Bloomberg Law

Class Action Litigation Report®

Jurisdiction

Reading the Tea Leaves of Early Post-*Bristol-Myers* Personal Jurisdiction Decisions

The U.S. Supreme Court ruling in *Bristol-Myers Squibb Co. v. Superior Court* has important implications for defendants seeking a federal forum in product liability cases, attorneys Geoffrey Wyatt and Jordan Schwartz say. However, recent decisions will likely embolden plaintiffs' lawyers' attempts to press forward with forum-shopping tactics, leaving open whether federal courts will take *Bristol-Myers* seriously and apply its core holding faithfully.

BY GEOFFREY WYATT AND JORDAN SCHWARTZ

In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), the Supreme Court made clear that specific personal jurisdiction is lacking over defendants with respect to claims asserted by plaintiffs whose allegations have no connection to the forum where an action is commenced – even when those plaintiffs join their claims with those of plaintiffs who live in the forum state or whose claims have some other connection to the forum.

This holding has important implications for defendants seeking a federal forum in product liability cases (and plaintiffs seeking to avoid one). For years, enterprising plaintiffs' lawyers in places like California and Missouri had been joining dozens of plaintiffs together in a single complaint – often with just a handful or even one in-state plaintiff among them, along with at least one plaintiff domiciled in the defendant's home state – to defeat complete diversity of citizenship and effectively bar removal while purportedly establishing personal jurisdiction through the claims of the in-state plaintiffs.

Geoffrey Wyatt, a counsel at Skadden in Washington, D.C., has represented an array of companies in proceedings involving medical and industrial products at both the trial and appellate levels.

Jordan Schwartz, an associate at Skadden in Washington, D.C., represents clients in purported class actions and multidistrict litigation, particularly consumer fraud class actions in federal and state courts.

After *Bristol-Myers*, this tactic no longer works; as federal courts have generally been quick to recognize, personal jurisdiction is lacking over the claims of the out-of-state plaintiffs in such joined actions, allowing defendants to remove and request dismissal of the claims over which personal jurisdiction is lacking before subject-matter jurisdiction is decided, leaving only completely diverse parties.

Already, though, plaintiffs' attorneys have been experimenting with attempted work-arounds to keep their forum-shopping hopes alive. One approach has been to allege a contractual relationship between the principal, out-of-state defendant and an in-state defendant such as a retailer or distributor. Another approach has been to allege a conspiracy between the primary foreign defendant and an in-state defendant. These approaches should be nipped in the bud. Both the reasoning of the Supreme Court's decision in *Bristol-Myers* and earlier decisions by other courts make clear that plaintiffs cannot create personal jurisdiction merely by adding allegations of relationships based on theories of contract or conspiracy between in-state and out-of-state defendants to their complaints.

In *Bristol-Myers*, more than 600 plaintiffs, most of whom were not California residents, sued Bristol-Myers

 ISSN 1529-0115

Squibb (''BMS'') in state court, alleging that they had sustained injuries resulting from their use of Plavix, a prescription drug manufactured by BMS. 137 S. Ct. at 1777-78. The Supreme Court held that personal jurisdiction was lacking over the claims of the out-of-state residents. The Court explained that ''[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California'' did not suffice for purposes of due process; ''[w]hat is needed . . . is a connection between the forum and the specific claims at issue'' – i.e., those being asserted by the particular plaintiff. *Id.* at 1781.

In addition to evaluating BMS's own contacts with California, the Supreme Court also rejected the plaintiffs' alternative, ''last ditch contention'' that jurisdiction was proper with respect to BMS based on ''[t]he bare fact that BMS contracted with [McKesson,] a California distributor,'' to distribute Plavix nationally. 137 S. Ct. at 1783. As the Court explained, due process must '' 'be met as to each defendant over whom a state court exercises jurisdiction.' '' *Id.* (citation omitted). That standard could not be satisfied by exercising personal jurisdiction over BMS based solely on the actions of McKesson; after all, ''it [was] not alleged that BMS engaged in relevant acts together with McKesson in California. Nor [was] it alleged that BMS [was] derivatively liable for McKesson's conduct in California.'' *Id.* In addition, ''the nonresidents [] adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it *to them*.'' *Id.* (internal quotation marks and citation omitted) (emphasis added). In short, ''[t]he bare fact that BMS contracted with a California distributor [was] not enough to establish personal jurisdiction in the State.'' *Id.*

Seizing on this language about what the *Bristol-Myers* plaintiffs did ''not allege[]'' about BMS and McKesson, plaintiffs seeking to trip up removals to federal court have argued that *Bristol-Myers* left a wide door open to contract-based theories of jurisdiction. They contend that this part of the decision should be read to mean that, if BMS had actually engaged in ''relevant acts together with McKesson in California,'' that would have sufficed to support the exercise of personal jurisdiction by a California court. But *Bristol-Myers* said no such thing, and in context, it is clear that the Court was merely emphasizing just how tenuous the alleged connection to California was – as is evident from its description of the theory as a ''last ditch contention.''

Fortunately, the few courts that have had occasion to test plaintiffs' arguments to the contrary have largely rejected them. For example, in *Zon LED, LLC v. Power Partners, Inc.*, No. CIV-16-1090-D, 2017 BL 330416 (W.D. Okla. Sept. 19, 2017), a Michigan corporation sued a Massachusetts distributor in Oklahoma, alleging that power-supply products sold by the distributor in Michigan were defective. In addition to suing the actual Massachusetts-based distributor of the products in question, the plaintiff also sued an Oklahoma corporation that happened to be the ''United States presence'' and ''a distribution center'' for the Chinese company that manufactured the allegedly defective products. The plaintiff alleged that the Oklahoma company ''cultivated [the plaintiff's] interest'' in the products and ''induced Plaintiff to purchase'' them. The Michigan company further alleged that the Massachusetts distributor had an ongoing contractual relationship with the Oklahoma company as the American representative of the Chinese manufacturer, which supposedly sufficed to provide the necessary contacts with Oklahoma to permit the exercise of specific personal jurisdiction over the Massachusetts distributor there. The court rejected this theory of personal jurisdiction, unable to ''conclude that *the contractual relationship between [the Michigan] Plaintiff and [the Massachusetts distributor]* had a minimally sufficient connection to Oklahoma to establish specific jurisdiction for this action.'' In so doing, the court relied on the portion of *Bristol-Myers* rejecting BMS's relationship with a California-based distributor as a valid basis for specific jurisdiction. As in *Bristol-Myers*, the court reasoned, ''[t]he fact that [the Massachusetts distributor] may have some contractual relationship with [the Oklahoma distribution center for the Chinese manufacturer] is not enough to establish personal jurisdiction over [the Massachusetts company] for Plaintiff's suit in Oklahoma regarding sales to Plaintiff in Michigan.''

Plaintiffs have also attempted to justify the exercise of specific personal jurisdiction over out-of-state corporations by courts in states where neither the plaintiff nor the defendant resides, based on highly attenuated conspiracy-based theories of personal jurisdiction. Plaintiffs advancing these theories essentially seek to impute an in-state defendant's contacts with the forum to the out-of-state defendant irrespective of whether the foreign defendant had any contact with the forum itself. But as one federal court recently recognized, ''it is highly unlikely that any concept of conspiracy jurisdiction survived the Supreme Court's ruling in *Walden v. Fiore*, 134 S. Ct. 1115 (2014).'' *In re Dental Supplies Antitrust Litig.*, 16 Civ. 696 (BMC)(GRB), 2017 BL 332564 (E.D.N.Y. Sept. 20, 2017). After all, *Walden* recognized that '' 'a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.' '' *Id.* (quoting *Walden*, 134 S. Ct. at 1123). Notably, this principle was reiterated in *Bristol-Myers*, with the Supreme Court reaffirming that due process must '' 'be met as to each defendant over whom a state court exercises jurisdiction.' '' 137 S. Ct. at 1783. (citation omitted).

Applying this paradigm in *In re Dental Supplies Antitrust Litigation*, the court dismissed a complaint filed against Burkhart, a regional distributor of dental products. The gist of the plaintiffs' allegations was that Burkhart and others had agreed to fix prices on dental supplies nationwide. But Burkhart did not sell its products directly in New York; instead, it supplied a group purchasing organization that in turn sold Burkhart-distributed products to its members. Among other grounds, the plaintiffs argued that jurisdiction could be based on Burkhart's alleged conspiracy with other distributors that did sell products directly in New York, arguing that Burkhart's alleged agreement to participate in price-fixing that had effects in New York sufficed to impute the co-conspirator's New York contacts to it. The court rejected this argument, emphasizing that the jurisdictional inquiry must focus on the individual defendant's contacts with the forum, citing both *Walden* and *Bristol-Myers*.

Notably, even before *Bristol-Myers* and *Walden*, courts trod cautiously when confronted with claims of personal jurisdiction based on an out-of-state defendant's supposed conspiracy with a forum defendant. In *National Industrial Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995), for example, the Texas Supreme Court

   ISSN 1529-0115

concluded that the exercise of conspiracy-based jurisdiction so ''disregard[ed] guiding principles'' of due process that it issued a writ of mandamus to vacate an order denying a motion to dismiss on personal jurisdiction grounds. There, Texas plaintiffs commenced a series of product-liability suits against multiple defendants, including the National Industrial Sand Association (''NISA''), a Maryland-based lobbying group, in Texas state court arising out of injuries allegedly caused by silica in industrial sand and protective equipment. NISA did not manufacture or supply sand or protective equipment; rather, it merely represented its members' interests before governmental bodies. The trial court's sole basis for exercising personal jurisdiction over the out-of-state lobbying group was that it conspired with a Texas company to suppress information on the dangers of silica and succeeded in defeating a ban on the use of abrasives containing high levels of silica. The Texas Supreme Court conditionally granted NISA's petition for a writ of mandamus, ''declin[ing] to recognize the assertion of jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state.'' *Id.* at 773.

The decisions discussed above provide a sound analytical framework for assessing the kinds of loose jurisdictional theories plaintiffs are advancing in the wake of *Bristol-Myers*. As these decisions appropriately recognize, automatically attributing the contacts of a forum-distributor or retailer to an out-of-state manufacturer based on unspecified contractual relationships or inadequately pled conspiracies disregards the proper focus of the personal jurisdiction inquiry, which is (aptly) *personal* and individual in nature. Specifically, a court should ask whether the alleged out-of-state manufacturer purposefully established its own contacts sufficient to satisfy due process – and not merely whether the manufacturer's business partners have done so.

For example, when a plaintiff attempts to predicate personal jurisdiction over an out-of-state manufacturer on its contractual relationship with an in-state retailer or distributor, the court should scrutinize the allegations to determine whether the in-state defendant actually ''played any significant part in [the *manufacturer's*] course of dealing'' with respect to the transaction giving rise to the lawsuit. *Zon LED*, 2017 BL 330416. In other words, the allegations must not only connect the out-of-state defendant to the forum, but also tie its relevant forum-contacts to the conduct giving rise to the claims at issue. Similarly, when confronted with a conspiracy-based theory of personal jurisdiction, the pertinent inquiry should focus on whether the out-of-state defendant engaged in any forum-based acts in furtherance of the conspiracy. And even then, the forum-based conspiratorial acts would have to be tied to the particular plaintiffs. *See Bristol-Myers*, 137 S. Ct. at 1783 (''the nonresidents [] adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it *to them*.'').

It remains to be seen how these theories will fare in the long run. While *Zon* and *In re Dental Supplies* are welcome news for defendants, they are by no means the last word on how courts will interpret *Bristol-Myers*. Indeed, at least one federal district court in California has already played fast and loose with certain dicta in *Bristol-Myers*. In *Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST, 2017 BL 221846 (N.D. Cal. June 27, 2017), the court attempted to distinguish *Bristol-Myers*, finding that jurisdiction could be exercised over foreign companies in California with respect to claims asserted by non-California residents based on the theory that virtually every ''pivotal'' clinical trial necessary to obtain FDA approval for the drug in question occurred in California. (citation omitted). Decisions like *Dubose* will likely embolden plaintiffs' lawyers' attempts to press forward with their forum-shopping tactics, leaving open the question of whether federal courts will take *Bristol-Myers* seriously and apply its core holding faithfully.