

## Expert Analysis

# Tough Times For Forum Shoppers

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This has been a difficult spring for forum-shopping lawyers. First the [U.S. Supreme Court](#) held in *TC Heartland LLC v. Kraft Food Group Brands LLC*, No. 16-341, that under the patent venue statute, 28 U.S.C. § 1400(b), a domestic corporation can be sued for patent infringement only in its state of incorporation.

Then the court issued its opinion in [BNSF Railway Co. v. Tyrrell](#), No. 16-405, confirming that a state court can exercise “general” (i.e., “all-purpose”) personal jurisdiction over a domestic corporation only if it is incorporated, maintains its principal place of business or otherwise is “at home” in the forum state.



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Now the court has held in [Bristol-Myers Squibb Co. v. Superior Court of California](#), No. 16-466, that due process bars a state from exercising “specific” (i.e., “case-linked”) personal jurisdiction over out-of-state plaintiffs’ product-liability claims against an out-of-state corporate defendant, “regardless of the extent of [the] defendant’s unconnected activities in the State,” if “what is missing ... is a connection between the forum and the specific claims at issue.” Slip op. at 7-8.

This trio of very recent Supreme Court decisions enforcing limits on exercise of personal jurisdiction over corporate defendants, like earlier cases, sends an unmistakable message to lower courts: Do not promote or condone forum shopping by stretching the boundaries of personal jurisdiction, and thereby infringe on corporate defendants’ due process rights.

The newest case, *Bristol-Myers*, illustrates the need to rein in lawyers who wish to use California and other states’ plaintiff-friendly courts as national tribunals for mass tort litigation against companies that are not at home in the forum state.

## **Bristol-Myers Case Background**

According to the Supreme Court’s opinion, *Bristol-Myers Squibb* (BMS), manufacturer of Plavix, a prescription blood-thinning drug, is incorporated in Delaware and headquartered in New York. Although BMS did not research, develop, manufacture, label, package or work on Plavix regulatory approval in California, it sold almost 187 million Plavix pills in California, representing more than \$900 million in sales during the relevant time period. See slip op. at 1-2.

The plaintiffs, consisting of 86 California residents and 592 nonresidents from 33 other states, sued BMS in California Superior Court, seeking damages for alleged health

problems caused by Plavix. The nonresident plaintiffs did not allege that they were prescribed Plavix, that they purchased or ingested Plavix or that they suffered Plavix-related injuries in California. *Ibid.*

BMS sought to quash the litigation for lack of personal jurisdiction. That jurisdictional issue made its way to California Supreme Court, which held in a 4-3 decision that the state's trial court could exercise "specific jurisdiction" over the out-of-state plaintiffs' claims.

Despite a strong dissent, the state supreme court's slender majority applied a contrived and subjective "sliding-scale approach" to specific jurisdiction, under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." *Id.* at 7.

### **U.S. Supreme Court Opinion**

In an 8-1 opinion authored by Justice Alito, and at the urging of the United States and private organizations such as DRI—The Voice of the Defense Bar, the [Washington Legal Foundation](#) and the [U.S. Chamber of Commerce](#) as amici curiae, the Supreme Court reversed.

Indicating that "settled principles regarding specific jurisdiction control this case," the court explained that "[i]n order for a court to exercise specific personal jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy.'" *Ibid.* (quoting [Goodyear Dunlop Tires Ops. S.A. v. Brown](#), 564 U.S. 915, 919 (2011)).

"[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales." *Ibid.* (quoting [Goodyear](#), 564 U.S. 931 n.6). The court held that there was no personal jurisdiction over BMS because the out-of-state plaintiffs' claims were unrelated to the sales of Plavix in California. See *id.* at 9 ("[t]he relevant plaintiffs are not California residents, and do not claim to have suffered harm in that State").

Justice Alito's opinion squarely rejects the "sliding-scale approach," which the California Supreme Court employed to find specific jurisdiction over the out-of-state plaintiffs' claims primarily on the ground that BMS had engaged in a nationwide marketing campaign for Plavix.

The opinion indicates that the sliding-scale approach not only "is difficult to square with [the Court's] precedents," but also "resembles a loose and spurious form of general jurisdiction," under which a court "may hear any claim" against a defendant that is "at home" in the forum State, "even if all the incidents underlying the claim occurred in different State." *Id.* at 5, 7.

The court reiterated that in contrast, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.* at 6 (quoting [Goodyear](#), 564 U.S. at 919); see also [Daimler AG v. Bauman](#), 134 S. Ct.

746, 757 (2014) (discussing “the essential difference between case-specific and all-purpose (general) jurisdiction”) (quoting *Goodyear*, 564 U.S. at 927).

The court also indicated that its “straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that [plaintiffs] conjure up.” *Id.* at 12. For example, the court explained that its “decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS.” *Ibid.*

Justice Sotomayor was the sole dissenter. She expressed concern that the court’s ruling “hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.” *Id.* at 10 (Sotomayor, J., dissenting).

According to Justice Sotomayor, “[t]he effect of ... the opinion will be to curtail — and in some cases eliminate — plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct.” *Id.* at 11.

## **Forum Shopping Deterred**

What the *Bristol-Myers* decision actually curtails is forum shopping in plaintiffs’ product liability havens, such as the California state court system, which is perennially at or near the top of the [American Tort Reform Foundation’s](#) list of the nation’s worst “Judicial Hellholes.”

For at least 80 years, going back to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court repeatedly has repudiated various manifestations of forum shopping in both state and federal courts. As illustrated by the *Bristol-Myers* case, forum shopping often can trample a defendant’s due process rights by distending the boundaries of personal jurisdiction.

The opinion emphasizes that “[i]t long has been established that the Fourteenth Amendment limits the personal jurisdiction of state courts.” Slip op. at 4. As the high court explained in *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014), “[d]ue process limit on a State’s adjudicative authority principally protect the liberty of the nonresident defendant — not the convenience of plaintiffs.”

Personal jurisdiction restrictions on state courts also reflect a state-sovereignty-based “federalism interest” — “territorial limitations on the power of the respective States.” Slip op. at 6, 7 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

## **Unanswered Questions**

*Bristol-Myers* goes a long way in reaffirming the limits of specific personal jurisdiction over out-of-state corporate defendants. But some unanswered questions remain.

For example, the high court stated that “since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” Slip op. at 12.

And in her dissent, Justice Sotomayor worries that “[a]fter this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States.” Id. at 11 (Sotomayor, J., dissenting). She also asks “about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States,” and thus, “not ‘at home’ in any State.” Ibid.

More fundamentally, Bristol-Myers — a case where there was utterly no connection between the out-of-state plaintiffs’ claims and the forum state — does not offer a bright-line rule for determining what types or degrees of “connection” between a nonresident plaintiff’s claims and a forum state are needed to trigger specific personal jurisdiction.

For example, what if one of the out-of-state plaintiffs had visited California on an overnight business trip and took a Plavix pill while there? Or what if another of the nonresident plaintiffs had vacationed in California for a week and ingested a Plavix pill each day? With all other facts remaining the same, would either of these scenarios create personal jurisdiction as to those particular plaintiffs’ claims?

The Bristol-Myers decision has helped to even the playing field on which such questions will have to be adjudicated on a case-by-case basis. In so doing, courts should not lose sight of the Supreme Court’s longstanding admonition in *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945), that exercise of personal jurisdiction over a defendant must “not offend traditional notions of fair play and substantial justice” (internal quotation marks omitted).

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***Disclosure: The author filed a merits-stage Supreme Court amicus brief on behalf of DRI—The Voice of the Defense Bar, in the Bristol-Myers case.***

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