

PUTTING AN END TO FORUM SHOPPING

STEP ONE: PERSONAL JURISDICTION DEFENSE ©

Presented by:

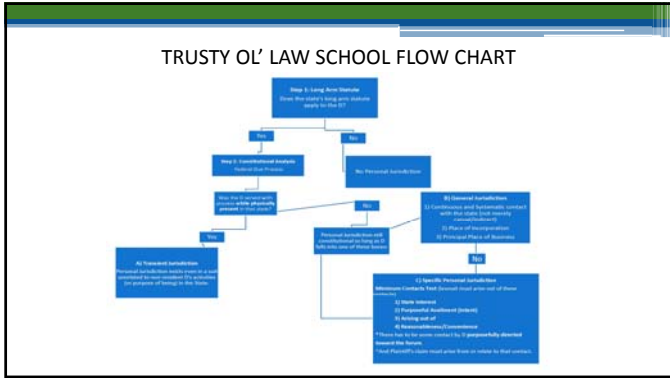
Kristi K. Brownson

Lindsey A. Streicher



Thursday, February 22

DeWitt Mackall Crouse & Moore S.C.



**GENERAL JURISDICTION:
WHERE THE DEFENDANT IS
"AT HOME"
(PLACE OF INCORPORATION OR
PRINCIPAL PLACE OF BUSINESS)**

Daimler AG v. Baumann, 134 S. Ct. 746 (2014)

- Relevant Facts:
 - Defendant: non-resident corporate entity (German)
 - Allegations arise out of purported conduct of the defendant in Argentina
- Held:
 - *No general jurisdiction over the non-resident corporate entity where it was not "at home" in the forum state: not its place of incorporation, nor its principal place of business, and there are no facts establishing it is an "exceptional case"*

LINGERING ISSUE: CONSENT BY REGISTRATION TO DO BUSINESS

States rejecting general jurisdiction by consent based on registration statutes¹:

- Alaska
- Arkansas
- Arizona
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Idaho
- Illinois
- Indiana
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Mississippi
- Missouri
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Rhode Island
- South Carolina
- South Dakota
- Texas
- Utah
- Vermont
- Washington
- West Virginia
- Wisconsin

¹ <https://www.dmagandweitzlawblog.com/2017/12/quasi-guard-post-50-state-survey-on-general-jurisdiction-through-consent-by-registration-to-do-business-putting-bauman-and-baseball-back-together.html>
(data last visited December 23, 2017).

Consent by Registration to Do Business: A Case Study

***Salgado v. Omnissource*, 2017 WL 4508085 (Tex. Ct. App. 2017)**

- *Registration to do business in and maintenance of an agent for service in Texas is not enough to establish general jurisdiction without more.*

***Spratley v. FCA US*, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017)**

- *After Daimler, registration to do business in New York does not amount to consent to general jurisdiction.*

***Brown v. Lockheed*, 814 F.3d 619 (2d Cir. 2016)**

- *Connecticut's registration statute does not require registrants to submit to the general jurisdiction of the state's courts – and even if it did, such exercise of general jurisdiction must comport with Federal Due Process.*

States with precedent arguably allowing general jurisdiction by consent based on registration statutes²:

- Iowa
- Minnesota
- Nebraska
- Pennsylvania

² *Id.*; see also Minn. Stat. § 303, et seq. (Minnesota's registration statute); *Knowlton v. Allied Van Lines*, 900 F.2d 1196 (8th Cir. 1990) (holding corporation's consent to jurisdiction by registering to do business in the state and appointing an agent for service of process)

**SPECIFIC JURISDICTION:
PLAINTIFF'S CAUSE OF ACTION ARISES
FROM OR RELATES TO DEFENDANT'S
CONTACTS WITH THE FORUM**

***Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017)**

- Relevant Facts:
 - Plaintiffs: 86 residents, and 575 non-residents (from 33 other states)
 - Defendant: non-resident corporate entity
 - Engaged in business activities in California:
 - R&D facility
 - Sales representatives
 - Small state-gov't advocacy office
 - Sold Plavix in CA (over \$900 million in sales)
- Analysis:
 - 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.' When there is no such connection, specific jurisdiction is *lacking regardless of the extent of a defendant's unconnected activities in the State.*" (emphasis added)

Bristol-Myers, continued . . .

- Held:
 - No specific jurisdiction over non-resident corporate entity for claims not arising out of the defendant's conduct in California. In so holding, the Court relied heavily on its prior analysis in Walden v. Fiore, 134 S. Ct. 1115 (2014):
 - The contacts the defendant itself creates with the forum and not its contacts with the plaintiff are what matters.
 - The plaintiff's contacts with the forum cannot form the basis for exercising jurisdiction over a non-resident defendant.

**LINGERING ISSUE:
TEMPORAL NATURE OF DEFENDANT'S
FORUM CONTACTS**

McGill v. Conwed Corp., 2017 WL 4534827 (D. Minn. Oct. 10, 2017)

- Relevant Facts:
 - Plaintiff: Kansas resident
 - Allegations arise out of exposure in Kansas
 - Commenced lawsuit in 2016
 - Defendant: Non-resident corporate entity
 - Ceased doing business in Minnesota in 1985
 - Authorization to do business in Minnesota revoked in 2009
 - Plaintiff alleged exposure to asbestos from Defendant's products occurring in Kansas
- Analysis:
 - To find specific jurisdiction, the following contacts "must exist"
 - (1) when the suit is filed,
 - (2) within a reasonable period of time immediately prior to that, or
 - (3) at the time the cause of action arose, . . . [and] Plaintiffs' suit must 'arise out of or relate to' those contacts."

McGill, continued . . .

- Held:
 - *No specific jurisdiction over non-resident corporate entity where the contacts with the forum ceased before the litigation commenced.*
 - “[Defendant’s] activities before 1985 are irrelevant to a cause of action that arose thirty years later—[Defendant’s] contacts must be contemporaneous to this lawsuit. * * * In sum, Plaintiffs do not point to any contacts that could support specific personal jurisdiction in this case.”

Morecambe Maritime, Inc. v. Nat’l Bank of Greece, S.A., 821 N.E.2d 780 (Ill. Ct. App. 2004)

- Relevant Facts:
 - Plaintiff: Non-resident corporate entity
 - Commenced lawsuit in March 2002
 - Defendant: Non-resident corporate entity
 - Entered into a contract with Plaintiff on 1/16/1998
 - Surrendered its certificate of authority to do business in Illinois on 12/31/1998
 - Sold its Illinois branch in 1/1/1999
- Analysis:
 - Illinois’ “doing business doctrine” provides a basis for personal jurisdiction over a non-resident.
 - BUT no personal jurisdiction on this basis where the claim/litigation arises *after* the company has ceased doing business in the state.
- Held:
 - *No personal jurisdiction over non-resident corporate entity where its registration to do business in the state terminated before the litigation commenced.*

PROBLEMS IN A POST BRISTOL-MYERS WORLD

Inconsistent Application Yields Unpredictable Results: The Missouri Talc Case Study

***Jinright v. Johnson & Johnson*, 2017 WL 3731317 (E.D. Mo. Aug. 30, 2017)**

- Plaintiffs: 81 non-residents, 2 residents
- Held: *The non-residents claims do not arise in or relate to Missouri, therefore the court lacks specific jurisdiction over such claims.*

***Fox v. Johnson & Johnson*, 2017 WL 4629383 (Mo. Ct. App. Oct. 17, 2017)**

- Plaintiffs: 63 non-residents, and 2 residents
- Held: *Fox's claims do not arise out of the defendant's conduct in the forum, and as such, the court reversed the \$72 million verdict awarded to that plaintiff.*

***Slemp v. Johnson & Johnson*, No. 1422-CC09326-02 (Mo. Cir. Ct. Nov. 29, 2017)**

- Plaintiffs: 59 non-residents, and 2 residents
- Held: *Specific jurisdiction existed over the defendant because there was evidence that it engaged in in-state conduct (e.g. enlisting a Missouri company to manufacture, bottle, process, label and package the product at issue) which plaintiffs allege gave rise to their claims.*

*Johnson & Johnson, the defendant in each of these cases is not a resident of Missouri

Fin.

Just Kidding. There's more.

Be Prepared

1. First and foremost, always be considering personal jurisdiction – don't fall victim to waiver!
2. Some courts (improperly) focus on plaintiff's contacts with the state in their specific jurisdiction analysis – remember to redirect focus to the defendant's contacts.
3. Some courts ignore the *Bristol-Myers* decision altogether.

“Waive” Goodbye to that Personal Jurisdiction Defense if You Fail to Timely Assert It!

Holt v. 4520 Corp., Inc., No. 1622-CC008844 (Mo. Cir. Ct. Aug. 17, 2017)

- 4/5/2016 - Plaintiff commenced lawsuit
- 5/6/2016 – Defendant’s answer: asserted lack of personal jurisdiction
- 4/2017 - Defendant filed notice of motion and motion to dismiss
- 7/14/2017 - Defendant filed its briefing on its motion to dismiss
- 8/28/2017 - Trial
- MO Court Rule 55.27(c): A defense of lack of personal jurisdiction must be heard and determined before trial—unless otherwise ordered by the court
- Held:
 - Defendant’s delay in moving to dismiss for lack of personal jurisdiction amounted to waiver of the defense.

Red Herring Facts: Plaintiff’s Contacts with the State

Align v. Boustred, 2017 WL 7208133 (Colo. 2017)

- Defendant: Taiwanese company, no physical presence in US
- Plaintiff purchased product from CO retailer
 - Product manufactured by Taiwanese company
 - Product distributed by DE corporation (contracted with defendant)
- The court’s only reference to or mention of *Bristol-Myers*, is in a footnote:
 - “In *Bristol-Myers*, the non-resident plaintiffs did not buy the product at issue in California, nor were they injured by the product in the state. In this case, in contrast, the plaintiff lives in Colorado, bought the product in Colorado, and was injured in Colorado. Hence, the issue implicated in *Bristol-Myers* is not implicated here.”

Bristol-Myers Who?

Murco Wall Products, Inc. v. Galier, No. 17-733 (Petition for Writ filed Nov. 16, 2017)

- Relevant Facts:
 - Plaintiff: Resident
 - Alleged exposure in Oklahoma
 - Defendant: non-resident corporate entity
- Writ to U.S. Supreme Court (No. 17-733)
 - “This is not the first case in which the Oklahoma courts have ignored this Court’s case law governing personal jurisdiction.”
- On February 20, 2018, the Supreme Court “vacated and remanded for further consideration in light of *Bristol-Myers*”

Bristol-Myers Who? Pt. II

Rice v. Am. Talc Co., 2017 WL 48873098 (Conn. Super. Ct. Sept. 7, 2017)

- Relevant Facts:
 - Plaintiff: worked at plant in CT 1962 – 1968
 - Defendant: TX company
 - Started shipping products to state in 1969
 - Did not obtain rights to mine talc until 1971
 - Sales to state stopped in 1977
- Analysis:
 - “[B]ecause of the requirement that the cause of action ‘arise out of’ the defendant’s contacts with the forum, specific jurisdiction may not be exercised without some causal connection between the defendant’s contacts with the forum and the existence of the plaintiff’s lawsuit.”
- Held:
 - “Even though the undisputed evidence” shows the defendant did not begin shipping products to Connecticut until a year after the plaintiff stopped working at the Connecticut plant, because the plaintiff claims exposure in Connecticut and the defendant once [albeit not during the time of the claimed exposure] shipped products to Connecticut, there is a basis for specific jurisdiction.”

Bristol-Myers Who? Pt. III

• **Fitzhenry-Russell v. Dr. Pepper/Snapple Grp., 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017)**

- Bristol-Myers doesn’t apply to class actions.

• **In re Chinese-Manuf. Drywall Prod. Liab. Litig., 2017 WL 5971622 (E.D. La. Nov. 30, 2017)**

- Bristol-Myers doesn’t apply to class actions.

• **Sloan v. General Motors LLC, 2018 WL 784049 (N.D. Cal. Feb. 7, 2018)**

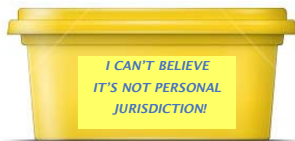
- Bristol-Myers doesn’t apply to federal courts.

IT’S NOT ALL BAD NEWS...

Sorry, No Specific Jurisdiction Here, Better Luck Next Time

- **Aspen Am. Ins. Co. v. Interstate Warehousing Inc., 2017 WL 4173349 (Ill. 2017)**
 - No specific jurisdiction where “[the] plaintiff does not complain of any conduct committed by defendant in Illinois.”
- **PTA-FLA v. ZTE Corp., 2017 WL 5483178 (4th Cir. 2017)**
 - No specific jurisdiction where the plaintiff’s claims do not arise out of any contact of the defendant with the forum state.
- **Hinkle v. Cont’l Motors, Inc., 268 F. Supp. 3d 1312 (M.D. Fla. 2017)**
 - No specific jurisdiction where there was no nexus between the defendant’s conduct in the state and the plaintiff’s injury.

PATENT VENUE



In re Cray Inc., 871 F.3d 1355 (Fed. Cir. 2017)

Relevant Facts:

- Defendant: non-resident corporate entity (2 employees that were allowed to work remotely from their homes in the Eastern District Texas)

Held:

- *Under the patent venue statute, in order for a place to be a proper venue to hear a patent dispute, the defendant company must have a regular and established place of business in that forum. The presence of 2 at-home workers in the forum was not sufficient to warrant venueing the case in the Eastern District of Texas.*³

³The Eastern District of Texas has been a hot-spot location for plaintiffs commencing patent disputes, much like the courts of certain counties in Illinois and Missouri have been hot-spots for plaintiffs in asbestos litigation. In fact, in a February 2018 *Bench & Bar* article by attorney Kelsey Thorkelson, it was noted that “[i]n the 90 days prior to TC Hearlston, . . . 33 percent of new patent cases were filed in the Eastern District of Texas. In the 90 days following, that number dropped to 13 percent.”

QUESTIONS TO CONSIDER

- 1. Where is the defendant's place of incorporation?
- 2. Where is the defendant's principal place of business?
- 3. Does the state have a business registration statute?
 - 1. Is the defendant registered to do business in the forum state?
 - 2. Does the defendant maintain an agent for service in the forum state?
- 4. Did the defendant make sales of the product to/in the forum state?
- 5. Did the defendant operate in the forum state?
- 6. Did the plaintiff use or purchase the defendant's product in the forum state?
- 7. Did the plaintiff's injury/claim occur in the forum state?
- 8. Does the plaintiff's injury/claim arise from or relate to the defendant's contacts with the forum state?
- 9. Does the defendant still have contacts with the forum state?
 - 1. If no, when did the defendant cease engaging with the forum state?
 - 2. If yes, are those contacts related to the plaintiff's claim/injury?

For More Information

Contact [Kristi Brownson](#) or [Lindsey Streicher](#)

kbrownson@brownsonnorby.com

lstreicher@brownsonnorby.com

www.brownsonnorby.com