



## WHAT THE SUPREME COURT'S LATEST PERSONAL-JURISDICTION RULING MEANS FOR MASS AND CLASS ACTIONS

by Brian A. Troyer

The US Supreme Court recently held that a California Superior Court violated the Fourteenth Amendment's Due Process Clause by exercising jurisdiction over a nonresident defendant with respect to claims of hundreds of plaintiffs who are not California residents and were not injured there. See *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). This ruling protects defendants from lawsuits in states where they do not reside and that have no meaningful connection to the claim. While it clearly proscribes some of the worst forum shopping to aggregate plaintiffs in unfavorable jurisdictions, *Bristol-Myers Squibb* leaves several important questions unanswered. As courts resolve those questions, defendants will continue to face an array of complex strategic options and decisions in defending against cross-jurisdictional litigation. This LEGAL BACKGROUNDER explains what defendants can expect.

**No "Sliding Scale" of Specific Jurisdiction.** The lawsuit underlying *Bristol-Myers Squibb* was a classic example of forum shopping by mass-tort plaintiffs. Nearly 600 plaintiffs who are not California residents sued BMS in California Superior Court, joining their claims with those of California residents. All asserted that the drug Plavix injured them, but the nonresidents could demonstrate no connection to California. The trial court initially denied BMS's motion to quash service, finding that California had *general* jurisdiction over the company. Shortly afterward, the US Supreme Court's ruling in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), made clear that California did not have general jurisdiction over a corporation based solely on the alleged conduct of continuous and systematic business in the state.

Undaunted, the trial court abandoned its finding of general jurisdiction and ruled that it had *specific* jurisdiction over BMS with regard to the nonresident plaintiffs' Plavix claims. The California Court of Appeal and California Supreme Court affirmed, agreeing with the plaintiffs' argument that the exercise of specific jurisdiction was appropriate because the nonresidents' claims were similar to those of the resident plaintiffs, and BMS had wide-ranging contacts with the state. The California Supreme Court adopted a "sliding scale" of specific jurisdiction, finding that the more contacts a defendant has with the state, the less plaintiff's claims must arise from those contacts to justify the exercise of jurisdiction.

The US Supreme Court reversed by an 8–1 vote, disapproving the sliding-scale analysis and holding that "settled principles" of specific jurisdiction precluded the California courts' exercise of jurisdiction over the nonresidents' claims. The Court rejected arguments basing jurisdiction on the similarity between California residents' and nonresidents' claims or on research conducted by BMS in California unrelated to Plavix. It also rejected the plaintiffs' argument that jurisdiction could arise from the defendant's contract with California-based McKesson to distribute Plavix nationwide, reaffirming its prior holding that a defendant's relationship with a third party is insufficient alone to support jurisdiction.

**Curtailed Forum Shopping.** The Supreme Court's holding discourages the worst forum-shopping abuses, where plaintiffs across the country flock to friendly jurisdictions in which the defendant is neither incorporated nor headquartered. Subject to other limitations, plaintiffs' lawyers will still be able to aggregate claims, but normally will be limited to doing so in the defendant's home state or in plaintiffs' home states, where only resident plaintiffs generally will be able to sue. *Bristol-Myers Squibb* will most significantly impact certain areas of mass-tort and consumer litigation like pharmaceutical litigation, for which certain states like New Jersey, Pennsylvania, Missouri, and California are litigation magnets.

Some courts overseeing pending mass-tort dockets have already begun to reconsider their exercise of jurisdiction over nonresident claims. However, some states will continue to see high concentrations of such litigation because many companies are headquartered or incorporated there. In fact, while *Bristol-Myers Squibb* will result in an outflow of nonresident claims against nonresident defendants from such states, their dockets of cases against resident defendants may increase as more cases come "home," because nationwide aggregation of claims normally will only be possible in a defendant's home state.

**Multiple Defendants.** What happens if a California defendant and a nonresident codefendant are sued together in California by nonresident plaintiffs? Does that change the equation? Not really. Specific jurisdiction still depends on the existence and strength of links between the nonresident defendant's conduct, the forum state, and the nonresident plaintiffs' claims. In certain cases, like some pharmaceutical litigation, plaintiffs allege that multiple defendants' independent acts or products contributed to their injuries. Without more, those facts would not support the exercise of jurisdiction over a nonresident defendant under *Bristol-Myers Squibb*.

In other areas of litigation, like antitrust conspiracy, plaintiffs can more frequently allege that a resident defendant and a nonresident defendant acted in concert. But in those cases as well, the existence of jurisdiction still depends on whether the nonresident engaged in *relevant* acts in the forum jurisdiction. The US Supreme Court distinguished these types of fact patterns. See *Bristol-Myers Squibb*, 137 U.S. at 1783 ("In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California."). The facts thus will dictate the results where multiple defendants are named, and one negative consequence of *Bristol-Myers Squibb* could be that plaintiffs will more aggressively seek to join defendants resident in their favored jurisdictions and allege joint conduct or agency as a basis for jurisdiction over nonresident defendants. Battles over this form of fraudulent joinder may now occur more frequently.

**Likely Effects on Litigation Outside Defendant's Home State.** The Supreme Court's decision is likely to affect the dispersion of corporate defendants' cases in several related ways. Cases in non-resident jurisdictions should be more geographically dispersed, and more of those cases should be removable to federal court. More cases are likely to be filed in defendants' home states, and those cases are more likely to be nonremovable to federal court.

The "resident defendant" exception to the removal statute, 28 U.S.C. § 1441(b)(2), ordinarily prevents removal of a diversity case filed in a defendant's home state. Lawsuits that, post-*Bristol-Myers Squibb*, plaintiffs file individually in a defendant's home state instead of in a mass-tort proceeding elsewhere are likely to remain in state court.

Cases filed outside a defendant's home state, on the other hand, will be more geographically dispersed than before, because most plaintiffs will have to file in their home states, and those cases are more likely than before to be removable to federal court. The reasons for this may not be immediately apparent but are illustrated by *Bristol-Myers Squibb* itself.

When a plaintiff sues a nonresident defendant in the plaintiff's home state, the defendant typically can remove the case to federal court, although plaintiffs often try to avoid this by joining nondiverse defendants to

destroy diversity. But forum shopping often is combined with liberal joinder rules in aggregate litigation to prevent removal and lock large numbers of cases into favorable state courts. This is exactly what happened in *Bristol-Myers Squibb*, where the 575 nonresident plaintiffs joined with California residents to file in California state court and named McKesson, headquartered in California, as a defendant to defeat diversity jurisdiction. Following another common practice, they also filed their claims in eight separate cases comprising fewer than 100 plaintiffs each to defeat removal as a “mass action” under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)(B). In other cases, forum-shopping plaintiffs have included at least one plaintiff resident in their favored forum to establish a basis for personal jurisdiction over the defendant, and one plaintiff resident in the defendant’s home state to defeat complete diversity, again locking large groups of claims into state courts that have no connection to most of the claims.

The holding of *Bristol-Myers Squibb* will now require all these nonresident plaintiffs’ claims to be filed in their own or a defendant’s home state, and when they are filed in plaintiffs’ home states, plaintiffs will not be able to use the same abusive and manipulative joinder devices to defeat diversity and removal. Plaintiffs thus can no longer congregate in a favorable forum where a second defendant can easily be joined to defeat diversity (*Bristol-Myers Squibb* itself). Nor can a plaintiff who is a resident of the same state as the defendant go forum shopping and block diversity jurisdiction over claims of plaintiffs in other states, because other states lack *in personam* jurisdiction over the defendant to hear the forum-shopping nondiverse plaintiff’s claim.

*Bristol-Myers Squibb* thus will force many of these claims back to jurisdictions where diversity jurisdiction exists and removal is possible. Its holding should also apply to cases filed in federal courts when personal jurisdiction is based on federal service of process and state long-arm statutes (diversity cases and most federal-question cases), contributing to the dispersion of cases away from more plaintiff-friendly jurisdictions and toward plaintiffs’ home states, again, unless the plaintiffs sue the defendant in its home state.

As a result, defendants may see their federal court dockets dispersed across more jurisdictions than before. In the federal court system, the Judicial Panel on Multidistrict Litigation (JPML) coordinates similar lawsuits pending in multiple courts. If *Bristol-Myers Squibb* results in more dispersion of federal cases across courts, one secondary result may be an increase in multidistrict litigation (MDL) petitions filed by either plaintiffs or defendants, depending on who wants an MDL (a decision defendants should always make with care and thought). After the relatively liberal granting of petitions in earlier years, the JPML has recently become stingier, and there is no way to predict how it might respond to a potential increase in petitions following *Bristol-Myers Squibb*.

On the whole, business defendants should face fewer cases in state courts where they are not resident. Of course, plaintiffs may redouble their efforts to fraudulently join nondiverse defendants in these cases as well, but they will not be able to aggregate claims in friendly jurisdictions where they can join nondiverse defendants to block removal. Plaintiffs will more often have to sue defendants where defendants reside if they are intent on defeating removal.

**Application in Federal-Question Cases Remains Open.** *Bristol-Myers Squibb* does not address the special situation where Congress authorizes nationwide service of process under specific statutes for federal-question suits in federal courts. In those cases, due process under the Fifth rather than the Fourteenth Amendment is implicated. The result may be the same, but that remains to be determined by courts in future cases.

**Likely Continued Boundary Testing.** The California courts aggressively pushed the boundaries of specific jurisdiction in this case, to the point that eight US Supreme Court justices agreed that California had defied “settled principles” of law in exercising such broad jurisdiction. It is likely, however, that plaintiffs will continue to test those boundaries in cases with facts that are not so far outside the existing norms. Companies therefore should not assume that plaintiffs can sue only in their own or a defendant’s home state. *Bristol-Myers Squibb* is a very significant victory for defendants, but they certainly have not seen the last attempts at forum shopping for advantage.

**Impact on Class Actions.** *Bristol-Myers Squibb* did not concern a class action but was rather a mass action involving the joinder of hundreds of individual claims. The US Supreme Court's ruling may have a similar impact on some types of class actions, but it remains to be seen how the ruling will be applied to claims of resident, named plaintiffs and absent, nonresident class members. Although there is a strong argument that the Court's reasoning should apply in both cases, it is not a foregone conclusion that all courts will agree.

Some background on personal jurisdiction in class actions is helpful here. The Court long ago held in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that a state court may exercise jurisdiction over nonresident absent members of a certified plaintiff class. Not unexpectedly, the plaintiffs in *Bristol-Myers Squibb* argued that *Shutts* supported the exercise of jurisdiction over the defendant in their case, but the Court found that *Shutts* had "no bearing on the question presented," because it concerned only the due-process rights of absent class members, even though the defendant raised those class members' rights as an obstacle to class certification. *Bristol-Myers Squibb*, 137 U.S. at 1783. The distinction between these two cases is important in navigating future plaintiffs' requests for courts to exercise broad specific jurisdiction in class actions.

One way to look at this problem is to ask: If joinder of plaintiffs does not establish specific jurisdiction over the defendant for nonresident plaintiffs' claims (*see Bristol-Myers Squibb*), can the result be any different when the nonresident plaintiffs are instead absent members of a class? The result should be the same, because a class action, like permissive joinder, is merely a procedural device and does not alter substantive rights. But some courts have not viewed the inclusion of nonresidents in a class as raising the same jurisdictional problem as a nonresident individual's claim. Rightly or wrongly, they have viewed it as a question of the scope or definition of the class and as implicating adequacy and choice-of-law requirements.

In fact, the obstacle that choice of law poses to the prosecution of nationwide and multistate class actions is probably one reason why *in personam* jurisdiction over class-action defendants has received less attention to date. Courts began to recognize two decades ago that class members' claims require individual choice-of-law analyses, typically leading to the application of different states' laws to nonresidents' claims. As a result, nationwide and multistate class actions under state law are already the exception to the rule, and there is less incentive for plaintiffs' lawyers to go forum shopping with nationwide class actions that raise *in personam* jurisdiction issues relating to nonresident class members' claims. For this reason, *Bristol-Myers Squibb* may not affect class actions as significantly as it will non-class litigation, even if courts find that the holding applies to named plaintiffs and absent class members in class actions. To the extent that the ruling does apply to members of putative classes, defendants still will need to consider the strategic choices available to them in defending multistate or nationwide class actions.

**Conclusion.** Proclamations that a new Supreme Court decision heralds "the end" of mass or class actions come and go. Likewise, *Bristol-Myers Squibb* will affect where and how some cases are litigated, but, as always, the overall environment of aggregate litigation will also adjust. Beyond eliminating the worst cases of forum shopping of individual plaintiffs' claims, it may not dramatically change how some companies experience mass- and class-action litigation or what it costs to defend against such litigation.

For companies that are victims of frequent forum shopping, on the other hand, the change may be significant. More cases may be filed in defendants' home states, at least where the plaintiffs' bar seeks to maximize aggregation of claims, and cases elsewhere will be more dispersed and more often removable. MDL activity may increase. What will not change, however, is that defendant companies will face complex strategic and tactical questions in developing their approach to the unique circumstances each outbreak of litigation presents.