# Client Update
# Supreme Court Limits Forum Shopping, Creates Risk Management Opportunities

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Monday's Supreme Court decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, No. 16 466 (June 19, 2017), narrows the ability of non-resident plaintiffs to bring claims in a state where the defendant is not headquartered or incorporated and did not engage in activities relevant to the non-resident plaintiff's claims. This decision limits the ability of plaintiffs' counsel to shop for plaintiff-friendly state courts in which to file nationwide class or multiplaintiff actions. As a result, companies subject to frequent litigation should analyze whether they can reduce their litigation risks by changing their domicile or the location of their business activities.

The Court's decision applies the Due Process Clause of the Fourteenth Amendment, and therefore applies to all actions in state court. The Court left open the question of whether the same rule applies to federal courts.

The Supreme Court held that for a state court to exercise specific jurisdiction over an out-of-state defendant, there must be a connection between the forum state and the conduct giving rise to the litigation. That test must be satisfied for each plaintiff in a multiplaintiff action.

The Supreme Court decision arose out of lawsuits filed by more than 600 plaintiffs against Bristol-Myers Squibb Co. ("BMS") in California state court regarding the company's alleged marketing practices for the prescription drug Plavix. Fewer than 100 of the plaintiffs were California residents, while the other plaintiffs were from 33 other states. BMS sought to dismiss the claims of non-California residents on the basis that the California court lacked personal jurisdiction over BMS with respect to the out-of-state claims because BMS is domiciled elsewhere. BMS, a Delaware corporation, is headquartered in New York and maintains substantial operations in New York and New Jersey.

The Supreme Court held that the jurisdictional analysis required a straightforward application of principles developed in cases brought by individual plaintiffs. Here, "the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." Therefore, BMS was subject to jurisdiction in California state court only with regard to the claims by California residents. The Supreme Court rejected the plaintiffs' arguments that the similar claims asserted by California residents or BMS's unrelated activities in California could provide the requisite connection between out-of-state plaintiffs and California. The Supreme Court explained that plaintiffs retained the option of suing in a jurisdiction where BMS is subject to general jurisdiction, in this case New York or Delaware, or bringing their claims on a state-by-state basis.

The decision is a significant win for companies that are subject to actions relating to the sale of their products—particularly in the pharmaceutical and consumer products industries. The decision undercuts the ability of plaintiffs' counsel to engage in forum shopping to find the most plaintiff-friendly jurisdiction in which to bring a nation-wide class or multiplaintiff action. As a result, plaintiffs' counsel will be unable to exert settlement pressure on defendants by aggregating large numbers of claims in the courts of states with plaintiff-friendly judges and juries and that lack meaningful safeguards against disproportionate verdicts. Instead, plaintiffs' counsel will have two choices: either they can sue a corporation in the state where it is headquartered or incorporated—which may be more business-friendly—or they can bring smaller, potentially less lucrative actions in disparate state courts on behalf of residents of each state.

The Supreme Court's decision may be of particular relevance to branded pharmaceutical manufacturers. Courts in recent years have permitted individuals who consumed generic drugs to bring failure-to-warn claims against the branded manufacturer that is responsible for the disclosure on the label of the drug that they consumed. The frequency of such suits may increase significantly if the FDA is successful in its push to bring more generic drugs onto the market as a means of lowering drug prices.

Following the Supreme Court's decision, consumers of generic drugs will face significant limitations on where they can file suit against branded manufacturers. Because these consumers' only individual contacts are with the generic manufacturer, they will be able to file suit against the branded manufacturer only where it is incorporated or has a principal place of business. In cases where the branded drug's manufacturer is a foreign corporation without a principal

place of business in the United States, such plaintiffs may face a challenge finding a forum state that will assert jurisdiction over the defendant.

The Supreme Court's decision, however, may also have some downsides for corporate defendants, because the prospect of multiple smaller lawsuits in courts across the country poses its own risks. Litigating in multiple courts may increase litigation costs and afford plaintiffs' attorneys many bites at the litigation apple to develop winning strategies and supportive precedent. Furthermore, multiple litigations make it far more challenging to engage in risk mitigation by reaching a nationwide settlement.

Companies that are subject to frequent litigation should take the Supreme Court's decision in *Bristol-Myers Squibb* as an opportunity to engage in strategic decision-making that reduces their exposure to nationwide actions in hostile jurisdictions. Such companies should consider whether they could materially reduce their litigation exposure by changing their state of incorporation, headquarters or locations of significant business operations. Relocating to jurisdictions that have laws favorable to defendants, such as stricter pleading standards or narrower discovery procedures, or that have defense-friendly courts and juries, may result in better outcomes than cases brought in courts where the deck is stacked against defendants. Additionally, corporations that are incorporated or headquartered in business-friendly jurisdictions should think about what legislative or other initiatives might be enacted that could mitigate the impact of nationwide or multiplaintiff actions filed in those jurisdictions.

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Please do not hesitate to contact us with any questions.