We're Not (Staying) in Kansas Anymore: Winning the Personal Jurisdiction Challenge

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In the wake of the United States Supreme Court’s decisions in *Daimler* and *Bristol-Myers*, personal jurisdiction challenges are being filed in massive numbers, particularly in those jurisdictions typically favored by plaintiffs. Courts historically hesitant to render decisions are now forced to adjudicate the issues. Indeed, the national impact of *Daimler* and *Bristol-Myers* is playing out in real time across the country, with federal and state courts redefining the approach and often granting defendants' motions to dismiss or for mistrials and reversing jury verdicts.

That said, lawyers and clients should not reflexively file such motions without first assessing and counseling their clients on the controlling laws of the alternative forums and evaluating the prospect of litigating the same case in different jurisdictions. This article details the new parameters by which courts will resolve personal jurisdiction challenges, and outlines critical issues that counsel should consider with their clients before asserting them.

I. The New Parameters For Establishing Personal Jurisdiction

At the outset of every litigation, a preliminary question is asked - does the court have personal jurisdiction over the defendant? Without personal jurisdiction, the court lacks the requisite authority to adjudicate a case. When a defendant – either an individual or corporation – does not reside in a jurisdiction, a court may exercise personal jurisdiction only to the extent permitted by the long-arm statute of the forum and by the Due Process Clause of the United States Constitution. The due process analysis requires a showing that the defendant has sufficient contacts with the forum state so the court’s exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.” *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017)
While the interests of the forum and the plaintiff’s choice of forum are factors to be considered, the “primary concern is the burden on the defendant,” and the primary focus of the “personal jurisdiction inquiry is the defendant’s relationship to the forum State.”  *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1779 (2017) (internal quotation marks and citation omitted).

Personal jurisdiction can be “general” - meaning, all-purpose jurisdiction - or it can be “specific” - meaning, conduct-linked jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). For general jurisdiction, the nonresident defendant must have connections to the forum state that are so “continuous and systematic” as to render the party essentially at home there. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). “Specific” jurisdiction may be asserted if the lawsuit arises out of the defendant’s contacts with the forum state. *Bristol-Myers*, 137 S. Ct. at 1780; *Goodyear*, 564 U.S. at 919. The distinction between these concepts is critical to understanding the limits of a court's jurisdictional reach.

A. **General Jurisdiction**

The Supreme Court has addressed the limits and requirements for general jurisdiction in a series of recent decisions. In these cases, the Court explained that “the paradigm forum for the exercise of general jurisdiction” over a corporation is one in which the corporation is (a) incorporated or (b) has its principal place of business. *Goodyear*, 564 U.S. at 924; see also *Daimler*, 134 S. Ct. at 760. However, there are "exceptional circumstances" where general jurisdiction can be established in a forum state that differs from the corporation's place of incorporation or principal place of business. In these rare instances, jurisdiction may be found where the entity's connections to the forum are “so substantial and of such a nature as to render the corporation at home in that State.” *Tyrrell*, 137 S. Ct. at 1558 (quoting *Daimler*, 134 S. Ct. at 761,
n.19). Such exceptional circumstances have been found where the corporation conducts its management activities within the forum, such as distributing salaries, holding board meetings, and authorizing purchases. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

**B. Specific Jurisdiction**

Specific jurisdiction derives from “the relationship among the defendant, the forum, and the litigation.” *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (internal citation and quotations omitted). “For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.* at 1122. “In other words, 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 and is therefore subject to the State’s regulation.” *Bristol-Myers*, 137 S. Ct. at 1780. For specific jurisdiction to attach, “even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.” *Goodyear*, 564 U.S. at 930, n.6.

In *Bristol-Myers*, the Supreme Court was asked to evaluate whether California had specific jurisdiction over a class action that asserted state-law claims for injuries allegedly caused by the Bristol-Myers drug, Plavix. The affected plaintiffs did not reside, were not prescribed Plavix, did not purchase Plavix, did not ingest Plavix, and were not injured by Plavix in California. Bristol-Myers sold the medication in California and engaged in substantial business activities there, including maintaining five research and laboratory facilities which employed approximately 160 employees, a small state-government advocacy office in Sacramento, and about 250 sales representatives in California. However, Bristol-Myers “did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in [California].” *Bristol-Myers*, 137 S. Ct. at 1775. The facts confirmed that the plaintiffs' products
liability claims related to the alleged defects in the warnings, design, and manufacture of Plavix did not arise from Bristol-Myers's business activities conducted in, or directed from, California. The Court therefore determined that the California court did not have specific jurisdiction over the plaintiffs' claims because there was no “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.” Id. at 1781.

II. Critical Factors When Considering a Personal Jurisdiction Challenge

Prevailing on a personal jurisdiction challenge likely will not end the litigation for the moving defendant unless the claims are barred for some other reason; instead, it merely means that the plaintiff can re-file all or some of the claims in another forum. Accordingly, there are a number of strategic issues to consider when deciding whether to assert or oppose a challenge.

The analysis begins with identifying the state(s) where the plaintiff has a reasonable basis to establish either general or specific jurisdiction. These other forums could include states where the defendants are "at home," that is the state of incorporation or principal place of business. The alternate forums could include states where key events occurred that gave rise to plaintiffs' claims, e.g., where the plaintiff purchased or used the product at issue, or where the defendant developed, created a marketing strategy for, manufactured, labeled, packaged, or worked on the regulatory approval for the product. Bristol-Myers, 137 S. Ct. at 1775. Armed with a map that plots plaintiff's potential alternative forums, counsel must conduct a comparative analysis of the potential benefits and pitfalls posed by litigating the plaintiff's particular claims under each state's laws. The critical inquiries include:
A. **Does the Alternative Forum's Law Favor Your Client?**

Counsel must evaluate the available claims and defenses under the alternative forum's law as well as its standards for deciding dispositive motions. For example, a manufacturer defending a products liability claim with strong evidence that its product conformed with the state-of-the-art at the time of manufacture will fare better in jurisdictions like New York, which recognizes this defense, rather than New Jersey, where the state-of-the-art defense has been rejected in failure-to-warn cases involving asbestos exposure claims. *See, e.g., Magadan v. Interlake Packaging Corp.*, 845 N.Y.S.2d 443 (App. Div. 2d Dept. 2007); *see also Fischer v. Johns-Manville Corp.*, 103 N.J. 643 (1986).

Practitioners defending a toxic tort case based on weak exposure proofs might prefer to litigate and move for summary judgment in a jurisdiction like New Jersey, where the plaintiff must prove that the alleged exposure was a substantial factor in causing the plaintiff's disease, as opposed to California, where the plaintiff must prove that the alleged exposure was a substantial factor *in increasing the risk* of the exposure-related injury, or New York, where the moving defendant has the burden to demonstrate that the alleged exposure could not have contributed to the causation of the plaintiff's injury. *See Sholtis v. Am. Cyanamid Co.*, 238 N.J. Super. 8 (App. Div. 1989); *see also Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal. 1997); *Koulermos v. A.O. Smith Water Prods.*, 27 N.Y.S.3d 157 (App. Dev. 1st Dept. 2016).

Layered on top of these issues are those involving choice-of-law principles and whether the relevant substantive or procedural law principles are critical to the ultimate decisions in the case or whether certain law will apply, regardless of the ultimate jurisdiction/venue of the case.
B. Does Your Client Prefer to be in a Frye or Daubert Jurisdiction?

Defense counsel also must compare the original forum's evidentiary standards versus those applied by the alternative jurisdictions. Critical to products liability and toxic tort cases is whether the forum state applies the Daubert or Frye or a hybrid test to gauge the admissibility of expert testimony. The Frye standard requires trial judges to admit expert evidence that comports with "generally accepted" knowledge within the relevant scientific community. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Thus, expert evidence that comports with a "generally accepted" principle but is derived from an otherwise weak foundation or methodology might be admitted in a Frye jurisdiction. States like Illinois and Kansas restrict the application of their versions of Frye to scientific testimony, but not necessarily medical testimony. *See Warstalski v. JSB Constr. & Consulting Co.*, 892 N.E.2d 122 (Ill. App. 2008); *State v. McHenry*, 136 P.3d 964 (Kan. App. 2006).

Conversely, trial judges in Daubert-like jurisdictions must assess the reliability of expert evidence. *Daubert v. Merrell Dow. Pharms., Inc.*, 509 U.S. 579 (1993). The Daubert standard evaluates the admissibility of expert testimony on the basis of four factors: (1) whether such evidence was generally accepted by the relevant scientific community; (2) whether the methodology was published and subject to peer review; (3) whether the methodology has a known or potential rate of error; and (4) whether the results are testable. Legal pundits acknowledge the stated rigors of the Daubert standard, while worrying that causation theories based on "junk science" can survive exclusion by merely claiming adherence to a legitimate methodology. These concerns often turn on whether the trial judges shy away from the required reliability assessment under Daubert and forego evaluating the basis and methodology underlying an expert opinion for fear of sliding into an impermissible credibility assessment of the challenged expert evidence.
Because the gatekeeping role can be carried out differently on a state-by-state basis – and possibly even on a courthouse by courthouse basis – practitioners must dig into recent decisions to determine how the relevant judges discharge their gatekeeping duties when faced with the type of expert proofs anticipated in their cases.

C. Will Your Client's Potential Exposure Be Impacted in the Alternative Forum?


D. Will Your Client Gain Access to Federal Court?

The alternative forums also might create complete diversity among the parties and provide an opportunity for removal to federal court. Consider whether the alternative forum might be where key events gave rise to the claim – e.g., the state where the plaintiff alleges product exposure – which often differs from both the plaintiffs' home state and the state where the defendant was either incorporated or has its principal place of business. For one reason or another, a party may prefer federal court, particularly where there is concern about a hometown advantage. Federal courts have been known to follow more stringent pleading requirements, utilize more uniformly applied procedural and evidence rules, draw from larger jury pools, and be less influenced by local factors or issues. In certain jurisdictions, having federal judges who are appointed rather than elected may provide the parties with more confidence in the process. A federal court venue will also assure that the Daubert standard will govern the admissibility of expert-related and novel scientific evidence.

E. Will Joint and Several Liability Apply?

In cases involving multiple defendants, it is important to evaluate the joint and several liability laws in the potential forum states, which impacts the extent to which a party is expected to bear the risk that a plaintiff will be unable to recover damages from an insolvent party. This analysis should include an evaluation of how settled parties are treated at trial. Some jurisdictions use a pro tanto approach in which a non-settling defendant's liability is reduced by the amount
paid by a settling defendant. Others use a pro rata approach where liability is distributed equally among liable defendants, regardless of fault. In some pro-rata jurisdictions, like Massachusetts, settled parties do not appear on the verdict sheet and the liable defendants may be entitled to a set-off for any settlements, making these jurisdictions particularly unattractive for cases involving a likely allocation of liability among several defendants. Other jurisdictions, like New Jersey, use a modified pro rata approach where a jury apportions liability among defendants, including settled parties and bankrupt entities, based on each party's relative degree of fault.

F. Will Your Client Be The Only Defendant at Trial and on the Verdict Sheet?

Allocation becomes critically important where a successful personal jurisdiction motion leaves a party defending the case in a new forum while a parallel action continues in the original jurisdiction. Counsel should consider the potential downside of a client standing as the only defendant at trial or on the verdict sheet if no other defendants are subject to jurisdiction in the refiled or transferred action. The jurisdictional arguments can be used as a sword in certain settings and a shield in others. New York's civil procedure rules provide that a defendant may seek an apportionment of fault to nonparties in an action, but a recent decision barred this practice if the plaintiff “proves that with due diligence he or she was unable to obtain jurisdiction over” the nonparty tortfeasor in the action. See C.P.L.R. § 1601; Artibee v. Home Place Corp., 28 N.Y.3d 739 (2017).

Other jurisdictions, like New Jersey, permit juries to allocate fault to a nonparty that settled in a separate but concurrent tort action arising out of the same injury and events. See Carter by Carter v. Univ. of Med. and Dentistry of N.J. – Rutgers Med. Sch., 854 F. Supp. 310 (D.N.J. 1994). New Jersey does not require the defendant to implead the nonparty, provided that the plaintiff had more than "last minute" notice that such an allocation would be sought. Id.; see also Kranz v.
In such situations, defendants would be wise to utilize the first pleading or discovery responses to notify all parties of the identities of any non-parties against whom an allocation will be sought.

Jurisdictions such as Indiana and Arizona have comparative fault statutes that specifically permit defendants to assert a "nonparty" defense so that the defendant can seek an allocation of fault against a nonparty without resorting to impleader. See, e.g., Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 911 (Ind. 2001); Ariz. Rev. Stat. §§ 12–2501 to 12–2509; Larsen v. Nissan Motor Corp., 194 Ariz. 142, 978 P.2d 119 (Ct. App. 1998). Similar to the New Jersey cases, these statutory schemes require the defendant to disclose of the identity of all nonparties against whom an allocation is sought within a particular time frame. See id.

G. Is the Venue Favorable to Your Client?

The proverbial caution "Be careful what you wish for" is no more relevant than with personal jurisdiction challenges that might cause a case to move from one plaintiff-friendly jurisdiction to another even less hospitable place. Imagine the conversation scheduled to explain justification for the lawyer time and expense to achieve such a result. Practitioners would be wise to understand and communicate the risks associated with potential alternative forums and obtain informed consent from the client before a jurisdictional challenge is lodged or waived.

H. What Is the Deadline for Asserting a Personal Jurisdiction Challenge?

The process and deadlines for asserting personal jurisdiction challenges vary significantly on a state-by-state basis. For instance, in Pennsylvania, within 20 days of service of the complaint, defendants must file preliminary objections outlining the salient facts concerning the lack of personal jurisdiction, while in New Jersey, defendants are afforded a longer time period to act and only need to move to dismiss within 90 days of filing the Answer. See 231 Pa. Code Rules 1017,
1026 and 1028; see also New Jersey Rule of Court 4:6-3. Failing to act within the window can forfeit the opportunity to escape an undesirable jurisdiction. With this in mind, the potential outcomes and client goals must be researched and factored into the decision-making process. On a simultaneous and parallel track, counsel must also work with the client to compile all of the important information necessary to demonstrate that there is neither general jurisdiction over the company in that state nor specific jurisdiction over the plaintiff's claim.

III. **Laying the Groundwork for A Successful Personal Jurisdiction Challenge**

A successful personal jurisdiction challenge must be made by motion or application accompanied by a supporting affidavit signed by a representative who is familiar with the company's current or historic contact with the particular state and those activities that are specific and relevant to the plaintiff's claims. The substance of the affidavit must satisfy the mandates of *Daimler* and *Bristol-Myers* and demonstrate that the entity (1) is not "at home" in the forum; and (2) conducts no business activities in the forum that give rise to the plaintiff's claims. The affiant might be deposed, and so his/her knowledge and presentation as a witness must be considered.

A. **Defeating General Jurisdiction**

To defeat general jurisdiction, the affidavit must identify the entity's state of incorporation and the location of the entity's principal place of business, which is typically defined as "the place where a corporation's officers direct, control and coordinate the corporation's activities … And in practice it should normally be the place where the corporation maintains its headquarters …" *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). Under the guidance of *Daimler* and *Perkins*, the affiant should attest that the entity does not hold board meetings, shareholder meetings or other management meetings in the jurisdiction and that the entity does not maintain bank accounts there, and if it does, that the entity does not pay salaries or make purchases from the jurisdiction.
Clients should be aware that plaintiffs often oppose jurisdictional challenges by arguing that a corporate defendant consented to general jurisdiction by registering to do business in the forum state. Numerous courts have rejected this argument and confirmed that mere corporate registration in a state is insufficient to impose general jurisdiction. See Dutch Run-Mays Draft, LLC v. Wolf Block, LLP, 450 N.J. Super. 590 (App. Div. 2017) (a plaintiff must show more than that the defendant engaged in some business or complied with corporate registration requirements of the forum); Genuine Parts Co. v. Cepec, 137 A.3d 123, 137 (Del. 2016) (“[Daimler] made clear that it is inconsistent with principles of due process for a corporation to be subject to general jurisdiction in every place it does business.”); Chatwal Hotels & Resorts LLC v. Dollywood Co., 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) (“After Daimler, with the Second Circuit cautioning against adopting ‘an overly expansive view of general jurisdiction,’ the mere fact of [defendant’s] being registered to do business [in New York] is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.”) (quoting Gucci Am. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014)); Magill v. Ford Motor Co., 379 P.3d 1033, 1039 (Colo. 2016) (despite Ford’s extensive activities in Colorado, “Nothing about Ford’s contacts with Colorado” including maintaining a registered agent, “suggest that it is ‘at home’ here”); State ex rel. Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41 (Mo. 2017); First Cmty. Bank, N.A. v. First Tenn. Bank, N.A., 489 S.W.3d 369 (Tenn. 2015); Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,-- N.W.2d --, No. 2015-AP-1493, 2017 WL 2824607 (Wis. June 30, 2017); Wal-Mart Stores, Inc. v. LeMaire, 395 P.3d 1116 (Ariz. App. Div. 2017); Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016).

At least one district court and one state court have held that registering to do business does confer general personal jurisdiction. Bors v. Johnson & Johnson, 208 F.Supp. 3d 648 (E.D. Pa.

B. Defeating Specific Jurisdiction

Defeating specific jurisdiction under Bristol-Myers requires the defendant to establish that its business activities had no relationship to the plaintiff's claims. In products liability actions, the defendant must establish that the plaintiff neither purchased or used the identified product in the forum. The defendant must next confirm that it did not develop, manufacture, package, label or engage in direct marketing for the identified product in the forum, thereby establishing that it conducted no activities in the forum that would give rise to the plaintiff's claims that the product is defective in design, manufacture or warnings. This process is significantly more complicated in multi-defendant toxic tort claims where plaintiffs typically do not identify the specific products
to which they were allegedly exposed at any particular time, but instead allege exposure only to a particular type of product. In response, the defendant should try to develop facts to show that plaintiff’s chosen forum was not where the product type was developed or manufactured, nor was it the forum from which the defendant directed labeling and marketing activities for that alleged product type.

This requires a careful examination of the history of the product from its initial product development phase, even if these events took place before the alleged period of use or exposure. The resulting corporate affidavit will help make an appropriate record and confirm that the forum has no relationship to where the product was designed and formulated, from whom and from where the company purchased the raw materials used to make the product, including any alleged to be defective, where relevant testing of the product took place, where the product was manufactured, where the company performed quality control functions, where the product labels were prepared, designed, manufactured and placed on the product, where the products were packaged, and finally, from and to where the product was ultimately distributed. Even if this investigation excludes the current forum as the place where all of these functions took place, the affidavit should also ideally confirm that no meetings or inspections took place or decisions related to these tasks were made in the forum.

Defendants also should not discount the Bristol-Myers Court’s suggestion that it might have found jurisdiction had Bristol-Myers contracted with its third-party distributor in California to distribute the products used by the plaintiffs. Thus, the investigation ideally should determine whether there were company contracts with any in-state third-parties, and, if so, whether those contracts involved functions related to the development, manufacture, and marketing of the product within the forum. If the defendant contracted with an in-state third-party, then the affidavit
should concisely detail the extent and nature of these contracts, affirm that the third-parties have no managerial or supervisory functions over the defendant, and indisputably confirm that these third-party contracts were unrelated to any products that plaintiffs allege are causally connected to their injuries.

C. **Responding to Jurisdictional Discovery**

While the *Daimler* and *Bristol-Myers* decisions give practitioners new clarity on personal jurisdiction standards, what remains far from clear is whether a court can order a party to engage in limited jurisdictional discovery *before* the court decides the motion. Ideally, any affidavit that accompanies a jurisdictional motion should leave no relevant corporate questions unanswered. However, if this is not possible, and additional information is sought through discovery requests, whether court-sanctioned or not, clients are best served by lodging objections to the discovery that explicitly state that the discovery is improper due to the Court's lack of jurisdiction over the defendant. The objections should state that the defendant preserves its jurisdictional defenses and its responses to discovery or deposition notices do not constitute waiver of any jurisdictional defenses. A motion for a protective order should be considered where the plaintiff seeks discovery or depositions that go beyond the scope of the corporate background deemed relevant to general and specific jurisdiction in *Daimler, Perkins* and *Bristol-Myers*.

IV. **Conclusion**

The *Daimler* and *Bristol-Myers* decisions have combined to define the limits of general and specific jurisdiction and thus fortify – perhaps even restore—the Due Process rights of corporate defendants who are sued in jurisdictions where they are neither at home nor have conducted activities that even remotely gave rise to the plaintiff's claim. Defendants can and should endeavor to exit those jurisdictions where they do not belong, but only after confirming
that the potential alternative forums are less hazardous than plaintiff's chosen forum. Otherwise, counsel and their clients could find themselves jumping out of the frying pan and into an inferno.

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