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## Jurisdiction

# **The ABCs of BMS: Surveying The Post-Bristol-Myers Squibb Landscape**

The U.S. Supreme Court ruling in *Bristol-Myers Squibb Co. v. Superior Court of California* has been uniformly applied by courts to preclude plaintiffs from pursuing nationwide class actions outside fora in which defendants are subject to general jurisdiction, say attorneys James Stengel and Marc Shapiro. The authors analyze the jurisdiction ruling and survey the post-BMS landscape.

BY JAMES STENGEL AND MARC SHAPIRO

Six months after the United States Supreme Court's highly-anticipated decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017) ("BMS"), its far-reaching implications are steadily coming into focus. Prior to the decision, courts across the country had routinely approved nationwide mass actions with little, if any, regard to whether the plaintiffs' claims had any connection with the defendants' contacts in the forum state. BMS, however, made clear that the due process analysis is claim- and plaintiff-specific, meaning a non-resident (whose claim lacks a freestanding nexus with defendant's contact in the forum state) cannot piggyback on the claims of other plaintiffs (over which the court may have jurisdiction).

Since BMS, the decision has been uniformly applied to preclude plaintiffs from pursuing nationwide class actions outside fora in which defendants are subject to general jurisdiction. The focus of this article is on BMS's impact on federal proceedings. We begin by briefly revisiting BMS and its reasoning, we then survey post-BMS arguments advanced by plaintiffs' lawyers for why BMS should not apply in federal court or at least to particular types of federal actions, we then iden-

tify the flaws in those arguments, and survey the post-BMS landscape.

**The Reasoning of BMS** At issue in BMS was a series of actions filed in California state court. The 600 plaintiffs consisted of 86 California residents and 592 residents from 33 other states. They brought various personal injury claims under California law, alleging that the prescription drug, Plavix, damaged their health. Bristol-Myers moved to dismiss the claims of non-California residents. Though there was no general jurisdiction, the California Supreme Court found specific jurisdiction as to the nonresidents by applying a sliding scale in which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Specifically, the California court found that this requirement was satisfied "because the claims of the nonresidents were similar in several ways to the claims of California residents (as to which specific jurisdiction was uncontested)," Bristol-Myers marketed and promoted the drug in California, and it engaged in non-Plavix-related research there.

An eight-justice majority of the United States Supreme Court reversed, characterizing the California Supreme Court's "sliding scale approach" as improperly "resembl[ing] a loose and spurious form of general jurisdiction." As the Court explained, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." Even if a corporation engages in ongoing activity within a state, the corporation is not "amenable to suit[] [there] unrelated to that activity." "[A] defendant's general connections with the forum are not enough." The Due Process Clause demands there be "a

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connection between the forum and the specific claims at issue.”

The Supreme Court found such a connection lacking. The nonresident plaintiffs had not been prescribed Plavix in California, did not purchase it there, did not take it in the state, and were not injured in California. Though the California plaintiffs had engaged in such in-state activities, that was not enough to permit “the State to assert specific jurisdiction over the nonresidents’ claims,” notwithstanding their similarity. Because “all the conduct giving rise to the nonresidents’ claims occurred” outside of California, the Court ultimately held that “the California courts [could not] claim specific jurisdiction” over the non-California residents.

**Plaintiffs’ Arguments** Recognizing, as even Justice Sotomayor did in dissent, that “[t]he upshot of [BMS] is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured,” plaintiffs have attempted to minimize the opinion’s reach. The primary arguments—each of which is addressed below—are that BMS is inapplicable to diversity cases, it has no application to class actions in view of the purposes of the Class Action Fairness Act and Federal Rule of Civil Procedure 23, and is inapplicable to multi-district litigation.

**Application to diversity cases** To avoid the import of BMS, plaintiffs have attempted to characterize it as a narrow opinion, asserting that the Supreme Court left open the question whether BMS applies in federal proceedings because they are governed by the Fifth Amendment. 137 S. Ct. at 1784. But all proceedings in federal court are not governed by the Fifth Amendment. “In a diversity action,” the question of “personal jurisdiction . . . [is governed by] the due process clause of the [F]ourteenth [A]mendment.” *Stuart v. Spademan*, 772 F.2d 1185, 1189 (5th Cir. 1985); see also *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 356 (6th Cir. 2014); *Dairy Farmers of Am., Inc. v. Bassett & Walker Int’l, Inc.*, 702 F.3d 472, 475 (8th Cir. 2012). By contrast, if a plaintiff relies only on a federal basis for personal jurisdiction—e.g., a federal statute providing for broad, nationwide service of process—the personal jurisdiction inquiry is presumably governed by the Fifth Amendment. See, e.g., *Busch v. Buchman, Buchman & O’Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994).

That the Court did not leave open the question of BMS’s application to diversity cases is imminently reasonable. The reason being, “[a] federal district court sitting in diversity is bound by the same due process limitations on its exercise of jurisdiction over out-of-state defendants as are the local state courts.” *Charlie Fowler Evangelistic Ass’n, Inc. v. Cessna Aircraft Co.*, 911 F.2d 1564, 1565 (11th Cir. 1990) (emphasis added). Thus, there is no principled basis for applying BMS to state courts but not federal courts sitting in diversity.

It is hardly surprising then that following BMS, federal courts sitting in diversity have routinely applied the opinion. See, e.g., *Jinright v. Johnson & Johnson, Inc.*, No. 17-cv-01849, 2017 BL 304776 (E.D. Mo. Aug. 30, 2017); *Covington v. Janssen Pharm., Inc.*, No. 17-cv-01588, 2017 BL 279479 (E.D. Mo. Aug. 10, 2017); *Turner v. Boehringer Ingelheim Pharm., Inc.*, No. 17-cv-01525, 2017 BL 272197 (E.D. Mo. Aug. 3, 2017); *Jordan v. Bayer Corp.*, No. 17-cv-00865, 2017 BL 243532 (E.D.

Mo. July 14, 2017); *Ergon Oil Purchasing, Inc. v. Canal Barge Co., Inc.*, No. 16-cv-5884, 2017 BL 219312 (E.D. La. June 26, 2017).

**Application to federal class actions** Plaintiffs have also attempted to assert that even if BMS is applicable in federal cases, it is inapplicable to federal class actions. These arguments take various forms but largely focus on the policies underlying the Class Action Fairness Act—namely, as plaintiffs tell it, the desire to expand federal jurisdiction over class actions. This argument is correct as far as it goes. Congress did intend to expand the reach of federal courts over class actions. But what the argument misses is that CAFA expanded federal subject matter jurisdiction. See, e.g., *Sabrina Roppo v. Travelers Commercial Ins. Co.*, 869 F.3d 568, 578 (7th Cir. 2017) (“CAFA expands jurisdiction for diversity class actions by creating federal subject matter jurisdiction” under certain conditions); *Adams v. Grefer*, 636 F. App’x 906, 907 (5th Cir. 2016) (“CAFA, as codified by 28 U.S.C. § 1332(d), created a new basis for federal subject matter jurisdiction over qualifying civil actions”); *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (“CAFA contains a series of modifications of existing principles of federal subject matter jurisdiction”). CAFA did not, however, intend to dispense with constitutional limitations on personal jurisdiction.

A related strand of this class action-focused argument zeroes in on Rule 23. Plaintiffs have argued that Rule 23 sets forth the requirements for class actions in federal proceedings and nothing in the rule precludes nationwide classes. That too is true. However, Rule 23 did not purport to alter the parameters of personal jurisdiction by loosening the due process protections afforded defendants. Nor could it have, as the “[R]ules of Civil Procedure] shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” 28 U.S.C. § 2072. And as BMS makes clear, it does not foreclose nationwide class actions altogether. Plaintiffs can “join[] together in a consolidated action in the States that have general jurisdiction” over the defendant. 137 S. Ct. at 1783 (emphasis added). What it precludes is plaintiffs from forum shopping on a classwide basis. Only those plaintiffs with meaningful connections to a state and whose claims arise out of defendants’ contacts with that state may hale the defendant into court there. See, e.g., *McDonnell v. Nature’s Way Products LLC*, 16 C 5011, 2017 BL 385398 (N.D. Ill. Oct. 26, 2017) (dismissing “claims on behalf of [unnamed nonresident] prospective class members” “[b]ecause the only connection to Illinois is that provided by [the named class representative’s] purchase of [the challenged product]” and that “cannot provide a basis for the Court to exercise personal jurisdiction over the claims of [unnamed] nonresident[]” members of the class); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165-PHX-DLR, 2017 BL 352969 (D. Ariz. Oct. 2, 2017) (explaining that the court “would not be able to certify a nationwide class” because it “lacks personal jurisdiction over the claims of putative class members with no connection to Arizona”); *In re Dental Supplies Antitrust Litig.*, No. 16-cv-00696, 2017 BL 332564 (E.D.N.Y. Sept. 20, 2017) (“[p]ersonal jurisdiction in class actions must comport with due process just the same as any other case”); but see *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. MDL 09-2047, 2017 BL 429967 (E.D. La. Sept.

30, 2017); *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564 NC, 2017 BL 337119 (N.D. Cal. Sept. 22, 2017).

**Application to multi-district litigation (MDLs)** In the context of MDLs, counsel for plaintiffs have rolled out a unique argument. They claim MDL courts are subject to specialized rules that immunize them from *BMS*. While it is correct that a district court sitting as a MDL is not subject to the normal rules governing personal jurisdiction, this exception does not authorize MDL courts to dispense with the Due Process Clause altogether. Rather, the unique role of MDL courts simply affords them the same jurisdictional reach as the courts from which the cases are transferred. *See, e.g., In re Plumbing Fixture Cases*, 298 F. Supp. 484, 495–96 (MDL Panel 1968) (“the jurisdiction and powers of the transferee court are coextensive with that of the transferor court”); *see also In re Ski Train Fire*, No. 343 F. Supp. 2d 208 (S.D.N.Y. Mar. 15, 2004) (noting that “[a] transferee court can exercise personal jurisdiction only to the same extent as the transferor court could”); *In re U.S. Office Prod. Co. Sec. Litigat.*, 251 F. Supp. 2d 58,

64–65 (D.D.C. 2003); *In re WellNx Mktg. & Sales Practices Litig.*, No. 07-md-1861, 2010 BL 409069 (D. Mass. Sept. 15, 2010); *In re Consol. Welfare Fund “ERISA” Litig.*, No. 92-cv-00424, 1992 WL 212348, at \*2 (S.D.N.Y. Aug. 21, 1992). That means the fortuitous transfer of a case to a MDL court does not afford a plaintiff greater claim to personal jurisdiction over a defendant. Just as transferor courts are subject to the Due Process Clause and *BMS*, so too is the MDL court.

**Conclusion** Although the decision in *BMS* was arrived at by applying settled personal jurisdiction principles, its impact is considerable. Indeed, despite plaintiffs’ efforts to characterize the holding as narrow, even Justice Sotomayor recognized it was anything but, lamenting that the decision “is likely to have consequences far beyond this case.” Indeed, it does. Accordingly, defendants proceeding in federal diversity cases should steadfastly maintain there is no principled basis for declining to apply the decision, particularly where it matters most: class action litigation and MDL proceedings.