

# Bloomberg Law Insights

## Not At Home: Reining in General Personal Jurisdiction After *BNSF Railway Co. v. Tyrrell*

### Civil Procedure

#### Jurisdiction

*BNSF Railway Co. v. Tyrrell* redefined the contours of a court's jurisdictional reach by effectively subjecting corporations to general personal jurisdiction only in those states where they are incorporated or have their principal place of business, attorneys from WilmerHale say. Moreover, dozens of courts across the country have relied on *BNSF Railway* to dismiss lawsuits under factual circumstances that, in the past, would almost certainly have sufficed for the exercise of general jurisdiction, they say.

BY ANDREW E. SHIPLEY AND MATTHEW F. FERRARO

### Introduction

Although it has been less than a year since the U.S. Supreme Court decided *BNSF Railway Co. v. Tyrrell*, 2017 BL 179673, 136 S. Ct. 1549 (2017), the decision has been repeatedly and successfully invoked to dismiss lawsuits against corporate defendants that, under previous jurisprudence, would likely have been haled into court.

*BNSF Railway* redefined the contours of a court's jurisdictional reach by effectively subjecting corporations to general personal jurisdiction only in those states where they are incorporated or have their principal place of business.

In *BNSF Railway*, the Court denied the exercise of personal jurisdiction by a Montana court over a corporation that had active operations, thousands of workers, thousand miles of railroad track, and hundreds of millions of dollars of property in the state. See *id.* at 1554.

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The corporation, however, was neither incorporated in nor had its principal place of business in Montana. The Supreme Court held that courts must assess "a corporation's activities in their entirety" and that a corporation that operates in many jurisdictions, like BNSF, cannot be at home in all of them. The mere fact that a corporation has contacts with a foreign state will "not suffice to permit the assertion of general jurisdiction" over claims "unrelated to any activity occurring" there. *Id.* at 1559 (internal citation omitted). In other words, general "all purpose" jurisdiction over an out-of-state corporate defendant will no longer obtain simply because that corporation maintains a presence—even a significant presence—in the forum.

Lower courts have taken notice of the Supreme Court's narrowed view of general jurisdiction. For example, in one of the first cases implementing *BNSF Railway*, the U.S. District Court for the District of Maryland dismissed a lawsuit against Northrop Grumman Systems Corporation for lack of general personal jurisdiction, even though the defendant headquartered one of its three business sectors in Maryland and employed over 11,000 people there. See *Grabowski v. Northrop Grumman Sys. Corp.*, No. CV GLR-16-3492, 2017 BL 266252, at \*5 (D. Md. June 30, 2017).

As *Grabowski* and the other cases discussed below illustrate, corporate defendants now have an effective shield against forum-shopping plaintiffs who seek to enmesh corporate defendants in jurisdictions with no connection to the subject matter of the litigation.

### Exercising General Jurisdiction Before *BNSF Railway*

The due-process provisions of the Fifth and 14th Amendments to the U.S. Constitution prohibit a plain-

tiff from haling into court a defendant who lacks sufficient contacts with the forum. *See, e.g., Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016).

The Supreme Court established a two-part due process test for personal jurisdiction in *International Shoe v. Washington*: the “minimum contacts” inquiry and the “reasonableness” inquiry. 326 U.S. 310, 316-317 (1945). The minimum contacts inquiry requires that the court determine whether a defendant has sufficient minimum contacts with the forum to justify the court’s exercise of personal jurisdiction over the defendant.

The reasonableness inquiry asks whether the assertion of personal jurisdiction comports with “traditional notions of fair play and substantial justice” under the circumstances of the particular case. *Id.* at 316.

There are two kinds of personal jurisdiction: *general jurisdiction* and *specific jurisdiction*.

General personal jurisdiction empowers a court to hear any and all claims against the defendant before it. The exercise of specific jurisdiction arises from the corporation’s in-state activity that “gave rise to the episode-in-suit.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011) (citing *Int’l Shoe*, 326 U.S. at 317) (emphasis in original).

For decades following *International Shoe*, courts routinely asserted general jurisdiction over corporate defendants on claims not arising from their activities in the forum. If a corporation had facilities or employees within the state, or did business within the state, these were often deemed “continuous and systematic contacts” sufficient to satisfy the minimum contacts and reasonableness inquiries for general personal jurisdiction.

For example, in *FLS Transportation Services (USA) Inc. v. National Bankers Trust Corp.*, the plaintiff, a Delaware corporation with its principal place of business in Illinois, sued NBT, a Tennessee corporation, in Missouri. *See Order Denying Mot. to Dismiss*, No. 12-00936-CV-W-GAF, (W.D. Mo. Jul. 16, 2012), Dkt. No. 20 (Nov. 26, 2012). NBT’s only contacts with Missouri consisted of contracts with thirteen Missouri freight carriers (all of which placed venue for any dispute in Tennessee and none of which was related to the plaintiff’s claims), 800 mailers sent into Missouri (out of a total of 25,000 mailers distributed nationwide), and a website available to any internet user in Missouri. NBT did not have any salespeople, an agent for service of process, property, or a secured interest in any real property in Missouri. Nonetheless, the court found that NBT’s contacts sufficed to establish general jurisdiction, observing, among other things, that the “percentage of a company’s advertising dollars spent on the forum state are generally irrelevant; the focus is instead on the company’s contacts with the forum state.” *Id.*

Similarly, in *Haubner v. Abercrombie & Kent International, Inc.*, 812 N.E.2d 704, 710-711 (Ill. App. Ct. 2004), a Ugandan tour operator was subjected to personal jurisdiction in a wrongful death suit, even though it did not have a corporate office in Illinois or conduct direct advertising in Illinois. The court premised jurisdiction on the fact that the defendant had communicated with employees of an Illinois tour operator regarding various tours offered by both companies in Africa, that it derived 30 percent of its revenue from business it conducted in Illinois, and that it had an Illi-

nois tour operator issue a refund to a customer on its behalf.

Starting with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the U.S. Supreme Court began to sharpen the type of “continuous and systematic contacts” needed to subject a corporate defendant to general jurisdiction within a forum, explaining that the paradigmatic forum was one in which the corporation was “at home,” *i.e.*, its place of incorporation or principal place of business. As indicated by the subsequently decided *FLS Transportation* case noted above, however, *Goodyear*’s exegesis was not accepted as a hard-and-fast rule.

In *Daimler AG v. Bauman*, 2014 BL 9151, 134 S. Ct. 746, 754 (2014), the Supreme Court clarified that general jurisdiction should usually be limited to the paradigm forums identified in *Goodyear*. *Daimler* stated that only in “exceptional cases” should a corporation be subjected to general jurisdiction in any other forum. The Court pointed to *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as an exemplar of such an “exceptional” case. *Daimler*, 134 S. Ct. at 761 n.19.

In *Perkins*, the Second World War compelled the defendant corporation’s owner to relocate the business temporarily from the Philippines to Ohio, whereupon Ohio became “the center of the corporation’s wartime activities,” rendering suit proper there. *Id.* at 756 n.8; *Perkins*, 342 U.S. at 447-448. The *Daimler* court rejected as “unacceptably grasping” the formulation previously adopted by many courts, namely, that general jurisdiction exists “in every State in which a corporation engages in a substantial, continuous, and systematic course of business.” *Daimler*, 134 S. Ct. at 761 (internal citation omitted). Nevertheless, the *Daimler* Court stated that “*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business.” *Id.* at 760 (emphasis in original).

## BNSF Railway and Its Progeny

Issued on May 30, 2017, *BNSF Railway* erased any doubt: absent truly rare circumstances, general jurisdiction may be found only in the forum in which a corporation is incorporated or has its principal place of business.

In *BNSF Railway*, the plaintiffs brought suit in Montana against BNSF under the Federal Employers’ Liability Act, 45 U.S.C. § 51 *et seq.*, (“FELA”)—a federal law that allows railroad workers to sue their employers for injuries that occur on the job—alleging work-related injuries. The plaintiffs were not residents of Montana, and their injuries did not occur there. *See BNSF Railway*, 137 S. Ct. at 1553. BNSF is neither incorporated nor has its principal place of business in Montana, but it employs over 2,100 people (under 5 percent of its total workforce) in Montana, owns over 2,000 miles of railroad track (around 6 percent of its total mileage) there, and generates less than 10 % of its total revenue in the state. *Id.* at 1554.

The Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF because the railroad “d[id] business” in the state within the meaning of FELA. *See id.* at 1554. In an 8-1 decision authored by Justice Ruth Bader Ginsburg, the U.S. Supreme Court reversed on both statutory and constitutional grounds.

First, the Supreme Court ruled that FELA governs venue, not jurisdiction, and merely authorizes state courts to hear FELA lawsuits. FELA does not authorize state courts to exercise personal jurisdiction over a railroad solely because the railroad does some business in their states. *Id.* at 1557-1558.

Second, the Court held that a Montana law that permitted state courts to exercise jurisdiction over “persons found” in Montana did not comport with constitutional due process. *Id.* at 1558.

The Court repeated its teaching in *Daimler* and *Goodyear*, and once again pointed to the 65-year-old, wartime emergency *Perkins* case as exemplifying the type of exceptional circumstances needed to exercise general jurisdiction over a corporation in a forum other than its state of incorporation or principal place of business. Although the Court acknowledged that BNSF had significant contacts with Montana—thousands of employees and large property holdings—it explained that a corporation that “operates in many places can scarcely be deemed at home in all of them.” *Id.* at 1559 (internal citation omitted). The Court further cautioned that “the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts,” and instead “calls for an appraisal of a corporation’s activities in their entirety.” *Id.* (internal citation omitted).

The practical implications of *BNSF Railway* are difficult to overstate. As the below survey illustrates, dozens of courts across the country have relied on *BNSF Railway* to dismiss lawsuits under factual circumstances that, in the past, would almost certainly have sufficed for the exercise of general jurisdiction.

## Second Circuit

In *Matter of Fornaciari for an Order to Take Discovery Pursuant to 28 U.S.C. § 1782*, No. 17MC521, 2018 BL 41036, at \*2 (S.D.N.Y. Jan. 29, 2018), the court refused to issue an order to compel the Royal Bank of Canada to provide discovery because “the mere existence of Royal Bank’s offices” in New York did not suffice to establish jurisdiction.

In *re Sargeant*, No. 17MC374, 2017 BL 362361 (S.D.N.Y. Oct. 10, 2017), the court denied an application for the issuance of a subpoena because the target of the subpoena, Burford Capital, LLC, was not incorporated or formed in New York and, at most, maintained an office there that was not its principal place of business. Under *BNSF Railway*, the mere allegation that Burford Capital conducted business in New York was insufficient to establish that its operations were so substantial and of such a nature as to render it at home in the forum. *Id.* at \*4-5.

## Third Circuit

In *Plumbers’ Local Union No. 690 Health Plan v. Apotex Corp.*, No. CV 16-665, 2017 BL 255436 (E.D. Pa. July 24, 2017), a health insurance plan brought a putative class action against companies involved in the generic prescription pharmaceutical drug business. While the court held that it had specific or consent jurisdiction over some of the defendants, it concluded that it did not have general jurisdiction over most of the defendants, even though many of them conceded that they sold generic prescription drugs in the state. Citing *BNSF Rail-*

*way and Daimler*, the court concluded that, while the defendants had “continuous and systematic contacts with Pennsylvania,” that fact was “insufficient to establish general jurisdiction.” *Id.* at \*6. No defendant was headquartered or incorporated in Pennsylvania, and the plaintiff did not contend that the defendants presented “an exceptional case in which [their] operations in Pennsylvania are so substantial and important as to render them at home in Pennsylvania.” *Id.*

In *American Guarantee & Liability Insurance Co. v. Arch Insurance Co.*, No. CV 17-582, 2017 BL 384748, at \*7-8 (W.D. Pa. Oct. 26, 2017), the court denied the plaintiff’s motion for jurisdictional discovery and granted the defendant’s motion to dismiss where the defendant was not organized or based in the forum, maintained no agents there, and at most sold coal and purchased equipment in the forum. *See also Antonini v. Ford Motor Co.*, No. 3:16-CV-2021, 2017 BL 295929, at \*2 n.2 (M.D. Pa. Aug. 23, 2017) (per *BNSF Railway*, Delaware-incorporated, Michigan-based defendant was not rendered at home in Pennsylvania by its allegedly significant business there).

## Fourth Circuit

In *Grabowski v. Northrop Grumman Systems Corp.*—one of the earliest cases to implement *BNSF Railway*—the plaintiff alleged that Northrop Grumman had been unjustly enriched at his expense, but his claim arose from alleged conduct that took place outside of Maryland and had no connection to the state.

The plaintiff argued, however, that because Northrop Grumman headquarters one of its three business sectors in Maryland and employs over 11,000 people there, its contacts with Maryland were so continuous and systematic as to render it “at home” in the state for purposes of general personal jurisdiction. *Grabowski*. at \*1. The district court disagreed. *Id.* Citing *BNSF Railway* and *Daimler*, the district court explained that only in “exceptional cases” will general personal jurisdiction exist over a corporate defendant in anything other than the “paradigm” forums of its state of incorporation and principal place of business. *Id.* at \*3.

The district court noted that its analysis could not “focus solely on the magnitude of the defendant’s in-state contacts.” *Id.* at \*3. Rather, it required an assessment of Northrop Grumman’s “activities in their entirety, nationwide, and worldwide.” *Id.* Relying upon Northrop Grumman’s annual report, the district court noted that the company employs 65,000 people worldwide, has 467 offices around the world, and headquarters business sectors in Maryland, California, and Virginia. Considering these facts, the district court concluded that “[m]aintaining a sector headquarters in [Maryland] with 11,000 employees is not ‘so substantial and of such a nature’ as to render Northrop Grumman at home in Maryland.” *Id.* at \*4 (quoting *BNSF Ry.*, 137 S. Ct. at 1558).

The court granted the motion to dismiss the lawsuit and did not transfer the case.

In another example, Maryland’s highest court considered whether general jurisdiction existed over a foreign corporation with a subsidiary incorporated in Maryland. In *Stisser v. SP Bancorp, Inc.*, 174 A.3d 405 (Md. 2017), the plaintiffs owned stock in SP Bancorp, Inc. (“SP”), a corporation incorporated in Maryland but headquartered in Texas. *Id.* at 410. The plaintiffs filed a

class action in Maryland for breach of fiduciary duty following SP's acquisition by a bank holding company incorporated and headquartered in Texas.

The court held that the Texas parent company was not subject to general jurisdiction in Maryland. Citing *Daimler, BNSF Railway*, and other cases "delimiting the authority of state courts to exercise general jurisdiction over nonresident corporations and corporate directors," the court concluded that the bank holding company was not "at home" in Maryland for purposes of general personal jurisdiction. *Id.* at 411.

The court explained that "a nonresident parent corporation is not subject to general jurisdiction in Maryland based solely on its incorporation of a subsidiary within Maryland." *Id.* at 424.

## Fifth Circuit

In *Blakes v. Dyncorp International, LLC*, No. CV 17-00001-BAJ-EWD, 2017 BL 375934 (M.D. La. Oct. 18, 2017), the court dismissed an employment-related lawsuit because the employer defendant was neither incorporated nor had its principal place of business in Louisiana, and the plaintiff had not otherwise alleged that the defendant's contacts with Louisiana were "so substantial and of such a nature as to render the corporation at home in [Louisiana]." *Id.* at \*2 (quoting *BNSF*, 137 S. Ct. at 1558).

Texas state courts have similarly relied upon *BNSF Railway*.

In *Chevron Bangladesh Block Twelve Ltd. ("Chevron Bangladesh") v. Baldwin*, No. 01-17-00303-CV, 2017 BL 438526 (Tex. App. Dec. 7, 2017), the Court of Appeals held that the trial court lacked personal jurisdiction over Chevron Bangladesh, a corporation organized under the laws of Bermuda and with its principal place of business in Bangladesh. *Id.* at \*1. The plaintiffs—all Texas residents—brought a lawsuit alleging negligence for injuries they sustained at a Chevron Bangladesh work site in South Asia. *Id.* The plaintiffs conceded that Chevron Bangladesh was not subject to specific jurisdiction, but argued that it was "essentially at home in Texas" because "between 2011 and 2016, Chevron Bangladesh recruited and hired five Texas residents[,] purchased millions of dollars of equipment and supplies from Texas-based companies," and its employees made over sixty trips to Texas. *Id.* at \*2.

The trial court ruled that it had general jurisdiction over the company. *Id.*

The Court of Appeals of Texas reversed. *Id.* at \*1. The court observed that Chevron Bangladesh did not conduct any operations in Texas; nor did it sell any products or services in the state, own or lease land, offices, or facilities, possess any government licenses or maintain any investments or subsidiaries, hold any business registrations, retain agents for service of process, or maintain bank accounts. *Id.* at \*4.

Relying on *BNSF Railway's* characterization of *Perkins* as the exemplar of the "exceptional circumstances" case, the court held that Texas was not one of Chevron Bangladesh's "paradigmatic forums" and that the evidence did not satisfy "the high threshold" for showing that the case was exceptional. *Id.* at \*3-4 & \*4 n.4.

In *Salgado v. OmniSource Corp.*, No. 01-16-00943-CV, 2017 BL 361756 (Tex. App. Oct. 10, 2017), a Texas plaintiff brought a work-place injury suit against an In-

diana company for an incident that occurred in Louisiana. The Court of Appeals of Texas observed that, when considering the propriety of general jurisdiction, "We are not concerned with the quantity of contacts, but instead the quality and nature of those contacts." *Id.* at \*6."

Although OmniSource paid franchise taxes in Texas, was registered to do business there, and maintained a registered agent in the state—these contacts were not "substantial enough to render it 'essentially at home'" in Texas. *Id.* at \*7. Citing *BNSF Railway*, the court affirmed the dismissal of the suit for lack of jurisdiction. *Id.* See also *N. Frac Proppants, II, LLC v. 2011 NF Holdings, LLC*, No. 05-16-00319-CV, 2017 BL 261904, at \*24, 26-27 (Tex. App. July 27, 2017) (maintaining a sales executive, agent for service, or "a small number of relatively low-level employees, out of a much larger workforce," does not make a defendant "at home" in Texas (citing *BNSF Ry.*, 137 S. Ct. at 1559-60, *Daimler*, 134 S. Ct. at 762 n. 20)).

## Sixth Circuit

In *Smith v. Amada Machine Tools America Inc.*, No. 16-12178, 2017 BL 435311 (E.D. Mich. June 12, 2017), a Michigan plaintiff brought a products liability action against several defendants allegedly involved with the design, manufacture, distribution, and sale of a machine that injured him in a workplace accident. *Id.* at \*1. One of the defendants, Noritake Co., Ltd. ("Noritake Japan"), manufactured the machine, sold it to another Japanese corporation, Amada Corporation, Ltd., and used a Japanese shipping company to deliver the product. The entire transaction, according to Noritake Japan, took place in Japan between two Japanese corporations, and involved payment in Japanese currency. *Id.* at \*2. The product somehow made its way to Michigan, although Noritake Japan stated that it never intended or expected that its products would end up in Michigan. *Id.*

The plaintiff alleged that this was an "exceptional" case sufficient to establish general jurisdiction because Noritake Japan was "doing continuous and systematic business" in Michigan. *Id.* at \*4. The court granted Noritake Japan's motion to dismiss, stating that for general jurisdiction, "the inquiry . . . is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum state.'" *Id.* at \*5 (alterations in original, internal citation omitted). The plaintiff offered no facts or even conclusory allegations that Noritake Japan was "at home" in Michigan. *Id.*

## Seventh Circuit

In *MG Design Associates, Corp. v. CoStar Realty Information, Inc.*, 267 F. Supp. 3d 1000 (N.D. Ill. 2017), the plaintiff, a trade show exhibit designer ("MG"), sued CoStar Realty and Apartments.com for breach of contract, fraudulent misrepresentation, and tortious interference. None of the defendants was incorporated or had its principal place of business in Illinois. MG argued that this was an "exceptional case" within the meaning of *BNSF Railway* because the defendants had

maintained physical offices in Illinois, were registered to do business in Illinois, and based key employees there, including Apartments.com's president and the CoStar employee who had originally contacted MG to design and build an exhibit that was the source of the controversy.

The court characterized the CoStar employee's presence in Illinois as limited to "a discrete subject matter, not global operations," and observed that CoStar's presence in Illinois did "not override its corporate operations out of Washington, D.C." *Id.* at 1014. Nor was registering to do business in Illinois "enough to confer general jurisdiction over a foreign corporation." *Id.* at 1014-15 (internal citation omitted). Accordingly, the court found that MG failed "to show that CoStar was operating in Illinois with the type of continuous and systematic operation to be at home [t]here," and it declined to exercise general jurisdiction over it. *Id.* at 1015.

The court acknowledged that whether it could exercise general jurisdiction over Apartments.com was "a closer question," because the defendant had maintained its primary office (including the corporate president's office) in Illinois until shortly before the suit was filed. Nevertheless, the court concluded that Apartments.com's decision to move the majority of its departments and its corporate president to Georgia before the filing of the suit showed that it "did not want a home in Illinois . . ." *Id.* at 1015.

Because Illinois was not the defendant's "chosen home," the court declined to exercise general jurisdiction over it. *Id.*

Another court in the same district denied general jurisdiction on similar grounds.

In *Guaranteed Rate, Inc. v. Conn*, 264 F.Supp. 3d 909 (N.D. Ill. 2017), the plaintiff brought a claim of conspiracy to breach fiduciary duties.

GRI asserted that it had met the "continuous and systematic" standard for general personal jurisdiction because a defendant, CCMI, (1) was registered to do business in Illinois; (2) held an Illinois Residential Mortgage License; (3) originated over \$215 million in loans in Illinois in 2016; (4) operated at least thirteen branches in Illinois; and (5) employed dozens of state residents in its Illinois branches. *Id.* at 915-916.

The district court held that GRI's argument was "unacceptably grasping." *Id.* at 916. "If the maintenance of 2,000 miles of railroad track and employment of more than 2,000 workers in the forum state cannot establish general jurisdiction as the Supreme Court held in *BNSF Railway*, then the business allegedly conducted by CCMI in Illinois in this case cannot either." *Id.* Accordingly, the court granted CCMI's motion to dismiss for lack of general personal jurisdiction. *Id.* at 932-33.

## Eighth Circuit

The Supreme Court of Missouri analyzed *BNSF Railway* when it ordered the trial court to vacate its order overruling the motion to dismiss in *State ex rel. Bayer Corp. v. Moriarty*, No. SC 96189, 2017 BL 455030 (Mo. Dec. 19, 2017).

In that case, dozens of plaintiffs (of which only seven resided in Missouri) brought a class action against a medical device corporation alleging that they were injured while using the defendant's contraceptive products. *Id.* at \*1-2. The defendant was neither incorpo-

rated nor had its principal place of business in Missouri, and the court held that the mere allegation that the defendant did substantial business in the state was insufficient to render the defendant at home in Missouri. *Id.* at \*4-5.

## Ninth Circuit

The Supreme Court of Montana (whose decision was overturned by the Supreme Court in *BNSF Railway*) revisited the due process limitations of general personal jurisdiction in *Buckles v. Continental Resources, Inc.*, 402 P.3d 1213 (Mont. 2017).

Zachary Buckles died of exposure to high levels of hydrocarbon vapors while working in North Dakota for a business called Black Gold, which had been contracted to perform oil-field work by Continental. Buckles' estate sued Continental for negligence-related torts, and the defendant moved to dismiss. The court observed that Continental was incorporated and had its principal place of business in Oklahoma. Even though it was authorized to do business in Montana, owned and operated hundreds of oil and gas wells and motor vehicles in the state, owned real property in Montana, and maintained two field offices there, the court found that, under *BNSF Railway*, these contacts were not sufficient to make Continental "at home" in Montana. *Id.* at 1217.

In *Benedith v. Case Western Reserve University*, No. 17-CV-05896-JST, 2018 BL 32882, at \*2 (N.D. Cal. Jan. 31, 2018), the federal district court in San Francisco relied on *BNSF Railway* to hold that a California court lacked general personal jurisdiction over Case Western Reserve University—a Ohio university—because Case Western's registration to do business in California as a foreign non-profit and its operation of a small school of engineering in San Diego did not make it "essentially at home" in California.

## Tenth Circuit

In *Singleton v. KAT Exploration, Inc.*, No. 2:17-CV-00556-CW-DBP, 2018 BL 38524, at \*1-2 (D. Utah Feb. 5, 2018), the plaintiff moved for default judgment.

The district court, however, pointed to *BNSF Railway*'s instruction that only in exceptional circumstances will a corporate defendant be at home in a forum other than where it is incorporated or maintains its principal place of business. Because the defendant was a Nevada corporation with its principal place of business in Canada, the court denied the motion for default judgment and dismissed the lawsuit for lack of personal jurisdiction.

## Eleventh Circuit

As of this writing, the U.S. Court of Appeals for the Eleventh Circuit is the only federal appellate court to interpret *BNSF Railway*.

In a *per curiam* opinion issued January 31, 2018, a unanimous three-judge panel affirmed the dismissal of a lawsuit filed in Georgia against a Florida law firm with its principal place of business in Florida and whose members were all residents of Florida. *Rowe v. Gary, Williams Parteni, Watson and Gary*, No. 16-17798, 2018 BL 31634, at \*1 (11th Cir. Jan. 31, 2018) (*per curiam*).

The plaintiffs alleged legal malpractice and fraudulent misrepresentation by the defendants for, among other alleged wrongs, failing to obtain relevant e-mail evidence to respond to a summary judgment motion and fraudulently inducing the plaintiffs to reject a settlement offer of \$20 million. *Id.* at \*1-2.

The original complaint alleged only subject matter jurisdiction via diversity of citizenship. In subsequent filings, the plaintiff asserted the existence of general personal jurisdiction based on the firm's contacts in Georgia. Specifically, the plaintiffs alleged that the law firm solicited the plaintiffs' business in Atlanta, made fraudulent misrepresentations in a strategy meeting held in Atlanta, met several times with the plaintiffs in Georgia, regularly practiced law in Georgia, and derived substantial income there. *See* Appellants' Brief, Rowe, Dkt. No. 38 (Apr. 24, 2017).

Based on *BNSF Railway* and *Daimler*, the court held that general jurisdiction against the defendants was improper "[b]ecause the allegations in the complaint do not demonstrate any facts that indicate the [defendants] are 'essentially at home' in the State of Georgia." Rowe, 2018 BL 31634, at \*3.

Similarly, in *Wertheim Jewish Educational Trust, LLC v. Deutsche Bank AG*, No. 17-CV-60120-KMM, 2017 BL 438583, at \*1 (S.D. Fla. Dec. 6, 2017), the Southern District of Florida dismissed a lawsuit alleging a scheme involving Credit Suisse and other financial firms surrounding the alleged mishandling of the \$3 billion estate of Karl Wertheim.

The plaintiff claimed an interest to foreign assets allegedly held by Deutsche Bank and Credit Suisse, among others. The plaintiff alleged that Deutsche Bank was subject to general jurisdiction in Florida because the bank had a registered agent in Florida, maintained offices with employees in Florida, had telephone, fax, and internet services there, advertised and solicited for business in the state, maintained bank accounts and international bank codes for its Florida operations, and operated interactive websites through which it conducted business throughout the state. *Id.* at \*10-11. The plaintiff further alleged that Deutsche Bank solicited and maintained accounts for high-net-worth U.S. citizens within the Southern District of Florida. *Id.* at \*11.

The court held that, although Deutsche Bank "appears to conduct some business in the state, it is not incorporated in Florida, it does not maintain its principal place of business in the state, and its operations in Florida are not 'so substantial and of such a nature as to render the corporation at home' in Florida." *Id.* at \*12 (quoting *BNSF Ry.*, 137 S. Ct. at 1158). The court noted that only 1.6 percent of the bank's employees were in Florida and all members of its Board of Directors were in Germany.

Next, the court considered the alleged contacts of defendant Credit Suisse AG ("CSAG").

The plaintiff admitted CSAG is headquartered and incorporated in Switzerland, but alleged that CSAG had offices, employed a registered agent, used SWIFT codes and phones in Florida, had telephone, fax, and internet services in Florida, solicited and advertised for its international banking business there, owned property and hosted conferences in the state, and used Florida courts to enforce its rights. *Id.* at \*14. Even accepting plaintiff's factual contentions as true, the court—after considering *Daimler*, *BNSF Railway*, and their progeny—found that the plaintiff's allegations were "necessarily inad-

equate" to establish general personal jurisdiction over CSAG in the forum. *Id.*

The Northern District of Georgia considered *BNSF Railway's* application to intellectual property claims in *Orafol Americas, Inc. v. DBi Services, LLC*, No. 1:16-CV-3516-SCJ, 2017 BL 327428 (N.D. Ga. July 20, 2017).

Orafol sued DBi for allegedly selling counterfeit Orafol trademarked delineation sheeting. *Id.* at \*1.

DBi, a Delaware LLC with its principal place of business in Pennsylvania, was authorized to do business in Georgia and had an agent for service of process, a project office, and two on-going highway projects in the state. Orafol claimed that although the alleged counterfeit sheeting was sold in South Florida, DBi conducted a substantial amount of business in Georgia, had contractual obligations in Georgia, and was "likely" to sell or deploy infringing goods in Georgia. *Id.*

DBi countered that none of its employees working on the Georgia projects had worked on the South Florida project, and that it did not distribute or use any of the delineators procured for the South Florida project in Georgia. In addition, DBi's Georgia projects "historically accounted for only 3.3% of its revenue." *Id.*

The court, citing *BNSF Railway*, held that the plaintiff's own complaint established that Georgia was not one of the paradigm forums in which DBi was at home and that the facts did not present an "exceptional" case. *Id.* at \*3.

DBi's alleged contacts with Georgia were "woefully insufficient to render DBi 'at home' in Georgia," the court held, adding, "[j]ust because a company does some small amount of business in Georgia does not mean that due process will allow that company to be sued in Georgia for acts that occurred outside the State." *Id.* at \*4. The court also held that the claim that DBi was "likely" to sell infringing goods in Georgia was insufficient to establish specific jurisdiction, but it transferred the case to the Southern District of Florida "in the interest of justice," pursuant to 28 U.S.C. § 1406(a). *Id.* at \*3, 6.

## Transfer

Plaintiffs who face motions to dismiss based on a lack of general personal jurisdiction may seek transfer to the corporate defendant's home forum under either 28 U.S.C. § 1406 or 28 U.S.C. § 1631.

Section 1631 provides that if a court lacks personal jurisdiction in a civil suit, "the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed."

Similarly, Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

To determine whether transfer is in the "interest of justice," a court engages in "an individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal citation omitted). "[T]ransfer is generally the favored route where the Court has a choice between transfer and dismissal." *Belfiore v. Summit Fed. Credit Union*, 452 F.Supp. 2d 629, 634 (D. Md. 2006).

But, “[d]ismissal, rather than transfer, may be appropriate where the plaintiff is harassing the defendants, acting in bad faith or forum shopping; where the plaintiff’s action is frivolous; or where the transfer would be futile because the case would be dismissed even after transfer.” *Altin Havayolu Tasamaciligi Turizm Ve Tic v. Sinnarajah*, 2008 BL 60865, at \*5 (N.D. Cal. Mar. 12, 2008); see also *Grabowski*, No. CV GLR-16-3492, 2017 BL 266252, at \*4 (dismissing case where defendant showed transfer would be futile because the statute of limitations had run in the transferee court); *Dutcher v. Eastburn*, No. 5:10-CV-210-Fl, 2011 BL 89818, at \*8 (E.D.N.C. Mar. 26, 2011) (same).

Some courts post-*BNSF Railway* have transferred cases that were brought in inappropriate forums. See, e.g., *Page v. JNJ Express, Inc.*, No. 17-9451 Section I, 2018 BL 516, \*4 (E.D. La. Jan. 02, 2018) (transferring auto injury case on parties’ consent to the district where accident occurred); *Presby Patent Tr. v. Infiltrator Water Techs., LLC*, No. 2:17-cv-00068-JAW, 2017 BL 426107, at \*7 (D. Me. Nov. 29, 2017) (transferring patent infringement suit to district of defendant’s incorporation); *Varieur v. BIS Glob.*, No. PX 16-3111, 2017 BL 353900, at \*4-5 (D. Md. Oct. 02, 2017) (granting plaintiff’s motion to transfer employment discrimination suit to defendant’s district of incorporation and headquarters); *Orafol Americas, Inc.*, 2017 BL 327428, at \*5-6.

Going forward, however, as *BNSF Railway*’s impact becomes clear and more courts rely upon it to dismiss lawsuits brought against out-of-state defendants, attorneys will be increasingly on notice that they must file suits only in forums where the defendant is “essentially at home.” If the plaintiff could reasonably foresee that the forum in which the suit was filed was improper, courts may be more likely to dismiss rather than transfer the case. See 14D Fed. Prac. & Proc. Juris. § 3827 (“[D]istrict courts often dismiss rather than transfer under Section 1406(a) if the plaintiff’s attorney reasonably could have foreseen that the forum in which the suit was filed was improper and that similar conduct should be discouraged.”).

## Conclusion

By emphasizing the “paradigm” formula enunciated in *Goodyear* and *Daimler*, *BNSF Railway* has effectively narrowed the circumstances in which corporations can be sued in foreign forums with no connection to the subject matter of the litigation. As the cases surveyed here show, a court will likely conclude that it does not have general personal jurisdiction over a defendant if the defendant is not incorporated or have its principal place of business in the forum.

While “exceptional circumstances” other than the World War II-vintage *Perkins* case may exist, *BNSF Railway* leaves no doubt they are truly rare.

Since *BNSF Railway* was decided, courts have declined to find exceptional circumstances in a range of circumstances that in earlier times would have sufficed for the exercise of personal jurisdiction.

To review, in light of *BNSF Railway*, courts have not found exceptional circumstances simply because

- the defendant conducted business in the forum or sold products there:

*In re Sargeant*, No. 17MC374, 2017 BL 362361 (S.D.N.Y. Oct. 10, 2017);

*Plumbers’ Local Union No. 690 Health Plan v. Apotex Corp.*, No. CV 16-665, 2017 BL 255436 (E.D. Pa. July 24, 2017);

*Orafol Americas, Inc. v. DBi Services, LLC*, No. 1:16-CV-3516-SCJ, 2017 BL 327428 (N.D. Ga. July 20, 2017); and

*State ex rel. Bayer Corp. v. Moriarty*, No. SC 96189, 2017 BL 455030 (Mo. Dec. 19, 2017);

- the defendant had an office or school in the forum:

*Benedith v. Case Western Reserve University*, No. 17-CV-05896-JST, 2018 BL 32882, at \*2 (N.D. Cal. Jan. 31, 2018);

*Matter of Fornaciari for an Order to Take Discovery Pursuant to 28 U.S.C. § 1782*, No. 17MC521, 2018 BL 41036 (S.D.N.Y. Jan. 29, 2018);

*Wertheim Jewish Educational Trust, LLC v. Deutsche Bank AG*, No. 17-CV-60120-KMM, 2017 BL 438583 (S.D. Fla. Dec. 6, 2017); and

*Buckles v. Continental Resources, Inc.*, 402 P.3d 1213 (Mont. 2017);

- the defendant purchased equipment from forum-based companies or had its employees travel to the forum:

*Chevron Bangladesh Block Twelve Ltd. v. Baldwin*, No. 01-17-00303-CV, 2017 BL 438526 (Tex. App. Dec. 7, 2017);

- the defendant was registered to do business in the state, paid taxes, and/or had an agent in the state to receive process:

*Guaranteed Rate, Inc. v. Conn*, 264 F. Supp. 3d 909 (N.D. Ill. 2017);

*Salgado v. OmniSource Corp.*, No. 01-16-00943-CV, 2017 BL 361756 (Tex. App. Oct. 10, 2017); and

*N. Frac Proppants, II, LLC v. 2011 NF Holdings, LLC*, No. 05-16-00319-CV, 2017 BL 261904 (Tex. App. July 27, 2017);

- the defendant had a large business presence and thousands of employees in the forum:

*Grabowski v. Northrop Grumman Systems Corp.*, No. CV GLR-16-3492, 2017 BL 266252 (D. Md. June 30, 2017);

- the defendant had a subsidiary incorporated within the forum:

*Smith v. Amada Machine Tools America Inc.*, No. 16-12178, 2017 BL 435311 (E.D. Mich. June 12, 2017); and

*Stisser v. SP Bancorp, Inc.*, 174 A.3d 405 (Md. 2017);

- the defendant moved its principal place of business out of the forum prior to suit being filed:

*MG Design Associates, Corp. v. CoStar Realty Information, Inc.*, 267 F. Supp. 3d 1000 (N.D. Ill. 2017);

- the defendant allegedly solicited the plaintiffs’ business in the forum, met several times with the plaintiffs there, and derived income there:

*Rowe v. Gary, Williams Parteni, Watson and Gary*, No. 16-17798, 2018 BL 31634 (11th Cir. Jan. 31, 2018) (per curiam).

In sum, *BNSF Railway* has significantly curtailed a plaintiff’s ability to hale corporate defendants into foreign states to defend against claims unrelated to any activity occurring there. The only viable response to a motion to dismiss for plaintiffs who ignore *BNSF Railway* may be to seek a transfer to the defendant’s home forum. Transfer may still be denied if the defendant can show that the plaintiff reasonably could have foreseen

that its chosen forum was improper, that the plaintiff had engaged in forum shopping, or that transfer would be futile as time-barred.