Advisory

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Recent Decision Opens State Courts to Claims by Nonresidents Concerning Nationally Marketed or Distributed Products

In a decision that should be of concern to any company that engages in national marketing campaigns or distributes products nationwide, the California Supreme Court has rolled out the welcome mat to nonresident plaintiffs who want to sue nonresident defendants in mass tort cases. The case – *Bristol-Myers Squibb Company v. Anderson* (Cal. Sup. Ct. Aug. 29, 2016) – concerned a group of hundreds of plaintiffs who sued Bristol-Myers Squibb ("BMS"), the maker of the prescription drug Plavix, in California. The plaintiffs alleged that they were prescribed and ingested Plavix, and suffered various injuries as a result. Only a small minority of the plaintiffs (86 out of 678) were residents of California. Indeed, there were more plaintiffs from Texas than from California. Moreover, BMS is not based in California and Plavix was not developed or manufactured in California. Nevertheless, the California Supreme Court held that its state courts had personal jurisdiction over BMS to adjudicate the nonresident plaintiffs' claims.

Of course, it is well-established that a court must have personal jurisdiction over a defendant in order to adjudicate claims against that defendant. This is required by the Due Process Clause of the Fourteenth Amendment to our federal constitution. Although many state long-arm statutes contain additional requirements in order for their state courts to exercise jurisdiction, California law simply extends jurisdiction to the maximum extent permissible under the constitution.

In the case of an individual person, the concept of personal jurisdiction is usually fairly straightforward. Because personal jurisdiction is generally premised on a person's residence or physical presence within a state, there is typically little doubt about whether jurisdiction over a person is proper. The concept of personal jurisdiction is more complicated for corporate entities. After all, a corporation is a legal fiction and its "presence" must be determined by the activities and acts of its agents.

In some cases, the corporation's continuous activities within a state subject it to "general," or "all-purpose" jurisdiction – that is to say, the corporation's activities in the jurisdiction are so substantial that there exists personal jurisdiction over the company for any lawsuit. In *Daimler AG v. Bauman* (U.S. Sup. Ct. 2014), the United States Supreme Court held that a state has general personal jurisdiction over only those corporations that are incorporated or maintain a principal place of business in the state, or otherwise have such "substantial, continuous, and systematic contacts" that the corporation is "essentially at home" in the state. General personal jurisdiction may not be based merely on the fact that a company sells a product nationwide; "[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

Given this legal framework, the *Anderson* court concluded that BMS was not subject to general personal jurisdiction. As the California Supreme Court put it: "BMS may be regarded as being at home in Delaware,

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where it is incorporated, or perhaps in New York and New Jersey, where it maintains its principal business centers." To be sure, BMS has substantial activities in California. It sells a "large volume of its products" in the state, and it "employed approximately 164 people in California in addition to its 250 sales representatives in the state." But this was a small fraction of BMS's overall workforce; in just New York and New Jersey, BMS employed approximately 6,475 people. The court concluded: "In assessing BMS's California business activities in comparison to the company's business operations in their entirety, nationwide, we find nothing to warrant a conclusion that BMS is at home in California."

But even if a court lacks general personal jurisdiction over a company, it can still exercise "specific" personal jurisdiction (also known as "case-linked" personal jurisdiction) for a particular lawsuit. Specific personal jurisdiction is based on the idea that the specific case "arise[s] out of or [is] connected with the [company's] activities within the state." Among other things, courts look to the relatedness of the company's forum contacts and the lawsuit – that is, whether there is a substantial "relationship among the defendant, the forum, and the litigation."

In *Anderson,* a 4-3 majority of the California Supreme Court concluded that the California state courts had specific personal jurisdiction over the claims against BMS made by the out-of-state plaintiffs. The court reached this conclusion in principal part because BMS apparently "sold Plavix to both the California plaintiffs and the nonresident plaintiffs as part of a common nationwide course of distribution." In other words, BMS had exposed itself to a lawsuit in California just by marketing and distributing Plavix nationwide. The court explained: "Both the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state. Thus, the nonresident plaintiffs' claims bear a substantial connection to BMS's contacts in California. BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's contacts in California concerning Plavix."

Additionally, the California Supreme Court was persuaded that BMS's California research and laboratory facilities provided a connection between BMS, the nonresidents' claims, and California – notwithstanding the fact that "there is no claim that Plavix itself was designed and developed in these [California] facilities." The court explained that the mere "fact the company engages in research and product development in these California facilities is related to plaintiffs' claims that BMS engaged in a course of conduct of negligent research and design that led to their injuries, even if those claims do not arise out of BMS's research conduct in this state."

The *Anderson* decision is troubling news for any company that markets, promotes, distributes, or sells a product nationwide. Of course, a company can expect to be sued in the states where it is incorporated or maintains its principal place of business, or perhaps in the states where it developed and manufactured the allegedly defective product. A company can structure its business activities with a view towards where they will and will not be subject to suit. Discarding this predictable system, the California Supreme Court has instead opened the door to state court mass tort cases involving nonresident plaintiffs and nonresident defendants. Many companies are familiar with the multidistrict litigation ("MDL") process in which a multitude of federal cases that share common issues (such as whether a particular product was defective or whether a company was negligent) can be transferred to the same district court and consolidated. The Anderson decision paves the way for massive state court cases that are comparable to MDLs. Hundreds of plaintiffs from Connecticut, New York, Pennsylvania, or anywhere else can join forces with a couple of California plaintiffs and simply file a mass tort suit in California. And personal jurisdiction won't be an issue, so long as the product was marketed, promoted, or distributed nationwide.

It is tough to reconcile the California Supreme Court's expansive understanding of specific personal jurisdiction with the limited scope of general personal jurisdiction as described by the United States Supreme Court. Indeed, as the *Anderson* dissent explains, the California Supreme Court's decision "expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction. At least for consumer companies operating nationwide, with substantial sales in California, the majority creates the equivalent of general jurisdiction in California courts." Given the due process and federalism problems with this expansive new ruling, it will not be surprising if BMS files a petition for certiorari with the United States Supreme Court. However, unless and until our nation's highest court reverses *Anderson*, companies should be on notice that they may be subject to litigation in California for claims that have no relationship with the company's activities in the state.