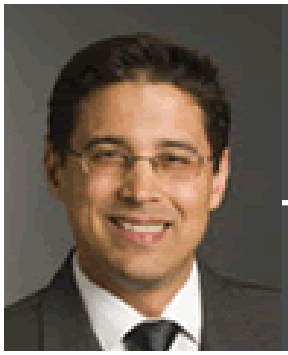

DOES BMS HARKEN AN END TO NATIONAL CLASS ACTIONS IN PLAINTIFF-FRIENDLY VENUES?

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Bristol-Myers – harkening the end of national class actions?
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Courts around the country continue to grapple with the application of Bristol-Myers to class actions,[3] which if applied to the claims of putative class members would bring about a ban on national class actions virtually everywhere plaintiffs like to file them – everywhere corporate defendants are not "at home." This article examines the growing circuit split, and takes a closer look at the battle-ground due process and federalism questions dominating the debate.

Bristol-Myers – A Brief Overview

In Bristol-Myers, 600 plaintiffs filed claims in California state court against Bristol-Myers Squibb — a company incorporated in Delaware and headquartered in New York — asserting claims based on injuries allegedly caused by the pharmaceutical company's drug Plavix. Applying settled specific jurisdiction principles, the U.S. Supreme Court held that because the nonresidents were not prescribed, did not purchase, did not ingest, nor were injured by Plavix in California, there was no "connection between the forum and the specific claims at issue." The Court explained that "[t]he mere fact that [some] 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." In sum, in Bristol-Myers, the U.S. Supreme Court mandated that each plaintiff must establish personal jurisdiction regardless whether it is established for another claimant in the action.

Because Bristol-Myers was decided in the "mass action" context, it does not expressly apply to class actions, as Justice Sotomayor pointedly observed in her dissent.[4] As there are reasons to distinguish mass and class actions,[5] the question has percolated in the lower courts since the Supreme Court's holding, resulting in a notable split that first developed between the Northern District of Illinois (whose judges have consistently held that Bristol-Meyers applies to class actions)[6] and the Northern District of California (whose judges have generally disagreed),[7] and the split is widening.[8] While the weight of numbers may

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3 Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco City., 137 S. Ct. 1773, 1780 (2017) ("Bristol-Myers").

4 Bristol Myers, 137 S. Ct. at 1789, n.4 (Sotomayor, J., dissenting) ("The 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.")

5 See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Group, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017) (noting that unlike class actions, each plaintiff in mass actions like Bristol-Myers was a real party-in-interest).

6 Anderson v. Logitech Inc., 2018 WL 1184729 (N.D. Ill. March 7, 2018) (striking nationwide class claims); DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (dismissing counts seeking to recover on behalf of out-of-state class members, noting "The Court believes that it is more likely than not based on the Supreme Court's comments about federalism that the courts will apply Bristol-Myers Squibb to outlaw nationwide class actions in a form, such as in this case, where there is no general jurisdiction over the Defendants."); McDonnell v. Nature's Way Products, LLC, 2017 WL 4864910 (N.D. Ill. October 26, 2017) (one of the first decisions to apply the reasoning of Bristol-Myers to class actions) ("a state may not assert specific jurisdiction over a nonresident's claim where the connection to the state is based on the defendant's conduct in relation to a resident plaintiff."); Practice Mgmt. Support Servs., Inc., No. 14 C 2032, 2018 WL 1255021, at *18 ("Because these nonresidents' claims do not relate to defendants' contacts with Illinois, exercising specific personal jurisdiction over defendants with respect to them would violate defendants' due process rights. Thus, . . . the Court finds it appropriate to dismiss the claims of the non-Illinois-resident class members.").

7 Fitzhenry-Russell, 2017 WL 4224723; see also Broomfield v. Craft Brew Alliance, 2017 WL 3838453 (N.D. Cal. Sept. 1, 2017) (deferring consideration of personal jurisdiction arguments under Bristol-Myers until class certification).

8 Notable decisions applying Bristol Meyers to class actions: Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., No.16-665 2017 WL 3129147 (E.D. Pa. July 24, 2017). Here, the court did not exercise personal jurisdiction over out-of-state-class members. The court

tip against Bristol-Myers' application to class actions, there remains strong momentum in favor of its application.[9] With none of the circuit courts yet deciding the issue, the question remains wide open.

Personal Jurisdiction – A Quick Refresher

Personal jurisdiction over a defendant must exist in one of two variants—general or specific—before a federal court can adjudicate an action in federal court.[10] General jurisdiction (or "all purpose" jurisdiction) permits courts to adjudicate claims against corporate defendants only where the defendant's "affiliations with the State are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State,"[11] but not everywhere it does business.[12] As the Daimler Court noted, "[a] corporation that operates in many places can scarcely be deemed at home in all of them."[13] "With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction'."[14] In contrast, specific personal jurisdiction is available only when the particular claim in the suit "arise[s] out of or relate[s] to" the "defendant's contacts with the forum."[15]

In either case, a court's exercise of authority over a

explained, "Only plumbers Pennsylvania claims arise out of or relate to Defendants' sales of generic drugs in Pennsylvania …. Accordingly, the court cannot exercise specific jurisdiction over the non-Pennsylvania claims…." Id. at *4. This case relied on two Northern District of Illinois cases: Demedicis v. CVS Health Corp., No. 16-CV-5973, 2017 WL 569157 (N.D. Feb. 13, 2017) and Demaria v. Nissan N. Am., Inc., No. 15c3321, 2016 WL 374145 (N.D. Ill. Feb. 1, 2016); Spratley v. FCA US LLC, No. 3:17-CV-0062, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017). Here the court granted the defendant's 12(b)(2) motion as to the plaintiffs whose claims were unrelated to the defendant's contacts with New York. Six of the eight named plaintiffs in this case had no connection to New York, the forum state for Chrysler—they purchased and repaired their defective vehicles in other states. In this case, the court analyzed the jurisdictional issue as though it were indistinguishable from the mass action holding in Bristol-Myers; In re Dental Supplies Antitrust Litig., No. 16 CV 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017). This case did not involve the exact issue in Bristol-Myers, but the court's language suggested that it would extend that holding to the class action context. "Plaintiffs attempt to side-step due process holdings in Bristol-Meyers by arguing that the case has not effect on the law in class actions because the case before the Supreme Court was not a class action. This argument is flawed . . .. Personal jurisdiction in class actions must comport with due process just the same as any other case." Id. at *9.; McDonnell v. Nature's Way Products, LLC, No. 16C5011, 2017 WL 4864910 (N.D. Ill. Oct. 23, 2017). Similarly, to Dr. Pepper (below), the plaintiffs in McDonnell claimed they were injured by deceptive advertising practices. The court reasoned that members of the class who purchased Nature's Way products in other states had "no injury arising from [the defendant's] forum-related activities in Illinois." Id. at *4.; Greene v. Mizuho Bank, 289 F. Supp. 3d 870 (N.D. Ill. 2017) where the defendant argued that the complaint did not establish that the bank had "any contacts with Illinois in connection with that plaintiff's claims." Id. at 874. The court agreed, holding that non-Illinois residents' claims did not establish jurisdiction over the bank. The plaintiffs in this case also argued that the differences presented by mass and class actions were substantial because in mass actions each plaintiff is treated as an individual. However, the court disagreed and explained that due process requirements dictate that in order to establish jurisdiction, there must be a connection "between the forum and the specific claims at issue."; Wenokur v. AZA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017). The court held that it lacked personal jurisdiction over the "claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class." Id. at *4.; In re Nexus 6P Products Liability Litigation, No.17-cv-02185-BLF, 2018 U.S. Dist. LEXIS 23622 (N.D. Cal. Feb. 12, 2018). In this case, the defendant, Huawei Device USA, was incorporated and had its principal place of business in Texas. The plaintiffs, however, claimed that the court had both general and specific jurisdiction over the defendant because the company had "conducted substantial business" in Northern California and had "intentionally and purposefully placed" the smartphones (the defective items complained about by the plaintiffs) "into the stream of commerce within this district and throughout the United States." Id. at *4. The court found neither general nor specific jurisdiction; DeBernardis v. NBTY, Inc., No. 17 CV 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018). The DeBernardis court noted one particularly important battleground argument discussed in Bristol-Myers, giving rise to an inference that the Court's ruling would apply to class actions: federalism. The District Court held that this principal would "outlaw nationwide class actions in a form [sic] where there is no general jurisdiction over the Defendants." Id. at 6; Anderson v. Logitech, Inc., 2018 WL 1184729 (N.D. Ill. Mar. 7, 2018). The court struck the nationwide class action claims applying DeBernardis v. NBTY, Inc., No. 17 CV 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018) and McDonnell v. Nature's Way Products, No. 16 C 5011, WL 4864910 (N.D. Ill. Oct. 26, 2017); Practice Mgmt. Support Servs., Inc., No. 14 C 2032 WL 1255021 (N.D. Ill. Aug. 2, 2018). Here, the court explained that the "Rules Enabling Act and the Fourteenth Amendment's due process clause … precludes 'nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum resident.'" Id. at 861. The court found that Bristol-Myers applies to class actions. Id. at 862; Chavez v. Church & Dwight Co., 2018 WL 2238191 (N.D. Ill. May 16, 2018). Here, the court dismissed claims on behalf of non-Illinois putative class members holding that Bristol-Myers does extend to class actions; Garvey v. American Bankers Insurance Company of Florida, 2019 WL 2076288 (N.D. Ill. May 10, 2019). Here, the court reasoned that it lacked general jurisdiction over the defendants in this case, both of whom were Florida residents. The court likewise did not find specific jurisdiction because the parties did "not contend that the non-Illinois residents were injured in Illinois" and therefore "exercising specific jurisdiction over defendants with respect to the nonresidents' claims would violate defendants' contacts with Illinois." Id. at *2. The court struck the "class definition to the extent it asserts claims of non-residents."; Bakov v. Consolidated World Travel, Inc., 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019). Here, the court refused to extend specific jurisdiction to the "proposed class members who are not Illinois residents" and would consider the "[p]aintiffs' motion for class certification only as it pertains to Illinois residents." Id. at *14. Notable decisions declining to apply Bristol Meyers to class actions: Fitzhenry-Russell v. Dr. Pepper Snapple Group, No.17-CV-00564 NC, 2017 WL 42247 (N.D. Cal. Sept. 22, 2017). Named plaintiffs, on behalf of a nationwide class, alleged that Dr. Pepper intentionally employed deceptive advertising practices. Dr. Pepper raised a 12(b)(2) motion as applied to the non-California class members. The court, however, agreed with the plaintiffs, reasoning that Bristol-Meyers did not apply because it extended only to mass actions, not class actions. The court noted that the named plaintiffs in this case were chosen to sidestep Bristol-Myers; In re Chinese-Manufactured Drywall Products Liability Litigation, No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017). The court denied the defendant's 12(b)(2) motion to the non-resident class members, in part, citing the Dr. Pepper principle that class actions and mass actions are not one in the same. The court relied on one of the primary battleground arguments highlighted throughout the case law: differences in due process protections present in class actions that are absent in mass actions. The elaborated the distinctions further by noting the hefty requirements of certifying a class under Rule 23(b)(3); Jordan v. Bayer Corp., No. 4:17-cv-00865-AGF, 2018 U.S. Dist. LEXIS 23244 (E.D. Mo. Feb, 13, 2018). The court in this case held that the "general presence of marketing strategies and clinical trials" are too broad to satisfy the narrow requirements under Bristol-Myers to determine whether personal jurisdiction can be asserted. The court rested much of its reasoning on the fact that in this case, the plaintiffs never saw advertisement for the product in Missouri nor did they participate in the trials. Furthermore, the non-Missouri residents were "not prescribed the product in Missouri, were not injured in Missouri, and did not purchase the product in Missouri." Jordan, 2018 U.S. Dist. LEXIS 23244, at *11; Sloan v. General Motors LLC., 287 F.Supp.3d 840 (N.D. Cal. Feb. 7, 2018). Here, plaintiffs brought a class action against General Motors alleging engine defects created risk of vehicle malfunction or fires. The court held that it would exercise jurisdiction over General Motors even with respect to the claims by non-California residents. The court explained that "Bristol-Myers was animated by unique interstate federalism concerns," which were absent from this case, and therefore did not persuade the court that "such a categorial extension" was warranted. Sloan, 287 F.Supp.3d at 858.

9 See, e.g., Roy v. FedEx Ground Package System, Inc., No. 3:17-CV-30116-KAR, WL 6179504, at *4 (D. Mass. Nov. 27, 2018) ("Bristol-Myers requires that the defendant be subject to specific jurisdiction as to the claims of FLSA opt-in plaintiffs in putative collective actions. Similarity of claims, alone, is not sufficient to extend personal jurisdiction to out-of-state opt-in plaintiffs."); Maclin v. Reliable Reports of Texas, Inc., 314 F. Supp. 3d 845, 850 (S.D. Ohio Oct. 31, 2018) (dismissing non-Ohio plaintiffs where the court lacked general jurisdiction over the corporate defendant); Chavez v. Church & Dwight Co., 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018) ("The Court therefore concludes that Bristol-Myers extends to class actions, and that Chavez is therefore foreclosed from representing either a nationwide and multistate class comprising non-Illinois residents in this suit."); Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc., No. 16 C 9281, 2018 WL 3474444, at *2 (N.D. Ill. July 19, 2018) ("The Court lacks jurisdiction over the Defendants as to the claims of the nonresident, proposed class members. As such …those class members who are not Illinois residents and who allegedly received the fax outside of this state's borders may not be part of this case."); McDonnell v. Nature's Way Prod., LLC, No. 16 C 5011, 2017 WL 4864910, *5 (N.D. Ill. Oct. 26, 2017)(dismissing, for lack of personal jurisdiction, the portions of plaintiff's class action complaint that encompassed claims on behalf of out-of-state putative class members); Spratley v. FCA US LLC, 2017 U.S. Dist. LEXIS 147492 at * 18 (N.D.N.Y. September 12, 2017) (same). See also Wenokur v. AXA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916 at* 4, n. 4 (D. Arizona October 2, 2017) (determining, during a dispute over venue, the impact of Bristol-Myers: "[t]he Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.").

10 See Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851 (2011).

11 BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017) (quoting Daimler AG v. Bauman, 571 U.S. 117, 126, 134 S. Ct. 746, 754 (2014)).

12 See Daimler AG v. Bauman, 571 U.S. 117, 139, 134 S. Ct. 746, 762 (2014) (error to conclude that defendant doing extensive business in California and having multiple facilities in California was "at home" in California).

13 Id., n.20; see also Henry A. v. Willden, No. 2:10-cv-00528, 2014 WL 1809634, at *6 (D. Nev. May 7, 2014) (finding that the Supreme Court in Daimler clarified that "the reach of general jurisdiction is narrower than had been supposed in the lower courts for many years.").

14 Daimler AG, 571 U.S. at 137 (citations omitted); see also BNSF Ry. Co. v. Tyrrell, 137 S.Ct. 1549, 1558 (2017) ("The 'paradigm' forums in which a corporate defendant is 'at home,' . . . are the corporation's place of incorporation and its principal place of business."). See also, e.g., Cahen v. Toyota Motor Corp., 147 F. Supp. 3d 955, 964 (N.D. Cal. 2015), aff'd, 2017 WL 6525501 (9th Cir. Dec. 21, 2017) (no general jurisdiction over Delaware corporation with its principal place of business in Michigan).

15 Bristol-Myers, 137 S. Ct. at 1780 (2017) (quoting Daimler AG, 571 U.S. at 126-27).

defendant must comport with the constitutional due process principles ensuring that maintenance of the lawsuit in the forum does not offend "traditional notions of fair play and substantive justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal citation omitted).[16]

Those In Favor

Not long after the U.S. Supreme Court decided Bristol-Myers, the Northern District of Illinois sowed the seeds of what is now the growing split Justice Sotomayor foreshadowed in her dissent, issuing one of the first decisions applying Bristol-Myers to class actions. In McDonnell v. Nature's Way Products, LLC., the plaintiffs filed a multi-state class action against Nature's Way, claiming they had been harmed by the company's deceptive advertising practices.[17] Despite the plaintiffs' arguments that Nature's Way "purposefully chose[] to market mislabeled products in Illinois," the Northern District of Illinois concluded that it did not have "jurisdiction over McDonnell's claims related to sales of Women's Alive outside of Illinois …."[18] Relying on Bristol-Myers, the court explained that "a state may not assert specific jurisdiction over a nonresident's claim where the connection to the state is based on the defendant's conduct in relation to a resident plaintiff …."[19]

Two New York cases decided within days of one another came to the same conclusion shortly thereafter.[20] In Spratley, the Northern District of New York dismissed out-of-state class action plaintiffs' claims, citing Bristol-Meyers. And while not specifically deciding the fate of out-of-state putative class members, the court analyzed the jurisdictional question as though it were indistinguishable from the mass action context. Eight days later, the Eastern District of New York in In re Dental Supplies criticized the plaintiffs' argument that Bristol-Myers had "no effect on the law in class actions," noting that "[t]he constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class."[21]

Subsequent cases issuing from the Northern District of Illinois have continued the trend, albeit many of them simply citing to the decisions that have come before without adding much to the analysis. For instance, in Anderson v. Logitech, Inc., the Northern District of Illinois struck the nationwide class action claims based on established principles from precedent coming out of the same court. Likewise, in Chavez v. Church & Dwight Co., the Northern District of Illinois confirmed that "Bristol-Myers extends to class actions" and that the plaintiff was "therefore foreclosed from representing either a nationwide or multistate class comprising non-Illinois residents in this suit."[22] The trend continues in the Northern District of Illinois unabated.[23]

Those Against

Based primarily on distinctions between mass and class actions, many district courts—most notably those in California—have rejected the sea of change Bristol-Meyers's application to the claims of putative class members would bring about.[24] Mass tort plaintiffs are, after all, "a real party in interest, meaning that each plaintiff is personally named and required to effect service,"[25] whereas "[t]he class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[26] As the Northern District of Georgia once noted, "[n]othing in Rule 23 suggests that class members are deemed 'parties' … Indeed, if class members were automatically deemed parties, all class actions would be converted into massive joinders. Such a result would emasculate Rule

16 The need for personal jurisdiction over an out-of-state defendant stems from the Due Process Clause, which "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 268, 269, 100 S. Ct. 559, 567 (1980).

17 McDonnell, an Illinois resident, purchased "Women's Alive! Energy Supplements" in various Illinois pharmacies. McDonnell claimed that she relied on the company's advertisement that the supplement was made in the United States, when in actuality some of the product's ingredients were manufactured outside of the country. FTC guidelines stated that because the energy supplement contained "foreign-sourced vitamin C," Nature's Way should have qualified the "Made in the USA statement." McDonnell v. Nature's Way Products, LLC, 2017 WL 4864910, at *1 (N.D. Ill. Oct. 23, 2017).

18 Id. at *4.

19 Id.

20 Spratley v. FCA U.S., LLC, No 3:17-CV-0062, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017); In re Dental Supplies Antitrust Litig., No. 16 CV 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017).

21 In re Dental Supplies, 2017 WL 4217115, at *9; see also Wenokur v. AXA Equitable Life Ins. Co., 2017 WL 4357916, at *4, n. 4 (D. Ariz. Oct. 2, 2017) (holding that the Court lacked personal jurisdiction over the "claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class") and Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., 2017 WL 3129147, at *4 (E.D. Pa. July, 24, 2017) (explaining that the Court could not exercise personal jurisdiction over out-of-state-class members because only the Pennsylvania-resident plumbers' claims "arise out of or relate to [the] [d]efendants' sales of generic drugs" within Pennsylvania).

22 Chavez v. Church & Dwight Co., No. 17-c-1948, 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018); see also In re Nexus 6P Products Liability Litigation, 2018 U.S. Dist. LEXIS 23622 (N.D. Cal. Feb. 12, 2018); Practice Mgmt. Support Servs., Inc. v. Cirque Du Soleil, Inc., 2018 WL 1255021 (N.D. Ill. Aug. 2, 2018).

23 Garvey v. American Bankers Insurance Company of Florida, 2019 WL 2076288 (N.D. Ill. May 10, 2019 and Bakov v. Consolidated World Travel, Inc., 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019) (refusing to extend specific jurisdiction to the "proposed class members who are not Illinois residents" and would consider the "Plaintiffs' motion for class certification only as it pertains to Illinois residents.").

24 See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Group, 2017 WL 42247 (N.D. Cal. Sept. 22, 2017) (declining to apply Bristol-Myers outside of the mass action, even though the named plaintiffs alleging Dr. Pepper engaged in deceptive advertising practices were chosen specifically to sidestep Bristol-Myers; see also, e.g., In re Chinese-Manufactured Drywall Products Liability Litigation, 2017 WL 5971622 (E.D. La. Nov. 30, 2017) (denying the defendant's 12(b)(2) motion to the non-resident class members, in part, citing the Dr. Pepper principle that class actions and mass actions are not one in the same).

25 Id.

26 Gen. Tel. Co., 457 U.S. at 155 ("The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

23."[27]

Due Process

Courts on both sides of the question are chiefly concerned with due process under the Fifth Amendment.[28] The Northern District of Illinois, for example, reasoned that due process principles require that there must be a "connection between the forum and the specific claims at issue" regardless of whether the plaintiff is bringing his claim in the mass or class action context. [29] Likewise, the Eastern District of New York concluded that "… personal jurisdiction in class actions must comport with due process just the same as any other case," admonishing the plaintiffs' contrary argument as attempting to side step the Constitution.[30]

The Eastern District of Louisiana, on the other hand, noted the due process protections baked into the procedural rules for class actions.[31] Rule 23 requires that "questions of law or fact [be] common to the class," Fed. R. Civ. P. 23(a)(2), that "the claims … of the representative parties are typical of the claims … of the class," id. at (a)(3), that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Id. at (b)(3). Mass actions, on the other hand, do not—and generally cannot—meet the requirements of Rule 23, because there are typically significant variations in the plaintiffs' claims.[32]

These courts have noted that personal jurisdiction is essentially rooted in fairness to the defendant, and Rule 23 provides significant safeguards to that end. As one of Rule 23's chief objectives is to ensure relative uniformity of the claims, there is no unfairness in hailing the defendant into court to answer for it in a forum that has specific jurisdiction over the defendant based on just the representative's claim."[33] Indeed, "if due process was not offended in Shutts, a class-action in State court with absent non-resident plaintiff class members, it is not offended by a potential class-action in federal court where the plaintiff class is made up in part with non-resident members."[34]

Critics have responded that the requirements for class certification are not substantial enough to mitigate the constitutional violation of compelling a defendant to defend itself in a state in which the court lacks general jurisdiction.[35] As one court noted, the "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."[36] That is because Rule 23 "must be interpreted in keeping with Article III constraints, and the Rules Enabling Act, which instructs that the federal court rules of procedure shall not abridge, enlarge, or modify any substantive right."[37]

Indeed, Congress may not expand the jurisdiction of courts beyond the bounds established by the Constitution.[38] So, while Congress has the power to enact requirements for class certification in federal courts, these requirements cannot exceed beyond the due process limits established under the Fifth Amendment Due Process Clause.[39] In other words, the requirements for class certification under Rule 23 (i.e., numerosity, commonality, typicality, and adequacy) cannot cure the constitutional violation of forcing a defendant to defend itself against a nationwide class action in a forum that has no general jurisdiction over such defendant.

Federalism

Federalism is the other principal concern. As the U.S. Supreme Court noted in Bristol-Myers, the "'primary concern' in assessing personal jurisdiction is 'the burden on the defendant.'"[40] That is because it "encompasses

27 Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); accord Devlin v. Scardelletti, 536 U.S. 1, 10 (2002) ("nonnamed class members cannot defeat complete diversity").

28 For instance, the Court in Molock held that the "material distinctions between a class action and a mass tort action," especially with regards to the "additional elements of a class action supply due process safeguards not applicable in the mass tort context." Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126 (D.D.C. 2018); but see Greene v. Mizuho Bank, 289 F. Supp. 3d 870 (N.D. Ill. 2017). In this case, the plaintiffs also postured that the differences between mass and class actions were substantial because in mass actions each plaintiff is treated as an individual. The court, however, disagreed, relying on due process grounds, like the court in Molock, to reach its contrary decision.

29 Greene, 289 F. Supp. 2d at 874. In Greene, the court agreed with the defendant's argument that it did not have any "contacts with Illinois in connection with the plaintiff's claims." Furthermore, the principles of due process apply to the question of whether the court can establish personal jurisdiction regardless of whether the suit is in the form of a mass or class action. See also Chavez v. Church & Dwight Co., 2018 WL 2238191 (N.D. Ill. May 16, 2018).

30 In re Dental Supplies Antitrust Litig., 2017 WL 42115 (E.D.N.Y. Sept. 20, 2017).

31 The court explained that what makes class actions distinguishable from mass actions comes from the requirements of Rule 23: numerosity, typicality, adequacy of representation, predominance, and superiority (citing DeBernardis v. NBTY, Inc., 2018 WL 461228, at *2 (N.D. Ill. Aug. 2, 2018)). Bristol-Myers would undercut these due process safeguards if it were applied to class actions.

32 See, e.g., Sanchez, 297 F. Supp. 3d at 1366 ("Thus, in contrast to a mass action like Bristol-Myers, which may—and likely would—present significant variations in the plaintiffs' claims, the requirements of Rule 23 class certification ensure that the defendant is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense.").

33 Sanchez, 297 F. Supp. 3d at 1366.

34 Id. at 1367.

35 See Practice Mgmt., 301 F. Supp. 3d at 864.

36 In re Dental Supplies Antitrust Litig., 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017); see also Practice Mgmt. Support Servs., Inc., 301 F.Supp.3d 840, 864 (N.D. Ill. Mar. 12, 2018) ("Under the Rules Enabling Act, a defendant's due process interest should be the same in the class context" as in the mass action context); Chavez v. Church & Dwight Co., 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018) ("Nothing in Bristol-Myers suggests that its basic holding is inapplicable to class actions; 'rather, the Court announced a general principle—that due process requires a 'connection between the forum and the specific claims at issue.' "), quoting Greene, 2017 WL 7410565, at *4 (N.D. Ill. Dec. 11, 2017).

37 Practice Mgmt., 301 F.Supp.3d at 861 (internal quotations and citations omitted).

38 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 491, 103 S. Ct. 1962, 1970 (1983).

39 See, e.g., Practice Mgmt., 301 F.Supp.3d at 864.

40 Bristol-Myers, 137 S. Ct. at 1776 (citing World-Wide Volkswagon Corp., 444 U.S. 286, 292 (1980)).

the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[41] Even if the burden on the defendant to litigate in one of these venues is slight because of its size and wealth, the interest of preserving federalism may prove to be decisive. Indeed, drawing from federalism, the Northern District of Illinois predicted that "courts will apply Bristol-Myers Squibb to outlaw nationwide class actions in a form [sic] where there is no general jurisdiction over the Defendants."[42]

California District Courts, on the other hand, have been dismissive of federalism concerns.[43] Cuing from Justice Sotomayor's dissent (the sole dissent in Bristol-Myers), they suggest that federalism is not an animating concern when it comes to large corporate defendants.[44] But this view invites the same "sliding scale" approach to jurisdiction that the Bristol-Myers Court warned against. The size, scope, and complexity of the defendant should not fade concerns of federalism.

Procedural Considerations

Corporate defendants have much to gain by making jurisdictional disputes early. In addition to the fact that jurisdictional challenges must be made at the outset or be waived, delaying their resolution subjects the parties (and the courts) to lengthy, costly, and litigious discovery into a putative nationwide class—a process that will not likely yield any facts relevant to jurisdiction. But many courts are nonetheless deferring consideration of Bristol-Myers challenges until the class certification stage, when they say the issue is riper for adjudication, and when the law may be more settled.[45] Ultimately, the decision of which stage to raise the jurisdictional challenge is best made case by case, guided strongly by how sister courts have resolved the question.

But regardless of whether moving to dismiss the class claims, or waiting until the class certification stage to raise the challenge, identifying the lack of personal jurisdiction as an affirmative defense in the first response is paramount, as defendants can learn the hard way. For example, the Southern District of California recently found a personal jurisdiction challenge under Daimler was waived because it was not preserved in the first response, concluding that Bristol-Myers was not an intervening change in the law that might justify the delay.[46]

Conclusion

While some district courts are cementing their positions for and against applying Bristol-Myers to the claims of putative class members, most district courts have not considered the question, and others are deferring to the class certification stage when the issue is riper for decision, and when the legal analysis may be better developed. As no circuit court has yet resolved the question, it remains too early to tell which side will ultimately form the majority view. For now, defendants are well-advised to preserve the issue and weigh carefully when and how to raise the challenge.

41 Bristol-Myers, 137 S. Ct. at 1776.

42 DeBernardis v. NBTY, Inc., 2018 WL 461228 (N.D. Ill. Aug. 2, 2018).

43 See, e.g., Sloan v. General Motors, LLC., 287 F. Supp. 3d 840, 853 (N.D. Cal. Feb. 7, 2018) (explaining that "Bristol-Myers was animated by unique interstate federalism concerns," which were absent from the instant case and therefore did not persuade the court that such a "categorical extension" was warranted).

44 Bristol-Myers, 137 S. Ct. at 1788 ("… I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct.")

45 See, e.g., Gasser v. Kiss My Face, LLC, 2018 WL 4538729, at *2 (N.D. Cal. Sept. 21, 2018); Campbell v. Freshbev LLC, 322 F. Supp. 3d 330 (E.D.N.Y. July 3, 2018). But see Practice Mgmt. Support Servs., 301 F. Supp. 3d at 846 and Maclin v. Reliable Reports of Texas, Inc., 314 F. Supp. 3d 845, 850 (S.D. Ohio Oct. 31, 2018) (dismissing the non-resident plaintiffs' claims because the court lacked personal jurisdiction and would otherwise violate the defendant's due process rights).

46 See McCurley v. Royal Seas Cruises, Inc., 2019 WL 1383804, at *16 (S.D. Cal. Mar. 27, 2019) (after noting the split in decisions after Bristol-Myers, deciding that the court need not weigh in on the question of jurisdiction because it was not raised until class certification, noting "An untimely personal jurisdiction defense—regardless of whether it is based on Bristol-Myers—is waived at the later stages of a litigation if the defense was not timely asserted."). See also LaVigne v. First Cmty. Bancshares, Inc., 2019 WL 1075600, at *4 (D.N.M. Mar. 7, 2019) (rejecting argument asserted at the class notice stage that Bristol-Myers precluded the court from exercising personal jurisdiction over non-New Mexico class members in part because it "was not appropriately raised").

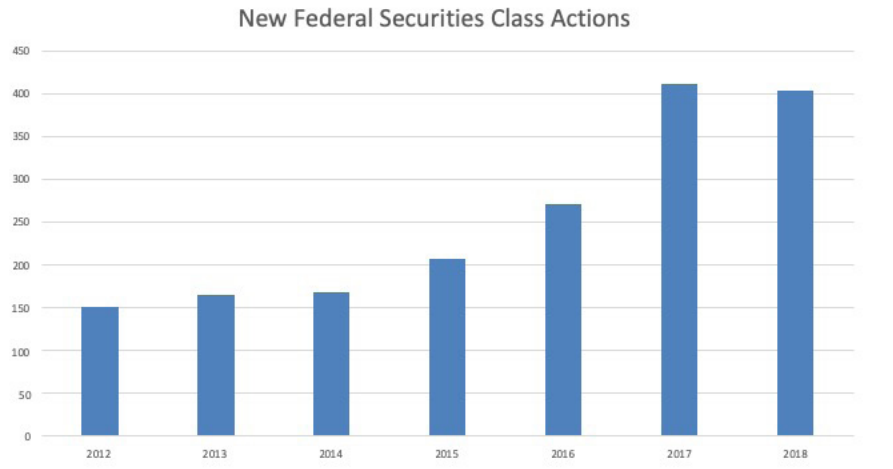
Snell & Wilmer

Bristol-Myers – Harkening the end of national class actions?

Gregory J. Marshall | Partner | Snell & Wilmer

Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco City., 137 S. Ct. 1773, 1780 (2017)

"[t]he mere fact that [some] 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 non-residents' claims."



Cornerstone Research

The Northern District of California's Approach

- *Fitzhenry-Russell v. Dr. Pepper Snapple Group*, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017)

The Northern District of Illinois' Approach

- *McDonnell v. Nature's Way Products, LLC*, 2017 WL 4864910, at *1 (N.D. Ill. Oct. 23, 2017)
- *In re Dental Supplies Antitrust Litig.*, No. 16 CV 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017)

Personal Jurisdictional – *A Quick Refresher*

Must not offend "traditional notions of fair play and substantive justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)

The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 268, 269, 100 S. Ct. 559, 567 (1980)

General (or "All Purpose") Personal Jurisdiction

"With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction'." *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549, 1558 (2017)

Error to conclude that the defendant doing extensive business in California and having multiple facilities in California was "at home" in California. *Daimler AG v. Bauman*, 571 U.S. 117, 139, 134 S. Ct. 746, 762 (2014)

Specific Personal Jurisdiction

"[A]rise[s] out of or relate[s] to" the "defendant's contacts with the forum." *Bristol-Myers,* 137 S. Ct. at 1780 (2017) (quoting *Daimler AG,* 571 U.S. at 126-27)

Court "may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985)

"Nonnamed class members ... may be parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002)

Due Process

"Personal jurisdiction is rooted in fairness to the defendant, and rule 23 provides significant safeguards to that end." *Allen v. ConAgra Foods, Inc.*, 2018 WL 646051, at *7 (N.D. Cal. Dec. 10, 2018)

"The class-action device was designed as an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" saving resources by permitting an issue potentially affecting every class member to be litigated in an economical fashion. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982)

"Nothing in Bristol-Myers suggests that its basic holding is inapplicable to class actions; 'rather, the Court announced a general principle—that due process requires a 'connection between the forum and the specific claims at issue.'" *Chavez v. Church & Dwight Co.*, 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018), *quoting Greene*, 2017 WL 7410565, at *4 (N.D. Ill. Dec. 11, 2017)

"Under the Rules Enabling Act, a defendant's due process interest should be the same in the class context" as in the mass action context. *Practice Mgmt. Support Servs., Inc.*, 301 F.Supp.3d 840, 864 (N.D. Ill. Mar. 12, 2018)

Federalism

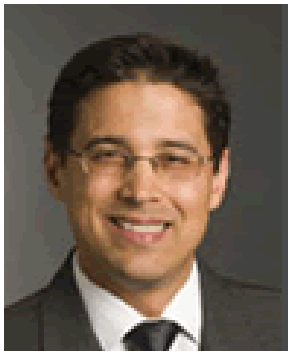
"'[P]rimary concern' in assessing personal jurisdiction is 'the burden on the defendant.'" That is because it "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1776 (*citing World-Wide Volkswagon Corp.*, 444 U.S. 286, 292 (1980)

"*Bristol-Myers* was animated by unique interstate federalism concerns," which were absent from the instant case and therefore did not persuade the court that such a "categorical extension" was warranted. *Sloan v. General Motors, LLC.*, 287 F. Supp. 3d 840, 853 (N.D. Cal. Feb. 7, 2018)

Procedural Considerations

- *Gasser v. Kiss My Face, LLC*, 2018 WL 4538729, at *2 (N.D. Cal. Sept. 21, 2018)
- *Campbell v. Freshbev LLC*, 322 F. Supp. 3d 330 (E.D.N.Y. July 3, 2018)

"An untimely personal jurisdiction defense—regardless of whether it is based on *Bristol-Myers*—is waived at the later stages of a litigation if the defense was not timely asserted." *McCurley v. Royal Seas Cruises, Inc.*, 2019 WL 1383804, at *16 (S.D. Cal. Mar. 27, 2019)



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Mr. Marshall co-chairs the firm's Financial Services Litigation Group, focusing his practice on the defense of banks and lenders. Mr. Marshall's clients include national and international banks, regional banks, mortgage lenders and servicers, credit card issuers, automobile finance servicers, credit unions, and money transmitters. Mr. Marshall's practice includes management of regional and national defense programs involving pattern litigation. Mr. Marshall has defended clients in a wide variety of litigation and regulatory matters, including qui tam, class action, and multi-district litigation (MDL). Mr. Marshall has substantial experience litigating claims involving the Dodd-Frank amendments, CFPB regulations, U.S. Treasury regulations and directives, HAMP and HARP, MERS, and lien priority disputes. Mr. Marshall also has substantial experience defending claims arising under the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Reporting Act (FCRA), the Telephone Consumer Protection Act (TCPA), the Unfair Debt Collection Practices Act (UDCPA), and state unfair and deceptive acts or practices (UDAP) statutes.

Related Services

- Class Action Litigation
- Commercial Litigation
- Financial Services Litigation
- Insurance
- International
- Non-Profit/Tax-Exempt Organizations
- Product Liability Litigation

Representative Experience

- Defended and tried bellwether case involving Fair Credit Reporting Act claims against secondary mortgage market participant.
- Defended national mortgage servicer against putative class action claims challenging servicing fees.
- Defended national banks in pattern qui tam litigation regarding unpaid transfer taxes.
- Defended several national mortgage lenders and servicers in MDL litigation involving mortgage origination claims.
- Defended mortgage originators and servicers in actions filed by government officials and entities involving mortgage origination practices.
- Defended national bank in appeal of precedent setting putative damages award.
- Defended and tried case for mortgage lender involving construction loan and allegations of deceptive practices.
- Defended and tried bad faith claims on behalf of mortgage servicer and credit life insurer.
- Managed regional defense program for mortgage servicer in consumer mortgage cases.
- Defended national mortgage lender in putative nationwide class action involving payoff fees.

Professional Recognition and Awards

- Southwest Super Lawyers, Rising Stars Edition, Banking (2012-2013)
- Arizona's Finest Lawyers
- Top 50 Pro Bono Attorneys, Arizona Foundation for Legal Services & Education (2011)

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- Emory University School of Law (J.D., 1999) - Dean's Fellow; Order of the Barristers; Order of the Advocates
- University of Arizona (B.A., cum laude, 1995)