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PERSONAL JURISDICTION

Two Hughes Hubbard & Reed LLP attorneys discuss the U.S. Supreme Court ruling in *BMS v. Superior Court of California* and offer insight on how pharmaceutical and medical device companies should proceed when faced with multi-plaintiff proceedings brought by jurisdictionally diverse plaintiffs.

INSIGHT: Effective Use of *BMS* Ruling to Halt Discovery Against Pharma, Medical Device Firms



BY DIANE E. LIFTON AND JULIE AMADEO

In June 2017, in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773 (2017) (*BMS*), the U.S. Supreme Court held that out-of-state plaintiffs cannot compel a company to litigate in a forum where the defendant is not “at home” and the plaintiff’s claims bear little or no connection to the company’s activities in that forum. Plaintiffs have since attempted to prove personal jurisdiction over pharmaceutical and medical device companies by claiming that conducting clinical trials and general marketing of a drug or medical device in that forum create the necessary nexus with a plaintiff’s claims for personal injuries in connection with use of that drug or medical device.

The California Superior Court in *In re Xarelto Cases* rejected that argument and denied plaintiffs jurisdictional discovery into those activities. *In re Xarelto Cases*, No. 4862, 2018 BL 226141 (Cal. Super. Ct. Feb. 6, 2018). Similarly, the U.S. District Court for the Eastern District of Missouri held in *Dyson v. Bayer Corp.* that Bayer’s activities in conducting clinical trials in Missouri, and first marketing its new product there, did

not suffice to permit the court to exercise personal jurisdiction over Bayer in Missouri in connection with the claims of non-resident plaintiffs. *Dyson v. Bayer Corp.*, No. 4:17-cv-2584, 2018 BL 23609 at *1 (E.D. Mo. Jan. 24, 2018).

Personal Jurisdiction and *BMS*

The doctrine of personal jurisdiction exists to protect defendants from the undue burden of litigating in a foreign forum. *See generally, BMS*, 137 S. Ct. 1773 (acknowledging that courts must assess “the burden [placed] on the defendant”). There are two types of personal jurisdiction—general jurisdiction and specific jurisdiction. *Id.* at 1780. General jurisdiction exists in a forum where defendant is “at home” (for a corporate defendant, usually by virtue of incorporation or principal place of business). Specific jurisdiction exists only if the plaintiff’s claims are connected to the defendant’s activities in that forum. *Id.* at 1781; *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014).

Thus, for an out-of-state defendant, courts look to specific jurisdiction to determine whether that defendant can be compelled to defend itself in that forum. 137 S. Ct. at 1781-82. In a pharmaceutical or medical device product liability personal injury case, personal jurisdiction over the defendant typically exists if the plaintiff resides in the state and was prescribed the drug or medical device there. The connection becomes more difficult to establish for an out-of-state plaintiff – precisely the challenge faced by the plaintiffs in *BMS*. In rejecting personal jurisdiction in *BMS*, the United States Supreme Court paved the way for dismantling improperly aggregated claims through challenges to improper “jurisdictional discovery”, and seeking dis-

missal of plaintiffs whose claims have no nexus to the defendants' activities in the forum state.

Recent Decisions Declining to Base Personal Jurisdiction on Clinical Studies or Marketing

In *In re Xarelto Cases* No. 4862, 2018 BL 226141, at *1 (Cal. Super. Ct. Feb. 6, 2018), plaintiffs sued Bayer Healthcare Pharmaceuticals Inc. (Bayer) and individual prescribing physicians in connection with Xarelto, a drug manufactured by Bayer. Specially appearing defendants moved for a protective order to prevent jurisdictional discovery from moving forward. *Id.*

Plaintiffs' discovery requests sought information on defendants' clinical trials, marketing efforts, discount programs, call centers, contracts, and any distribution of Xarelto that may have occurred in California. *Id.* at *9.

To conduct jurisdictional discovery, the court noted that plaintiffs had to make out a *prima facie* case for personal jurisdiction. *Id.* at *9-10. Relying on *BMS* to grant the protective order, the court held that plaintiffs' discovery was "insufficient to establish the Court's jurisdiction" because the discovery would "not likely lead to the production of facts establishing jurisdiction over the defendant." *Id.* at *11. The jurisdictional discovery requests were insufficient because they did not focus on how the plaintiffs' claims, in a drug product liability case primarily alleging a failure to warn of potential risks, negligent and fraudulent inducement, and negligent failure to perform sufficient tests, may have arisen out of transactions or occurrences in the state. *Id.*

The court cited a January 2018 Missouri federal court decision applying *BMS* to dismiss the claims of 92 out-of-state plaintiffs. In *Dyson v. Bayer Corp.*, 95 plaintiffs filed a products liability lawsuit against Bayer Corp., Bayer HealthCare LLC, Bayer Essure Inc., and Bayer HealthCare Pharmaceuticals Inc. (collectively, Bayer) in Missouri state court, alleging that the Essure device broke, caused hemorrhage, migrated through their bodies, and/or punctured their organs. *See generally*, *Dyson v. Bayer Corp.*, No. 4:17-cv-2584, 2018 BL 23609 at *1 (E.D. Mo. Jan. 24, 2018), Compl. Docket No. 1 (describing the harm alleged by plaintiffs). Only three of the 95 plaintiffs were citizens of Missouri or had their Essure implant procedure in Missouri. Bayer removed the lawsuit to the Eastern District of Missouri. The plaintiffs moved to remand the case back to state court. In opposing remand, Bayer argued that the presence of the 92 non-Missouri citizen plaintiffs did not defeat diversity jurisdiction because the court lacked personal

jurisdiction over their claims. Bayer argued that the claims of these 92 plaintiffs should be dismissed.

Plaintiffs argued that the court could exercise personal jurisdiction over the claims because Bayer had extensive contact with Missouri during the development of Essure. For example, plaintiffs alleged that Bayer created a marketing strategy, labeling, and obtained FDA approval in Missouri. Plaintiffs further argued that Bayer conducted clinical trials in Missouri and the results of the studies were used to support Bayer's FDA application. Additionally, St. Louis was the first city in the U.S. to commercially offer the Essure procedure.

In dismissing the claims of the 92 plaintiffs, the court rejected the premise that the Supreme Court in *BMS* intended for testing, marketing and manufacturing to constitute "a blueprint for establishing personal jurisdiction." *Dyson*, 2018 BL 23609 at *4. The court focused on the lack of a connection between the claim and the forum, holding "[t]hat Missouri happened to be Essure's first marketed area has no bearing on the non-Missouri plaintiffs' claims where those plaintiffs did not see marketing in Missouri, were not prescribed Essure in Missouri, did not purchase Essure in Missouri, and were not injured by Essure in Missouri." *Id.*

The court also denied plaintiffs' motion for leave to conduct jurisdictional discovery. *Id.* at *5. Because the court had jurisdiction over the Missouri plaintiffs' claims, the court denied plaintiffs' motion to remand. *Id.*; *cf.* *M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 61 N.E.3d 1026, appeal denied sub nom. *M.M. v. GlaxoSmithKline LLC*, 65 N.E.3d 842 (Ill. 2016), and cert. denied, 138 S. Ct. 64, 199 L. Ed. 2d 20 (2017).

Lessons Learned

In re Xarelto and *Dyson* both provide guidance on how pharmaceutical and medical device companies should proceed when faced with multi-plaintiff proceedings brought by jurisdictionally diverse plaintiffs in a plaintiff-friendly court. Companies should continue to challenge and to move for protection from broad jurisdictional discovery seeking documents and information relating to aspects of their business that cannot support personal jurisdiction, such as clinical trials and general marketing activities. Similarly, companies should continue to seek dismissals in appropriate cases.

Author Information

Diane Lifton is a partner and co-chair of the Life Sciences and Product Liability Groups at Hughes Hubbard & Reed LLP. Julie Amadeo is an associate in Hughes Hubbard & Reed LLP's Litigation Department.