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Will 'Bristol-Myers' Exclude Tort Actions From—or Draw Them to—Pa.?

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The U.S. Supreme Court's recent game-changing decision in *Bristol-Myers Squibb v. Superior Court of California* is widely seen as the beginning of the end for mass torts in several venues that have historically attracted large-scale litigation, including California and Missouri.

But, for Pennsylvania—another state with significant mass tort dockets—the ruling is expected to be much more of a mixed bag, and, according to some, could instead lead to an uptick in suits against certain defendants.

On Monday, a majority of the Supreme Court determined that plaintiffs suing *Bristol-Myers Squibb* in California who were not California residents had failed to establish specific jurisdiction over the pharmaceutical giant, since there was no significant link between the claims and *Bristol-Myers*' conduct in California. The ruling, according to observers, makes clear that out-of-state plaintiffs can't sue companies in states where the defendants aren't considered to be "at home," or haven't

conducted business directly linked to the claimed injury.

Even before the Supreme Court made its ruling, motions were filed in Pennsylvania and across the country seeking stays until the justices ruled on the issue. Since *Bristol-Myers Squibb* came down, it has already led to one mistrial, and attorneys in Pennsylvania said they are already beginning to file jurisdictional challenges based on the case.

According to James Beck, a products liability attorney with Reed Smith, the ruling means all of the cases in Philadelphia filed by out-of-state plaintiffs are subject to being tossed out of Pennsylvania state court. According to the latest statistics from Philadelphia's Complex Litigation Center, that means 33 percent of the asbestos cases and 74 percent of the pharmaceutical cases filed in 2016 could potentially be affected by the decision.

"Unless they are suing a Pennsylvania defendant—and there are some—every one of those cases, where a non-Pennsylvania plaintiff has come to Philadelphia to sue someone, is potentially implicated," Beck said.

However, plaintiffs attorneys say Pennsylvania's business consent

laws and the fact that many pharmaceutical businesses have strong ties to the Philadelphia area put the Keystone State in a different situation than other venues that historically saw significant mass tort litigation.

"Janssen [the defendant in the *Risperdal* mass tort] is a Pennsylvania corporation. With Bayer, which is a Pennsylvania corporation, nothing changes. Merck, which has significant facilities here, under the right factual pattern, would be in Philadelphia. Ethicon, which is in the transvaginal mesh cases, purchased material from a Pennsylvania corporation, so nothing has changed," **Kline & Specter attorney Thomas Kline**, whose firm is handling cases in both the *Risperdal* and transvaginal mesh mass torts, said.

Attorneys agreed that the ruling will most dramatically impact mass tort programs in Illinois, Missouri and California, which is where hundreds of other *Risperdal* cases have been filed. Those courts, according to attorneys, were more favorable toward allowing in out-of-state claims. Attorneys noted that Missouri, for example, had allowed out-of-state plaintiffs to join their claims, or "tag along," with complaints filed

by in-state plaintiffs. That practice is not allowed in Philadelphia.

Cases in those jurisdictions directly affected by Bristol-Myers Squibb might see their cases transferred either to federal court, or venues deemed to be either, the company's home, or where the conduct occurred that was sufficiently linked to the injury.

That could mean Pennsylvania would see an increase in litigation against specific defendants.

"The Pennsylvania-incorporated product manufacturers are going to get sued more here in Pennsylvania," Abby Sacunas, a partner in Cozen O'Connor's products liability practice, said.

Others agreed.

The decision will "send cases where the court believes they belong," Kline said. "A place where the Risperdal cases would belong would be Philadelphia."

According to Joseph Blum, a mass torts attorney with Shook, Hardy & Bacon, Bristol-Myers Squibb won't change the number of plaintiffs bringing claims, but it will have a significant impact on where those claims are filed.

"Probably you will see not as many of the coordinated proceedings, but they will be bigger," Blum said. "With a company that is at home in Philadelphia, you could see a very big mass tort."

Another factor that makes Pennsylvania somewhat unique is its business consent law, which an Eastern District of Pennsylvania judge recently found sufficient to subject an out-of-state defendant to general jurisdiction since it registered as a corporation in the state. That case was *Bors v. Johnson & Johnson*.

Products liability and asbestos attorney Edward Nass of Nass Cancelleri Brenner noted that several federal courts have determined some state laws requiring businesses to register are not enough to create jurisdiction.

"In those, [the courts] cited the Pennsylvania statute as being different, where Pennsylvania has a specific provision in the statute saying, if you want to do business here, you are consenting to the court's general jurisdiction," Nass said. "So by virtue of that statute ... I don't think the Bristol-Myers Squibb decision will have a whole lot of impact for Pennsylvania."

Beck, however, said that reasoning would go against due process issues that the Supreme Court considered in deciding Bristol-Myers Squibb and its predecessor case, *Daimler AG v. Bauman*, which said a company could only be subject to general jurisdiction in its home state.

So, at the very least, Pennsylvania's consent statute is likely to create another jurisdictional argument between the plaintiffs and defense bars.