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Second Circuit rejects personal jurisdiction over claims by out-of-state class plaintiffs and again quashes claim of "reasonable consumer" deception

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The issue of personal jurisdiction in class action litigation continues to be addressed by the federal appellate courts. We recently published an article about the Seventh Circuit's decision in *Mussat v. IQVIA,* No. 19-1204, 2020 WL 1161166 (7th Cir. Mar. 11, 2020), where it held that the Supreme Court's jurisdictional ruling in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), does not apply to a nationwide class action filed in federal court under a federal statute. *See Seventh Circuit rules that Bristol-Myers personal jurisdictional ruling does not apply to class actions* (March 30, 2020). Under *Mussat*, named plaintiffs who reside in the forum state can represent non-resident class members, even though the non-residents' claims do not arise from the defendant's contacts with the forum state

Two weeks ago, the Second Circuit addressed a different but closely-related issue, holding a district court does not have personal jurisdiction over a non-resident class action defendant with respect to the claims of out-of-state named plaintiffs. *Chen v. Dunkin' Brands, Inc* ., -- F.3d --, No. 18-3087-cv, 2020 WL 1522826 (2d Cir. Mar. 31, 2020). The Second Circuit also ruled on another issue we have covered in prior posts, reiterating that "context matters" in ruling that allegedly deceptive marketing would not as a matter of law mislead a "reasonable consumer." *See, e.g., Second Circuit: False labeling class actions – viewed in context, is the theory of deception plausible?* (Jan. 31, 2019).

In *Chen*, five plaintiffs filed a putative class action against Dunkin' Brands Inc. ("Dunkin Donuts") in the Eastern District of New York, alleging that Dunkin Donuts deceptively marketed two food products, the Angus Steak & Egg Breakfast Sandwich and the Angus Steak & Egg Wake-Up Wrap. They asserted that through misrepresentations on product labels and in various ads, Dunkin Donuts tricked the consuming public into believing that the "Angus Steak" offerings contained an "intact" piece of angus steak when they actually contained hamburger-like ground beef patties infused with various additives. The class plaintiff advanced (among other state law claims) claims under various state consumer protection statutes, including New York General Business Law ("GBL") Sections 349 and 350.

Dunkin Donuts, which is headquartered in Massachusetts and incorporated in Delaware, has franchises all over the United States, including in Flushing, New York, where one of the plaintiffs, New York resident Chufen Chen, purchased her Angus Steak products. The other four plaintiffs made their purchases from Dunkin Donuts outside of the state of New York.

Dunkin Donuts moved to dismiss on personal jurisdiction grounds as well as on the merits. The district court granted the motion to dismiss, ruling it did not have personal jurisdiction over Dunkin Donuts with respect to the claims of the out-of-state plaintiffs, further ruling that Ms. Chen did not plausibly allege

she was deceived by the alleged misconduct. The plaintiffs appealed and the Second Circuit affirmed. On the jurisdictional issue, and applying the Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the Second Circuit ruled that Dunkin Donuts was not subject to general jurisdiction in New York because it was not "at home" in New York, given that it was headquartered in Massachusetts and incorporated in Delaware. 2020 WL 1161166, at *4. Accordingly, because the New York federal court did not have specific jurisdiction over the claims of the out-of-state plaintiffs, those claims were appropriately dismissed for lack of personal jurisdiction under *Daimler* and Second Circuit decisions applying *Daimle*r. *Id*. at *4-*5. The Second Circuit also ruled that Dunkin Donuts' registration to do business in New York and designation of a registered agent to accept service of process in New York did not – in light of *Daimler* – amount to consent to be subject to general personal jurisdiction in New York. *Id*. at *3-*4. This ruling – rejecting pre-*Daimle*r decisions holding that an entity's registration to do business in New York amounted to consent to general jurisdiction – followed similar decisions by the three intermediate New York state appellate courts. *Id*. at *4 (collecting cases).

Regarding the merits of Ms. Chen's GBL claims, the Second Circuit concluded that the district court correctly determined as a matter of law that Dunkin Donuts' labels and ads would not have misled a "reasonable consumer." 2020 WL 1161166, at *5. The television ads, which used the term "steak," displayed zoomed-in images showing that the "Angus Steak" products were beef patties. Moreover, while "steak" can refer to an intact piece of meat, the Merriam-Webster Dictionary also defines "steak" as "ground beef prepared for cooking or for serving in the manner of a steak," such as chopped steak and Salisbury steak. *Id*.

Ms. Chen also asserted that the products did not in fact contain "Angus beef." The Second Circuit nevertheless affirmed the dismissal of this claim, noting that "context is crucial": Ms. Chen purchased the food products for $4 or less each; they were advertised as "grab-and-go products" that could be consumed without utensils; and a reasonable consumer making a purchase in this context would not be deceived into believing she was purchasing an "unadulterated piece of meat." 2020 WL 1161166, at *6. Accordingly, the district court correctly dismissed Ms. Chen's GBL claims.

On the issue of personal jurisdiction, the Second Circuit's decision in Chen addressed a different issue – personal jurisdiction over non-resident named plaintiffs – than the Seventh Circuit's decision in *Mussat*, which addressed personal jurisdiction over non-resident class members. And *Chen* involved state-law claims and claims under state consumer protection statutes, rather than under a federal statute (such as the TCPA claim in Mussat). The cases do not resolve whether a resident named plaintiff can represent non-resident class members in a class action asserting common law claims or claims under state statutes.

In recent district court decisions in the Second Circuit, and unlike in Chen, the resident named plaintiffs had stated viable state-law claims or claims under their own states' consumer protection statutes. *See, e.g., Napoli-Bosse v. General Motors LLC*, No. 3:18-cv-1720 (MPS), 2020 WL 1677089 (D. Conn. Apr. 6, 2020) (holding resident named plaintiff had stated a claim for breach of contract); *Lugones v. Pete and Gerry's Organic, LLC,* 19 Civ. 2097 (KPF), 2020 WL 871521 (S.D.N.Y. Feb. 21, 2020) (holding resident named plaintiffs had stated a claim under New York consumer protection statute). While these decisions dismissed the claims of non-resident named plaintiffs for lack of personal jurisdiction, they expressly reserved for later determination the issue of personal jurisdiction relative to the claims of non-resident class members. *See Napoli-Boose*, 2020 WL 1677089, at *3 n.4 (refusing to address personal jurisdiction

issue with respect to claims of "non-resident, absent class members" as "premature" before class certification); *Lugones*, 2020 WL 871521, at *4 (deferring "assessment of whether there is specific jurisdiction over the claims of putative non-New York class members until the class certification stage "). If resident named plaintiffs remain free to press common law and state statutory claims on behalf of non-resident class members, will the dismissal of the claims of non-resident named plaintiffs be a pyrrhic victory for a class defendant? The answer should be "no," because the class defendant should have a strong argument that a resident *named* plaintiff cannot represent the non-resident class members. As the Fifth Circuit recently confirmed, courts should be hesitant to certify nationwide classes pressing common law claims unless they have undertaken a meaningful and detailed "analysis of state law variations." *Cruson v. Jackson Nat'l Life Ins. Co* ., No. 18-40605, 2020 WL 1443531, at *9-*10 (5th Cir. Mar. 25, 2020) (reversing class certification of breach of contract claims for failure to undertake a rigorous analysis of state law variations). And resident named plaintiffs should be found to lack standing to assert claims under the consumer protection laws of other states. *See, e.g., In re Packaged Ice Antitrust Litig*., 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011) (holding "named plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury") (collecting cases); *In re Wellbutrin XL Antitrust Litig*., 260 F.R.D. 143, 157 (E.D. Pa. 2009) (finding plaintiffs lack standing "to bring claims under the laws of states where no named plaintiff is located" or suffered injury).

The U.S. Supreme Court may soon resolve the question of whether district courts can exercise personal jurisdiction over the claims of non-resident class members against non-resident defendants. Until the Supreme Court determines whether *Bristol-Myers Squibb* applies to class actions, class defendants should continue to attack nationwide class actions asserting common law and state statutory claims through personal jurisdiction challenges to the claims of non-resident named plaintiffs, as well as through more traditional class certification arguments against allowing named plaintiffs to press the claims of non-resident class members.