CORPORATE LITIGATION:

THE EXERCISE OF SPECIFIC JURISDICTION OVER NON-RESIDENT CLASS MEMBERS' CLAIMS

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The Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017), reaffirmed that a court may not exercise specific personal jurisdiction unless the defendant has itself engaged in suit-related forum activity that gives rise to the particular plaintiff's own claims. *Bristol-Myers* was not a class action, and the court did not decide whether defendants may be subject to specific jurisdiction as to claims made by absent class members located outside the forum. The majority of federal district courts to consider the issue have held that *Bristol-Myers* does not apply to the claims of absent class members, but a number of courts have held otherwise. Last month, the U.S. Courts of Appeals began to weigh in, with the Fifth, Seventh, and D.C. Circuits issuing decisions, but significant uncertainty remains as to whether—and at what stage of litigation—defendants can seek dismissal of absent class members' claims for lack of personal jurisdiction.

Background

In *Bristol-Myers*, more than 600 named plaintiffs sued defendant, a Delaware corporation headquartered in New York, in a mass action in California state court, alleging that they were harmed by its prescription blood thinner Plavix. While some plaintiffs were California residents, most were not, and had neither purchased the product in California nor were injured there. The U.S. Supreme Court rejected California's exercise of personal jurisdiction over these non-resident plaintiffs' claims because they did not reside in California and Bristol-Myers' alleged tortious conduct occurred elsewhere. The similarity between the resident and nonresident plaintiffs' claims was not sufficient to create specific jurisdiction as to claims lacking a connection with California. Since the plaintiffs' claims had been consolidated into a mass action through California procedural law, Justice Sotomayor's dissent noted that the majority "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." 137 S. Ct. at 1789, n.4. Nor did *Bristol-Myers*—which concerned state claims and state-court jurisdiction limited by the Fourteenth Amendment—address its applicability to federal suits under the Fifth Amendment's Due Process Clause. Id. at 1784.

Most district courts confronting these open questions have held that *Bristol-Myers* does not apply to federal class actions. Whereas all the plaintiffs in *Bristol-Myers* were named in complaints consolidated under California law, federal class action law distinguishes between named plaintiffs and the absent class members

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they seek to represent pursuant to the requirements of Rule 23, treating only the former as formal parties in most instances. As the Supreme Court has recognized, "nonnamed class members … may be parties for some purposes and not for others"; "the label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). Thus, while *Devlin* recognized that a class member may appeal from a class action settlement she has objected to, class members are not considered parties for purposes of determining diversity (except under the Class Action Fairness Act (CAFA)), venue, and Article III standing.

A significant number of decisions, including several from the Northern District of Illinois, have come out the other way, holding that the reasoning of *Bristol-Myers*, and the Due Process guarantees it preserves, logically apply equally to class actions. In *Mussat v. IQVIA*, a putative Telephone Consumer Protection Act class action alleging unauthorized fax communications, the district court granted defendant's motion to strike the named plaintiff's class definition to the extent it included nonresidents who received the challenged faxes outside of Illinois. 2018 WL 5311903, at *1 (N.D. Ill. Oct. 26, 2018). Reasoning that, "[w]hether it be an individual, mass, or class action, the defendant's rights should remain constant," the *Mussat* district court held that *Bristol-Myers* permits nationwide class actions only in a forum that can properly exercise general jurisdiction over the defendant. Id. at *5. As the decision effectively denied class certification, the Seventh Circuit accepted interlocutory review under Rule 23(f). *Mussat v. IQVIA*, 2020 WL 1161166, at *4 (7th Cir. March 11, 2020).

Seventh Circuit's Decision in 'Mussat'

Last month, the Seventh Circuit rejected the reasoning of the district court in *Mussat* and a spate of other cases that had applied *Bristol-Myers* to class actions. While those decisions were premised on equal treatment of *defendants* in mass actions and class actions when determining the limits of specific jurisdiction, the Seventh Circuit's *Mussat* decision instead emphasized the long-established distinctions between named plaintiffs and absent class members, the latter of which "are not full parties to the case" for many purposes: "We see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: 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. Limiting nationwide class actions to the forum, if any, where a defendant is subject to general jurisdiction would, the court noted, represent "a major change in the law of personal jurisdiction and class actions" not compelled by *Bristol-Myers*, which did not address federal court jurisdiction or class action law. Id. at *5. The Seventh Circuit specified, without elaboration, that its holding was limited to class actions brought pursuant to federal statute, leaving open the possibility that *Bristol-Myers* applies to nationwide federal class actions premised on diversity jurisdiction.

Timing of Personal Jurisdiction Defense

In recent decisions of first impression regarding the applicability of *Bristol-Myers* to the class action context, the Fifth and D.C. Circuits likewise found putative class members' status as nonparties determinative. But rather than foreclose defendants' personal jurisdiction defense, these courts held that assertion of the defense is not ripe unless and until a class is certified. See *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 297 (D.C. Cir. 2020); *Cruson v. Jackson Nat'l Life Ins. Co.*, 2020 WL 1443531, at *5 (5th Cir. March 25, 2020).

In *Mollock*, Whole Foods moved to dismiss state law claims for lost wages by non-resident class members, asserting lack of personal jurisdiction under Rule 12(b). The district court granted the motion to dismiss and certified an interlocutory appeal to the D.C. Circuit. Declining to reach the motion on the merits, a divided panel held that dismissal of nonresident class members' claims was premature prior to class certification. Until that point, absent class members remain nonparties. In reaching this result, the court invoked Supreme

Court authority holding, in the context of claim preclusion, that the filing of a putative class action cannot bind absent class members prior to certification. Thus, a subsequent court may hear a class certification motion even though a federal court has previously rejected certification of the same proposed class in a parallel case brought by a different plaintiff. See *Smith v. Bayer*, 564 U.S. 299 (2011).

The Fifth Circuit has likewise indicated that class certification is the appropriate vehicle for defendants to raise personal jurisdiction challenges with respect to absent class members. While declining to reach the merits of the defendant's personal jurisdiction defense, it held in *Cruson* that the defense had not been waived because it was omitted from the defendant's Rule 12 motions, as non-resident class members were "not yet before the court" at the pleading stage. 2020 WL 1443531, at *5.

In a lengthy dissent from the *Mollock* decision, Judge Silberman disagreed that a personal jurisdiction motion at the pleading stage is premature simply because absent class members are nonparties. He then reached the merits, opining that *Bristol-Myers* precludes the exercise of specific jurisdiction over class claims unrelated to the forum. On the first point, he clarified that the defendant sought to dismiss not the absent class members, or their claims, but merely those aspects of the *named plaintiffs'* claims that purported to represent a class. Thus, the status of absent class members as parties or nonparties is irrelevant to the question whether the named plaintiffs had properly pleaded their putative class claims. Indeed, a number of district courts—including the Northern District of Illinois—had directly ruled on the applicability of *Bristol-Myers* at the pleading stage. In his view, *Smith*'s holding that putative class members are not parties for claim preclusion purposes supports early adjudication of personal jurisdiction over non-resident class claims, as a dismissal on jurisdiction grounds would not bind the non-residents.

The dissent also highlighted the practical downsides to the majority's timing ruling. Notably, delaying a determination of the court's personal jurisdiction as to nonresidents' claims would require the parties to incur the expense and time of class discovery, even if the Supreme Court ultimately holds that *Bristol-Myers* applies to class actions.

Unlike the Seventh Circuit, which carefully distinguished the *Bristol-Myers* decision as one not involving federal-question, class-action claims, Judge Silberman's evaluation of the merits focused on *Bristol-Myers*' core holding: specific jurisdiction must be evaluated on a claim by claim basis. Applying that lens, the relevant inquiry is the rights of the defendant, as a court exercises "coercive power" over a defendant in a class action no less than in a mass tort context. The Rule 23 standards governing class action, in contrast, are concerned with assessing whether the claims of the named plaintiffs are sufficiently similar to those of the broader class. "But … using the 'similarity' of claims to relax the standards of personal jurisdiction was one of the mistakes that the state court made in *Bristol-Myers*."

Conclusion

The first wave of circuit guidance on the procedural and substantive implications of *Bristol-Myers* for class actions brought in federal court has unfortunately failed to mitigate uncertainty about the timing and viability of jurisdictional challenges to nonresidents' putative class claims. Additional specific jurisdiction guidance may be forthcoming from the U.S. Supreme Court, which in an individual action is slated to decide this term the proper standard for determining whether a claim has the necessary substantial connection with the forum. See *Ford Motor Co. v. Bandemer*, No. 19-369. For now, under the Supreme Court's recent personal jurisdiction jurisprudence, the preferred forum for nationwide class actions is one where the defendant is "at home" and subject to general jurisdiction. Where there is no such forum (for instance, in the case of foreign defendants lacking a U.S. headquarters or place of incorporation), the reach of *Bristol-Myers* remains unsettled. While the Seventh Circuit's *Mussat* decision resolved a district-level split on the applicability of *Bristol-Myers* to nationwide class actions based on federal statutory claims, it did not address state-law

diversity claims. And courts across the country continue to grapple with the competing impulses of awarding defendants the full protections afforded by Due Process and fealty to long-established class action practice, which distinguishes between named plaintiffs and absent class members in the resolution of issues as varied as venue, claim preclusion, threshold standing, discovery, and non-CAFA diversity jurisdiction.

The decisions by the D.C. and Fifth Circuits to delay adjudication of the personal jurisdiction defense to the class certification stage introduces a second layer of uncertainty: Should a defendant raise the personal jurisdiction defense at the earliest opportunity, or wait until plaintiff files for class certification, thereby incurring the expense of class and, potentially, partial merits discovery? As Judge Silberman astutely noted, it would make little sense to require defendants to forego a personal jurisdiction defense until the class certification phase in a world where the applicability of *Bristol-Myers* to class actions is settled. But the reasoning of decisions finding class personal jurisdiction defenses premature at the Rule 12(b) stage—that absent class members are non-parties—may also support a merits finding that *Bristol-Myers* does not apply, as the Seventh Circuit has held.

Absent additional circuit and Supreme Court guidance, prudent class action defense strategy will require careful consideration of the pros and cons of raising a specific jurisdiction defense via a motion to dismiss or motion to strike class allegations.
