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District Courts Divide over Application of Bristol-Myers Squibb Decision to Class Actions

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In a September 8, 2017 Washington Legal Foundation [Legal Backgrounder](#) on [Bristol-Myers Squibb Co. v. Superior Court of California](#), 137 S. Ct. 1773 (2017), I noted that it would remain to be determined how courts would apply it to nationwide and multistate class actions. An Illinois federal court recently became the latest to confront this issue, holding that it lacked jurisdiction over the defendant with respect to claims of nonresident class members, disagreeing with courts in California and Louisiana. The result is a clear split among district courts on the question, and the issue is likely to be brought to the U.S. Supreme Court if courts of appeal also reach opposite conclusions on such a fundamental question.

Refresher on *Bristol-Myers Squibb Co.*

In *Bristol-Myers Squibb Co.*, a multistate mass-tort case, the U.S. Supreme Court held that a California superior court lacked personal jurisdiction over the defendant to hear claims of plaintiffs not resident in California. The Court rejected a “sliding scale” approach to jurisdiction, under which more extensive contacts with the forum state would offset a weak connection to nonresident plaintiffs’ claims. Previously, this lax approach to jurisdiction had allowed claims of many nonresident plaintiffs to be bundled together and filed with those of resident plaintiffs against a nonresident defendant, meaning that states like California were adjudicating hundreds or thousands of claims having no connection to the state. It led, in other words, to rampant forum shopping.

As I explained my previous article, however, it was not a foregone conclusion that all federal courts would apply the holding in *class* actions. It should apply in the same way, because a class action is a procedural device that may not be used in ways that alter substantive law and parties’ rights. Nevertheless, some courts have treated claims of absent class members as not raising the same kinds of jurisdictional issues as when nonresident plaintiffs are joined as parties, choosing instead to treat such questions as being resolved as matters of class definition and certification.

The DeBernardis Ruling

The court in [DeBernardis v. NBTY, Inc.](#), 2018 U.S. Dist. LEXIS 7947 (N.D. Ill. Jan. 18, 2018), confronted this issue. The plaintiff, an Illinois resident, sought damages and injunctive relief for allegedly advertising the benefits of a dietary supplement on behalf of a multistate class for violation of state consumer-fraud laws, and nationwide classes for breach of express warranty and unjust enrichment, as well as an Illinois consumer class.

The court found that *Bristol-Myers Squibb* does apply to absent class members and dismissed the plaintiff's claims to the extent they sought recovery on behalf of nonresidents. In doing so, it agreed with the ruling in [McDonnell v. Nature's Way Products, LLC](#), 2017 U.S. Dist. LEXIS 177892 (N.D. Ill. Oct. 26, 2017).

While calling it a "close question," the court predicted that "based on the Supreme Court's comments about federalism the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in a form, such as in this case, where there is no general jurisdiction over the Defendants." *DeBernardis*, 2017 U.S. Dist. LEXIS 7941, at *6. Another district court had found that forum shopping does not present the same problem in class actions as in mass tort actions, *In re Chinese-Manufactured DryWall Products*, 2017 U.S. Dist. LEXIS 197612 (E.D. La. 2017), but the *DeBernardis* court disagreed, finding that "possible forum shopping is just as present in multi-state class actions." *DeBernardis*, 2018 U.S. LEXIS 7947, at *6-7.

That conclusion is hard to dispute, since the only difference between a mass tort and a class action in this regard is that nonresident class members' claims are adjudicated on a representative basis while mass-tort plaintiffs are joined as parties—which is to say, there is no real difference at all as far as jurisdiction over the defendant is concerned. A court cannot have jurisdiction over the defendant to adjudicate claims of nonresident plaintiffs merely because they are not joined as parties but instead have their claims adjudicated in absentia. Their claims are still adjudicated in a forum to which they have no connection.

The Developing Split

DeBernardis establishes a clear split in the lower courts over the application of *Bristol-Myers Squibb Co.* to class actions. In addition to the Eastern District of Louisiana in *In re Chinese-Manufactured DryWall Products*, a decision of the Northern District of California has rejected application of *Bristol-Myers Squibb* to class actions on the highly questionable ground that claims of absent class members are not before the court for purposes of jurisdiction over the defendant. See [Fitz-Russell v. Dr. Pepper Snapple Group](#), 2017 U.S. Dist. LEXIS 155654 (N.D. Cal. Sept. 20, 2017). Under this reasoning, the court

would have been required to dismiss claims of nonresidents named as representative plaintiffs but not the claims of nonresident absent class members from the same states. This hardly seems rational.

Other courts have agreed with the Northern District of Illinois, dismissing claims of nonresident class members in the absence of general jurisdiction over defendants. See *In re Dental Supplies Antitrust Litig.*, 2017 U.S. Dist. LEXIS 153265 (E.D.N.Y. Sept. 20, 2017); *Spratley v. FCA US LLC*, 2017 U.S. Dist. LEXIS 147492 (N.D.N.Y. Sept. 12, 2017); *Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.*, 2017 U.S. Dist. LEXIS 114733 (E.D. Pa. July 24, 2017).

The issue seems likely to end up back in the Supreme Court if courts of appeal also reach opposite conclusions, because a circuit split would only magnify the problem of forum shopping as plaintiffs flock to courts that allow nationwide class actions against nonresident defendants.

Takeaways

The application of *Bristol-Myers Squibb Co.* to class actions will change the structure of risks faced by defendants, if this view ultimately prevails. In the meantime, plaintiffs may seek out jurisdictions that take the opposite view. The impact of *Bristol-Myers Squibb Co.* on class actions may also be moderated by two principal factors. One is that choice of law is already an obstacle to nationwide and multistate class actions, with the result that more plaintiffs' counsel have already adopted the strategy of filing separate class actions in different states.

Of course, filing multiple single-state actions is a much more expensive and time-consuming proposition than filing a single, nationwide case. It has both pros and cons for defendants, and, as noted in my previous article, it could also lead to an increase in MDL petitions and grants. The other moderating factor is that *Bristol-Myers Squibb Co.* does not prevent the filing of nationwide class action in a defendant's home state. It only prevents forum-shopping the case to more plaintiff-friendly jurisdictions. But that, of course, is welcome protection for defendants.