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After The BNSF Decision, There's No Place Like 'At Home'

By **Richard Dean and Michael Ruttinger**

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The United States Supreme Court's decision in Daimler v. Bauman AG, 134 S. Ct. 746 (2014), sparked what some have called a "revolution" in personal jurisdiction law with its holding that courts may only exercise general jurisdiction over corporations where they are "at home" — typically, in either the corporation's place of incorporation or its principal place of business.


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In short order, Daimler touched off a torrent of lower court decisions restricting the practice of "litigation tourism," in which non-resident plaintiffs file suit in a foreign, plaintiff-friendly forum, even though they were not injured and have never resided in the forum.


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Consequently, it is no surprise to see articles like the May 22, 2017, piece authored by Leslie Brueckner and Andre Mura titled The Supreme Court Puts Personal Jurisdiction On Trial, which offers plaintiff-side criticism of Daimler. As counsel coming from a defense perspective, it will come as no surprise that the authors disagree with Brueckner and Mura's position that the Supreme Court's recent personal jurisdiction precedent is fundamentally unfair to plaintiffs.

But there is one position on which we, and now the Supreme Court, agree — the outlook for plaintiffs who seek to sue outside of the forum where their injury occurred or where the defendant is "at home" is bleak. Plaintiffs have gone to great lengths to distinguish Daimler and preserve every opportunity for forum-shopping, but the 2017 Supreme Court term may close the window on their attempts.

Specifically, the Supreme Court accepted certiorari in two cases — BNSF Railway Co. v. Tyrrell, No. 16-405, and Bristol Myers Squibb Co. v. Superior Court of California, San Francisco County, No. 16-466, in which plaintiffs persuaded lower courts to construe Daimler narrowly.

In one of these cases, plaintiffs have already lost; on May 30, 2017, the U.S. Supreme Court reversed the Supreme Court of Montana and broadly held that "Daimler ... applies to all state-court assertions of general jurisdiction over nonresident defendants." BNSF Railway Co. v. Tyrrell, No. 16-405, 2017 WL 2322834, at *10 (May 30, 2017).

In BNSF Railway, the Supreme Court unequivocally rejected one attempt by plaintiffs to limit Daimler to

its narrow factual circumstances. The plaintiff filed suit against the defendant railroad under the Federal Employers' Liability Act (FELA) in Montana, even though "[n]either plaintiff alleged injuries arising from or related to work performed in Montana" and neither plaintiff lived in Montana. BNSF Railway, 2017 WL 2322834 at *3.

The Supreme Court's holding was familiar to anyone who has read Daimler — it confirmed that a Montana court could not exercise general jurisdiction over BNSF Railway because it "is not incorporated or headquartered in," and is therefore not "at home in," Montana. 2017 WL 2322834 at *2. But the Supreme Court did more than reaffirm Daimler; it rejected attempts to confine its holding to any particular set of claims.

In the underlying case before the Supreme Court of Montana, the plaintiffs had persuaded the court to distinguish Daimler "on the ground that [the Supreme Court] did not there confront a FELA claim or a railroad defendant." Id. at *10. Therefore, since it believed Daimler did not apply, the Supreme Court of Montana concluded it could exercise general jurisdiction just because the railroad "does business" in Montana. See Tyrrell v. BNSF Railway Co., 373 P.3d 1, 7 (Mont. 2016).

But the high court rejected that distinction, clarifying that "Daimler, however, 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." Id. at *10.

The Supreme Court's holding in BNSF Railway bodes ill for the non-resident plaintiffs' hopes in the Bristol Myers case, where the court is poised to deal a further blow to litigation tourism. By confirming that it will apply its Daimler holding irrespective of "the type of claim asserted or business enterprise sued," the high court has sent an unequivocal message that Daimler applies to any kind of claim raised against any kind of defendant — from common-law to contract or statute-based.

In Bristol Myers, the California Supreme Court sought an end run around Daimler by turning to specific jurisdiction, not general, and attempted to peg specific jurisdiction to a novel test comparing the similarity of claims of California and Ohio residents. But that test is inconsistent with the U.S. Supreme Court's companion decision to Daimler in Walden v. Fiore, 134 S. Ct. 1115 (2014), in which the court reiterated its long-held rule that specific jurisdiction exists only where the defendant's conduct giving rise to the injury is specifically connected to the forum. Walden, 134 S. Ct. at 1122.

Thus, if the U.S. Supreme Court reverses the California Supreme Court, which seems likely in the wake of the BNSF Railway decision, it will cut off yet one more way in which plaintiffs seek to avoid Daimler's impact on litigation tourism.

Collectively, Daimler, Walden and BNSF Railway offer an easily followed test that provides plaintiffs with three options for where they can file a lawsuit: (1) the forum that could exercise specific jurisdiction (often the location of the injury); (2) the defendant's state of incorporation; or (3) the state in which the defendant has its principal place of business.

And yet despite that guidance, plaintiffs' counsel like Brueckner and Mura decry the Supreme Court's holdings as "deep[ly] unfair[] for plaintiffs who will have difficulty finding forums in which to seek a remedy." But finding a forum in which to seek a remedy is easy under Daimler, Walden and BNSF — the real issue is that plaintiffs want to seek out the most plaintiff-friendly forum possible, which may not be a court that can exercise jurisdiction.

Nor is the rule articulated in Daimler and BNSF Railway "especially favorable" to corporations or unfair to individual plaintiffs, as Brueckner and Mura criticize. Objectively, numerous fairness principles favor litigation either where the alleged injury occurs or where the defendant is "at home." In almost any litigation, it will favor both sides to have a forum where fact witnesses and third-party witnesses can be easily subpoenaed for trial. Common sense dictates that a critical mass of these witnesses will be located either near the defendants' headquarters or the location of the injury.

Moreover, litigation tourism prejudices defendants by allowing plaintiffs to choose forums that have peculiarly restrictive summary judgment rules, lengthy statutes of limitation for bringing claims or especially lax rules for the admission of scientific testimony.

And indeed, litigation tourism is even used to unfairly deprive defendants of the ability to litigate claims against them in federal court by lumping together out-of-state plaintiffs' claims with that of a single in-state resident of whatever state where the defendant is "at home," thus contriving to defeat diversity jurisdiction. Limiting the forums in which corporate defendants can be sued does not deprive plaintiffs of the chance to seek a remedy, but it does restore a measure of balance between the parties.

BNSF and the possible reversal in Bristol Myers Squibb will significantly curtail the future of litigation tourism, with impact on both current and future cases. Indeed, it should be noted that many of the large verdicts reported in the last few years in this publication were the result of litigation tourism to plaintiff-friendly jurisdictions. The jurisdictional issues were raised and preserved in many of these cases and several of those verdicts may be vacated in light of BNSF and Bristol Myers.

A South Dakota resident who has never set foot in San Francisco, St Louis City or Cook County won't be able to collect a huge judgment and, in the future, such plaintiffs will have to choose between suing in the place where they were injured or where defendant is "at home." In most cases, one of the parties — plaintiff or defendant — will always be "at home." How is that unfair?

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