

## What 2 Jurisdiction Rulings Mean For Class Action Defendants

By **Anthony Pierce, Caroline Wolverton and Jason Gangwer** (April 22, 2020)

Defendants generally may be sued in a forum outside their home state when a suit stems from the defendant's contacts with the forum, i.e., where the claims come within the forum's specific personal jurisdiction over the defendant — as opposed to the general jurisdiction over a defendant where it is incorporated or has its principal place of business.

When a class action defendant is sued outside its home state, whether unnamed class members' claims that arise outside the forum state fall outside the forum's jurisdiction has been an open question.

Oftentimes, class action defendants litigating outside their home state will look for opportunities to eliminate the claims of out-of-state class members if possible, and to do so at the earliest opportunity. Claims originating in multiple states add to the costs of pre-class certification discovery as well as defendants' overall liability exposure.

Following the U.S. Supreme Court's 2017 ruling in *Bristol-Myers Squibb Co. v. Superior Court*[1] class action defendants sued outside their home state have relied on its conclusion that personal jurisdiction is required for all plaintiffs' claims in a mass tort action in arguing that personal jurisdiction is required for all class members' claims in a class action.

The Supreme Court recognized in *Bristol-Myers* that due process in the form of limits on personal jurisdiction shields a defendant from suit in a forum for claims that do not arise from or relate to activities the defendant has chosen to undertake in that forum.

Since a class action asserts claims of all class members, due process should similarly shield a defendant from suit in a forum for claims that do not stem from any activities it has undertaken there. While this argument has had some success in the district courts, unfortunately for defendants two circuit court decisions last month rejected it.

In March, the U.S. Courts of Appeals for the Seventh and D.C. Circuits both denied motions to eliminate claims of putative class members for lack of jurisdiction, albeit for different reasons. The U.S. Court of Appeals for the Seventh Circuit denied a motion to strike the class definition in *Mussat v. IQVIA Inc.*,[2] rejecting the defendant's reliance on *Bristol-Myers* and holding that personal jurisdiction is not necessary vis-a-vis unnamed class members.

The U.S. Court of Appeals for the D.C. Circuit sidestepped the issue in *Molock v. Whole Foods Market Group Inc.*,[3] and held that a motion to dismiss targeting putative class members is premature prior to class certification.

Class action defendants in the Seventh and D.C. Circuits should prepare for discovery concerning putative class members' claims, even if they are out-of-state and lack minimum contacts with the forum state.



Anthony Pierce



Caroline Wolverton



Jason Gangwer

Importantly, however, the D.C. Circuit did not foreclose the argument that personal jurisdiction is a requirement for all claims of a putative plaintiff class. Nor did it hold that a defendant must wait until class certification to make the argument. Objections to discovery may be a good time.

### **Mussat v. IQVIA**

In *Mussat v. IQVIA*, an Illinois physician filed a class action suit under the Telephone Consumer Protection Act against IQVIA, a Delaware corporation headquartered in Pennsylvania. Florence Mussat claimed to represent all persons in the country who received similar junk faxes from IQVIA.

The U.S. District Court for the Northern District of Illinois granted IQVIA's motion to strike the claims of out-of-state putative class members on the ground that, under *Bristol-Myers*, the court did not have specific personal jurisdiction. On interlocutory appeal, the Seventh Circuit reversed.

In a unanimous opinion, the court first distinguished *Bristol-Myers* as inapplicable to federal class actions because it dealt with an action for mass torts under state law. The court reasoned that the mass tort procedure is more akin to multidistrict litigation than to class actions.

It then looked to *Devlin v. Scardelletti*,<sup>[4]</sup> where the Supreme Court held in 2002 that unnamed class members in certified class actions are treated as nonparties for purposes of determining complete diversity and the amount-in-controversy requirements of diversity jurisdiction, as well as for purposes of venue. The Seventh Circuit found no reason to treat personal jurisdiction differently and concluded that unnamed class members are like nonparties for purposes of personal jurisdiction.

### **Molock v. Whole Foods Market Group**

In *Molock*, current and former Whole Foods employees filed a class action to recover lost wages under Washington, D.C., law. Whole Foods, a Delaware corporation headquartered in Texas, moved to dismiss the claims of unnamed class members without sufficient minimum contacts with D.C., arguing lack of personal jurisdiction.

The district court denied the motion, and on interlocutory appeal the D.C. Circuit affirmed in a 2-1 decision. The majority concluded that it would be premature to assess personal jurisdiction as to claims of putative class members at the pleading stage because they are not parties until a class is certified. Only after class certification could the district court entertain a motion targeting unnamed class members.

U.S. Circuit Judge Laurence Silberman dissented. He interpreted Whole Foods' motion as an attempt to dismiss the named plaintiffs' claim to represent out-of-state putative class members, construing it as a "run-of-the-mill attack on class certification at the pleading stage" and therefore not premature.

Silberman would have applied *Bristol-Myers* to class actions and held that the named plaintiffs' claims to represent putative class members who lack sufficient minimum contacts to D.C. should be dismissed for lack of personal jurisdiction.

## **Potential For More Precertification Discovery, With Room For Objections**

After *Mussat* and *Molock*, plaintiffs relying on specific jurisdiction over defendants in the Seventh and D.C. Circuits can be expected to include out-of-state individuals in class definitions and to serve precertification discovery specific to those putative class members.

Indeed, Judge Silberman's dissent in *Molock* emphasized the often extensive and costly discovery associated with claims of putative class members who fall outside the court's personal jurisdiction. In *Molock*, for example, the plaintiffs sought discovery of payroll records from more than 200 Whole Foods stores before moving for class certification.

Significantly for defendants, Judge Silberman's dissent in *Molock* recognizes that discovery objections provide another point at which an argument about personal jurisdiction over putative class members' claims can be raised, although Silberman emphasized his view that the argument is more appropriate at the pleading stage. The context of a jurisdictional challenge presented as a discovery objection could be useful in illustrating why claims concerning out-of-state individuals are improper.

Precertification discovery may have nothing to do with the defendant's contacts with the forum state. In *Molock*, for example, the plaintiffs sought discovery about hundreds of Whole Foods stores outside D.C. Thus, even though a motion to dismiss may be a more logical vehicle for a personal jurisdiction argument, as Silberman explained, the context of discovery could make the argument stronger if it is presented as an objection to discovery.

The *Molock* majority's conclusion that challenges concerning putative class members are premature before class certification could be read to preclude this jurisdictional argument during precertification discovery in the D.C. Circuit. However, the majority did not decide whether a challenge to the named plaintiffs' claims to represent putative class members is necessarily premature prior to class certification; it explicitly refused to construe Whole Foods' motion as asserting such a challenge.

*Molock* thus does not appear to foreclose discovery objections challenging personal jurisdiction vis-a-vis putative class members if the objections are framed as a challenge to the named plaintiffs' claims. The decision similarly does not appear to rule out pleading-stage challenges that are framed to target claims of the named plaintiffs, although challenges may be stronger if presented in the context of discovery.

In the Seventh Circuit, however, *Mussat*'s holding that personal jurisdiction is not required for unnamed class members would appear to foreclose the argument regardless of how it is framed.

## **An Open Question Outside the Seventh Circuit**

In *Bristol-Myers*, the Supreme Court explicitly left open the question of whether its holding requiring personal jurisdiction as to all plaintiffs' claims in a state law mass tort action would apply in the class action context. While *Mussat* answered that question (in the negative) for the Seventh Circuit, the D.C. Circuit majority opinion in *Molock* did not.

The *Molock* majority opinion does not indicate how the D.C. Circuit would decide the question of personal jurisdiction at the class certification stage or if presented in the form of a challenge to named the plaintiffs' claims to represent putative class members. Whether the D.C. Circuit would extend *Bristol-Myers* to class actions, as Judge Silberman advocated, remains to be seen.

In *Cruson v. Jackson National Life Insurance Co.*, the U.S. Court of Appeals for the Fifth Circuit recently applied reasoning similar to the *Molock* majority in reversing a district court conclusion that a defendant waived a challenge to unnamed class members on personal jurisdiction grounds by failing to assert it in a motion under Federal Rule of Civil Procedure 12.[5] But like the D.C. Circuit, the Fifth Circuit did not suggest how it would decide the jurisdictional question.

The other circuits likewise have yet to address the question. Judge Silberman's dissent in *Molock* may influence other circuit judges and could create a circuit split.

It will not be surprising if the Supreme Court steps in at some point and decides whether personal jurisdiction is required vis-a-vis unnamed class members' claims, as well as when a challenge to personal jurisdiction as to those claims can be presented.

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*Anthony T. Pierce is a partner, Caroline L. Wolverton is senior counsel and Jason Gangwer is an associate at Akin Gump Strauss Hauer & Feld LLP.*

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[1] *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

[2] *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020).

[3] *Molock v. Whole Food Market Group, Inc.*, 952 F.3d 293 (D.C. Cir. 2020).

[4] *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

[5] *Cruson v. Jackson National Life Insurance Co.*, 954 F.3d 240 (5th Cir. 2020).