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Fifth Circuit rules that defendant did not waive Bristol-Myers personal jurisdiction defense asserted at class certification stage

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Takeaway: We previously wrote that the Seventh Circuit had become one of the first circuits to address the application of the Supreme Court's personal jurisdictional holding in *Bristol-Myers* to class actions, holding that *Bristol-Myers* does not apply to a nationwide class action filed in federal court under a federal statute. In *Cruson v. Jackson National Life Insurance Company*, -- F.3d --, No. 18-40605, 2020 WL 1443531 (5th Cir. Mar. 25, 2020), the Fifth Circuit viewed *Bristol-Myers* from a different perspective, ruling a non-resident defendant did not waive its objection to personal jurisdiction over the defendant with respect to the claims of non-resident class members by not raising the issue in motions to dismiss the named plaintiffs' individual claims.

Cruson and other named plaintiffs brought a putative class action against Jackson, alleging that Jackson breached annuities contracts by miscalculating and overcharging them for early-withdrawal fees. Jackson filed two rounds of 12(b)(6) motions and did not raise lack of personal jurisdiction as a defense in either motion. In its subsequent answer, however, Jackson objected to personal jurisdiction over it as to the claims of non-resident class members, based on *Bristol-Myers*. 2020 WL 1443531, at *1-*2.

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" and therefore not subject to general personal jurisdiction in California, the Supreme Court concluded that the California court lacked personal jurisdiction over Bristol-Myers with respect to the claims of the non-resident plaintiffs. In other words, the California court did not have specific jurisdiction over Bristol-Myers with respect to the claims of non-residents that had no connection to California.

In *Cruson*, after the plaintiffs moved to certify a nationwide class, Jackson argued the district court lacked specific personal jurisdiction over Jackson as to the claims of non-resident class members. The district court disagreed, holding that Jackson had waived any jurisdictional defense by failing to raise it in its Rule 12(b) motions attacking the claims of the named plaintiffs. The district court then certified a nationwide class of all individuals who had purchased variable annuities products from Jackson and then had incurred an early-withdrawal fee. 2020 WL 1443531, at *2-*3.

On appeal, the Fifth Circuit first determined that Jackson did not waive its personal jurisdiction defense based on *Bristol-Myers*, which had been issued seven months prior, by not substantively briefing the issue prior to

class certification. The appellate court reasoned that a personal jurisdiction objection concerning putative class members was not available to Jackson prior to certification because the nonresident class plaintiffs were not yet before the court, with the result that their claims were only hypothetical. As the Fifth Circuit explained, "[a]lthough *Bristol-Myers* provided new legal support for Jackson's objection, the Supreme Court's decision did not make the objection 'available.' Certification did." *Id*. at *6.

Though it held that Jackson's Bristol-Myers defense had not been waived, the Fifth Circuit also concluded that it could not address the merits of this jurisdictional defense for the first time on appeal. The appellate court noted that, upon remand, "Jackson is free to raise the defense again should plaintiffs seek to re-certify a class." *Id*. at *4 n.7.

The Fifth Circuit then vacated the class certification order because (1) the district court failed adequately to analyze the impact of variations in state law on a nationwide class; and (2) the district court failed to consider the individualized evidence supporting Jackson's affirmative defenses of waiver and ratification. *Id*. at *9-*12. The appellate court reasoned that waiver or ratification "would be based on customers' knowledge of the facts, not their knowledge of the legal effect of those facts." *Id*. at *11.

Finally, the Fifth Circuit held that the class plaintiffs failed to present a damages model showing that damages were capable of measurement on a classwide basis, taking issue with the lack of evidentiary support for the calculation of damages relating to living and death benefits. The court noted, however, that this issue might disappear on remand because at oral argument plaintiffs' counsel conceded they would no longer seek damages based on those benefits. *Id*. at *12.

The Fifth Circuit's holding in *Cruson* seems at least somewhat in tension with the Seventh Circuit's recent decision in *Mussat*. In *Mussat*, the court considered the impact of *Bristol-Myers* after the defendant raised the defense in a motion to strike the pleadings. In *Cruson*, however, the court allowed a defendant to address the impact of *Bristol-Myers* during class certification, despite the defendant not having raised the issue in its initial motions to dismiss.

Bottom line: The optimal practice for class defendants going forward may be to file a motion to strike the nationwide class allegations based on Rule 23(c)(1)(A) and (d)(1)(D). If a court denies such a motion as premature, there should be no argument the defendant waived the objection when it later challenges the claims of non-resident class members in opposing class certification.