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Third Circuit Addresses *Bristol-Myers'* Impact on Nationwide Actions Brought in Federal Court, Deepening Circuit Split

In 2017, the Supreme Court of the United States limited the venues in which plaintiffs can pursue mass-tort suits in *Bristol-Myers Co.* v. *Superior Court*, ruling that *each* plaintiff in a mass-tort suit must demonstrate personal jurisdiction over its claims to comport with due process.[1] Since then, lower courts have differed on how to treat jurisdictional issues in other varieties of multi-party suits. A circuit split has emerged as to how to apply *Bristol-Myers* to collective actions brought under the Fair Labor Standards Act (FLSA), with one view holding that each plaintiff in an FLSA collective action must establish personal jurisdiction to pursue any claims and another holding that each plaintiff in such an action need not do so.

On July 26, 2022, the United States Court of Appeals for the Third Circuit held in *Fischer* v. *Federal Express Corp.*,[2] that plaintiffs who could not establish personal jurisdiction over their claims could not join an FLSA putative collective action. In so holding, the Third Circuit joined the United States Circuit Courts of Appeals for the Sixth[3] and Eighth[4] Circuits, which had reached similar conclusions, and expressly rejected the approach of the United States Court of Appeals for the First Circuit in *Waters* v. *Day & Zimmerman NPS, Inc.*,[5] which held that each plaintiff that opts into an FLSA collective action does not need to establish personal jurisdiction over their claims to participate.

Despite a clear and on going circuit split on this issue, on March 6, 2023, the Supreme Court denied the *Fischer* plaintiffs' petition for a writ of certiorari. The status quo may encourage forum shopping for plaintiffs seeking to file an FLSA collective action. As other circuits address this question, the circuit split may deepen and the issue may eventually be decided by the Supreme Court.

Background

In *Bristol-Myers*, a group including California residents and non-residents alleged injury caused by a medication manufactured by Bristol-Myers, a New-York-based, Delaware-headquartered pharmaceutical company. Plaintiffs argued that the California court could establish specific jurisdiction over the corporation due to Bristol-Myers' extensive contacts in California, specifically its state-wide marketing and sales practices, even though those contacts

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

[2] 42 F.4th 366 (3d Cir. 2022).

[3] *Canaday* v. *Anthem Companies, Inc.*, 9 F.4th 392 (6th Cir. 2021).

[4] *Vallone, et al.* v. *CJS Solutions Group, LLC*, 9 F.4th 861 (8th Cir. 2021).

[5] 23 F.4th 84 (1st Cir. 2022).

did not give rise to the dispute against the non-resident plaintiffs. On appeal, the Supreme Court rejected the non-resident plaintiffs' jurisdiction argument, ruling that California did not have specific jurisdiction over their claims[6] and that the contacts in the forum relating to the claims of the resident plaintiffs could not be used to exercise jurisdiction over those who lived out of state. The Court made clear that, for the non-resident plaintiffs to establish specific jurisdiction, they would need to show a link between *their* claims and the defendant's actions in the forum.

Since *Bristol-Myers*, the lower courts have struggled to apply its holding to other types of multi-party cases, such as collective actions or class actions. At issue in *Bristol-Myers* were mass actions — suits in which a court treats as separate individuals a group of plaintiffs with similar injuries. In a collective action, like those brought under the FLSA, but unlike a mass action, a plaintiff purports to sue on behalf of him- or herself and others similarly situated. A similarly-situated individual may join a collective action by "opting-in" and affirmatively indicating an interest in participating in, and being bound by the judgment of, the case. Only those participating in a collective action by virtue of joining may collect a portion of any resulting settlement or judgment. Class actions, on the other hand, are also brought by a purported representative on behalf of a similarly-injured group, but once a court certifies a class under the Federal Rules of Civil Procedure, all potential members of the class are included in any settlement or judgment, absent a potential class member affirmatively opting-out of the class.[7]

In *Canaday* and *Vallone*, the Sixth and Eighth Circuits found that, under *Bristol-Myers*, each plaintiff in a collective action must establish personal jurisdiction over its claims to participate after "opting-in."[8] In *Waters*, the First Circuit disagreed, ruling that *Bristol-Myers* did not dictate the personal jurisdiction analysis for claims under the FLSA because its holding "rests on Fourteenth Amendment constitutional limits on state courts exercising jurisdiction over state-law claims" and did not control a federal court's exercise of jurisdiction over non-resident plaintiffs' federal claims.[9] The panel reasoned that under the Fifth Amendment, a non-resident plaintiff is not barred from filing a federal claim in federal court provided that the defendant "maintained the requisite minimum contacts with the United States."[10] It also disagreed with the Sixth and Eighth Circuits, finding that Rule 4(k)(1) of the Federal Rules of Civil Procedure 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.[11] Thus, neither the Federal Rules nor due process prevent a court from exercising jurisdiction over all plaintiffs' claims so long as one plaintiff can establish jurisdiction over the defendant.[12] The alternative approach would result in plaintiffs "fil[ing] separate lawsuits in separate jurisdictions against the same employer based on the same or similar alleged violations of the FLSA[,]" which is not what the FLSA contemplated.[13]

The Third Circuit's decision in *Fischer* deepened this pre-existing circuit conflict.

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[6] 137 S. Ct. at 1784.

[7] Following *Bristol-Myers*, lower courts have faced difficulty or simply avoided ruling on its application in the class action context. Justice Sotomayor made clear in her dissent that *Bristol-Myers* did not address class action suits. *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting); *see, e.g.*, *Mussat* v. *IQVIA*, 953 F.3d 441 (7th Cir. 2020) (declining to extend *Bristol-Myers* to class actions involving federal claims); *Molock* v. *Whole Foods Market Group*, 952 F.3d 293 (D.C. Cir. 2020) (potential members of a putative class are not parties to a litigation until the court certifies a class); and *Cruson* v. *Jackson National Life Insurance Co.*, 954 F.3d 240 (5th Cir. 2020) (same).

[8] *See, e.g.*, *Vallone*, 9 F.4th 861, 866 (8th Cir. 2021) ("for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy").

[9] 23 F.4th at 92.

[10] *Id.*

[11] *Id.*at 94.

[12] *Id.*

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

The Third Circuit's decision in *Fischer*

In *Fischer*, a former Federal Express ("FedEx") security specialist filed an FLSA collective action complaint alleging that FedEx had underpaid its security specialists after misclassifying them as exempt from overtime payment under the FLSA.[14] When two out-of-state former FedEx employees sought to opt-in to the litigation, the United States District Court for the Eastern District of Pennsylvania dismissed their claims, finding that "opt-in plaintiffs in FLSA collective actions each have status as individual parties," and therefore, jurisdiction over "each of these parties claims must be assessed individually."[15] Allowing the out-of-state opt-in plaintiffs' participation would "ignore[] the fact that a territorial limitation would not prevent plaintiffs from bringing collective action lawsuits under the FLSA in complete harmony with congressional intent" and would not reflect Congress' intent when it chose not to provide nationwide service of process in the FLSA.[16] The district court only certified the collective action and notice plan for security specialists who had worked for FedEx in Pennsylvania.

On appeal, a unanimous panel for the Third Circuit agreed, ruling that, "where the basis of personal jurisdiction in an FLSA collective action in a federal court is specific personal jurisdiction established by serving process," opt-in plaintiffs must show that their "claim arises out of or relates to the defendant's minimum contacts with the forum state."[17] The court considered the FLSA's legislative history, as well as *Bristol-Myers* and its progeny, and ultimately concluded that FLSA suits should be treated no differently than any other suit for purposes of personal jurisdiction. Accordingly, the court held that opt-in plaintiffs must demonstrate that the court has personal jurisdiction over each of their claims.[18]

The Third Circuit contrasted the differences between class actions under Rule 23 of the Federal Rules of Civil Procedure and collective actions under the FLSA. Unlike class actions, which anticipate a named party to act as a "representative" of the group once certified, an opt-in plaintiff under the FLSA is a "party plaintiff," and "should have the same status in relation to the claims of the lawsuit as do the named plaintiffs."[19] Even though Fischer established specific jurisdiction over FedEx with respect to her claims in Pennsylvania, the Maryland and New York opt-in plaintiffs' claims arose out of FedEx's connection to the states where they worked for FedEx, not FedEx's Pennsylvania contacts. As a result, the initial service of summons on FedEx in Pennsylvania was not sufficient to exercise jurisdiction on the out-of-state claims alleged.[20]

The panel recognized that it was not the first appellate court to address this question, noting the First Circuit's ruling in *Waters*, and expressly stating that it was joining the Sixth and Eighth Circuits in reaching its decision.[21] In reaching this conclusion, the panel rejected *Waters*, in which the First Circuit distinguished *Bristol-Myers* because it concerned constitutional limits of state court jurisdiction, whereas the *Waters* decision concerned an opt-in plaintiffs' ability to enforce a federal statute in federal court. The Third Circuit held that the Supreme Court's decision in *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co., Ltd.*[22] foreclosed this approach because "the

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[14] 42 F.4th at 370.

[15] 509 F. Supp. 3d 275, 287 (E.D. Pa. 2020).

[16] *Id.* at 288.

[17] 42 F.4th at 370.

[18] *Id.* at 376.

[19] *Id.* at 377.

[20] *See id.* at 382.

[21] *Id.* at 370.

[22] 484 U.S. 97 (1987).

[Supreme] Court identified Rule 4 of the Federal Rules of Civil Procedure as the primary Congressionally-authorized mechanism by which a federal court could serve process and thus exercise personal jurisdiction over a defendant . . . the Supreme Court declined to fashion a personal jurisdiction rule unique to federal courts in the absence of authorization from Congress, even if the rule would satisfy the Fifth Amendment."[23] The panel also considered whether there were other ways for opt-in plaintiffs to establish jurisdiction over a defendant separate from initial service of process but concluded that, absent a federal statute authorizing the exercise of personal jurisdiction (which the FLSA lacks) or a statute providing for nationwide service of process, "the opt-in plaintiffs in FLSA collective actions must satisfy the personal jurisdiction requirements of the Fourteenth Amendment to join the suit."[24]

Finally, the court rejected the argument that not allowing opt-in plaintiffs to participate in the collective action would lead to duplicative suits. It reasoned that plaintiffs could still try to bring suit in a court of general jurisdiction (i.e., where the defendant is incorporated or has its principal place of business), even if there were inherent challenges in doing so.[25]

Conclusion

Fischer further entrenches a split among the circuits as to whether each plaintiff in a collective action must establish specific jurisdiction over its claims. Although the Supreme Court denied the *Fischer* plaintiffs' petition for a writ of certiorari, the Court may soon need to resolve the differing approaches to 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.

[23] *Id.* at 381.

[24] *Id.* at 387.

[25] *See id.* at 388 (citing *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting)).