

Lawyers working on class actions, civil procedure experts and many others have been waiting to see what circuit courts will do with the “BMS issue” – the question, raised by the Supreme Court’s decision in *Bristol-Myers Squibb v. Superior Court*, of whether a federal court has personal jurisdiction for a nationwide class action based only on the defendant’s interactions with the named plaintiffs. The last few days have produced two very different results, from the Seventh and the D.C. Circuits. This issue has now, if anything, become more difficult.

Three years ago, the Supreme Court caused a major stir in class action litigation when it decided that a product liability mass action, with plaintiffs from across the nation, could not proceed in a California state court against Bristol-Myers Squibb. The company is not domiciled in California. However, the state court had used a “sliding-scale” approach to personal jurisdiction, in which extensive contacts with the state (Bristol-Myers Squibb sells a lot of products in California) could justify the exercise of jurisdiction over the whole case. The Supreme Court said no. A key premise of its reasoning was that nonresidents of California (who bought and used the accused product outside the state) represented distinct claims, for which Bristol-Myers Squibb had no contacts with California that could support personal jurisdiction.

*Bristol-Myers Squibb* arose from a state court, and the decision said it left undecided “whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” Justice Sotomayor, in a lone dissent, stressed that the Court had not determined whether its opinion would apply to a nationwide class action. That question has now been hotly disputed in district courts around the country, as defendants repeatedly resist class actions by contending courts lack jurisdiction for class claims arising outside their forum states. The issue could substantially change the practice of class action litigation. If a nationwide class action can only be brought in the defendant’s home state, class plaintiffs will no longer be able to choose so freely which court to sue in. In addition, as any litigator will tell you, where to sue is often a critical strategic choice. Moreover, nationwide class actions with multiple defendants might often be impossible, because the defendants might not all be amenable to nationwide claims in the same court.

Results have been mixed, both on the substantive legal question about the limits on a federal court’s personal jurisdiction, and on the process about how to present that question. Some district courts have reasoned that the limits on personal jurisdiction are (for most types of claim) the same for a federal court as for the state it sits in, and grouping claims into a class action cannot change that. Others have held that class actions are different, and that class members are not fully parties to the case so that personal jurisdiction over their claims is not necessary.

On process, the ordinary way to dispute personal jurisdiction is to move to dismiss the complaint, or at least the claims for which jurisdiction was lacking. However, filing a class action complaint does not create a class action, so it is not clear if there are claims to dismiss. Some (but not all) defendants have waited until the stage of class certification to raise jurisdictional objections, but some (but not all) courts have said that is too late (and the objections are waived). Some defendants have raised the issue in motions to dismiss, and some (but not all) courts have said that is too early.

Until this week, no circuit court had issued a decision on any of this. The first two appeals presenting these questions were in *Molock v. Whole Foods Market Group*, in the D.C. Circuit; and *Mussat v. IQVIA*, in the Seventh Circuit. The D.C. Circuit issued its opinion on Tuesday, and the Seventh Circuit on Wednesday.

*Molock* involves a dispute over wages. The plaintiffs claim Whole Foods manipulated its bonus program to deprive employees of compensation they should have been paid. Whole Foods is incorporated in Delaware and headquartered in Texas, but the plaintiffs filed a nationwide class action in the D.C. district court. Whole Foods filed a motion to dismiss on the basis of *Bristol-Myers Squibb*. The district court denied that motion but certified its decision for immediate appeal. The expectation was that the D.C. Circuit would decide whether Whole Foods could be subject to personal jurisdiction in the D.C. court for class claims involving plaintiffs from across country.

Instead, the court decided that a motion to dismiss was the wrong vehicle for the dispute – it raises the jurisdictional question too early. The theoretical class members are not parties to the case at this point, so there is nothing to dismiss. The court acknowledged that the plaintiffs had forfeited this argument, but the opinion resurrected it. In doing so, the court carefully avoided suggesting whether an objection at the time of class certification could be successful, in other words, whether the defendant’s jurisdictional objection has merit. Indeed, the majority’s willingness to reach out to decide the case on a forfeited process ground suggests that it found the substantive question more difficult.

Whole Foods may now have to go through the certification process – discovery about its employees nationwide, and elaborate briefing and a hearing about how the Rule 23 factors apply in this case – before getting to a decision about whether the nationwide employees can be permitted in a case against it in a D.C. court at all. There are other procedural options available to a defendant, such as moving early in the case to strike nationwide class allegations. (The *Molock* majority insisted that Whole Foods had not availed itself of other options.) Those options are not as clear-cut as a motion to dismiss, and they leave a district court with greater discretion. This difference is of enormous practical difference to both plaintiffs and defendants in potential class actions, as they strategize about costs, time and the flow of information in discovery.

Yet, at the end of the day, the *BMS* argument remains undecided in D.C., and it remains quite possible that defendants could get an early exit from nationwide class actions on the basis of jurisdictional arguments. For that ultimate question, perhaps the most interesting outcome of *Molock* is actually the dissent. Judge Silberman disagreed about the majority's treatment of the process question, which he thought the plaintiffs had waived. He proceeded to explain why he thinks *Bristol-Myers Squibb* certainly does apply to a federal class action – in other words, that if a defendant objects, a court must assess personal jurisdiction regarding all the class members' claims. Judge Silberman is not necessarily a harbinger of what his D.C. Circuit colleagues will think. Still, any lawyer litigating personal jurisdiction would do well to read Judge Silberman's opinion carefully – whether to crib from it or to prepare counterarguments.

In *Mussat v. IQVIA*, the defendant had already used one of those procedural options that the D.C. Circuit said Whole Foods had missed. An Illinois plaintiff brought claims under the Telephone Consumer Protection Act, in federal court in Illinois, against a defendant headquartered in Pennsylvania. The district court struck (rather than dismissed) a nationwide class allegation, on the ground that it would not have personal jurisdiction over IQVIA for incidents outside Illinois. The circuit court allowed an immediate appeal under Rule 23(f), a provision that permits discretionary review of orders granting or denying class certification.

The Seventh Circuit decided that striking the nationwide class allegations was improper because the absent class members simply do not matter for determining personal jurisdiction over the defendant. The court reasoned that class members are parties to a case only for some purposes. For example, a decades-old Seventh Circuit case had held that a defendant class can be sued in a single court even if absent class members have no connection to the forum. If so, the *Mussat* panel concluded, then personal jurisdiction should not be a requirement with respect to members of a plaintiff class. This decision is particularly significant because federal courts in Illinois (within the Seventh Circuit) had been the first to decide that *Bristol-Myers Squibb* applies in federal class actions.

The *Mussat* decision and Judge Silberman's *Molock* opinion display divergent views of how jurisdiction works. For the *Mussat* panel, personal jurisdiction is measured at the level of parties to a case. If absent class members are not fully parties, in the Seventh Circuit's view, they should not count for personal jurisdiction purposes. For Judge Silberman, personal jurisdiction is measured at the level of claims. A court needs personal jurisdiction for each claim it adjudicates. Presenting claims from unnamed class members does not alter that requirement or enhance the court's authority to decide the claims.

The next round of cases is pending in several circuit courts, and it seems possible the Supreme Court will eventually need to decide this issue.

This article first appeared in the March 12, 2020, edition of *Law360*. To learn more about *Law360* and Portfolio Media, visit [Law 360's website](#).

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