

This Week's Feature

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Strategies and Considerations When Breaking Up Mass Actions After *BMS*

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Numerous articles have detailed the Supreme Court's groundbreaking decision in *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017) (*BMS*). This article addresses the mechanics and practical considerations when deciding whether to use *BMS* to break up a mass action.

The *BMS* decision is a culmination of six years of Supreme Court jurisprudence narrowing personal jurisdiction and limiting litigation tourism, which started with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). *Goodyear*, and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), after it, rejected the premise that a defendant is subject to general jurisdiction in any state where it conducts "continuous and substantial business." No longer able to rely on a far-reaching general jurisdiction standard to claim jurisdiction over the nonresident defendant, the Supreme Court of California in *BMS* avoided *Goodyear* and *Daimler* by applying a "sliding scale approach to specific jurisdiction." *BMS*, 137 S. Ct. at 1778. Using this watered-down standard, the court held that specific jurisdiction was met "because the claims of the nonresidents were similar in several ways to the claims of the California residents." *Id.* at 1779. But the U.S. Supreme Court rejected this end-run around its jurisprudence, holding that the "mere fact that *other* plaintiffs . . . ingested [the drug] in California—and allegedly sustained the same injuries as did the nonresidents—did not allow the State to assert specific jurisdiction over nonresidents' claims." *Id.* at 1781. This is a serious blow to litigation tourism, and hopefully, it will end the outsized effect of "judicial hellholes" on our civil legal system.

The question that remains, however, is how to take advantage of the *BMS* decision in your pending multi-plaintiff suits. To break up these mass actions, you will likely need to file a motion to dismiss (or a motion for reconsideration of a previously denied motion to dismiss), raising lack of personal jurisdiction pertaining to the claims of each nonresident plaintiff. See, e.g., *EnQuip Techn. Group v. Tycon Technoglass, S.R.L.*, 2d Dist. Greene Nos. 2009 CA 42, 2009 CA 47, 2010-Ohio-28, ¶ 40. Judge Rex Burlington’s decision to grant a mistrial in a multi-plaintiff talc case against Johnson & Johnson just one day after *BMS* was decided is an early indication that courts will engage in the plaintiff-by-plaintiff jurisdictional analysis required by *BMS*. See *Swann v. Johnson & Johnson*, No. 1422-cc09326-01 (Cir. Ct. Mo. June 20, 2017).

Before you do so, however, consider whether breaking up a mass action is actually in your client’s best interest. This may not be as obvious as you may think. First, weigh the advantages and disadvantages of the present forum against the forum or forums where the cases may be refiled, including the judges, jurisdictions, speed of the dockets, and applicable laws. You should also consider whether these lawsuits are more likely to be covered by your client’s insurance if they remain part of a single mass action versus a number of individual suits spread across the country. In addition, the efficiency of the mass action may weigh in favor of keeping the actions consolidated. Just as it is costly and time-consuming for plaintiffs’ counsel to hire local counsel and file hundreds of cases across the country, it is equally costly and time-consuming to defend against those cases. But at the same time, through a thoughtful and well-coordinated defense strategy, you may gain the upper hand against plaintiffs’ counsel who will not be able to coordinate the prosecution of numerous cases spread across the country effectively.

Finally, and perhaps most importantly, you should evaluate which nonresident plaintiffs’ cases will be barred by the statute of limitations when they are dismissed and refiled in the proper forum. Some states, such as California, have “savings statutes” (or similar common law) that toll the applicable statutes of limitation when a plaintiff’s action is dismissed for lack of personal jurisdiction in another state court. See Cal Civ. Proc. Code § 355 (permitting filing within one year of dismissal of an action, except on the merits, that was timely filed in another jurisdiction). But other states, such as Pennsylvania, do not toll the statutes of limitation for out-of-state filings. See *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 943 (Pa. Super. Ct. 2002) (“[A]n action filed in another state does not toll the running of the statute of limitations as to an action in Pennsylvania”). Thus, the continued viability of dismissed and refiled cases depends heavily on state-specific tolling provisions. We have compiled a comprehensive 50-state survey detailing each state’s relevant tolling provisions that will aid in this analysis. (Please contact the authors for a copy (or to discuss any aspect of this article)).

In sum, it will generally be advantageous to break up these mass actions, particularly those filed in “judicial hellholes,” but it should not be taken as a given. Should you decide to do so, consider first using *BMS* as leverage: offer opposing counsel an opportunity to dismiss the nonresident plaintiffs or seek a discounted settlement. If they refuse, then file your motion to dismiss and make sure that your national defense strategy is well underway.



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