



Significant Developments in Class Actions

Significant Developments in Jurisdiction:

Bristol-Meyers Squibb Co. v. Superior Court of California, San Francisco City, 137 S. Ct. 1773 (2017)



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Class Action Mastery
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Speaker

Katrina Carroll

Member

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Katrina Carroll has litigated class actions for over 15 years and has recovered more than \$1 billion for her clients. As the head of LDG's Chicago office, Katrina is actively involved in many of the firm's highest-profile cases. She currently serves as co-lead counsel in three major product liability matters: *In re: Rust-Oleum Restore Marketing, Sales Practices and Products Liability Litigation (MDL)*, *Mednick v. Precor Inc.* (N.D. Ill) and *Keith v. Ferring Pharmaceuticals, Inc.* (N.D. Ill.).

Speaker

Jonathan Jagher

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Jonathan Jagher has a national practice representing plaintiffs in antitrust class actions for over ten years. Jonathan and his firm are co-lead counsel for the Direct Purchaser Plaintiffs in In re Automotive Parts Antitrust Litigation, MDL No. 2311 (E.D. Mich.) and have recovered hundreds of millions of dollars for the class. His other recent cases include: In re Korean Ramen Antitrust Litigation, 13-cv-04115 (N.D.Cal.); In re Lithium Ion Batteries Antitrust Litigation, 13-MD-2420 (N.D.Cal.); In re OSB Antitrust Litigation, Master File No. 06-CV-00826 (E.D.Pa.); In re Online DVD Rental Antitrust Litigation, MDL No. 2029 (N.D.Cal.); In re Processed Eggs Antitrust Litigation, MDL No. 2002 (E.D.Pa.); and In re Air Cargo Shipping Services Antitrust Litigation, MDL No. 1775 (E.D.N.Y.).

What Happened to International Shoe?

- Post *International Shoe*, SCOTUS defined “minimum contacts” based on the nature of the connection to the forum, refining it into two categories:
 - 1) General Jurisdiction – Defendant is “at home” in the forum state and any and all claims may be heard regardless of their connection or not to the forum.
 - 2) Specific Jurisdiction –
 - “an affiliation between the forum and the underlying controversy”
 - “suit arises out of or relates to defendant’s contacts with the forum;”
 - or, “activity or an occurrence that takes place in the forum that is subject to that states’ regulation”

SCOTUS narrowed general & specific jurisdiction

General jurisdiction

- Since *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), general jurisdiction is now essentially limited to the defendant's place of incorporation and its principal place of business.

Specific jurisdiction

- After *J. McIntyre, Ltd. v. Nicastro*, 564 U.S. 873 (2011), “stream of commerce” theory without more is insufficient for specific jurisdiction.
- *Shuker v. Smith & Nephew*, (3d. Cir. March 1, 2018) (Precedential)
 - Specific jurisdiction exists when injuries “arise out of or relate to” activities “purposefully directed” by a defendant toward residents of a forum state.
 - Exploiting a “national market” is not enough to establish that it “purposely availed itself” of the privilege of conducting activities in the forum state.

Bristol Meyers Squibb – California Supreme Court

- Consolidated mass tort regarding BMS blood thinner Plavix involving
 - 700 plaintiffs from 34 states
 - 86 California plaintiffs
- California Supreme Court found non-California plaintiffs' claims related to BMS's contacts with California under “**sliding scale**” approach to specific jurisdiction:
 - “The more wide ranging the defendants’ forum contacts, the more readily is shown a connection between the forum contacts and the claim”
 - Liken it to it exercising Supplemental or Pendant Jurisdiction

Bristol Meyers Squibb - SCOTUS

- The Court rejected California's sliding-scale approach
- The Court said that out-of-state plaintiffs can either:
 - obtain specific jurisdiction in their home states; or
 - proceed with consolidated mass actions in states with general jurisdiction
- The Court did not impose "a rigid requirement that a defendants' in state conduct must actually cause a plaintiff's claim".

Bristol Meyers Squibb

- Thought experiments on how the outcome of BMS may have been different, supporting a finding of specific jurisdiction as to out-of-state plaintiffs too.
- Could out-of-state plaintiffs invoke specific jurisdiction if:
 - Plavix was developed and tested in California? BMS did some R&D there, but not Plavix
 - Plavix was manufactured in California? Would it make a difference if the claim were for a manufacturing defect as opposed to a defective design/warning?
 - Marketing for Plavix targeted to all 50 states was developed and implemented in California?
 - Decisions seem to default to specific jurisdiction where product was purchased, prescribed or caused harm, but is that necessarily so? Does an out-of-state plaintiff's claim "arise out of or relate to" tortious activities in the forum if that activity is something other than the ultimate sale, like the defective/dangerous design work or the development and implementation of a false advertising scheme.

Does *Bristol Meyers Squibb* apply to class actions and to matters in federal court?

- SCOTUS did *not* “confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum state seeks to represent a nationwide class of plaintiffs, not all of whom were injured there”. *BMS* 137 S. Ct at 1789 n.4
- *BMS* limited its ruling to the exercise of jurisdiction by a state courts and did not decide whether “the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court “ *BMS* 137 S. Ct. at 1784.

District Courts presented with BMS have split on whether it applies to nationwide class actions. No Circuit Court has ruled yet.

- *Mc Donnell v. Nature's Way Products LLC*, 2017 WL 4864910 (N.D. Ill. October 26, 2017)
 - Diet Supplement/false advertising claim dismissed non-resident claims based on BMS
- *De Bernardis v. NBTY, Inc.*, 2018 WL 461228, at *1-*2 (N.D. Ill. Jan. 18, 2018)
 - Diet Supplement/Consumer fraud class action – applied BMS to dismiss out of state plaintiffs from the putative class.
- *Practice Management Support Services, Inc. v. Cirque du Soleil, Inc.*, 2018 WL1255021 (ND Ill. March 12, 2018)
 - TCPA class action. Statute does not have a provision for nationwide service of process, accordingly 14th Amendment due process analysis applies just like in diversity cases.
No specific jurisdiction.

District Courts presented with BMS have split on whether it applies to nationwide class actions. No Circuit Court has ruled yet.

- *Fitzhenry –Russell v. Dr. Pepper Snapple Group*, 2017 WL 4224723 (N.D. Cal Sept 22, 2017)
 - Declined to dismiss out of state class members based on BMS
- *In re Chinese-Manufactured Dry Wall Products*, 2017 WL 5971622 (E.D. La Nov. 30, 2017)
 - Declined to apply BMS to nationwide class

District Courts presented with BMS have split on whether it applies to nationwide class actions. No Circuit Court has ruled yet.

- *Sloan v. General Motors LLC*, --F. Supp. 3d—(N.D. Cal. 2018), 2018 WL 44072
 - Ruled BMS applied only to state courts. Interstate federalism/state sovereignty concerns not present in federal court, so due process determined by 5th amendment and “traditional notions of fair play and substantial justice.”
 - Court exercised pendant jurisdiction.
- *Tickling Keys v. Transamerica Financial Advisors*, 2018 WL 1701994 (M.D. Fla. Apr. 4, 2018)
 - Relied on the express limitations in BMS opinion and “decline[d] to extend *Bristol-Meyers* to federal class action context.”

- Previously certified anti-trust class regarding bird food
- Defendants sought to limit to California only class members based on BMS
- Judge Houston relied on the express limitations in BMS opinion and found it was not applicable to federal courts or class actions.
- Judge Houston also found “[c]laims of unnamed class members are irrelevant to the question of specific jurisdiction”
 - In jurisdictions where this rule is law, that may be a way to keep out-of-state absent class members in the forum.

5th vs. 14th Amendment Due Process

- Where state long arm statute is the basis for service of process, 14th Amendment applies, whether the matter is filed in state or federal court. Arguably, BMS already applies to such cases.
 - FRCP 4(k) Territorial Limits of Effective Service
 - (A) Personal jurisdiction established by service of summons where defendant subject to general jurisdiction
 - (C) or when authorized by federal statute
- When a federal cause of action authorizes nationwide service of process the 5th amendment due process standards apply, which is left unresolved under BMS, so arguably nationwide class actions may be maintainable for claims based on the following:
 - Securities Exchange Act of 1934, 15 U.S.C. §78aa
 - Clayton Act 15 U.S.C. §22
 - ERISA 29 U.S.C. 1132 (e) (2)
 - RICO 18 U.S.C. §1965
 - What is not in this list? CAFA!

Implications for class actions

- Personal Jurisdiction disputes become another front-loaded obstacle.
- Likely to cause splitting of related claims because co-defendants may not be subject to jurisdiction in same forum. May cause defendants difficulty establishing set-offs for co-defendant liability.
- Potentially inefficient and unnecessary duplication of judicial resources.
- Potential for inconsistent decisions and outcomes
- Potential difficulty for a defendant to obtain nationwide peace via settlement or disposition.
- May enable plaintiffs to keep control of their statewide class actions.
- Shrinking personal jurisdiction seems regressive in contrast to realities of a globalizing economy, the internet, etc.

Practice Tips

- Defendants must move for dismissal for lack of personal jurisdiction at the outset of litigation, because unlike subject matter jurisdiction, personal jurisdiction may be waived.
- If not filing where general jurisdiction is available, plaintiffs should file with putative class representatives who meet specific jurisdiction requirements for the chosen forum.
- Pre-filing investigation and analysis of jurisdictional facts.
- What does target defendant report to taxing authorities of proposed forum. See eg, NJ Division of Taxation Notice of Business Activities Report by a Foreign Corporation
- Discovery on jurisdiction issues may be necessary and should be prioritized in initial conference.
- Be mindful of statute of limitations concerns should chosen forum dismiss for lack of personal jurisdiction.