

Reproduced with permission from Product Safety & Liability Reporter, 44 PSLR 1270, 12/05/2016. Copyright © 2016 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

JURISDICTION**PRODUCT LIABILITY**

The California Supreme Court's ruling regarding jurisdiction in a product liability case, *Bristol-Myers v. Super. Ct.* (2016 BL 280870), "unnecessarily expands the scope of personal jurisdiction and intensifies the "foreign plaintiff problem" inherent in state mass torts, attorneys Rachel B. Sherman, Louis M. Russo, and Michelle M. Bufano say. The 4-3 ruling will "lead to even more lawsuits being brought in California by nonresidents," the authors say.

The Foreign Plaintiff Problem

BY MICHELLE M. BUFANO, RACHEL B. SHERMAN
AND LOUIS M. RUSSO

Out of state plaintiffs in mass tort cases have long been the source of angst among corporate defendants. Among the reasons for concern is judicial forum shopping and a drain on venue-specific resources. These problems are particularly pronounced in California and other jurisdictions that are well known for having significant numbers of cases brought by out of state plaintiffs.

According to the Civil Justice Association of California, from January 2010 to May 2016, in Los Angeles and San Francisco counties alone, pharmaceutical companies were sued by 25,503 separate plaintiffs in 2,919 cases. Of those plaintiffs, a staggering 89.9% were from out of state. Furthermore, 67% of cases did not involve

a California plaintiff at all. Civil Justice Association of California, *Out of State Plaintiffs 2* (2016), available at http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf. A recent ruling by the California Supreme Court finding that state courts have jurisdiction over the claims of out of state residents exacerbates these concerns.

In *Bristol-Myers Squibb Co. v. Super. Ct.*, 1 Cal. 5th 783 (Aug. 29, 2016), the California Supreme Court ruled, in a 4-3 split decision, that hundreds of out of state residents have the right to sue Bristol-Myers Squibb ("Bristol-Myers") in California state court for alleged injuries arising out of their use of the blood-thinner drug Plavix. Although Bristol-Myers is not headquartered in California, the high court found that given the company's significant contacts with California, such as its marketing and distribution of the drug

in the state, as well as research and development facilities located there, the state courts have specific personal jurisdiction over the nonresidents' claims.

As discussed below, the court's ruling unnecessarily expands the scope of personal jurisdiction and intensifies the "foreign plaintiff problem" inherent in state mass torts.

Background

In March 2012, 678 individual plaintiffs filed eight separate complaints against Bristol-Myers in San Francisco Superior Court alleging that the use of Plavix caused a variety of injuries, including ulcers, heart attacks, strokes, and 18 deaths. The eight cases were joined together and assigned as a coordinated matter to a judge of the San Francisco Superior Court. Of the 678 plaintiffs, only 86 were California residents. The remaining 592 plaintiffs are residents of 33 other states.

Bristol-Myers, a Delaware corporation that is headquartered in New York, moved to dismiss the nonresident plaintiffs' claims against it, arguing that it was not subject to general jurisdiction in California, nor was it subject to specific jurisdiction for the nonresident plaintiffs' claims because those plaintiffs' claims did not arise in California.

In support of its motion, Bristol-Myers introduced evidence that it maintains substantial operations in New Jersey, including its major research and development campuses and more than half of its United States workforce. Bristol-Myers asserted that it did not manufacture Plavix in California and its research and development of Plavix did not take place in California. Likewise, none of the work related to its labeling, packaging, regulatory approval or its advertising or marketing strategy for the product took place in California. Although it sold Plavix in California, its sales revenue from the sale of Plavix in the state constituted approximately 1.1 percent of the company's total nationwide sales revenue of all of its products.

The evidence also showed that Bristol-Myers maintains operations in California, including five research and laboratory facilities employing approximately 164 people. The company employs some 250 sales representatives in the state and maintains an office in Sacramento to advocate for the company in state government affairs. In addition, the plaintiffs introduced evidence showing that Bristol-Myers maintains a registered agent for service of process in California and that the

company sold almost 187 million Plavix pills to distributors and wholesalers in California from 2006 to 2012, with sales revenue of almost \$918 million.

Following a California appellate court's 2014 decision holding that specific jurisdiction existed over the nonresident plaintiffs' claims, Bristol-Myers appealed to the California Supreme Court. As discussed below, the high court affirmed the decision.

The Opinion

The court began its analysis by explaining that under the California Code of Civil Procedure and the United States Constitution, the state courts may exercise jurisdiction over a nonresident defendant so long as the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate "traditional notions of fair play and substantial justice." *Bristol-Myers*, 1 Cal. 5th at 791.

The court noted that under certain circumstances, a corporation's continuous activities within the state are so substantial as to justify suits against it on causes of action that are unrelated to those activities. This is known as "general" jurisdiction. *Id.* at 792. In other circumstances, where the company's activities in the state are more limited, general jurisdiction may be lacking but the courts may still exercise jurisdiction over claims that "arise out of or are connected with the [company's] activities within the state." This is known as "specific" jurisdiction. *Id.* The court went on to analyze whether there was jurisdiction over the nonresident plaintiffs' claims against Bristol-Myers, under either a theory of general personal jurisdiction or specific personal jurisdiction.

Bristol-Myers Is Not Subject to General Jurisdiction in California

After discussing the evolution of the law on general jurisdiction, starting with the landmark decision of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), the court addressed the United States Supreme Court's 2014 decision in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). In *Daimler*, the high court clarified that in order to support the exercise of general jurisdiction over a corporation, its contacts with the forum state must be so extensive as to render the company essentially "at home" in the forum state. 134 S.Ct. at 760. The court went on to explain that a corporation's state of incorporation and its principal place of business are the two "paradigm all-purpose forums" and that general jurisdiction will not exist in another state unless the corporation's activities are so "continuous and systematic" as to render it at home in that state. *Id.* at 761.

The California Supreme Court acknowledged that *Daimler* is binding on it and dictates the conclusion that Bristol-Myers is not subject to the general jurisdiction of California courts. *Bristol-Myers*, 1 Cal. 5th at 794. Specifically, the court noted that, despite the fact that Bristol-Myers sold large volumes of its products in California, "sizeable" sales activity in a state is insufficient to establish general jurisdiction under *Daimler*. *Id.* at 797. The court assessed Bristol-Myers's California business activities in comparison to the company's business operations overall and found that there was no evidence that Bristol-Myers is "at home" in California. *Id.*

Notably, the court also rejected plaintiffs' assertion that the fact that Bristol-Myers is registered to do business in California and maintains an agent for service of

Michelle M. Bufano is a litigation partner at Patterson Belknap Webb & Tyler LLP. She has represented major pharmaceutical and medical device companies in complex products liability and mass tort litigation for over 15 years, including class actions, multi-district litigations and coordinated proceedings in state courts.

Rachel B. Sherman is a litigation associate at Patterson Belknap Webb & Tyler, where her practice focuses on products liability, false advertising, and complex commercial litigation.

Louis M. Russo is an associate at Patterson Belknap Webb & Tyler, where he represents clients in a variety of litigation matters.

process in the state is sufficient to establish general jurisdiction. The court explained that California law requires a foreign corporation transacting business in the state to register and to appoint an agent for service of process in the state. *Id.* at 798. It reasoned that compliance with these state laws “cannot compel [the corporation’s] surrender to general jurisdiction for disputes unrelated to its California transactions.” *Id.* In so ruling, the California Supreme Court joined a growing number of high-profile courts—including the Second Circuit and the Supreme Court of Delaware—to hold in recent months that registration to do business in a state is insufficient to constitute consent to general personal jurisdiction. For companies doing business in multiple states across the country, this is an encouraging trend.

Bristol-Myers Subject to Specific Jurisdiction Regarding Plavix Claims

Having determined that Bristol-Myers is not subject to general jurisdiction in California, the court went on to analyze whether the state court could exercise specific jurisdiction over Bristol-Myers in this case. The question of whether specific jurisdiction exists requires a showing that: 1) the defendant “purposefully directs” its activities at the forum state; 2) the plaintiff’s claims arise out of or are related to those forum-directed activities; and 3) the exercise of jurisdiction is reasonable under the circumstances. *Id.* at 799. Although Bristol-Myers did not contest that the first and third factor weighed in favor of a finding that specific jurisdiction exists, the court analyzed each of the three factors.

First, the court held that that there is “no question” that Bristol-Myers has purposely availed itself of the privilege of conducting activities in the state. *Id.* at 801. Bristol-Myers markets, advertises, and sells Plavix in California; employs sales representatives in the state; contracts with a California-based distributor; operates research and laboratory facilities in the state; maintains a lobbying office in the state capital; and employs more than 400 people there. *Id.* at 801-02. Accordingly, the court found that Bristol-Myers “would be on clear notice that it is subject to suit in California concerning such matters.” *Id.* at 802.

Second, the court explained that the relatedness requirement for specific jurisdiction “is satisfied if there is a substantial nexus or connection between the defendant’s forum activities and the plaintiff’s claims.” *Id.* at 800. After analyzing the extent of Bristol-Myers’s contacts in the state, the court held that Bristol-Myers’s substantial contacts with California in the course of the design, marketing and distribution of Plavix put it on notice that it could be sued in California for claims arising from use of the drug.

Specifically, the court emphasized Bristol-Myers’s “common nationwide course of distribution,” noting that “[b]oth the resident and nonresident plaintiffs’ claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state.” *Id.* at 804. Thus, the court found that “the nonresident plaintiffs’ claims bear a substantial connection to [Bristol-Myers]’s contacts in California.” *Id.* The court reasoned that Bristol-Myers’s “nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresi-

dent plaintiffs’ claims and the company’s contacts in California concerning Plavix.” *Id.*

The court also cited several other factors that it found justified the exercise of specific jurisdiction over Bristol-Myers for the nonresident plaintiffs’ claims. In particular, the court noted that the nationwide marketing, promotion and distribution of Plavix was associated with a California-based distributor. *Id.* at 803. It also emphasized that Bristol-Myers maintains research and laboratory facilities in California, which was relevant to plaintiffs’ claims that Plavix was negligently developed and designed, despite the fact that “there is no claim that Plavix itself was designed and developed in these facilities.” *Id.* at 804. In addition, the court found that Bristol-Myers “embraced” the risk of suit in numerous states by “coordinating a single nationwide marketing and distribution effort.” *Id.*

Third, with respect to the reasonableness of exercising jurisdiction, the court found that the burden on Bristol-Myers of litigating these claims in California was not excessive. *Id.* at 809. It then addressed California’s interest in the case and held that California public policy favors the exercise of personal jurisdiction because coordination of mass tort claims promotes efficiency in the judicial system, as well as because many of the resident California plaintiffs claimed severe injuries and their claims could be stalled if the nonresident plaintiffs sued Bristol-Myers in different forums. *Id.* at 810-11. It also found that California has an interest in protecting consumers from the potential dangers posed by pharmaceutical medications and regulating the conduct of Bristol-Myers’s codefendant, which is headquartered in California. *Id.* On balance, the court held that exercise of jurisdiction would not be unreasonable.

Significantly, in reaching its conclusion, the court analyzed the facts with repeated reference to the accompanying California plaintiffs’ claims. As of this writing, it is unclear whether the court would reach the same result in a case that involved only the claims of nonresidents. However, given the court’s analysis, it is unlikely the outcome would differ.

The California Supreme Court subsequently stayed the litigation to allow Bristol-Myers to file a petition for writ of certiorari with the United States Supreme Court. Bristol-Myers filed a petition on October 7, 2016.

Impact of the Decision

As noted above, California already sees significant numbers of claims brought by out of state plaintiffs. The court’s decision in *Bristol-Myers* will no doubt lead to even more lawsuits being brought in California by nonresidents, which raises a number of public policy concerns. First, as a practical matter, and without engaging in a choice of law analysis, the law of the state where a plaintiff resides is often the law applied in an individual mass-tort case. The citizens of California would not have any interest and/or relationship to the nonresident plaintiffs’ claims to the extent such claims were based on the law of other states.

Additionally, out of state plaintiffs place a substantial burden on the court and tax the administrative process. With nearly 90% of recently filed cases in Los Angeles and San Francisco counties being brought by out of state plaintiffs, these nonresidents are imposing a massive financial and resource burden on a state in which they do not reside and have no connection. While that

burden hurts taxpayers, it also hurts California plaintiffs, whose only available court system is the California state court system. Indeed, the Judicial Council of California notes that California already faces a shortage of trial court judges, resulting in “a significant decrease in Californians’ access to the courts, compromised public safety, an unstable business climate, and backlogs in some courts that inhibit fair, timely, and equitable justice.” Judicial Council of California, *New Judgeships 1* (2015), available at <http://www.courts.ca.gov/documents/fact-sheet-new-judgeships.pdf>.

Moreover, the burden on the state of California from mass torts consisting almost entirely of out of state plaintiffs is an unnecessary one because the judiciaries in the plaintiffs’ home states are available to interpret their own laws and protect their own citizens. The court’s ruling in *Bristol-Myers* will exacerbate these issues in California.

Other Jurisdictions Face Similar Concerns

Even more concerning for defendants is the prospect that other states will follow the *Bristol-Myers* court’s lead. Each year, the American Tort Reform Foundation publishes a list of jurisdictions where it concludes the laws are systematically applied in an “unfair and unbalanced manner, generally to the disadvantage of defendants.” ATR Foundation, *2015-2016 Judicial Hellholes* (2015), available at <http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf> (“ATR Foundation Report”). Of the states included in the list, California, Florida, Missouri and Madison County, Illinois are well known for having significant numbers of cases brought by out of state plaintiffs. *Id.* at 1-2. In addition to those jurisdictions, Atlantic County, New Jersey and Philadelphia, Pennsylvania are on the “watch list,” and remain extremely challenging locations for pharmaceutical and medical device manufacturers. *Id.* at 3. Should the California Supreme Court’s decision in *Bristol-Myers* become the law of the land, defendants will increasingly find themselves litigating in these “judicial hellholes.”

According to the U.S. Chamber of Commerce, Madison County, Illinois handles approximately 1/3 of all asbestos litigation in the United States. Some 98% of cases filed in the jurisdiction are not brought by plaintiffs who live in Madison County. Indeed, the Chamber of Commerce found that “more cases were brought in Madison County courts by residents of Texas than by residents of Illinois.” Institute for Legal Reform, *Madison County’s “No. 1!” Ranking Has Out of State Plaintiffs’ Lawyers Cheering, Local Taxpayers Footing the Bill*, U.S. Chamber of Commerce, Apr. 15, 2015, <http://www.instituteforlegalreform.com/resource/madison-countys-no-1-ranking-has-out-of-state-plaintiffs-lawyers-cheering-local-taxpayers-footing-the-bill>.

Similarly, Bloomberg has compiled statistics on out of state plaintiffs in St. Louis, Missouri for five mass tort actions: talc, GM ignition, Lipitor®, Essure®, and Xarelto®. Of the 313 Plaintiffs involved in those litigations in St. Louis, 96.4% are resident outside of Missouri. Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, Bloomberg, Sept. 29, 2016, <http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis>. Atlantic County, New Jersey is also a popular mass tort litigation center.

As of July 2015, 23,669 cases were pending. Of those cases pending against drug and medical device manufacturers, 93% are brought by out of state plaintiffs. See ATR Foundation Report at 29. Philadelphia, Pennsylvania’s Complex Litigation Center (“CLC”) is another major center of mass tort litigation. Of the pharmaceutical and medical device cases filed in the CPC in 2015, 87% were filed by out of state plaintiffs. Nicholas Malfitano, *Mass Tort Filings Decrease Significantly This Year, As of August*, Penn Record, Sept. 24, 2015, <http://pennrecord.com/stories/510639677-mass-tort-filings-decrease-significantly-this-year-as-of-august>.

Courts in some of these jurisdictions have reached the opposite conclusion than the court did in *Bristol-Myers*. For example, in *In re Plavix*, No. 2012 L 5688 (Ill. Cir. Ct. Aug. 11, 2014)—a post *Daimler* decision, plaintiffs argued that defendant Bristol-Myers Squibb was subject to specific jurisdiction in Illinois because it had hired employees in Illinois and generated “\$1,782,812,455.30 in Plavix sales.” *Id.* Unlike the California court, the Illinois court found that in order to assert specific jurisdiction, “the plaintiff’s claim ‘must directly arise out of the contacts between the defendant and the forum.’” *Id.* (quoting *Spartan Motors, Inc. v. Lube Power, Inc.*, 337 Ill. App. 3d 556, 561 (2nd Dist. 2003)). The Illinois court found that Bristol-Myers’s sale of Plavix in Illinois had no connection to the non-Illinois residents’ claims and dismissed those claims for lack of personal jurisdiction. *Id.*

Likewise, a federal court in Florida recently rejected the exercise of jurisdiction on similar facts. In *Waite v. AII Acquisition Corp.*, No. 15-cv-62359-BLOOM/Valle, 2016 BL 149160 (S.D. Fla. May 4, 2016), the plaintiff attempted to exercise specific jurisdiction over Union Caribe on the basis that the defendant had registered to do business in Florida, sold massive quantities of asbestos in Florida, had dozens of customers in Florida, and had been involved in lawsuits in Florida. *Id.* at *5. The court ruled that these contacts were not sufficient to establish specific jurisdiction over Union Caribe because the plaintiff’s cause of action did not arise in relation to any of these activities in Florida. *Id.* at *7. And in *Falcon v. Pfizer, Inc.*, No. ATL-L-4318-12 (N.J. Super. Ct. Dec. 1, 2014), a New Jersey trial court granted a motion to dismiss on forum non conveniens grounds. In *Falcon*, the plaintiff was an Iowa resident that brought suit against two New Jersey companies and one New York company. The court determined that the case should be heard in Iowa, where it would be easier to obtain discovery from plaintiff’s treating physicians.

However, other courts continue to deny motions to dismiss for forum non conveniens, even where the plaintiff and defendant have no significant connection to the state or venue. See, e.g., *Bald v. Ace Sprinkler Co.*, No. 14-L-1448 (Mad. Cnty. Il. 2015). Likewise, in *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216 (Mo. 2008), the Missouri Supreme court held that a court does not abuse its discretion by denying a motion to dismiss under the doctrine of forum non conveniens even where none of the plaintiffs’ causes of action arose in Missouri. *Id.* at 223.

While it remains to be seen whether the United States Supreme Court will accept a petition for review of the *Bristol-Myers* decision, the court’s ruling will no doubt increase the burden on corporate defendants and the judicial system alike.