Erosion Of Bristol-Myers Test In Class Actions Is Misguided

By **Jessica Miller, Jordan Schwartz and Nick Schnell** (October 7, 2019, 5:32 PM EDT)

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A U.S. Court of Appeals for the Seventh Circuit panel appears poised to hold that a federal court can exercise personal jurisdiction over a nonresident defendant, even where unnamed, putative class members base their claims solely on events that occurred outside of the forum jurisdiction.

On Friday, Sept. 27, Chief Circuit Judge Diane Wood and Circuit Judges Michael Kanne and Amy Coney Barrett heard argument in Mussat v. Iqvia.[1] The appeal involves an Illinois corporation's Telephone Consumer Protection Act claim against a Delaware corporation on behalf of a putative nationwide class of plaintiffs. The proposed class included parties who received junk, promotional faxes in Illinois and other states.

Because unnamed, out-of-state class members' claims did not relate to or involve any activity in Illinois, Judge Virginia M. Kendall struck all nationwide class allegations for lack of personal jurisdiction.[2] The Seventh Circuit granted leave to appeal as a denial of class certification under Federal Rule of Civil Procedure 23(f).

Judge Kendall's ruling relied on the U.S. Supreme Court's seminal personal jurisdiction ruling in Bristol-Myers Squibb v. Superior Court of California.[3] In BMS, more than 600 named plaintiffs sued an out-of-state pharmaceutical company in California state court for the harmful effects of a drug. The mass action included nonresident plaintiffs whose claims relied solely on out-of-state actions.

The Supreme Court ultimately held that California state courts did not have specific, personal jurisdiction over the nonresident plaintiffs' claims. It explained that the "mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California — and allegedly sustained the same injuries as the nonresidents — does not allow the [s]tate to assert specific jurisdiction over the nonresidents' claims."[4] As Justice Sonia Sotomayor's single-vote dissent noted, BMS did not explicitly answer a similar question arising in the class action context — i.e., whether a court must have personal jurisdiction over each class member's claims, not just the named representative's claim.[5]

In the years following BMS, several district courts have applied its rationale to class

actions, holding that all class members must satisfy the requirements for personal jurisdiction over a defendant.[6] However, other courts have held that BMS does not apply to absent class members.[7]

The issue has now been heard by two appellate courts: the U.S.Court of Appeals for the District of Columbia Circuit in Molock v. Whole Foods Market Inc.,[8] and the Seventh Circuit in Mussat. Both the D.C. Circuit panel, which heard argument on Sept. 25, and the Seventh Circuit panel expressed palpable skepticism toward applying BMS to class actions.

In the Seventh Circuit, Judges Wood and Barrett emphasized distinctions between mass actions and class actions. Discussing BMS, Judge Barrett stated, "It was distinguishable. It was not a class action. It was joinder. There were named plaintiffs. And here everything in the class is judged by the [named] plaintiff — who is ... the litigating entity."

This line of questioning appears to overlook the underlying principle animating the Supreme Court's decision in BMS: that personal jurisdiction requires a "connection between the forum and the specific claims at issue."[9] After all, absent class members should be considered because, like plaintiffs in a mass action, they would be bound by any final judgment. Thus, each class member would have the authority to enforce a judgment against the defendant in the adjudicating jurisdiction.

Because personal jurisdiction, at its core, exists to protect out-of-state defendants from being subjected to a foreign court's "coercive power,"[10] there is simply no legitimate basis for distinguishing between the claims asserted by named and absent class members.

In addition, the Seventh Circuit panel suggested that Federal Rule of Civil Procedure 23 adequately protects class defendants' interests. For example, Judge Wood stated that "[t] he class action device itself has quite a few safeguards," citing the Supreme Court's decision in Wal-Mart Stores v. Dukes[11] as imposing "a more rigorous standard of commonality ... [to prevent] Wal-Mart [from] trying to defend against [an] unmanageable monster."

But this stance misperceives Rule 23's primary purpose, i.e. to protect plaintiffs' due process rights, not the defendant's rights. Despite any incidental benefit defendants receive, Rule 23 "ensures that the named plaintiffs are appropriate representatives of the class."[12] It should not supplant the necessary personal jurisdiction inquiry, which asks whether each class member's claims arise out of the out-of-state defendant's activities in the forum.

More importantly, a nonlegislative procedural device cannot authorize adjudication of claims by a tribunal that would otherwise lack jurisdiction. Under the Rules Enabling Act, a Federal Rule of Civil Procedure cannot "abridge, enlarge or modify [a] substantive right." Defendants maintain a right to not be hauled into forums with no connection to pending claims, and that right should not be abridged merely because a litigant asserts claims as an unnamed class member instead of a named plaintiff.

Finally, the panel suggested that Mussat is distinct from prior interpretations of BMS because it relies on federal question jurisdiction. BMS explicitly leaves open the question whether federal question cases implicate the same personal jurisdiction concerns as state court or diversity claims.[13] In doing so, it cited a prior decision discussing the federal legislature's ability to authorize nationwide service and the possibility that personal jurisdiction in federal question cases should be analyzed in terms of nationwide contacts.[14] Here, however, the TCPA does not authorize nationwide service, and thus, courts should apply BMS's personal jurisdiction inquiry.

In sum, it appears that both the Seventh and D.C. Circuits might be slated to water down the import of BMS to class actions, even though there is no policy justification for applying

different policies to class actions and individual actions.

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[1] No. 19-1204.

[2] No. 17 C 8841, 2018 WL 5311903, at *1, *5-6 (N.D. Ill. Oct. 26, 2018).

[3] 137 S. Ct. 1773 (2017).

[4] Id. at 1781.

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

[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); 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 v. Nature's Way Prods., LLC, No. 16 C 5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 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).

[8] No. 18-7162.

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

[10] Id. at 1789 (citation omitted).

[11] 564 U.S. 338 (2011).

[12] Id. at 349.

[13] BMS, 137 S. Ct. at 1784.

[14] Id. (citing Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co., 484 U.S. 97, 102, n.5 (1987)).