

Three Recent Federal Circuit Court Decisions Address Whether a Lead Plaintiff Must Establish Personal Jurisdiction Over the Claims of Absent Class Members

In 2017, in *Bristol-Myers Squibb Co. v. Superior Court*,¹ the Supreme Court of the United States held that, in federal cases involving multiple plaintiffs, each plaintiff must establish that the court has personal jurisdiction over each of its claims.² This severely limited the forums where plaintiffs could bring multiple-plaintiff cases against defendants.

Since then, there has been an open question as to whether *Bristol-Myers*, which involved a mass tort case, applies to nationwide class actions and requires a lead plaintiff to establish that the court has personal jurisdiction over each absent class member's claim. Relying heavily on *Bristol-Myers*, defendants in nationwide class actions have been frequently bringing motions to dismiss absent class members without sufficient contacts with the forum to warrant the exercise of personal jurisdiction. As a practical matter, if courts were to begin granting such motions, they would likely eviscerate most nationwide class actions because, in most cases, a good portion of the absent class members likely could not establish personal jurisdiction in the relevant forum. Three recent decisions by the United States Court of Appeals, for the Fifth, Seventh, and District of Columbia Circuits, demonstrate the different ways appellate courts have been dealing with such motions.

On March 11, 2020, in *Mussat v. IQVIA*, the Seventh Circuit rejected application of *Bristol-Myers* to class actions and held that, for federal question claims, district courts need not have personal jurisdiction over the claims of absent class members because, for purposes of personal jurisdiction, only the named plaintiffs matter.

In contrast, in *Molock v. Whole Foods Market Group*, decided the day before *Mussat*, the District of Columbia Circuit held that the defendant's Rule 12(b)(2) motion to dismiss the absent class members was premature, as those class members are not parties to the case unless and until a class is certified. On March 25, 2020, in *Cruson v. Jackson*, the Fifth Circuit reached a similar conclusion and held that the question of whether a court has jurisdiction over the claims of absent class members is appropriately addressed at the class certification stage because that is when absent class members become part of the case. These decisions leave for another day the question decided in *Mussat* – namely, whether absent class members can be dismissed for lack of personal jurisdiction in a nationwide class action.

I. Background

Since 2014, the Supreme Court has issued a trilogy of decisions that have dramatically changed the law of personal jurisdiction and, in doing so, limited the forums in which an out-of-state or foreign company can be sued.

In *Daimler AG v. Bauman*,³ the Court addressed general jurisdiction (i.e., whether there is personal jurisdiction over a defendant regardless of whether the underlying dispute has a connection with the forum) and rejected the practice of exercising general jurisdiction over companies if they conducted substantial business activities in the forum.⁴ Instead, the Court limited general jurisdiction over a company to only those forums where

¹ 137 S. Ct. 1773 (2017).

² *Id.* at 1781, 1783.

³ 571 U.S. 117 (2014).

⁴ *Id.* at 137-38.

it is “at home,” which, absent extraordinary circumstances, generally means where a company is incorporated or has its principal place of business.⁵

In *Walden v. Fiore*,⁶ the Court addressed specific jurisdiction (i.e., whether there is jurisdiction over a particular dispute) and clarified that the inquiry must be focused on “the relationship among the defendant, the forum, and the litigation,” and that relationship must arise out of contacts that the “defendant *himself* creates with the forum,” as opposed to those created by the plaintiff or third parties.⁷

Finally, in *Bristol-Myers Squibb Co.*, the Court clarified how the principles of *Daimler* and *Walden* apply to cases involving multiple plaintiffs. In *Bristol-Myers*, residents and non-residents of California sued Bristol-Myers, a New York company incorporated in Delaware, in California state court, alleging that the company’s drug Plavix had damaged their health. The nonresident plaintiffs did not allege that they obtained Plavix from a California source, were injured in California, or were treated for their injuries in California but sued in California anyway because of Bristol-Myers’ extensive activities marketing and selling Plavix to other plaintiffs.

The Court rejected the non-resident plaintiffs’ attempt to establish jurisdiction, holding that California courts lacked specific jurisdiction over the non-residents’ claims because there was not an adequate link between California and the non-residents’ claims.⁸ That *other* plaintiffs were prescribed, obtained, and ingested Plavix in California did not sufficiently establish jurisdiction over the non-residents’ claims.⁹ In doing so, the Supreme Court extended its ruling in *Walden* to multi-plaintiff cases by mandating that each plaintiff must establish that the court has personal jurisdiction over each of its claims.¹⁰

II. The Fifth, Seventh, and District of Columbia Circuits Consider Personal Jurisdiction over the Claims of Absent Class Members

While *Bristol-Myers* held that each plaintiff in a multiple-plaintiff case must establish personal jurisdiction over each of its claims, the Supreme Court left unanswered whether in a class action a lead plaintiff must establish that the court has jurisdiction over each absent class member’s claim.¹¹ Three recent appellate decisions, by the United States Court of Appeals for the Fifth, Seventh, and D.C. Circuits address this recurring issue.

A. Treatment by the Seventh Circuit

In *Mussat v. IQVIA*, the Seventh Circuit held that, at least with respect to federal claims, a court need not establish jurisdiction over absent class members, notwithstanding the Supreme Court’s ruling in *Bristol-Myers*. The plaintiff, Florence Mussat, an Illinois physician, received two unsolicited faxes from IQVIA, a Delaware corporation, and brought a nationwide putative class action in the Northern District of Illinois, alleging that IQVIA

⁵ *Id.* at 139.

⁶ 571 U.S. 277 (2014).

⁷ *Id.* at 284.

⁸ 137 S. Ct. at 1784.

⁹ *Id.* at 1781.

¹⁰ *Id.* (Absent an “affiliation between the forum and the underlying controversy, principally [an] activity or occurrence that takes place in the forum state . . . specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the [forum].”).

¹¹ *Id.* at 1789 n.4 (Sotomayor, J., dissenting) (“The Court today does not confront the question whether its opinion here would also apply to a class action.”).

violated the Telephone Consumer Protection Act by sending the faxes. IQVIA moved to strike the class definition, arguing that the district court did not have personal jurisdiction over the non-Illinois members of the proposed nationwide class because there was no connection between the faxes sent to them and Illinois. The district court granted the motion, holding that, under *Bristol-Myers*, each absent class member needed to establish jurisdiction over its claims, and the non-Illinois residents could not do so because their claims had no connection to Illinois.¹²

The Seventh Circuit reversed. In doing so, the panel was concerned that to read *Bristol-Myers* as requiring jurisdiction to be established over each absent class member would mean that there could never be a nationwide class action in a forum other than where a defendant was subject to general jurisdiction.¹³ The court noted that, before *Bristol-Myers*, courts, including the Supreme Court, would typically allow nationwide class actions to proceed in a forum other than where the defendant was subject to general jurisdiction, and nothing in *Bristol-Myers* suggested the Supreme Court intended to upend this practice.¹⁴ The panel held that it was consistent with due process to consider only the contacts of the named class representatives in determining personal jurisdiction because “non-named class members . . . may be parties for some purposes and not for others.”¹⁵ The court also noted that, in determining whether the complete diversity of citizenship requirement is satisfied, courts consider only whether named class representatives satisfy the jurisdictional requirements — a fact that the court cited in support of its holding that the jurisdictional analysis could be limited to an analysis of the named plaintiffs.¹⁶

B. Treatment by the D.C. and Fifth Circuits

1. The D.C. Circuit

The District of Columbia Circuit’s decision in *Molock v. Whole Foods Market Group*¹⁷ and the Fifth Circuit’s decision in *Cruson v. Jackson National Life Insurance Co.*¹⁸ addressed similar issues as those raised in *Mussat*. These cases addressed *when* a court must determine whether it has jurisdiction over the claims of absent class members — i.e., at the outset of the case or at class certification. Both courts held that, because absent class members are not parties until a class is certified, courts either do not need to or cannot consider the issue until class certification. The majority opinions for both courts thus left for another day the issue decided by the Seventh Circuit in *Mussat* — namely, whether all members of a nationwide class need to demonstrate that a court has personal jurisdiction over their claims.

¹² *Mussat v. IQVIA, Inc.*, 2020 WL 1161166, at *1 (7th Cir. Mar. 11, 2020).

¹³ It bears mentioning that the Seventh Circuit’s concern is inconsistent with the practice of the lower courts, which have found they can exercise nationwide jurisdiction over certain federal claims. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2019 WL 1331830, at *24 (S.D.N.Y. Mar. 25, 2019) (asserting nationwide specific jurisdiction over foreign Floating-Rate Issuer defendants); *Moon Joo Yu v. Premiere Power LLC*, 2015 WL 4629495, at *5 (S.D.N.Y. Aug. 4, 2015) (holding that a New York federal court could exercise nationwide specific jurisdiction over a defendant for Exchange Act claims even though the defendant was a resident of Oklahoma).

¹⁴ *Id.*

¹⁵ *Id.* at *5.

¹⁶ *Id.* Agreeing with the Seventh Circuit, the District Court for the Western District of Washington in *Lacy v. Comcast Cable Communications*, held that it would not extend *Bristol-Myers* to the class action context and “upend the traditional approach to personal jurisdiction in class actions absent an express ruling from the Supreme Court.” *Lacy v. Comcast Cable Communications, LLC*, 2020 WL 1469621, at *2 (W.D. Wash. Mar. 26, 2020). The Court noted that to do otherwise would limit nationwide class actions “to the few states where defendants are subject to general jurisdiction.” *Id.*

¹⁷ 952 F.3d 293 (D.C. Cir. 2020).

¹⁸ 2020 WL 1443531 (5th Cir. Mar. 25, 2020).

In *Molock*, several current and former employees filed a nationwide putative class action in the District of Columbia against Whole Foods, alleging that Whole Foods manipulated its incentive-based bonus program, resulting in employees losing wages otherwise owed to them. Whole Foods moved to dismiss the complaint under 12(b)(2), arguing that the district court lacked personal jurisdiction over the claims of the non-resident putative class members. The district court denied the motion and certified its order for interlocutory appeal.¹⁹ Whole Foods appealed.

The District of Columbia Circuit affirmed the district court's denial of the motion to dismiss and further held that putative class members become parties to an action — and thus subject to dismissal — only after class certification.²⁰ The court noted that, because the class had yet to be certified, Whole Foods' motion to dismiss the putative class members was premature.²¹

Judge Silberman dissented and argued that the court should have granted Whole Foods' motion to dismiss because the *Bristol-Myers* holding should apply in the class action context. The dissent noted that class actions, like the mass action in *Bristol-Myers*, are a type of joinder, which enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. Because the requirements of personal jurisdiction must be satisfied independently for “the specific claims at issue,”²² the dissent concluded that personal jurisdiction over claims asserted on behalf of absent class members must be analyzed on a claim-by-claim basis. The dissent recognized that applying *Bristol-Myers* to the class action context would essentially eliminate nationwide class actions against a foreign defendant who is not subject to general jurisdiction anywhere in the United States, but noted that individual plaintiffs cannot ordinarily bring these defendants into court to answer to claims that have nothing to do with the forum.

2. The Fifth Circuit

In *Cruson*, the Fifth Circuit reached a similar conclusion as the majority in *Molock*. There, several Texas residents filed a nationwide putative class action in Texas against Jackson National Life Insurance Company (“Jackson”), alleging that Jackson breached its annuity contracts with plaintiffs by miscalculating early-withdrawal fees. Jackson moved to dismiss the complaint under 12(b)(1) and 12(b)(6) but did not raise its personal jurisdiction defense until after the district court denied its motion to dismiss. Plaintiffs then moved for class certification, and Jackson opposed class certification arguing, *inter alia*, that to the extent the putative class included non-Texas residents, plaintiffs had failed to establish personal jurisdiction as to those claims under *Bristol-Myers*. The district court certified the class and rejected Jackson's personal jurisdiction defense, finding that the defense had been waived because Jackson failed to raise it in a Rule 12 motion.²³ Jackson appealed.

The Fifth Circuit vacated the district court's grant of class certification and further held that Jackson had not waived its personal jurisdiction defense as to the non-Texas residents by raising the argument at the class certification stage, rather than in its motion to dismiss.²⁴ In reaching this conclusion, the court relied heavily on the

¹⁹ 952 F.3d 293 (D.C. Cir. 2020).

²⁰ *Id.*

²¹ *Id.*

²² *Bristol-Myers*, 137 S. Ct. at 1781.

²³ *Id.* at *3.

²⁴ *Id.* at *7, 13.

fact that absent class members do not become parties to the litigation until class certification is granted.²⁵ “Certification of a class is the critical act which reifies the unnamed class members and, critically, renders them subject to the court’s power.”²⁶

The Fifth Circuit remanded the substance of Jackson’s personal jurisdiction challenge to the district court and, therefore, did not specifically address whether the lead plaintiffs needed to establish that the court had jurisdiction over the absent class members’ claims.

III. Conclusion

Bristol-Myers, echoing *Walden*, made it clear that a court must generally consider jurisdiction on a plaintiff-by-plaintiff and claim-by-claim basis. Recent decisions by the Fifth, Seventh, and D.C. Circuits demonstrate that there is still an open question as to how to apply *Bristol-Myers* to nationwide class actions.

The Seventh Circuit in *Mussat* flatly rejected the extension of *Bristol-Myers* to class actions involving federal claims, holding that absent class members are not parties to the case for purposes of establishing personal jurisdiction. In contrast, the Fifth Circuit in *Cruson* and the District of Columbia Circuit in *Molock* held that absent class members do not become parties to the case *until* class certification, leaving open the ultimate question of whether *Bristol-Myers* requires all members of a nationwide, certified class to demonstrate that the court has personal jurisdiction over them. As defendants continue to challenge personal jurisdiction in cases involving nationwide classes, it is worth watching how appellate courts deal with this sure-to-be-recurring question.

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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 at 212.701.3120 or jkurtzberg@cahill.com; Adam Mintz at 212.701.3981 or amintz@cahill.com; or G. Kevin Judy II at 212.701.3499 or Kjudy@cahill.com; or email publications@cahill.com.

²⁵ *Id.* at *5.

²⁶ *Id.*