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This Week's Feature

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"Are We There Yet?" Will Personal Jurisdiction End Litigation Tourism?

by Knight S. Anderson and Nathan T. Newman

U.S. tourism is an almost trillion-dollar industry. And while no official "litigation tourism" numbers are reported, those activities generate tremendous revenue for plaintiffs and their attorneys. Unfortunately, this "industry" does so to the *detriment* of local taxpayers by increasing costs and clogging courts. *Daimler* constructed some "do not enter" signs and redirected some traffic on the litigation superhighway, but these tourists are devoted and continue to look for and—with the help of some courts—are still finding their preferred destinations, though some involve detours. So, where are we going?

Is "at Home" Really Where Your Heart Is?

In an 8–1 decision in the "other" personal jurisdiction case considered during its October 2016 term, the United States Supreme Court made clear that it meant what it said about general jurisdiction and "at home" in *Daimler*. *BNSF Railway Co. v. Tyrrell*, 581 U. S. ____ (May 30, 2017). The Court reversed a Montana Supreme Court decision finding personal jurisdiction over BNSF in lawsuits brought under the Federal Employers Liability Act (FELA) on behalf of two employees who did not live and who were not injured in Montana. In response to the argument that *Daimler* did not involve a FELA claim or railroad defendant, the Court clarified that the "due process constraint described in *Daimler* . . . applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued." *Slip Op.* at 11. The Court also found that BNSF's 2,000 miles of railroad track

and 2,000 Montana employees were insufficient "to permit the assertion of general jurisdiction over claims like [the plaintiffs'] that are unrelated to any activity occurring in Montana." *Slip Op.* at 11–12.

This decision should sound the death knell for arguments that in-state business contacts unrelated to the episode in suit are sufficient to establish general jurisdiction over a nonresident corporate defendant. *See also Barrett v. Union Pac. R.R. Co*., 361 Or. 115, 131–32 (Or. 2017) ("[w]e cannot follow the Court's decision in *Daimler* and give continued effect to the 'doing business' cases that plaintiff implicitly urges us to follow"); *ClearOne Inc. v. Revolabs, Inc*., 369 P.3d 1269, 1284 (Utah 2016) ("the Supreme Court in *Daimler* clearly rejected the 'doing business' test").

Meet Me in St. Louis?

In *State ex. rel. Norfolk S. Ry. Co. v. Dolan,* 512 S.W.3d 41 (Mo. 2017), the Missouri Supreme Court issued a decision that should permanently change the plans of nonresident plaintiffs who wish to try to join the 21st-century gold rush by filing and pursuing their cases in St. Louis, a top litigation tourism destination. *See, e.g.*, *Timms v. Johnson & Johnson*, No. 4:16-cv-00733-JAR, 2016 WL 3667982 (E.D. Mo. July 11, 2016) (remanding action back to City of St. Louis Circuit Court, where 77 of 80 unrelated plaintiffs were from 31 states other than Missouri); *see Robinson v. Pfizer Inc*., No. 4:16-CV-439 (CEJ), 2016 WL 1721143 (E.D. Mo. Apr. 29, 2016) (remanding action back to City of St. Louis Circuit Court, where 64 plaintiffs were from 29 different states).

The plaintiff in *Dolan*, an employee of the defendant, lived and was injured in Indiana. Though the railroad defendant owned and operated 400 miles of tracks in Missouri, employed nearly 600 people in Missouri, and generated $232 million in revenue from Missouri, the court found that specific jurisdiction did not exist because the plaintiff's claim did not arise out of those Missouri activities. *Id.* at 49. The court also rejected the argument that because the plaintiff's claims arose out of the same activity that the railroad conducted in Missouri, specific jurisdiction existed: "Just because a company like Ford, for example, sells cars in Iowa and in California, does not mean there is jurisdiction in California for injuries that occurred in Iowa simply because Ford engages in the same 'type' of activity—selling cars—in both states." *Id*. Finally, the court spurned the "jurisdiction by consent" argument.

Oh, Where Do We Go Now? Well, What Does the GPS Say?

While most expect the U.S. Supreme Court decision in *Bristol-Myers Squibb* (No. 16-466) to have a profound and practical effect on where cases, and in particular, mass tort cases, can and will be filed, a narrow reversal may still leave an open question about the correct test to determine the "arising from" causal link for specific jurisdiction. This issue is currently raised in a Petition for a Writ of Certiorari filed in *GlaxoSmithKline LLC v. Meyers* (No. 16-1171), challenging a decision by an intermediate appellate court in Illinois.

Speaking of Illinois—another popular litigation tourist destination—the Illinois Supreme Court recently heard arguments in *Aspen American Ins. Co. v. Interstate Warehousing*, a subrogation case that should decide the contours of the "doing business" test under Illinois law. Interestingly, the Illinois Trial Lawyers Association (ITLA), and the American Association for Justice (AAJ) filed a joint amicus brief on behalf of the plaintiff insurance company.

Finally, while *Tyrrell* explicitly avoided deciding the "consent to jurisdiction" argument, as states examine their respective statutes, conflicting decisions may arise that could prompt further review of these jurisdictional issues. So while courts continue to limit the use of the most popular routes for nonresidents to travel to and enjoy the fruits of plaintiff friendly state courts, some avenues may still be open for discussion (and litigation).

But if I have to pull this car over one more time . . . .

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