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How Bristol-Myers Squibb May Transform Class Actions

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Although we are only three months removed from the U.S. Supreme Court's decision in Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017), much ink has already been spilled predicting the demise of so-called "litigation tourism."

So far, the results support the hype; although Bristol-Myers won't spell the end for all mass actions, it has triggered high-profile dismissals from several jurisdictions, like the Eastern District of Missouri, which previously acted as "magnet jurisdictions" for non-resident plaintiffs' tort claims. See, e.g., Jordan v. Bayer Corp., No. 4:17-CV-865 (CEJ), 2017 WL 3006993 (E.D. Mo. July 14, 2017) (dismissing the claims of 86 different plaintiffs from 25 states).

But while the vast majority of discussion about Bristol-Myers has focused on its impact on forum shopping, the implications of the Supreme Court's decision stretch further. When Bristol-Myers is viewed in context with the high court's other recent decisions, such as its general jurisdiction companion, BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017), it seems clear that the court is constricting its personal jurisdiction jurisprudence.

Often, the best place to preview the full consequences of a decision is the dissent, and that is especially true here, where Justice Sotomayor predicted several major implications of the decision beyond its effect on litigation tourism. So while many practitioners follow the trail of no-jurisdiction dismissals in the wake of Bristol-Myers, keep an eye out for how lower courts treat personal jurisdiction disputes following Bristol-Myers. They may herald new issues that could be back before the Supreme Court soon enough.

Plaintiffs Will Be Required to Sue in Multiple Jurisdictions for the Same Underlying Injuries

In her lone dissent, Justice Sotomayor expressed sympathy towards plaintiffs' tasks following Bristol-Myers, fretting that that "[t]he majority's rule will make it difficult to aggregate the claims of plaintiffs across the country," "will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States," and "will result in piecemeal litigation and bifurcation of claims." Id. at 1784.

Her prediction reflects the concern plaintiffs expressed on page 39 of their Respondents' Brief to the Supreme Court, in which they warned that a more restrictive test for specific jurisdiction could mean that "no state court could fully and efficiently adjudicate such litigation" and "[r]ather than jointly filing their claims challenging the identical wrongful conduct in one state court, the plaintiffs must proceed before fifty, or perhaps bring the same exact joint case against two different defendants in two courts simultaneously on opposite sides of the country." 2017 WL 1207530 at *39.

The plaintiffs' concern was driven in part by the specter of Daimler AG v. Bauman, 134 S. Ct. 746 (2014), in which the Supreme Court had already constricted the places where a corporation was "at home" for purposes of establishing general jurisdiction. Indeed, the Supreme Court's decision in BNSF — which preceded Bristol-Myers by only three weeks — reaffirmed that the exercise of general jurisdiction is limited in most cases to the "corporation's place of incorporation and its principal place of business." BNSF, 137 S. Ct. at 1558.

Thus, if a plaintiff sought to sue two different corporations who were "at home" in different states, there was already only one forum in which he could aggregate his claims — the forum that could exercise specific jurisdiction. Further limiting the specific jurisdiction test could, consequently, make claim aggregation even more difficult.

Rather than allay plaintiffs' fears, it appears that the Supreme Court sent a message that less claim aggregation is exactly what the Due Process Clause requires. In the Due Process context, the court explained, the "primary focus" of the Supreme Court's fairness inquiry "is the defendant's relationship to the forum State." Bristol-Myers, 137 S. Ct. at 1779 (emphasis added).

Consequently, it seems in the wake of Bristol-Myers that the plaintiffs' concern about being required to sue defendants in multiple jurisdictions to recover for a single injury now seems not only possible, but probable.

Plaintiffs Will Have More Difficulty Bringing Nationwide Class Actions

Although Bristol-Myers did not directly implicate class actions, Justice Sotomayor foreshowed in her dissent that district courts may use the Supreme Court's recent personal jurisdiction holdings to resist certification of nationwide classes.

Although the majority opinion made no mention of class litigation, Justice Sotomayor expressly noted in a footnote that the Supreme Court left open "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." Bristol-Myers, 137 S.Ct. at 1789 n.4.

In the past, courts have held that they may exercise specific jurisdiction over absent class members' claims so long as they can exercise personal jurisdiction over the named plaintiffs' lawsuit. Yet the Supreme Court's holding in Bristol-Myers threatens that reasoning insofar as it held that a California court could not "assert specific jurisdiction over the nonresidents' claims" even though they obtained and ingested the same drug as the California plaintiffs. 137 S. Ct. at 1776.

Specifically, the Supreme Court has emphasized that the class action device is a procedural rule, and therefore "must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right." Amchem Prods.

Inc. v. Windsor, 521 U.S. 591, 592 (1997).

Combined with the Supreme Court's holding in Bristol-Myers, that principle poses a strong potential argument for opposing the certification of broad national classes. After all, if class certification is just another form of joinder, then it is not clear how plaintiffs can distinguish the Supreme Court's holding in Bristol-Myers that nonresidents' claims could not proceed on the theory that aggregation with the California residents' claims through joinder established personal jurisdiction.

Put simply, class certification under Rule 23 is not a substantive exception to the Due Process Clause's personal jurisdiction requirements. If fairness under the Due Process Clause precludes nonresident plaintiffs from aggregating their claims with an in-forum resident outside of the class context, it should also bar nonresident class members from doing the same.

Although no court has yet applied Bristol-Myers to class certification issues, the issue is certain to crop up in forthcoming litigation. See Broomfield v. Craft Brew Alliance Inc., No. 17-cv-01027-BLF, 2017 WL 3838453, at *15 (N.D. Cal. Sept. 1, 2017) ("Regardless of the temptation by defendants across the country to apply the rationale of Bristol-Myers to a class action in federal court, its applicability to such cases was expressly left open by the Supreme Court and has yet to be considered by lower federal courts. Indeed, this Court may be among the first to rule on the implications of the decision for nationwide class actions.").

Conclusion

The Bristol-Myers decision will continue to grab headlines for its impact on curtailing forum-shopping, but if Justice Sotomayor is correct about the wide-reaching consequences of the court's decision then that effect will be just the first symptom of a much wider contraction of personal jurisdiction jurisprudence.

It has been a long road from cases like International Shoe, 326 U.S. 310 (1945) and Worldwide Volkswagen, 444 U.S. 286 (1980) to Bristol-Myers and BNSF Railway. There may be a few interesting twists in that road yet to be revealed.

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