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Message from the Chair

John G. McCarthy

While it is difficult for me to fathom, more than a fifth of my term as the Chair of your Section is already over. That realization caused me to consider what has transpired since October 1.

During those five months, a lot has happened in this country that highlights the importance of being actively involved in organizations like the Federal Bar Association and particularly this Section. I also took this opportunity to look forward toward the remainder of my term. When it ends on September 30, 2018, this country will be involved in mid-term Congressional elections. Regardless of political affiliation, I am sure that we can all agree that the months between then and now will be interesting ones in our capital, and possibly in federal courts throughout this nation.

During my time in this organization I have repeatedly witnessed members with different views working together to further our Association's mission – to strengthen the federal legal system and administration of justice. We are frequently asked to analyze and comment on proposed legislation and rules impacting the federal legal system. We sponsor or co-sponsor programs throughout the United States that educate members and non-members thereby improving the administration of justice. This newsletter gives our members an opportunity to be heard by thousands of fellow practitioners on significant developments affecting the federal legal system. Active involvement in the work of this Section allows each of us to contribute to the future of that system. Thus far in my term many of you have stepped forward and offered to help and I thank each of you that have done so. As my mother used to say, many hands make light work. We need as many hands as possible to continue the important work of this Section.

Finally, it is my great pleasure to inform you that for the first time in our Section's history we have liaisons from the Law Student Division participating in our leadership. Ashley Akers, Chair of the Law Student Division, has appointed two liaisons to our Section from her Division. James Kelly from the University of Mississippi School of Law and Royal Newman II from the University of Miami School of Law are the inaugural liaisons to our Section. They have already participated in a Section Board meeting and we all look forward to working with them to coordinate activities between our Section and the Law Student Division. **SB**

About the Chair • *John McCarthy is a trial attorney and partner in the New York City office of Smith, Gambrell & Russell, LLP, where he leads the litigation practice and is a member of the firm's Intellectual Property Law Group and its Commercial and Bankruptcy Law Practice. John is a former FBA Circuit Vice President and past Chapter President of the S.D.N.Y. Chapter; John most recently served as Vice Chair of the FBA Federal Litigation Section. He can be reached at jmccarthy@sgrlaw.com or (212) 907-9703.*

Inside this Issue

Federal Litigation Section News

Bristol-Myers Squibb Co. v. Superior Court: *Will California Be The New Forum Of Choice For Nationwide Class Actions?*

Erik W. Kemp and Elizabeth Holt Andrews

We all remember learning the basics of personal jurisdiction in civil procedure during our first semester of law school— maybe even on the first day of class. In reality, the issue is not frequently litigated in this day and age. Recently, however, the prevalence of nationwide mass tort litigation has once again vaulted personal jurisdiction to the forefront of the national conversation on civil procedure.

In August 2016, the California Supreme Court issued a landmark 4-3 ruling in *Bristol-Myers Squibb Co. v. Superior Court* on the issue of personal jurisdiction in a joint nationwide products liability action.[1] In a nutshell, the majority opinion held that a lack of specific personal jurisdiction did not bar California courts from presiding over a joint action brought by resident and nonresident plaintiffs against a nonresident defendant.[2] In other words, California was held to be an appropriate jurisdiction for nonresident plaintiffs to pursue their claims against nonresident defendants— so long as these claims were part of a joint action that included at least some Californians as well.

In January 2017, following a petition for certiorari and a flurry of amicus briefs in support, the United States Supreme Court took up the case for its spring calendar.

The case has important implications for federal practitioners. In the Ninth Circuit, of which California is a part, federal district courts generally apply the personal jurisdiction law of the state where the court sits (unless a federal statute independently determines personal jurisdiction).[3] So if *Bristol-Myers Squibb* is affirmed, California's famously plaintiff-friendly courts—both state and federal—are poised to become the nationwide jurisdiction of choice for most nationwide products liability litigation, as well as many other types of mass tort actions.

Proceedings in the Trial Court

As is typical for a case that turns on personal jurisdiction, *Bristol-Myers Squibb* is wending its way through the appellate system after barely getting off the ground at the trial court level. At the heart of the case is the defendant's drug Plavix, which is used to inhibit blood clotting.[4] Six hundred seventy-eight plaintiffs—86 California residents and 592 nonresidents—filed a total of eight lawsuits against Bristol-Myers Squibb ("BMS") in San Francisco Superior Court, claiming various injuries caused by the drug including heart attack, stroke, and even death.[5] The Superior Court designated the matter complex and consolidated all the lawsuits before Judge John E. Munter.[6]

BMS immediately moved to quash service of summons for lack of personal jurisdiction with respect to the out-of-state residents—who comprised the vast majority of the plaintiffs.

Judge Munter denied the motion, reasoning that BMS had subjected itself to general personal jurisdiction in California because of its "wide-ranging, systematic and continuous contacts" with the state.[7] In support of his decision, he noted that the defendant had sold more than $1 billion worth of Plavix in California, had been registered to conduct business in the state since 1936, and currently maintains an agent for service of process in Los Angeles.[8]

Proceedings in California's Intermediate Appellate Court

BMS responded to Judge Munter's ruling by filing a writ of mandate in the First Appellate District in San Francisco, seeking to overturn the interim order. Judge Brick of the Alameda County Superior Court, who was sitting on the appellate panel by assignment, authored a unanimous majority opinion rejecting Judge Munter's reasoning that BMS had subjected itself to general personal jurisdiction in California.[9] However, Judge Brick went on to examine the issue of specific personal jurisdiction—a question which Judge Munter had not reached.[10]

Judge Brick's opinion led off with a treatise-worthy mini-tutorial on the jurisprudential history of personal jurisdiction, beginning with seminal cases known to every 1L: *Pennoyer*[11] and *International Shoe.*[12] He then moved forward in time to the modern—though scarcely less seminal—cases of *Goodyear*[13] and *Daimler.*[14] He concluded that *Goodyear* and *Daimler* prevented a finding of general jurisdiction because there was insufficient evidence that BMS was "at home" in California.[15]

Moving to the question of specific personal jurisdiction, he concluded that the Superior Court could exercise this type of jurisdiction over the nonresidents' claims against BMS, as well as those of California residents.[16] He ran through the factors: (1) whether the defendant has purposefully directed its activities at the forum state, (2) whether the plaintiffs' claims are related to or arise out of these forum-directed activities, and (3) whether the exercise of jurisdiction is reasonable.[17] Ultimately, his analysis of each factor favored plaintiffs. BMS's writ petition was denied.[18]

Proceedings in the California Supreme Court

BMS next petitioned for review in the California Supreme Court. The petition was granted in November 2014. Nearly two years later, after what must have been considerable wrangling among the Justices behind closed doors, the First Appellate District's ruling was affirmed by a narrow 4-3 majority.

The majority opinion by Chief Justice Tani G. Cantil-Sakauye runs through the same three-factor test for specific jurisdiction utilized by Judge Brick and, like him, concludes that each factor weighs in favor of the California courts' exercise of personal jurisdiction over the non-resident plaintiffs' claims against the defendant.[19] The 3-justice dissent, authored by Justice Kathryn M. Werdegar, is vigorous and lengthy in its criticism of the majority's reasoning.[20]

Principally, the fault line between the state high court's majority and dissent lies in the second factor in the analysis: the "arising-from-or-related-to" factor. The Justices' disagreement stems from fundamentally different ways of characterizing BMS's marketing and distribution efforts.

The majority emphasizes that these efforts are nationwide in scope. As the Chief Justice puts it, "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state. . . . BMS's nationwide marketing, promotion, and distribution of Plavix created a *substantial nexus* between the nonresident plaintiffs' claims and the company's contacts in California

concerning Plavix."[21]

The dissent, by contrast, is unmoved by the uniformity of BMS's nationwide marketing and distribution. Instead, Justice Werdegar uses similar phraseology to argue for the opposite result: "BMS promoted and sold Plavix in this state, giving rise to the California plaintiffs' claims. BMS also engaged in such promotion and sales in many other states, giving rise to claims by residents of those states. As all the claims derive from similar conduct and allege similar injuries, the nonresident plaintiffs' claims closely resemble those made by California residents. But I can perceive no substantial nexus between the nonresidents' claims and BMS's California activities."[22]

The "substantial nexus" language relied upon by the majority and the dissent is self- consciously echoing a line of authority in the California Supreme Court dating back to the forty- year-old case Cornelison v. Chaney.[23] Importantly, however, this precise concept does not feature prominently in the federal case law on specific personal jurisdiction. Indeed, Justice Scalia once mocked "substantial nexus" as "an indeterminate phrase that lacks all pedigree," commenting in 2012 that "[o]ur case law has used it as a term of art in only one context," namely in analyzing the Commerce Clause.[24]

Ultimately, however, the Chief Justice's "substantial nexus" analysis persuaded one more Justice than Justice Werdegar's take on the same phrase. As of this writing, the original 2013 order from Judge Munter still stands, and BMS's attempts to quash service of summons have thus far been unavailing.

Proceedings in the United States Supreme Court

Having taken a beating at all three levels in the California state court system, BMS filed a petition for certiorari to the United States Supreme Court. Briefing is getting underway, and the hearing is scheduled for Tuesday, April 25, 2017.

The parties—and, to date, five amici—are bringing in the heavy guns for the high court. Bristol-Myers Squibb has retained Neal K. Katyal of Hogan Lovells, a former acting Solicitor General, tenured professor of constitutional law at Georgetown, and active member of the #appellatetwitter community. For their part, plaintiffs have hired Thomas C. Goldstein of Goldstein & Russell, whose web page indicates he has personally argued thirty-eight cases in the Supreme Court in the last fifteen years and served as counsel for more than a hundred. Whatever your view of the merits, it will be fascinating to watch these two distinguished federal practitioners squaring off before the Justices.

And what will the outcome be? This may boil down to how quickly (or slowly) Judge Neil Gorsuch's nomination proceeds through the Senate. At present, SCOTUS does not have the same advantage that the California Supreme Court currently enjoys: an odd number of justices, which enables it to reach a firm substantive decision even on its most contentious cases. Given how sharply the California Supreme Court has divided on this issue—and the high stakes of the outcome for the future of mass tort litigation in America—it's anyone's guess how the high court will rule. Lawyers across the country will no doubt be watching this West Coast case with great interest. **SB**

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Endnotes

[1]*Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016), *cert. granted*, 85 U.S.L.W. 3181 (U.S. Jan. 19, 2017) (No. 16-466).

[2]*Id.* at 894.

[3]*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

[4]*Bristol-Myers Squibb*, 377 P.3d at 878.

[5]*Id.*

[6]*Plavix Product & Marketing Cases*, No. CGC 13 004748 (San Francisco Super. Ct. Feb. 8, 2013) (order assigning coordination motion judge).

[7]*Plavix Product & Marketing Cases*, No. CGC 13 004748 (San Francisco Super. Ct. Sept. 23, 2013) (order denying motion to quash service of summons for lack of personal jurisdiction).

[8]*Id.* at 2.

[9]*Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412 (Ct. App. 2014).

Statement of the FBA Board of Directors on Judicial Independence

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.