District Courts Remain Divided Over Supreme Court Decision in *Bristol-Myers Squibb's* Applicability to Class Action Claims

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Whether a non-resident defendant may be hauled into court to defend itself against non-resident plaintiffs who have no connection to the forum can have enormous implications, whether tactical, financial, or otherwise. Last year, in *Bristol Myers-Squibb Co. v. Superior Court* (*BMS*), the U.S. Supreme Court addressed the issue of whether a state court may exercise personal jurisdiction over non-resident defendants in a mass tort action. 137 S. Ct. 1773 (2017). In *BMS*, a group of mostly non-resident plaintiffs brought product liability claims in California state court against BMS, a non-resident defendant, relating to Plavix, a blood-thinning drug manufactured by BMS.

The non-resident plaintiffs did not purchase or use Plavix in California, and BMS's only connection to the state was that it sold Plavix in California. The California Supreme Court found that it had "case-linked" specific personal jurisdiction over the non-resident plaintiffs' claims because they mirrored the claims brought by the California plaintiffs. The U.S. Supreme Court disagreed, holding that continuous activity in a state, alone, does not create jurisdiction; instead, there must be a link between the forum and the individual lawsuit for a court to assert jurisdiction over a non-resident defendant.

The *BMS* decision provides clear guidance for mass tort actions involving non-resident plaintiffs. The U.S. Supreme Court, however, declined to address whether the *BMS* holding extends to class actions. Indeed, in her dissent, Justice Sonia Sotomayor noted that whether the *BMS* decision "[w]ould also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs" remained an open question. 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting). Unsurprisingly, following *BMS*, there has been discord among lower federal courts regarding the application of the *BMS* holding to class action claims. Despite the split in authority, thus far, the District Courts that have extended the *BMS* holding to class action claims outnumber the District Courts that have declined to do so.

Those courts applying the *BMS* holding have refused to exercise personal jurisdiction over the claims of unnamed, non-resident class members against non-resident defendants. The U.S. District Court for the Northern District of Illinois has been leading the charge. For example, in January 2018, the *DeBernardis* court held that it is more likely than not that courts will apply *BMS* to "outlaw nationwide class actions" in forums in which general jurisdiction does not exist over foreign defendants. *DeBernardis v. NBTY, Inc*., No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018). In fact, federal courts in Illinois have consistently held that *BMS* prevents federal courts from exercising specific jurisdiction over non-resident class members whose claims have no connection to the forum state. *See, e.g., Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc.*, No. 16 C 9281, 2018 WL 3474444 (N.D. Ill. July 19, 2018); *Al Haj v. Pfizer Inc.*, No. 17 C 6730, 2018 WL 1784126 (N.D. Ill. April 13, 2018); *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018); *LDGP, LLC v. Cynosure, Inc*., No.

15 C 50148, 2018 WL 439122 (N.D. Ill. Jan. 16, 2018); *McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017).

Federal courts in various other jurisdictions have also rejected arguments that personal jurisdiction requirements should be relaxed in the class action context. *See, e.g., In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017); *Spratley v. FCA US LLC*, No. 3:17-CV-0062, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017); *Maclin v. Reliable Reports of Texas, Inc*., No. 1:17-CV-2612, 2018 WL 1468821 (N.D. Ohio Mar. 26, 2018); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-165, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017).

Other federal District Courts, relying upon a panoply of justifications and led by the U.S. Court of Appeals for the Ninth Circuit and other California federal courts, have declined to extend *BMS* to nationwide class actions. In *Fitzhenry-Russell*, for example, the U.S. District Court for the Northern District of California held that absent class members are not parties, or fully "present," for purposes of personal jurisdiction evaluation and, thus, need not be considered. *Fitzhenry-Russel v. Dr. Pepper Snapple Group, Inc*., No. 17-cv-00564, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017). The same court later held that *BMS* did not require the dismissal of claims by non-resident plaintiffs who did not have a case-specific connection to the forum, relying upon the conclusion that the federalism rationale outlined in *BMS* applies only to state court cases. *Sloan v. General Motors, LLC*, 287 F. Supp. 3d 840 (N.D. Cal. 2018).

In *In re Chinese-Manufactured Drywall Products*, the U.S. District Court for the Eastern District of Louisiana held that procedural differences between mass actions and class actions rendered *BMS* inapplicable to class actions. *See In re Chinese-Manufactured Drywall Prod. Liab. Litig*., No. MDL 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017). These justifications, however, seem to ignore the underlying question of whether a defendant's due process rights are implicated by the claims of absent class members. Other district courts have been reluctant to address the question in similar actions, perhaps waiting until the various appeals courts further consider the issue.

We anticipate that the case law surrounding application of the *BMS* decision to class action claims will continue to evolve. At first blush, the post-*BMS* trends observed in the District Courts should be encouraging to companies conducting business across the country and seeking to evade nationwide class actions claims brought in plaintiff-friendly forums. However, the *BMS* decision may ultimately result in a decrease in the consolidation of claims, prompting more plaintiffs to bring numerous state-specific class action cases and resulting in a multiplication of cases that a defendant may be forced to litigate. Either way, the inconsistency in the application of *BMS* by the federal courts creates uncertainty for defendants and creates a dangerous opportunity for forum-shopping plaintiffs. We will continue to monitor the shifting landscape in order to evaluate the evolving implications of *BMS* in the class action context.

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