Class Action Defense: Don't Give Up On Bristol-Myers Squibb

By **Jennifer Nagle, Wesley Prichard and Krishna Hegde** (October 25, 2023)

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In its 2017 Bristol-Myers Squibb Co. v. Superior Court of California decision, the U.S. Supreme Court held in the mass-tort context that federal courts lack specific personal jurisdiction over nonresident defendants with respect to the claims of nonresident plaintiffs.[1]

Logic suggests that, similarly, federal courts would lack personal jurisdiction over a nonresident defendant concerning the claims of out-of-state absent class members in putative class actions. Yet, the application of Bristol-Myers Squibb to class actions caused an immediate divide.

Over the few years following Bristol-Myers Squibb, federal courts issued a flurry of decisions on the issue, including decisions from five federal courts of appeal in 2020 and 2021.

Unfortunately, those decisions reflected vastly inconsistent positions, and federal district court decisions followed suit. Class action defendants have since been waiting patiently for further guidance from federal courts or, better yet, for the Supreme Court to grant a petition for writ of certiorari and resolve the confusion.

Unfortunately, two years have passed since those initial decisions and class action defendants still have no answer to the pressing question: Is a specific personal jurisdiction argument viable as to the claims of nonresident putative class members? The answer remains a resounding "maybe."

But rather than be discouraged, class action defendants should be encouraged to consider carefully whether, where and when arguing lack of specific personal jurisdiction under Bristol-Myers Squibb may be advantageous.

The Bristol-Myers Squibb Class Action Landscape

In the years immediately following Bristol-Myers Squibb, five federal courts of appeal considered the decision's application to class actions and reached variable conclusions.

The U.S. Courts of Appeals for the Sixth[2] and Seventh[3] Circuits are the only ones to have directly opined on whether Bristol-Myers Squibb extends to class actions — Lyngaas v. Curaden AG in 2021 and Mussat v. IQVIA Inc. in 2020, respectively. And, according to those courts, it does not.

Both circuits held that courts need not consider whether they have specific personal jurisdiction over the claims of out-of-state absent class members, so long as specific personal jurisdiction exists as to the claims of the named plaintiff(s).

The U.S. Courts of Appeals for the Fifth,[4] D.C.[5] and Ninth[6] Circuits have only addressed the proper timing of a Bristol-Myers Squibb jurisdictional argument, but have not

opined on the threshold question of whether Bristol-Myers Squibb extends to class actions.

In the Fifth and Ninth Circuit cases — Cruson v. Jackson National Life Insurance Co. in 2020 and Moser v. Benefytt Inc. in 2021 — the courts below had granted class certification and rejected Bristol-Myers Squibb jurisdictional arguments on the ground that the defendants had waived the defense by not raising it at the motion to dismiss stage.

Each court reversed and remanded, holding that the defendants could not have waived a jurisdictional defense as to absent class members, because those individuals were not yet parties to the case.

As explained by the Ninth Circuit, the defendant could not waive the defense because "a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case" was not available prior to certification, and to "conclude otherwise would be to endorse the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified."[7]

The U.S. Court of Appeals for the D.C. Circuit held similarly in Molock v. Whole Foods Market Group Inc. in 2020, albeit upon review of the California Supreme Court's decision rejecting the defendant's Bristol-Myers Squibb argument on a motion to dismiss.[8]

There, the court affirmed the denial of the defendant's motion to dismiss, but not on the merits; rather, because it was premature where "[p]utative class members become parties to an action — and thus subject to dismissal — only after class certification."[9]

Since the Ninth Circuit's decision in 2021, little progress has been made to clear up the state of the law, and no additional circuit courts of appeal have taken on the issue.[10]

Hopes for clarification were dashed earlier this year when the Supreme Court denied a petition for writ of certiorari in Fischer v. Federal Express Corp. earlier this year that would have materially addressed the question.[11]

Analysis and Takeaways

Where does this leave class action defendants?

In the Sixth and Seventh Circuits, a Bristol-Myers Squibb jurisdictional argument will likely be challenging. In the Fifth, D.C. and Ninth Circuits, prevailing authority instructs that class action defendants can make the argument, but must do so at or after class certification — and they cannot waive the argument by waiting until that time.

In other words, it's anyone's ballgame. And this is magnified by the fact that district courts across the country, with little to no guidance, have reached all sorts of decisions on this issue.

The trend among courts of appeals that have directly considered the issue seems to point toward Bristol-Myers Squibb not applying to class actions, as noted above, but some district courts have held the opposite and dismissed putative class claims at the pleadings stage for lack of jurisdiction over nonresident absent class members' claims.[12]

In Stacker v. Intellisource LLC, for example, the U.S. District Court for the District of Kansas agreed in 2021 that Bristol-Myers Squibb extended to class actions and struck class

claims from the complaint because a nationwide class could never be certified where it "could include claims of class members that have no connection to Kansas and would be subject to dismissal due to lack of personal jurisdiction."[13]

Class action defendants should canvas their jurisdiction's authority on this issue and carefully consider whether to press and preserve specific personal jurisdiction arguments based on Bristol-Myers Squibb.

The authority is inconsistent to be sure, but it does not foreclose the argument at either the pleadings or class certification stage.

Pressing the issue early may provide leverage for defendants throughout pleadings and discovery stages, communicating to plaintiffs attorneys that, even if the court declines to address the argument on a motion to dismiss, time may be up once class certification comes around. It may also serve as a useful tool in settlement negotiations.

And making the Bristol-Myers Squibb argument early and often may also eventually pay off in the wake of various Supreme Court decisions trending toward increased scrutiny over jurisdictional issues in class actions.

For example, the hight court in TransUnion LLC v. Ramirez in 2021 held that allowing "unharmed plaintiffs to sue defendants" would violate Article III because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[14]

Further, the court in Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System, also in 2021, emphasized that issues relevant to the class certification inquiry cannot be deferred until after the certification decision, even if they overlap with merits issues.[15]

Together, TransUnion and Goldman Sachs signal that a district court should consider whether it has specific personal jurisdiction over the claims of out-of-state absent putative class members at the class certification stage, if not earlier.[16]

A court deferring such a decision — or worse, ignoring it entirely — may result in the exercise of judicial power to certify a class of claims over which the court has no jurisdiction.[17]

Class action defendants should continue to argue Bristol-Myers Squibb's application at the earliest possible stages, but no later than the class certification stage, in order to ensure the issue is preserved for appeal, even while federal courts remain mixed on the issue.

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[1] See 582 U.S. 255, 265 (2017).

[2] Lyngaas v. Curaden AG, 992 F.3d 412, 433-38 (6th Cir. 2021) (declining to extend Bristol-Myers Squibb to out-of-state putative class members).

[3] Mussat v. IQVIA, Inc., 953 F.3d 441, 446-48 (7th Cir. 2020) (declining to extend Bristol-Myers Squibb to out-of-state putative class members).

[4] Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240, 249-52 (5th Cir. 2020) (remanding for adjudication of defendant's personal jurisdiction defense as to putative non-resident class members, which was not waived but could not be addressed until class certification).

[5] Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 295-96 (D.C. Cir. 2020) (holding that, because the class had not yet been certified, the jurisdictional question was premature).

[6] Moser v. Benefytt, Inc., 8 F.4th 872, 877 (9th Cir. 2021) (remanding for adjudication of defendant's personal jurisdiction defense as to putative non-resident class members, which was not waived but could not be addressed until class certification).

[7] Id. at 877 (internals omitted).

[8] Molock, 952 F.3d at 300.

[9] Id. at 298.

[10] In 2022, the Third Circuit suggested in Kelly v. RealPage Inc. that it was aligned with other courts that Bristol-Myers Squibb does not apply to class actions. 47 F.4th 202, 211 n.7 (3d Cir. 2022). But the point was made only in passing, at the end of a footnote with no analysis.

[11] Fischer v. Fed. Express Corp., 143 S. Ct. 1001 (2023) (denying petition for writ of certiorari concerning the question of applicability of Bristol-Myers Squibb to collective actions).

[12] See Stacker v. Intellisource, LLC, No. 20-2581, 2021 WL 2646444, at *10-11 (D. Kan. Jun. 28, 2021); Spratley v. FCA US LLC, No. 17-62, 2017 WL 4023348, at *7 (N.D.N.Y. Sept. 12, 2017).

[13] 2021 WL 2646444, at *10-11.

[14] 141 S. Ct. 2190, 2207-08 (2021) (emphasis in original and quoting Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 446 (2016) (Roberts, C.J., concurring)). The Supreme Court has previously emphasized the importance of applying jurisdictional limitations in the class action context. See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 146 (2021) (in class actions, "courts must be more careful to insist on the formal rules of standing, not less so").

[15] 141 S. Ct. 1951, 1960-61 ("As we have repeatedly explained, a court has an obligation before certifying a class to determine that Rule 23 is satisfied, even when that requires inquiry into the merits." (internals omitted)).

[16] This is unlike a statutory standing inquiry, which the Supreme Court in Amchem

Prods., Inc. v. Windsor, 521 U.S. 591 (1997) and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) held could be deferred until after the certification decision since statutory standing does not implicate a court's jurisdiction. See Lexmark Int'l, Inc. v. Static Ctrl. Components, Inc., 572 U.S. 118, 128 n.4 (2014) (emphasizing that the label "statutory standing" is "misleading" because the inquiry "does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case").

[17] See Flecha v. Medicredit, Inc., 946 F.3d 762, 770-71 (5th Cir. 2020) (Oldham, J., concurring); Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can who 'injury in fact' resulting from the action which they seek to have the court adjudicate.").