Chemical &
Toxic Torts:

A Practice Update on Personal Jurisdiction

By Luis Leitzelar

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Personal jurisdiction is a constitutional safeguard meant to protect defendants from being sued in forums in which they do not have sufficient minimum contacts. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Defendants can move to dismiss a case if the forum state lacks personal jurisdiction, which may be either general or specific.

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General Jurisdiction

General jurisdiction (all-purpose jurisdiction) exists when a defendant has such substantial contacts with a forum that it is essentially "at home" in the forum and can be subject to any claim there, irrespective of whether the lawsuit relates to the forum. *See Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 924-25 (2011) (holding that North Carolina state court lacked general jurisdiction over foreign subsidiaries of U.S. tire manufacturer and rejecting North Carolina's stream of commerce analysis to establish general jurisdiction).

Instructed by *Goodyear*, the Supreme Court in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), found that a corporation is typically only "at home" in its "place of incorporation and principal place of business." In a footnote, the Court stated that it could not foreclose the possibility that in an "exceptional" case, "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that state." *Id*. at 139 n.19. The Court held that general jurisdiction was lacking in California despite Daimler's sale of $4.6 billion in the state, noting that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Id*. at 139 n.20.

Three years later, in *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402 (2017), the Supreme Court further narrowed general jurisdiction, rejecting the argument that BNSF could be considered "at home" in Montana because the company had over 2,000 miles of railroad track and more than 2,100 employees in the state. *Id*. at 414. According to the Court, these contacts were not substantial enough for general jurisdiction because they represented only a small portion (less than 6%) of BNSF's total personnel and track mileage in the United States. *Id*. at 406.

The Supreme Court's rulings in *Daimler* and BNSF are of particular significance to defendants in product liability and toxic tort litigation, where hundreds or thousands of plaintiffs can sue the same defendant manufacturer over the same product or tort. Narrowing the venues in which defendants are considered "at home" can critically curtail plaintiffs' efforts to "forum shop" for perceived and actual favorable courts.

In an attempt to erode *Daimler* and *BNSF*, plaintiffs have turned to "consent" arguments to broaden general jurisdiction. For instance, plaintiffs will argue that defendants "consent" to jurisdiction in any state where they register to do business. Generally, courts have held that registration to do business in a state, standing alone, is not a basis for general jurisdiction. *See, e.g., Chen v. Dunkin' Brands, Inc*., 954 F.3d 492, 499 (2d Cir. 2020) (noting that there were "constitutional concerns... including that such a regime could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done no business at all... and that every corporation would be subject to general jurisdiction in every state in which it registered, and Daimler's ruling would be robbed of meaning by a back-door thief"); *Waite v. All Acquisition Corp*., 901 F.3d 1307, 1318-22 (11th Cir. 2018) (registration to do business in Florida was not express or implicit consent to subject corporate defendant in a product liability suit to jurisdiction in the state).

Mallory v. Norfolk Southern

In reaction to the Supreme Court's narrowing of general jurisdiction, courts and state legislatures have sought to expand the consent argument. *See, e.g., Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 652-53 (E.D. Pa. 2016) (holding that "Pennsylvania law imposes a basis for personal jurisdiction over a business if the business qualifies as a foreign corporation in the state" and that "[t]he ruling in Daimler does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania"). In 2021, the Pennsylvania Supreme Court held that the Pennsylvania statute violated the U.S. Supreme Court's general jurisdictional rulings in *Goodyear & Daimler. See Mallory v. Norfolk S. Ry. Co*., 266 A.3d 542, 571 (Pa. 2021) (deeming the state statute "legislatively coerced consent," which violated the defendants' due process and personal jurisdiction rights). The *Mallory* plaintiff, diagnosed with colon cancer, alleged occupational exposures to toxic chemicals while working for Norfolk Southern, a Virginia corporation. Even though he did not allege that any exposures occurred in Pennsylvania, Mallory argued that by registering to do business in Pennsylvania, Norfolk Southern should be subject to general personal jurisdiction in Pennsylvania state court.

Last year, the U.S. Supreme Court granted the *Mallory* plaintiff's writ application to review the Pennsylvania Supreme Court's decision. *See Mallory v. Norfolk S. Ry. Co.*, 142 S. Ct. 2646 (Apr. 25, 2022). The Supreme Court heard oral argument on the *Mallory* case on November 8, 2022. The Court may rule on the issue of whether a company can be sued in a state solely based on the fact that it has registered to do business there. There is precedent to support the assertion of personal jurisdiction. More than a century ago, while still operating under the "territorial approach to personal jurisdiction" espoused in *Pennoyer v. Neff,* 95 U.S. 714 (1878), the Supreme Court held in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co*., 243 U.S. 93 (1917), that such a case could proceed under a consent by registration theory.

In its seminal case of *International Shoe* requiring "minimum contacts," the Court did not overrule *Pennsylvania Fire*, nor did it address the continued viability of the consent by registration theory. The Supreme Court in *Mallory* could ultimately decide that a corporation can be considered to be "at home" at a place other than its principal place of business or incorporation as an "exceptional case" for purposes of *Daimler.* As a textbook example of an "exceptional case," the Court in *Goodyear* and *Daimler* cited *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437, 448 (1952), where it held that where war had forced the foreign corporation's owner to relocate its business temporarily from the Philippines to Ohio, Ohio then became the center of the corporation's activities, which was sufficient to confer Ohio courts with general jurisdiction over the foreign corporation.

As every state in the country has a corporate registration statute, if the court were to uphold Pennsylvania's consent-by-registration theory, it could sound the death knell for the general and specific personal jurisdiction as we know it and open the door for rampant venue and forum shopping. *See, e.g., Chavez v. Bridgestone Ams. Tire Ops., LLC*, 503 P.3d 332, 339

(N.M. 2021) ("consent by registration theory of personal jurisdiction... is a relic of the now-discarded *Pennoyer*... era of personal jurisdiction jurisprudence"); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 132 (Del. 2016) (finding consent by registration unconstitutional and noting that "two recent U.S. Supreme Court decisions, *Goodyear and Daimler*, made a major shift in our nation's personal jurisdiction jurisprudence—a shift that undermines the key foundation upon which prior federal cases like [*Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 308 U.S. 165, 170, 175 (1939)] and *Pennsylvania Fire* relied").

Given the Supreme Court's contraction of specific jurisdiction, we should expect product liability plaintiffs to continue to rely on the "stream of commerce" theory.

Specific Jurisdiction

Specific jurisdiction (case- linked or conduct- linked jurisdiction) can be invoked even when a defendant has few contacts with the forum, as long as the claim arises directly out of those contacts. To exercise personal jurisdiction, a court must find (1) the defendant purposely availed itself of the privileges of conducting activities within the forum; (2) the plaintiff's claim "arises out of or relates to" the defendant's conduct in the forum state; and (3) the exercise of jurisdiction must be reasonable under the circumstances. *See Walden v. Fiore*, 571 U.S. 277, 284-85 (2014).

Bristol Myers Squibb

In 2017, the Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255 (2017), wherein it significantly limited specific jurisdiction in product cases. BristolMyers, a pharmaceutical company, was sued in a product liability lawsuit in California state court by both resident and non-resident plaintiffs. The non-resident plaintiffs comprised eighty percent (80%), or nearly 600 of the 678 plaintiffs, who did not claim to have suffered harm in California. The Court held that specific jurisdiction could be exercised over the claims of the resident plaintiffs who lived, purchased, or were prescribed Plavix in California. However, the non-resident plaintiffs, whose claims had no relation to California, could not piggyback their claims onto those of the California residents to establish specific jurisdiction. Justice Sotomayor dissented from the majority opinions in *BristolMyers* and *BNSF*, specifically noting that the Court was imposing substantial curbs on general jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court unless all the people were injured in the forum state. *Id*. at 269.

BristolMyers has been applied by courts across the country to prevent forum shopping by out-of-state plaintiffs asserting product liability claims. *See, e.g., LG Chem, Ltd. v. Super. Ct. of San Diego Cnty.* (2022) 80 Cal. App. 5th 348, 370, *rev. denied* (Oct. 12, 2022) ("Since Lawhon's product liability claims have no demonstrated connection to LG Chem's sales of 18650 batteries in California, specific jurisdiction is lacking."); *Miller v. LG Chem, Ltd.*, 281 N.C. App. 531, 540 (2022) (granting motion to dismiss because "'stream of commerce' theory of jurisdiction over Defendants violates due process, is contrary to established precedents, and is invalid"); *Wallace v. Yamaha Motors Corp., U.S.A.*, 2022 WL 61430, at *4 (4th Cir. Jan. 6, 2022) ("Wallace offers no facts to connect her specific claims to Yamaha's actions in South Carolina."); *Davis v. Cranfield Aerospace Sols. Ltd.*, 2022 WL 36488, at *8 (D. Idaho Jan. 4, 2022) ("This … is a tort case involving all out -of-state plaintiffs, an out-of-state accident, and an out-of-state defendant. No party alleges any harm suffered in Idaho[.]"); *Sloan v. Gen. Motors LLC,* 2020 WL 1955643, at *4 (N.D. Cal. Apr. 23, 2020) ("[T]he Court followed "the growing weight of authority" that has applied *Bristol-Myers* to federal courts sitting in diversity and concluded that the exercise of pendent personal jurisdiction as to Plaintiff Szep's claims would be improper."); *Gebel v. Ethicon, Inc.*, 2020 WL 888729, at *3 (E.D. Mo. Feb. 24, 2020) (granting motion to dismiss because non-Missouri plaintiffs did not allege facts connecting the product to their contacts with Missouri); *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, 358 F. Supp. 3d 418, 423-424 (E.D. Pa. Jan. 7, 2019) (defendant's in-state activities not involving the alleged injury-causing product were not jurisdictional contacts).

In class action cases, however, courts are split on the application of *BristolMyers* to putative class members' claims. Certain courts have found *BristolMyers* requires dismissal of non-resident putative class members' claims that have no connection to the forum state. *See, e.g., Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1037 (S.D. Cal. 2020) ("[s]ome courts, including this one, have found that *BristolMyers* applies to the claims of non-resident named plaintiffs in a case involving state-specific classes concerning the same product"); *Chavira v. OS Rest. Servs., LLC*, 2019 WL 4769101, at *6 (D. Mass. Sept. 30, 2019) (granting motion to strike non-resident class action allegations, noting that *BristolMyers* applies to all cases, including class actions). Certain courts have refused to extend *BristolMyers* to the class action context, declining to dismiss the claims of non-resident putative class members. *See, e.g., Partida v. Tristar Prod., Inc.*, 2021 WL 4352374, at *5 (C.D. Cal. Aug. 5, 2021) (noting that the Supreme Court in *BristolMyers* did not address whether its holding extended to the class action context and "… the weight of authority examining this issue[, which] has concluded that BristolMyers does not apply to class actions."); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 297-98 (D.C. Cir. 2020) (holding it is premature to raise issue of personal jurisdiction as to unnamed putative class members claims before a class is certified); *In re Takata Airbag Prod. Liab. Litig.*, 396 F. Supp. 3d 1101, 1134-37 (S.D. Fla. 2019) (denying motion to dismiss claims of non-resident putative class members in MDL where jurisdiction was based on federal question); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443 (7th Cir. 2020) (*BristolMyers* does "not apply to the case of a nationwide class action filed in federal court under a federal

statute"), *cert. denied*, 2021 WL 78484 (U.S. Jan. 11, 2021).

Indeed, courts have noted the fundamental differences between mass joinders and class actions in determining the impact of *Bristol Myers*. *See, e.g., Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 247 n.4 (5th Cir. 2020) (discussing split of authority over application of *Bristol Myers* to class actions brought in federal court); *Rosenberg v. LoanDepot.com LLC*, 435 F. Supp. 3d 308, 326 (D. Mass. 2020) ("A mass tort action is fundamentally distinguishable from a class action. This court joins the large majority of district courts which have held the Bristol Myers case inapplicable to class actions such as the instant [mass tort action]."); *Cabrera v. Bayer Healthcare, LLC*, 2019 WL 1146828, at *7-8 (C.D. Cal. Mar. 6, 2019) (discussing split of authority and holding that "decisions concluding that *Bristol-Myers* does not apply in the class action context are more persuasive").

Given the Supreme Court's contraction of specific jurisdiction, we should expect product liability plaintiffs to continue to rely on the "stream of commerce" theory. Under the Fifth Circuit's stream of commerce approach, the minimum contacts requirement is satisfied if the court "finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state." *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 177 (5th Cir. 2013). Courts have generally held that a defendant's placement of products into the stream of commerce, alone, does not establish jurisdiction, even if that product ultimately causes an alleged injury in the forum. *See, e.g., M.S. v. W. Power Sports, Inc.*, 2021 WL 83393, at *3 (W.D. Pa. Jan. 11, 2021) (applying the "stream of commerce"-plus theory); In *re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 888 F.3d 753, 778-79 (5th Cir. 2018) (noting that this "issue divides the circuits" and taking "Justice Brennan's more expansive view" in *Bristol-Myers* that "awareness that a product will be sold in the forum state suffices to support jurisdiction").

Ford Motor v. Montana

The Supreme Court recently decided the case of *Ford Motor Co. v. Montana Eighth Judicial Dist. Court,* 141 S. Ct. 1017 (2021), where it rejected the defendant's "causation-only" argument, i.e., that the defendant's forum conduct must give rise to the plaintiff's claims to support specific jurisdiction. There, Ford sold allegedly defective cars outside the forum States (Montana and Minnesota), with consumers later selling them to those States' residents. After establishing that Ford did have minimum contacts with either of the forum states, which Ford did not contest, the Supreme Court focused on the second requirement for personal jurisdiction, that the conduct must "arise out of or relate to" the minimum contacts with the forum. Pointing to the "or relate to" portion of the Supreme Court test, the Court rejected Ford's contention that the minimum contacts must have a direct causal relationship to the damages sought by the plaintiffs. An automaker regularly marketing a vehicle in a state, the Court said, has "clear notice" that it will be subject to jurisdiction in the state's courts when the product malfunctions there, regardless of where it was first sold.

The Court in *Ford* did not mention the "stream of commerce" argument advanced by the plaintiffs. But that has not stopped product liability plaintiffs from citing *Ford* while arguing that a manufacturer placing its products in the stream of commerce supports the exercise of specific jurisdiction. *See, e.g., Thurman v. Am. Honda Motor Co., Inc.*, 2022 WL 4292331 (W.D. Mo. Sept. 16, 2022) ("A manufacturer's "'strategic choice of distributors that could reach much of the country [is] evidence of [its] efforts to place its products in the stream of commerce'"); *cf. Lorenzen v. Toshiba Am. Info. Sys., Inc.*, 569 F. Supp. 3d 109 (D.R.I. 2021) (stating *Ford* "expanded the constitutional reach of personal jurisdiction" in cases where a company serves a market for a state and product causes injury to a resident of that state).

Imputing Personal Jurisdiction

In *Stein v. E.I. du Pont de Nemours & Co.*, 879 S.E.2d 537 (N.C. Nov. 4, 2022), the North Carolina Supreme Court recently expanded the concept of personal jurisdiction in the area of toxic torts and product liability. Prefacing the opinion with the observation that "personal jurisdiction is a shield—not a sword" and that "it is not a tool to be weaponized against claimants by enabling defendants to evade accountability for potentially tortious conduct," the *Stein* court allowed a predecessor's personal jurisdiction to be imputed to its corporate successors to establish personal jurisdiction even where the successor itself had no direct contact with the forum state.

Here, E.I. DuPont de Nemours and Company (Old DuPont) underwent a significant corporate reorganization and transferred millions of dollars in assets to out-of-state companies, creating substantial losses for itself. In 2020, the State of North Carolina brought an action against Old DuPont and its corporate successors, including Chemours, New DuPont, and Corteva, alleging that Old DuPont knowingly operated a plant in Fayetteville, North Carolina that released per- and polyfluoroalkyl substances (PFAS) into the environment for over 40 years.

New DuPont and Corteva moved to dismiss the State's action, arguing personal jurisdiction could not be exercised over them because they were Delaware holding companies who did not conduct business in North Carolina. The trial court held that jurisdiction was established by imputing Old DuPont's liabilities to Corteva and New DuPont, and New DuPont appealed.

The parties agreed that Corteva and New DuPont were not subject to general jurisdiction in North Carolina state court. The question then was whether they were subject to specific jurisdiction. The court ruled that North Carolina law permitted a predecessor company's liabilities to be imputed to its corporate successors, making jurisdiction over out-of-state successors proper under the Due Process Clause. Specifically, the *Stein* court reasoned that because Corteva and New DuPont expressly assumed Old DuPont's PFAS-related liabilities via an April 2019 separation agreement and a June 2019 letter agreement, Corteva and New DuPont's conduct and connection with the forum state were such that they should have reasonably anticipated being sued in North Carolina state court.

The court declined to recognize mergers as the sole circumstance in which successor jurisdiction was appropriate. If that

were the case, companies could avoid liability for tortious conduct simply by forming a new, out-of-state company instead of effectuating a merger. A company cannot expressly assume liabilities from its predecessor, fail to limit those liabilities geographically, and then disclaim liability based on the notion that it did not expect to be brought to court in a particular forum. Moreover, when companies undergo complicated transactions like that between Old DuPont, Corteva, and New DuPont, they conduct extensive due diligence, and the new parties either were aware of, or should have been aware of, the liabilities they might have acquired.

The North Carolina Supreme Court cited federal court case law holding that the Supreme Court's pronouncement that the due process requirements of *International Shoe* "must be met as to each defendant over whom a state court exercises jurisdiction" does not preclude us from imputing the jurisdictional contacts of a predecessor corporation to its successor corporation or individual alter ego. *See Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 653 (5th Cir. 2002); *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 454 (4th Cir. 1990) (""The great weight of persuasive authority permits imputation of a predecessor's actions upon its successor whenever forum law would hold the successor liable for its predecessor's actions.'" (quoting *Simmers v. Am. Cyanamid Corp.*, 576 A.2d 376, 385 (Pa. 1990))).

Courts are increasingly imputing personal jurisdiction over out-of-state parent and affiliated companies using successor liability and alter ego principles. *See, e.g., Ewalt v. Gatehouse Media Ohio Holdings II, Inc.*, 2021 WL 825978, at *6 (S.D. Ohio Mar. 4, 2021) ("An out-of-state parent exerting a large degree of control over its in-state subsidiary's corporate activities risks being hauled into the forum state.") (citing *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1069 n. 17 (9th Cir. 2000)) ("Although jurisdiction over a subsidiary does not automatically provide jurisdiction over a parent... where the parent totally controls the actions of the subsidiary so that the subsidiary is the mere alter ego of the parent, jurisdiction is appropriate over the parent as well."); *Verizon Trademark Servs., LLC v. Prods., Inc.*, 810 F. Supp. 2d 1321, 1329 (M.D. Fla. 2011) (noting that while personal jurisdiction over a Florida parent corporation will generally not equate to personal jurisdiction over a subsidiary, "[a]n exception arises when the subsidiary is merely the alter ego or mere instrumentality of the Florida parent corporation, over which the Court does have personal jurisdiction" but that "[t]he corporate veil will not be penetrated... unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them."); *FTC - Forward Threat Control, LLC v. Dominion Harbor Enter., LLC*, 2020 WL 5545156, at *7 (N.D. Cal. Sept. 16, 2020) ("The standard for personal jurisdiction under an alter ego theory is lower than the standard for liability under an alter ego theory.").

Conclusion

Consent, stream of commerce, and imputation arguments threaten to broaden personal jurisdiction and enable forum shopping by plaintiffs seeking to make defendants answerable in states and forums beyond where they are at home or transact business. Defendants should keep a close eye on court decisions that could significantly impact the forums available in products and toxic tort cases.