

Quarterly Review

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**A Quarterly Review of
Emerging Trends
in Ohio Case Law
and Legislative
Activity...**

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Strategically Leveraging the Personal Jurisdiction Requirement To Put the Brakes on Litigation Tourism & Forum Shopping

David J. Oberly, Esq.
Blank Rome LLP

Kevin M. Bandy, Esq.
Blank Rome LLP



David J. Oberly, Esq.



Kevin M. Bandy, Esq.

I. Why It Matters

Until recently, personal jurisdiction over corporate defendants had been expanding significantly in scope through the reliance on tenuous corporate contacts or business conducted by a defendant in a particular forum.

In January 2014, however, that all started to change when the United States Supreme Court issued its decision in *Daimler AG v. Bauman*, 564 U.S. 915 (2014), holding that corporations are subject to general jurisdiction in just two states – the company’s state of incorporation, and state in which the company maintains

its principal place of business. Three years later, the Supreme Court reaffirmed its ruling in *Daimler in BNSF Railway Co. v. Tyrrell*, 137 S.Ct. 1549 (2017), in which the Court erased any doubt regarding the contours of general jurisdiction by holding that absent any truly rare circumstances, general jurisdiction may be found only in a company’s state of incorporation or where it has its principal place of business. Finally, also in 2017 the Supreme Court decided *Bristol-Myers Squibb v. Superior Court of California*, 137 S.Ct. 1773 (2017), in which the Court articulated a clear rule limiting specific jurisdiction to those cases where the injury at issue arises out

of the defendant’s specific conduct occurring within the borders of the chosen forum, thereby eliminating the ability to establish personal jurisdiction merely through a defendant’s *general* connections with the forum. Combined, these three decisions are critical for corporate defendants who find themselves embroiled in toxic tort, asbestos, and product liability litigation, as these cases have significantly limited where plaintiffs can bring claims and, in turn, have substantially curtailed the practice of litigation tourism and forum shopping as a result of the limitations that have been placed on a forum state’s exercise of personal jurisdiction.

II. Overview of the Law on Personal Jurisdiction

There are two types of personal jurisdiction. The first, known as specific jurisdiction, encompasses cases in which the suit arises out of or relates to the defendant’s contacts with the forum. For specific jurisdiction to exist, a plaintiff’s action must arise out of a defendant’s forum-related activities. More specifically, specific jurisdiction is applicable if the in-state activities of a corporate defendant are not only continuous and systematic, but also gave rise to the liabilities sued on. Adjudicatory authority of this order, therefore, relates to instances where the suit arises out of or relates to the defendant’s contacts with the forum. Thus, the question addressed by specific jurisdiction is whether a plaintiff’s suit arises out of, and is adequately related to, the defendant’s forum contacts, which must be extensive enough that the exercise of jurisdiction comports with fair play and substantial justice.

The second, general jurisdiction, is exercisable when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." General jurisdiction imposes an exacting standard because a finding of general jurisdiction permits a defendant to be hauled into court in the forum state to answer for any of its activities anywhere in the world. As such, a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the state in which suit is brought are so constant and persuasive "as to render [it] essentially at home in the forum State."

III. The Problem of Expanding Personal Jurisdiction & Forum Shopping

Until recently, personal jurisdiction over corporate defendants had been expanding significantly in scope through the reliance of courts and the plaintiffs' bar on tenuous corporate business conducted in a given forum. Importantly, for some time courts and litigants have operated under the general rule that a court may exercise general jurisdiction over a corporate defendant in any state where the company maintains "continuous and systematic" business contacts. As a result, businesses have been long subjected to being sued in any state across the country, regardless of strength of the business's connection to the forum. The expansive scope of personal jurisdiction that was seen until just recently resulted in significant, egregious litigation tourism and forum shopping by plaintiffs' attorneys in toxic tort, asbestos, and product liability actions, as plaintiffs took advantage of the significant leeway they had in filing large numbers of lawsuits in a select few extremely plaintiff-friendly courts, many of which are commonly known as some of the worst "judicial hellholes" for litigating these types of complex lawsuits.

IV. *Daimler AG v. Bauman*: Reining In the Scope of General Jurisdiction

In *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), the United States Supreme Court significantly curtailed plaintiffs' ability to forum shop in toxic tort, asbestos, and product liability lawsuits as a result of the Court's holding which significantly narrowed the applicable standard for general personal jurisdiction under the Fourteenth

Amendment's Due Process Clause. Until *Daimler*, the general consensus was that a defendant is subject to general or all-purpose jurisdiction—which extends to suits wholly unrelated to any activity conducted by the defendant in the forum state—in every state where the corporate defendant had continuous and systemic general business contacts. The *Daimler* opinion is significant, then, as in that case the Court held that general jurisdiction may only be exercised if a defendant is regarded as "at home" in the forum state. Importantly, with respect to corporations, the concept "at home" is limited to only the business's place of incorporation and its principal place of business, as well as where other "exceptional" contacts exist. In doing so, the Court further held that a corporation is *not* deemed "at home" in a state merely by way of the fact that the company "engages in a substantial, continuous, and systematic course of business." Based on the Court's reasoning, general jurisdiction should rarely apply in a forum other than the state in which the defendant is incorporated, or has its principal place of business.

The *Daimler* decision was a significant win for toxic tort, asbestos, and product liability defendants, as the opinion significantly strengthened the requirements for exercising personal jurisdiction against corporate defendants. In doing so, the decision significantly narrowed the ability of state courts to exercise personal jurisdiction based merely on a corporation's general activity within the state. Importantly, because state courts ordinarily exercise jurisdiction to the limits of the federal due process standard, and because federal courts also do so as well, the *Daimler* decision is applicable from coast to coast and, more importantly, in every hotbed of toxic tort, asbestos, and product liability litigation. Significantly, many subsequent decisions rendered since *Daimler* have limited general jurisdiction to a defendant corporation's state of incorporation and principal place of business. In doing so, these courts have also held in unison that "continuous and systematic" business operations in the forum state no longer suffices to establish general jurisdiction.

V. *BNSF Railway Co. v. Tyrrell*: Reaffirming Narrow Scope of General Jurisdiction

In 2017, the Supreme Court reaffirmed its decision in *Daimler* in *BNSF Railway Co. v. Tyrrell*, 137 S.Ct.

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1549 (2017). *Tyrrell* pertained to consolidated Federal Employers' Liability Act lawsuits filed in Montana state court by non-residents against a railroad that operated in Montana, but was not incorporated and did not have its principal place of business in the state. Importantly, in its ruling the Court rejected the Montana Supreme Court's holding that general jurisdiction could be exercised because the company was "doing business" and "found within" the state as a result of the railroad's significant contacts with Montana. In doing so, the Court clearly provided that the company's in-state business did not suffice to permit the assertion of general jurisdiction over claims that were wholly unrelated to any activity that took place in the state. At the same time, the Court also rejected the Montana Supreme Court's attempt to distinguish *Daimler* as not pertaining to a FELA claim or a railroad defendant. Rather, the Court found that the Fourteenth Amendment's due process constraint described in *Daimler* applies to all state court assertions of general jurisdiction over defendants, and that the constraint does not vary with the type of claim asserted or business enterprise sued. Finally, the Court highlighted that although the railroad maintained over 2,000 miles of track and over 2,000 employees in the state, "[a] corporation that operates in many places can scarcely be deemed at home in all of them." As such, the Court emphasized that "in-state business" is not sufficient to allow the assertion of general jurisdiction over claims that are unrelated to any activity occurring in the forum. Significantly, with the *Tyrrell* decision, the Court removed any doubt that the *Daimler* general jurisdiction standard applies in both state and federal forums from coast to coast.

VI. *Bristol-Myers Squibb Co. v. Superior Court of California*: Defining the Contours of Specific Jurisdiction

Most recently, in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773 (2017), the Supreme Court provided additional, more focused rules for the exercise of specific jurisdiction which significantly benefits toxic tort, asbestos, and product liability defendants. That case arose out of multiple suits filed in California by over 600 plaintiffs, most of whom resided outside the confines of California, against Bristol-Myers Squibb (BMS), the manufacturer of a blood thinning drug

that allegedly caused bodily injury to the plaintiffs. BMS was incorporated in Delaware, headquartered in New York, and conducted substantial business in New York and New Jersey. On appeal, the United States Supreme court reversed the California Supreme Court's decision that BMS's "wide-ranging" contacts with California were adequate to trigger specific jurisdiction over the claims asserted by the non-resident plaintiffs. In doing so, the Court noted that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." In this regard, the suit itself—and not just some other aspect of the litigation—"must arise out of or relate to the defendant's contacts with the forum." Thus, to exercise specific jurisdiction, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence which takes place in the forum State." When such a connection is lacking—the Court continued—specific jurisdiction cannot be utilized "regardless of the extent of the defendant's unrelated activities in the State." Accordingly, a defendant's general connections with the forum cannot suffice to establish specific jurisdiction.

VII. Plaintiffs' Responses to the *Daimler*, *Tyrrell*, and *Bristol-Myers Squibb* Rulings

In response to *Daimler*, *Tyrrell*, and *Bristol-Myers Squibb*, the plaintiffs' bar has attempted a range of techniques in order to get around the general jurisdiction limitations set forth by the Supreme Court in *Daimler*.

A. Consent Via Registration or Appointment of Agent for Service of Process

One of the most significant strategies employed by plaintiffs has been their attempt to create an exception to the *Daimler* general jurisdiction rule whereby corporate defendants consent to general jurisdiction by registering to do business in the state or by appointing an agent for purposes of service of process. Here, plaintiffs argue that a corporation's act of registering to do business in a state, or appointing a corporate agent for service purposes, constitutes consent on the part of the corporation to be sued in the forum. Unfortunately, *Daimler* did not directly address this issue of "consent" jurisdiction. More importantly, to date the courts are split on whether registration or agent appointment in a

given state justifies the exercise of general jurisdiction over a corporate defendant. Some courts have held that registration or the appointment of an agent for service subjects the company to general jurisdiction in that state because the company is deemed to have consented to general personal jurisdiction. Conversely, other state courts have found that registration or the designation of an agent is inadequate to establish general jurisdiction, and would violate the company's due process rights. As such, plaintiffs' counsel will almost certainly continue to raise this argument until another Supreme Court decision definitively resolves this issue.

B. Jurisdictional Discovery

Furthermore, plaintiffs' counsel also commonly seek to engage in lengthy and expensive jurisdictional discovery in response to a defendant's preliminary attack on jurisdiction, which plaintiffs' counsel ordinarily contends is needed before any rulings can be made on jurisdictional issues. Importantly, this particular form of discovery is sought in an attempt to discover rationales why a court should exercise jurisdiction, which can oftentimes constitute an extremely time-consuming and costly endeavor because plaintiffs will often continue their search through discovery until favorable evidence is obtained. Conversely, jurisdictional discovery does little to assist a defendant in supporting its position that jurisdiction is not appropriate. In some instances, courts have permitted jurisdictional discovery to allow plaintiffs to evaluate a company's overall business structure and operations to ascertain all of the locales where the company operates, not just whether the company is "at home" in the given forum.

C. Specific Jurisdiction

Finally, as a result of the significant tightening on the scope of general jurisdiction, plaintiffs have turned their attention to expanding the scope of specific jurisdiction in order to maintain suits against out-of-state corporate defendants. Specific jurisdiction is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." Here, the focus of inquiry is on the relationship between the defendant, the forum, and the litigation. For example, in some product liability actions, plaintiffs allegedly injured by exposure to a company's product outside the confines

of the forum state have contended that specific jurisdiction exists because the defendant also sold the same product in the forum state and, as such, the claim "relates to" those sales because they both pertain to the same product. In some instances, courts have been receptive to stretching the bounds of specific jurisdiction in toxic tort, asbestos, and product liability suits. In doing so, courts have held that although there may be insufficient contacts to permit general jurisdiction under *Daimler*, a court may still possess specific jurisdiction over a claim against an out-of-state defendant for actions occurring entirely outside of the forum state where such actions are deemed "sufficiently related" to conduct that takes place in the forum state.

VIII. Strategies for Defense Counsel

A. Overview

Daimler, *Tyrrell*, and *Bristol-Myers Squibb*, along with subsequent related decisions, have provided corporate defendants with robust tools to combat litigation tourism and forum shopping that has become all-too-common in plaintiff-oriented forums. Importantly, these decisions give companies significant ammunition to pursue successful jurisdictional dismissal motions when they find themselves faced with a lawsuit in a foreign state arising out of conduct that has no reasonable connection to the forum. In particular, *Daimler* provides sound guidance for defense counsel to make reasoned decisions as to whether a challenge founded on a lack of general jurisdiction may be successful, as the case makes clear that in the absence of a basis for specific jurisdiction, national corporations can only be sued where they are incorporated, have their principal place of business, or have "affiliations with the State that are 'so continuous and systematic' as to render them essentially at home in the forum State."

In analyzing the potential likelihood of success in mounting a jurisdictional attack, counsel must first determine whether specific jurisdiction is applicable to a given case, as a general jurisdiction attack would be fruitless if specific jurisdiction allowed a court to exercise jurisdiction in the case at hand. In the event counsel determines that specific jurisdiction is inapplicable, as an initial matter corporate counsel should identify where exactly the company is

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“at home” in terms of the entity’s state of incorporation and place of principal business. For those forums where the company is not “at home,” counsel should utilize jurisdictional motions to aggressively raise the argument that a lawsuit filed against counsel’s corporate client in any jurisdiction other than where the defendant is “at home” is improper. In doing so, counsel should rely heavily on *Daimler*’s “at home” test to formulate robust arguments aimed at persuading courts to refuse to accept jurisdiction in improper forums. In addition, counsel should also stringently emphasize that pursuant to *Daimler*, companies should not be forced to defend themselves in jurisdictions where they maintain only a small or passive presence, or even where they conduct significant operations, yet are not “at home.” In most instances, in order to prevail on a *Daimler*-based argument, counsel will most likely have to present evidence to the court to establish where the company is “at home.” In addition, additional evidence demonstrating that the company’s activities maintained in the plaintiffs’ chosen forum is but a small percentage of the business’s global operations will also aid in supporting the defendant’s position that jurisdiction is improper in a given forum.

B. Consent Arguments

In order to combat plaintiffs’ “consent”-based arguments, defense counsel should educate the court that because almost every state mandates registration by corporate entities who wish to do business in the state, and since almost every state also requires a corporation to appoint an agent for purposes of service of process, any consent argument must be rejected because accepting such an argument would allow corporations to be sued in every state, thereby completely nullifying *Daimler*’s general jurisdiction ruling. In addition, counsel should also highlight the fact that the *Daimler* Court held that it would be “unacceptably grasping” for a state to assert general jurisdiction over a corporation merely because that entity engages in a regular course of business in the state. As such, it would be equally “unacceptably grasping” for the court to find that a corporate defendant consented to general jurisdiction merely by registering to do business in the state, or by appointing an agent for service of process, which the company was required to do by state law. Furthermore, counsel can also point to the “unconstitutional conditions” doctrine, which

provides that a state may not “require a corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution.” Pursuant to this doctrine, it would be unconstitutional for a state to condition doing business in the state on relinquishing its due process right shielding the company from being subjected to general jurisdiction outside its principal place of business and state of incorporation. Finally, defendants should also stress that proceeding on a consent theory would be just as expansive—and as a result just as violative of due process—as the general and specific jurisdiction theories that were rejected by the Court in *Daimler* and *Bristol-Myers Squibb*.

C. Jurisdictional Discovery

To combat plaintiffs’ attempts to conduct jurisdictional discovery, defense counsel should stress that jurisdictional discovery is unnecessary and inappropriate, as any such discovery would fail to reveal any evidence that would be sufficient to demonstrate that the exercise of personal jurisdiction is appropriate. In particular, counsel should demonstrate to the court that almost all jurisdictional discovery is completely needless, as no amount of discovery is needed to determine whether the company is “at home” in the selected forum. In reality, almost all jurisdictional discovery topics are going to be irrelevant, as they pertain to issues other than whether the company is “at home” in a given jurisdiction. Importantly, counsel should also highlight the fact that the *Daimler* Court directly addressed the impact of its ruling on the issue of jurisdictional discovery, noting that “it is hard to see why much in the way of discovery would be needed to determine whether a corporation is at home.” Furthermore, to combat jurisdictional discovery centering on a company’s extraterritorial activities, defendants may elect to voluntarily provide statistical information demonstrating that the entity’s forum contacts constitute only a small part of the business’s overall operations. This statistical evidence can be included in the defendant’s initial jurisdictional motion, serving as a pre-emptive strike to guard against any potential arguments by the plaintiffs that jurisdictional discovery is necessary. Significantly, courts have rejected the exercise of general jurisdiction where the company’s business in the forum, while not insubstantial, constitutes only a very small part of its portfolio.

D. Specific Jurisdiction Arguments

To combat specific jurisdiction arguments, defense counsel can rely heavily on both the *Daimler* ruling, as well the Supreme Court's subsequent ruling in *Bristol-Myers Squibb*. Importantly, while sometimes overlooked in light of the significant holding on general jurisdiction, the *Daimler* Court also provided key guidance as to the contours of specific jurisdiction. Specifically, the Court provided that for specific jurisdiction to be available, a defendant's activities in the forum ordinarily must be "continuous and systematic," and give rise to the cause of action.

Furthermore, defense counsel can utilize the *Bristol-Myers Squibb* decision—which limits the power of state courts to adjudicate claims by non-resident plaintiffs when the actions on which the claims are based take place outside the forum state—to combat many different attempts at establishing specific jurisdiction by plaintiffs. Specifically, *Bristol-Myers Squibb* can be leveraged to attack and eliminate any lawsuits that are not defendant-specific, not filed in the target defendant's state of incorporation or principal place of business, or filed by plaintiffs who reside in states other than the forum state where the litigation is instituted. In particular, defense counsel should emphasize that pursuant to *Bristol-Myers Squibb*, non-resident plaintiffs who do not allege any injuries arising from conduct occurring in a state cannot maintain a suit in that same state against a company who is neither headquartered nor incorporated in the forum state.

Taken together, defense counsel can utilize *Daimler*, *Bristol-Myers Squibb*, and subsequent decisions to establish that specific jurisdiction is inappropriate in any jurisdiction where the actual events giving rise to the plaintiff's injury did not occur in the forum state. In addition, defense counsel should also highlight the fact that any theory that a defendant is subject to specific jurisdiction for claims arising out of out-of-state sales activity by the mere fact that the company also made sales within the forum states is nothing more than a thinly-veiled effort to sidestep the Court's recent decisions curtailing the scope of general jurisdiction. At the same time, defense counsel should stress that allowing specific jurisdiction under such circumstances would render any substantial manufacturer amenable to suit, on any claim for relief,

wherever its products are distributed – a sprawling view of jurisdiction that was specifically repudiated by the *Daimler* Court.

IX. The Final Word

Ultimately, given the generally favorable reception of *Daimler*, *Tyrrell*, and *Bristol-Myers Squibb* in subsequent decisions, toxic tort, asbestos, and product liability defense practitioners should make sure to keep jurisdictional challenges in their litigation toolbelts, and should seek to utilize this game-changing defense whenever possible. In particular, as a result of the Supreme Court's extremely defense-friendly decisions in *Daimler*, *Tyrrell*, and *Bristol-Myers Squibb*, defendants should thoroughly analyze the applicability of a jurisdictional defense during counsel's preliminary evaluation of a claim. Utilized properly, corporate defendants can effectively combat forum shopping and litigation tourism by successfully removing lawsuits from state courts that lack the proper jurisdiction. Finally, because this area of law is rapidly evolving and still developing, defense counsel and their corporate clients should ensure they stay abreast of all relevant developments on this key issue. In particular, counsel should remain on the lookout for new, innovative jurisdictional arguments being made by plaintiffs, and be able to successfully combat them should they be asserted in the course of a lawsuit.

David J. Oberly, Esq., is an associate attorney in the Cincinnati office of Blank Rome LLP, where he focuses his practice in all aspects of environmental law and toxic torts, including litigation and enforcement, compliance and regulatory advice, due diligence and transactional advice, policy development, and business transactions.

Kevin M. Bandy, Esq., is an associate attorney in the Cincinnati office of Blank Rome LLP, where he focuses his practice on administrative law, environmental law and toxic torts, mass torts, and commercial litigation.