Awaiting Answers On A Post-Bristol-Myers Class Question

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Two years ago, the U.S. Supreme Court issued its seminal personal jurisdiction ruling in Bristol-Myers Squibb Co. v. Superior Court of California.[1] BMS held that state courts cannot exercise personal jurisdiction over out-of-state defendants as to plaintiffs whose claims arose out of state.

The ruling made clear that this fundamental rule applies even when, as was the case in BMS, the state court is presiding over nationwide mass tort actions involving substantially similar claims by in-state plaintiffs against the same out-of-state defendants. Although the decision has reined in plaintiffs lawyers' forum-shopping efforts to manufacture personal jurisdiction by joining the claims of resident plaintiffs with those of nonresidents in state court in mass tort proceedings, its applicability to class actions — which sometimes also seek to group the claims of in- and out-of-state plaintiffs against out-of-state defendants — was left an open question.[2]

In the two years since BMS was decided, a significant number of district courts have confronted that question. Every court of which we are aware has recognized that BMS applies to the named plaintiffs in putative class actions, but courts have split on whether the Supreme Court's landmark decision applies to unnamed class members. Dozens of district courts have passed on the matter, but the courts of appeals have not yet addressed the question. That should soon change, as the issue is presented in pending appeals in both the Seventh and D.C. Circuits.[3]

For the reasons explained in this article, these courts should follow the better-reasoned lower-court decisions that have held that BMS applies in full to class actions, including to the claims of unnamed class members, and, as a result, that nationwide classes cannot be maintained except where the defendant is subject to general personal jurisdiction (typically, the defendant's principal place of business or place of incorporation). Appellate consensus on this issue would provide important guidance for lower courts and litigants, establish greater predictability for defendants on where they might be called to face class litigation, and forestall the need for Supreme Court intervention.

The BMS Decision

In BMS, more than 600 plaintiffs, most of whom were not California residents, sued BMS in California state court, alleging that they had been injured by ingesting Plavix, a drug manufactured by BMS. BMS moved to dismiss the nonresidents' claims on the ground that the court lacked personal jurisdiction.

On appeal, the California Supreme Court concluded that the trial court did have specific personal jurisdiction over the claims in light of BMS's extensive contacts with California and the similarity between the claims of the California residents and those of the nonresidents. But the U.S. Supreme Court reversed, explaining that the "mere fact that other plaintiffs

were prescribed, obtained, and ingested Plavix in California — and allegedly sustained the same injuries as did the nonresidents — does not allow the [s]tate to assert specific jurisdiction over the nonresidents' claims."[4] In so doing, the court made clear that a state court necessarily lacks specific personal jurisdiction over a defendant with respect to claims asserted by plaintiffs whose claims have no connection to the forum where an action is commenced, regardless of whether those plaintiffs join their claims with plaintiffs whose claims have some connection with the forum.

Application of BMS to Putative Nationwide Class Actions in District Courts

In the aftermath of BMS, several dozen federal district courts have weighed in on the question whether BMS applies to putative class actions pending in federal court. Court after court has concluded that BMS applies at the very least to the named class action plaintiffs. Thus, the named plaintiffs must be able to plead and prove that their alleged injury has some nexus to the forum state in order to support the exercise of specific personal jurisdiction over the putative class action.[5]

The more contentious question is whether BMS applies to limit the authority of a court to hear claims by absent class members with no connection with the forum. A number of courts have interpreted the case to bar actions on behalf of a multistate class unless the defendant can be subjected to general jurisdiction, concluding that the principles of BMS apply regardless of the form of the pleadings.[6] However, several other courts have held that BMS does not apply to the unnamed class plaintiff context and therefore putative nationwide classes may be brought nearly anywhere.[7]

Prospects for Resolution at the Appellate Level

The circuit courts of appeals now have an opportunity to weigh in and attempt to guide the lower courts toward greater uniformity on this issue. In Whole Foods Market Group. Inc. v. Molock, the case that will soon be heard by the U.S. Court of Appeals for the D.C. Circuit, a group of grocery store employees sued their employer for alleged violations of state common and statutory law. The district court dismissed the named plaintiffs with no connection to the District of Columbia, but denied the motion to dismiss the nationwide class allegations, concluding that the claims of unnamed class members were not barred by BMS. Recognizing a controlling question of law on which there was substantial ground for difference of opinion, however, the district court certified the case for interlocutory review under 28 U.S.C. Section 1292(b).[8]

In Mussat v. IQVIA, to be heard by the U.S. Court of Appeals for the Seventh Circuit, the district court reached the opposite conclusion. There, suit was brought for purportedly junk faxes under the Telephone Consumer Protection Act by an Illinois resident seeking to represent a nationwide class. The district court applied the principles of BMS to the unnamed class members and struck the class definition.[9] The plaintiff petitioned for leave to appeal the denial of class certification under Federal Rule of Civil Procedure 23(f), which the Seventh Circuit granted.

Both the Seventh and D.C. Circuits should hold that BMS applies to absent class members because the reasoning underlying the Supreme Court's treatment of personal jurisdiction in mass tort proceedings applies with at least equal force to nationwide class actions. This is so because each class member, named or unnamed, must bring his or her claims in a court that has personal jurisdiction over the defendant being sued. Unless the court is in a state "in which the [defendant] is fairly regarded as at home" — i.e., its state of incorporation or principal place of business — each class member must be able to establish the requisite

“connection between the forum and the specific claims” he or she is asserting.[10]

Resort to the procedural class action device cannot provide a justification for allowing class members to have their cases heard by a tribunal that would otherwise lack jurisdiction. Limitations on the exercise of personal jurisdiction are rooted in due process rights. If a defendant has a right not to answer claims from a litigant with no connection to the forum, that right should not be abrogated merely by virtue of the fact that the litigant asserts the claims as an unnamed class member rather than a named plaintiff. Otherwise, the invocation of Rule 23 could "abridge, enlarge or modify [a] substantive right" in violation of the Rules Enabling Act.[11]

Faced with this fundamental precept, courts that seek to avoid applying BMS to class actions offered several reasons. None are persuasive. The various arguments against the application of BMS to federal class actions are collected most comprehensively in In re: Chinese-Manufactured Drywall Products Liability Litigation. There, the court offered several theories to distinguish — or simply ignore — the reasoning in BMS.[12] But as explained below, the theories advanced by this court and others are unavailing.

First, many courts have concluded that "the citizenship of ... unnamed plaintiffs is not taken into account for personal jurisdiction purposes."[13] These courts have noted that "[n]onnamed class members ... may be parties for some purposes and not for others" and asserted that personal jurisdiction is among the purposes for which they are not parties.[14] But this approach misreads personal jurisdiction precedents.

As these precedents make clear, the due process clause limits the authority of states (and federal courts sitting in diversity) to compel out-of-state defendants to "submit[] to the [state’s] coercive power" and ultimately limits the state’s power to "try causes."[15] These concerns apply equally to all class members on whose behalf judgment might be rendered — whether named or unnamed. Assuming a judgment were entered on behalf of the class, for example, any class member would be able to enforce it individually after the fact — even out-of-state class members with no relationship to the forum — forcing the defendant to answer in a forum that has no nexus to the dispute between the parties.[16]

Some courts have offered other, even less persuasive justifications that would nullify BMS in federal class actions even as to named plaintiffs. Several courts have pointed out the unremarkable fact that class actions, unlike mass tort actions, must meet the various requirements imposed by Rules 23(a) and 23(b).[17] While the courts that rely on Rule 23 denominated these as "due process safeguards," they ignored that they exist primarily to protect the due process rights of absent class members, and they certainly have no purpose to protect a defendant’s right not to be subject to the coercive power of a forum with respect to claims that have no connection with it.

Other courts have asserted that the Supreme Court’s earlier decision in Phillips Petroleum Co. v. Shutts[18] "sanctioned the use of a nationwide class action."[19] Not so. The Supreme Court in BMS could not have been clearer: "[s]ince Shutts concerned the due process rights of plaintiffs, it has no bearing on the question presented here" — i.e., the due process rights of defendants.[20] The Chinese Drywall court further held Rule 23 to be a valid exercise of Congress’ power to provide federal jurisdiction.[21] But as already mentioned, Rule 23 was not a legislative enactment, so if it did purport to expand personal jurisdiction (and it certainly did not), it did so in violation of the Rules Enabling Act.

Finally, the Chinese Drywall court posited that a state law class action does not implicate "federalism concerns" if brought in federal court on diversity grounds. As an initial matter,

the court concluded that federal courts are materially different from state courts with respect to personal jurisdiction considerations, even when sitting in diversity.[22] This theory — which would render BMS a dead letter in any case in federal court, class action or otherwise — has, to our knowledge, not been accepted by any other court, including even those on which the Chinese Drywall court otherwise relied.[23]

And with good reason: Black letter law requires a federal court sitting in diversity to apply the same personal jurisdiction analysis as a forum state court.[24] The Chinese Drywall decision further suggested that federalism concerns are absent in class actions where the defendant "ha[s] made enough [other] contacts [with] the forum."[25] But this reasoning resembles the California Supreme Court's "loose and spurious form of general jurisdiction" that the Supreme Court expressly rejected in BMS: "extensive forum contacts that are unrelated" to the claims at issue are simply irrelevant.[26]

At bottom, none of the justifications offered by the various district courts to ignore BMS in the class context can overcome a single fundamental principle. Neither the Rules Enabling Act nor the U.S. Constitution permits plaintiffs to sue — and possibly recover — in a court without jurisdiction, simply because they style their suit a class action.

Accordingly, the courts of appeals that are positioned to address these questions should clarify that BMS does apply to unnamed class members in putative nationwide class actions. Doing so will offer important guidance to lower courts; it will also provide important predictability to entities that must defend against multistate class actions, which generally could only be maintained (at least in diversity suits) in the entities' home states.

This ability to predict where the entity will likely be called to defend against claims in litigation is one of the core values that the personal jurisdiction doctrine was intended to protect. Ultimately, if the courts of appeals fail to reconcile the divided approach of the district courts on this issue, it will be the Supreme Court that must clarify the import of its landmark decision.

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[1] 137 S. Ct. 1773 (2017) ("BMS").

[2] See id. at 1789 n.4 (Sotomayor, J., dissenting).

[3] See Mussat v. IQVIA, Inc., No. 19-1204 (7th Cir.) (oral argument originally set for September 6, 2019 has since been vacated); Molock v. Whole Foods Mkt., Inc., No. 18-7162 (D.C. Cir.) (set for oral argument on September 25, 2019).

[4] See BMS, 137 S. Ct. at 1781.

[5] A few courts have held that this requirement is met as long as the court can exercise specific personal jurisdiction over just one of many named class representatives, reasoning

that personal jurisdiction could be exercised over the other named class representatives under a theory of pendent personal jurisdiction. See Solomon v. Am. Web Loan, No. 4:17cv145, 2019 WL 1320790 (E.D. Va. Mar. 20, 2019); Sloan v. Gen. Motors LLC, 287 F. Supp. 3d 840 (N.D. Cal. 2018) (pendent personal jurisdiction); Allen v. ConAgra Foods, Inc., No. 3:13-cv-01279-WHO, 2018 WL 6460451 (N.D. Cal. Dec. 10, 2018) (pendent personal jurisdiction). This reasoning cannot be reconciled with BMS, which rejected the notion that broader specific personal jurisdiction can be created through joinder of in- and out-of-state plaintiffs.

See, e.g., Morrison v. Ross Stores, Inc., No. 18-cv-02671-YGR, 2018 WL 5982006 (N.D. Cal. Nov. 14, 2018); see also In re Welspun Litig., No. 16 CV 6792 (VB), 2019 WL 2174089 (S.D.N.Y. May 20, 2019); Grossman v. Schell & Krampter, Inc., No. 2:18-cv-02344-JAM-AC, 2019 WL 1298997 (E.D. Cal. Mar. 20, 2019); Petersen v. Costco Wholesale Co., No. SA CV 13-1292-DOC (JCGx), 2019 WL 1715485 (C.D. Cal. Jan. 17, 2019) (in dicta); Sharpe v. Puritan's Pride, Inc., No. 16-cv-06717-JD, 2019 WL 188658 (N.D. Cal. Jan. 14, 2019); Hills v. AT&T Mobility Servs., LLC, No. 3:17-cv-556-JD-MGG, 2018 WL 6322363 (N.D. Ind. Dec. 4, 2018); Reitman v. Champion Petfoods USA, Inc., No. CV 18-1736-DOC (JPRx), 2018 WL 4945645 (C.D. Cal. Oct. 10, 2018); Gaines v. Gen. Motors, LLC, No. 17cv1351-LAB (JLB), 2018 WL 3752336 (S.D. Cal. Aug. 6, 2018); Hickman v. TL Transp., LLC, 317 F. Supp. 3d 890 (E.D. Pa. 2018); Jackson v. Bank of Am., N.A., No. 16-CV-787G, 2018 WL 2381888 (W.D.N.Y. May 25, 2018); LDGP, LLC v. Cynosure, Inc., No. 15 C 50148, 2018 WL 439122 (N.D. Ill. Jan. 16, 2018); Greene v. Mizuho Bank, Ltd., 289 F. Supp. 3d 870 (N.D. Ill. 2017); Spratley v. FCA US LLC, No. 3:17-CV-0062, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017).

[6] See, e.g., Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018); see also Garvey v. Am. Bankers Ins. Co. of Fla., No. 17-CV-986, 2019 WL 2076288 (N.D. Ill. May 10, 2019); Bakov v. Consol. World Travel, Inc., No. 15 C 2980, 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019); In re Dicamba Herbicides Litig., 359 F. Supp. 3d 711 (E.D. Mo. 2019); Leppert v. Champion Petfoods USA Inc., No. 18 C 4347, 2019 WL 216616 (N.D. Ill. Jan. 16, 2019) (in dicta); Mussat v. IQVIA Inc., No. 17 C 8841, 2018 WL 5311903 (N.D. Ill. Oct. 26, 2018), appeal filed, No. 19-1204; Am.'s Health & Resource Ctr., Ltd. v. Promologics, Inc., No. 16 C 9281, 2018 WL 3474444 (N.D. Ill. July 19, 2018); Chavez v. Church & Dwight Co., No. 17 C 1948, 2018 WL 2238191 (N.D. Ill. May 16, 2018); DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018); McDonnell vture's W. Naay Prods., LLC, No. 16 C 5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017); Wenokur v. AXA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017) (in dicta); Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., No. 16-665, 2017 WL 3129147 (E.D. Pa. July 24, 2017).

[7] See, e.g., Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114 (D.D.C. 2018), appeal filed, No. 18-7162; Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815 (N.D. Ill. 2018); see also Gress v. Freedom Mortg. Corp., No. 1:19-cv-375, 2019 WL 2612733 (M.D. Pa. June 26, 2019); In re Takata Airbag Prods. Liab. Litig., MDL No. 2599, 2019 WL 2570616 (S.D. Fla. June 20, 2019); Dolan v. JetBlue Airways Corp., No. 18-62193-Civ-Scola, 2019 WL 2443527 (S.D. Fla. May 28, 2019); Sotomayor v. Bank of Am., N.A., 377 F. Supp. 3d 1034 (C.D. Cal. 2019); LaVigne v. First Cmty. Bancshares, Inc., 330 F.R.D. 293 (D.N.M. 2019); Cabrera v. Bayer Healthcare, LLC, No. LA CV17-08525 JAK (JPRx), 2019 WL 1146828 (C.D. Cal. Mar. 6, 2019); Ross v. Huron Law Grp. W. Va., PLLC, No. 3:18-0036, 2019 WL 637717 (S.D. W. Va. Feb. 14, 2019); Burke v. Credit One Bank, N.A., No. 8:18-cv-00728-EAK-TGW, 2019 WL 1468536 (M.D. Fla. Feb. 5, 2019); Curran v. Bayer Healthcare LLC, No. 17 C 7930, 2019 WL 398685 (N.D. Ill. Jan. 31, 2019); Swinter Grp.,

Inc. v. Serv. of Process Agents, Inc., No. 4:17-CV-2759 RLW, 2019 WL 266299 (E.D. Mo. Jan. 18, 2019); Hicks v. Hous. Baptist Univ., No. 5:17-CV-629-FL, 2019 WL 96219 (E.D.N.C. Jan. 3, 2019); Thompson v. Transamerica Life Ins. Co., No. 2:18-cv-05422-CAS-GJSx, 2018 WL 6790561 (C.D. Cal. Dec. 26, 2018); Harrison v. Gen. Motors Co., No. 17-3128-CV-S-SRB, 2018 WL 6706697 (W.D. Mo. Dec. 20, 2018); Goodman v. Sun Tan City, LLC, No. 18-81281-CIV-ROSENBERG/REINHART, 2018 WL 6978695 (S.D. Fla. Dec. 14, 2018), report and recommendation adopted by 2019 WL 1112258 (S.D. Fla. Jan. 7, 2019); Hosp. Auth. of Metro. Gov. of Nashville v. Momenta Pharm., Inc., 353 F. Supp. 3d 678 (M.D. Tenn. 2018); Lee v. Branch Banking & Tr. Co., No. 18-21876-Civ-Scola, 2018 WL 5633995 (S.D. Fla. Oct. 31, 2018); Dennis v. IDT Corp., 343 F. Supp. 3d 1363 (N.D. Ga. 2018); Richmond v. Nat'l Gypsum Servs. Co., No. 18-7453, 2018 WL 5016221 (E.D. La. Oct. 16, 2018); Brotz v. Simm Assocs., Inc., No. 6:17-cv-1603-Orl-40TBS, 2018 WL 4963692 (M.D. Fla. Oct. 15, 2018); Braver v. Northstar Alarm Servs., LLC, 329 F.R.D. 320 (W.D. Okla. 2018); Morgan v. U.S. Xpress, Inc., No. 3:17-cv-0085, 2018 WL 3580775 (W.D. Va. July 25, 2018); Becker v. HBM Media, Inc., 314 F. Supp. 3d 1342 (S.D. Fla. 2018); Tickling Keys, Inc. v. Transamerica Fin. Advisors, Inc., 305 F. Supp. 3d 1342 (M.D. Fla. 2018); In re Morning Song Bird Food Litig., No. 12cv01592 JAH-AGS, 2018 WL 13827476 (S.D. Cal. Mar. 19, 2018); Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods., Inc., No. 17-2161, 2018 WL 1377608 (E.D. La. Mar. 19, 2018); Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360 (N.D. Ga. 2018); Peters v. Wells Fargo Bank, N.A., No. 17-cv-04367-JST, 2018 WL 398238 (N.D. Cal. Jan. 12, 2018); In re Chinese-Manufactured Drywall Prods. Liab. Litig, MDL No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 28, 2017) ("Chinese Drywall"); Day v. Air Methods Corp., No. 5:17-183-DCR, 2017 WL 4781863 (E.D. Ky. Oct. 23, 2017); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-cv-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017).

[8] See Molock v. Whole Foods Mkt. Grp., Inc., 317 F. Supp. 3d 1 (D.D.C. 2018).

[9] 2018 WL 5311903, at *6.

[10] BMS, 137 S. Ct. at 1780-81 (emphasis added) (citation omitted).

[11] 28 U.S.C. § 2072(b); see Practice Mgmt. Support Servs., 301 F. Supp. 3d at 861 ("The Supreme Court held in [BMS] that the Fourteenth Amendment's [D]ue [P]rocess [C]lause precludes nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum resident. Under the Rules Enabling Act, a defendant's due process interest should be the same in the class context.") (citation omitted).

[12] 2017 WL 5971622, at *14-20.

[13] Id. at *12 (quoting Fitzhenry-Russell, 2017 WL 4224723, at *5).

[14] Fitzhenry-Russell, 2017 WL 4224723, at *5 (citation omitted); see also, e.g., Al Haj, 338 F. Supp. 3d at 820 (concluding absent class members are not parties for personal jurisdiction purposes); Molock, 297 F. Supp. 3d at 126-27 (dismissing named plaintiffs without connection to the forum but allowing nationwide class allegations to proceed).

[15] BMS, 137 S. Ct. at 1780 (citation omitted).

[16] See, e.g., Germonprez v. Dir. of Selective Serv., 318 F. Supp. 829 (D.D.C. 1970) (enforcing class judgment on behalf of an individual class member).

[17] See, e.g., Lyngaas v. Curaden AG, No. 17-cv-10910, 2019 WL 2231217, at *18 (E.D. Mich. May 23, 2019), appeal filed, No. 19-108; Molock, 297 F. Supp. 3d at 126; Chinese Drywall, 2017 WL 59162, at *14 (all discussing the purported due process safeguards provided by Rule 23).

[18] 472 U.S. 797 (1985).

[19] Chinese Drywall, 2017 WL 5971622, at *15; see also Sanchez, 297 F. Supp. 3d at 1366.

[20] BMS, 137 S. Ct. at 1783.

[21] Chinese Drywall, 2017 WL 5971622, at *17.

[22] Id. at *20.

[23] See, e.g., Fitzhenry-Russell, 2017 WL 4224723, at *4 ("Nothing in the [BMS] [o]pinion [l]imits the [d]ecision's [r]easoning to [s]tate [c]ourts."; "It is hard to see how [the state's] 'coercive power' would not be exerted if the [c]ourt is applying solely [state] law, and is required to apply [state] law the way a state trial court would.").

[24] See Fed. R. Civ. P. 4(k)(1)(A) (authorizing a federal court to exercise jurisdiction over a party "who is subject to the jurisdiction of a [forum state] court"); 4A Charles Alan Wright et al., Federal Practice and Procedure § 1075 (4th ed.) (Apr. 2019 update) (noting that this rule "requires an inquiry into the... question of whether that state's courts could constitutionally exercise personal jurisdiction consistent with the ... Fourteenth Amendment"); see also, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985) (Fourteenth, rather than Fifth, Amendment controls due process analysis in diversity cases).

[25] Chinese Drywall, 2017 WL 5971622, at *19-20.

[26] BMS, 137 S. Ct. at 1781.