James Bickford *Round-up*
Posted Thu, June 30th, 2011 3:07 pm

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Opinion analysis: No jurisdiction over foreign companies

On Monday, the Court issued opinions in two cases involving different questions of personal jurisdiction, *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicastro*. And although six Justices were able to agree on the result in *J. McIntyre*, the different opinions expressed by those Justices all but promised that more decisions on the issue would follow.

In *Goodyear*, the Court addressed the limits of a state court's jurisdiction over foreign subsidiaries of a U.S. parent corporation. Justice Ginsburg wrote the opinion for a unanimous Court. The case involved a fatal bus accident outside of Paris in which two boys from North Carolina were killed. The bus was using Goodyear tires manufactured in Turkey by a foreign subsidiary of the American company. The boys' parents brought suit in North Carolina, blaming defective tires for the deaths. The North Carolina courts concluded that they had jurisdiction over the foreign subsidiaries because the companies had placed their tires into the stream of commerce and allowed them to be sold in North Carolina.

A quick primer for anyone whose civil procedure has grown rusty: the Court has described two types of personal jurisdiction, general and specific. General jurisdiction is the all-purpose form, allowing any claim to be brought against a defendant as long as the defendant has "systematic and continuous" contacts with that forum. Specific jurisdiction, by contrast, arises from the connection between a forum and a particular controversy and is therefore limited to that controversy.

In *Goodyear*, the Court first made clear that the only question before it was that of general jurisdiction: because the site of the accident and the factory where the tires were made were both outside of North Carolina, no connection to the state allowed for specific jurisdiction there. Turning to the question of whether North Carolina courts might nonetheless have general jurisdiction over the foreign subsidiaries, the Court focused on the "stream-of-commerce metaphor," which is often invoked when "a nonresident defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately causes harm *inside* the forum." Although that action, the Court explained, "may bolster an affiliation germane to *specific* jurisdiction," it "do[es] not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." After reviewing its precedents involving general jurisdiction over a foreign corporation, the Court concluded that the foreign subsidiaries' connections to North Carolina "" essentially that they had allowed their products to reach the state "" "fall far short of "the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." (The Court declined to consider an alternative ground for affirming the decision below "" that jurisdiction was appropriate because the Goodyear parent and its subsidiaries were effectively a "unitary business" "" because the argument was raised for the first time in the merits briefs.)

By contrast, the Court's decision in *J.McIntyre* was far from unanimous. In this case, the Court considered a lawsuit brought by a New Jersey worker who lost four fingers while using a metal-shearing machine against that machine's British manufacturer. The British company had hired a U.S. distributor, which sold the machine to a New Jersey firm. The New Jersey Supreme Court held that the New Jersey courts did have jurisdiction over the worker's lawsuit because J. McIntyre knew or reasonably should have known that its products were distributed nationwide and might reach any of the fifty states, where they could cause an injury.

Six Justices voted to reverse the New Jersey Supreme Court's decision. Chief Justice Roberts and Justices Scalia and Thomas joined a plurality opinion authored by Justice Kennedy. In his opinion, Justice Kennedy framed the question presented by the case in terms of courts' jurisdiction over an entity that is not present in the forum and has not consented to the exercise of jurisdiction. The Court has previously held that courts have specific jurisdiction over a defendant when it "purposefully avails itself" of the privilege of doing business somewhere; this "purposeful availment," the plurality explained, can mean advertising in the forum, shipping goods there, or otherwise "targeting" a state. As Justice Kennedy described it, "[t]he principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign." But merely allowing merchandise to reach a forum will not meet this test: "as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." The plurality emphasized that "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment," and that personal jurisdiction "requires a forum-by-forum, or sovereign-by-sovereign, analysis" which notably allows for the possibility that "a litigant may have the requisite relationship with the United States Government but not with the government of any individual State." The plurality concluded that even if J. McIntyre had targeted the United States as a whole, New Jersey's courts lacked jurisdiction because the company had not "purposefully availed itself of the New Jersey market."

Justices Breyer and Alito agreed that the New Jersey Supreme Court's decision should be reversed, but they would resolve the case simply by relying on the Court's prior decisions "" none of which, they emphasized, hold "that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient" to establish personal jurisdiction. Rather, Justices Breyer and Alito explained, the Court "has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place." Thus, they continued, the Court had no need to

establish "strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign' and cannot "be said to have targeted the forum.'" Indeed, they asked, how would such rules apply to modern electronic commerce? What if "a company targets the world by selling products from its Web site," they posited, or "instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the order"? They urged the Court to revisit these kinds of "contemporary commercial circumstances" in the appropriate personal jurisdiction case, and with the participation of the Solicitor General.

Justice Ginsburg filed a dissenting opinion, which was joined by Justices Sotomayor and Kagan. The dissenters would have held that the New Jersey courts did have jurisdiction over J. McIntyre. In their view, the goal of the company was "simply to sell as much as it can, wherever it can" and "to avoid product liability litigation in the United States" if at all possible. The rest of the Court, they argued, had effectively allowed foreign manufacturers to avoid the jurisdiction of state courts simply by hiring a distributor to ship the manufacturer's products to the U.S. (By shipping the products itself, the company might "target" particular states.) Here, because McIntyre "availed itself of the market of all States in which its products were sold by its exclusive distributor," it therefore should be subject in any of them to suits arising out of events occurring there.

Posted in *Goodyear Lux. Tires, SA v. Brown*, *J. McIntyre Machinery v. Nicastro*, Analysis, Featured, Merits Cases

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William Baude *Jurisdiction*
Posted Wed, January 15th, 2014 11:30 am

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Opinion recap: A stricter view of general jurisdiction

Readers of the Supreme Court's decision yesterday in *Daimler Chrysler v. Bauman* may have learned two things: First, it is increasingly difficult to establish general jurisdiction over a corporation for conduct unrelated to the forum; second, the Court ultimately resolves the issue it wants to, which may not be the one the parties focused on.

When the parties briefed *Daimler* to the Court, they presented it as a question about the interaction of agency and general jurisdiction. Daimler is a German corporation that was sued in California by Argentinian plaintiffs for human rights violations in Argentina. The Ninth Circuit upheld jurisdiction, reasoning that MBUSA, an indirect subsidiary of Daimler, did extensive business in California, and its conduct could be attributed upward to Daimler. The circuits have disagreed over when such conduct may be attributed to a parent corporation, and Daimler argued that the Ninth Circuit made it too easy to attribute one corporation's behavior to another.

Justice Ginsburg (Art Lien)

But the Court resolved the question quite differently. In keeping with a line of questions she had asked at argument, Justice Ginsburg wrote a broad opinion for eight justices holding that it did not matter whether MBUSA's conduct was attributed to Daimler. Even if it was, California did not have general jurisdiction over Daimler.

The opinion opens with a remarkably long recharacterization of the Court's precedents dealing with specific and general jurisdiction. Specific jurisdiction is based on a connection between the forum and the defendant's conduct at issue – it is (as the name suggests) case-specific. General jurisdiction, by contrast, allows a defendant to be sued for any activities it has committed anywhere – even totally unrelated – and it is hence much harder to establish. In another recent decision by Justice Ginsburg, the Court had said that to establish general jurisdiction, the defendant must be "at home" there. In Daimler, she added that specific jurisdiction is supposed to be the norm while "general jurisdiction has come to occupy a less dominant place in the contemporary scene."

With the question framed that way, the Court finally turned to the question presented – sort of. It said the Ninth Circuit's agency test would "stack the deck," and "sweep beyond" other approaches that the Court had already rejected as too broad. But it nonetheless went on to assume that MBUSA's conduct could be attributed to Daimler. Even so, said the Court, Daimler was not "at home" in California. Outside of "an exceptional case," the Court ruled, general jurisdiction will generally be limited to the places where a corporation is incorporated and its principal place of business.

Justice Sotomayor wrote a long opinion concurring in the judgment. She would have found the exercise of jurisdiction unreasonable on fact-specific grounds. She objected to the majority's decision to go beyond the agency question and also to the merits of its ruling on general jurisdiction. Justice Sotomayor dueled with the majority at length about a 1952 precedent, *Perkins v. Benguet Consolidated Mining Co.*, in which a Philippine mining corporation had temporarily ceased operating during World War II and apparently been managed out of Ohio, where the Court had permitted general

jurisdiction. Ultimately, however, the majority saw *Perkins* as an unusual "exceptional case," not an analogy for future claims of broad general jurisdiction.

Plain English: If you want to sue a corporation in a particular court, you need to establish a connection between the corporation and the place where you are suing. The most common way to do that is to show that thing you are suing for happened – at least partly – in that place. But it is also possible to sue a corporation in its "home" place, for anything it does, anywhere in the world. Daimler is a German corporation, but one of its subsidiaries has a California "home," and the Ninth Circuit held that was enough to treat it as Daimler's "home" as well. The Court rejected this view. Even if its subsidiary's contacts with California were relevant to Daimler's contacts, Daimler's true home was elsewhere, and therefore it could not be sued in California for activities that had nothing to do with California.

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William Baude *Jurisdiction*
Posted Wed, February 26th, 2014 2:37 pm

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Opinion analysis: The boundaries of specific jurisdiction

What happens in Las Vegas may stay in Las Vegas, but the inverse is also true. In *Walden v. Fiore*, decided yesterday, the Court unanimously concluded that a pair of professional gamblers from Nevada could not force a Georgia law enforcement agent to litigate against them in Nevada, because the agent had never had connections to that state.

The background: Officer Anthony Walden had seized a large amount of money from Gina Fiore and Keith Gipson when they were changing planes in Atlanta. After they returned home to Nevada, they and their lawyer eventually got their money back — but only after getting the runaround, they say, from Walden. Fiore and Gipson sued Walden in a federal court in Nevada, which prompted the question whether Nevada could exercise jurisdiction over him. The Ninth Circuit had said that it could.

In a unanimous opinion written by Justice Thomas, the Court reversed the Ninth Circuit. Jurisdiction depends, it said, on the defendant's (i.e., Walden's) contact with the forum. Moreover, it is not enough that he may have harmed someone who resides in the forum. He must have contact with the forum itself, not simply with the plaintiffs. For these propositions the Court cited settled precedents. Walden's only contact with Nevada was the fact that Fiore and Gipson happened to live there, so there was no jurisdiction.

The case might therefore have been a no-brainer were it not for a different prior precedent from the Court — *Calder v. Jones*. In *Calder*, the Supreme Court had allowed California courts to exercise jurisdiction over two out-of-state authors who were sued for libel. They had written a story, published in the *National Enquirer* and circulated in California, that made scandalous claims about California actress Shirley Jones. *Calder* might seem to suggest that harming a person who is in California can get you sued in California.

The Court took a much more limited view of *Calder*. Jurisdiction had been appropriate in that case, it explained, not simply because the comments were directed at a Californian. Rather, the story had been read throughout California by third parties, not merely by Jones. Indeed, being published to third parties is a crucial element of a defamation claim. So California was a non-incidental part of the conduct. By contrast, Walden had taken the money *in Georgia*, and the only connection to Nevada is that the plaintiffs happened to be there when they wanted their money — but they could have just as easily been anywhere.

After the argument, I noted that the Court appeared to be looking to decide the case in a non-controversial way that would not implicate difficult questions about "virtual contacts" through the Internet. In a footnote, the Court announced that it would "leave questions about virtual contacts for another day."

In recent years the Court has repeatedly been reaffirming a narrower view of "general" jurisdiction, including in *Daimler AG v. Bauman*, which I covered last month. *Walden v. Fiore* now does the same thing for "specific" jurisdiction. In a sense, these cases may simply be reaffirmations of settled law. But in both areas, they resolved questions that had started to become unsettled in the lower courts, and so they may be quite widely cited by litigators and judges going forward.

Plain English: It is a basic principle of jurisdiction that you cannot force somebody to travel to a far-off place to litigate a case if they have no connection to that place. If you want to sue somebody in a particular state, you need to show that they have made contact with the state — either by committing an act in that state, or at least by intentionally reaching out to the state somehow. But you cannot sue them simply because you live in the state and you have been hurt. Because Officer Walden confiscated the plaintiffs' money in Georgia and kept it in Georgia, they could not sue him in Nevada when they returned home.

[Disclosure: The law firm of Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is among the counsel to the respondents in both *Walden v. Fiore* and *Daimler AG v. Bauman*. However, the author of this post is not affiliated with the firm.]

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Amy Howe *Independent Contractor and Reporter*

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Posted Tue, May 30th, 2017 1:14 pm

Opinion analysis: Court restricts lawsuits against out-of-state railroads

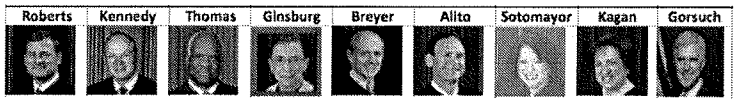
Three years ago, a unanimous Supreme Court threw out a lawsuit that sought to hold a German car company liable in California for the actions of its Argentinian subsidiary, which allegedly worked with security forces in Argentina during the country's "Dirty War" to kidnap, torture and kill some of the subsidiary's workers. Today the court, in an opinion by Justice Ruth Bader Ginsburg, made clear that its 2014 ruling applies fully to bar two lawsuits that were brought in Montana against BNSF Railway by former employees who did not live there and were not injured there.

The plaintiffs in today's cases are Robert Nelson of North Dakota, who contends that he injured his knee while working for the railroad in Washington state, and Kelli Tyrrell of South Dakota, who claims that her husband died of cancer he contracted after being exposed to chemicals while working for BNSF in South Dakota, Minnesota and Iowa. But today's ruling stops their lawsuits short, because BNSF cannot be sued in Montana for these alleged wrongs.

The court rejected both of the theories on which the plaintiffs had relied to justify jurisdiction over BNSF in Montana. First, it ruled that the Federal Employers' Liability Act, a federal law that allows railroad workers to sue their employers for injuries that occur on the job, merely governs venue – that is, where a lawsuit may be filed – and then authorizes state courts to hear FELA lawsuits as well. FELA does not itself create a special rule authorizing jurisdiction over railroads just because they happen to do business in a particular place, the court emphasized.

Second, the court continued, a Montana rule that allows courts in the state to exercise jurisdiction over "persons found" in Montana also does not help the plaintiffs. Even if BNSF concedes that it is "found" in Montana, exercising jurisdiction over BNSF must still be consistent with the Constitution's due process clause – which, the court concludes, it is not. Under its earlier cases, the court explained, BNSF can only be sued in Montana if it is "at home" there, which normally means that the company is either incorporated in the state or has its principal place of business there. But neither of those criteria is met, the court continued, nor is the railroad so "heavily engaged in activity" in Montana as to present the kind of "exceptional" case in which jurisdiction could exist even outside the company's state of incorporation and principal place of business. So although BNSF could, the court acknowledged, be sued in Montana for claims that are related to its business in Montana, it can't be sued there for claims that aren't related to anything it did within the state.

Today's decision was the first ruling on the merits in which Justice Neil Gorsuch, who joined Ginsburg's opinion in full, participated. Justice Sonia Sotomayor filed an opinion concurring in part and dissenting in part from the decision. She stressed that she still disagreed with the court's 2014 ruling on jurisdiction. But in any event, she added, the court should have sent the case back to the Montana Supreme Court so that it could determine on its own whether BNSF is "at home" in Montana. Moreover, she lamented, the decision gives "a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning," she wrote, "it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation." Time will tell whether that is indeed is the result of today's decision, but the broad consensus among the justices suggests that the rule is likely to remain in place for the foreseeable future.



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Ronald Mann *Contributor*
Posted Mon, June 19th, 2017 2:56 pm

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Opinion analysis: Justices reject California courts' jurisdiction over claims by out-of-state litigants against out-of-state defendants

The court's decision this morning in *Bristol-Myers Squibb v. Superior Court of California* could hardly surprise anybody who noticed the court's near-unanimous ruling last month in *BNSF Railway Co. v. Tyrrell*, which reaffirmed the justices' commitment to the limitations on state-court jurisdiction announced a few years ago in *Daimler AG v. Bauman*. The issues in these cases are so closely related that it would have been remarkable if the court had not reversed the decision of the California Supreme Court.

Today's decision involves litigation by several hundred individuals from 33 states (along with 86 California residents) seeking compensation for injuries associated with the Bristol-Myers drug Plavix. Although Bristol-Myers has extensive contacts with California, little about the claims of these particular plaintiffs involves California: Bristol-Myers did not develop or manufacture the drug in California and there is no reason to think that marketing, promotion or distribution in California was involved in the injuries of the out-of-state plaintiffs. The only way in which the nonresidents' claims relate to California is that the marketing and promotion of the pharmaceutical was conducted on a nationwide basis: The same advertising and distribution arrangements that reached the out-of-state plaintiffs also reached the in-state plaintiffs (who plainly can sue in California courts).

Traditionally, the court has considered cases of this type under a two-part framework. Under the first part of the framework, the court has permitted state courts to assert "general" jurisdiction over all claims against companies that are so pervasively active in a particular state as to make it seem reasonable to hold them accountable in that state for all of their behavior, wherever it occurs. Under the second part of the framework, the court has permitted state courts to assert "specific" jurisdiction over defendants only if the claims are related to the defendants' contacts with the particular state. The 2014 decision in *Daimler AG* was important because it held that general jurisdiction for the most part is limited to a corporation's home state. All agree that California cannot assert general jurisdiction over Bristol-Myers under *Daimler AG*.

In this case, the California Supreme Court held that because Bristol-Myers has such substantial contacts with California, it was appropriate for the California courts to exercise specific jurisdiction over the nonresidents' claims against Bristol-Myers even though the relation between the claims of the nonresidents and the activities of Bristol-Myers in California was elusive. The briefing and argument suggested that several of the justices regarded this as an effort to circumvent the limits *Daimler AG* imposed on state-court jurisdiction. The opinion of Justice Samuel Alito for eight of the nine justices (all but Justice Sonia Sotomayor) suggests that this concern dominated the court's resolution of the matter.

Justice Alito's opinion explains that the approach of the California court "is difficult to square with our precedents," in large part because it "resembles a loose and spurious form of general jurisdiction." To the Supreme Court, a simple recitation of the salient facts demonstrates the failure of the California court to "identif[y] any adequate link between the State and the nonresidents' claims":

> [T]he nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the non-residents—does not allow the State to assert specific jurisdiction over the nonresidents' claims.

The opinion does not ignore the practical consequences of the limitation on state-court jurisdiction, but the justices seem persuaded that their rejection of the California courts' authority "will not result in the parade of horribles that [the nonresident plaintiffs] conjure up." To illustrate the point, the opinion closes by offering three specific ways in which the litigation could proceed notwithstanding this decision:

> Our decision does not prevent the California and other out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. .... Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.

There is every reason to think that the events of this term reflect a consolidation of perspective. Justice Sonia Sotomayor was the lone dissenter in this case and in *Tyrrell*. Also, because this case was argued in April after the confirmation of Justice Neil Gorsuch, we can see from his joinder here that he will not be leading a charge to reshape this area of the law. In sum, plaintiffs' attorneys seeking a forum for mass actions probably need to accept the reality that the defendant's home jurisdiction often will be the only state-court forum for a consolidated nationwide suit.

[**Disclosure**: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is among the counsel to the respondents in this case. The author of this post, however, is not affiliated with the firm.]