Robert N. Fisher
BRADLEY GROMBACHER LLP

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Bristol-Myers Squibb's impact on class actions

BRISTOL-MYERS SQUIBB IMPOSED NEW LIMITATIONS ON SPECIFIC JURISDICTION IN MASS ACTIONS

In 2017, the United States Supreme Court rendered a significant decision in the world of mass and class actions in *Bristol-Myers Squibb Co. v. Superior Court of California* (2017) 137 S.Ct. 1773. The Court limited a state court's ability to hear the claims of out-of-state residents in mass actions, holding that the California courts could not assert personal jurisdiction over an out-of-state defendant with respect to out-of-state claimants if their individual claims did not arise out of or relate to the defendant's contacts with the forum.

Much ink was spilled at the time theorizing that this decision would impact the ability of plaintiffs to prosecute class actions on behalf of nationwide classes. However, as the issue has begun to aerate in the lower courts, it appears that *Bristol-Myers Squibb*'s impact on class-action cases in federal court has been minimal. On the other hand, the decision has been disruptive in collective actions in some jurisdictions, and it is not yet entirely clear what the impact will be on class actions brought in state court.

Before getting into the ins and outs of the *Bristol-Myers Squibb* decision, a brief refresher on the basics of personal-jurisdiction doctrine may be helpful.

A review of personal jurisdiction

Although learning the nuances of personal-jurisdiction doctrine can be daunting (perhaps because it is often the first topic taught in law school), the underlying principles are relatively simple –defendants cannot be haled into court unless they have sufficient contacts with the forum state so that it is fair for the court in the forum state to exercise jurisdiction over them. An unfair assertion of personal jurisdiction violates the defendants' due process rights. Absent personal jurisdiction, and upon challenge by a defendant, a case against that defendant must be dismissed.

Many states have so-called long-arm statutes that determine when that state's courts can grab out-of-state defendants and bring them into court. Others have dictated that jurisdiction can be asserted more broadly, up to the due process limits. Federal courts can generally assert jurisdiction over out-of-state defendants by borrowing a state's long-arm statute or when suit is brought under a federal law that provides for jurisdiction. (See Fed. Rules Civ. Proc., rule 4(k).)

Personal jurisdiction comes in two forms, depending on the nature of the contacts between the defendant and the forum.

General jurisdiction may be asserted when a defendant corporation's "affiliations with the State are so

See Fisher, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2020

'continuous and systematic' as to render [it] essentially at home in the forum State." (*Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 564 U.S. 915, 919, 131 S.Ct. 2846.) The *Goodyear* decision and the later decision in *Daimler AG v. Bauman* (2014) 571 U.S. ——, 134 S.Ct. 746 , have substantially narrowed the applicability of general jurisdiction such that it is rarely found to exist outside a corporation's state of incorporation and state where it maintains its headquarters.

Thus, unless a defendant is sued in one of the limited jurisdictions in which it is "at home," it is specific jurisdiction that is relevant. Specific jurisdiction over a defendant may be asserted if the claims in the suit "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." That is, "there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." (*Bristol-Myers Squibb*, 137 S. Ct. at 1780 (internal citations omitted, alterations in original).)

Bristol-Myers Squibb imposed new limitations on specific jurisdiction in mass actions.

A squib on *Squibb*

In *Bristol-Myers Squibb*, 86 California residents and 592 residents of other states filed a mass action in California state court against Bristol-Myers Squibb ("BMS"), asserting state-law claims based on injuries caused by a BMS drug called Plavix. BMS is incorporated in Delaware and headquartered in New York, but it has connections to California, including research facilities with 160 employees and about 250 sales representatives working in California. BMS sells Plavix in California, but the drug was not developed here, nor was it manufactured, labeled, or packaged here, and the marketing strategy for the drug was not conceived in California. The non-California resident plaintiffs did not allege that they obtained Plavix from California or that they were treated for injuries in California.

The Supreme Court reviewed a California Supreme Court decision affirming a lower court determination that specific jurisdiction over BMS could be asserted. This decision was based on a sliding-scale approach to specific jurisdiction. Under that approach, the more wide-ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. Based on that approach, the California Supreme Court found that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required."

The U.S. Supreme Court rejected the sliding-scale approach, indicating that "[i]n order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." (*Goodyear,* 564 U.S., at 919, 131 S.Ct. 2846 (internal quotation marks and brackets in original omitted).) When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state. (*Bristol-Myers Squibb*, 137 S.Ct. at 1781.)

The Court took a plaintiff-by-plaintiff approach to the analysis and noted that "[t]he mere fact that *other* 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." (*Ibid.*)

"The relevant plaintiffs [we]re not California residents and d[id] not claim to have suffered harm in that State. In addition . . . all the conduct giving rise to the nonresidents' claims occurred elsewhere." (*Ibid.*) Thus, the Court held that "even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." (*Ibid.*)

The Court noted that its decision left certain avenues for bringing mass actions with plaintiffs from multiple states indicating that "[o]ur decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS." The Court also expressly reserved the issue of whether its decision applies to federal courts, stating that "we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." (*Id.* at 1784.)

Justice Sotomayor dissented, urging a case-by-case approach, noting that "there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike." (*Ibid.*) She criticized the majority's rule because it would "make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone" and "will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different states and "will result in piecemeal litigation and the bifurcation of claims." (*Ibid.*)

Justice Sotomayor also put her finger directly on the issue addressed in this article. In a footnote, she noted that, "[t]he Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there." (*Id.* at 1789 n.4.)

Thus, the *Bristol-Myers Squibb* decision left open two critical questions relevant to class action practice. First, can a plaintiff sue on behalf of a class including out-of-state class members when those out-of-state class members' claims do not arise out of contacts with the forum state? Second, is there a distinction between whether the case is brought in state or federal court?

See Fisher, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2020

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Cases brought in federal court

The significant weight of the authority since *Bristol-Myers Squibb* holds that its limitations do not apply to class actions brought in federal court.

In *Mussat v. IQVIA, Inc.*, No. 19-1204, 2020 WL 1161166 (7th Cir. Mar. 11, 2020), the Seventh Circuit rejected the argument that unnamed class members had to show minimum contacts with the forum state and held that "the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute." (*Id*. at *1.) Rather, the Court held that "the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so." (*Id*. at *4.) The Court noted that this is consistent with the purpose of Rule 23 because one of the factors in damages classes is the desirability of the single forum "'in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought.'" (*Id*. at * 5 (quoting Fed. Rules Civ. Proc., rule 23(b)(3), Committee Note to 1966 amendment).)

Many district courts have likewise concluded that "[a] mass tort action is fundamentally distinguishable from a class action" because "in a mass tort action each individual plaintiff is a real party in interest" and "a class action, unlike a mass tort case, must meet additional due process standards for certification under Fed. R. Civ. P. 23." (*Rosenberg v. LoanDepot.com LLC*, No. CV 19-10661-NMG, 2020 WL 409634, at *13 (D. Mass. Jan. 24, 2020) [denying motion to dismiss out of state putative class members' claims and collecting cases].) Indeed, the Rule 23 standards, "ensure that the defendant is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense." (*Boger v. Citrix Sys., Inc.*, No. 8:19-CV-01234-PX, 2020 WL 1033566, at *8 (D. Md. Mar. 3, 2020).) Accordingly, the majority of courts have "declin[ed] to extend *Bristol-Myers Squibb* to federal class actions." (*Id*. at *8 (collecting cases). See also *Sotomayor v. Bank of Am., N.A.*, 377 F. Supp. 3d 1034, 1038 (C.D. Cal. 2019). But see *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, No. 14 C 2032, 2018 WL 1255021, at *16 (N.D. Ill. Mar. 12, 2018); *Chavez v. Church & Dwight Co.*, 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018) [holding that *Bristol-Myers Squibb* does apply to class actions in federal court].)

Finally, with regard to the middle ground of cases brought under the Fair Labor Standards Act ("FLSA"), in which plaintiffs must affirmatively opt in, courts are split. (Compare *Swamy v. Title Source, Inc.*, No. C 17-01175 WHA, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017) [holding "that *Bristol-Myers* does not apply to divest courts of personal jurisdiction in FLSA collective actions"] with *Chavira v. OS Rest. Servs., LLC*, No. 18-CV-10029-ADB, 2019 WL 4769101, at *7 (D. Mass. Sept. 30, 2019) [providing an overview of decisions on the topic and concluding that *Bristol-Myers Squibb* can apply to divest courts of jurisdiction over out of state plaintiffs in FLSA cases].)

One wrinkle was recently introduced by the D.C. Circuit in *Molock v. Whole Foods Mkt. Grp., Inc.*, No. 18-7162, 2020 WL 1146733 (D.C. Cir. Mar. 10, 2020). There, the Court rejected the defendant's argument that it lacked jurisdiction over it with respect to the claims of out-of-state class members. However, it did so on the ground that the issue was premature, noting that "[a]bsent class certification, putative class members are not parties before a court." (*Id*. at * 1.) The Fifth Circuit likewise has concluded that "a personal jurisdiction objection respecting merely putative class members" is not 'available'" until class certification. (*Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020).)

This development is not entirely welcome for plaintiffs because it can lead to prosecution of a case past the pleading stage and up to class certification, followed by the reopening of the personal-jurisdiction issue at that stage. Nonetheless, if the rationale of the majority of the decisions holding that *Bristol-Myers Squibb* does not apply to class action cases is ultimately adopted by the forum court, it matters little when in the proceedings that decision is made.

Cases brought in state court

Although a fifty-state survey would be outside the scope of this article, as of yet, there do not appear to be significant published decisions in the state courts concerning the applicability of *Bristol-Myers Squibb* to class actions in state court. Of course, as discussed, the decision itself leaves open the question of whether its rationale extends to class actions.

There is some reason to believe that the rationale of *Bristol-Myers Squibb* is more applicable to class actions brought in state court than to those in federal court. In this regard, the interstate federalism concerns that animated the Supreme Court apply to the state courts but not the federal courts. On the other hand, it is equally true in state and federal court that only the named plaintiffs are truly parties before the court, that there are procedural safeguards to ensure due process, and that the defendant must only address the common questions that are raised by the in-state plaintiff(s).

The answer may lie in the actions of district courts in resolving this issue. As noted above, when a district court sits in diversity, it applies the law of the forum state in determining whether it can assert jurisdiction over a defendant. Several federal district courts have held that class cases asserting state law claims alone are also insulated from the rationale of *Bristol-Myers Squibb*. (See, e.g., *Fitzhenry- Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-CV-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017) [declining to extend *Bristol-Myers Squibb* to class case in which state law claims were asserted]; *Day v. Air Methods Corp.*, No. CV 5: 17-183-DCR, 2017 WL 4781863, at *2 (E.D. Ky. Oct. 23, 2017) (same).)

A note on waiver of jurisdictional issues by defendants

A defendant may waive objections to personal jurisdiction by litigation conduct

See Fisher, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2020

including in the context of mass actions. (See *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1025 (7th Cir. 2018), cert. denied, 139 S.Ct. 1465, 203 L. Ed. 2d 684 (2019) ["While briefing the issue now before us – class certification – in the district court, neither party raised personal jurisdiction. . . . On remand, Speedy is free to explain if and how it preserved this point"].) However, the timing at which waiver can occur is up in the air. In *Cruson*, the Fifth Circuit found that waiver could not occur until after class certification, because only then are the out-of-state class members before the court. The same rationale would likely apply under the D.C. Circuit's decision in *Molock*. In other jurisdictions which have not determined that the jurisdiction issue is deferred until class certification, waiver may occur at the pleading stage. As the case law continues to develop, waiver may be a significant consideration for keeping defendants in front of the court.

Conclusion

Although none of the direst predictions regarding class-action practice made in the aftermath of the *Bristol-Myers Squibb* decision have yet come to pass, the law is still evolving. Attention should be paid to circuit court decisions that may create a split on the applicability of *Bristol-Myers Squibb* to class cases brought in federal court, decisions on the applicability of the doctrine to collective actions, and state court decisions addressing the interstate-federalism concerns raised by the Supreme Court in the context of class actions.

Robert Fisher is a New York-based associate at Bradley/Grombacher, LLP. *His practice focuses on class action cases primarily in the areas of employment, consumer protection, and products liability. Mr. Fisher received his law degree from NYU School of Law and he has a master's degree in biomedical engineering from NYU Tandon School of Engineering. rfisher@bradleygrombacher.com.*