Global Commerce, Local Jurisdiction: How the Supreme Court is changing whether and where a defendant can be sued in the United States

by Mark A. Kressel and Jacob M. McIntosh

The constitutional limits on personal jurisdiction continue to be a source of great interest and great change, because the relationship between a court and those summoned before it is fundamental to the legitimacy of every court order, and because the assessment of that relationship changes with technological and economic advances. While the twentieth century saw more expansive interpretations of jurisdiction, in three decisions over the past five years, the United States Supreme Court curtailed the power of courts over out-of-state and international defendants by restricting both general personal jurisdiction (all-purpose jurisdiction) and specific personal jurisdiction (case-specific jurisdiction). These decisions implicitly recognize the rapid growth and increasing societal benefits of interstate and global commerce.

This article explains the Court's recent opinions and their underlying rationale, reviews how lower courts have subsequently responded, and explores some potentially surviving theories that plaintiffs may increasingly rely on going forward to assert personal jurisdiction over nonresident defendants.

The Court's jurisdictional shift

In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), Argentinian plaintiffs sued a German holding company in California, alleging the company's Argentinian subsidiary had committed human rights violations in Argentina. The plaintiffs contended jurisdiction existed in California because the company's American subsidiary did substantial business in California that was vital to the German parent's business. The United States Supreme Court held that the subsidiary's contacts with California were not sufficient to support general jurisdiction over its German parent. Instead, the Constitution permits general jurisdiction only "when [the foreign corporations'] affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* at 127 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Court explained that this is generally only where a company is incorporated or has its principal place of business. *Id.* at 139. Beyond that, it will require an *exceptional* case where a corporation's other operations are "so substantial and of such a

nature as to render the corporation at home in that State." *Id.* at 139 n.19.

In *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), two workers from outside Montana sued a railroad in Montana for injuries that occurred in other states. A divided Montana Supreme Court ruled there was jurisdiction because the railroad was "doing business" in Montana. The court reasoned *Daimler* did not apply because it dealt with a different type of claim against a foreign corporation. The United States Supreme Court reversed, clarifying that *Daimler*'s brightline "at home" standard applies to all assertions of general jurisdiction over out-of-state defendants. And, although the railroad had thousands of employees and miles of railroad track in Montana, the Court made clear that a corporation doing business—even a substantial amount of business—in many states cannot "be deemed at home in all of them." *Id.* at 1559 (quoting *Daimler*, 571 U.S. at 139 n.20).

The Court turned its attention to specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). There, a group of plaintiffs brought a mass tort action against a pharmaceutical company in California over the drug Plavix. Some plaintiffs were California residents injured by the drug in California, but the vast majority were nonresidents injured in other states. The California Supreme Court permitted specific jurisdiction over the nonresidents' claims because they arose from the same defective product and same national marketing scheme as the California claims. The United States Supreme Court again reversed, holding specific jurisdiction exists only where there is a "connection between the forum and the specific claims at issue." *Id.* at 1781. Even though the company had extensive contacts with California, none of those contacts gave rise to the nonresidents' claims. And the Constitution does not permit jurisdiction over out-of-state defendants for out-of-state claims merely because they are similar to claims brought by others that would support specific personal jurisdiction.

Viewed together, these three cases likely reflect a consensus at the Court that the benefits that flow from facilitating the technologically driven growth in interstate and global commerce outweigh the challenges posed to plaintiffs who may have fewer choices of forum for where to bring suit. To be sure, many jurists have taken and will continue to personally take the opposite view, one which is captured by Justice Sotomayor's separate opinions in the Court's recent jurisdiction cases: that if a company (or its related entities) can do business in a forum, it is fair to subject that company to suit in that forum. (See *id.* at 1784 (Sotomayor,

J., dissenting) ("[T]here is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike."); *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part) (suggesting jurisdiction should depend on "whether the benefits a defendant attained in the forum State warranted the burdens associated with general personal jurisdiction"); *Daimler*, 571 U.S. at 151 (Sotomayor, J., concurring) ("When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts."). Justice Sotomayor is animated by the concern that plaintiffs will be unable to hold accountable in forums of their choosing nonresident tortfeasors who have harmed them. (See *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting); *BNSF*, 137 S. Ct. at 1561 (Sotomayor, J., concurring in part and dissenting in part); *Daimler*, 571 U.S. at 158-159 (Sotomayor, J. concurring).) But in all three of these cases, no other justice of the Court joined Justice Sotomayor's opinion. Thus, the remaining justices, who maintain varied judicial philosophies, rejected that view. Instead, the majority have converged on the understanding that society benefits greatly from the free flow of goods and services across state and national borders, and that free flow and its benefits will be reduced if companies fear being sued in every state where they do business for claims unrelated to that business. The majority believe it is sufficient for the purposes of a plaintiff's litigation if it occurs where the claim arose or on the corporation's home turf.

The Court's analysis thus suggests a new rule for analyzing assertions of personal jurisdiction: if a plaintiff asserts a theory of jurisdiction in the plaintiff's chosen state that would also result in jurisdiction in all fifty states, that theory is probably unconstitutional. *See Daimler*, 571 U.S. at 139 (rejecting "exorbitant exercises" of jurisdiction that provide "global reach" and would "presumably be available in every other State in which [defendant's] sales are sizable"); *id*. at 136 (rejecting Ninth Circuit's "agency" test because, as formulated, "the [test] stacks the deck, for it will always yield a pro-jurisdiction answer"); *Tyrell v. BNSF Ry. Co.*, 373 P.3d 1, 9 (Mont. 2016) (McKinnon, J., dissenting) ("[T]he United States Supreme Court's conclusion [was] that permitting general jurisdiction wherever a nonresident defendant is engaging in a substantial, continuous, and systematic course of business would deprive the defendant due process of law."); *Genuine Parts Co. v. Cepec* (Del. 2016) 137 A.3d 123, 143 ("If all of our sister states were to exercise general jurisdiction over our many corporate citizens, who often as a practical

matter must operate in all fifty states and worldwide to compete, that would be inefficient and reduce legal certainty for businesses. Human experience shows that 'grasping' behavior by one, can lead to grasping behavior by everyone, to the collective detriment of the common good. It is one thing for every state to be able to exercise personal jurisdiction in situations when corporations face causes of action arising out of specific contacts in those states; it is another for every major corporation to be subject to the general jurisdiction of all fifty states.").

These decisions also demonstrate the Court's focal shift from practical fairness to the *parties* to more abstract constitutional and societal concerns. While earlier decisions were likelier to assert jurisdiction where the marginal burden on the defendant of having to litigate in the plaintiff's chosen state was minimal—such as for corporations that already did substantial business in the forum state even if that business was unrelated to the plaintiff's claims—the Supreme Court's recent cases limit jurisdiction based on notions of constitutional due process, international comity, and federalism limits on the power of states to decide claims properly brought elsewhere. *See Bristol-Myers*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting) ("The majority's animating concern, in the end, appears to be federalism. . . .").

The lower courts respond

The impact of these decisions is readily apparent in state and federal appellate courts. For the most part, courts have recognized the import of the Supreme Court's new decisions and have applied them broadly.

For instance, courts have found *Daimler*'s brightline "at home" test for general jurisdiction hard to satisfy in a forum that is not a corporation's place of incorporation or principal place of business, even where that corporation generates substantial revenue or employs hundreds of workers there. The courts for the most part have resisted plaintiff's arguments that they bring the truly "exceptional case" where general jurisdiction is warranted elsewhere. *See, e.g., Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627-30 (2d Cir. 2016) (declining to find corporation "at home" in Connecticut despite generating $160 million in revenue there); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 47 (Mo. 2017) (declining to find corporation "at home" in Missouri despite generating $232 million in revenue and employing almost 600 workers there).

Further, lower courts have indicated that the Court's decisions implicitly undermine several other, long-held theories of jurisdiction:

Stream of commerce: This theory permitted specific jurisdiction where a company places its products into the marketplace with the mere expectation they might be sold within the forum state. Multiple courts have noted "stream of commerce" is at odds with *Bristol-Myers*, which requires that the defendant have affirmatively reached out to the forum state in ways that substantially relate to the plaintiff's claims. *See e.g.*, *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 780 (3d Cir. 2018); *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824, 831-34 (Okla. 2018) (noting that because of *Bristol-Myers* "'stream of commerce' is no longer the analysis this Court will use to determine specific personal jurisdiction"); *see also A.T. Through Travis v. Hahn*, 341 F. Supp. 3d 1031, 1037 (E.D. Mo. 2018) (noting *Bristol-Myers* "appears to have drastically changed the specific jurisdiction landscape to the exclusion of the stream-of-commerce theory"). *Bristol-Myers* also stated that the mere fact that an out-of-state defendant contracts with an in-state distributor is not enough to establish jurisdiction. 137 S. Ct. at 1783.

Sliding-scale jurisdiction: Under this theory for specific jurisdiction, the more extensive and wide-ranging a defendant's contacts were with the forum, the less a connection had to be shown between those contacts and the plaintiff's claim. The Supreme Court rejected this theory in *Bristol-Myers* as resembling "a loose and spurious form of general jurisdiction." 137 S. Ct. at 1781. Multiple courts have since struck down or called into question similar tests used in their respective jurisdictions. *Montgomery*, 414 P.3d at 833 (noting that *Bristol-Myers* renders a sliding-scale approach "insufficient to establish specific personal jurisdiction"); *Stisser v. SP Bancorp, Inc.*, 174 A.3d 405, 421 n.8 (Md. Ct. Spec. App. 2017) (recognizing that *Bristol-Myers*'s reasoning "calls into question" Maryland's rendition of the sliding-scale test). This may have a significant impact in the online and e-commerce spaces, where the dominant test from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)—in which a higher level of website interactivity increases the likelihood of specific jurisdiction—may have been undermined by *Bristol-Myers*. *See SprayFoamPolymers.com, LLC v. Luciano*, No. 03-16-00382-CV, 2018 WL 1220891, at *5 n.7 (Tex. App. Mar. 9, 2018) ("We note that the Supreme Court recently disapproved of the 'sliding scale' approach to specific jurisdiction as originally used in *Zippo*. . . .").

Agency/representative services: This theory allowed general jurisdiction when a corporation uses an agent or representative entity to conduct activities that are so important that the corporation would do them itself if there was no agent available. The Supreme Court in *Daimler* expressed doubt as to this theory. 571 U.S. at 136. Since then, some lower courts have indicated a court cannot exercise general jurisdiction over a nonresident parent corporation based solely on its agent's or subsidiary's actions in the forum state. *See, e.g., Stisser*, 174 A.3d at 424; *see also Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 225-26 (2d Cir. 2014). One court has noted the inverse rule is also true—a court cannot establish general jurisdiction over a foreign *subsidiary* purely based on the activities of a domestic *parent* corporation. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070-71 (9th Cir. 2015).

Importantly, however, a court can still exercise *specific* jurisdiction if an out-of-state corporation purposefully avails itself of a forum "by directing its agents or distributors to take action there" that harms the plaintiff. *Daimler*, 571 U.S. at 135 n.13; *accord In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 531 (5th Cir. 2014).

United States federal court as forum for litigating global human rights abuses: Various federal statutes provide causes of action for human rights abuses and acts of terrorism primarily occurring outside of the United States. But the requirements of the Supreme Court's recent decisions likely foreclose the United States as a forum to adjudicate most claims for harms occurring *entirely* outside of the United States, even when the victims are United States citizens. *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 336 (2d Cir. 2016) (holding there was no specific jurisdiction over Palestinian organizations for an Anti-Terrorism Act violation arising from a terrorist act in Israel); John N. Drobak, *The Alien Tort Statute from the Perspective of Federal Court Procedure*, 13 WASH. U. GLOBAL STUD. L. REV. 421, 432 (2014) ("The limitations on personal jurisdiction in . . . *Daimler* will make it impossible to bring some types of [Alien Tort Statute] suits in the United States."); *see Daimler*, 571 U.S. at 141 (declining to exercise jurisdiction over claims arising under the Alien Tort Statute and the Torture Victim Protection Act in part because of "the risks to international comity [an] expansive view of general jurisdiction posed").

The future of personal jurisdiction

In the future, defendants can expect to see plaintiffs develop new jurisdictional theories, or creative extensions of existing theories, still left open by the Supreme Court:

Consent: Traditionally, a corporation can be sued where it has voluntarily submitted to the jurisdiction of the forum. Consequently, a forum-selection clause within a freely negotiated contract can still create specific jurisdiction over a dispute arising from that contract. *See Genuine Parts Co.*, 137 A.3d at 147.

The question is less clear regarding the "consent" that some states mandate as a condition of doing business in the state through registration statutes. Courts around the country are split as to whether these state statutes are still constitutional. Some have concluded that states retain the power to force "consent" to general jurisdiction in exchange for the privilege of doing business there. *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 651-52 (E.D. Pa. 2016); *Rodriguez v. Ford Motor Co.*, No. A-1-CA-36402, 2018 WL 6716038, at *3-4 (N.M. Ct. App. Dec. 20, 2018). Others have reasoned that such statutes swallow the due process constraints laid out by the Supreme Court by effectively replacing the "at home" test for general jurisdiction with the now-rejected "doing business" test. *See e.g., DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 9 (Mont. 2018). The Delaware Supreme Court in *Genuine Parts Co.*, 137 A.3d at 127-28, 137 provided a thorough explanation of how the Supreme Court's recent cases support that analysis:

> In our republic, it is critical to the efficient conduct of business, and therefore to job- and wealth-creation, that individual states not exact unreasonable tolls simply for the right to do business. Businesses select their states of incorporation and principal places of business with care, because they know that those jurisdictions are in fact 'home' and places where they can be sued generally. An incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state's market. . . .
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> Suffice it to say we no longer live in a time where foreign corporations cannot operate in other states unless they somehow become a resident; nor do we live in a time

> when states have no effective bases to hold foreign corporations accountable for their activities within their borders. As importantly, we have long ago become a truly national—even international—economy, and the ability of foreign corporations to operate effectively throughout our nation is critical to our nation's economic vitality and ability to create jobs.

Research and development: At least one court has hypothesized that clinical trials or market research for a pharmaceutical drug conducted within a forum may support specific jurisdiction in that forum over claims by nonresidents injured by that drug in other states. *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 234 (Mo. 2017).

Alter ego: Personal jurisdiction may still arise over an out-of-state parent corporation if it is merely the alter ego of its in-state subsidiary. *See Ranza*, 793 F.3d at 1071 (noting "the Court left intact [the Ninth] circuit's alter ego test for 'imputed' general jurisdiction"). This "alter ego" relationship requires that the out-of-state corporation exercises control of the subsidiary's internal affairs or daily operations. *Id.*

Conspiracy: In some states, an out-of-state defendant who lacks any contacts with the forum who participates in a civil conspiracy may be subject to jurisdiction based on the actions of its in-state co-conspirator. *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 395 (Tenn. 2015). Plaintiffs are likely to allege creative theories of "conspiracy" between target out-of-state defendants and in-state defendants to obtain jurisdiction over the former.

In conclusion, the Supreme Court has interpreted the Constitution to favor global commerce and local litigation. Despite some resistance from some courts and plaintiffs, most lower courts are implementing this directive and limiting defendants' exposure to suit in far-flung locales.

Mark. A. Kressel is a partner at Horvitz & Levy LLP and Jacob M. McIntosh is an appellate fellow at Horvitz & Levy LLP.
