American Bar Association | Section of Litigation
Class Actions & Derivative Suits
Winter 2020, Vol. 30 No. 2

ARTICLES

Does *Bristol-Myers Squibb Co. v. Superior Court* Apply to Class Actions?

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Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County (*BMS*), 137 S. Ct. 1773 (2017), sent shock waves through the class action bar, leading defendants to contest personal jurisdiction in numerous cases by arguing that unnamed class members have no connection to their putative representatives' chosen forum.

With federal appeals courts poised to decide the applicability of *BMS* in the class action setting, it is a good time to reckon with the following questions now facing judges and practitioners: Does *BMS* apply to the claims of absent class members? Why or why not?

We argue it should not, as a defendant's due process rights find protection in the express provisions of Rule 23 of the Federal Rules of Civil Procedure. Arguments for determining personal jurisdiction by reference to those who are represented (absent class members), rather than joined (mass tort claimants), in a lawsuit misconceive the nature of a class action and conflict with settled precedent. Applying *BMS* to class member claims, moreover, would impair efficiencies furthered by representative litigation and distort the civil justice playing field. Jurisdiction over major controversies would exist only in a defendant's home state, unless plaintiffs filed overlapping class actions in multiple states.

The *BMS* Decision

BMS involved mass tort claims and applied the existing principle that a plaintiff's claim must arise out of or relate to the defendant's forum contacts for the court to have specific personal jurisdiction over the defendant. The litigation centered on a group of individual plaintiffs' alleged injuries from the drug Plavix. The plaintiffs sued the drug's manufacturer, Bristol-Myers Squibb, in California state court. But Bristol-Myers had not developed Plavix in California. Nor had Bristol-Myers developed a marketing strategy for Plavix in California or manufactured, packaged, labeled, or worked on regulatory approval of Plavix in California.

The U.S. Supreme Court reversed a decision that had allowed all of the claims, including those of non-Californians, to proceed in California state court. Applying "settled principles" of specific jurisdiction, the Court held that the Due Process Clause requires an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." 137 S. Ct. at 1780–81. In short, for a cause of action to proceed, it must be meaningfully connected to the forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–78 (1985). And because the nonresident plaintiffs in *BMS* were not prescribed Plavix in California, didn't purchase or use the drug in California, and weren't injured in California, the

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Supreme Court held that the California courts lacked specific jurisdiction over Bristol-Myers in connection with their claims.

Justice Sotomayor dissented and indicated that the *BMS* decision was limited to mass tort and individual actions: "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." 137 S. Ct. at 1789 n.4.

Aftereffects and Analysis of *BMS* in the Class Context

Defendants in class actions across the country seized on *BMS*, advocating dismissal for lack of personal jurisdiction with respect to the claims of nonresident proposed class members. Many defendants alleged due process violations from being haled into courts without power to adjudicate putative class member claims. Nonetheless, in a class action in federal court, application of Rule 23 ensures the judgment will fairly bind the defendant and the class. As the Senate Judiciary Committee explained, "the strict requirements of Rule 23 . . . are intended to protect the due process rights of both unnamed class members and defendants." S. Rep. No. 109-14, at 14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14.

It is through the act of certifying a class that a court asserts personal jurisdiction in relation to the class members' claims: "The granting of class certification under Rule 23 authorizes a district court to exercise personal jurisdiction over unnamed class members who otherwise might be immune to the court's power." *In re Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233, 1245 (11th Cir. 2006); *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (a certification order gives the class an "independent status" such that the judgment may bind its members).

A federal court rejected a *BMS*-based due process argument in *In re Chinese-Manufactured Drywall Products Liability Litigation*, No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017). It ruled that "in class actions, the citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes." *Id.* at *12. Distinguishing *BMS*, the court stated that class and mass tort actions are different in kind, including because "a class action has different due process safeguards" and "for a case to qualify for class action treatment, it needs to meet the additional due process standards for class certification under Rule 23." *Id.* at *14.

Under Rule 23, class members' claims are tested *through* a typical and adequate representative plaintiff. "This means that class claims are limited to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 162 (1982) (Burger, C.J., concurring in part and dissenting in part). Hence, the representative plaintiff prosecutes the action while an unnamed class member "is not required to do anything. He may sit back and allow the litigation to run its course." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

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Based on this distinction inherent to representative litigation, "most of the courts that have encountered this issue have found that [*BMS*] does not apply in the federal class action context." *Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1332 (D. Minn. 2018) (citing, inter alia, *Chernus v. Logitech, Inc.*, No. CV 17-673 (FLW), 2018 WL 1981481, at *7 (D.N.J. Apr. 27, 2018)). One court, for instance, reasoned that specific jurisdiction requires "the suit" to arise out of or relate to the defendant's forum contacts, and that with a class action "there is only one suit: the suit between Plaintiff and Defendant. While Plaintiff may end up representing other class members, this is different than a mass action where independent suits with independent parties in interest are joined for trial." *Morgan v. U.S. Xpress, Inc.*, No. 3:17-CV-00085, 2018 WL 3580775, at *5 (W.D. Va. July 25, 2018).

Another court noted that Rule 23's requirements ensure "a unitary, coherent claim to which [a defendant] need respond only with a unitary, coherent defense," and the court therefore "perceive[d] no unfairness in haling the defendant into court to answer to [such a claim] in a forum that has specific jurisdiction over the defendant based on the representative's claim." *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018); *see also, e.g.*, *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) (finding *BMS* "meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff"); *Day v. Air Methods Corp.*, No. 5:17-183-DCR, 2017 WL 4781863, at *2 (E.D. Ky. Oct. 23, 2017) (concluding that "the inquiry for personal jurisdiction lies with the named parties of the suit asserting their various claims against the defendant, not the unnamed proposed class members").

Before *BMS* as well, federal courts held that personal jurisdiction over the defendant is determined solely by reference to class representatives, not those they propose to represent. *See Ambriz v. Coca-Cola Co.*, No. 13-cv-03539-JST, 2014 WL 296159, at *6 (N.D. Cal. Jan. 27, 2014) (holding that "a defendant's contacts with the named plaintiff in a class action, without reference to the defendant's contacts with unnamed members of the proposed class, must be sufficient for the Court to exercise specific personal jurisdiction over the defendant"); *AM Tr. v. UBS AG*, 78 F. Supp. 3d 977, 986 (N.D. Cal. 2015) ("[C]laims of unnamed class members are irrelevant to the question of specific jurisdiction.").

By contrast, most courts that have applied *BMS* to dismiss claims in class actions disavowed personal jurisdiction for claims not of absent class members but of named plaintiffs. *See*, *e.g.*, *In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185-BLF (N.D. Cal. Feb. 12, 2018), ECF No. 113 (named plaintiffs failed to establish personal jurisdiction); *In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696 (BMC) (GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) (claims of named plaintiffs did not give rise to personal jurisdiction over defendant in New York); *Ferrari v. Mercedes Benz USA, LLC*, No. 17-cv-00018-YGR, 2017 WL 3115198, at *2–3 (N.D. Cal. July 21, 2017) (lack of personal jurisdiction with respect to named plaintiffs); *Jordan v. Bayer Corp.*, No. 4:17-cv-865 (CEJ), 2017 WL 3006993, at *4 (E.D. Mo. July 14, 2017) (same).

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Absent class members, by definition, are not "present" or joined; instead, they are represented. Rule 23(d)(1)(B)(iii) empowers the court to allow particular class members to intervene or "otherwise come into the action." There would be no need to give the court discretion to let class members "into the action" if they were already in it for jurisdictional purposes.

Personal jurisdiction's doctrinal sibling, venue—also a waivable defense typically addressed at the outset of the case—is analyzed in class actions by reference to the named plaintiff alone. *United States v. Trucking Emp'rs, Inc.*, 72 F.R.D. 98, 100 (D.D.C. 1976). Likewise, "requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 367 (3d Cir. 2015). Absent class members also are not parties, in diversity suits not based on the Class Action Fairness Act, for purposes of assessing the amount in controversy and whether complete diversity of citizenship exists. *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002); *Snyder v. Harris*, 394 U.S. 332, 338 (1969).

A defendant seeking to extend *BMS* must, therefore, contend that "[a]lthough absent class members are *not* parties for purposes of diversity of citizenship, amount in controversy, Article III standing, and venue, they *are* parties for purposes of personal jurisdiction over the defendant." *Al Haj v. Pfizer Inc.*, 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018). But "[t]hat cannot be right. Personal jurisdiction shares a key feature with those other doctrines: each governs a court's ability, constitutional or statutory, to adjudicate a particular person's or entity's claim against a particular defendant." *Id.*

After the case-inception stage, too, class members "are almost never subject to counterclaims or cross-claims, or liability for fees or costs." *Shutts*, 472 U.S. at 810; *see Donson Stores, Inc. v. Am. Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973) (holding that counterclaims may not be brought against absent class members). Nor are they usually subject to discovery. *Shutts*, 472 U.S. at 810 n.2; *see, e.g.*, *In re Worlds of Wonder Sec. Litig.*, No. C-87-5491 SC (FSL), 1992 WL 330411, at *6 (N.D. Cal. July 9, 1992) (denying "highly irregular discovery" sought from absent class members).

Toward the end of a case, absent class members cannot appeal an adverse judgment, *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 458 (7th Cir. 1997), and unless a class is certified, they are neither bound by the judgment nor precluded from obtaining certification in a follow-on suit, *Smith v. Bayer Corp.*, 564 U.S. 299, 313–17 (2011).

The Supreme Court, for largely pragmatic reasons, has endorsed treating class members as parties only for purposes of tolling statutes of limitations and appealing settlement approval orders. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550–56 (1974); *Devlin*, 536 U.S. at 10–11. Other than in those two procedural contexts, however, unnamed class members are not normally accorded party status. Thus, for nearly 50 years it has been held that "Rule 23 must be interpreted to allow inclusion of all class members, whatever their connection with the forum." *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974).

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A class may be certified only if it is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Given that unnamed class members are never joined, subjecting their claims to a personal jurisdiction inquiry makes little sense doctrinally. Indeed, the court lacks personal jurisdiction over the class itself unless and until it is certified. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 137–38, 141 (3d Cir. 1998).

No purpose of Rule 23 would be served by treating class members as parties in personal jurisdiction analysis. Doing so would not only conflict with existing law but also encourage wasteful, duplicative litigation in multiple forums.

Appellate Outlook

Appeals raising these issues are pending in the Seventh and D.C. Circuits and were argued within a week of each other last fall.

On September 27, 2019, the Seventh Circuit heard *Mussat v. Iqvia*, a Telephone Consumer Protection Act case in which the Illinois defendant invoked *BMS* to challenge personal jurisdiction on the grounds that class member claims did not relate to any Illinois activity. After the district court struck the nationwide class allegations, *see* 2018 WL 5311903, the Seventh Circuit granted leave to appeal, *In re Mussat*, No. 18-8024, 2019 U.S. App. LEXIS 26924 (7th Cir. Jan. 25, 2019).

Based on the oral argument, the *Mussat* panel seems likely to reverse. The Seventh Circuit judges repeatedly remarked that accepting the defendant's position would require overturning established class action precedent. One judge said she found it "difficult to believe that the Supreme Court thought in *Bristol-Myers* that it was ushering in this dramatic change to the way everyone has understood class actions to work for more than 50 years." Another judge called the defendant's argument "inconsistent with this whole notion of class actions, and I would think we would be behaving very consistently with Supreme Court jurisprudence to recognize that mass actions, such as Bristol-Myers faced in California, are simply not the same thing."

Similarly, in *Whole Foods Market Group, Inc. v. Molock*, a D.C. Circuit panel appeared skeptical that *BMS* can be extended to absent class members, with judges variously asking, "How do you talk about a court's jurisdiction over someone who's not a party?" and stating that "[t]he Supreme Court has said that putative class members are not parties." The order on appeal in *Whole Foods* squarely concludes that *BMS* "does not apply to class actions." 297 F. Supp. 3d 114, 126 (D.D.C. 2018).

As of this publication date, the appellate decisions in *Mussat* and *Whole Foods* have not issued. Yet, the judges' questioning echoes the main points from our preceding discussion: Class actions are representative litigation, and the claims of unnamed class members are not joined as in mass tort litigation. Due process protections in a class action are secured by applying Rule 23's requirements. Personal jurisdiction, like any other defense, should be assessed with regard to the parties actually present in the suit.

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