Strategic Considerations Before Challenging Personal Jurisdiction in Products Liability Litigation

Over the last seven years, the U.S. Supreme Court has rapidly and dramatically altered the landscape of personal jurisdiction law. Specifically, the court issued six opinions that overturned a lower court's exercise of personal jurisdiction, reinforced due process limitations on state assertions of jurisdiction, and narrowed the scope of constitutionally permissible general and specific personal jurisdiction.

By **Eric Rosenberg** | January 30, 2018

Over the last seven years, the U.S. Supreme Court has rapidly and dramatically altered the landscape of personal jurisdiction law. Specifically, the court issued six opinions that overturned a lower court's exercise of personal jurisdiction, reinforced due process limitations on state assertions of jurisdiction, and narrowed the scope of constitutionally permissible general and specific personal jurisdiction. See *Bristol-Myers Squibb v. Superior Court of California San Francisco*, 137 S. Ct. 1773 (2017) (BMS); *BNSF Railway v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 134 S. Ct. 1115 (2014);

Daimler AG v. Bauman, 134 S. Ct. 746 (2014); *J. McIntyre Machinery v. Nicastro,* 564 U.S. 873 (2011); and *Goodyear Dunlop Tires Operations v. Brown,* 564 U.S. 915 (2011). The net impact of these decisions has been a reduction of plaintiff forum shopping in so-called "magnet jurisdictions"—or as the American Tort Reform Association prefers, "judicial hellholes." (http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf)

The two most critical opinions include *Daimler* and *BMS* on general and specific jurisdiction, respectively. In *Daimler*, Justice Ruth Bader Ginsberg wrote for an eight-justice majority and held that general jurisdiction is only proper where an entity's instate business activities are "so 'continuous and systematic' as to render it essentially at home in the forum state." *Daimler* effectively limits general jurisdiction to entities that are either incorporated within the forum or maintain their principal place of business there. The most recent blow to plaintiff forum shopping came in 2017 when SCOTUS issued *BMS* to decisively separate the analyses for general and specific jurisdiction. ustice Samuel Alito wrote for the eight-justice majority that specific jurisdiction requires "a connection between the forum and the specific claims at issue" meaning that unrelated contacts are irrelevant to the analysis.

Products liability defense practitioners widely tout the *Daimler* and *BMS* decisions as ending litigation tourism in "magnet jurisdictions" once and for all, spawning a new generation of litigation involving challenges to personal jurisdiction in those forums. One blogger even identified *BMS* as "one of the most important mass tort/product liability decisions ever" because of the limits it places on plaintiffs' ability to rely on "expansive notions of personal jurisdiction" (https://www.druganddevicelawblog.com/2017/06/breaking-news-

%E2%88%92-bristol-myers-squibb-slams-the-door-on-litigation-tourism.html) in support of forum shopping.

Taken as a whole, these six opinions have chipped away at plaintiff forum shopping, making it decidedly more difficult to initiate products liability actions in the forum of their tactical choosing. But there remain innumerable strategic and practical considerations that defense counsel should assess before engaging in knee-jerk challenges to personal jurisdiction. Although the battle for dismissal on jurisdictional grounds is often a worthy endeavor, the possibility always remains that you will be forced to defend your client against the same claim in another jurisdiction if you prevail. While SCOTUS has armed defense counsel with a new set of weapons to combat litigation tourism, there may be circumstances where it is more advantageous to waive jurisdictional challenges and litigate in the forum of the plaintiff's choosing.

The goal of this article is to pose an open-ended list of issues that may make waiver of jurisdiction an attractive option that allows your client to litigate in a challengeable forum with other potentially liability co-defendants rather than litigate alone, or among fewer defendants, in a forum that is more jurisdictionally appropriate.

Legal Costs

From a purely practical and nonlegal standpoint, the sheer cost of litigating jurisdictional challenges makes the endeavor unattractive to some clients, especially clients that are nominal defendants in multi-party litigation, or clients that are not regular targets of products liability lawsuits and may not stand to gain from developing favorable legal precedent. Depending on the case, the cost of briefing and discovery could exceed six figure sums before the parties even begin to litigate the merits of the case.

Expert Costs

Likewise, from a practical standpoint, the cost of expert retention in complex, multi-party products liability litigation can easily reach hundreds of thousands of dollars if the matter is taken to trial. The ability to share the cost of both damages and liability experts with co-defendants in a single forum is a beneficial cost-saving measure that will be lost if you challenge jurisdiction, prevail, and get sued in another forum with none or fewer co-defendants available to share the expense.

Exposing Clients to Discovery

After a defendant challenges personal jurisdiction, the court may need to schedule an evidentiary hearing, permit limited jurisdictional discovery, and allow the parties to submit supplemental briefing. Plaintiffs may be permitted to take fairly extensive discovery from your clients, depending on the case-specific issues involved, exposing your client to invasive discovery before ever reaching discovery on the actual merits of the case, see, e.g., *Reid v. Siniscalchi*, No. 2874, 2011 Del. Ch. LEXIS 15 (Del. Chan. Jan. 31, 2001) (a particularly expansive example of permissive jurisdictional discovery where the court allowed plaintiff to take eight depositions and seek information regarding defendants' advertising activities in the forum state as part of jurisdictional discovery). This can be problematic when jurisdictional issues involve confidential financial, marketing, and/or sales information, and may result in multiple depositions of client representatives—especially where those representatives may be deposed again as witnesses later in the litigation and risk providing unfavorable testimony as case strategy shifts.

Joint and Several Liability

Aside from practical strategic considerations, there are several key choice of law issues that impact defendants in multi-party products liability litigation. Joint and several liability laws are perhaps the most critical substantive legal issues

that pervade all products liability litigation, especially in products cases with scores of potentially liable defendants. Pennsylvania has adopted the Fair Share Act, which ensures that defendants are only responsible to pay for the percent they are found liable up to 60 percent, at which point a defendant becomes jointly liable for the total award. If you succeed in challenging personal jurisdiction, you may find yourself litigating among a smaller pool of co-defendants in a jurisdiction that maintains a lower threshold for join liability—or worse, a pure joint and several liability jurisdiction such as Alabama, Delaware, and North Carolina—resulting in greater potential exposure than if your client originally waived jurisdictional challenges in Pennsylvania. This consideration is especially apt in light of guidance from the Pennsylvania Superior Court, which recently held that strict liability claims are also subject to *pro rata*, as opposed to *per capita*, several apportionment under the Fair Share Act, see *Roverano v. John Crane,* No. 2847 EDA 2016, 2017 Pa. Super. LEXIS 1110 (Pa. Super. Dec. 28, 2017).

Allocation of Fault to Nonparties

Another related choice of law issue involves allocation of fault to a nonparty—known as the "empty chair" defense. In most cases, Pennsylvania law does not permit defendants to submit nonparty tortfeasor liability to the jury for the purpose of allocating the verdict and reducing proportional fault, see *Rothermel v. Owens-Illinois*, 16 Pa. D. & C.4th 20 (Phila. Cnty. 1992) ("An 'empty chair' defendant may exculpate the other tortfeasors totally if they show the 'empty chair' defendant was solely liable. However, someone not sued cannot be considered a joint tortfeasor for purposes of reducing the verdict."). A few jurisdictions, such as Wisconsin, actually permit defendants to allocate liability to nonparties in some instances to ensure that a severally liable defendant only pays its share of a damages award, even if one of the culpable parties has not been sued, as in *Hardware Mutual Casualty v. Harry Crow & Son,* 6 Wis. 2d 396 (Wis.1959). This is a critical advantage not available under

Pennsylvania law that may warrant the expense of a challenge to jurisdiction in Pennsylvania.

Employer Immunity

Many states prevent the plaintiff from suing his/her employer, but the Pennsylvania Supreme Court carved out a narrow exception to this rule in 2013, holding that the Pennsylvania Workers' Compensation Act does not bar latent occupational disease lawsuits against employers where the disease manifests 300-weeks (roughly five-and-a- half years) after the last exposure, as in *Tooey v. AK Steel* , 81 A.3d 851, 858 (Pa. 2013). Many states have an unconditional employer immunity statute, making waiver of jurisdiction an attractive option in Pennsylvania toxic tort litigation.

In conclusion, this discussion addresses a few of the practical and legal considerations that defense counsel should address before immediately challenging jurisdiction under *Daimler* or *BMS*. There are undoubtedly more issues for counsel to discuss with their clients before embarking on such a challenge, but this article addresses a few of the most key considerations. Keep in mind—SCOTUS has made it easier for lower courts to dismiss parties for lack of personal jurisdiction, but the ability to do so does not always make it the best choice for your client.

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