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Bristol-Myers Squibb: The Aftermath

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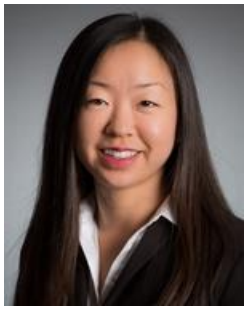

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Law360, New York (August 3, 2017, 2:54 PM EDT) --Last month, the U.S. Supreme Court clarified the scope of specific personal jurisdiction in Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773 (2017) ("BMS"). Mass tort defendants have wasted little time in moving to dispose of claims from nonresident plaintiffs under this ruling.

In Case You Missed It: BMS in a Nutshell

As previously reported, on June 19, 2017, the Supreme Court decided a long-awaited specific jurisdiction question in favor of Bristol-Myers Squibb Co. This case arose when a group of consumers — consisting of 86 California residents and 592 residents from 33 other states — brought tort claims in California state court, alleging injuries from using Plavix, a prescription drug that thins blood and inhibits blood clotting.

The nonresident plaintiffs did not claim that any Californian physicians prescribed them the drug, they did not claim that they were injured by Plavix in California, nor did they claim that they were treated for their injuries in California. In fact, Bristol-Myers did not develop Plavix in California, did not create a marketing strategy for Plavix in California and did not manufacture, label, package or work on the regulatory approval of the product in California.

The only relationship BMS had to California with regard to Plavix was the fact that BMS contracted with a Californian distributor to sell the drug there. After considering this dearth of connection to California, the U.S. Supreme Court held that California courts lacked specific personal jurisdiction over the nonresident plaintiffs, reversing the California Supreme Court.

The California Supreme Court had employed a "sliding scale approach" that relaxed the strength of the requisite connection between the forum and the specific claims at issue if the defendant has extensive forum contacts that are unrelated to those claims. The high court found "no support for this approach" in its personal jurisdiction jurisprudence and, instead, reaffirmed the principle that "[a] corporation's continuous activity of some sorts within a state ... is not enough

to support the demand that the corporation be amenable to suits unrelated to that activity."

In reaching this conclusion, the Supreme Court employed a "straightforward application ... of settled principles of personal jurisdiction" in which specific jurisdiction over a claim can only be exercised if there is an "affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State."

In the month since BMS, a handful of courts have already applied this decision in similar factual scenarios. We highlight two successful uses of personal jurisdiction to dismiss nonresident plaintiffs' claims as well as a possible outlier to applications of BMS.

Siegfried v. Boehringer Ingelheim Pharm. and Jordan v. Bayer Corp.

Siegfried and Jordan, two Eastern District of Missouri cases, exemplify straightforward applications of the BMS holding, sharing nearly identical facts.

In Siegfried, eight Missouri plaintiffs joined 86 non-Missouri plaintiffs to sue Boehringer Ingelheim Pharmaceuticals Inc. and Boehringer Ingelheim International GmbH (together, "Boehringer"), in Missouri state court. All plaintiffs shared the claim that they were injured by taking Boehringer's anti-clotting drug, Pradaxa.

Not one of the 86 nonresident plaintiffs claimed that they were prescribed Pradaxa in Missouri, that they suffered any injuries in Missouri or that they received treatment for any injuries in Missouri. The court decided to exercise its discretion in examining personal jurisdiction before subject matter jurisdiction based on diversity of citizenship, noting that personal jurisdiction was now the more straightforward inquiry following BMS.

Just as in BMS, Boehringer marketed and sold its drug in the forum state, but the nonresident plaintiffs did not ingest the drug in the forum, nor did they claim to have suffered resulting injuries in the forum. The court easily dismissed the 86 nonresident plaintiffs' claims after finding that their injuries had no connection with Missouri.

Similarly, in Jordan, plaintiffs from around the country brought suit in Missouri state court for injuries allegedly sustained as a result of using Essure, a medical device manufactured and sold by Bayer Corporation; Bayer Essure Inc.; Bayer HealthCare LLC; and Bayer HealthCare Pharmaceuticals Inc. (together, "Bayer").

Of the 94 plaintiffs, seven were citizens of Missouri, one plaintiff was an Illinois citizen who allegedly had the device implanted in Missouri, and the remaining plaintiffs were citizens of 25 other states. Just as in Siegfried, the court chose to prioritize the personal jurisdiction inquiry over other grounds to dismiss, in part because "recent decisions ... made personal jurisdiction the more straightforward inquiry" (citing BMS).

The court pointed out that (with the exception of the Illinois citizen) the non-Missouri plaintiffs did not allege that they acquired the Essure device from a Missouri source or that they were injured or treated in Missouri, and Bayer did not develop, manufacture, label, package or create a marketing strategy for Essure in Missouri. Finding this case to be completely analogous to BMS, the court granted Bayer's motion to dismiss for lack of personal jurisdiction as to the claims of all non-Missouri plaintiffs, except the one plaintiff whose device was implanted in Missouri.

These two courts employed a personal jurisdiction analysis in lieu of deciding other procedural motions on the ground that BMS made the specific jurisdiction inquiry much simpler. Defendants should evaluate immediately seeking dismissal based on personal jurisdiction in order to avoid protracted litigation where dismissal is appropriate under BMS.

The Saxagliptin Cases: Outliers?

The same was not true for BMS in another matter before a California district court. In the Saxagliptin cases, the plaintiffs filed complaints against AstraZeneca Pharmaceuticals LP and Bristol-Myers Squibb Co., alleging that Saxagliptin — a prescription drug manufactured, distributed and sold by the defendants — caused injury to users with Type 2 diabetes, due to an increased cardiovascular risk.

The defendants filed a motion to dismiss for lack of personal jurisdiction over AstraZeneca and BMS on the ground that they were out-of-state defendants and the plaintiffs' claims did not arise from the defendants' conduct in California. Applying the Ninth Circuit's "but for" test, the court found that the plaintiffs' injuries would not have occurred but for AstraZeneca's and Bristol-Myers's contacts with California because the defendants conducted clinical trials in California, and the trials were part of the unbroken chain of events leading to the plaintiffs' alleged injuries.

Unwilling to adopt an arbitrary cutoff of a quantifiable percentage of trials adequate to confer personal jurisdiction, the court found that the clinical trials conducted in California were enough contact notwithstanding the fact that clinical trials for Saxagliptin took place across the country and the trials in California only constituted a small fraction of the overall trials.

The court distinguished BMS on the ground that "nearly every pivotal clinical trial necessary for NDA approval involved studying of the Saxagliptin drugs throughout the State of California." In BMS, by contrast, Bristol-Myers did not develop Plavix in California, did not create a marketing strategy for Plavix in California and did not manufacture, label, package or work on the regulatory approval of the product in California.

The court therefore denied BMS's and AstraZeneca's motion to dismiss for lack of personal jurisdiction but then granted their alternative motion to transfer the cases to the District of South Carolina and Eastern District of New York, where each plaintiff resides.

In the Saxagliptin cases, the court departed from a clear application of BMS as a result of the defendants' clinical trials in the forum state. While the end result took these cases out of California, it is dubious whether the trials conducted in California rise to the level of contact contemplated by the Supreme Court in BMS to confer specific personal jurisdiction on nonresident parties.

Takeaways

Courts may choose to dispose of claims brought against nonresident defendants through personal jurisdiction as an easier inquiry than other procedural vehicles as in Jordan and Siegfried, especially in large mass tort cases where joinder issues can prove to be complicated.

Despite BMS, courts may continue to grapple with determining the threshold level of contact in the forum state to create personal jurisdiction as evinced in the Saxagliptin cases. As at least one case has shown, clinical trials conducted in the forum state can be enough to confer personal jurisdiction on out-of-state defendants.

While this may ultimately not comport with the Supreme Court's reasoning in BMS, it may be years before the issue is considered on appeal. In the meantime, companies seeking to avoid plaintiff forum-shopping might consider limiting research and development activities to jurisdictions where they are willing to litigate against nonresident plaintiffs.

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