

High Court Plavix Ruling To Shrink, Scatter Mass Torts

By **Emily Field**

Law360, New York (June 19, 2017, 10:24 PM EDT) -- The U.S. Supreme Court's decision that almost 600 non-Californians can't pursue claims in that state alleging that they were harmed by Bristol-Myers Squibb Co.'s blood thinner Plavix will likely reshape national mass tort litigation, as consumers will have fewer choices on where to file suit.

Almost unanimously, the Supreme Court found that California state courts don't have jurisdiction over outsiders' suits, reversing a decision by the state's high court that given the drugmaker's business ties to the state, California courts could exercise personal specific jurisdiction over their claims. Now, consumers will either have to pursue their claims in their home state or in jurisdictions where a company is incorporated or uses as its principal place of business, attorneys said.

"One of the issues in BMS ... is that [the plaintiffs'] argument basically meant that anyone could assert a claim against BMS in any state in which there was one person who would also assert a claim," Andy Pincus of Mayer Brown LLP said. "So you basically had 50 different jurisdictions for every plaintiff and that didn't make a lot of sense."

A likely consequence will be that instead of facing one large mass tort in a jurisdiction where a company isn't at home, companies will defend smaller mass actions in more areas, according to attorneys.

Already, as a result of the high court's ruling, a Missouri state judge has declared a mistrial in a suit brought on behalf of three women who died of ovarian cancer after using Johnson & Johnson's talcum powder products for decades. Although one woman had been a resident of Missouri, another had lived in Virginia and the other in Texas.

Although the ruling will likely result in more administrative work and the "hassle" of coordinating discovery for companies facing mass tort litigation, James Beck of Reed Smith LLP said that plaintiffs will be facing a steeper hurdle to clear in prevailing on their claims.

"When the mass torts are smaller, the defense has more ability to require that each plaintiff go and prove their case," Beck said.

The California state appellate court's controversial ruling last summer had allowed the out-of-state plaintiffs to bring claims over a range of alleged injuries such as heart attack, stroke and death from taking Plavix, finding that Bristol-Myers' ties to the state, such as its marketing and distribution of the

drug as well as research and development facilities, were sufficient to establish personal specific jurisdiction there.

At issue were eight separate complaints filed in San Francisco in March 2013 by 86 Californians and 592 residents of 33 other states. Each one has the same allegations — including negligence, false or misleading advertising and strict product liability claims.

The California supreme court said there were three factors to consider when determining if a court has specific jurisdiction over a defendant who isn't a resident of the state: if a defendant has "purposefully directed its activities" at that state, whether the claims are related to those activities and whether exercising jurisdiction would be reasonable.

But Justice Samuel Alito, who penned the majority's opinion, said that this "sliding scale approach" resembled a "loose and spurious" form of general jurisdiction— which enables a court to exercise jurisdiction over a defendant no matter the subject of the litigation— that didn't align with high court precedents.

"What is needed — and what is missing here — is a connection between the forum and the specific claims at issue," Justice Alito wrote.

Attorneys noted that the 8-1 ruling wasn't divided on ideological lines, with the lone dissenter being Justice Sonia Sotomayor.

"I think in this era of hyper-polarization in politics and on the court as well, the fact that you're having both conservatives and liberals come together on that piece ... indicates that there might be still more rulings related to personal jurisdiction and whether the court will continue on this current trend of imposing real limitations to the scope of personal jurisdiction," said Timothy Droske of Dorsey & Whitney LLP.

Earlier this term, in another 8-1 ruling, the Supreme Court ruled that Montana courts can't assert jurisdiction over claims made by nonresident workers who were injured working outside the state in *BNSF Railway Co. v. Tyrrell et al.*

And in May, the high court unanimously tightened restrictions on where patent owners can file infringement lawsuits, thus limiting the ability of jurisdictions like the Eastern District of Texas to continue as favored venues for patent suits.

These rulings continued a trend that began with the court's 2014 ruling in *Daimler AG v. Barbara Bauman*, which laid out limits on general jurisdiction, attorneys noted.

In that 2014 ruling, the Supreme Court said that California courts couldn't hear a suit against the German automaker over an Argentine subsidiary's union-busting activities and human rights violations committed in collaboration with the Argentine government.

Now with the guidance provided by *BMS*, plaintiffs may be more careful about choosing where to file suit, knowing that the defense will have an additional tool to argue for dismissal if there isn't a basis for general or specific jurisdiction, Amy Rubenstein of Schiff Hardin LLP noted.

"Anytime there's clarity it's good for both plaintiffs and defendants because it gets the parties having

their dispute heard before the right court and that benefits both sides of the litigation,” Rubenstein said.

Although it was not directly addressed by the high court, the ruling may also have implications for personal jurisdiction in class actions, attorneys said.

“I don’t think plaintiffs will be able to bring nationwide class actions based on state law theories anymore,” Beck said. “Now with personal jurisdiction limited you aren’t going to have nonresident plaintiffs being able to be class members against nonresident defendants where they wouldn’t be able to have personal jurisdiction if they had brought the suit by themselves.”

The case is Bristol-Myers Squibb Co. v. Superior Court of California for the County of San Francisco et al., case number 16-466, before the U.S. Supreme Court.

--Additional reporting by Daniel Siegel. Editing by Pamela Wilkinson and Breda Lund.

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