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Jurisdiction

Bristol-Myers Squibb v. Superior Court: Practical Implications and Doctrinal Conundrums

The U.S. Supreme Court ruling in *Bristol-Myers Squibb v. Superior Court* marks the Court's first extended discussion of the ''relatedness'' requirement for specific jurisdiction—that is, the rule that a plaintiff's claims must arise out of or relate to a defendant's contacts with the forum—which alone makes it noteworthy, attorneys Daniel M. Sullivan and Kevin D. Benish say. But, they add, its reasoning will also force courts to reconsider where mass, and perhaps even class, actions may be brought.

BY DANIEL M. SULLIVAN AND KEVIN D. BENISH

Amid the usual flurry of late-June opinions from the Supreme Court, one of the less heralded, the personal-jurisdiction case *Bristol-Myers Squibb v. Superior Court of California*, 137 S.Ct. 1773 (2017), may be among the most consequential.

In the first place, the decision marks the Court's first extended discussion of the ''relatedness'' requirement for specific jurisdiction—that is, the rule that a plaintiff's claims must arise out of or relate to a defendant's contacts with the forum—which alone makes it noteworthy. But its reasoning will also force courts to reconsider where mass, and perhaps even class, actions may be brought. Finally, the Court's broader doctrinal discussion may portend a shift in the tectonic plates underlying most debates about personal jurisdiction during the last 70-odd years.

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Background to *Bristol-Myers Squibb* A word of context. Personal jurisdiction, which is limited by the Due Process Clauses of the Fourteenth and Fifth Amendments in state and federal courts, respectively, comes in two flavors: general jurisdiction and specific jurisdiction. General jurisdiction allows a defendant to be sued ''on any and all claims against it, wherever in the world the claims may arise.'' *Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014). Its scope, however, is narrow: Individuals are only subject to general jurisdiction where they are domiciled or can be served personally with process, and corporations only where they are ''fairly regarded as at home'' (usually where they are incorporated or have their principal place of business). *Id.* at 760 (citation and quotation marks omitted).

By contrast, specific jurisdiction is ''case-linked.'' It allows a court to exercise authority only over disputes connected to the defendant's contacts with the forum, but its requirements are less stringent than those for general jurisdiction. A plaintiff seeking to invoke spe-

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cific jurisdiction, the usual formulation goes, must establish: (1) that a defendant has ''purposefully availed'' itself of the forum state; (2) that the claims asserted ''arise out of or relate to'' the defendant's contacts with that state; and (3) that the exercise of personal jurisdiction is ''reasonable'' under the circumstances. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–78 (1985).

In *Bristol-Myers Squibb*, a group of over 600 plaintiffs sued BMS and McKesson Corporation in California state court, asserting state-law claims based on injuries the plaintiffs alleged they suffered from Plavix, a drug that BMS developed, manufactured, and sold and that McKesson distributed. The catch, however, was that the plaintiffs consisted of both residents of California and non-residents. The non-residents did not assert that they had obtained Plavix from California doctors or any other California source or that they had seen any advertisements or marketing for Plavix in California; nor did they assert that they had been injured or had received treatment in California. *See* 137 S.Ct. at 1778.

BMS moved to quash the service of summons for the non-residents' claims for lack of personal jurisdiction. The California trial court denied the motion, finding that it had general jurisdiction over BMS. After BMS sought mandamus relief from the California Court of Appeal, the case went up and down and up again through the California appellate system. The case reached the U.S. Supreme Court after a divided California Supreme Court held that there was specific jurisdiction over the non-residents' claims. 1 Cal.5th 783 (2016); *see also id.* at 813–37 (Werdegar, J., dissenting).

In determining whether the ''relatedness'' prong of specific jurisdiction—whether the plaintiffs' claims arise out of or relate to the defendant's contacts with the forum—was met, the California Supreme Court applied its longstanding rule, known as the ''substantial connection'' test. Under that test, ''claim[s] need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact[s] to warrant the exercise of specific jurisdiction.'' *Id.* at 802 (citing *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 452 (1996)).

Instead, ''the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim.'' *Id.* at 806 (citing *Vons*, 14 Cal.4th at 455). Here, BMS marketed and sold Plavix to residents of California and other states ''as part of a common nationwide course of distribution,'' all the plaintiffs claimed to be injured by the same drug, and BMS maintained a research and development laboratory in California (albeit not the lab in which Plavix was developed). *Id.* at 804. Viewing these contacts through the lens of its substantial connection test, the California Supreme Court held that it was proper to assert specific jurisdiction ''based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required.'' *Id.* at 806.

California's substantial connection test is one of several that courts use in evaluating relatedness for purposes of specific jurisdiction. Indeed, how to determine relatedness is the subject of a longstanding split among state courts and federal circuits. *See International Aspects of U.S. Jurisdiction: A Practitioner's Deskbook* 63–69 (James Berger, ed. ABA 2017) (contrasting various tests). The Supreme Court granted certiorari on the issue in 1991, but it ultimately declined to reach it. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991).

Bristol-Myers Squibb marks the first time the Supreme Court has confronted the relatedness requirement since its near miss in *Carnival Cruise*, 26 years ago.

The *Bristol-Myers Squibb* Decision In an 8-1 opinion by Justice Samuel Alito, the Supreme Court reversed the California Supreme Court's decision, holding that there was not specific jurisdiction over the non-residents' claims. Emphasizing that specific jurisdiction requires an ''affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State'' (137 S.Ct. at 1780 (quotation marks omitted)), Justice Alito's opinion found ''no support'' for the California Supreme Court's ''sliding scale'' approach. *Id.* at 1781. On the contrary, the majority dismissed that approach as ''a loose and spurious form of general jurisdiction,'' because it allowed the degree of the defendant's unrelated forum contacts to ''relax'' the connection required between the plaintiff's claim and the defendant's contacts. *Id.*

Bristol-Myers Squibb's reasoning is driven principally by two concepts. First, it relies heavily on the distinction between specific and general jurisdiction, and makes clear that the relatedness requirement is a key ingredient in that distinction. *See id.* at 1780 (''Specific jurisdiction is very different'' from general because ''the *suit* must arise out of or relate to the defendant's contacts with the *forum*'' (citation and quotation marks omitted)).

Second, the opinion implicitly requires personal jurisdiction to be assessed claim by claim. After all, there was clearly jurisdiction over the California residents' claims. But that did not affect the analysis of the non-residents' claims, because ''[w]hat is needed—and what [wa]s missing here—is a connection between the forum and the *specific claims at issue*.'' *Id.* at 1781 (emphasis added). Although the circuits have generally required personal jurisdiction to be shown for each claim (*e.g., Willow Bend, L.L.C. v. Downtown ABQ Partners, L.L.C.*, 612 F.3d 390, 393 (5th Cir. 2010); *Remick v. Manfredy*, 238 F.3d 248, 255–56 (3d Cir. 2001); *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 289 (1st Cir. 1999)), the Supreme Court had not previously addressed the issue directly. *Cf. Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (requiring a defendant-by-defendant analysis).

Justice Sotomayor, writing alone, dissented. Rather than explicitly defending California's sliding scale test, she simply concluded it sufficed that the non-residents' claims arose out of ''conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States.'' *Bristol-Meyers Squibb*, 137 S.Ct. at 1786 (Sotomayor, J., dissenting). Although the interactions between BMS and each plaintiff were factually distinct from each other, for Justice Sotomayor the ''core concern'' of personal jurisdiction law is ''fairness.'' *Id.* at 1784. And, in her view, ''there 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 non-residents alike.'' *Id.*

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Narrow Ruling, Anti-Forum-Shopping Tool, or Harbinger of a Sea-Change? On one reading, *Bristol-Myers Squibb* is a modest decision. That is, perhaps all the decision does is to reject California's substantial connection test on the ground that it effectively eviscerated the relatedness requirement, at least for defendants (like big corporations) with extensive unrelated forum contacts. Although the Supreme Court has never addressed exactly what the relatedness requirement means, it has long maintained that the requirement exists. *E.g.*, *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549, 1554 (2017); *Daimler*, 134 S.Ct. at 754; *Burger King*, 471 U.S. at 472–73; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). And, as noted above, neither the Court's insistence on the rigid distinction between general and specific jurisdiction nor its analysis of personal jurisdiction claim by claim was particularly innovative. *Cf. Bristol-Meyers Squibb*, 137 S.Ct. at 1781 (''Our settled principles regarding specific jurisdiction control this case.'').

But the decision can also be read as more far-reaching. While claim-specific analysis itself is not new, *Bristol-Myers Squibb* shows how powerful such analysis can be in practical terms, as the decision makes it much more difficult for plaintiffs to bring nationwide mass actions in the forum of their choice. Depending on the facts of the case, it may be that an action aggregating the claims of plaintiffs across the country against a domestic defendant can only be brought in the state where the defendant is incorporated or has its principal place of business. And—again, depending on the circumstances—plaintiffs may not be able to bring a nationwide mass action against a foreign defendant at all.

In this sense, *Bristol-Myers Squibb* is a potent addition to recent Supreme Court decisions that constrain forum-shopping. *See, e.g.*, *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S.Ct. 1514 (2017) (holding, for purposes of patent venue statute, that defendant ''resides'' only in the state of incorporation); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013) (holding plaintiff may not preclude removal to federal court under the Class Action Fairness Act by stipulating to an amount in controversy below the statutory minimum).

Bristol-Myers Squibb's claim-specific analysis could have a similar impact in other contexts. Take class actions. The Rules Enabling Act prohibits the Federal Rules of Civil Procedure—including Rule 23, which governs class actions—from ''abridg[ing], enlarg[ing] or modify[ing] any substantive right'' (28 U.S.C. § 2702(b)), including, presumably, the right not to be sued in the absence of personal jurisdiction. Defendants will likely argue, therefore, that Rule 23 cannot allow a nationwide class action in a forum where there is personal jurisdiction over the named plaintiffs' claims, but not over those of the absent class members.

We might also see courts become less likely to permit suit to proceed on all of a plaintiff's claims where personal jurisdiction exists over only some of them. *See Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180–81 (9th Cir. 2004) (describing doctrine of ''pendent personal jurisdiction'').

Of course, *Bristol-Myers Squibb* left these issues unaddressed. Interestingly, though, the Court went out of its way to point out another issue it was leaving open: ''whether the Fifth Amendment''—which applies to the federal as opposed to state government—''imposes the same restrictions on the exercise of personal jurisdiction by a federal court.'' 137 S.Ct. at 1784 (citing *Omni Capital Int'l, Ltd. v. Rodolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987)).

The footnote in *Omni Capital*, to which the Court referred, declined to decide whether the Fifth Amendment permits the assertion of personal jurisdiction by a federal district court on the basis of a defendant's contacts with the United States as a whole, as opposed to contacts with the state in which the court sits. The Supreme Court has long noted but not resolved this question (*see Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987)), which arises in certain federal question cases. *See* Fed. R. Civ. P. 4(k). The Court may be signaling its interest in reaching it now, and will have an opportunity to do so next term. *See Sokolow v. Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016), *cert. pending*, No. 16-1071 (U.S. Mar. 3, 2017).

Finally, the analysis in *Bristol-Myers Squibb* contains some striking doctrinal characteristics. For one thing, the majority never once uses the familiar three-pronged formulation for specific jurisdiction of purposeful availment + relatedness + reasonableness. Only Justice Sotomayor's dissent does. *See* 137 S.Ct. at 1785–86. Indeed, because Justice Alito liberally cites cases addressing purposeful availment rather than relatedness, the casual reader might not even realize that *Bristol-Myers Squibb* is the Supreme Court's first extended discussion of the relatedness requirement. Time will tell whether the majority simply did not think it was necessary to recite the traditional formula or whether its decision not to do so portends something more.

What the majority uses in place of the conventional three-prong formula, however, is especially remarkable—a full-throated emphasis on a state's sovereign power over its territory. The Court begins by identifying ''the burden on the defendant'' as the most important of the various interests a court must consider in evaluating specific jurisdiction. *Id.* at 1780 (quotation marks omitted). And the burden on the defendant, the majority continues, is not merely a question of practical inconvenience, but also whether a state has a ''legitimate interest'' in the claims at issue, which in turn the majority defines in terms of the state's territorial power. *Id.*

''(R)estrictions on personal jurisdiction,'' the majority explains, '' 'are a consequence of territorial limitations on the power of the respective States,' '' and '' '[t]he sovereignty of each State . . . implies a limitation on the sovereignty of all its sister States.' '' *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), and *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980) (alterations omitted)). Thus, even if considerations of convenience and the forum state's practical interest in the dispute would justify litigation in the forum, '' 'the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.' '' *Id.* at 1781 (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

The contrast with Justice Sotomayor's dissent could not be more dramatic, since she argues that the ''core concern'' of personal jurisdiction law is ''fairness.'' 137 S.Ct. at 1784.

Should it have staying power, the *Bristol-Myers Squibb* Court's focus on ''sovereignty''—and its lopsided rejection of Justice Sotomayor's focus on fairness—would herald a transformation. As most law students are taught, the Supreme Court originally analyzed personal jurisdiction in terms of the limits of a

sovereign state's power to adjudicate within its borders. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (Because ''every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . no State can exercise direct jurisdiction and authority over persons or property without its territory.''). In *International Shoe v. Washington*, however, the Court reoriented the law around whether the defendant had ''certain minimum contacts'' with the forum ''such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' '' 326 U.S. at 316 (citations omitted).

Ever since, the Supreme Court has seesawed between opinions declaring that *International Shoe* totally abandoned concepts of sovereignty and territoriality and opinions insisting that those concepts remain relevant. *Compare, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 212 & n.39 (1977) (''We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.''), and *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (''The personal jurisdiction requirement . . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.'') *with World-Wide Volkswagen*, 444 U.S. 286, 291–92 (''The concept of minimum contacts . . . acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.''), and *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (Scalia, J.) (plurality) (''Jurisdiction based on physical presence alone . . . is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice[,]' [which was] developed by *analogy* to 'physical presence.' '').

Indeed, as recently as *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), the Supreme Court split into factions, with a four-Justice plurality stating that ''sovereign authority'' rather than ''fairness'' is the ''central concept'' underlying personal jurisdiction (*id.* at 882), while a three-Justice dissent authored by Justice Ginsburg insisted that ''*International Shoe* gave prime place to reason and fairness'' (*id.* at 903) and Justices Breyer and Alito preferred to resolve the case on narrower grounds (*id.* at 887–93).

Given this splintered history, it is surprising that seven Justices joined Justice Alito's sovereignty-based analysis of personal jurisdiction (and that Justice Alito, agnostic in *McIntyre*, wrote it). Indeed, as recently as 2014, Justice Ginsburg's opinion for eight Justices in *Daimler* described ''the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States'' as ''the central concern of the inquiry into personal jurisdiction.'' 134 S.Ct. at 754. Yet the same eight Justices—except for Justice Scalia, replaced by Justice Gorsuch—now suggest that territoriality is very much alive in the law of personal jurisdiction.

Commentators and lower courts will have plenty to parse in the months and years ahead.

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