

PRODUCT LIABILITY

JULY 2020

IN THIS ISSUE

IADC members representing product liability defendants know the importance of promptly examining whether their clients are subject to either general personal jurisdiction or specific personal jurisdiction of the forum court. A court with general personal jurisdiction over a defendant can hear any and all claims against that defendant. After the United States Supreme Court's decisions in Daimler AG v. Bauman, 134 S. Ct. 746 (2014) and BSNF Railway Co. v. Tyrell, 137 S. Ct. 1549 (2017), it seems clear that absent exceptional circumstances, a court can exercise general personal jurisdiction over a defendant, regardless of the type of claim asserted, only in a forum where a defendant is incorporated or has its principal place of business. Assessing whether a court can exercise specific personal jurisdiction over an out-of-state defendant is more challenging.

Alert to Product Liability Defense Counsel: United States Supreme Court Set to Again Address Specific Personal Jurisdiction

ABOUT THE AUTHOR



Joseph J. Stroble is a litigation partner at Bradley Arant Boult Cummings. Jay represents a broad spectrum of clients on regional, national, and international engagements in the areas of pharmaceutical and medical device litigation, product liability litigation, agricultural biotechnology litigation, commercial litigation, and professional malpractice defense. Throughout the United States, Europe, and Asia, Jay has prepared and defended key fact and expert witnesses during deposition, trial, and arbitration proceedings. Jay is a practice leader of Bradley's Food and Agriculture Litigation and Regulatory practice group. He has extensive experience working with other leading law firms while serving on national trial teams, as well as serving as national discovery counsel and national coordinating counsel in multidistrict litigation, mass tort litigation, and individual actions. He is based in Jackson, Mississippi and he can be reached at jstroble@bradley.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Daniel Higginbotham
Vice Chair of Newsletters
Thomas Combs & Spann, PLLC
dhigginbotham@tcspllc.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

What Does “Arise Out Of Or Relate To” Mean?

The Supreme Court has held that a court may exercise specific personal jurisdiction over an out-of-state-defendant only when the claims at issue “arise out of or relate to” the defendant’s in-state activities. *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985). But what does “arise out of or relate to” mean? Must the nonresident defendant’s in-state conduct have caused or given rise to the plaintiff’s claims to satisfy specific personal jurisdiction? Or is some less direct connection between the nonresident defendant’s in-state conduct and the plaintiff’s claims sufficient to satisfy specific personal jurisdiction?

The Supreme Court’s Answer To The “Arise Out Of Or Relate To” Question Will Have Significant Consequences

Because lower courts have answered these questions differently, defendants have been unable to determine with certainty what jurisdictions they can expect to have to defend product liability suits. The Supreme Court will soon provide needed guidance to manufacturers and other businesses with interstate operations as to where they are subject to specific personal jurisdiction. In the context of two consolidated automotive product liability cases involving Ford Motor Company (“Ford”) wherein state supreme courts found personal jurisdiction proper over out-of-state Ford even though (a) Ford did not design, manufacture, or sell the subject vehicles in the forum states; and (b) Ford’s contacts with the forum states did not cause the accidents at issue, the Supreme Court is set to address what “arise out of or

relate to” means for purposes of specific personal jurisdiction. Oral argument, originally scheduled for the April Term 2020 but postponed due to the pandemic, is now set for the October Term 2020.

The Supreme Court’s decision should have significant consequences, particularly for manufacturers of products that are distributed nationwide and manufacturers of mobile/movable products that cross state lines. If the Supreme Court were to agree with Ford’s position that there must be a causal link between a defendant’s forum-state conduct and a plaintiff’s claims, then defendants have needed predictability.

However, if the Supreme Court were to affirm the Minnesota and Montana Supreme Courts’ less stringent approaches to specific personal jurisdiction, then manufacturers can expect to have to defend against arguments that they are subject to specific personal jurisdiction in every state where they sell their products or where their products can be found, notwithstanding the lack of a relationship between a specific claim and a manufacturer’s contacts in the forum state.

Not surprisingly, this matter has generated tremendous interest on both sides of the v. The federal government, the United States Chamber of Commerce, the Alliance of Automobile Manufacturers, and the Pharmaceutical Research and Manufacturers of America are but a few of the entities that have filed amicus briefs in support of Ford’s position. Stakeholders filing amicus briefs in support of plaintiffs/respondents include a group of thirty-nine states and the District of

Columbia, The American Association for Justice, and The Center for Auto Safety. The Solicitor General on behalf of the United States requested ten minutes of oral argument time in support of Ford, but the Supreme Court denied the Solicitor General's motion.

The Impact of the Supreme Court's Decision in *Bristol-Myers*

The Supreme Court's holding in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) regarding specific personal jurisdiction may factor prominently in the Supreme Court's decision in the Ford matters. In *Bristol-Myers*, in the context of a pharmaceutical product liability action, the Supreme Court considered whether a California state court could exercise specific personal jurisdiction over out-of-state defendant Bristol-Myers regarding claims made by non-resident plaintiffs who did not allege that they were prescribed the subject medication in California, were injured in California, or were treated in California.

The Supreme Court found that the claims of the non-resident plaintiffs did not arise out of or relate to Bristol-Myers' business activities in California, which included marketing and selling the subject medication in California and having offices and employees in California. The Court therefore held that the California state court did not have specific personal jurisdiction over Bristol-Myers.

Both the Minnesota and Montana Supreme Courts rejected Ford's argument that *Bristol-Myers* required that a non-resident defendant's in-state activities cause the

plaintiff's injuries to establish specific personal jurisdiction. As discussed below, the Minnesota Supreme Court even found that *Bristol-Myers* established that a plaintiff's contacts with the forum state were relevant to whether a court could exercise specific personal jurisdiction over a non-resident defendant.

The Minnesota Case, *Ford v. Bandemer*, 931 N.W.2d 744

The Minnesota case involved a Minnesota resident who was injured in 2015 on a Minnesota road after a 1994 Ford Crown Victoria in which he was a passenger rear-ended a county snow plow. Plaintiff was treated for his injuries in Minnesota by Minnesota doctors. Plaintiff sued Ford in Minnesota state court under theories of product liability, negligence, and breach of warranty, alleging that he suffered severe brain injuries when the Crown Victoria airbag failing to deploy.

The subject Crown Victoria was not designed, manufactured, or originally sold in Minnesota. Ford did not contest that its contacts in Minnesota included sales of other 1994 Crown Victorias in Minnesota, the sell of 200,000 other Ford vehicles to Minnesota dealerships from 2013-2015, direct mail advertising to Minnesota residents and national advertising campaigns that reached the Minnesota market, and Ford's collection of data from its Minnesota dealerships for use in redesign and repairs. Ford moved to dismiss for lack of personal jurisdiction, arguing that the Supreme Court's decision in *Bristol-Myers* required a more direction connection among its actions, the forum, and the litigation.

Both the original court and Minnesota's intermediate appellate court found that the exercise of jurisdiction was proper. The lower courts found that Ford's marketing in Minnesota constituted a substantial connection among Ford, the forum, and the litigation, such that Ford purposefully availed itself of the forum, and Ford's Minnesota contacts sufficiently related to plaintiff's cause of action. The Minnesota Supreme Court upheld the rulings of the lower courts, rejecting Ford's argument that *Bristol-Myers* required application of a causation standard.

The Minnesota Supreme Court reasoned that plaintiff's claims were about the design of the Crown Victoria, and because Ford collected data through Minnesota dealerships on how its vehicles performed in part to inform decisions on design improvements, Ford's in-state activities were substantially connected to plaintiff's claims. Significantly, the Minnesota Supreme Court also found that the Supreme Court's discussion in *Bristol-Myers* of the non-resident plaintiffs' contacts to California meant that a plaintiff's contacts with the forum state were relevant to whether a court could exercise specific personal jurisdiction over a non-resident defendant. The Minnesota Supreme Court found that plaintiff's Minnesota resident status added to the substance of the connection among Ford, the forum, and plaintiff's claims.

The Montana Case, *Ford v. Montana Eighth Judicial District Court*, 443 P.3d 407

The Montana case involved a Montana resident who died from injuries sustained

while driving a 1996 Ford Explorer on a Montana interstate. The Explorer was not designed or manufactured in Montana and was first sold to a dealer in Washington. Over ten years later, the Explorer was registered in Montana.

Decedent's personal representative brought a wrongful death action against Ford, alleging claims for design defect and failure to warn. Ford moved to dismiss the case for lack of specific personal jurisdiction, arguing that there was no link between Ford's Montana contacts and plaintiff's claims. The district court denied Ford's motion, and Ford appealed to the Montana Supreme Court.

The Montana Supreme Court applied a three-part analysis in assessing whether the exercise of personal jurisdiction over Ford comported with due process: (1) whether Ford purposefully availed itself of the privilege of conducting business in Montana; (2) whether plaintiff's claims arose out of or related to Ford's Montana activities; and (3) whether the exercise of personal jurisdiction was reasonable. The Montana Supreme Court applied a "stream of commerce plus" theory in assessing whether Ford availed itself of the privilege of conducting business in Montana. The Montana Supreme Court found that Ford, by delivering vehicles and parts into the stream of commerce with the expectation that Montana consumers would purchase them, combined with Ford advertising in Montana and selling and repairing vehicles in Montana, purposefully availed itself of the privileges of conducting business in Montana.

In determining whether decedent's claims arose out of or related to Ford's Montana

activities, the Montana Supreme Court found that “arise out of relate to” did not require that Ford’s Montana activities directly connect to or cause plaintiff’s claims. Rather, the Montana Supreme Court held that plaintiff’s claims “related to” Ford’s Montana activities “if a nexus existed between the Explore and Ford’s Montana activities and if Ford could have reasonably foresee the Explore being used in Montana.” The Montana Supreme Court held that such a nexus did exist, because Ford sold, maintained, and repaired vehicles in Montana, and could have reasonably foreseen the Explorer being used in Montana.

The Montana Supreme Court rejected Ford’s argument that under *Bristol-Myers* plaintiff’s claims did not arise out of relate to Ford’s Montana activities. The Montana Supreme Court held that *Bristol-Myers* did not so limit personal jurisdiction and did not impact its analysis, because *Bristol-Myers* involved out-of state-injuries, while decedent was injured while driving the Explorer in Montana. Finally, the Montana Supreme Court found that Montana’s exercise of jurisdiction over Ford was reasonable, as Montana had an interest in adjudicating disputes involving Montana residents occurring on Montana roadways, the forum was convenient, and Ford’s contacts with Montana were extensive.

The Causal Requirement Is Superior To An Non-Causal Test

The requirement that a nonresident defendant’s in-state conduct must cause or give rise to a plaintiff’s claims in order for a state court to exercise specific personal

jurisdiction over a non-resident defendant is consistent with Supreme Court precedent.

Supreme Court decisions such as *Burger King* make clear that it’s the defendant’s contacts with the forum state, not the plaintiff’s contacts with the forum state, that must form the basis for jurisdiction. Recall that the Minnesota Supreme Court considered the plaintiff’s contacts with the forum state in finding jurisdiction over Ford proper.

Bristol-Myers and other Supreme Court decisions support the position that the defendant’s in-state conduct must be suit-related or give rise to the claims in the suit, and that in-state conduct involving third-parties that is similar to the conduct the plaintiff complains of is not sufficient to establish jurisdiction. Both the Minnesota and Montana courts employed the type of sliding scale, loose approach rejected in *Bristol-Myers*.

Significantly, the causal requirement promotes fairness by providing warning to defendants as to what acts subject them to suit and where, thereby allowing defendants to structure their conduct accordingly. The causal requirement also serves to efficiently allocate jurisdiction between state and federal courts.

Conclusion

After *Daimler*, a defendant could reasonably conclude that it would be subject to general personal jurisdiction only where it is incorporated or where it has its principal place of business. In *Bristol-Myers*, the Supreme Court seemingly provided the same sort of clarity with respect to specific personal jurisdiction. However, lower courts have not uniformly applied the “arising out



of or related to” standard. Therefore this Fall the Supreme Court is set to provide additional guidance. The Supreme Court’s decision could significantly impact manufacturers and any business with interstate operations.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

JUNE 2020

[Using Bankruptcy to Your Client's Advantage](#)

Whitney Frazier Watt and Caroline C. Phelps

MAY 2020

[Why isn't Amazon Treated as a Prime Company in France?](#)

Sylvie Gallage-Alwis

APRIL 2020

[Pending Overhaul of the Class Proceedings Landscape in Canada's Most Populous Province](#)

Cherl Woodin and Katrina Crocker

MARCH 2020

[Defeating Remand: Proving Fraudulent Joinder of a Non-Diverse Distributor](#)

Robin Shah and Kate Mullaley

FEBRUARY 2020

[Updates on E-Cigarette Litigation and Practitioner Takeaways Related to Social Media Marketing](#)

Shayna S. Cook and Symone D. Shinton

JANUARY 2020

[Rule 23\(b\)\(3\) Predominance in Benefit-of-the-Bargain Actions](#)

Kelly Luther and Jacob Abrams

DECEMBER 2019

[Is Daubert Broken?](#)

Bill Anderson

NOVEMBER 2019

[Reviving Failure to Warn Defenses in Cases Involving Deceased Prescribing Physicians](#)

Daniel Higginbotham and Brenda A. Sweet

OCTOBER 2019

[E-cigarettes: How the Situation in the US could Give Rise to Litigation in the EU](#)

Sylvie Gallage-Alwis and Guillaume Racle

SEPTEMBER 2019

[An Introduction to Product Liability Regimes in the Asia Pacific Region](#)

Nicole Boehler and David Goh

AUGUST 2019

[Old and New Targets: IARC Releases its 2020-2024 Priority List for Evaluation](#)

Eric G. Lasker and John M. Kalas