Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Applying BMS To Federal Class Actions: Due Process Matters

By **J. Gordon Cooney, Brian Ercole, Ezra Church and Joseph Fay**
(January 12, 2018, 11:45 AM EST)

J. Gordon Cooney

Brian Ercole

Ezra Church

Joseph Fay

The U.S. Supreme Court's decision last this year in Bristol-Myers Squibb Co. v. Superior Court of California, 137 S.Ct. 1773 (2017), has already garnered much attention as courts and litigants explore and question its meaning. Perhaps one of the most significant questions raised by BMS is whether and how it applies to the claims of absent class members in the context of federal class action litigation, particularly with respect to claims that do not arise under a statute authorizing nationwide service of process.

The Impact of BMS On Putative Class Actions In Federal Court

In BMS, the Supreme Court addressed personal jurisdiction over a defendant with respect to state law claims by non-residents in a mass action; it held that a California state court could not exercise personal jurisdiction over a pharmaceutical manufacturer with respect to product liability claims asserted by non-resident plaintiffs where those residents did not purchase, consume or suffer any injury from drugs sold in California.[1] The Supreme Court rejected "pendent party personal jurisdiction" based on claims brought by separate California-resident plaintiffs.[2]

BMS has far-ranging implications for putative multi-state class actions. Where the sole basis for personal jurisdiction over a defendant in federal court is specific jurisdiction (i.e., the defendant is not "at home" in the forum), the logic of BMS suggests that, in many cases, a federal court would lack personal jurisdiction over the defendant concerning the claims of non-resident class members.

Indeed, Justice Sotomayor expressly raised the decision's potential impact in this manner in her dissent, arguing that the majority opinion did not address whether the decision "would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."[3]

Courts that have considered BMS's impact on federal class actions have reached different conclusions with remarkably different logic. Some, while acknowledging the fundamental question, have chosen to avoid it for the time being.[4] Some have determined that BMS does not apply in federal class actions, reasoning — for example — that "the inquiry for personal jurisdiction lies with the named parties of the suit asserting their various claims

against the defendant, not the unnamed proposed class members."[5] Others have reached the opposite conclusion, recognizing that the decision applies to and can bar the assertion of personal jurisdiction over the defendant with respect to claims of non-resident absent class members.[6]

This split has not yet been resolved by any circuit — and only continues to widen. The core tension appears to be a fundamental difference over what a federal class action truly is.

The Devlin Tension Over The Essential Character Of A Federal Class Action

Courts analyzing BMS in the class context have invoked the Supreme Court's decision fifteen years ago in Devlin v. Scardelletti, 536 U.S. 1 (2002), a decision perhaps most revealing for the fundamental disagreement between the majority and dissent on the question of the essential nature of a federal class action.

The majority in Devlin viewed a class certification order as effectively joining people and their claims, making each class member a "party" for the critical purpose of judgment — and, as a corollary, concluded that each class member that had preserved its objection to a class settlement in the district court had a right to appeal the judgment approving that settlement despite failing to intervene in the action under Rule 24.[7] Devlin's holding addressed this narrow point.[8]

The Devlin dissent viewed a class certification order not as effectuating joinder but rather as akin to something creating privity on an ad hoc basis, allowing class members to be bound by judgments without becoming parties (who could appeal) or implicating the full range of due process protections.[9] It was remarkable that in 2002, 36 years after the 1966 amendments to Rule 23, the high court split 6-3 on the essential question of whether Rule 23 is a joinder device or something else. Notwithstanding Devlin, the same uncertainty may exist today.[10]

The lack of consistency in how courts have viewed BMS as applied to class actions flows from this uncertainty. Courts declining to take guidance from BMS in the context of putative federal class actions (Fitzhenry-Russell, Feller, Chinese Drywall and Day) first begin with Justice Sotomayor's dissenting opinion — that the majority in BMS did not explicitly address whether personal jurisdiction over the defendant must separately be established as to each claim asserted by or on behalf of each absent class plaintiff.[11]

Finding the question unresolved, these courts then answer the question in the negative, often without explanation or by relying upon dicta in Devlin.[12] For instance, quoting Devlin, the Fitzhenry-Russell court simply stated that class members within the framework of Rule 23 may be "parties" for some purposes but not others.[13] While recognizing that "this may be one of those contexts in which an unnamed member should be considered as parties given the language the Supreme Court chose to use in Bristol-Myers,"[14] the Fitzhenry court declined to do so, noting that there is no "binding law" providing that absent class members are parties for purposes of personal jurisdiction over the defendant.[15]

Neither Devlin nor Justice Sotomayor's dissent in BMS directly supports the proposition that BMS does not apply to the claims of absent plaintiff class members. Although courts have utilized these decisions to conclude that the question is open, finding BMS' analysis inapplicable to the claims of absent plaintiffs reflects an unwillingness to recognize that class action defendants have the same basic due process rights as defendants in other types of cases.

The Case For Applying BMS to Unnamed Class Plaintiffs

Relying upon Devlin, Fitzhenry-Russell and other courts have suggested two possible justifications for refusing to extend BMS to the claims of unnamed class members — either (1) personal jurisdiction is not constitutionally necessary with respect to the claims of absent class members, because they are not fully "parties" or present in the traditional sense; or (2) to the extent the court must concern itself with personal jurisdiction with respect to the claims of absent class members, it can for that purpose look to the named plaintiff(s) as representing all such persons and as asserting all such claims (and analyze its personal jurisdiction accordingly).

Both lines of analysis begin with what might be considered the "Devlin dissent" view of class actions. Both lines of analysis, however, focus on who is technically asserting the claims in a class action and, therefore, obscure the key issue — whether a defendant's fundamental due process rights are implicated by the claims of absent class members. Neither can be reconciled with well-established legal principles.

The Supreme Court has rejected the non-party theory

The broad proposition that the claims of absent class members simply do not implicate due process concerns, because such persons are not truly "parties," misunderstands the fundamental question: whether a defendant's due process rights can be impaired by the claims of absent class members, regardless of whether they are "parties" for all purposes.[16]

The application of due process principles to the claims of class members was addressed more than 30 years ago in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). The court there noted that "[t]he Fourteenth Amendment ... protect[s] 'persons' not 'defendants,' so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum state which seeks to adjudicate their claims."[17]

The court in Shutts explained that because the burdens on absent class members were less onerous than the burdens on defendants, absent class members were as a matter of due process entitled to more limited protections than defendants when a court adjudicates these claims.[18] Nevertheless, the plain premise of the court's holding in Shutts is that the claims of absent class members implicate personal jurisdiction concerns, as a matter of due process.[19]

It makes little sense to suppose that the due process clause applies to protect absent class members with respect to the adjudication of their claims (at least where such claims involve a constitutionally protected property interest), yet does not also apply to protect defendants as to precisely the same claims. As Shutts makes clear, due process affords defendants greater protections than absent plaintiffs.

Indeed, a defendant's exposure increases significantly when a class is certified because it ultimately can be liable for the claims of absent class members; it can hardly be said that a defendant is not entitled to due process protection as a result of those claims. Due process concerns are implicated whenever a class action seeks to establish liability and the imposition of a judgment with respect to absent class members whose claims would not be within the court's power to exercise personal jurisdiction.

The representative theory ignores principles of specific jurisdiction and obscures the real issue

The related notion that personal jurisdiction analysis of the claims of absent class plaintiffs can be

conducted as though all claims were asserted by the named plaintiff is a diversion. It, too, does not address the problem of establishing personal jurisdiction over the defendant with respect to the claims of absent class members.

Specific personal jurisdiction over a defendant as to a given claim is a function of the relationship between the defendant, the forum and the claim.[20] It requires an "affiliation between the forum and the underlying controversy,"[21] and it is not generally a function of the identity or residence of the plaintiff. The Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State."[22]

This principle is best illustrated by example. Imagine that the Plavix-related claims of non-Californian purchasers in BMS had been assigned to California residents. Even a valid assignment would not have changed the fact that the California court lacked specific personal jurisdiction over Bristol-Myers Squibb Co. as to those claims, because they would have arisen from the defendant's conduct outside of and not directed to California.

BMS therefore cannot be avoided or distinguished by imagining the class representative(s) as standing in the shoes of all absent class members. Just as the existence of specific personal jurisdiction over a defendant as to a given claim does not change regardless of whether the individual asserting that claim is labeled a "party" or not, it does not change with the transfer of that claim from one plaintiff to another. Perceiving the named plaintiff as asserting all claims does not change the specific personal jurisdiction analysis over the defendant with respect to those claims that arise from out-of-state conduct.

Conclusion: Ensuring Due Process In Class Actions

The rationales for applying BMS in federal court generally, but declining to extend its logic to federal class actions, are thus unpersuasive. In fact, they conflict with the Rules Enabling Act, which makes clear that Rule 23 cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Interpreting Rule 23 to conclude that a defendant cannot contest personal jurisdiction as to the claims of absent class members who could not bring actions individually in the forum — but for whom the defendant may be liable through a class judgment — would result in the abridgement of a core substantive, indeed, due process right. If BMS does not apply to federal class actions, Rule 23 effectively would create and expand jurisdiction over a defendant with respect to absent class member claims for which, if brought individually in the forum, personal jurisdiction would be lacking — a result that the Rules Enabling Act and Rule 82 preclude.[23]

It remains to be seen how the Circuit Courts of Appeals will address the impact of BMS on class actions in federal court, or whether a definitive resolution of that issue would also resolve the issue exposed in Devlin as to the essential nature of a federal class action. In the meantime, federal courts will continue to be called upon to balance the practical efficiency goals of class litigation against the commandment of the Rules Enabling Act and the critical requirements of due process.

J. Gordon Cooney, Brian Ercole and Ezra Church are partners, and Joseph Fay is senior counsel, at Morgan Lewis & Bockius LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general info rmation purposes and is not intended to be and should not be taken as legal advice.

[1] Bristol-Myers Squibb Co., 137 S.Ct. at 1781-82, 1784.

[2] Id.

[3] Id. at 1789 n.4 (Sotomayor, J. dissenting)

[4] See Broomfield v. Craft Brew All. Inc., No. 17-CV-01027-BLF, 2017 WL 3838453, at *15 (N.D. Cal. Sept. 1, 2017) (recognizing that "[r]egardless of the temptation by defendants across the country to apply the rationale of Bristol-Myers to a class action in federal court, its applicability to such cases was expressly left open by the Supreme Court and has yet to be considered by lower federal courts" and "defer[ring] consideration of CBA's specific personal jurisdiction arguments until class certification, when the parties will be able to brief their positions, including whether Bristol-Myers should apply to this case").

[5] Day v. Air Methods Corp., 2017 WL 4781863, at *2 (E.D. Ky. Oct. 23, 2017); see also Feller v. Transamerica Life Ins. Co., 2017 WL 6496803, at *17 (C.D. Cal. Dec. 11, 2017); In re: Chinese-Manufactured Drywall Products Liab. Litig., 2017 WL 5971622, at *12 (E.D. La. Nov. 30, 2017) ("Chinese Drywall") (MDL No. 2047); Fitzhenry-Russell v. Dr. Pepper Snapple Group Inc., 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017); cf. Swamy v. Title Source Inc., 2017 WL 5196780, *2 (N.D. Cal. Nov. 10, 2017) (rejecting BMS-based challenge to personal jurisdiction in FLSA collective action, noting that the result "would splinter most nationwide collective actions, trespass on the expressed intent of Congress, and greatly diminish the efficacy of FLSA collective actions as a means to vindicate employees' rights," a result "not mandated by [BMS].").

[6] Wenokur v. AXA Equitable Life, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017) ("The Court ... lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class."); In re Dental Supplies Antitrust Litig., 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) (rejecting plaintiffs' argument that BMS does not apply in class actions, writing that "[t]he constitutional requirements of due process does [sic] not wax or wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case."); see also Alvarez v. NBTY Inc. et al., No. 17-CV-00567-BAS-BGS, 2017 WL 6059159, at *7 (S.D. Cal. Dec. 6, 2017) ("Bristol-Myers may have created a new defense … [that the Count lacks] personal jurisdiction over the claims brought by the unnamed members to Plaintiff Alvarez's proposed multi-state class, i.e. Defendants' in-state activities relating to Plaintiff Alvarez cannot be used to support specific jurisdiction for claims alleged by unnamed out-of-state class members").

[7] Devlin, 536 U.S. at 8-10.

[8] Id. at 14.

[9] Id. at 15-16 (Scalia, J. dissenting)

[10] See, e.g., Taylor v. Sturgell, 553 U.S. 880, 894 (2007), for a unanimous Court, describing "properly conducted class actions" as one exception to the general rule against "nonparty preclusion."

[11] See, e.g., Chinese Drywall, 2017 WL 5971622, at *12; Feller, 2017 WL 6496803, at *17.

[12] Fitzhenry-Russell, 2017 WL 4224723, at *5; Day, 2017 WL 4781863, at *2 & n. 1 (citing Devlin to support proposition that "inquiry for personal jurisdiction lies with the named parties of the suit asserting their various claims against the defendant, not the unnamed proposed class members").

[13] Fitzhenry-Russell, 2017 WL 4224723, at *5.

[14] Id.

[15] Id.

[16] As the Supreme Court has made clear, "[d]ue process limits" imposed by constitutional personal jurisdiction rules "principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014).

[17] Shutts, 472 U.S. at 811.

[18] Id. at 807-811.

[19] Indeed, Shutts based its holding in part on the assumption that "defendants are entitled to some protection from the jurisdiction of a forum state which seeks to adjudicate [absent plaintiffs'] claims." Id. at 811.

[20] Walden, 134 S.Ct. at 1121-22, 1124-25.

[21] Goodyear Dunlop Tires Operations S.A. v. Brown, 564 U.S. 915, 919 (2011) (internal citations and quotations omitted).

[22] Walden, 134 S. Ct. at 1122.

[23] Rule 82 provides that the Federal Rules of Civil Procedure do "not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."