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Bristol-Myers Squibb: A Dangerous Sword

By **Neil Tyler and Claudia Vetesi** (April 25, 2018, 2:11 PM EDT)

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On June 19, 2017, the U.S. Supreme Court issued a decision that has the potential to reshape the way class actions are litigated in courts throughout the country. In Bristol-Myers Squibb Co. v. Superior Court of California,[1] or BMS, the court clarified the scope of specific personal jurisdiction in the context of a mass tort action brought in California state court. Since that decision, some defendants have attempted to use BMS as a sword in response to putative nationwide class actions, with varying levels of success. No circuit court has yet to weigh in on the question of whether BMS applies in the class action context. But even if courts begin to consistently dismiss putative nationwide classes on BMS grounds, filing a motion to dismiss for lack of personal jurisdiction may not always be the best strategic and business decision for defendants.

The Supreme Court's BMS Decision: Specific Jurisdiction Requires a Connection Between the Forum and the Specific Claims

The Trial Court's Decision

In BMS, nearly 700 plaintiffs from 34 states filed a mass tort action against Bristol-Myers Squibb in California state court, asserting a variety of state-law claims based on injuries they allegedly suffered as a result of the sale of the drug Plavix.[2] Because Bristol-Myers Squibb is based outside California, it moved to quash service of summons as to the non-California plaintiffs' claims based on a lack of personal jurisdiction.[3] The trial court disagreed, finding that the court had general jurisdiction over Bristol-Myers Squibb based on the company's "extensive activities in California."[4] Bristol-Myers Squibb appealed.

The State Court Appeals: General Contacts with California Sufficient for Personal Jurisdiction Over Nonresident Claims

The California Court of Appeals disagreed with the trial court, finding general jurisdiction lacking because Bristol-Myers Squibb is not based in California.[5] The Court of Appeals, however, found that the California courts had specific jurisdiction over both the resident and nonresident plaintiffs' claims based on Bristol-Myers Squibb's general contacts with California, such as nationwide marketing, advertising and sales of the product.[6] Bristol-Myers Squibb appealed the ruling to the California

Supreme Court.

Applying a "sliding-scale approach to specific jurisdiction," the California Supreme Court likewise found that the state courts had specific personal jurisdiction over the nonresidents' claims.[7] Specifically, the court concluded that because of Bristol-Myers Squibb's extensive general contacts with California, specific jurisdiction could be satisfied despite less direct connections between the company's forum activities and the nonresident plaintiffs' claims.[8] Bristol-Myers Squibb filed a petition for writ of certiorari with the United States Supreme Court, which was granted.

The Supreme Court's Decision: No "Adequate Link" Between California and the Nonresidents' Claims

The U.S. Supreme Court reversed the California Supreme Court, holding that the California state courts lacked specific jurisdiction over the nonresident plaintiffs' claims, and rejected the "sliding-scale approach."[9]

The U.S. Supreme Court explained that for specific jurisdiction to be satisfied "there must be an affiliation between the forum and the underlying controversy."[10] Applying this legal framework, the Supreme Court found there was no "adequate link between [California] and the nonresidents' claims."[11] Bristol-Myers Squibb did not develop, create a marketing strategy, manufacture, label, package or work on regulatory approval for Plavix in California, and "the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California."[12] Bristol-Myers Squibb's only connection to California related to the lawsuit was that it had sold nearly 187 million pills of Plavix, totaling $900 million in sales, to others between 2006 and 2012.[13] But the Supreme Court explained that "[t]he mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. ... This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents."[14] The Supreme Court therefore found lacking "a connection between the forum and the specific claims at issue" because "all the conduct giving rise to the nonresidents' claims occurred elsewhere."[15]

BMS's Application: Does the Decision Apply to Class Actions in Federal Court?

Since BMS, lower courts have been grappling with several open issues, most importantly whether the specific personal jurisdiction principles and requirements discussed in BMS apply equally to class actions in federal court.

In a footnote in her dissent, Justice Sonia Sotomayor recognized that "[t]he Court today does 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."[16][17] District courts have come out on all sides of this issue. Some courts have declined to confront the issue until the class certification stage and other courts provide more guidance.[18] Others have found BMS inapplicable to class actions.[19] But several courts have found the same constitutional limits and principles discussed in BMS apply to class actions.[20]

The reasoning of Practice Management Support Services Inc. v. Cirque du Soleil Inc. provides a convincing foundation for defendants to argue that BMS applies to class actions. In Practice Management, the district court held that BMS applies to class actions because under the Rules Enabling Act a defendant's due process rights should be the same in the class context. The Rules Enabling Act

provides that a rule of procedure cannot "abridge, enlarge, or modify any substantive right."[21] Accordingly, if Federal Rule of Civil Procedure 23 were found to permit putative class members to pursue claims against a nonresident defendant in a forum where those individuals could not otherwise bring them in their individual capacity, the defendant's constitutional right to be free of the "coercive power of a State that may have little legitimate interest in the claims in question" would be violated.[22]

Key Considerations for Defendants Considering Drawing Their BMS Swords

Defendants considering BMS-based motions need to think strategically and quickly about whether to raise their personal jurisdiction defenses. A lack of personal jurisdiction defense must be raised at the outset of a case or else the defendant risks waiving it. Accordingly, nationwide class action defendants must often present their BMS-based arguments without a full understanding of the facts, strengths, and weaknesses of the case or the composition of the putative class.

Because no circuit court has yet to weigh in on BMS's application to class actions, whether a defendant's BMS-based motion will be successful may largely depend on the forum and judge hearing the case. But even if faced with a judge who is likely to rule that BMS applies to class actions, a defendant should give careful consideration to whether it truly desires the outcome that a successful BMS motion will bring.

The Sharp Edge of the BMS Sword

If a defendant succeeds in disposing of the claims of nonresident putative class on BMS grounds, the defendant's potential liability will be significantly decreased. Depending on the case and composition of the putative class, winning a BMS-based motion could be almost as significant and beneficial as fully defeating class certification. The prospect of knocking out the majority of class members, litigating on a state-specific level, and potentially settling the case for a much smaller amount seems to lead to the inevitable conclusion that a defendant should file a BMS-based motion whenever available.

Why Defendants May Not Want to Draw the BMS Sword

There are potential unintended consequences associated with winning a BMS-based motion, however. Nonresident putative class members' claims may still be filed in another forum. Under principles of general personal jurisdiction, these claims could still all be brought together in the forum where the defendant is incorporated and/or has its principal place of business. This could result in putative nationwide class actions being filed in courts less favorable to the defendant.

Relatedly, and maybe even more concerning, a successful BMS motion could lead to nonresident putative class members re-filing class actions in each of their resident states. This could result in many almost identical class actions based on the same facts and asserting the same claims pending in courts throughout the country. Thus, from a cost and resources perspective, it might be more beneficial for a defendant to adjudicate all of the class members' claims in one forum through a nationwide class action than to incur duplicative costs and spend considerable time and resources litigating identical cases in several different fora.

Finally, a successful BMS motion could make it more difficult for a defendant to settle all putative class members' claims in a single forum. Nationwide putative class actions regularly settle before a class has been certified, yet the parties and courts must still engage in the process of certifying one or more classes for settlement purposes. If the class has been narrowed to only one state on BMS grounds, the parties may face difficulty trying to enlarge it for the purpose of a nationwide settlement.[2] A

defendant therefore should consider whether it may want to enter into a nationwide class action settlement before filing its BMS motion.

Takeaway

The determination of whether to raise a BMS defense will largely depend on the case, the forum, the presiding judge, the defendant's resources, and the possibility of settlement. Each defendant considering filing a BMS-based motion in a putative nationwide class action should weigh the costs and benefits of a court granting the motion.

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[1] San Francisco Cty., 137 S. Ct. 1773 (2017).

[2] 137 S. Ct. at 1778.

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id. at 1779.

[9] Id. at 1783.

[10] Id. at 1780.

[11] Id.

[12] Id.

[13] Id.

[14] Id. at 1780.

[15] Id. at 1781-82.

[16] Id. at 1789 n. 4 (Sotomayor dissent).

[17] Justice Sotomayor also recognized that "since [BMS] concerns the due process limits on the exercise of specific jurisdiction by a State, [the Supreme Court] leave[s] open the question whether the Fifth Amendment imposes the same restrictions [as the Fourteenth Amendment] on the exercise of personal jurisdiction by a federal court." Id. at 1783-84 (Sotomayor dissent). While not the subject of this article, when a federal court sitting in diversity applies state law and looks to a state's long-arm statute as the basis for service of process, the Fourteenth Amendment should govern the exercise of personal jurisdiction even in federal court. See FRCP 4(k); McDonnell v. Nature's Way Prod. LLC, No. 16 C 5011, 2017 WL 4864910, at *4 n.7 (N.D. Ill. Oct. 26, 2017).

[18] See, e.g., Broomfield v. Craft Brew All. Inc., No. 17-cv-01027-BLF, 2017 WL 3838453, at *15 (N.D. Cal. Sept. 1, 2017).

[19] See, e.g., Fitzhenry–Russell v. Dr. Pepper Snapple Grp. Inc., No. 17-cv-00564-NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017); Molock v. Whole Foods Market Inc., No. 16-CV-02483 (APM), 2018 WL 1342470, at *6 (D.D.C. Mar. 15, 2018); In re Morning Song Bird Food Litigation, No. 12CV01592 JAH-AGS, 2018 WL 1382746, at *5 (S.D. Cal., Mar. 19, 2018).

[20] See, e.g., Practice Management Support Services Inc. v. Cirque du Soleil Inc., No. 14 C 2032, 2018 WL 1255021, at *15-17 (N.D. Ill. Mar. 12, 2018); McDonnell v. Nature's Way Prod. LLC, No. 16 C 5011, 2017 WL 4864910, at *4 (N.D. Ill. Oct. 26, 2017); Wenokur v. AXA Equitable Life Insurance, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017).

[21] 28 U.S.C. § 2072(b).

[22] BMS, 137 S. Ct. at 1780.

[23] In a prior blog post [https://classdismissed.mofo.com/false-advertising-claims/ninth-circuits-pro-defense-decision-in-hyundai-opens-the-door-for-class-certification-defenses/], we discussed the ramifications of In re Hyundai and Kia Fuel Econ. Litig., No. 15-56067, 2018 U.S. App. LEXIS 1626 (Jan. 23, 2018), where the Ninth Circuit denied certification of a settlement class because the district court had failed to consider the differences in various state consumer protection laws. Though personal jurisdiction defenses can be waived by defendants, raising a BMS defense early in the case and then attempting to waive it at the settlement stage may invite the same type of rigorous scrutiny from courts as was seen in Hyundai.