JUNE 4, 2018

Deepening district court discord on application of Bristol-Myers to class actions highlights need for appellate guidance

By: Stephanie Bedard

District courts continue to split on whether to apply the Supreme Court's holding in *Bristol-Myers*, a case limiting personal jurisdiction over non-resident multistate mass tort claimants, to the class action context. This issue, which frequently will have significant impact on the size of the proposed class (and thus the defendant's potential exposure), likely will continue to be hotly contested at the district court level until the appellate courts (and possibly even the Supreme Court) step in to resolve the question once and for all.

In *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), both resident and non-resident plaintiffs filed suit in California state court against the defendant pharmaceutical company, which was incorporated in Delaware and headquartered in New York. As Bristol-Myers was not "at home" in the state of California, the Supreme Court concluded that California courts lacked personal jurisdiction over the non-resident plaintiffs. Justice Sotomayor's dissent noted that the majority's holding left open whether it applied to nationwide class actions, a comment that foretold the subsequent district court split.

Since the Supreme Court's decision in *Bristol-Myers*, district courts have taken two divergent paths: while some courts have applied *Bristol-Myers* to the class action context and have required that personal jurisdiction exist as to each putative class member, others have distinguished class actions from mass tort litigation and have refused to extend the Court's reasoning to Rule 23 cases.

Courts applying *Bristol-Myers* to class actions

Even before *Bristol-Myers*, the Northern District of Illinois had issued one of the leading decisions refusing to exercise personal jurisdiction over non-resident class members where the class action had been brought outside of the defendant's "home" forum. In *Demeria v. Nissan N. Am., Inc.*, No. 15 C 3321, 2016 WL 374145, at *8 (N.D. Ill. Feb. 1, 2016), the court held that where the claims of the non-resident class members "remain unrelated to anything that transpired in Illinois, imposing personal jurisdiction for all of the claims because specific jurisdiction may lie as to this one plaintiff's claims would run afoul of the traditional notions of fair play and substantial justice that form the bedrock of any court's personal jurisdiction analysis." *See also Demedicis v. CVS Health Corp.*, No. 16-5973, 2017 WL 569157, at *4-*5 (N.D. Ill. Feb. 13, 2017) (similarly holding, in a pre-*Bristol-Myers* ruling, that it lacked jurisdiction of claims of non-residents: "Because specific personal jurisdiction is based on claims arising out of a defendant's

conduct within the forum state, this Court has no jurisdiction over claims based on out-of-state consumer fraud laws.").

Since *Bristol-Myers*, the Northern District of Illinois consistently has rejected personal jurisdiction over non-resident class members where the defendant did not reside in Illinois. In *McDonnell v. Nature's Way Products, LLC*, No. 16 C 5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017), both resident and non-resident plaintiffs brought a nationwide class action in Illinois against the manufacturer of a vitamin supplement. After rejecting the named plaintiffs' argument that *Bristol-Myers* should be limited to mass tort claims, the court dismissed the non-resident putative class plaintiffs.

Similarly, in *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018), the named plaintiff brought claims on behalf of a nationwide class against a dietary supplement distributor headquartered in New York. Describing the applicability of *Bristol-Myers* as a "close question," the court ultimately elected to follow *McDonnell* and dismissed those claims brought on behalf of non-resident plaintiffs, noting that the concern with forum shopping in *Bristol-Myers* likewise applied to class actions. *Id.*, 2018 WL 461228, at *2.

And in *Practice Management Support Services Inc. v. Cirque du Soleil Inc.*, No. 14 C 2032, 2018 WL 1255021 (N.D. Ill. Mar. 12, 2018), the court applied *Bristol-Myers* in denying class certification as to the non-resident putative class members, reasoning that the Rules Enabling Act precluded the court from modifying due process considerations merely because litigants invoked Rule 23.

Other courts similarly have ruled. In one of the first district court decisions to address the issue after *Bristol-Myers*, the Eastern District of Pennsylvania cited *Bristol-Myers* in the introduction of its discussion of personal jurisdiction over the non-resident class members before following the reasoning of *Demeria* and *Demedicis*. *See Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.* , Civ. A. No. 16-665, 2017 WL 3129147, at *9 (E.D. Pa. July 24, 2017). Similarly, in *Spratley v. FCA US LLC*, No. 3:17-CV-0062, 2017 WL 4023348, at *7-*8 (N.D.N.Y. Sept. 12, 2017), the Northern District of New York cited *Bristol-Myers* in holding "the Court lacks specific jurisdiction over the out-of-state Plaintiffs' claims" before following *Demeria* in rejecting the invocation of "pendant personal jurisdiction."

Another Second Circuit district court echoed the due process concerns of *Cirque du Soleil* when it rejected the argument that *Bristol-Myers* should be limited to its mass tort context: "The constitutional requirements of due process does [sic] 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 Civ. 696 (BMC)(GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).

The Northern District of Ohio likewise relied on due process considerations in refusing to exercise personal jurisdiction over the claims of non-resident class members against a non-resident defendant in *Maclin v. Reliable Reports of Texas, Inc.*, No. 1:17-CV-2612, 2018 WL 1468821 (N.D. Ohio Mar. 26, 2018). After discussing *Bristol-Myers* and Ninth Circuit district court decisions refusing to apply *Bristol-Myers* outside of the mass torts context (as discussed below), the *Maclin* court held: "[T]he Court cannot

envisage that the Fifth Amendment Due Process Clause would have any more or less effect on the outcome respecting FLSA claims than the Fourteenth Amendment Due Process Clause, and this district court will not limit the holding in *Bristol–Myers* to mass tort claims or state courts." *Id.*, 2018 WL 1468821, at *4.

Finally, the District of Massachusetts recently rejected the argument that *Bristol-Myers* should be limited to cases originally filed in state court. *See Roy v. FedEx Ground Package Sys., Inc.*, No. 3:17-cv-30116-KAR, 2018 WL 2324092, at *9 (D. Mass. May 22, 2018) ("Given that the Fourteenth Amendment must be satisfied, the 'settled principles' of Fourteenth Amendment jurisprudence as articulated in *Bristol-Myers* apply."). But it still found the exercise of jurisdiction would be appropriate, under the facts of the case before it.

Courts holding *Bristol-Myers* does not apply to class actions

Ninth Circuit district courts have led the contrary line of authorities. In *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017), the Northern District of California held that *Bristol-Myers* should be limited to mass tort claims – where each plaintiff was named and a real party in interest – and not extended to class actions – where the named plaintiffs seek to represent all similarly situated parties. Other district courts in the Ninth Circuit have followed this approach. *See, e.g., Sloan v. General Motors LLC*, 287 F. Supp. 3d 840 (N.D. Cal. Feb. 7, 2018); *In Re Morning Song Bird Food Litig.*, No. 12CV01592 JAH–AGS, 2018 WL 1382746 (S.D. Cal. Mar. 19, 2018).

In *Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114 (D.D.C. 2018), a District of Columbia district court agreed with *Fitzhenry-Russell*, refusing to dismiss the claims of non-resident putative class members because of the distinctions between mass tort claims and class actions. But the court also dismissed the claims of two class representatives whose alleged injuries did not arise out of any contacts with the forum state (because they were not residents of or employed in the state). The *Molock* court made no effort to reconcile these holdings, which allow the exercise of personal jurisdiction over putative class members who could not establish personal jurisdiction if they had appeared as a named plaintiff in the case.

Other district courts outside of the Ninth Circuit that have reached a similar conclusion include *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360 (N.D. Ga. 2018) (adopting a Magistrate Judge's Report and Recommendation), and *In re Chinese–Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 5971622 (E.D. La. Nov. 30, 2017) (addressing the issue in the context of a long-running MDL proceeding).

The need for appellate guidance

As district courts on both sides of the split have acknowledged, class action plaintiffs could avoid the possibility that their nationwide class would be limited by *Bristol-Myers* simply by filing in the defendant's home forum. But the continued proliferation of decisions addressing *Bristol-Myers*' applicability to nationwide class action confirms that, for reasons of practicality or forum-shopping, plaintiffs' attorneys continue to file class actions against non-resident defendants in a perceived

"friendly" forum. The deepening divide in the district courts' rulings on this issue highlights the need for appellate guidance, to avoid the possibility a defendant's due process rights would hinge on the particular court in which it has been sued.