

5th Circ. Ruling Amplifies Bristol-Myers Class Action Debate

By **Michael Ruttinger** (April 7, 2020)

The U.S. Court of Appeals for the Fifth Circuit's recent decision in *Cruson v. Jackson National Life Insurance Co.*[1] deepens the emerging divide among the federal appellate courts that have recently addressed the U.S. Supreme Court's 2017 personal jurisdiction decision, *Bristol-Myers Squibb Co. v. Superior Court of California*,[2] and its impact on class action litigation.



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Earlier in the month, the U.S. Court of Appeals for the D.C. Circuit[3] and the U.S. Court of Appeals for the Seventh Circuit[4] became the first courts to address whether *Bristol-Myers* effectively bars nationwide class actions when absent class members would be otherwise unable to establish personal jurisdiction over their claims against a defendant.

The D.C. Circuit's decision in *Molock v. Whole Foods Market Group Inc.* and the Seventh Circuit's decision in *Mussat v. IQVIA Inc.*, unfortunately, raised as many questions as they answered. The same could be said about *Cruson*, but the Fifth Circuit's reasoning — much of which aligns with the D.C. Circuit — provides helpful guidance for when and how litigants should raise the personal jurisdiction issue in class actions.

Bristol-Myers, Personal Jurisdiction and Class Actions

Ever since the Supreme Court's 2017 holding in *Bristol-Myers*, federal district courts have sharply divided over what impact — if any — the Supreme Court's holding has on class actions.

Bristol-Myers was a decision about specific personal jurisdiction and noteworthy mainly for its holding that "[i]n order for a state to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum," meaning "there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." [5]

It took relatively little time for class action litigants to consider whether *Bristol-Myers* may be used to defeat certification of nationwide classes. If *Bristol-Myers* prohibited out-of-state plaintiffs from joining a mass-tort litigation in a state in which their claims did not arise, why should the same not be true for absent class members whose claims did not "arise out of or relate to the defendant's contacts with the forum"? [6]

The district courts took it from there; it took just months to develop a well-defined fault between those courts that reasoned that "[p]ersonal jurisdiction in class actions must comport with due process just the same as any other case," [7] and those that distinguish class actions from mass action like *Bristol-Myers*. [8]

Since then, class action lawyers and jurisdiction junkies have waited with anticipation not just for appellate guidance, but for a potential return-engagement before the Supreme Court. When the *Molock* and *Mussat* decisions issued earlier this month, the general consensus was that rather than clarity, the courts added more confusion.

In *Molock*, the D.C. Circuit never reached the merits question, finding instead that the personal jurisdiction question was premature because "[p]utative class members become parties to an action — and thus subject to dismissal — only after class certification."^[9] The court thus never addressed whether the *Bristol-Myers* reasoning would apply to class actions, though Judge Laurence Silberman separately dissented to address his belief that "it seems to me that logic dictates that it does."^[10]

In contrast, the Seventh Circuit in *Mussat* did reach the merits, refusing to apply *Bristol-Myers* because class actions "in short, are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class."^[11]

Cruson v. Jackson National Life Insurance

On March 25, the Fifth Circuit issued its decision in *Cruson*. Unlike *Molock* and *Mussat*, *Cruson* dealt with a purely procedural issue — waiver. Specifically, Jackson National Life Insurance did not raise personal jurisdiction as a defense when it moved to dismiss a nationwide class action challenging Jackson's calculation of so-called surrender charges on its annuity contracts.^[12] Jackson only raised *Bristol-Myers* later, at the class certification stage, prompting the plaintiffs to argue that Jackson waived the issue.

The Fifth Circuit's decision largely aligns with the D.C. Circuit's in *Molock*. The court concluded that the defense of personal jurisdiction was not an available defense within the meaning of Federal Rule of Civil Procedure 12 because the absent class members "were not yet before the court when Jackson filed its Rule 12 motions."^[13] Indeed, the Fifth Circuit cited to the *Molock* decision as part of its no-waiver holding, while confirming that what "brings putative class members before the court is certification."^[14]

Like *Molock*, however, the Fifth Circuit did not reach the merits. Having concluded that Jackson did not waive its personal jurisdiction objection, the court declined "Jackson's request to address the merits of its personal jurisdiction defense for the first time on appeal."^[15] Instead, the court rejected class certification on other grounds — an insufficient showing of predominance under Rule 23(b)(3) — and offered that "Jackson is free to raise the defense again should plaintiffs seek to re-certify a class."^[16]

Implications of the Fifth Circuit's Decision

Cruson bears important implications for the future of the *Bristol-Myers* and class actions debate. In particular, it provides new guidance on when and how parties should raise *Bristol-Myers* as an objection to a nationwide class.

Much like *Molock*, *Cruson* instructs that a personal jurisdiction challenge to class certification is not ripe until the certification stage. If a party wishes to raise personal jurisdiction as an objection to class certification, the time to do it is in an opposition to the plaintiff's class certification motion.

The *Cruson* holding — along with the D.C. Circuit's holding in *Molock* — arguably conflict with the Seventh Circuit's decision in *Mussat*. After all, the defendant in *Mussat* raised *Bristol-Myers* by way of a motion to strike the pleadings, well before briefing class certification issues.

Under the reasoning from *Cruson* and *Molock*, the Seventh Circuit arguably should also have held the jurisdiction issue premature. Instead, by reaching the merits, the Seventh Circuit

has suggested that jurisdiction over a class is ripe at the pleadings stage.

This split on the procedure for challenging jurisdiction in class actions — while not as eye-catching as a circuit split on the merits — may signal that the next crucial stage of the debate will not be whether Bristol-Myers applies, but when any such challenge should be raised.

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[1] *Cruson v. Jackson National Life Insurance Co.*, No. 18-40605, --- F.3d ---, 2020 WL 1443531 (5th Cir. Mar. 25, 2020).

[2] *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

[3] *Molock v. Whole Foods Market Group*, No. 18-7162, --- F.3d ---, 2020 WL 1146733 (D.C. Cir. Mar. 10, 2020).

[4] *Mussat v. IQVIA*, No. 19-1204, --- F.3d ---, 2020 WL 1161166 (7th Cir. Mar. 11, 2020).

[5] *Bristol-Myers*, 137 S.Ct.. at 1780.

[6] *Id.*

[7] See, e.g., *In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696 (BMC) (GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).

[8] See e.g., *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) (“Bristol-Myers is meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff.”).

[9] *Molock*, 2020 WL 1146733 at *3.

[10] *Id.* at *9 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010)) (Silberman, J., dissenting).

[11] *Mussat*, 2020 WL 1161166 at *4.

[12] *Cruson*, 2020 WL 1443531, at *1.

[13] *Id.* at *5.

[14] *Id.* at *5 (citing *Molock*, 2020 WL 1146733, at *3).

[15] *Id.* at *4 n.7.

[16] Id.