some other state where meaningful decisions related to the product at issue were made.

Questions or Information:

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