Class Action Monitor

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In re National Prescription Opiate Litigation: Lessons Learned from the Novel "Negotiation Class"

By Paul Genender, Lara Bach and Jake Rutherford

On September 11, 2019, Judge Dan Polster—the District Court Judge presiding over the *In re National Prescription Opiate Litigation* MDL in Ohio—approved a novel and untested class construct under Rule 23: a "negotiation class certification." As the court described it, this "innovative solution" attempts to remedy common impediments that prevent negotiated global resolutions in high-stakes class actions by conducting the class certification and opt-out process ***before*** the settlement is reached in hopes of giving defendants full visibility of class size and potential additional exposure going into negotiations. While the court's certification of the novel "negotiation class" in this case is currently on appeal before the Sixth Circuit, parties may still glean lessons from this case for future class action litigation.

The Opioid MDL Litigation and Negotiation Class Certification

The Opioid MDL encompasses over 2,000 individual actions brought by state and local governments against numerous pharmaceutical manufacturers, distributors, and pharmacies. *See* Mem. Op. Certifying Negotiation Class at 1, *In re Nat'l Prescription Opiate Litig.*, (No. 1:17-MD-2804) (N.D. Ohio Sept. 11, 2019), ECF No. 2590. The plaintiffs in the Opioid MDL seek recovery of funds expended in addressing the opioid epidemic across the United States,

(continued on next page)

principally through claims asserting violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act and the Controlled Substances Act. *Id.* at 2, 14. There are thousands of additional cases pending in state courts throughout the United States in which municipalities seek similar relief against defendants. *Id.* at 2.

The MDL parties engaged in extensive negotiations, overseen by a court-appointed Special Master and expert. *Id.* Eventually, however, the negotiations reached an impasse, ostensibly because the parties could not develop a settlement structure that gave the defendants the necessary assurances that they would not face extensive and debilitating liability from plaintiffs with high-value claims that chose to opt out of any settlement class. *Id.* at 3.

In an attempt to remedy this issue, the plaintiffs proposed a strategy that had been proposed in an academic article, but that had never been tested by a court: they sought to dispense with the traditional settlement class process in favor of a process that instead conducts class certification and the opt-out period *prior* to actually reaching a settlement with any defendant. *Id.* at 3.

To implement this proposal, the plaintiffs first developed a sophisticated voting plan that assigned weighted values to each class member's vote and set an allocation mechanism to distribute any settlements that may eventually be obtained from the defendants. *Id.* at 6. Then, on June of 2019, the plaintiffs filed—on behalf of 51 cities and counties—a motion seeking certification of a negotiation class along the parameters set out above. *Id.* at 4. The motion drew numerous objections from several Defendants, some class members, parties litigating similar claims in state courts, and numerous attorneys general from across the United States. *Id.*

After conducting hearings, the court granted the motion to certify the negotiation class. Although Federal Rule of Civil Procedure 23 does not specifically enumerate a "negotiation class," the court ruled that the history and equitable nature of Rule 23 support its liberal application, and went so far as to authorize certification of this negotiation class so long as the requirements of Rule 23 governing class certification were met. *Id.* at 9. The court determined that the defendants' desire for a "global settlement" and the public interest in expediting relief to affected communities necessitated "creative thinking." *Id.* at 2. Finally, the court reasoned that the negotiation class was not violative of due process because the procedural protections in Rule 23 remained intact. *Id.* at 9.

The court then engaged in a traditional class certification analysis and determined the Rule 23 factors were satisfied. Additionally, the court conducted a preliminary analysis of the proposed allocation and voting plan under Rule 23(e) and determined that any settlement would likely be approved. *Id.* at 33.

After certification, the class members were given a window to opt out, after which time the class size was set. *Id.* at 7. Those that opted out are free to separately pursue their claims. *Id.* Finally, if a settlement is reached that garners support from 75% of the class, and the court approves that settlement, the funds will be allocated according to the procedures set in place prior to certification. *Id.* at 7. Parties that did not opt out are free to object, but, if the settlement is approved, it will be binding (absent court intervention). *Id.* at 7, 10.

In the interim, numerous parties that objected to certification of the negotiation class have appealed to the Sixth Circuit arguing, primarily, that the negotiation class is not permitted under Rule 23 and that the court's Rule 23 analysis was not supported by sufficient evidence. *See, e.g.*, Brief for Defendant Appellants at 8–11, *In re Nat'l Prescription Opiate Litig.*, (No. 19-305) (6th Cir. Sept. 26, 2019), ECF No. 1-2. The parties currently await a decision.

Practice Pointers

It remains to be seen whether this particular negotiation class will survive appeal to the Sixth Circuit. Whatever the outcome, however, one should expect that creative lawyers for would-be class members will almost certainly attempt to employ and refine the negotiation class in future cases. Indeed, the negotiation class provides plaintiffs a

definitive understanding of their recovery and at an earlier stage in the trial. This case also provides clear guidance and takeaways for defendants going forward:

- **Allocation and Voting Plans:** Defense counsel should carefully analyze any proposed settlement allocation and voting plan. Some defendants may find it in their interest to contest liability (and therefore certification) at the outset. Their lawyers should review the proposed allocation and voting process to determine if it may violate Rule 23(e)(2)(D)'s fairness requirement. For clients that are undecided but are open to the notion of a negotiation class, counsel should make a determination of (1) whether the structure satisfies Rule 23's fairness requirement and, if so, (2) whether there are other implications that may adversely affect their clients' interest. There could certainly be scenarios where the class may be certified under Rule 23, but the proposed voting process or allocation is likely to entice high-value plaintiffs to opt out of the process.
- **Litigation of the Underlying Claims Will Likely Continue Even if a Negotiation Class is Certified:** Negotiation class certification is a means to end—not an end in-and-of itself. Because negotiation classes are intended to remove impediments to global resolution, courts will likely be reticent to allow negotiation activities to interfere with litigation, thereby imposing significant settlement pressure of its own. Whether or not a particular defendant intends to object, defense counsel should be prepared to continue to litigate the substantive claims on any schedule the court has already set.
- **Deciding to Oppose Negotiation Class Certification:** Before deciding to oppose negotiation class certification, defense counsel should carefully weigh the costs and benefits of this approach and advise their clients accordingly. Some defendants will take an understandably aggressive posture and oppose any resolution short of a decision on class certification or the merits. However, for defendants with significant risk of exposure, the prospect of capturing an entire class and binding members to a negotiated settlement under Rule 23 provides optionality and the potential for significant risk avoidance. Further, all defendants may observe an incremental reduction in litigation costs because this process occurs relatively early in the proceedings. This alone warrants consideration. In certain cases, the negotiation class structure will be appealing to certain defendants. For example, for defendants in cases with heterogeneous damages and a high degree of risk if high-value plaintiffs opt out, the finality (and earlier detection of exposure) could have some appeal. Conversely, in certain situations, a negotiation class might be altogether unnecessary because there is no incentive for plaintiffs to opt out, such as cases in which the plaintiffs have low-value, homogeneous claims.
- **Objecting Defendants Still Have Significant Procedural Protections:** Most importantly, any negotiation class seeking certification will be subjected to the requirements of Rule 23. As such, defense counsel seeking to object to a negotiation class can still rely on the traditional arguments concerning numerosity, commonality, typicality, and adequacy under Rule 23(a), as well as the predominance and superiority requirements under Rule 23(b)(3). These remain powerful tools for defendants to contest the class.
- **Defendants Who Lose their Objection Still Have Options:** Should a defendant find itself in a case with a negotiation class, nothing compels that defendant to settle. It is still free to litigate.

Supreme Court's Decision in *Bristol-Myers Squibb Co. v. Superior Court of California* Continues to Divide Courts

By Edward Soto, Pravin Patel, Corey Brady and Daniel Guernsey

In *Bristol-Myers Squibb Co. v. Superior Court of California*, the U.S. Supreme Court limited the ability of out-of-state mass tort claimants to sue a defendant that is not "at home" in a given jurisdiction. But it did not indicate the decision's applicability to nationwide class actions. That important question continues to divide courts across the country.

Background

In *Bristol-Myers*, a mix of California residents and nonresidents filed a mass tort action alleging injuries from a drug produced by Bristol-Myers Squibb. The nonresident plaintiffs pled neither general jurisdiction over Bristol-Myers Squibb nor a California nexus with their use of the drug, prompting the defendant to argue a lack of personal jurisdiction. The California Supreme Court found specific jurisdiction existed as to all plaintiffs' claims, reasoning that Bristol-Myers Squibb had extensive contacts with the state, and all plaintiffs' claims were similar. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 377 P.3d 874, 884-94 (Cal. 2016). The Supreme Court reversed, stating that "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." *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (citation omitted and alteration adopted). Here, it held there was not—there was no link between the state and each plaintiff's claims sufficient to establish personal jurisdiction. Nor was it adequate to rely on the similarity of plaintiffs' claims. Justice Sotomayor dissented, opining that such similarity meant it would be fair for a large corporation like Bristol-Myers Squibb to defend itself in California. She also noted that the majority had not addressed whether the decision applies to nationwide class actions—a question that has continued to divide courts.

Courts Not Applying *Bristol-Myers* to Class Actions

The majority of courts, including the D.C. Circuit and the Seventh Circuit, have declined to apply *Bristol-Myers*'s holding on specific jurisdiction to class actions (at least prior to class certification). The D.C. Circuit considered this question after the district court certified it for resolution, noting the diverse approaches among courts and finding "a substantial ground for difference of opinion." *Molock v. Whole Foods Mkt. Grp.*, 317 F. Supp. 3d 1, 5 (D.D.C. 2018). In light of putative class members' status as nonparties, the D.C. Circuit concluded, over a dissenting opinion, that "[p]ersonal jurisdiction need not be established over these hypothetical parties and claims because they are not 'before the court.'" *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 299 (D.C. Cir. 2020) (citation omitted and alteration adopted).

The Seventh Circuit has also considered this question and rejected *Bristol-Myers*'s applicability to a nationwide class action. It characterized the application of *Bristol-Myers* in this context as "a major change in the law of personal jurisdiction and class actions," because unlike a mass tort action, class plaintiffs must satisfy the requirements of Rule 23, which serves to protect the due process rights of defendants. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447-48 (7th Cir. 2020). And like the D.C. Circuit, the Seventh Circuit ascribed importance to unnamed class members' status as nonparties in many circumstances. *Id.*

Many district courts have also taken this approach, citing similar reasons. For example, the Northern District of Georgia in *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360 (N.D. Ga. 2018), rejected

Bristol-Myers's application to a class action because: (i) that device differs from a mass tort action; (ii) Rule 23 affords due process protections to defendants; and (iii) unnamed class members are treated as nonparties for many purposes.[1]

Courts Applying *Bristol-Myers* to Class Actions

Despite the majority of courts declining to apply *Bristol-Myers*'s specific jurisdiction holding to class actions, a number have gone the other way—including some courts that have split from their colleagues within the same circuit. In the Eastern District of New York, for instance, one judge stated that "[t]he constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case." *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017). However, other courts in the Second Circuit have noted the contrary majority position,[2] and still others have avoided the issue by deferring its resolution until class certification.[3] In the Ninth and Eleventh Circuits, there is also intra-circuit (and sometimes intra-district) disagreement.[4]

Conclusion

The Supreme Court's holding in *Bristol-Myers* offers defendants facing mass tort actions a potential defense against the claims of out-of-state plaintiffs, where there is neither general jurisdiction nor a clear nexus with the forum. But it did not clarify whether that potential defense can be deployed against a nationwide class action. Though two circuits and a majority of district courts to consider the issue have rejected *Bristol-Myers*'s applicability in this context, other courts have permitted this defense, creating a shifting legal landscape—even within a given circuit or district. We recommend that defendants finding themselves facing a class action in this jurisdictional situation closely evaluate their options under the rapidly evolving case law.

Weil's leading class action practice will continue to monitor this issue for developments that may benefit our clients.

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[1] *Id.* at 1365-69; *see also generally, e.g.*, *Rosenberg v. LoanDepot.com LLC*, 2020 WL 409634 (D. Mass. Jan. 24, 2020) (joining the "large majority" of district courts rejecting the applicability of *Bristol-Myers* to class actions); *Gress v. Freedom Mortg. Corp.*, 386 F. Supp. 3d 455 (M.D. Pa. 2019) (similar); *Boger v. Citrix Sys., Inc.*, 2020 WL 1033566 (D. Md. Mar. 3, 2020) (similar); *Murphy v. Aaron's, Inc.*, 2019 WL 5394050 (D. Colo. Oct. 22, 2019) (similar).

[2] *See, e.g.*, *Cummings v. FCA US LLC*, 401 F. Supp. 3d 288, 317 (N.D.N.Y. 2019).

[3] *See, e.g.*, *Bank v. Vivint Solar, Inc.*, 2019 WL 2280731, at *7 (E.D.N.Y. Feb. 25, 2019) (deferring the *Bristol-Myers* issue until class certification "[g]iven the unsettled and constantly developing caselaw regarding [this issue]"); *Lugones v. Pete & Gerry's Organic, LLC*, 2020 WL 871521, at *4 (S.D.N.Y. Feb. 21, 2020).

[4] *Compare Schertzer v. Bank of Am., N.A.*, 2020 WL 1046890, at *12 (S.D. Cal. Mar. 4, 2020) (siding with the "majority of cases" finding *Bristol-Myers* inapplicable to class actions), *with Carpenter v. Petsmart, Inc.*, 2020 WL 996947, at *4 (S.D. Cal. Mar. 2, 2020) (concluding the opposite); *compare King v. Bumble Trading, Inc.*, 2020 WL 663741, at *4-5 (N.D. Cal. Feb. 11, 2020), *with Sloan v. GM LLC*, 2019 WL 6612221, at *9-10 (N.D. Cal. Dec. 5, 2019); *compare Howe v. Samsung Elecs. Am., Inc.*, 2018 WL 2212982, at *3-4 (N.D. Fla. Jan. 5, 2018), *with Becker v. HBN Media, Inc.*, 314 F. Supp. 3d 1342, 1344-46 (S.D. Fla. 2018).

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