

Big forum shopping changes in store after landmark Norfolk Southern decision

By: Clark Hedger and Jasmine Y. McCormick April 3, 2017

By now, news of the Supreme Court of Missouri's landmark personal jurisdiction decision in *State ex rel. Norfolk Southern Railway Company v. Dolan* has filtered out to the broader legal community.

Businesses are asking two big questions: How does this ruling affect my existing cases, including those in which I filed and lost personal jurisdiction motions? How will this affect St. Louis, which has become a magnet for asbestos, talc, and other national product liability cases? In short, the decision promises big changes on both fronts.

Norfolk Southern settled two important issues. First — much to the dismay of the plaintiffs' bar — it concluded that the U.S. Supreme Court's decision in *Daimler AG v. Bauman* did, in fact, dramatically change general jurisdiction jurisprudence. No longer do a foreign corporation's continuous and systematic activities in a forum confer general jurisdiction. After *Daimler*, a corporation is only subject to general jurisdiction in (1) its state of incorporation, (2) the state of its principle place of business, and (3) a state where its contacts are "so substantial and of such a nature as to render the corporation at home in that state." While *Norfolk Southern*'s contacts in Missouri were substantial — 600 employees, 400 miles of track, and more than \$230 million in revenue — it was not subject to general jurisdiction because Missouri only accounted for two percent of its employees, track, and revenue.

Second, *Norfolk Southern* settled the jurisdictional impact of a foreign corporation's decision to register to do business in Missouri (sometimes called consent jurisdiction). Despite several very recent opinions out of the U.S. District Court, Eastern District of Missouri, holding to the contrary, the Supreme Court held that registering to do business in Missouri does not equate to consent to general jurisdiction. Because the injury in *Norfolk Southern* occurred in Indiana, where the plaintiff lived, *Norfolk Southern* wasn't subject to specific jurisdiction either, and the Supreme Court made permanent its writ prohibiting the trial court from hearing the case.

Norfolk Southern's impact on existing cases will be quite significant, but will vary according to procedural posture and venue. Upon motion, pending federal cases premised on consent jurisdiction, in which defendants have already lost personal jurisdiction motions, should be dismissed. Barring unique circumstances unlikely to be present, federal courts apply decision-based law retroactively to all cases pending at the time of issuance. Federal courts also hold that, even after denial of a personal jurisdiction motion, the plaintiff bears the burden of proving jurisdiction at trial, and a defendant preserves its objection to jurisdiction. Procedurally, to procure the dismissals to which they're entitled, defendants should call for an evidentiary hearing on personal jurisdiction under a reasonable extension of the seminal case in this area, *Lake v. Lake*, or let plaintiffs fail in their proof at trial.

While rare in federal court, some defendants probably raised personal jurisdiction as a defense in their answers, but opted not to file Rule 12(b)(2) motions. The result in these cases is less clear. Rule 12(b), on its face, recognizes the right to raise personal jurisdiction as a defense in a pleading, and does not require a motion. Rule 12(h) similarly leaves open the possibility of non-waiver in the event an answer contains a personal jurisdiction defense. Given that 12(b)(2) motions must be raised "before pleading if a responsive pleading is allowed," however, it's not clear how to tee-up the issue after an answer has been filed. The case law is undeveloped in this area, but it is difficult to see the

downside of raising personal jurisdiction in a motion combining a request for judgment on the pleadings under Rule 12(c) with an alternative request for an evidentiary hearing on personal jurisdiction. One way or another, these motions should prove successful.

Those defendants in federal court who opted not to file a motion or plead a personal jurisdiction defense are probably out of luck, as personal jurisdiction is waivable.

Notably, *Norfolk Southern* should have little or no impact on federal cases where plaintiffs premised general jurisdiction on grounds other than consent through registration to do business, as federal courts must interpret *Daimler* for themselves, without regard to state court decisions.

The impact in Missouri state courts should be more significant. Like federal courts, Missouri courts presume the retroactive application of case-based law. Like the Federal Rules, the Missouri Rules allow personal jurisdiction to be raised via defense (as opposed to motion) without waiver. While the case law is far less developed, it is reasonable to assume that, if confronted with these issues, Missouri courts will hold that plaintiffs bear the burden of establishing jurisdiction through trial. They should also hold that defendants who raised the defense via motion or in an answer preserved their objections. Thus, Missouri courts, like their federal counterparts, should entertain requests for evidentiary hearings, or consider dismissals at trial for lack of personal jurisdiction. Moreover, now that the Supreme Court of Missouri has spoken, Missouri state courts must necessarily reject the line of federal authority which suggests that *Daimler* did not actually change the scope of general jurisdiction.

The long term impact on forum-shopping in Missouri, especially in St. Louis, will be equally compelling. Going forward, *Norfolk Southern* should drastically cut down on forum shopping by out-of-state plaintiffs suing non-Missouri defendants in Missouri. Defendants who operate nationally, without a very significant presence in Missouri on par with, or very close to their presence in the state of their principle place of business should stand a very good chance of winning personal jurisdiction motions.

If they lose in the first instance (or in the second instance in existing cases where defendants take a second run at securing personal jurisdiction dismissals) the Missouri Courts of Appeals — if concerned about implementing *Norfolk Southern*, which they should be — will likely entertain personal-jurisdiction writs much more frequently. Combined with Gov. Eric Greitens signing into law a *Daubert*-like standard for the admissibility of expert testimony, it seems very likely that national plaintiffs' attorneys will turn their attention back toward Madison and St. Clair counties in Illinois, and other, friendlier jurisdictions, that allow jurisdiction by consent or otherwise interpret *Daimler* more narrowly, but only time will tell.



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