



Have We Seen a
Decrease in Filings?

By James P. Brady
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Were these notable
United States Supreme
Court decisions of
2017 the major blow
to mass torts and
litigation tourism that
many predicted?

Post-*Bristol-Myers Squibb* and Post-*BNSF*

The first comment from my Civil Procedures professor was: “This is the most important class you will take in law school. There is no trial, no oral argument, no briefing and no rules of evidence if you don’t know where to file the

lawsuit.” She was right. The class then promptly read the 1945 landmark decision of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), in which the United States Supreme Court held that a party may be subject to the jurisdiction of a state court if it has “minimum contacts” with that state. *International Shoe* was the law of the land for decades. However, the U.S. Supreme Court has issued several decisions in the past few years, providing clarification on the definition of personal jurisdiction, and narrowing it in certain respects.

Last summer saw two separate decisions regarding the scope of personal jurisdiction. The decisions in *Bristol-Myers Squibb v. Superior Court of California*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), and *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 198 L. Ed. 2d 36 (2017), built off of the Court’s decision from several years earlier in *Daim-*

ler AG v. Bauman, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014). These decisions were greeted with excitement and were expected to have an immediate effect on mass litigation by limiting where corporate defendants could be sued and reducing forum shopping.

As a brief refresher, the United States Supreme Court issued its opinion in *Daimler AG v. Bauman* in 2014, holding that a corporation is only subject to general jurisdiction in a particular state if its contacts with that state are so continuous and systematic as to render them essentially at home in the forum.

In *BNSF*, a North Dakota resident sued BNSF in Montana state court. The U.S. Supreme Court applied its *Daimler* analysis and held that BNSF’s activity in Montana was not substantial enough to render the corporation at home in that state. There-

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fore, BNSF was not subject to jurisdiction in Montana in a case involving a non-resident's claim based on conduct that did not occur in Montana. Only a few weeks after *BNSF*, the Court decided *Bristol-Myers Squibb*. In an 8–1 decision, the Court ruled that a California state court did not have jurisdiction over the defendant, which was not headquartered or incorporated and did not engage in relevant activities in California.

The immediate response was that *Bristol-Myers Squibb* and *BNSF* were significant victories for the defense bar. As a result, companies doing business in multiple states and foreign companies with American subsidiaries were expected to bring jurisdictional challenges when they were sued in states that had little or no connection to the facts of a lawsuit. The decisions were thought to be a death knell to litigation tourism and mass tort actions. Commentary on the decisions was swift and vast. Publications across the country described the decisions as a game changer and predicted their effect as the end of an era. Now, almost a year since those decisions were rendered, we examine the actual effect that these decisions have had, how both plaintiffs and defendants are adapting as a result, and whether all of the hype that followed these decisions turned out to be accurate.

Impact of Decisions

There is no doubt that the *BNSF* and *Bristol-Myers Squibb* decisions had an immediate effect. The decisions made it clear that personal jurisdiction exists when a non-resident plaintiff's claim against a non-resident defendant arises out of or relates to activities that the defendant purposefully directed in the forum state. However, jurisdiction is lacking when there is no such connection. The defense bar seized on this analysis and began filing motions for dismissal within days of the *Bristol-Myers Squibb* decision.

Almost immediately, defendants were successfully dismissed from suits that were filed in jurisdictions where the defendant did not have sufficient contacts related to the plaintiff's claims. For instance, in the product liability context, courts were quick to dismiss claims of non-resident plaintiffs against out-of-state defendants when

the plaintiffs failed to allege that they used the defective product in the forum state or that they suffered any harm in the forum state. However, as courts have had time to consider last year's rulings, their decisions have indicated that there is a fine line between sufficient and insufficient contacts with the forum for the purposes of establishing personal jurisdiction in the post-*BNSF* and post-*Bristol-Myers Squibb* world.

The claims of non-resident plaintiffs were dismissed in *Bristol-Myers Squibb* after the court ruled that defendant did not test Plavix in California or have any other sufficient contacts with California that would warrant personal jurisdiction over Bristol-Myers Squibb. Not long after that, the U.S. District Court for the Northern District of California ruled that it did have personal jurisdiction over Bristol-Myers Squibb in a lawsuit related to another drug. *Cortina v. Bristol Myers Squibb*, 2017 WL 2793808. The critical distinction between these two cases was the fact that in the later case, Bristol-Myers Squibb tested the subject drug in California. The court reasoned that the plaintiffs would not have been harmed by the drug had it never been tested and subsequently approved in California. Bristol-Myers Squibb's testing of the drug in California was sufficiently related to the plaintiffs' claims for the court to exercise personal jurisdiction over Bristol-Myers Squibb in that particular case.

Similarly, in August of 2017, Johnson & Johnson successfully won dismissal of claims made by 79 non-Missouri residents claiming that they developed ovarian cancer through use of talcum powder. *Jinright v. Johnson & Johnson, Inc.*, No. 4:17CV01849 ERW, 2017 WL 3731317 (E.D. Mo. Aug. 30, 2017). The *Jinright* court dismissed the claims because the plaintiffs could not show a link between their claims and Johnson & Johnson's contacts with Missouri. Three months later, another Missouri court ruled that it did have jurisdiction over Johnson & Johnson because Johnson & Johnson used a Missouri company to manufacture, label, and package the talcum powder at issue in that case. *Slemp v. Johnson & Johnson*, No. 1422-CC09326-02 (Mo. Cir. Ct. Nov. 29, 2017).

These different outcomes demonstrate why defendants should expect plaintiffs to go to extreme lengths to identify any

forum-related activities that a defendant engaged in and any tenuous connection that those activities may have to the litigation. Defendants should be aware of any activities conducted in a forum state, no matter how small, including product testing, clinical trials, or even communicating with a plaintiff. Decisions regarding the location for product testing, clinical trials,

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packaging, labeling, marketing, or communications must be carefully considered if defendants wish to avoid being haled into certain jurisdictions.

In a recent Texas case, the plaintiffs sued a debt collection agency for violating their rights under federal and state collection statutes. *Chism v. Cont'l Collection Agency, Ltd.*, No. CV H-16-3343, 2017 WL 6034126 (S.D. Tex. Dec. 6, 2017). The defendant operated a business that exclusively collected debts originating in Colorado. The plaintiffs rented a home in Colorado, and failed to pay rent and damages. The debt was ultimately assigned to the defendant, but by that time the plaintiffs had moved to Texas. The defendant subsequently sent 12 letters to the plaintiffs' home in Texas; called the plaintiffs at their home in Texas three times and hired a Texas deputy to serve the plaintiffs at their home in Texas.

The defendant filed a jurisdictional motion, arguing that the defendant lacked sufficient contacts with Texas. The defendant asserted that when the plaintiffs vacated their apartment without paying their final months' rent and other damages, the



defendant had no choice but to contact the plaintiffs in Texas, and those communications did not rise to the level of sufficient contacts for purposes of personal jurisdiction in Texas.

The United States District Court for the Southern District of Texas disagreed and held that the defendant's conduct of sending letters to Texas, calling the plain-

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tiffs, and hiring a deputy in Texas gave rise to the plaintiffs' claims. Thus, the claim-triggering violations that formed the basis of the plaintiffs' claims occurred in Texas, and the court therefore had jurisdiction over the defendant.

In other cases, plaintiffs have attempted to argue that registering to do business or registering for service of process in a state constitutes consent to personal jurisdiction. These arguments have been rejected by multiple courts since *BNSF* and *Bristol-Myers Squibb*. In *Dutch Run-Mays Draft v. Wolf Block*, 450 N.J. Super. 590 (N.J. Super. Ct. App. Div. 2017), developers, from Florida, sued their Pennsylvania law firm in New Jersey, regarding the purchase of property in West Virginia. The subject law firm had contacts with New Jersey, in the form of two satellite offices and having filed lawsuits there. However, the New Jersey court held that it did not have personal jurisdiction over the subject law firm because the

law firm's contacts with New Jersey were not related to the plaintiff's claims.

Other courts have reached similar rulings that registration to do business or appointment of an agent did not equal consent to personal jurisdiction. See *Siegfried v. Boehringer Ingelheim Pharm., Inc.*, No. 4:16-cv0-1942, 2017 WL 2778107, (E.D. Mo. June 27, 2017) (finding that the plain language of Missouri's registration statutes did not mention consent to personal jurisdiction for unrelated claims); *Travelers Property Casualty Co. v. Hume Lake Christian Camps, Inc.*, 2018 WL 280025 (S.D. Cal. Jan. 3, 2018) (holding that registration to do business and appointment of agent was insufficient to create personal jurisdiction).

The End of Litigation Tourism?

In light of *BNSF* and *Bristol-Myers Squibb*, this article addresses the following question: Have we seen a decrease in non-resident filings and mass tort actions, particularly involving out-of-state defendants?

Plaintiffs' lawyers have long sought to file cases in the jurisdiction in which they would most likely prevail. These hotbeds for plaintiff filings are known as "plaintiffs' havens," and their popularity is the result of so-called litigation tourism. In certain niches of litigation, different plaintiffs' havens have emerged around the country, some with their own mass tort dockets. Many defense attorneys and commentators throughout the county predicted that *BNSF* and *Bristol-Myers Squibb* would end mass tort dockets and litigation tourism, but it is unclear at this time if those predictions were overblown.

Philadelphia has become a hotspot for mass tort claims involving transvaginal mesh. By the fall of 2017, there were about 130 cases on Philadelphia's docket for mesh-related claims. Of those 130 cases, 101 of the plaintiffs did not live in Pennsylvania. *Judicial Hellholes 2017-2018*, American Tort Reform Foundation. In light of *Bristol-Myers Squibb*, defendants were optimistic that many of these cases could be dismissed. Johnson & Johnson sought to have 71 cases brought by out-of-state residents against its New Jersey-based subsidiary dismissed. But in December of 2017, a Pennsylvania state court judge ruled that the court had jurisdiction over all but one of the 71 cases brought by the out-of-state

plaintiffs against Johnson & Johnson. *In Re: Pelvic Mesh Litigation*, Case No. 140200829 (Phila. Cty. Ct. Com. Pl.).

Interestingly, in February of 2018, the same state court judge amended the order and stated that "substantial questions of jurisdiction exist." As a result, Johnson & Johnson can now appeal the original decision not to dismiss the out-of-state plaintiffs' claims. This case is indicative of the inconsistencies that should be expected among early decisions interpreting the standards of *Bristol-Myers Squibb* and *BNSF*, particularly involving mass torts and large corporations that do business in many parts of the country.

In asbestos exposure litigation, a select few jurisdictions have long been home to a disproportionately high number of plaintiff filings. In total, 72 percent of all asbestos lawsuits were filed in just 10 jurisdictions in 2016. Daniel J. Ryan *et al.*, *What's New in 2017? Filing Trends and Developments in Asbestos Litigation*, Mealey's Litigation Report: Asbestos (Aug. 16, 2017). In particular, Madison County, Illinois, has been the epicenter of asbestos exposure litigation in the United States for several years. So much so, that the 1,078 mesothelioma-related filings in Madison County in 2016 accounted for 47 percent of all such filings nationwide. *Id.* Notably, over 83 percent of the Madison County mesothelioma claims were filed by out-of-state plaintiffs. *Id.*

The good news is that things appear to be changing. Asbestos-related filings in Madison County dropped by 13.4 percent from 2016 to 2017. *Asbestos Litigation: 2017 Year in Review*, KCIC. In St. Louis, Missouri, another popular jurisdiction for non-resident asbestos plaintiffs, a 40.3 percent decrease in filings occurred over the same period. *Id.* These reductions in filings likely are at least a partial result of *BNSF* and *Bristol-Myers Squibb*, as well as subsequent local rulings that applied those Supreme Court standards. However, despite the decrease in filings in these jurisdictions, Madison County's neighbor to the south, St. Clair County, Illinois, saw a 200 percent increase in asbestos-related filings in 2017. *Id.*

The defense bar should generally expect plaintiff firms to pursue fewer cases in plaintiffs' havens such as Madison County, Illinois, but to increase filings in other jurisdictions. For instance, California saw

a 28 percent increase in non-resident filings of asbestos-related cases in 2017, despite being the state that the *Bristol-Myers Squibb* case originated. *Id.* New York and Delaware will also likely see an increase in non-resident filings in cases with corporate defendants because many companies are headquartered or incorporated there. Only time will tell if *BNSF & Bristol-Myers Squibb* will have a significant effect on mass tort dockets and litigation tourism or if creative plaintiffs' attorneys will find ways to minimize their effect.

Considerations for Defense Counsel After *BNSF* and *Bristol-Myers Squibb*

Non-resident plaintiffs will have to change portions of their playbook if they wish to continue filing cases against non-resident defendants. Defendants need to be aware of tactics that the plaintiffs' bar will undoubtedly use to try to keep cases within their preferred jurisdiction.

Defendants should expect an increase in non-resident plaintiffs resorting to requests for jurisdictional discovery in an effort to fight off motions to dismiss for lack of personal jurisdiction. Most courts allow some form of jurisdictional discovery by a plaintiff to establish that a court has personal jurisdiction over a defendant. As defendants are more likely to seek dismissals for lack of personal jurisdiction in the wake of these decisions, courts will have to decide if jurisdictional discovery is, in fact, necessary. When the facts are not developed enough for a decision on jurisdiction to be made, trial courts may allow jurisdictional discovery to develop a factual record on which to make a decision. However, defendants should vigorously oppose fishing expeditions seeking to find any miniscule basis to establish personal jurisdiction.

There have been several decisions since last year in which courts have rejected or limited jurisdictional discovery. The Missouri Court of Appeals reversed a \$72 million dollar verdict and vacated the judgment after finding no personal jurisdiction. *Estate of Fox v. Johnson & Johnson*, No. ED104580, 539 S.W.3d 48 (Mo. Ct. App. 2017), *reh'g and/or transfer denied* (Dec. 19, 2017), *transfer denied* (Mar. 6, 2018). In reaching that decision, the court denied the plaintiffs' request to conduct jurisdictional discovery to develop a record of personal

jurisdiction rather than dismissing the case. Conversely, the U.S. District Court for the District of New Hampshire declined to rule on a jurisdictional motion and granted the plaintiffs leave to conduct limited discovery focused on the issues necessary to decide whether the court could exercise personal jurisdiction. *In re Atrium Med. Corp. C-Qur Mesh Prod. Liab. Litig.* (MDL No. 2753), No. 16-MD-2753-LM, 2017 WL 5514193, (D.N.H. Nov. 14, 2017). However, the court limited the scope of the discovery and noted that the plaintiffs' proposed discovery, particularly requests related to any and all subsidiaries and affiliates of the defendant, were broader than necessary to address the jurisdictional issues.

Plaintiffs may also attempt to link the activities of a particular out-of-state defendant to their claim by alleging that the defendant conspired with an in-state defendant. Defendants should be prepared to challenge the factual basis for making such a claim and whether those bases are sufficient to meet the standards under *BNSF* and *Bristol-Myers Squibb*. Additionally, plaintiffs may seek to avoid diversity jurisdiction, and subsequent removal to federal court, by joining non-diverse defendants against which a plaintiff has a legitimate claim. Similarly, plaintiffs may seek to prevent removal by joining non-diverse plaintiffs. Jurisdictional challenges based on *BNSF* and *Bristol-Myers Squibb* can prove to be a useful tool to combat such tactics.

And lastly, defense counsel must be aware of the consequences of delaying jurisdictional challenges that they may have. Personal jurisdiction, unlike subject matter jurisdiction, can be waived. Filing a pleading or a motion prior to filing a motion requesting a special appearance to contest jurisdiction may result in a waiver. That said, in some circumstances, it may make sense for a defendant to waive a personal jurisdiction defense. For instance, in a mass tort case it may be more advantageous to remain in the subject forum rather than to defend cases in multiple jurisdictions. Defense counsel should always give consideration to the various pros and cons of a jurisdictional challenge while being mindful that they avoid taking any actions that could waive personal jurisdiction before they determine if they actually will file a jurisdictional motion.

The True Effect Is Yet to Be Seen

The *Bristol-Myers Squibb* and *BNSF* decisions were not necessarily groundbreaking. Rather, they clarified personal jurisdiction standards that were established in *Daimler* and *International Shoe*, which afterwards were often misapplied. Defendants need to be cognizant of these standards and file jurisdictional motions early and

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