



The Challenges of Representing Out-of-State Parties in Pharma and Medical Device Litigation

By Hon. Gail A. Andler (Ret.)

Trying a pharma or medical device case in state court with an out-of-state plaintiff presents special challenges. Jurisdiction issues are front and center as we await review by the U.S. Supreme Court of the California Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*. Under what circumstances can a nonresident sue a pharmaceutical manufacturer in California where the pharmaceutical manufacturer is both headquartered and incorporated outside of California? The briefs of the parties, and of the many amici curiae, should prove interesting reading as we wait for the Supreme Court of the United States to answer the question presented in the petition for certiorari: "Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts."

Bristol-Myers Squibb Co. (BMS), a pharmaceutical manufacturer doing business around the globe, headquartered in New York, and incorporated in Delaware, was sued in California state court by 678 plaintiffs, including 575 non-California residents. The plaintiffs alleged that a drug manufactured by BMS, Plavix, caused serious side effects, including strokes and bleeding. BMS moved to quash service of the summons based on lack of personal jurisdiction, arguing

that Plavix was not prescribed to, distributed to, or ingested by the nonresident plaintiffs in California and, further, that BMS did not manufacture Plavix at its California facilities or prepare the Plavix marketing or regulatory materials in California. BMS lost its motion in the trial court, which found general jurisdiction over the claims based on the "wide-ranging, continuous, and systematic activities in California" of BMS. The appellate court found there was no general jurisdiction but that specific jurisdiction over the nonresident claims was justified by the activities of BMS.

The California Supreme Court affirmed the appellate court and held that although *Bristol-Myers Squibb* was not "at home" in California for purposes of the exercise of general jurisdiction, its "extensive contacts" in California—through the marketing and distribution of Plavix, hundreds of California employees, research and development facilities, and millions of dollars of revenues received from the sales of Plavix—provided a "substantial nexus" sufficient to justify the exercise of specific personal jurisdiction over the claims of the nonresident plaintiffs arising from the same course of conduct (allegedly defective product and misleading advertising) as the claims of the plaintiffs who were California residents. In its petition to the Supreme Court of the United States, BMS contends the "sliding scale" approach of the California Supreme Court impermissibly used "forum state contacts unrelated

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to [the plaintiffs'] suit" to justify the imposition of jurisdiction. Rather, BMS argues, only "suit-related conduct" may be considered in determining whether contacts are sufficient with the forum state. BMS urged the Supreme Court of the United States to resolve the split across the circuits and states on the standard for relatedness.

Jurisdiction challenges aside for the moment, there are a number of practical considerations to bear in mind when considering the defense or prosecution of claims of out-of-state parties, regardless of the forum. Counsel for both sides must consider how to marshal and preserve evidence located out of state, including subpoenas and depositions directed to third parties. Court orders and commissions may be required, and it may be necessary to associate local counsel to ensure familiarity with local rules and procedures, particularly if there are enforcement issues.

If there is related litigation pending in another jurisdiction, counsel should determine whether some form of coordination would make sense. Is there already a document depository in place for the other case? Is the information subject to a protective order? Will a request be made for one court to stay the action and defer to the other, or will both proceed on parallel tracks? Is your state court judge willing to talk to the other state or federal court judge to see if informal coordination makes sense? This can take many forms, such as inviting the other multidistrict litigation judge to listen in via conference call to the state court status conferences, a joint "science day," coordinated briefing, or even having a joint hearing with separate briefing and rulings. A common area for coordination is with settlement conferences. There are obvious advantages to having a single mediator, or special master, who can become the subject matter expert capable of discerning, with the input of counsel, where heed must be paid to the laws or procedures of the differing jurisdictions to effect a global resolution.

If the case does not settle and must proceed to jury trial, counsel must consider issues related to the scheduling of out-of-state witnesses. Trials do not always begin on the "firm" date set for the commencement of trial, and there may be unanticipated delays related to selecting a jury, hearings on legal issues, or the completion of the testimony of other witnesses. Thus, out-of-state witnesses may need to be flexible enough to change or extend their travel plans. This is often problematic for physicians, executives, or expert witnesses with busy calendars. Counsel should investigate whether the assigned trial judge will permit remote appearances via telephone or video conference.

In selecting a jury, counsel should consider how to uncover bias against an out-of-state party. Jurors have been known to ask counsel, out in the hall after the verdict, why the case was tried in their community. The possibility that this may influence a verdict should be considered. These challenges should be part of the evaluation when determining the settlement value of a case.

Of course, to come full circle, if your pending case is one that might be affected by the outcome of *Bristol-Myers Squibb Co. v. Superior Court of California*, you may wish to factor that uncertainty into both the amount and the timing of your settlement negotiations, and the language of any settlement documents.

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