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Class Certification Case Developments (May 2020)

In this installment of our client alerts focused on class certification decisions, we discuss three recent cases which illustrate an issue percolating in district courts across the country regarding personal jurisdiction in nationwide class actions in the wake of the Supreme Court's *Bristol Myers Squibb* decision. In these recent cases, the courts examine how to address class certification where not all class members could individually establish personal jurisdiction in the forum state.

We also discuss another decision—this one serving as a reminder in the post-*Comcast* world that, when seeking to demonstrate the ability to rely on common evidence for predominance questions, plaintiffs must ensure their damages analyses sufficiently align with their theories of liability.

Three Cases Discussing Personal Jurisdiction in National Classes after *Bristol-Myers Squibb*

1. *Molock* v. *Whole Foods Market Group, Inc.* (D.C. Cir.)

In a March 10, 2020 opinion, ***Molock* v. *Whole Foods Market Group, Inc.***,[1] the United States Court of Appeals for the D.C. Circuit used class certification to procedurally punt on the issue that not all class members could establish personal jurisdiction. Plaintiffs sought to certify a nationwide class consisting of employees of Whole Foods, arguing that Whole Foods had manipulated its bonus payment program in violation of state laws. A central question was whether the Supreme Court's 2017 decision relating to personal jurisdiction of participants in a federal mass tort action in *Bristol-Myers Squibb* v. *Superior Court of California*[2] applies to nationwide class actions.

The Supreme Court in *Bristol-Myers* determined that personal jurisdiction was not present in a mass tort action relating to a blood thinner, Plavix, because there was too tenuous a connection between out-of-state plaintiffs and the forum state.[3] In that case, more than 600 plaintiffs filed their claims in California state court asserting a variety of California state law claims alleging injuries caused by the drug. The majority of plaintiffs, however, were not California residents, and did not allege they obtained Plavix from California, that they were injured in California or that they received treatment in California. They contended, instead, that personal jurisdiction was appropriate under California's sliding scale approach to jurisdiction because

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1 952 F.3d 293 (D.C. Cir. 2020).

2 U.S. ---, 137 S. Ct. 1773 (2017).

3 *Bristol-Myers*, 137 S. Ct. at 1777.

of defendants' wide-ranging contacts with the state, or alternately, because defendants contracted with a California company to distribute Plavix nationally. But the Court held that "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."[4]

In a dissent, Justice Sotomayor essentially predicted the issue in *Molock*, observing that the Court's decision did "not confront whether its opinion . . . 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."[5]

Plaintiffs in *Molock* sued Whole Foods on behalf of a nationwide class in the United States District Court for the District of Columbia, under the laws of the District of Columbia and five states.[6] On a motion to dismiss, Whole Foods argued that claims from putative class members outside the District of Columbia should be dismissed in light of *Bristol-Myers*.

The plaintiffs sought to distinguish *Bristol-Myers* by arguing that it involved a mass tort action—not a class action—and that extending its holding would frustrate class actions as a concept. The district court agreed with plaintiffs and concluded that extending *Bristol-Myers* to class actions "would effectively eviscerate all multi-state class actions and the purpose of [Rule] 23."[7] It therefore denied defendant's motion to dismiss claims for lack of personal jurisdiction and permitted out of state employees to proceed with their claims. Whole Foods filed an interlocutory appeal.

On appeal, a 2-1 panel held that because the class had not yet been certified, the jurisdictional question was premature. They reasoned that the parties were not yet officially before the court as part of the class.[8] The decision was therefore affirmed and remanded to the district court to proceed with class certification.[9]

In a dissent, Judge Silberman disagreed that the motion was premature. He concluded that *Bristol-Myers* requires dismissing the claims brought by putative class members outside of Washington, D.C. and that Rule 23 is not "an adequate substitute for normal principles of personal jurisdiction."[10] Judge Silberman also noted that general jurisdiction remained an avenue for the plaintiffs to bring their claims, and for this

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4 *Id*. at 1782 (emphasis added).

5 *Id*. at 1789 n.4 (emphasis added) (Sotomayor, J., dissenting).

6 *Molock* v. *Whole Foods Mkt.*, 297 F. Supp. 3d 114, 119 (D.D.C. 2018).

7 *Molock*, 297 F. Supp. 3d at 126.

8 *Molock*, 952 F.3d at 295.

9 *Id*. at 300.

10 *Id*. at 307.

defendant in particular, Delaware—the state of incorporation for Whole Foods—was only 110 miles down the road.[11]

2. *Mussat* v. *ICVIA, Inc.* (7th Cir.)

Just days after the D.C. Circuit's *Molock* opinion, the Seventh Circuit overruled the Northern District of Illinois and reached a similar conclusion as the district court in *Molock*. In *Mussat* v. *ICVIA, Inc.*,[12] an Illinois physician received two unsolicited faxes from the defendant, which failed to include an opt-out notice required by federal law.[13] Plaintiffs sought certification for a nationwide class of all persons who had received similar junk faxes from the defendant in the last four years.[14]

In the district court, defendant moved to strike the class definition because the court did not have personal jurisdiction over non-Illinois members of the proposed nationwide class.[15] The court granted defendant's motion to strike in light of *Bristol-Myers*, reasoning that the unnamed members of the class each had to show minimum contacts between the defendant and the forum state relating to their claim.[16] Plaintiffs filed an interlocutory appeal pursuant to Rule 23(f).[17]

The Seventh Circuit rejected defendants arguments that the Supreme Court's *Bristol-Myers* decision applied to class actions brought under Rule 23, holding that "the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute."[18] The opinion noted how *Bristol-Myers* was brought under a "different aggregation device" and referred to how non-named class members are not considered for purposes of complete diversity in subject matter jurisdiction or with regard to venue in the context of Rule 23.[19] The court provided, "[o]nce certified, the class as a whole is the litigating entity, . . . and its affiliation with a forum depends only on the named plaintiffs."[20] Accordingly, the Seventh Circuit reversed the district court and remanded the case for further proceedings.

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11 *Id*. at 305.

12 953 F.3d 441 (7th Cir. 2020).

13 953 F.3d at 443.

14 *Mussat*, 953 F.3d at 443.

15 *Mussat* v. *IQVIA Inc.*, Case No. 17 C 8841, 2018 WL 5311903, at *1 (N.D. Ill. Oct. 26, 2018).

16 *Mussat*, 2018 WL 5311903, at *4.

17 *Mussat*, 953 F.3d at 443.

18 *Id*.

19 *Id*.

20 *Id*. at 455.

3. *Cruson* v. *Jackson Nat'l Life Ins. Co.* (5th Cir.)

In *Cruson*,[21] the Fifth Circuit considered whether the defendant had waived its personal jurisdiction defense as to the out-of-state class members by failing to raise the issue prior to class certification.

The Fifth Circuit held that although the defendant, Jackson National Life Insurance Company ("Jackson"), had not litigated its personal jurisdiction defense as to the non-resident class members prior to class certification, the defense was not waived. At the outset of litigation, Jackson moved to dismiss both a complaint and amended complaint without raising a personal jurisdiction defense. After the district court ruled and dismissed several of plaintiffs' claims for lack of standing, Jackson answered the complaint, but denied that the court had personal jurisdiction over Jackson for the non-resident class members, should a nationwide class be certified.[22] When the plaintiffs moved to certify the class, Jackson then raised, among others, a personal jurisdiction defense, arguing that *Bristol-Myers* foreclosed specific jurisdiction as to claims of out-of-state class members.

The plaintiffs protested that defendants had waived their personal jurisdictional arguments by not raising them at the outset of litigation. The appellate court disagreed, because Jackson had contested specific jurisdiction both in its answer as well as at the earliest point at which the defense was available. It concluded that only after class certification was there a justiciable controversy between the defendant and the putative class members before the court.[23]

Here, then, just like the D.C. Circuit in *Molock*, the Fifth Circuit focused on—and reached the same conclusion as to—the procedural question of *when* a *Bristol-Myers* argument is appropriate in a case, without considering whether such an argument has merit.

In light of these varying outcomes in cases invoking the Supreme Court's decision in *Bristol-Myers*, the question foreseen by Justice Sotomayor no doubt will continue to percolate in district and circuit courts nationwide. These results demonstrate there will likely be disagreement amongst the circuits as more cases work their way up. If the Supreme Court eventually takes up the issue and determines *Bristol-Myers* applies to nationwide class actions, plaintiffs might have a much harder time meeting Rule 23 requirements when their claims must have a nexus to the forum state. If it is determined not to apply, jurisdictional inquiries will continue to be limited to named class representatives. Until then, expect a patchwork of decisions to be

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[21] 964 F.3d 240 (5th Cir. 2020).

[22] *Cruson*, 954 F.3d at 246–47.

[23] *Id.* at 251 ("Prior to class certification, a personal jurisdiction defense as to putative non-resident class members was 'not available' under Rule 12.").

sewn as district and circuit courts individually address whether *Bristol-Myers* applies to nationwide class actions.

Comcast Strikes Again: Damages Models Must Align With Liability Theories When Assessing Predominance

In a March 9th opinion, *McMorrow* v. *Mondelez Int'l, Inc.*,[24] the United States District Court for the Southern District of California denied class certification under the predominance prong of Rule 23 and the Supreme Court's ruling in *Comcast Corp.* v. *Behrend*, because plaintiffs' damages expert did not align his damages model with plaintiffs' theory of liability.[25]

In *McMorrow*, the plaintiffs alleged that defendant misled consumers in claiming that its products were nutritious, even though they had high sugar content. The specific marketing claims alleged to be misleading were: "NUTRITIOUS SUSTAINED ENERGY," "NUTRITIOUS STEADY ENERGY ALL MORNING," and "4 HOURS OF NUTRITIOUS STEADY ENERGY."[26]

To support their bid for certification, the plaintiffs offered a survey expert to show that damages could be determined using common evidence and without the need for individualized inquiries. The survey expert was to survey consumers to measure the value they placed on defendants' marketing phrases.[27] But the expert did not separate the messages' claims regarding "ENERGY" from those about them being "NUTRITIOUS," which made it impossible to learn whether consumers placed any premium on the "NUTRITIOUS" message versus the "ENERGY" message.[28] Relying on *Comcast*,[29] the court wrote that "[c]lass certification can be denied . . . 'when the proposed price premium (i.e. overpayment) methodology fails to . . . isolate the premium attributable to the alleged misleading marketing statement."[30]

In *Comcast*, plaintiffs advanced four theories of individual injury. The United States District Court for the Eastern District of Pennsylvania only accepted one theory—called the "overbuilder theory"—as capable of class-wide proof.[31] The model proffered by plaintiffs for calculating damages, however, included damages

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[24] Case No. 17-cv-2327-BAS-JLB, 2020 WL 1157191 (S.D. Cal., Mar. 9, 2020).

[25] *McMorrow*, 2020 WL 1157191, at *1.

[26] *Id.*

[27] *Id.* at *6.

[28] *Id.*

[29] 569 U.S. 27, 34–35 (2013).

[30] *McMorrow*, 2020 WL 1157191, at *8 (citation omitted).

[31] *Comcast*, 539 U.S. at 1431.

for all four theories, including the three rejected theories.[32] Nevertheless, the district court found the damages methodology adequate and certified the class.[33] On appeal, the Third Circuit affirmed the district court by concluding that "attacking on the merits of the methodology has no place in the class certification inquiry."[34]

The Supreme Court reversed the lower courts. Writing for the majority, Justice Scalia provided that, "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible to measurement across the entire class. . . ."[35]

The *McMorrow* opinion's application of *Comcast* is not unique. Indeed, courts across the country routinely decline to certify putative classes where plaintiffs fail to provide a damage analysis which does not adequately tie price premiums to the challenged marketing statements.[36] For example, in a case from the United States District Court for the Eastern District of Wisconsin, that court declined to certify a putative class because the proposed methodology for calculating damages involved asking consumers if they would pay less for premium dog food if they were presented "corrective statements" regarding the actual contents of the dog food.[37] In no way did the proffered damages model speak to the premium placed on the allegedly misleading marketing statements that the dog food was "biologically appropriate," "made with fresh regional ingredients," "never outsourced" and "natural."[38] Similarly, the United States District Court for the District of New Jersey declined to certify a putative class alleging misleading statements regarding the purity and naturalness of Tropicana Pure Premium orange juice.[39] There, plaintiffs' methodology for calculating damages failed to test the value across the products' various instantiations and labels during the class period, and plaintiffs' expert admitted surveying consumers about these various labels could impact consumers' willingness to pay.[40]

The *McMorrow* decision is a reminder that plaintiffs must be thoughtful in designing their damages analyses to ensure that they align with their theories of liability, especially where liability is based on alleged

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[32] *Behrend* v. *Comcast Corp*., 264 F.R.D. 150, 175–77 (E.D. Pa. 2010).

[33] See *id*.

[34] *Behrend* v. *Comcast Corp*., 655 F.3d 182, 206–07 (3d Cir. 2011).

[35] 569 U.S. 27 at 35.

[36] *See, e.g., Weaver* v. *Champion Petfoods USA Inc.*, Case No. 18-CV-1996-JPS-JPS, 2019 WL 7370374 (E.D. Wis. Dec. 31, 2019).

[37] *Id*. at *3–*4.

[38] *Id*. at **3–*4.

[39] *In re Tropicana Orange Juice Mktg. & Sales Practices Litg*., Civ. No. 2:11-07382, 2019 WL 2521958, at *14 (D.N.J. June 18, 2019).

[40] *Id*.

marketing misrepresentations which led consumers to pay a premium for a product. If a putative class of plaintiffs fails to provide a method for calculating damages which specifically traces their theory of liability, *Comcast* requires denying certification.[41]

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[41] *See Comcast*, 569 U.S. at 35.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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