

The Case That Ate the Appellate Bar

By Jenna Greene

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If it wasn't apparent that an appellate decision on Friday against Mylan Pharmaceuticals Inc. involving the (deceptively sleepy-sounding) exercise of personal jurisdiction was a big deal, the list of lawyers alone should make it obvious.

It's like the denizens of Mount Olympus descended on the U.S. Court of Appeals for the Federal Circuit.

On the winning side were former Solicitor General **Theodore Olson** from Gibson, Dunn & Crutcher and Williams & Connolly appellate head **Kannon Shanmugam**.

Backing them were amici represented by Sidley Austin chairman **Carter Phillips** (on behalf of four law professors); Wilmer Cutler Pickering Hale and Dorr partner and former deputy attorney general **David Odgen** (for The Pharmaceutical Research and Manufacturers of America); **William Jay** of Goodwin Procter (for Teva Pharmaceuticals) and **Christopher Glancy** of White & Case (for the Biotechnology Industry Association).

But the other side had plenty of firepower too. **Paul Clement** of Bancroft, who succeeded Olson as solicitor general, represented Mylan.

He got support from Wiley Rein's **James Wallace Jr.**, who represented the Generic Pharmaceutical Association.

Another amicus, the U.S. Chamber of Commerce, represented by Mayer Brown's **Andrew Pincus**, didn't technically back either side, but made an argument that favored Mylan.

So what was the issue that attracted such high-octane talent?

Jurisdiction--or lack thereof.

The case is actually two cases, both on appeal from the U.S.

District Court for

the District of Delaware. Each began in a ho-hum way, when a brand name drug maker--Acorda in Olson's case, AstraZeneca in Shanmugam's--sued generic drug maker Mylan in Delaware. The companies alleged that their patents covered drugs that Mylan was seeking permission from the Food and Drug Administration to manufacture and market.

Why Delaware? For one thing, it's a popular forum for patent holders to bring lawsuits. Pricewaterhouse Coopers in its 2015 patent litigation study ranked it No. 2 in the country in terms of favorable outcomes for patent holders. AstraZeneca also has its U.S. headquarters in Wilmington, and Acorda is incorporated in the state.

In a novel move, Mylan responded to the suits by arguing that the Delaware court lacked jurisdiction over it, pointing to the U.S. Supreme Court's 2014 decision in *Daimler v. Bauman*, which it called "a sea change." In that case, the high court held that absent special circumstances, a corporation is subject to general personal jurisdiction only in its state of incorporation and state of principal place of business.

For Mylan, that's West Virginia.



Kannon Shanmugam

Photo: Diego M. Radzinski/NLJ

“Mylan has no property, no employees, no mailing address and essentially no direct sales in Delaware,” Clement wrote in court papers.

Which is not to say Mylan (which sells the drugs it makes in all 50 states) has no presence in Delaware. “Because Mylan sporadically conducts business in the state, however, it has complied with Delaware law by registering to do business there,” Clement acknowledged. “As part of that registration process, Mylan was required to name an agent to accept service of process in Delaware.”

The question before the court was, is that enough to sue them in Delaware?

The answer matters tremendously to businesses everywhere.

As the U.S. Chamber of Commerce, put it, “Most Chamber members conduct business in states other than their states of incorporation and principal place of business. They therefore have a substantial interest in the rules governing whether, and to what extent, a non-resident corporation may be subjected to general personal jurisdiction in those other states,” Pincus of Mayer Brown wrote.

He continued, “Subjecting corporations to general jurisdiction in every state in which they could be required to register to do business would eviscerate the due process protection recognized by the court in *Daimler*.”

But amici on the other side were equally dramatic. If the Federal Circuit sided with Mylan, wrote Glancy of White & Case for Bio, it “would lead to duplicative litigation, a waste of judicial resources, and needless delay in resolving the underlying dispute.”

The Federal Circuit did its best to avoid teeing up a (probably inevitable) Supreme Court appeal by keeping its decision narrow.

The panel dodged the issue of whether Delaware could exercise general personal jurisdiction over Mylan, ruling

only that Mylan is subject to specific personal jurisdiction based on its suit-related contacts with Delaware.

“Mylan seeks approval to sell its generic drugs throughout the United States, including in Delaware ... Mylan has registered to do business in Delaware and appointed an agent to accept service of process there,” wrote Judge Richard Taranto for the panel. Judge Pauline Newman concurred, and Judge Kathleen O’Malley issued a separate opinion concurring in the judgment.

“Such directing of sales into Delaware is sufficient for minimum contacts,” the panel found.

Besides, Taranto added, “The burden on Mylan will be at most modest, as Mylan, a large generic manufacturer, has litigated many [drug patent] lawsuits in Delaware, including some that it initiated.”

For AstraZeneca lawyer Shanmugam of Williams & Connolly, who focused his argument on specific rather than general jurisdiction, the case had an added element of interest.

He was on the same side as Olson, who hired him in 2004 to work in the solicitor general’s office--but opposed to Clement, who was his boss there after Olson left later that year.

“It was a real pleasure and privilege to argue with Ted and Paul,” Shanmugam said, adding that this was the first time the three of them met in one case. “They’re two of the finest appellate advocates in the country. Both have been role models for me over the course of my career.”

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