HARRISMARTIN PUBLISHING

From: HarrisMartin's Mdl Mass Tort & Class Action Monitor Publication
Date: December 15, 2017
www.harrismartin.com

"The Reports of the Death of Federal Multi-State Class Actions Have Been Greatly Exaggerated"

[Editor's note: Martin P. Schrama is a Shareholder in Stark & Stark's Commercial Litigation and Intellectual Property Groups, and is Chairman and Co-Founder of the firm's Mass Tort Litigation Group. Stefanie Colella-Walsh is a Shareholder and member of Stark & Stark's Litigation, Insurance Coverage & Liability, Intellectual Property and Mass Torts Groups where she concentrates her practice in complex litigation with a focus in mass tort and pharmaceutical litigation.]

Federal multi-state class actions are the things of Hollywood movies – everyday people banding together against mighty corporations, storied legal champions engaged in fierce courtroom combat, and vast fortunes won or lost on daring legal strategy or the masterful turn of a phrase. Indeed, the roots of class action litigation go back to English common law, later becoming codified in one of the original Federal Rules of Civil Procedure, as well as becoming the subject of statutory refinement (through legislation such as the Class Action Fairness Act of 2005) and decades of formative case law.

Thus, there was an understandable strain of disbelief when the U.S. Supreme Court began handing down rulings on jurisdiction that had the real potential to greatly curtail or do away with nationwide class actions altogether, at least in all but the rarest situations.

In Daimler AG v. Bauman, 134 S. Ct. 746 (2014), the U.S. Supreme Court General jurisdiction can be established when a corporation's acts in a forum state are sufficiently "continuous and systematic" that the corporation is "at home" in that forum state. In Bauman, the plaintiffs sought to have the court exercise general jurisdiction over DaimlerChrysler AG, the parent company of an automobile distributor, Mercedes-Benz USA, that concededly engaged in widespread distribution of automobiles throughout California. However, the claims against DaimlerChrysler AG evolved from its unrelated activities during civil unrest in Argentina, rather than car sales in California. The U.S. Supreme Court held that general jurisdiction can only be exercised in the forum state where a corporation is "at home" – meaning, specifically, only where the corporation is: 1) incorporated; or 2) has its principal place of business.

Then the U.S. Supreme Court took up the issue of specific jurisdiction over foreign corporations in earnest in Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017). Specific jurisdiction is established when a corporation's acts in the forum state actually give rise to a plaintiff's claims. In Bristol-Myers Squibb, a group of individually named plaintiffs brought a mass action against BMS in California state court, asserting claims under California law, based on injuries allegedly caused by the BMS drug, Plavix. While many of the plaintiffs were California residents, the vast majority of the plaintiffs were residents of various other states. BMS is incorporated in Delaware and headquartered in New York, and the nonresident plaintiffs "did not allege that

they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California."

The California Supreme Court had held that there was specific jurisdiction over the nonresident plaintiffs' claims, because those claims were "similar in several ways to the claims of the California residents." The U.S. Supreme Court reversed, finding that, though the claims of the nonresident plaintiffs were similar to the claims of the resident plaintiffs, California courts could not establish specific jurisdiction over BMS regarding the nonresident plaintiffs' claims, as the nonresident plaintiffs did not claim to have suffered harm in California and the conduct giving rise to their claims did not occur in California.

Granted, the Bristol-Myers Squibb holding dealt with state mass action claims, which are quite different than federal multi-state class action claims. Nonetheless, the sole dissenter, Justice Sotomayor, portended a seismic and potentially mortal shift in the longstanding standards governing mass and, ostensibly, class actions. Justice Sotomayor reasoned that the ruling would make it "profoundly difficult for plaintiffs who are injured in different states by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action." Justice Sotomayor further argued that the effect of the majority's opinion would be to simply "eliminate" such actions in any state where a corporate defendant was not "at home" (i.e. the state of incorporation, or the state of principal place of business).

On the heels of the U.S. Supreme Court ruling, the initial class action cases that interpreted the Bristol-Myers Squibb holding did not augur well for federal multi-state class actions. Building on rulings from the U.S. District Court for the Northern District of Illinois (Demaria v. Nissan N.A., Inc., 2016 WL 374145 (N.D. Ill. Feb. 1, 2016); Demedicis v. CVS Health Corp., 2017 WL 569157 (N.D. Ill. Feb. 13, 2017)), the U.S. District Court for the Eastern District of Pennsylvania questioned that court's jurisdiction over a nationwide consumer protection class, based on the sale of generic drugs, in Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., 017 U.S. Dist. LEXIS 114733 (E.D. Pa. July 24, 2017). The Plumbers' Local court essentially held that it had no general jurisdiction, because the defendant was not at home in the forum, and no personal jurisdiction for claims based on the respective state consumer protection laws in states and territories other than Pennsylvania.

Then there was the decision by the U.S. District Court for the Eastern District of New York in In re Dental Supplies Antitrust Litigation, 2017 U.S. Dist. LEXIS 153265 (E.D.N.Y. Sept. 20, 2017), specifically positing that the plaintiff's argument that the Bristol-Myers Squibb holding "has no effect on the law in class actions because the case before the Supreme Court was not a class action" was "flawed." See, also, Greene v. Mizuho Bank, 2017 U.S. Dist. LEXIS 202802 (N.D. Ill. Dec. 11, 2017) ("Nothing in Bristol-Myers suggests that it does not apply to named plaintiffs in a putative class action . . .").

More to the point, some District Courts appeared to be taking the position that the Bristol-Myers Squibb holding stood for the proposition that a District Court had to establish personal jurisdiction over a defendant with regard to the individual claims of all unnamed class members. See Alvarez v. NBTY, Inc., 2017 U.S. Dist. LEXIS 201159 (S.D. Cal. Dec. 6, 2017) (citing McDonnell v. Nature's Way Prod., LLC, 2017 U.S. Dist. LEXIS 177892 (N.D. Ill. Oct. 26, 2017); Wenokur v. AXA Equitable Life Ins. Co., 2017 U.S. Dist. LEXIS 162812 (D. Ariz. Oct. 2, 2017)).

This line of precedent, along with other cases that appeared to, at least obliquely, call into question the continued viability of nationwide federal class actions following the Bristol-Myers Squibb holding, struck at the

heart of the longstanding form and function of federal class action litigation. Obviously, if a District Court could not certify a class encompassing the claims of unnamed forum resident and nonresident class members, the very purpose of the federal multi-state class action mechanism, along with decades of legal precedent, would be eviscerated.

However, in the scramble to sort out the ramifications of the Bristol-Myers Squibb holding as it rippled through the District Courts, this sentiment was not shared by the U.S. District Court for the Northern District of California in Fitzhenry-Russell v. Dr. Pepper Snapple Group, 2017 U.S. Dist. Lexis 155654 (N.D. Cal. September 22, 2017). Fitzhenry-Russell involved California class representatives seeking to certify a nationwide class based on claims of false labeling suggesting that the defendant's ginger ale actually contained natural ginger root. Even though the class representatives conceded that 88 percent of the putative class members were not California residents, the Fitzhenry-Russell court reasoned that the federal multi-state class action should be permitted to proceed because Bristol-Myers Squibb involved a "mass tort action" in which "each plaintiff was a real party in interest to the complaints, meaning that they were named as plaintiffs in the complaints."

The case before the Fitzhenry-Russell court was a "class action" in which "one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the 'named plaintiffs' are the only plaintiffs actually named in the complaint." Accordingly, the Fitzhenry-Russell court was "not persuaded to extend the Bristol-Myers Squibb holding to the class action context" and recognized that, for class action purposes, the citizenship of the class representatives is properly considered for jurisdictional purposes, as the U.S. Supreme Court has found that "[n]onnamed class members . . . may be parties for some purposes and not for others."

Thereafter, arguably the most well-reasoned and detailed analysis of the issue was set forth in the decision of the U.S. District Court for the Eastern District of Louisiana in In re Chinese-Manufactured Drywall Prods. Liab. Litig., 2017 U.S. Dist. LEXIS 197612 (E.D. La. Nov. 28, 2017) (authored by District Judge Eldon E. Fallon, well known for his seminal work in the Vioxx litigation, as well as other class and mass actions including the pending Xarelto Multidistrict Litigation).

The Chinese-Manufactured Drywall lawsuit involved multi-state claims against manufacturers and distributors of defective drywall manufactured in China and used in various parts of the United States, in rebuilding efforts following Hurricanes Rita and Katrina. The foreign defendants called the District Court's continued exercise of jurisdiction into question following the Bristol-Myers Squibb holding.

Judge Fallon agreed with the Fitzhenry-Russell court that "in class actions, the citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes." The Chinese-Manufactured Drywall court went on to maintain that this is because class actions, as opposed to mass actions or other forms of actions, are required to "meet the additional due process standards for class certification under Rule 23 – numerosity, commonality, typicality, adequacy of representation, predominance and superiority." Federal courts are empowered to aggregate claims all of the time, under different mechanisms, including "class action, intradistrict consolidation under Federal Rule of Civil Procedure 42, MDL transfers, and the assembling of tort claims that automatically accompanies a bankruptcy filing."

Judge Fallon then comprehensively addressed the crux of the issue of jurisdiction over unnamed nonresident class members:

In federal court, appropriately certified class actions under Rule 23 can encompass nonresident plaintiffs. Defendants, however, argue that BMS makes clear that nonresident plaintiffs cannot avail themselves of the forum states where the claims did not arise from any activity there – even in a class action. Not quite. Rule 23 has been specifically found to be a valid exercise of congressional authority. For example, jurisdiction over absent nonresident class members' claims has often been found to be a valid exercise of a federal court's jurisdiction. See, e.g., Horton v. USAA Cas. Ins. Co., 266 F.R.D. 360, 364 (D. Ariz. 2009) (noting the argument that a district court lacks jurisdiction to certify a nationwide class 'is frivolous,' as a 'federal court applying Rule 23 of the Federal Rules of Civil Procedure may certify a nationwide class if the requirements for certification are satisfied.'); In re Telectronics Pacing Systems, Inc., 137 F. Supp. 2d 985, 1029 (S.D. Ohio 2001) (certifying nationwide products liability settlement class).

Under Article III, Section 2 of the Constitution, Congress has great leeway in shaping federal court jurisdiction. See U.S. CONST. art. III, § 2. The following are a few areas in which Congress has exercised its authority in this regard. [e.g., a. Federal Rule of Civil Procedure 4; b. Multidistrict Litigation Act; c. Class Action Fairness Act; d. Federal Rule of Civil Procedure 23]

Therefore, Judge Fallon in Chinese-Manufactured Drywall explicitly found that the Bristol-Myers Squibb holding "does not speak to or alter class action jurisprudence" and that "this court has personal jurisdiction over nonresident class members and has the power to do what many courts before it have done – approve a nationwide class and proceed with the action."

Certainly, these issues are largely fluid, considering both the relatively short passage of time since the Bristol-Myers Squibb holding, as well as the differing perspectives of the decisions that have endeavored to interpret the holding (not to mention the federal District Courts and, eventually, the Circuit Courts of Appeals that will address these issues in the future). Moreover, there remain many issues inherent in the Bristol-Myers Squibb holding that have not yet been the subject of close scrutiny, but that also threaten to significantly circumscribe federal multi-state class actions (most notably, the observation by Justice Sotomayor in the Bristol-Myers Squibb holding that "a nationwide class purporting to sue multiple defendants . . . in different states shouldn't be possible at all" under the U.S. Supreme Court's standard, and the manifold choice of law issues arising in certain class action litigations referenced by Judge Fallon in Chinese-Manufactured Drywall).

However, the clearest danger to the sustainability of federal multi-state class actions has been addressed by the Fitzhenry-Russell court and Judge Fallon's sage treatment in the Chinese-Manufactured Drywall holding.

At present, it will be difficult to dispute or disregard the fundamental theme of those holdings – that it is well-established that if a District Court has personal jurisdiction over a defendant regarding the claims of a named resident class representative, a federal multi-state class can be certified, even if the District Court could not otherwise exercise personal jurisdiction over a defendant regarding the claims of the unnamed nonresident class members of the putative class.

HarrisMartin Publishing - 30 Washington Avenue, Suite D-3, Haddonfield, NJ 08033
(610) 647-5500 - www.harrismartin.com - service@harrismartin.com