



A SIMPLE SPECIFIC-JURISDICTION TEST FOR SEPARATING “CASE LINKED” ACTIVITY FROM GENERAL CONTACTS

by James M. Beck

The implications of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (“*BMS*”), for personal jurisdiction in mass tort cases are many, but they often hinge on how the “arising from”/“related to” test for specific (“case linked”) jurisdiction is applied. Although *BMS* has been criticized in some circles for not addressing causation as a jurisdictional factor, the Court in fact applied a relatively simple test that cuts the Gordian Knot surrounding the “arising from”/“related to” test for minimum contacts.

The specific-jurisdiction requirement that “the suit must arise out of or relate to the defendant’s contacts with the forum” has existed for a long time. *Id.* at 1780. *BMS* cited cases from the mid-1980s, but its antecedents go back to *International Shoe v. Washington*, 326 U.S. 310 (1945), itself. While some courts (and some defense *amici* in *BMS*) interpret that requirement as requiring “causation,” the Supreme Court did not address that question.

Instead, *BMS* lambasted the California “sliding scale” approach—that “the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claim”—as “a loose and spurious form of general jurisdiction.” *Id.* at 1781. “For specific jurisdiction, a defendant’s general connections with the forum are not enough.” *Id.* In the next paragraph, the *BMS* Court listed what was missing, and what did not even matter:

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims. As noted, the nonresidents were *not prescribed* [the product] in California, did *not purchase* [the product] in California, did *not ingest* [the product] in California, and were *not injured* by [the product] in California. . . . Nor is it sufficient—*or even relevant*—that [defendant] conducted research in California on matters unrelated to [the product]. What is needed—and what is missing here—is a connection between the forum and *the specific claims* at issue.

Id. (emphasis added).

The above-quoted discussion provides the test for preventing other post-*BMS* “loose and spurious form[s] of general jurisdiction” from arising in the guise of purported case-linked specific jurisdiction. What is necessary to establish specific jurisdiction after *BMS* is case-specific—that is, plaintiff-specific—contacts with the forum, like those the Court listed in *BMS*: facts such as the plaintiff being prescribed, buying, taking, and/or being injured by a product in the state where that plaintiff sued. Such plaintiffs can demonstrate “a

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connection” to “the specific claims at issue,” even if they don’t happen to live in that state.

Conversely, what is insufficient, indeed, not “even relevant,” are a defendant’s claimed in-state activities that, if accepted as a basis for jurisdiction, would produce so-called specific jurisdiction that is in practice indistinguishable from general jurisdiction—the characteristic that prompted the Supreme Court’s disparaging “loose and spurious” description. *BMS* named one, “conducting research.” That is not a proper case-linked activity to consider because any plaintiff hailing from anywhere could assert it as a contact. Claimed contacts of this nature would cause specific jurisdiction to operate like general jurisdiction.

The actual test for case-linked minimum contacts post-*BMS* is thus even easier to apply than a “causation” standard would be. If the claimed forum contact could be asserted by any plaintiff, no matter where that plaintiff is from, was injured, etc., then the purported contact is not the kind that makes a claim “arise from” or “relate to” the forum state. Rather, that kind of contact is not “sufficient . . . or even relevant.” *Id.* at 1781.

In prescription medical-product litigation, these “loose and spurious”—and thus insufficient—purported contacts could include not just in-state clinical trials (unless the particular plaintiff participated), but also the following activities engaged in by a defendant:

1. Collaboration with in-state residents (not involving a particular plaintiff);
2. in-state marketing efforts (unless actually known to the plaintiff’s prescribing physician);
3. obtaining FDA approval (and other FDA interactions);
4. in-state distribution of materials to persons unaffiliated with the plaintiff;
5. contracts with in-state businesses; and
6. transportation of the product through the state.

Allowing such contacts to establish personal jurisdiction would create a “loose” single-product version of the “continuous and substantial” contacts test, but it is missing the critical “at home” element. Such a test would be “spurious” because it is insufficient to establish either general or specific personal jurisdiction. Plaintiffs have asserted all of these “contacts” in mass tort suits since *BMS*. But litigation tourists from Maine, Florida, Alaska, or California could equally assert such purported “contacts.” The Court’s jurisdictional precedent rejects anything that “elide[s] the essential difference between case-specific and all-purpose (general) jurisdiction.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011).

A corollary to applying the *BMS* “arising from”/“related to” test as the Court itself did is that most “jurisdictional discovery” sought by plaintiffs is (to quote *BMS*) an “irrelevant” smoke screen. Plaintiffs—not defendants—have access to the types of evidence that *BMS* listed as “adequate links” to the forum state. Plaintiffs would know where they were prescribed the product, bought the product, used the product, and were injured by the product. Any plaintiff actually participating in a clinical trial would know that. If a plaintiff’s prescribing physician were exposed to advertising in the jurisdiction, that plaintiff is in a better position to find that out from a treater than the defendant.

So ultimately, the “arising from”/“relating to” test should not be difficult to apply. The Court told everyone what type of evidence is “adequate” to support specific or case-linked jurisdiction, and conversely what is “irrelevant.” If use of a particular asserted “contact” would cause specific jurisdiction to behave like general jurisdiction—by permitting any plaintiff from anywhere to sue without regard to his or her individual facts—then it is improper under *BMS* as another attempt at “loose and spurious” general jurisdiction.