

Home is Where You're Incorporated: The Supreme Court Limits Forum Shopping

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As corporate counsel, you make critical decisions with important strategic consequences for your business. At first blush, where your business should be incorporated may not sound like that kind of decision. For some businesses, your needs are simple, and it makes perfect sense to incorporate where you are headquartered. Other companies may wish to incorporate in a different state to take advantage of the benefits of that state's corporate laws. That seems simple enough; what more is there to consider?

Thanks to a series of recent Supreme Court cases, where you incorporate plays an increasingly important role in another important strategic consideration: where your business will likely be sued. While your state of incorporation has always been a forum to which plaintiffs could direct litigation, plaintiff's lawyers have long taken advantage of decisional law that permitted lawsuits just about anywhere a corporation did business. As a result, the norm was to defend these lawsuits in plaintiff-friendly forums, on grounds of plaintiffs' choosing. But now, the corporation's home—either its headquarters or place of incorporation—is one of the few places courts will have authority to hear claims against them. In fact, recent data have already shown a shift in where claims against corporate defendants are being brought—away from plaintiff-friendly litigation hotspots and toward states where businesses commonly incorporate. In the years following these decisions, states like Delaware have seen private civil actions almost double and personal injury cases almost quadruple.

This seismic shift changes the calculus. Corporate counsel need to quickly assess whether it makes sense to stay incorporated in distant states, like Delaware, where you might now find yourself having to defend case after case that you used to see filed elsewhere. Changing your state of incorporation may provide an opportunity to bring those cases to your home turf.

An Overview of Personal Jurisdiction

Personal Jurisdiction, as we may remember from Civil Procedure in law school, is the court's power over a specific defendant. This power comes in two varieties: courts may assert *general* jurisdiction, enabling them to hear any and all claims against a given defendant, or they may assert claim-based *specific* jurisdiction, which allows them to hear claims only if the activities giving rise to those claims have a sufficient connection to the state where the court is located (e.g., claims rose from an accident which occurred in the state).¹

In prior years, jurisdictional requirements were defined very broadly, enabling forum-shopping plaintiffs to bring claims practically wherever they wished. In the famous 1945 case *International Shoe*, for example, the Supreme Court instructed that the defendant need only have "certain minimum contacts" with the forum state, so long as those contacts were "continuous and

¹ *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, __ U.S. __, 137 S. Ct. 1773, 1779 (2017); *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316, (1945).

systematic.”² With encouragement from the plaintiffs’ bar, courts began finding that corporations with a substantial business presence nationwide had “continuous and systematic” contacts practically everywhere—and this only got worse during the information age, where even having a website could mean your company was subject to general jurisdiction anywhere that had an internet connection.³

Virtually every company stood a significant risk of being haled into court effectively anywhere—especially plaintiff-friendly litigation hotspots where plaintiffs could direct their claims in hopes of securing a strategic advantage.

Daimler and BNSF Railway Co.: Limiting the Scope of General Personal Jurisdiction

Within the past five years, the Supreme Court has pushed the pendulum in the other direction.

First, in 2014 *Daimler AG v. Bauman*, the Court rejected a California state court’s assertion of general jurisdiction over claims against a non-California corporate defendant. Though the defendant had engaged “in a substantial, continuous, and systematic course of business” in California, the Supreme Court clarified that such activities could not justify bringing in that forum “causes of action arising from dealings entirely distinct from those activities.”⁴ General, all-purpose jurisdiction over a corporate defendant, the Court instructed, was appropriate only in a forum where the corporation “is fairly regarded as at home”—*i.e.*, its “place of incorporation and principal place of business.”⁵ Thus, the corporation could not be “subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.”⁶

The Court reinforced this limit in 2017 in *BNSF Railway Company v. Tyrrell*, where it rejected a Montana court’s assertion of general jurisdiction over claims against a railway company that was not incorporated in Montana and did not maintain its principal place of business there. The railway company had an extensive presence in Montana, including more than 2,000 miles of railroad track and more than 2,000 employees. But these extensive contacts “d[id] not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in Montana”; rather, the company could be subject only to *specific* personal jurisdiction “on claims related to the business it does in Montana.”⁷

² *Int’l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

³ Daniel Ritter, *Limiting Personal Jurisdiction: The Impact of Tyrrell, Bristol-Myers Squibb, and Aspen American*, 106 Ill. B.J. 32, 33 (2018).

⁴ *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (quoting *International Shoe*, 326 U.S. at 318).

⁵ *Id.* (quoting *Goodyear*, 564 U.S. at 735).

⁶ *Id.* at 140.

⁷ *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, 137 S. Ct. 1549, 1559 (2017).

Following *Daimler* and *BNSF*, the only forums where a court may exercise general jurisdiction over a corporate defendant are its “home” forums, which consist almost exclusively of its state of incorporation and its principal place of business.⁸

Bristol-Myers Squibb Company: Limiting the Scope of Specific Jurisdiction

One month after handing down *BNSF*, the Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*. There, a group of hundreds of plaintiffs from California and 33 other states filed claims in California state court, alleging harm rising from a prescription drug manufactured by the defendant. The defendant had extensive ties with the forum state, including research and laboratory facilities and 160 employees, but was incorporated and maintained its principal place of business in another state.

Acknowledging the Supreme Court’s decision in *Daimler*, the California Supreme Court conceded that California courts lacked general jurisdiction over claims against the corporate defendant. Yet it found that the defendant’s “extensive contacts with California” permitted the exercise of specific jurisdiction over the claims of all the plaintiffs, including the non-California residents, “based on a less direct connection between [the defendant’s] forum activities and plaintiffs’ claims than might otherwise be required.” In other words, even though the non-California residents’ claims did not rise from contacts with California, the court thought a strong showing as to the defendant’s contacts with the forum excused a weaker showing as to the state’s connection to the claims.

But the Supreme Court rejected this “sliding scale” approach. “In order for a court to exercise specific jurisdiction over a claim,” the Court noted, “there must be an ‘affiliation between the forum and the underlying controversy, principally, [a]n activity or an occurrence that takes place in the forum State.’”⁹ “When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.”¹⁰ Therefore, only the California residents could bring their claims in California, as their claims rose from the defendant’s activities in that state; non-California plaintiffs, by contrast, had to bring their claims elsewhere—either New York, where the defendant had its principal place of business; Delaware, where it was incorporated; or other places with specific jurisdiction, where conduct in those states gave rise to the specific claims.¹¹

⁸ In addition to these “paradigm” forums, the Court also acknowledged the possibility of an “exceptional case” where a corporate defendant’s operations in another forum “may be so substantial and of such a nature as to render the corporation at home in that State.” *BNSF Ry. Co.*, 137 S. Ct. at 1558. But as Justice Sotomayor acknowledged in her dissent, this exception is a narrow one, and notably, the Court in *BNSF* did not even bother remanding to allow the lower court to consider whether it applied, “send[ing] a signal to the lower courts that the exceptional-circumstances inquiry is all form, no substance.” *Id.* at 1562 (Sotomayor, J., dissenting).

⁹ *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1781 (2017) (quoting *Goodyear*, 564 U.S. at 919).

¹⁰ *Id.*

¹¹ *Id.* at 1783–84.

The implications of this decision are significant. Instead of marshalling diverse plaintiffs together in a single consolidated action in a state of their choosing, plaintiffs' counsel must either divide their claims into separate lawsuits in separate states, or bring them in the defendant's home forum.¹² And there are implications on the other side of the "v." as well: not only will counsel be unable to consolidate their plaintiffs, they will also be unable to consolidate the defendants if they are based in different jurisdictions. This may require plaintiffs' counsel to bring multiple claims in multiple forums to seek recovery from diverse defendants. As Justice Sotomayor recognized in her dissent, the decision "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."¹³

Immediate Implications of the Court's Decisions

These decisions are clear victories for corporate defendants. In their wake, plaintiffs arguing that a corporate defendant has substantial business presence nationwide and could therefore face claims in any state will discover this argument bears little fruit.¹⁴

Relying on the Court's reasoning in *Daimler*, *BNSF*, and *Daimler*, corporate defendants have already had success moving to dismiss claims brought by non-resident plaintiffs in venues other than the home states of those defendants. For example, Johnson & Johnson and a subsidiary have recently convinced the Missouri Court of Appeals to reverse two adverse judgments, totaling over \$125 million, on the ground that the court lacked personal jurisdiction over them with regard to those claims.

Even if a corporation cannot convince a court to dismiss claims against it for lack of personal jurisdiction, the Supreme Court's skepticism on the scope of personal jurisdiction may still prove useful. A number of fringe questions remain unaddressed following the Court's decisions, such as whether the cases' holdings apply equally to state and federal courts.¹⁵ Some commentators have also questioned whether the cases apply equally to claims based on federal causes of action and to state-law claims, or how they might apply to class actions.¹⁶ If these questions are resolved in favor of corporate defendants, they will reinforce the defendants' ability to resist claims brought in unfriendly forums. But even before these questions are definitively settled, they may provide leverage for a favorable settlement from plaintiffs hoping to avoid the risk of reversal on appeal. Corporate counsel should therefore raise and preserve these jurisdictional arguments while these and other issues are being sorted out.

Directing Litigation toward Corporate Defendants' Home States

¹² See *id.* at 1789 (Sotomayor, J., dissenting) (predicting the consequences of the decision).

¹³ *Id.* (Sotomayor, J., dissenting).

¹⁴ See Daniel Ritter, *Limiting Personal Jurisdiction: The Impact of Tyrrell, Bristol-Myers Squibb, and Aspen American*, 106 Ill. B.J. 32, 33 (2018).

¹⁵ *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1783–84.

¹⁶ See, e.g., Michael Paisner, What Do the New Rules of Personal Jurisdiction Mean for in-House Counsel?, ACC Docket, December 2017, at 58, 62.

One might also expect that, in the wake of the Supreme Court's decisions, mass and class actions will migrate away from plaintiff-friendly litigation hotspots to the home-state jurisdictions of corporate defendants, curtailing forum-shopping and directing claims against corporate defendants to forums of their choosing.¹⁷

The early evidence indicates that this is already happening. For example, Delaware, a particularly common place of incorporation, appears to be experiencing a surge in litigation since the Court's decisions in 2014 and 2017. According to the Caseload Statistic Data Tables available from the United States Courts' website,¹⁸ 1,178 private civil actions were commenced in the United States District Court for the District of Delaware in the year ending March 31, 2016. The following year, this number increased by over 25 percent to 1,481, and in the year after that, 2,044 new private civil cases were commenced in that district. Mass tort litigation appears to be a major driver of this increase. In the year ending March 31, 2016, 69 personal injury cases were commenced in the district of Delaware. The next year, this number climbed by almost 70 percent to 117; the year after that, it soared to 291, over four times the number of cases that had been commenced in the year ending March 2016.

The prediction of courts and commentators thus seems to be bearing out: by restricting the scope of personal jurisdiction, the Supreme Court's decisions are funneling litigation toward corporate defendants' home states.

Corporate Location as a Litigation Risk Strategy

This trend of funneling demonstrates the increasing importance of where businesses incorporate in mitigating litigation risks. It made little sense under the old regime to think about common, day-to-day lawsuits when considering where to incorporate. Under the relatively loose personal jurisdiction standards that existed prior to 2014, companies could find themselves being sued just about anywhere no matter where they were incorporated; better, one might have thought, to focus on factors that truly did impact the business, like tax rates or where uncommon claims like strike suits and shareholder actions could be brought, when deciding where to incorporate. Now, with the Supreme Court reinforcing restrictions on personal jurisdiction, where you incorporate may dictate where myriad other claims against your company are brought. This could very well change the calculus.¹⁹

In making this decision, one thing to consider is the reputation of the state's legal system and its ability to handle the kind of litigation your business is likely to face. Delaware, with its Chancery Court—looked to as an authority on business law nationwide—has earned a reputation as a corporate-friendly forum. In addition, its cases are heard by judges rather than juries, expediting the litigation process and adding a level of predictability to its outcomes. But these

¹⁷ See Michael Paisner, *What Do the New Rules of Personal Jurisdiction Mean for in-House Counsel?*, ACC Docket, December 2017, at 58, 62.

¹⁸ <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>; see, generally, Tables C-1 and C3 for years ending 3/31/16, 3/31/17, and 3/31/18.

¹⁹ Of course, this is just one factor among many. Questions such as whether and at what rates the state imposes a corporate or personal income tax, or how burdensome the state's reporting requirements are, remain important points to consider.

advantages come at a price—unlike other common states of incorporation, Delaware imposes a state corporate and personal income tax (though the corporate tax applies only to companies that transact business there).

You might also wish to consider procedural rules, such as statutes of limitations, a state may apply to claims against corporate defendants—especially the kinds of claims your business is likely to face. In Delaware, for example, claims for a breach of contract must be brought within three years of the breach.²⁰ By contrast, the limitations period for a breach of contract action in Nevada, another corporate-friendly location, is four years for a non-written contract, and up to six years for a written contract.²¹ In Wyoming, the limitations period is even longer: up to eight years for a non-written contract, and up to 10 years for a written contract.²² On the other hand, claims for libel or slander may be brought in Delaware and Nevada within two years of their accrual,²³ while the limitations period for libel or slander claims in Wyoming is only one year.²⁴

As these examples show, there is no one clear answer as to which state’s procedural rules will be most beneficial to your corporation; this will depend on any number of fact-specific circumstances you should carefully consider as you evaluate how incorporating in a given forum may impact litigation risks and other strategic factors.

Where Do We Go from Here?

The Supreme Court’s decisions reinvigorating jurisdictional defenses for corporate defendants hand corporations an important tool for resisting litigation brought against them in unfavorable locations, as well as for mitigating litigation risks before cases are ever filed.

Once an action against your corporation has been filed, review the claims closely to see whether the plaintiffs have complied with the personal jurisdiction requirements the Supreme Court recently set out. Remember, personal jurisdiction defenses can be waived; if they are not pleaded and asserted at the outset of the litigation, they may be unavailable down the road. The steps you must take to raise and preserve personal jurisdiction defenses may vary between forums, so it is crucial that you closely review local rules and precedent to ensure a viable defense is not inadvertently waived.

Even before claims are filed against a corporation, you should consider how the Supreme Court’s decisions on personal jurisdiction affect corporate strategy. As a result of the Court’s decisions, many of the cases being brought in plaintiff-friendly litigation hotspots will be funneled to other forums, including your corporation’s home state. Where you incorporate will have a lot to do with where these claims are brought and fought. As a result, give serious consideration to evaluate the pros and cons of your current state of incorporation *before* a lawsuit is filed.

²⁰ Del. Code Tit. 10 § 8016.

²¹ Nev. Rev. Stat. § 11.190(1)(b), (2)(c).

²² Wyo. Code § 1-3-105(a)(i), (ii)(A).

²³ Del. Code Tit. 10 § 81119; Nev. Rev. Stat. § 11.190(4)(c).

²⁴ Wyo. Code § 1-3-105(a)(v)(A).