Strategic Perspectives

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It's been a busy month for *Bristol-Myers*

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In its 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*,[1] the U.S. Supreme Court ruled that a state court could not exercise specific personal jurisdiction over nonresident plaintiffs' claims against a nonresident company. Left unresolved by the Court was whether its decision, handed down in a mass tort action, applied to class actions under Federal Rule of Civil Procedure 23 and whether it applied to collective actions, as authorized by the Fair Labor Standards Act[2] Section 216(b) and the Age Discrimination in Employment Act.[3] In the intervening years, federal district courts have issued conflicting rulings on *Bristol*'s applicability to each. Recently, several federal appeals courts have weighed in.

Sixth Circuit: *Bristol-Myers* applies to collective actions

The most significant decision (and the most important for multistate employers potentially at risk of nationwide representative lawsuits, class or collective) was issued by the U.S. Court of Appeals for the Sixth Circuit. In a case closely watched by class action litigators, the appeals court in *Canaday v. Anthem Cos., Inc*.[4] ruled that the Supreme Court's *Bristol-Myers* holding applies to collective actions brought under the FLSA. Consequently, the appellate panel held that the district court could not exercise personal jurisdiction over the claims of nonresident plaintiffs, including nonresident putative collective members.

Although two circuit courts have ruled on the applicability of *Bristol-Myers* to Rule 23 class action suits filed in federal court, *Canaday* marks the first federal appeals court decision to consider the Supreme Court's holding in an FLSA collective action. That the ruling came from the Sixth Circuit, a hotbed of sorts for *Bristol-Myers* jurisdiction cases, is especially important to employers.

In *Canaday*, a Tennessee-based employee filed a putative nationwide overtime collective action on behalf of herself and similarly situated employees who allegedly were misclassified as exempt and denied overtime pay by the insurance company defendant, which was not subject to general jurisdiction in the state. A Tennessee federal district court held that it lacked specific jurisdiction over the claims of out-of-state plaintiffs, finding the claims of such plaintiffs were not connected to the defendant's activities within the state. A divided Sixth Circuit panel affirmed on interlocutory review.

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"The principles animating *Bristol-Myers*'s application to mass actions under California law apply with equal force to FLSA collective actions under federal law," the appeals court wrote, observing that FLSA collective actions are more like mass tort actions than opt-out class actions. "The key link is party status. In an FLSA collective action, as in the mass action under California law, each opt-in plaintiff becomes a real party in interest, who must meet her burden for obtaining relief and satisfy the other requirements of party status."

> *"The principles animating Bristol-Myers's application to mass actions under California law apply with equal force to FLSA collective actions under federal law."*

Among the plaintiff's arguments rejected by the panel majority, the court disposed of the notion that plaintiffs need merely show that their claims arose out of the defendant's contacts "with the United States as a whole, not Tennessee." Indeed, Congress could have empowered federal courts to exercise personal jurisdiction as sweeping as the federal government's sovereign authority, the panel noted. Yet, "[w]hile the FLSA shows no reticence in setting nationwide labor standards, it does not establish nationwide service of process," the majority wrote. "That silence rings loudly when juxtaposed with the many other instances in which Congress included nationwide service of process provisions in laws enacted before and after the FLSA's passage in 1938."

Personal jurisdiction determined claim-by-claim

The plaintiff in *Canaday* also urged that personal jurisdiction should be analyzed "at the level of the suit rather than at the level of each claim." But *Bristol-Myers* foreclosed this contention: "What is needed" for specific personal jurisdiction, the Supreme Court instructed, "is a connection between the forum and the specific claims at issue."

The plaintiffs made the same argument to no avail in *Vallone v. CJS Solutions Group, LLC*.[5] In that case, two consultants for a Florida-based company (one a Florida resident, the other, a New York resident) filed a putative FLSA collective action in federal court in Minnesota, seeking pay for time spent traveling to various live events in the United States, including several events in Minnesota. The plaintiffs contended that, because the court had jurisdiction over the claims that arose based on travel to Minnesota, the court could exercise jurisdiction over *all* of the travel-time claims against the employer, including those arising outside of the forum state.

However, the Eighth Circuit Court of Appeals, citing *Bristol-Myers*, explained that each (alleged) discrete failure to pay wages was a separate violation giving rise to a distinct claim, and personal jurisdiction is to be decided on a "claim-by-claim basis." Like the Sixth Circuit in *Canaday*, the Eighth Circuit panel pointed out that the FLSA does not contain a nationwide service-of-process provision. Therefore, the appeals court held the Minnesota district court

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properly refrained from exercising personal jurisdiction over claims arising from events elsewhere that had no connection to Minnesota.

Inefficiencies? Irrelevant.

In the *Canaday* collective action, the plaintiff pointed out that the plaintiffs were all challenging a single policy under the FLSA, allegedly applied in uniform fashion across the country, and that the approach favored by the Sixth Circuit would result in inefficient resolution of such claims. In a lengthy dissent, Judge Bernice Bouie Donald agreed:

> [T]he majority forces those plaintiffs to file separate lawsuits in separate jurisdictions against the same employer based on the same or similar alleged violations of the FLSA. Actions that combined hundreds of claims based on similar violations of the FLSA will now be splintered into dozens, if not hundreds, of lawsuits all over the country. … The practice will undoubtedly result in piecemeal litigation, potentially divergent outcomes for similarly situated plaintiffs, and major inefficiencies for the federal courts.
>
> Congress could never have intended collective actions to be fractured in this way, and I fear that the majority has cloaked nationwide employers with unwarranted jurisdictional-armor to fend off FLSA collective action litigation.

The majority acknowledged that its holding presented “obstacles to prompt relief for plaintiffs.” However, “inefficiencies” notwithstanding, it stressed that defendants’ due process rights hang in the balance, and “these limitations are designed principally to protect defendants, not to facilitate plaintiffs’ claims.” The majority continued: “It is not obvious, at any rate, that state-based collective actions are necessarily inefficient. Congress apparently did not think so.”

Class actions: Logic is different, and *Bristol-Myers* doesn’t necessarily apply

The Sixth Circuit reached a different conclusion on whether *Bristol-Myers* applies to Rule 23 class action suits. In its recent decision in *Lyngaas v. Curaden AG*,[6] a Telephone Consumer Protection Act case, the appeals court found a district court had personal jurisdiction over a defendant as to all of the claims brought by class members, concluding that only the named plaintiff in a class action must satisfy personal jurisdiction requirements. Class and collective actions have fundamental differences, the Sixth Circuit observed, describing those differences in detail. As such, it stated, class and collective actions call for “different approaches to personal jurisdiction.”

> *Thus, both circuit courts to have decided the issue have ruled that Bristol-Myers does not apply to Rule 23 suits.*

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In another TCPA suit, the Seventh Circuit also had found 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."[7] Thus, both circuit courts to have decided the issue have ruled that *Bristol-Myers* does not apply to Rule 23 suits. And the Supreme Court denied the defendant's petition for review in the Seventh Circuit case.

Three other circuit courts, however, have punted. Most recently, in *Moser v. Benefytt, Inc*.,[8] a divided Ninth Circuit panel vacated a district court's order certifying two nationwide classes in a TCPA case brought by a resident of California against a company incorporated in Delaware (with its principal place of business in Florida). There was no dispute the district court had specific personal jurisdiction over the plaintiff's *own* claims against the defendant, but the defendant had successfully argued that the court could not certify the nationwide classes because, under *Bristol-Myers,* it lacked personal jurisdiction over the claims of non-California plaintiffs.

On appeal, the Ninth Circuit held the lower court erred in finding that lack of personal jurisdiction over unnamed, non-resident putative class members was an "available" Rule 12(b) defense at the motion-to-dismiss stage. Noting the unnamed putative class members were not yet parties to the case, the panel reasoned that the defendant "could not have moved to dismiss on personal jurisdiction grounds the claims of putative class members who were not then before the court." Nor was the defendant "required to seek dismissal of hypothetical future plaintiffs." The proper phase to address the issue, in the Ninth Circuit panel's view, was at class certification so no waiver occurred from the defendant's decision not to interpose the argument by Rule 12 motion.

The Court of Appeals for the District of Columbia Circuit reached the same conclusion in a 2020 decision involving the applicability of *Bristol-Myers* to class actions. The appeals court did not address the ultimate issue: whether *Bristol-Myers* applies to class actions. It concluded instead that the defendant's motion to dismiss should have been denied as premature, because the putative out-of-state plaintiffs were nonparties, so their claims were subject to dismissal only after class certification. Like the D.C. Circuit (as well as the Fifth Circuit[9]), the Ninth Circuit in *Moser* declined to resolve the merits of the defendant's *Bristol-Myers* objection to class certification in the appellate court. Instead, the appeals court remanded the case for the district court to address the merits of the *Bristol-Myers* defense to certification in the first instance.

The remanded litigations will likely end up in the circuit courts again, perhaps creating a circuit split on the applicability of *Bristol-Myers* to Rule 23 class actions and prompting the Supreme Court to make a definitive ruling.

> *For now, defendants must navigate a murky landscape as they face a spate of conflicting decisions with little controlling precedent.*

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Where does this leave us?

As for collective actions, the Sixth Circuit majority in *Canaday* predicted that applying *Bristol-Myers* principles would not unduly disrupt the filing of such cases. Employees can still file nationwide collective actions ("so long as they do so in a forum that may exercise general jurisdiction over the employer—namely its principal place of business or its place of incorporation," the panel majority wrote).

Meanwhile, the issue is pending in the First Circuit. In its August 14, 2020, ruling certifying for interlocutory appeal its decision in *Waters v. Day & Zimmerman NPS, Inc.*,[10] a federal district court in Massachusetts observed: "There is no question that the relevant question of law presents a substantial ground for difference of opinion. As of this writing, 13 other district judges have reached the same conclusion as this session of this Court and held that *BMS* does not apply to FLSA collective actions, while 11 district judges have taken the contrary position." The appeals court heard oral argument in the case on June 7, 2021.

In her dissent in *Canaday*, Judge Donald argued that *Bristol-Myers* was inapplicable to the case at hand because it arose under a federal statute and was filed in federal court. In her view, *Bristol-Myers* "simply addressed the limitations of state courts in their exercise of personal jurisdiction over nonresidents with respect to matters of state law," and it did so out of "respect for state sovereignty." The "territorial limitations on the power of the respective States" was not at issue in that case. The Sixth Circuit majority did not respond directly to this argument; for the majority, *Bristol-Myers* provides a clear rule regarding when a federal statute authorizes such sweeping jurisdiction: when it expressly says it does.

For now, defendants must navigate a murky landscape as they face a spate of conflicting decisions with little controlling precedent. And none of this authority helps ward off collective actions against employers in states in which the employer is subject to general jurisdiction (arbitration agreements remain a prominent tool for doing so, since the Supreme Court's 2018 *Epic Systems Corp. v. Lewis*[11] decision). It may be that employers will be at reduced risk of defending 216(b) lawsuits on a nationwide scale in forums other than where they are headquartered, where they have their principal place of business, or in states where they register to do business. Perhaps a consensus emerges that *Bristol-Myers* applies to collective but not class actions, altering the calculation for plaintiffs as they decide where, and under what statute, to sue. What *is* clear, however, is that employers facing nationwide class and collective actions must carefully consider the implications of *Bristol-Myers* in mapping their defense strategy.

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[1] *Bristol-Myers Squibb Co. v. Superior Court of Cal*., 137 S. Ct. 1773 (2017).
[2] 29 U.S.C. sec. 201.
[3] 29 U.S.C. sec. 621.
[4] *Canaday v. Anthem Cos., Inc.*, No. 20-5947 (6th Cir. Aug. 17, 2021).
[5] *Vallone v. CJS Solutions Group, LLC*, No. 20-2874 (8th Cir. Aug. 18, 2021).
[6] *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021).
[7] *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir.), *en banc reh'g denied*, 2020 U.S. App. LEXIS 15526 (7th Cir. May 14, 2020).
[8] *Moser v. Benefytt, Inc*., No. 19-56224 (9th Cir. Aug. 10, 2021).
[9] See *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020).
[10] *Waters v. Day & Zimmerman NPS, Inc*., 464 F. Supp. 3d 455 (D. Mass. 2020).
[11] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). For a detailed analysis of the case, see: Supreme Court: Class Action Waivers in Employment Arbitration Agreements Do Not Violate Federal Labor Law.

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