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# NEW FRONTIERS IN PERSONAL JURISDICTION AND THE FUTURE OF CLASS ACTIONS

Allyson Ho  
Steve Reed

October 5, 2017

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# Overview of Recent Supreme Court Decisions

As the Supreme Court gets underway with a new term, we consider two decisions from the last term that are likely to shape class litigation going forward:

- *Bristol-Myers Squibb v. Superior Court*, No. 16-466 (June 19, 2017) (“*Bristol-Myers Squibb*”)
- *Microsoft Corp. v. Baker*, No. 15-457 (June 12, 2017) (“*Microsoft Corporation*”)

Of these, the *Bristol-Myers Squibb* case, which deals with personal jurisdiction over defendants, is likely to have the broadest impact on multi-plaintiff litigation, including class actions.

# Status of Traditional “Minimum Contacts” Analysis as a Means of Establishing Personal Jurisdiction

*International Shoe Co. v. Washington*, 326 U.S. 310 (1945) largely established the modern framework for determining the limits on personal jurisdiction that may be exercised by state courts under the Due Process Clause of the Fourteenth Amendment.

- Two Supreme Court decisions in 2011 – *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), and *Goodyear-Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), began to reshape *International Shoe* analysis, focusing closely on the difference between “general” personal jurisdiction (jurisdiction over the defendant for all purposes) and “specific” personal jurisdiction (jurisdiction over the defendant only with respect to claims linked to the defendant’s activity in or directed to the forum state).
- Two Court decisions in 2014 – *Daimler AG v. Bauman*, 571 U.S. \_\_\_ (2014), and *Walden v. Fiore*, 571 U.S. \_\_\_ (2014), explored and reinforced the difference between these two types of personal jurisdiction, making it clear that “general” jurisdiction as to a particular defendant will only exist in a limited number of places.

# Reshaping the Landscape of Personal Jurisdiction

The *Bristol-Myers Squibb* case illustrates a consequence of the fact that most cases will implicate specific rather than general jurisdiction.

- That case was a multiple-plaintiff action brought in state court in California, involving purchases of drugs by persons both inside and outside California.
- Focusing on specific jurisdiction, the Supreme Court concluded that California courts could only exercise personal jurisdiction over the defendant with respect to claims of California residents, because the non-residents' claims lacked any connection with the state.
- Despite the fact that California courts could exercise personal jurisdiction over the defendant with respect to the claims of *some* plaintiffs – and all plaintiffs were presumably properly joined as a matter of California procedure – the Court held (quoting *Walden*) that “a defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.”
- The Supreme Court therefore seemed to reject “pendent” personal jurisdiction as to the claims of additional parties for purposes of the Fourteenth Amendment.

# Reshaping the Landscape of Personal Jurisdiction

- Because nothing in the *Bristol-Myers Squibb* case suggests that the analysis therein is limited to situations where plaintiffs are joined in conventional ways, the analysis should apply to class actions in state court. Therefore, multistate class actions in state court should be limited to places where the defendant is subject to general jurisdiction, typically where the defendant is incorporated or has its principal place of business.
- Multistate class actions involving multiple defendants alleged to have acted together will present further complicating factors.

# Reshaping the Landscape of Personal Jurisdiction

- The application of the *Bristol-Myers Squibb* case in the federal courts will depend on issues not yet fully resolved. As it has in the past, the Supreme Court in the *Bristol-Myers Squibb* case left open the question whether the Fifth Amendment “imposes the same restrictions on the exercise of personal jurisdiction by a federal court as the Fourteenth Amendment imposes on state courts.”
- Notwithstanding this reserved question regarding the direct constitutional limits the Fifth Amendment may or may not impose on federal courts, the *Bristol-Myers Squibb* case is unlikely to have any effect on actions in federal court under statutory schemes where Congress has authorized nationwide service of process (such as the antitrust laws); nationwide service of process in such circumstances is presumed to be constitutionally permissible.

# Reshaping the Landscape of Personal Jurisdiction

The extent to which the *Bristol-Myers Squibb* case will be transposed to the federal courts may be largely a matter of interpreting Rule 4(k) of the Federal Rules of Civil Procedure, which governs the territorial limits of effective service in the federal courts. Of particular importance is Rule 4(k)(1)(A), which allows service on a person or entity “subject to the jurisdiction of a court . . . in the state where the district court is located.” This phrasing brings constitutional limits on state court personal jurisdiction into play in the federal courts.

# Reshaping the Landscape of Personal Jurisdiction

Although the *Bristol-Myers Squibb* case does not speak to personal jurisdiction issues that arise in cases involving multiple defendants, it will likely prompt more litigation over such issues.

# Practice Point

The defense of lack of personal jurisdiction (unlike lack of subject matter jurisdiction) is waivable, and defendants may in some circumstances be well advised to refrain from asserting that defense. It may be preferable, as a matter of litigation efficiency or otherwise to litigate related claims in a single forum, notwithstanding the fact that personal jurisdiction may be lacking as to some of the claims at issue.

The key point is that because the defense is waivable if not properly raised at the earliest opportunity under the applicable procedural rules, asserting a personal-jurisdiction defense should be on your “checklist” and carefully considered so the opportunity isn’t lost through inaction.

# Another US Supreme Court Opinion That Is Likely to Affect Class Action Practice

- The *Microsoft Corporation* case also arose in a context unique to class litigation. The issue in the case was whether a plaintiff could effectively create a right to appeal a denial of class certification (where discretionary interlocutory review had been denied) by voluntarily dismissing its claims with prejudice and then pursuing an appeal from the resulting final decision.
- Although the Ninth Circuit had allowed such an appeal, and reversed (and remanded) the denial of class certification, the Supreme Court concluded that there was no appealable order. The Court was concerned with the extent to which allowing appeal in such circumstances would undermine the discretionary interlocutory appeal mechanism created by Rule 23(f).
- Although a majority of the Court did not embrace the point, Justice Thomas in a concurring opinion concluded that there was no remaining case or controversy under Article III after the plaintiffs voluntarily dismissed their claims.

# Another US Supreme Court Opinion That Is Likely to Affect Class Action Practice

The *Microsoft Corporation* case deprives class plaintiffs of a path otherwise available in the Ninth Circuit that would circumvent Rule 23(f). Left unclear by the remand of the case is how the lower courts are to proceed in light of the dismissal of the plaintiffs' claims.

# Biography



## **Allyson N. Ho**

Dallas/Houston

T +1.214.466.4180

allyson.ho@morganlewis.com

Allyson N. Ho represents clients in high-stakes litigation in US state and federal trial and appellate courts nationwide, including the US Supreme Court, where she has argued multiple times as lead counsel. Co-chair of the firm's appellate practice, Allyson has litigated cases in every federal court of appeals and in the highest courts of multiple states. She has won cases for Fortune 500 companies, represented former high-ranking US and foreign government officials in federal court, and counseled US senators and presidential candidates. In 2014, Allyson was the only female lawyer in private practice to argue more than one case at the US Supreme Court—arguing two cases within 21 days.

# Biography



**Steve A. Reed**

Philadelphia

T +1.215.963.5603

steven.reed@morganlewis.com

A seasoned litigator at the trial and appellate levels, Steve A. Reed represents businesses in a wide range of high-stakes class actions and other commercial litigation, including antitrust, securities fraud, shareholder derivative, merger challenges, and other complex disputes. He is listed in leading peer review guides for antitrust, securities, general commercial litigation, and “bet the company” litigation. A former deputy general counsel, Steve brings an insider’s view to client service. Steve is the practice group leader of the firm's global antitrust and competition law practice.

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