

# What the Supreme Court Has Done

- ***Daimler v. Bauman*** – No general jurisdiction over corporate defendants except in their principal place of business or state of incorporation
- ***Walden v. Fiore*** – Specific jurisdiction requires defendant's suit-related conduct to have substantial connection to forum state
- ***BNSF v. Tyrell*** – In-state business, no matter how extensive, cannot provide specific jurisdiction over activities/claims unrelated to the forum state
- ***BMS v. Superior Court*** – ***BNSF*** + other plaintiffs or defendants subject to specific jurisdiction in forum state do not establish a non-resident's substantial connection



# Mass-Tort Litigation Tourist Plaintiffs Are Almost Out of Arguments

- Existing P mass-tort business model assumed general jurisdiction anywhere over large corporate defendants.
- After *Bauman* took that away, Ps tried for the same result using specific jurisdiction
  - *Walden*, *BNSF*, and especially *BMS* (a mass tort case) defeated that argument
- What's left?
  - General jurisdiction by consent
  - Less expansive “substantial relationship” arguments
  - Piercing the corporate veil



# General Jurisdiction by Consent

- Based on *Pa. Fire Ins. v. Gold Issue Mining*, 243 U.S. 93 (1917) – pre-*International Shoe*
- Many states reject consent jurisdiction under state law
  - California, Illinois, Missouri, New Jersey, Delaware, West Virginia, Delaware
- Most post-*Bauman* decisions consider *Pa. Fire* obsolete
- Pennsylvania has a peculiar registration statute specifying “general” jurisdiction
  - Pennsylvania is thus the likely show-down state
- Should not matter – state statutes subject to constitutional Due Process
  - N.Y. A.5918 / S.5889 would be unconstitutional



# “Substantial Relationship” After *BMS*

- Non-resident P & D “substantial relationship” not categorically ruled out in *BMS*
- On case-specific facts, one or two more states might rise to “substantial” level
  - Site of manufacturing/design for manufacturing/design defect?
- Ps extreme theory – any location of clinical trial
  - 44-state “substantiality” allowed by Ill. App.
    - *M.M. v. GSK* – cert. denied (10/2/17)
  - Same argument rejected by S.D. Ill.
    - Judge Herndon – in Xarelto cases
- Illinois likely to be showdown state
- A basis for Ps seeking discovery



# Jurisdictional Discovery

- Jurisdictional discovery mostly a weapon for delay and increasing nuisance value
- Grounds for rejecting discovery
  - Purported basis for discovery not pleaded
    - Multi-plaintiff complaints typically allege nothing as to forum state
  - Plaintiffs offer only speculation
  - *Twlqbal* rationale – must plead a case before inflicting expense of discovery on Ds
  - Reject discovery into contacts with in-state third parties under *BMS*
- If Ps on wild goose chase, discovery might require recoupment of costs if unsuccessful



# Increased Attempts To Pierce Corporate Veil

- Without other options, Ps increasingly assert contacts by corporate affiliates
  - “Agency” discredited in *Bauman*
  - For such contacts to be relevant, must pierce corporate veil
- Corporate veil jurisdictional issues not much different than for liability
  - Formalities of corporate separation
  - Use of separate corporate form for fraudulent purpose
- Is another basis for Ps seeking jurisdictional discovery



# Defense-Side Initiatives After *BMS*

- Fraudulent misjoinder to defeat diversity jurisdiction
- Non-resident Ps suing multiple defendants, some in-state
- Stream of commerce jurisdiction
- Changes in MDL practice
- Ancillary discovery
- Nationwide/multi-state class actions under state law
- Personal jurisdiction in federal causes of action



# Defeating Fraudulent Misjoinder

- Multi-plaintiff complaints with one non-diverse and one resident plaintiff – scores of other Ps
- Fraudulent misjoinder not recognized in most places
- CAFA “mass action” jurisdiction problematic
- After *BMS*, personal jurisdiction in multi-plaintiff complaints is much more straight forward
  - Under *Ruhrgas*, can decide simple personal jurisdictional issues first
  - Result is dismissal of 90+% of Ps for lack of personal jurisdiction
  - Remaining in-state Ps are now diverse
- This procedure increasingly accepted, even in E.D. Mo. and S.D. Ill., which previously granted remand





# Multi-Defendant Litigation Tourists

- Asbestos litigation tourists particularly egregious
- Non-resident asbestos plaintiff almost certainly sue primarily non-resident defendants
  - Typical asbestos complaint sues 40 or more defendants
  - form complaints drafted without considering personal jurisdiction
  - Most Ds are also non-residents
- **BMS** requires personal jurisdiction based on each D's own contacts – already seeing D exodus in some courts
- Against non-resident defendants, non-resident Ps will not be able to obtain jurisdiction
- Non-resident asbestos Ps will be limited to suing a limited universe of non-resident Ds



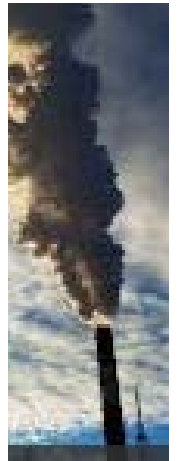
# “Stream of Commerce” Jurisdiction

- Can third-party intermediate sales give rise to specific jurisdiction under minimum contacts analysis?
- Supreme Court unable to reach majority in last two decisions
- Questionable after *BMS* rejection of specific jurisdiction bases on acts of others
  - Stream of commerce is inherently based on the commercial actions of numerous third persons
- Effort to return stream of commerce to Supreme Court after *BMS* could be successful



# Case in Point – Climate Change Suits

- Must be based on state law; federal common law rejected in air pollution cases, *AEP v. Connecticut*
- Ds are typically non-resident power companies
  - Power companies geographically limited – no significant contacts with other forums
  - Alleged contacts through a form of stream of commerce – atmospheric circulation
- Jurisdiction cannot be general; specific dependent on combined contact that cannot separate one D from the others
- Is both reliance on contacts of others and “grasping”



# MDL Practices

- MDLs increasingly a weapon to beat Ds into submission
- Consolidated six-week show trials and excessive verdicts
- MDLs only have jurisdiction derived from transferor courts – don't give them more
  - Do not waive *Lexicon* right to trial in transferor court
  - Do not consent to direct filing of complaints in MDL
    - No jurisdictional basis for direct filing except waiver
- Be extremely careful with any agreements relating to jurisdictions
  - MDL plaintiffs make absurd waiver arguments
    - *Pinnacle Hip* mandamus



# Limiting Ancillary Discovery

- Litigants frequently seek to take third-party discovery
  - Common example – discovery in aid of execution against financial institutions
- Courts only exercise personal jurisdiction over non-parties to the extent Due Process allows
- Court-ordered discovery from third-party corporations must meet *Bauman*
  - Discovery must be ordered by a court with jurisdiction
- Third-party discovery in civil litigation presumably must also comply with *Bauman*



# Nationwide State-Law Class Actions

- Rule 23 class actions cannot expand substantive law under Rules Enabling Act
- Beyond forum state, multi-state class actions necessarily involve non-resident Ps suing non-resident Ds
- Would Violate REA for a class action to create jurisdiction that otherwise does not exist
- Multi-state class actions dismissed on jurisdiction:
  - *Demaria v. Nissan*, 2016 WL 374145 (N.D. Ill.)
  - *Rael v. Dooney*, 2016 WL 3952219 (S.D. Cal.)
  - *Famular v. Whirlpool*, 2017 WL 280821 (S.D.N.Y. )
- May also work for some federal claims, depending on statutory jurisdiction provision

# Jurisdiction & Federal Venue Statute

- The federal venue statute, *28 U.S.C. §1391(c)*, references personal jurisdiction

For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district **in which it is subject to personal jurisdiction** at the time the action is commenced.

- Some federal statutes have their own jurisdictional provisions
- Those without are dependent on the jurisdiction of the forum in which they are brought
- Limits on state jurisdiction, thus can affect federal jurisdiction and venue as well

