Supreme Court Continues Rule-based Refinement of Personal Jurisdiction

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On May 30, 2017, the U.S. Supreme Court handed down yet another personal jurisdiction opinion emphasizing clear rules as to when out-of-state defendants may be haled into court. While the decision in BNSF Railway Co. v. Tyrell, No. 16-405, was largely a reprise of Daimler AG v. Bauman, 134 S.Ct. 746 (2014), the message to lower courts and litigants was that the Court meant what it said Daimler, and it is time to pay attention. The old days of assessing a variety of non-litigation-related contacts—How many employees in the state? How much business? How many offices?—to determine “general” personal jurisdiction are over.

For all practical purposes, only the states of incorporation or principal place of business will have general jurisdiction over a corporation. The Court found the absence of the facts necessary to support general jurisdiction in BNSF so clear that rather than remanding the case to the Montana Supreme Court for that court to apply the correct legal standard, the Court reversed the decision and essentially directed dismissal of the lawsuit for lack of personal jurisdiction. As Justice Sotomayor observed in dissent, the Court has made it “virtually inconceivable” that a forum other than the states of incorporation or principal place of business would have general jurisdiction.

In this update, we review the decision in BNSF, place it in context with the Court’s recent personal jurisdiction and venue decisions, and note a significant pending case that will further clarify personal jurisdiction. The law of personal jurisdiction is in flux, and the availability of personal jurisdiction is contracting. Defendants should be careful to preserve a personal-jurisdiction challenge in order to take advantage of any changes in the case law.

Personal Jurisdiction 101

The original concept of personal jurisdiction was territorial, most notably espoused by the U.S. Supreme Court in Pennoyer v. Neff, 95 U.S. 714 (1878). In order for a court to have personal jurisdiction over a non-consenting defendant, the defendant must have been personally served in the territory of the state. That view of personal jurisdiction was later modified in International Shoe Co. v. Washington, 326 U.S. 310 (1945), with the Court holding that due process only required sufficient “minimum contacts” between the defendant and the state. The “minimum contacts” analysis was then refined into two separate concepts: general jurisdiction and specific jurisdiction.

General jurisdiction applies when a defendant’s contacts with the forum state are so continuous and systematic that the defendant is essentially “at home” in the forum state. It is “all purpose” jurisdiction, meaning that the defendant can be sued in that jurisdiction on any claim, even one completely unrelated to its activities in the state. The paradigmatic general jurisdiction forums are the state of principal place of business and the state of incorporation. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918-19 (2011).

Specific jurisdiction applies when sufficient events or connections giving rise to the litigation occurred or exist in the forum state. To be precise, “the defendant’s suit-related conduct must create a substantial connection with the forum State.” Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014). Thus, connections to a state unrelated to the lawsuit are not relevant to specific jurisdiction.

Decision in BNSF

The Supreme Court’s decision applied to two cases brought in Montana state court against BNSF alleging railroad employment injuries. Neither of the plaintiffs was from Montana, nor did the events alleged take place in Montana. The plaintiffs therefore did not argue that BNSF was subject to specific jurisdiction in Montana.

Instead, plaintiffs claimed that BNSF did sufficient business in Montana that personal jurisdiction was proper, and further, that a provision of the Federal Employers’ Liability Act (FELA) authorized jurisdiction. The provision, 45 U.S.C. § 56, says that “an action may be brought in a district court … in which the defendant shall be doing business” and that state courts have “concurrent jurisdiction.” The Montana Supreme Court treated the FELA provision as authorizing personal jurisdiction wherever the defendant railroad is doing business, consistent with a judicial policy of liberal construction of FELA to benefit injured railroad workers.

But more significantly, the Montana Supreme Court also held that personal jurisdiction was consistent with the discussion of “general jurisdiction” found in Daimler and Goodyear. Most careful readers of those opinions had concluded that they had limited “general” jurisdiction to a defendant’s state of incorporation or the state of the defendant’s principal place of business except in a truly “exceptional case.” See, e.g., Martinez v. Aero Caribbean, 764 F.3d 1062, 1070 (9th Cir. 2014). The Montana Supreme Court, however, seemed to limit Daimler to its specific facts, going so far as to quote the question presented in Daimler, as though the decision should perhaps be limited to “claims involving only foreign plaintiffs and occurring entirely abroad.” Tyrell v. BNSF Ry.
The U.S. Supreme Court, in an opinion by Justice Ginsburg for eight members (including Justice Gorsuch, the first merits opinion he has joined), reversed the Montana Supreme Court at essentially every turn.

First, the Court held that the FELA provision dealt with venue and subject matter jurisdiction, not personal jurisdiction. Second, the Court reiterated the holding of *Daimler* and framed it as essentially a flat rule that general jurisdiction only applies in the states of incorporation or principal place of business except in truly extreme cases, the only existing example being a company relocating its headquarters during World War II. Finally, the majority saw no need to remand to the Montana Supreme Court for application of any kind of “minimum contacts” analysis or other “factual investigation” (as Justice Sotomayor advocated in dissent).

The BNSF opinion would seem to be something of a message to lower courts seeking to buck *Daimler* and revive the kind of open-ended, fact-intensive assessment of “minimum contacts” that once prevailed but that *Daimler* expressly rejected. *Daimler*, 134 S. Ct. at 760-61 (“Plaintiffs would have us … approve the exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business.’ … That formulation, we hold, is unacceptably grasping.”).

Indeed, that type of inquiry fundamentally misunderstands general jurisdiction. General jurisdiction is not merely a conclusion that the defendant has enough contacts in a state to make defending a particular lawsuit fair or reasonable. As Justice Ginsburg emphasized for the Court in *Goodyear*, general jurisdiction means that *any* lawsuit may be brought against the defendant in that forum; it is “all purpose” jurisdiction. Thus, it may have seemed fair to the Montana Supreme Court that a North Dakota plaintiff sued BNSF in Montana based on a North Dakota accident. But if there were general jurisdiction in Montana, BNSF could be sued there by a New Mexico plaintiff, or based on events that occurred in Germany or anywhere, which is far less fair or reasonable when Montana is not the place of BNSF’s headquarters or principal place of business.

The most obvious message from the Court in *BNSF* is that the Court meant what it said in *Daimler*, and lower courts must follow it: there are clear rules for when general jurisdiction is proper in all but extreme and exceptional cases—it must be the state of incorporation or the state of the principal place of business. Justice Ginsburg’s opinion for the Court even seemed to give more than the typical nod to the dissent of Justice Laurie McKinnon in the Montana Supreme Court, which had argued that the Montana Supreme Court’s decision was clearly contrary to what the U.S. Supreme Court had plainly said and held in *Daimler*. At times the U.S. Supreme Court will reward lower court judges with special attention for faithfully attempting to follow precedent when that judge’s colleagues seem bent on avoiding it.

**More to Come**

By Supreme Court standards, there has been a flurry of decisions regarding personal jurisdiction. Two significant decisions in 2011 were *Goodyear* and *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). In 2014, it was *Daimler* and *Walden v. Fiore*, 134 S. Ct. 1115 (2014). And in 2017, it is *BNSF* and the yet-to-be-released opinion in *Bristol-Myers Squibb Co. v. Superior Court of California*, No. 16-341 (May 22, 2017), overturned an interpretation of the patent venue statute that had allowed rampant forum-shopping by patent plaintiffs.

The Court is aware of forum shopping and the abuses of liberal or malleable personal jurisdiction standards, and its response has been to prescribe more rule-based tests for when jurisdiction is proper. That project works quite well regarding general jurisdiction, and there is apparently broad agreement among the justices on that issue. Specific jurisdiction is far more difficult, as reflected in the fractured Court in *J. McIntyre* six years ago. And the Court still has not addressed personal jurisdiction in the context of internet sales. There is much more to come regarding personal jurisdiction.

Defendants should preserve personal jurisdiction challenges to take advantage of any future changes in the developing case law. Defendants should also consider resisting jurisdictional discovery about number of employees, offices, sales, and so forth in a particular state where the only potential theory those facts could support is a losing theory of general jurisdiction. *BNSF* did not remand for factual investigation or analysis because the law of general jurisdiction is clear and easy to apply. In all but truly extreme cases, there will only be general jurisdiction in the states of incorporation and principal place of business.

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Eric B. Wolff
Partner
Seattle
D +1.206.359.3779

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