Cahill

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First Circuit Addresses *Bristol-Myers*' Impact on Nationwide Actions Brought in Federal Court

In 2017, the Supreme Court of the United States held in *Bristol-Myers Co.* v. *Superior Court*[1] that the Due Process Clause of the U.S. Constitution requires all plaintiffs in a mass-tort action to demonstrate that the court has personal jurisdiction over their claims.[2] The ruling significantly limited the locations in which plaintiffs could bring mass-tort cases, and since *Bristol-Myers*, courts have grappled with whether due process limits the locations in which class actions and other types of multi-party cases can be asserted.

On January 13, 2022, in *Waters* v. *Day & Zimmerman NPS, Inc.*,[3] the United States Court of Appeals for the First Circuit addressed whether due process requires each plaintiff in a collective action brought under the Fair Labor Standards Act ("FLSA") to establish jurisdiction over each defendant. The First Circuit disagreed with previous decisions from the United States Courts of Appeals for the Sixth and Eighth Circuits that held that each plaintiff who opts into the case need not establish personal jurisdiction over their claims. The decision creates a circuit split that may eventually require resolution by the Supreme Court. In the meantime, the decision will likely encourage plaintiffs to bring multi-party actions in those jurisdictions that have adopted more expansive views of jurisdiction.

I. Background

In *Bristol-Myers*, California residents and non-residents filed complaints in California state court against Bristol-Myers, a New York-based pharmaceutical company incorporated in Delaware, alleging injury caused by one of company's medications. The suit did not allege that the non-California plaintiffs obtained the medication in California, were injured in California, or received treatment for injury in California. Instead, plaintiffs targeted California on the theory that the California court could establish specific jurisdiction over the non-California claims based on the company's significant contacts in the state, including its extensive marketing and retail practices there.

On appeal, the Supreme Court held that the Fourteenth Amendment's Due Process Clause places limits on non-residents of the forum state who cannot demonstrate a connection to the forum and the claims they assert. The Court rejected the non-resident plaintiffs' attempt to establish jurisdiction over Bristol-Myers in California, finding that California state courts lacked specific jurisdiction over the non-residents' claims.[4] Further, the Court held that those

[1] 137 S. Ct. 1773 (2017).

[2] *Id.* at 1781, 1783.

[3] 23 F.4th 84 (1st Cir. 2022).

[4] 137 S. Ct. at 1784.

California residents who could demonstrate jurisdiction over their claims were unable to extend their jurisdiction to the claims of the non-resident plaintiffs.[5]

The Supreme Court left unanswered how courts should apply its ruling in different types of multi-party cases. In *Bristol-Myers*, the Court addressed mass actions — cases in which a group of plaintiffs who share similar injuries bring suit as a group but are treated as separate individuals by the court because they cannot be certified as a class. Mass actions differ from collective actions, in which a representative plaintiff purportedly brings claims on behalf of him- or herself and others similarly situated. To participate as a member of a collective action, all putative collective action members must affirmatively "opt-in" by joining the lawsuit and signaling their desire to participate. A party who does not consent to joining the collective action is not bound by its judgment, nor will this party receive a payment arising from settlement or judgment in the collective's favor. Both mass and collective actions also differ from a third category of multi-party cases: class actions. Class actions, like collective actions, are brought by a purported representative plaintiff on behalf of a similarly situated group, but once the class demonstrates that it meets certain requirements under the Federal Rules of Civil Procedure and is certified, all potential members of the class are included by default and must affirmatively opt out to signal non-participation with the class.[6]

Following *Bristol-Myers*, the Sixth and Eighth Circuits have considered whether its holding should be extended to FLSA collective actions and found that it should be. In *Canaday* v. *Anthem Companies, Inc.*, a split panel of the Sixth Circuit held that federal district courts lack personal jurisdiction over nationwide collective actions brought by claimants who did not work in the state where the collective action is brought, as the FLSA does not provide for nationwide service of process.[7] A unanimous Eighth Circuit reached the same conclusion in *Vallone, et al.* v. *CJS Solutions Group, LLC*, finding that "for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy," that was lacking in this instance.[8]

The First Circuit confronted this issue in *Waters* and reached the opposite conclusion.

II. The First Circuit's Decision in *Waters*

In *Waters*, plaintiffs filed an FLSA collective action complaint against Day & Zimmerman, a Massachusetts corporation, alleging that Day & Zimmerman failed to pay them and other similarly situated employees overtime wages in violation of the FLSA. Following service on Day & Zimmerman via the Massachusetts' long-arm statute and in accord with the FLSA's procedures, current and former Day & Zimmerman employees from around the country filed "opt-in" consent forms with the district court in an effort to join as plaintiffs.

Day & Zimmerman moved to dismiss the opt-in claims for those individuals not employed in Massachusetts. It argued that, under *Bristol-Myers* and the Fourteenth Amendment, state courts lack jurisdiction in a state-law

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[5] *Id.* at 1781.

[6] The Supreme Court expressly left open the question of whether the holding in *Bristol-Myers* would apply in the class action context. *Id.* at 1789 n.4 (Sotomayor, J., dissenting). The lower courts have struggled with this question and, in some circumstances, have avoided ruling on it. The United States Court of Appeals for the Seventh Circuit in *Mussat* v. *IQVIA*, 953 F.3d 441 (7th Cir. 2020), refused to extend *Bristol-Myers* to class actions involving federal claims. The United States Court of Appeals for the District of Columbia Circuit in *Molock* v. *Whole Foods Market Group*, 952 F.3d 293 (D.C. Cir. 2020), and the United States Court of Appeals for the Fifth Circuit in *Cruson* v. *Jackson National Life Insurance Co.*, 954 F.3d 240 (5th Cir. 2020), have avoided ruling on this question, finding that potential class members are not parties to a litigation until a class is certified and cannot object pre-certification to their inclusion in a putative class. *See generally* Joel Kurtzberg, Adam Mintz, and Kevin Judy, *Three Recent Federal Circuit Court Decisions Address Whether a Lead Plaintiff Must Establish Personal Jurisdiction Over the Claims of Absent Class Members*, CAHILL GORDON & REINDEL LLP FIRM MEMORANDA (April 7, 2020), available here.

[7] 9 F.4th 392 (6th Cir. 2021).

[8] 9 F. 4th 861, 866 (8th Cir. 2021).

collective action with non-resident defendants with no connection to the forum state.[9] Day & Zimmerman further argued that the case could not be brought in a Massachusetts federal court as Rule 4(k)(1) of the Federal Rules of Civil Procedure imposes a limit on a federal court's ability to entertain the claims of opt-in claimants after process has been served.

The district court disagreed, refusing to extend the personal jurisdiction requirements of *Bristol-Myers* to FLSA cases in federal courts and Day & Zimmerman filed an interlocutory appeal.[10] A split panel of the First Circuit affirmed the district court's ruling, finding that out-of-state employees can opt-into a collective action.[11] The court distinguished *Bristol-Myers* by pointing out that the Supreme Court's analysis concerned the application of "Fourteenth Amendment constitutional limits on state courts exercising jurisdiction over state-law claims," whereas *Waters* raised issues about out-of-state plaintiffs opting into a federal case to enforce a federal statute, and held that an opt-in plaintiff could join such a suit, provided that the defendant "maintained the 'requisite minimum contacts with the United States.'"[12]

The majority of the First Circuit panel disagreed with the Sixth and Eighth Circuits, finding that Rule 4(k)(1) does not limit the exercise of personal jurisdiction in collective actions, including those enabled by the FLSA, where the defendant was properly served in the state where it is a citizen.[13] The majority made a point to quote from the dissent in the Sixth Circuit's decision in *Canaday* that "a district court lack[ing] jurisdiction over the non-resident opt-in claims would 'force[ ] those plaintiffs to file separate lawsuits in separate jurisdictions against the same employer based on the same or similar alleged violations of the FLSA.' That is not what the FLSA contemplated."[14] Further, a review of the legislative history of Rule 4[15] led the court to affirm the district court's decision and deny Day & Zimmerman's interlocutory appeal.[16]

In dissent, Judge Barron opined that the majority's broad reading of Rule 4 unnecessarily created a circuit split, and the approach did not draw on any case "read[ing] Rule 4(k)(1)(A) in the narrow, time-of-service-limited way that the majority reads it."[17] Instead, Judge Barron argued for a "restrained" approach that did not use *Waters* as a test case, given its procedural posture, as the majority's rule would impact a range of cases beyond FLSA collective actions, but that implicate Rule 4(k)(1)(A).[18]

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[9] 137 S. Ct. at 1779.

[10] 23 F.4th at 87.

[11] As an initial matter, the court raised, *sua sponte*, the issue of whether the opt-in plaintiffs were parties in the district court action, and thus whether the court had jurisdiction to resolve the dispute. *See id.* at *3. The question for the court's analysis was whether filing the opt-in notices made each filer a party, or whether the filers collectively became parties to the action only after conditional certification. *Id.* at *3–*4. The court held that the text of the FLSA, Supreme Court precedent, and decisions from nearly every circuit "compel only one conclusion: the opt-ins who filed consent forms with the court became parties to the suit upon filing those forms. Nothing else is required to make them parties." *Id.* at *5.

[12] *Id.* (internal quotations omitted).

[13] *Id.* at 94. The court also found that the FLSA's "similarly situated" limitation for opt-in parties to a collective action "displaces" Rule 20's "same transaction [or] occurrence" and "common question[s] of law or fact" for FLSA actions. *See id.* at 96.

[14] *Id.* at 97 (quoting *Canaday*, 9 F.4th at 415–16 (Donald, J., dissenting)).

[15] *Id.* at 98–99 ("Rule 4 is concerned with initial service, not jurisdictional limitations after service. And the consequence is not that additional parties and claims can be added to escape jurisdictional limitations. In both the case of added parties and claims, the court's jurisdiction is still subject to constitutional limitations—in the case of federal-law claims, the Fifth Amendment—and statutory limitations governing subject matter jurisdiction and venue.").

[16] *Id.* at 99–100.

[17] *Id.* at 103 (Barron, J., dissenting).

[18] *Id.* at 103 ("Federal courts in our circuit will have to change how they have been doing things in many cases, and in all cases that involve state law claims. For, under the majority's reading, they will have to assess personal jurisdiction in those cases with

III. Conclusion

The *Waters* decision creates a circuit split. While the Sixth and Eighth Circuits have barred opt-in plaintiffs from joining FLSA collective actions if they fail to establish personal jurisdiction over their claims, the First Circuit has reached the opposite conclusion finding that *Bristol Myers* imposes no such bar. The emerging split may require the Supreme Court to consider how *Bristol-Myers* applies to other forms of multi-party actions.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Joel Kurtzberg (partner) at 212.701.3120 or jkurtzberg@cahill.com; Adam Mintz (counsel) at 212.701.3981 or amintz@cahill.com; or Samuel Weiner (associate) at 212.701.3997 or sweiner@cahill.com; or email publications@cahill.com.

exclusive reference to Fifth Amendment-based due process limits (and thus to work their way through all the legal complexity that may arise from their doing so in cases involving state law claims) despite their seeming common practice of not using that lens except in certain classes of cases that involve federal claims, in which the degree of legal complexity that then arises from using that same lens is much less.") (internal citations omitted); *see also id.* at 104.