

NEW AND NOTEWORTHY:

NORFOLK SOUTHERN RY. CO. V. DOLAN: THE END TO LITIGATION TOURISM IN THE CITY OF ST. LOUIS?

In recent years, the City of St. Louis has been a plaintiffs' favorite for litigation tourism, particularly in drug and medical device cases. And for good reason: By September of 2016, three of the year's six-largest products liability verdicts in the United States—totaling \$173.5 million—were from the St. Louis City circuit court.¹ This earned the City of St. Louis its status as the #1 “judicial hellhole” in the United States in the American Tort Reform Foundation's most recent report.²

Plaintiffs' tactic is to join together multiple plaintiffs from across the country with one or more unrelated St. Louis plaintiffs. The only commonality is typically that the plaintiffs were prescribed the same drug or device. This practice developed because Missouri federal courts have disallowed removals based on fraudulent misjoinder or lack of personal jurisdiction under *Ruhrgas v. Marathon Oil Co. and Daimler AG v. Bauman*,³ and Missouri state courts have denied motions to sever and motions to dismiss based on lack of venue, lack of personal jurisdiction, and forum non conveniens.

But a recent Missouri Supreme Court decision may put an end to this practice.

On February 28, 2017, the Missouri Supreme Court decided *State ex rel. Norfolk Southern Ry. Co. v. Dolan* (“*Norfolk*”).⁴ In that case, an Indiana resident who worked for Norfolk in Indiana brought suit for injury allegedly sustained during his employment under the Federal Employer's Liability Act (FELA). Norfolk is a Virginia corporation. The plaintiff never worked in Missouri and did not allege any action by Norfolk in Missouri caused him harm. Rather, he claimed there was jurisdiction over his claim in Missouri because Norfolk did business in that state (by maintaining train tracks running through Missouri and having employees in Missouri)

and because Norfolk complied with Missouri's business registration statutes (by registering with the state and designating a registered agent for service of process in the state). Granting a writ of prohibition, the Missouri Supreme Court rejected plaintiff's argument.

In its opinion, the Missouri Supreme Court found:

- 1. General personal jurisdiction cannot be based on the mere fact that a company does business continuously or systematically in the state.** “Prior to *Daimler*, this would have been a valid argument. But it is no longer the law.” Under *Daimler*, general jurisdiction would exist in Missouri only (i) if the corporation is incorporated in Missouri, (ii) if the corporation has its principal place of business in Missouri, or (iii) “in the exceptional case when [the corporation's] contacts with Missouri are so extensive and all-encompassing that Missouri, in effect, becomes another home state.” As to the last ground, that would only exist if the state became the “surrogate for place of incorporation or home office.” That was obviously not the case in *Norfolk*, where only about 2% of the company's train tracks and employees were in the State of Missouri.
- 2. There can be specific jurisdiction only if the plaintiff's claims arise out of the defendant's contacts with Missouri.** It is not enough that the Indiana injuries arose from the same “type” of activities as Norfolk's Missouri activities. Nor did FELA itself provide for specific jurisdiction in any place a railroad corporation has tracks.
- 3. A company does not consent to personal jurisdiction by complying with a state's foreign corporation registration statute.** Implied consent is a question of statutory interpretation, and nothing in the Missouri registration statutes gives any indication that compliance would constitute consent to

personal jurisdiction. In fact, the statutes do not mention consent at all. The court found that to the extent any holdings or dicta in other cases suggested otherwise, “they go beyond the language of the relevant statutes and should no longer be followed.”

Thus, *Norfolk* held unequivocally that a plaintiff whose claim arises out of state does not have any business filing suit in Missouri if Missouri is not the defendant corporation's home state or “surrogate” home state.

Although *Norfolk* did not explicitly address the issue of joinder, the Missouri Supreme Court indicated that joinder cannot extend personal jurisdiction when it acknowledged that doing business in Missouri can subject a corporation to specific jurisdiction in Missouri, “[b]ut that jurisdiction would exist only over **claims that are related to those contacts**” and that jurisdiction could not be extended simply because they are the same “type” of activities. The court provided an example that perfectly illustrates the problem with the plaintiffs' jurisdiction-by-joinder theory:

Just because a company like Ford, for example, sells cars in Iowa and in California, does not mean there is jurisdiction in California for injuries that occurred in Iowa simply because Ford engages in the same “type” of activity—selling cars—in both states. Such an argument goes even further than the pre-*Daimler* approach to general jurisdiction that *Daimler* rejected as providing no authority for general jurisdiction over a company. To say this same conduct confers specific jurisdiction over suits the facts of which have no relationship to the forum state would be to turn specific jurisdiction on its head.

And even if *Norfolk* did not put the last nail in the coffin for multi-plaintiff pharmaceutical litigation tourism in Missouri, there are a number of other developments on the horizon that might:

- Bills pending in the Missouri House and Senate, which would put an end to the practice by requiring that joinder or intervention cannot establish venue or personal jurisdiction if the party could not establish it independently, and conversely, that joinder or intervention is improper if the party cannot independently establish venue or jurisdiction.⁵

- *Bristol-Myers Squibb Co. v. Superior Court of California*, which is scheduled for oral argument in the United States Supreme Court on April 25, 2017, and should be decided before the end of the Court's term in June of this year. That case addresses whether there is personal jurisdiction over the claims of multiple out-of-state plaintiffs who joined with California plaintiffs to file suit in California.⁶
- A products liability appeal in the Missouri Supreme Court, which challenges whether joinder can extend venue.⁷ The appeal is set for oral argument on May 11, 2017.
- Appeals from the talc products liability verdicts in the Missouri Court of Appeals, which address whether joinder can extend personal jurisdiction.⁸ Oral argument is set for May 10, 2017.
- An appeal in the Eighth Circuit Court of Appeals, which addresses the propriety of the removal of a case involving 64 unrelated plaintiffs from 29 different states—only four from the State of Missouri—under *Ruhrgas* and *Daimler*. Oral argument is scheduled in that case for April 5, 2017.⁹

Defense counsel across the country are closely watching these developments, because to the extent *Norfolk* has not already done it, any one of these events could be the final death knell for litigation tourism in the City of St. Louis.

1. See Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, BloombergBusinessweek (Sept. 29, 2016), available at <http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis> (last accessed Mar. 10, 2017).
2. American Tort Reform Foundation, *2016-2017 Judicial Hellholes*, available at <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf> (last accessed Mar. 10, 2017).
3. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
4. *State ex rel. Norfolk Southern Ry. Co. v. Dolan*, 2017 WL 770977 (Mo. banc Feb. 28, 2017).
5. See Mo. HB 460, HB 461, HB 462, HB 463, SB 258, SB 259, SB 260, SB 261, SB 262.
6. See Supreme Court Dkt. No. 16-466.
7. See *Barron v. Abbott Labs.*, Case No. SC96151.
8. See, e.g., *Fox v. Johnson & Johnson*, Case No. ED104580.
9. *Robinson v. Pfizer, Inc.*, Case No. 16-2524 (8th Cir.).



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