Lightfoot

NEWS & INSIGHTS

IS THERE PERSONAL JURISDICTION?

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In vigorously defending against class actions – and particularly those potentially reaching beyond state lines – one must begin with a jurisdictional examination: does the court where the class action is pending have personal jurisdiction over the defendant?

In *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), the United States Supreme Court, reversing a decision of the California Supreme Court, held that, in the context of mass actions, there must be personal jurisdiction over the defendant as to each plaintiff's claim. In that case, a group of plaintiffs brought a mass action in California state court for injuries allegedly caused by Plavix, a drug manufactured and distributed by Bristol-Myers, which was incorporated in Delaware and headquartered in New York. The 678 plaintiffs included 86 California residents and 592 residents of 33 other states. Bristol-Myers sold Plavix and engaged in other business activities in California but "did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." Conceding personal jurisdiction as to the resident plaintiffs, Bristol-Myers sought dismissal as to the non-resident plaintiffs.

The Supreme Court determined that "[t]he mere fact that other [California] plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims." Rather, "[w]hat is needed . . . is a connection between the forum and the specific claims at issue."

After *Bristol-Myers*, federal courts have divided over whether the decision applies to class actions. If it does, then nationwide class actions are barred in forums where the defendant is not subject to general personal jurisdiction. At present, many courts have refused to extend *Bristol-Myers* to class actions, but based on the decision's logic, an emerging trend has been to do so.

For the courts declining to apply *Bristol-Myers* to class actions, they rest on the procedural distinctions between a mass action and a class action. As one court explained, in mass actions, "each plaintiff is a real party in interest to the complaints; by contrast, in a putative class action, one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the 'named plaintiffs' are the only plaintiffs actually named in the complaint.'" *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126 (D.D.C. 2018).

Identifying procedural distinctions between mass and class actions, however, seems only to beg the question: *should* the logic of *Bristol-Myers* be extended to class actions? To that end, "nothing in *Bristol-Myers* suggests the general principle it stands for – that due process requires 'a connection between the forum and the specific claims at issue' – does not apply to nonresident claims in a multistate class action brought in federal court." *Leppert v. Champion Petfoods USA, Inc.*, No. 18-4347, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019).

In addition, for the courts holding *Bristol-Myers* inapplicable, they have determined that Federal Rule of Civil Procedure 23 adequately protects a defendant's due process rights, notwithstanding whether the court has personal jurisdiction over the defendant as to each claim by each class member. Class actions present the defendant "with a unitary, coherent claim to which it need respond only with a unitary, coherent defense," and on that account, courts have "perceive[d] no unfairness in haling the defendant into court to answer to it in a forum that has specific jurisdiction over the defendant based on the representative's claim" but lacks jurisdiction over the

absent members' claims. *Sanchez v. Launch Tech. Workforce Solutions, LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018); *Morgan v. U.S. Xpress, Inc.*, No. 17-85, 2018 WL 3580775, at *5 (W.D. Va. July 25, 2018) ("Rule 23's requirements (numerosity, commonality, typicality, adequacy of representation, predominance, and superiority) supply due process safeguards not applicable in [*Bristol-Myers Squibb's*] mass tort context.").

But a form of that argument was rejected in *Bristol-Myers*. There, the claims between the residents and the non-residents were "similar in several ways" because their "claims [were] based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." Relaxing jurisdictional requirements in favor of efficiency, the California Supreme Court noted that "the addition of 592 nonresident plaintiffs [was] a significant added burden, but the alternative [would be] to litigate the claims of these other 592 nonresident plaintiffs in a scattershot manner in various other forums, in potentially up to 34 different states" – "an alternative [that] would seem to be a far more burdensome distribution of [Bristol-Myers'] resources in defending these cases than defending them in a single, focused forum."

In her dissent from the California Supreme Court's opinion, Justice Werdegar criticized that approach: "California might or might not be an especially convenient and efficient forum for nationwide Plavix litigation, but joinder of California plaintiffs cannot confer personal jurisdiction over [Bristol-Myers] to adjudicate claims that do not arise out of, and are not otherwise related to, [Bristol-Myers's] business activities in California." And, in rejecting the California Supreme Court's "loose and spurious form of general jurisdiction," the Supreme Court sided with Justice Wedegar's concern that efficiency is no proxy for personal jurisdiction. In the same way, courts resisting *Bristol-Myers* based on the availability of Rule 23's safeguards are attempting to revive the California Supreme Court's framework by presuming efficiency displaces the need for general or specific jurisdiction as to each claim. *Bristol-Myers*, however, left no room for that sort of jurisdictional elasticity.

Moreover, satisfaction of Rule 23's requirements is essential to bind the absent class members, *not* the defendant. To conclude otherwise would raise significant questions under the Rules Enabling Act. By operation of the Act, a growing number of courts have found that the jurisdictional protections pertaining to a mass action, with a geographic hodgepodge of plaintiffs, should be indistinguishable from those pertaining to a class action, with comparable geographic diversity:

> Indeed, it not clear how [the putative class representative] can distinguish the Supreme Court's basic holding in *Bristol-Myers* simply because this is a class action. The Supreme Court has emphasized that "Rule 23's [class action] requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the [federal court] rules of procedure 'shall not abridge, enlarge, or modify any substantive right.'" The Supreme Court held in *Bristol-Myers* that the Fourteenth Amendment's due process clause precludes nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum resident. Under the Rules Enabling Act, a defendant's due process interest should be the same in the class context.

Practice Management Support Servs. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 592 (1997) (quoting, in turn, 28 U.S.C. § 2072(b))).

In short, "[t]he constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case." *In re Dental Supplies Antitrust Litig.*, No. 16-696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017); *see also Leppert*, 2019 WL 216616, at *4 ("[A] defendant's due process rights should remain constant regardless of the suit against him, be it an individual, mass, or class action.").

Given the interlocutory nature of these rulings, there has not yet been appellate review. But the D.C. Circuit may soon weigh in. In *Molock v. Whole Foods Market, Inc*., 297 F. Supp. 3d 114 (D.D.C. 2018), the court denied the defendant's motion to dismiss the putative class action based on *Bristol-Myers*. On June 11, 2018, the court then granted the defendant's motion to certify for appellate review the question of whether "the jurisdictional limits" in *Bristol-Myers* "extend to unnamed, nonresident members of a putative nationwide class in federal court." Assuming that the D.C. Circuit reaches the issue, it may be the first Circuit Court to do so.