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The Class Action Chronicle

Interpreting *Bristol-Myers*: Are Unnamed Members of Nationwide Class Actions 'Parties'? If So, When?

By Geoffrey M. Wyatt, Jordan M. Schwartz and Anthony J. Balzano

In 2017, the Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court of California* (*BMS*), holding that a California state court could not exercise personal jurisdiction over a defendant as to the claims being asserted by nonresident plaintiffs in a sprawling mass tort proceeding. 582 U.S. — , 137 S. Ct. 1773 (2017). As Justice Sonia Sotomayor's dissent in that case noted, the Supreme Court expressly left open whether the ruling would apply to claims being asserted by members of putative nationwide classes in federal court.

In the immediate aftermath of the decision, district courts split somewhat evenly on this question. By one court's count, as of the one-year anniversary of *BMS*, approximately nine cases had ruled that *BMS* does apply to nationwide class actions, while another nine or so cases had "gone the other way."[1] As the courts in the former camp explained, the general principle outlined in *BMS* applies just as much to absent class members as to the mass action plaintiffs in *BMS* for several reasons. For starters, federalism burdens persist notwithstanding the federal forum and status of the litigation as a putative class action.[2] This is so because the forum has no legitimate interest in a dispute between nonforum class members and a nonforum defendant any more than it would in a dispute between out-of-state plaintiffs and defendants. In addition, these courts recognized that the Rules Enabling Act — under which substantive rights cannot be abridged by procedural rules — also compels the application of *BMS* to putative class actions pending in federal court both as to the claims of named and unnamed class members.[3]

The first two federal appeals courts to weigh in on this recurring and nettlesome question issued their opinions in March 2020. The U.S. Court of Appeals for the Seventh Circuit held that *BMS* does not apply to putative nationwide class actions, while the U.S. Court of Appeals for the District of Columbia Circuit punted on the issue and deemed the question premature prior to class certification. Although the cases reached slightly different conclusions, they both found that nonresident putative class members are not "parties" before the court. This reasoning has since been followed by district courts elsewhere in the United States, signaling that the U.S. Supreme Court itself might have

[1] *Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 5 (D.D.C. 2018) (collecting cases).

[2] *See Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018). ("[T]he [c]ourt's concerns about federalism suggest that it seeks to bar nationwide class actions in forums where the defendant is not subject to general jurisdiction.")

[3] *See Practice Mgmt. Support Servs., Inc. v. Cirque Du Soleil Inc.*, 301 F. Supp. 3d 840, 861-62 (N.D. Ill. 2018).

to intervene and clarify once and for all whether the dictates of *BMS* apply with equal force to nationwide class actions.

In *Mussat v. IQVIA, Inc*., the plaintiffs brought a putative class action, alleging that the defendant violated the Telephone Consumer Protection Act (TCPA) by mailing unsolicited "junk faxes" to the putative class members.[4] The district court granted the defendant's motion to strike the class definition, finding that under *BMS*, the court did not have personal jurisdiction over the out-of-state members of the proposed class. On appeal, the Seventh Circuit reversed, holding that *BMS* did not extend to class actions because nonresident putative class members are not parties to the action for purposes of personal jurisdiction. The *Mussat* court distinguished *BMS* on the basis that consolidation of individual cases into a mass action is different from a federal class action because all plaintiffs in a mass action are parties to the action, whereas in class actions, "[n]onnamed class members ... may be parties for some purposes and not for others." According to the *Mussat* court, in some contexts — like diversity of citizenship analysis or determination of proper venue — courts do not consider unnamed class members, and the same should obtain with the question of personal jurisdiction.

In *Molock v. Whole Foods Market Group, Inc*., a putative class of current and former Whole Foods employees sued the company for lost wages, alleging that the company unfairly manipulated its bonus program.[5] Relying on *BMS*, Whole Foods moved to dismiss the claims of the nonresident potential class members, arguing that the court lacked personal jurisdiction over it with respect to those specific claims. The district court denied the motion and Whole Foods appealed. On appeal, the D.C. Circuit affirmed, but on alternative grounds. Unlike the district court, the D.C. Circuit did not reach the merits of the motion; instead, the court concluded that the motion should have been denied as premature, holding that the unnamed putative class members were not parties before the court during the period prior to class certification. The court explained that "[i]t is class certification that brings unnamed class members into the action and triggers due process limitations on a court's exercise of personal jurisdiction over their claims." On that basis, the court concluded that "[b]ecause the class in this case has yet to be certified, Whole Foods' motion to dismiss the putative class members is premature."

In the wake of these appellate decisions, district courts across the country have been tasked with deciding whether to follow *Mussat* and *Molock* or chart their own course. The early returns indicate that many district courts have been persuaded by *Mussat*, expressly relying on that case in declining to apply the requirements of *BMS* to nationwide class actions.[6] For example, in *Lacy v. Comcast Cable Communications, LLC*, the U.S. District Court for the Western District of Washington applied *Mussat* in denying a motion to dismiss the claims of nonresident putative class members in a TCPA action.[7] Like the Seventh Circuit, the *Lacy* court found *BMS* inapplicable because "a plaintiff in a mass tort action is named as a plaintiff, making each 'a real party in interest[;]' [i]n contrast, only the proposed class representative is actually named on the complaint in a class action." In addition to that rationale, the *Lacy* court also found *BMS* distinguishable because "Federal Rule of Civil Procedure 23 imposes additional due process safeguards on class actions that do not exist in the mass tort context." In sum, the *Lacy* court held that "[t]his [c]ourt will not upend the traditional approach to personal jurisdiction in class actions absent an express ruling from the Supreme Court."[8]

Unlike the largely positive reception of *Mussat* by the lower courts, the *Molock* decision has garnered a more mixed reaction. For example, one judge in the U.S. District Court for the Southern District of Ohio explicitly declined to follow *Molock* in another case brought under the TCPA.[9] In *Progressive Health & Rehab Corp. v. Medcare Staffing, Inc*., the court reasoned that addressing the question left open by *BMS* is not "premature"

[4] 953 F.3d 441 (7th Cir. 2020).

[5] 952 F.3d 293 (D.C. Cir. 2020).

[6] *Lacy v. Comcast Cable Commc'ns, LLC*, No. 3:19-cv-05007-RBL, 2020 WL 1469621, at *2 (W.D. Wash. Mar. 26, 2020) (refusing to extend *BMS* to class actions and noting that "[t]his [c]ourt will not upend the traditional approach to personal jurisdiction in class actions absent an express ruling from the Supreme Court"); *Munsell v. Colgate-Palmolive Co.*, No. 19-12512-NMG, 2020 WL 2561012, at *8 (D. Mass. May 20, 2020) ("Given those differences and the well-reasoned caselaw declining to extend *BMS* to the class action context, this [c]ourt reaffirms its decision in *Rosenberg* and concludes that *BMS* does not apply to the Rhode Island claims of the unnamed members of the putative Rhode Island Class in these circumstances. Accordingly, defendants' motion to dismiss those claims will be denied."); *Murphy v. Aaron's, Inc.*, No. 19-cv-00601-CMA-KLM, 2020 WL 2079188, at *16-17 (D. Colo. Apr. 30, 2020) ("Accordingly, the [c]ourt declines to apply *Bristol-Myers* to the instant action because to do so would contribute to the erosion of modern class actions where neither Rule 23 nor due process demands so."); *see also Velazquez v. State Farm Fire & Cas. Co.*, No. 19-cv-3128, 2020 WL 1942784, at *11 (E.D. Pa. Mar. 27, 2020) ("In the absence of binding precedent on the applicability of *Bristol-Myers* to class actions, I respectfully recommend against extending its holding at this time.") (footnote omitted), *report and recommendation adopted*, No. 19-3128, 2020 WL 1939802 (E.D. Pa. Apr. 22, 2020).

[7] 2020 WL 1469621, at *2.

[8] *Id.*

[9] *Progressive Health & Rehab Corp. v. Medcare Staffing, Inc.*, No. 2:19-CV-4710, 2020 WL 3050185, at *3, *3 n.1 (S.D. Ohio June 8, 2020) ("This [c]ourt is persuaded by the reasoning in the Seventh Circuit's recent decision in *Mussat*."; "This [c]ourt takes note of the District of Columbia Court of Appeals' recent decision in a similar matter that motions to dismiss putative class members prior to class certification are 'premature' since class members are not parties to a litigation and thus not subject to dismissal until after class certification. ... Nonetheless, this [c]ourt will take a different approach and address the merits of [d]efendant's motion since the issue here is not whether this court retains personal jurisdiction over absent class members, but whether this court has personal jurisdiction over [d]efendant for claims relating to a nationwide class. The distinction is important because jurisdiction over parties is a threshold issue and because district courts have the power to adjudicate a named plaintiff's ability to represent a class of individuals. ...") (citations omitted).

before class certification because "the issue ... is not whether this court retains personal jurisdiction over absent class members, but whether th[e] court has personal jurisdiction over [d]efendant for claims relating to a nationwide class." In rejecting the key premise from *Molock*, the court explained that "[t]he distinction is important because jurisdiction over parties is a threshold issue and because district courts have the power to adjudicate a named plaintiff's ability to represent a class of individuals pursuant to [Rule 23]." Nonetheless, the court followed the Seventh Circuit's reasoning in *Mussat* and denied the motion to dismiss the claims of the absent class members on the ground that *BMS* simply does not apply to "Rule 23 class actions."

However, the *Molock* decision has not been completely rejected or ignored, with at least one district court following it and the majority of district courts that relied on *Mussat* also citing *Molock* for additional support or as an alternative ground for denying a motion to dismiss on personal jurisdiction grounds.[10] Moreover, the U.S. Court of Appeals for the Fifth Circuit recently indicated an inclination to follow *Molock* as well. In *Cruson v. Jackson National Life Insurance Co*., the court considered whether the defendant had waived its personal jurisdiction challenge against nonresident putative class members by failing to timely raise it at the outset of the case.[11] As the Fifth Circuit put it, the answer to that question was "no" because those nonresident putative class members "were not yet before the court when Jackson filed its Rule 12 motions"; "[w]hat brings putative class members before the court is certification."[12] Although the Fifth Circuit did not cite *Molock*, it employed precisely the reasoning underlying the D.C. Circuit's decision.

As these recent examples illustrate, courts construing *Molock* and *Mussat* have rejected personal jurisdiction challenges to claims being asserted on behalf of absent class members, either kicking the can down the road to class certification or rejecting the application of *BMS* outright. But either approach essentially relies on the same rationale — that unnamed class members are not "parties" for purposes of personal jurisdiction. There is sound basis, however, to question that rationale, and it is articulated by D.C. Circuit Judge Laurence H. Silberman's succinct dissenting opinion in *Molock*.

First and foremost, the notion that a personal jurisdiction challenge with respect to absent class members is not ripe until class certification is based on the "flawed premise" that such a challenge seeks the dismissal of putative class members themselves. As Judge Silberman explained, "Whole Foods did not move to dismiss nonresident putative class members; it moved to dismiss the named plaintiffs' claims to represent those putative class members."[13] Under the approach endorsed by the majority in *Molock* and effectively countenanced by the Fifth Circuit in *Cruson*, "a hypothetical named plaintiff would be entitled to extensive class discovery even after an on-point decision by the Supreme Court" compelling the dismissal of claims at the outset of a case.[14] As noted above, this reasoning from Judge Silberman has gained traction with at least one district court, which explicitly adopted it and declined to defer consideration of *BMS*' application until class certification (though it ultimately endorsed *Mussat*'s approach to the merits of the question and rejected the application of *BMS* to absent class members).[15]

Judge Silberman also addressed and rejected the key arguments that led the Seventh Circuit and more recent courts to deny personal jurisdiction challenges in the class action context on the merits.

One such argument is that class actions are different from mass actions (such as *BMS*, which had more than 600 plaintiffs) in that the plaintiffs in the latter category of proceedings are actual "parties," whereas absent class members in the former category are not. Specifically, as mentioned above, the Seventh Circuit reasoned in *Mussat* that because the Supreme Court has not treated absent class members as "parties" for purposes of subject matter jurisdiction or venue, it must follow that they should not count as parties for purposes of assessing personal jurisdiction. But subject matter jurisdiction and venue do not generally raise due process concerns, which are implicated by the exercise of personal jurisdiction over a defendant. Regardless of how absent class members are treated when assessing subject matter jurisdiction or venue, they should be deemed parties for the purpose of analyzing personal jurisdiction because (assuming they do not opt out) they would be "bound" by any final judgment and therefore could enforce that judgment against the defendant in the

[10] *See Ford v. USHealth Grp., Inc.*, No. 3:19-cv-01091, 2020 U.S. Dist. LEXIS 63040, at *22 (M.D. Pa. Apr. 10, 2020) ("Without class certification, putative class members are not yet parties before a court, rendering premature USHG's motion to dismiss the claims of putative class members. Thus, USHG's motion to dismiss the claims of putative class members is denied, but USHG may raise these issues again at the class certification stage."); *Velazquez*, 2020 WL 1942784, at *11, ("Moreover, as the *Molock* [c]ourt reasoned, no class has been certified, and it would be premature to assess whether specific jurisdiction is proper for the claims of unnamed class members at this early pre-certification stage."); *Murphy*, 2020 WL 2079188, at *17 ("As a final point, the fact that this matter is only at the motion to dismiss stage is of import to the [c]ourt's decision to deny the motion to dismiss pursuant to Rule 12(f)."); *see also Antonicic v. HSBC Bank USA, N.A.*, No. 19-cv-3038, 2020 WL 1503201, at *1 (N.D. Ill. Mar. 27, 2020) (although finding *Mussat* "controlling," still citing to *Molock*); *Leszanczuk v. Carrington Mortg. Servs., LLC*, No. 19-cv-3038, 2020 WL 1445612, at *2 (N.D. Ill. Mar. 25, 2020) (same); *Lacy*, 2020 WL 1469621, at *2 (similar).

[11] 954 F.3d 240 (5th Cir. 2020).

[12] *Id.* at 250.

[13] 952 F.3d at 300, 303 (Silberman, J., dissenting).

[14] *Id.* at 304 (Silberman, J., dissenting).

[15] *See Progressive Health & Rehab Corp.*, 2020 WL 3050185, at *3, *3 n.1.

forum where the suit was brought. As Judge Silberman put it, "the goal of a nationwide class action is 'a binding judgment over the defendant as to the claims of the entire nationwide class — and the deprivation of the defendant's property accordingly.'"[16]

While it is true that many certified class actions settled, and a defendant could waive personal jurisdiction issues in order to facilitate a settlement, a court facing the question of certification prior to any proposed settlement must assume that a certified class would be tried and have a plan for binding the defendant as to all class members following any adverse verdict. As such, the question of whether the court could exercise personal jurisdiction over the defendant with respect to out-of-state class members must necessarily be answered before any class can be certified.

Some district courts following *Molock* and *Mussat*, such as in the *Lacy* case described above, have gone even further and justified an exception for class actions on the ground that "at its core, '[p]ersonal jurisdiction is rooted in fairness to the defendant, and Rule 23 provides significant safeguards to that end.'"[17] However, those procedural safeguards cannot elevate the class action device above due process requirements of the Constitution. To conclude otherwise would arguably manufacture personal jurisdiction by dint of the lawsuit's putative classwide status and exceed the scope of the Rules Enabling Act by using a procedural rule to "abridge, enlarge or modify [a] substantive right."[18]

Finally, Judge Silberman also dismissed the "parade of horribles" that plaintiffs' lawyers have frequently suggested would result from applying *BMS* to nationwide class actions. Specifically, the plaintiffs in *Molock* contended that such an application would render nationwide class actions moribund. Some district courts have agreed. For example, one court recently stated that "fusing the *Bristol-Myers* rule into class actions would divest federal courts of specific jurisdiction over nationwide class actions — even where Rule 23 requirements are met — simply because the federal court may not maintain specific jurisdiction over a nonresident defendant as to every single class member['s] claim as though each class member had brought an individual suit."[19] It is important to remember, however, that specific jurisdiction is not the only way to establish personal jurisdiction over a defendant. As Judge Silberman recognized in *Molock*, general jurisdiction could have been exercised over Whole Foods in its home state of Delaware "without any personal jurisdiction difficulties."[20] Nor would a straightforward application of *BMS* to class actions preclude defendants from waiving personal jurisdiction objections if they chose to do so, such as where parties on both sides sought to resolve a nationwide dispute by way of settlement.[21] Moreover, plaintiffs can bring purely statewide class actions in their own home states. In short, the policy claims being advanced in opposition to *BMS* in the class action context could well be overstated.

It remains to be seen whether *Mussat* and *Molock* will continue to hold sway among other lower courts. But it is clear that they have influenced subsequent district court decisions despite the countervailing arguments outlined by Judge Silberman and prior district court decisions that *BMS* should apply to putative nationwide class actions. Ultimately, the Supreme Court itself will likely have to weigh in on whether the limits on the exercise of personal jurisdiction over out-of-state defendants apply to putative nationwide class actions.

Recent Class Action Decisions of Note

Courts Continue To Split on Whether Consumers Have Standing To Sue on Behalf of Consumers Who Purchased a Different, but Substantially Similar, Product

***Richey v. Axon Enterprises, Inc.*, 437 F. Supp. 3d 835 (D. Nev. 2020)**

Chief Judge Miranda M. Du of the U.S. District Court for the District of Nevada held that a plaintiff had standing to bring claims on behalf of purchasers of three models of allegedly defective Tasers even though the plaintiff only purchased and used one of those particular models. In that case, the plaintiff alleged that his model of Taser — called the Pulse — discharged while in the "safe" position and that the Taser could fire even if the safety mechanism was moved only part of the way from the "safe" to the "armed" position. Based on this claim, the plaintiff sought to represent a class comprising not only purchasers of the Pulse but also purchasers of two other models of Tasers sold by the defendant. The defendant moved to dismiss the claims involving the other models, arguing that the plaintiff did not have standing to bring such claims because he never purchased those models.

The court disagreed, holding that the plaintiff had standing to bring claims on behalf of purchasers of all three models because the models were substantially similar. Although courts are split on whether plaintiffs can bring claims on behalf of consumers who purchased similar, but not identical, products, the court reasoned that most find standing "so long as the products and alleged misrepresentations are substantially similar."

[16] *Molock*, 952 F.3d at 307 (Silberman, J., dissenting) (quoting 2 William B. Rubenstein, Newberg on Class Actions § 6:26 (5th ed. 2019)).

[17] *Lacy*, 2020 WL 1469621, at *2 (citation omitted).

[18] 28 U.S.C. § 2072(b).

[19] *Murphy*, 2020 WL 2079188, at *16 (emphasis added).

[20] *Molock*, 952 F.3d at 309 (Silberman, J., dissenting).

[21] *Gonzalez v. TCR Sports Broad. Holding, LLP*, No. 1:18-CV-20048-DPG, 2019 WL 2249941, at *4 (S.D. Fla. May 24, 2019) (approving nationwide class action settlement notwithstanding prior personal jurisdiction objection raised under *BMS*).

To determine whether products are substantially similar, Judge Du explained that courts ask whether "the resolution of the asserted claims will be identical between the purchased and unpurchased products" and look to factors such as similarity in products, claims and injuries. Applying that standard, the court found that the three Taser models at issue were substantially similar. In particular, the court focused on three similarities. First, the models had the "same traditional hand gun design"; second, an investigation by the Canadian government found that all three models had the same design flaw; and, third, the defendant failed to disclose the defects in all three models. In light of those similarities, the court determined that the plaintiff had standing to assert claims on behalf of consumers who purchased all three Taser models.

***Snyder v. Green Roads of Florida LLC*, 430 F. Supp. 3d 1297 (S.D. Fla. 2020)**

Judge Ursula Ungaro of the U.S. District Court for the Southern District of Florida held that consumers did not have standing to bring certain class claims against a company that sold cannabidiol (CBD) products because the consumers did not purchase some of the products at issue. In that case, the plaintiffs alleged that the defendant misrepresented the amount of CBD in its products, some of which the named plaintiffs did not purchase themselves. The court held that the plaintiffs could not bring class claims with respect to the CBD products they did not purchase. The court reasoned that, while some courts allow consumers to bring class claims involving nonpurchased products that are substantially similar to the purchased products, courts in the U.S. Court of Appeals for the Eleventh Circuit do not. The court explained that, because at least one named plaintiff must have standing with respect to each claim under Article III, standing did not exist with respect to a particular product unless one of the named plaintiffs purchased that product. As a result, the court determined that the classes were overbroad in including claims related to CBD products that the named plaintiffs did not purchase and dismissed them for lack of standing.

Ninth Circuit Vacates Order Allowing Counsel To Use Discovery To Identify a Lead Plaintiff

***In re Williams-Sonoma, Inc.*, 947 F.3d 535 (9th Cir. 2020)**

Judge Ferdinand F. Fernandez, writing for a panel of the U.S. Court of Appeals for the Ninth Circuit, granted a writ of *mandamus* vacating a pre-class-certification order for discovery that would have allowed the plaintiff's counsel to find a lead plaintiff to pursue class claims. In that case, the plaintiff brought suit in Kentucky, alleging that the defendant misrepresented the thread count of its bedding. After the trial court held that the plaintiff could not bring a class action under Kentucky law, the court ordered the defendant, on the plaintiff's request, to produce a list of California customers so the plaintiff's counsel could find a plaintiff to bring the class action. In granting the writ vacating that order, the Ninth Circuit relied on U.S. Supreme Court precedent holding that potential class members' names and addresses were not relevant under Federal Rule 26 and thus were not discoverable. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350-53 (1978). The court also disagreed with the plaintiff's argument that the list of Californian purchasers was relevant to commonality, typicality, ascertainability and reliance, reasoning that "using discovery to find a client to be the named plaintiff before a class action is certified is not within the scope of Rule 26(b)(1)." Accordingly, the court vacated the discovery order.

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Contributors

John H. Beisner
Partner / Washington, D.C.
202.371.7410
john.beisner@skadden.com

Jessica D. Miller
Partner / Washington, D.C.
202.371.7850
jessica.miller@skadden.com

Geoffrey M. Wyatt
Partner / Washington, D.C.
202.371.7008
geoffrey.wyatt@skadden.com

Jordan M. Schwartz
Counsel / Washington, D.C.
202.371.7036
jordan.schwartz@skadden.com

Anthony J. Balzano
Associate / New York
212.735.2173
anthony.balzano@skadden.com

Kent T. Hiebel
Associate / Washington, D.C.
202.371.7149
kent.hiebel@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000