INTRODUCTION

In 1985, the United States Supreme Court held in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), that state courts can, within certain due process constraints, adjudicate claims of non-resident class members. This ruling opened the door for state courts to entertain multi-state and nationwide class actions that had traditionally been filed in federal forums. While some state courts proved more hospitable than others to multi-state class actions, the succeeding decade witnessed a significant increase in the number of multi-state class actions being adjudicated in the state courts.

The trend toward increasing Supreme Court involvement in major class actions was fueled by several factors, not the least of which was the perception that state courts offered a more flexible forum for adjudication of both certification and liability issues, as well as for approval of class-wide settlements. This was only partly accurate, since most states address class certification and other class action procedural issues, such as class notice and class action settlement approval, under statutes or rules that rely heavily upon, and are often identical to, Fed. R. Civ. P. 23 itself. However, differences in substantive laws, standards of proof, and statutes of limitations meant that claims that might have been barred in a class member’s home jurisdiction could nevertheless be adjudicated in a multi-state class certified by a state court in a different jurisdiction.

Accompanying the shift of much class action litigation from federal to state forums was an increase in the number of competing class actions, i.e., the filing of separate class action complaints, commenced in different courts and by different plaintiffs, asserting essentially identical claims against the same defendant.

The appeal of state court forums for class actions was enhanced when the United States Supreme Court ruled that state courts have subject matter jurisdiction to resolve nationwide class actions and that class settlements reached in state courts have preclusive effect even over federal claims that were not litigated in the state forum. Matsushita v. Epstein, 516 U.S. 367 (1996). The following year, the Supreme Court in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), confirmed that settlement classes are not exempt from the requirements of Rule 23 in a decision which, though technically applicable to both federal and state courts, reinforced the view that parties seeking approval for multi-state settlement classes might encounter fewer obstacles in state than in federal courts.

The 2005 enactment of the Class Action Fairness Act (CAFA) added a new dynamic to the state vs. federal equation. CAFA exponentially expanded federal diversity jurisdiction over cases brought as class actions by, inter alia, amending 28 U.S.C §§ 1332 and 1445. Under these provisions of CAFA, parties have a broader right to file class action claims in, or remove them to, federal court, including claims that previously would have been outside the federal courts’ diversity jurisdiction. For example, class members’ individual claims need not meet the $75,000 traditional federal diversity jurisdiction threshold. Cases brought as class actions in which any unnamed class member is of diverse citizenship
from any defendant, and involving over $5 million in controversy, may be filed in or
removed to federal court under the expanded diversity jurisdiction provisions of 28 U.S.C.
§ 1332(d)(1)(I).

A thorough and thoughtful understanding of the workings of the relevant state class
action rules and case law will be an important component of either side’s decision on fil-
ing in, or removal to, federal court. Additionally, and notwithstanding the CAFA-fueled
substantial increase in federal forum selection for state-law-based class actions that for-
merly did not qualify for federal court jurisdiction (either through original federal filing
by plaintiffs; or, more frequently, by removal of state-filed class actions to federal court
by defendants), the states’ class action jurisprudence remains highly relevant. This is par-
ticularly true for the more populous or influential states, such as California, Massachu-
setts, Ohio, Illinois, Texas, and Florida, which have a longstanding class action tradition,
a highly developed class action jurisprudence, may have specialized Rules of Court for
class actions and other complex cases, and which, the sea change wrought by CAFA not-
withstanding, will likely continue to preside over a substantial number of significant class
action cases.

The issuance by state courts of a number of key issues summarized in this survey and
the Supreme Court’s ruling in Smith, et al. v. Bayer Corp., 131 S. Ct. 2368 (2011), demon-
strate the continuing important role of state courts and their class action-related decisions. In
Smith, the Supreme Court found that the federal court’s rejection of Rule 23 certification
did not preclude later adjudication in state court of a consumer’s class certification motion
because federal and state certification rules are not identical and because the state court
plaintiff was not a party to the federal suit.

Significantly impacting the scope of class action claims potentially litigable in the
state courts is the United States Supreme Court’s 2013 opinion in American Express Co. v.
Italian Colors Restaurant holding that contractual arbitration clauses containing class action
waivers are enforceable notwithstanding potentially prohibitive transaction costs in arbi-
trating individual claims one by one. The impact of arbitration on class certification is an
especially active and volatile area.

In 2014, the state courts continued to address the procedural and enforceability issues
following from arbitration clauses, such as whether courts, or arbitrators, are to decide
whether claims can be arbitrated on a class basis. See, e.g., Sandquist v. Lebo Automotive, Inc.,
of arbitrator determination on class certification). This area will continue to be active and
to produce a variety of outcomes in the future.

Of late, the United States Supreme Court has turned a critical eye upon the bounds of
personal jurisdiction. In Bristol-Myers Squibb v. Superior Court of California (BMS), the Court
explicitly limited the scope of adjudication of mass tort actions by state courts in states
where no defendant resides, finding adjudication under those circumstances incompat-
ible with the Fourteenth Amendment due process clause. 137 S. Ct. 1773 (2017). The Court
further clarified that specific personal jurisdiction principles apply to nonresident plain-
tiffs whose claims have been joined with those of in-state plaintiffs, and held that state
courts cannot assert jurisdiction over such claims unless each nonresident plaintiff can
establish a connection between the forum and their specific claims at issue.

Lower courts are now divided on the question of whether BMS applies to nationwide
class actions. The arguments that BMS does not apply to class actions rest in part on the
fact that, as noted by Justice Sotomayor in her dissent, the majority specifically did not
resolve whether its holding “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.” 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting). These courts would limit BMS to mass tort actions under the rationale that, in such cases, plaintiffs are named as individual parties and thus are real parties in interest. See, e.g., Molock v. Whole Foods Market, Inc., 297 F. Supp. 3d 114 (D.D.C. 2018); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-cv-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017). Another proffered argument would render BMS inapplicable to class actions in part because, unlike in mass tort actions, Fed. R. Civ. P. 23 provides class actions with their own procedural due process safeguards. In re Chinese-Manufactured DryWall Prods., Civ. Act. MDL No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017). Thus far, at least one court has concluded that the balance weighed against applying BMS in the class-action context but then opted not to resolve the matter of specific jurisdiction until the plaintiff class was certified. See Chernus v. Logitech, Inc., No.: 17-673(FLW), 2018 WL 1981481 (D.N.J. Apr. 27, 2018).

At the same time, a number of courts have read BMS to apply to nationwide class actions. See, e.g., Maclin v. Reliable Reports of Texas, Inc., No. 1:17-CV-2612, 2018 WL 1468821 (N.D. Ohio Mar. 26, 2018) (“[T]his district court will not limit the holding in Bristol-Myers to mass tort claims or state courts.”); Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., No. 14 C 2032, 2018 WL 1255021 (N.D. Ill. Mar. 12, 2018) (finding that BMS was not distinguishable simply because the case at hand was a class action). These courts have noted that Fed. R. Civ. P. 23 alone does not provide sufficient due process safeguards for defendants, as it would permit putative class members to pursue claims against nonresident defendants in a forum in which those class members would not otherwise have been able to do so in their individual capacities. See In re Dental Supplies Antitrust Litig., No. 16 Civ. 696 (BMC)(GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) (“Personal jurisdiction in class actions must comport with due process just the same as any other case.”). Applying BMS to class actions, these courts have dismissed for lack of personal jurisdiction the claims of absent class members that arise outside of the forum state. See Chavez v. Church & Dwight Co., No. 17 C 1948, 2018 WL 2238191 (N.D. Ill. May 16, 2018) (dismissing claims of absent class members arising outside Illinois); McDonnell v. Nature’s Way Prods., LLC, No. 16 C 5011, 2017 WL 4864910, at *4 (N.D. Ill. Oct. 26, 2017) (describing the BMS analysis as “instructive in considering whether the Court has personal jurisdiction over the claims” of the non-Illinois class members and then dismissing those claims); Wenokur v. AXA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916 at *4 n.4 (D. Ariz. Oct. 2, 2017) (noting that the court lacked jurisdiction over the claims of “putative class members with no connection to Arizona”); Spratley v. FCA US LLC, No. 3:17-CV-0062, 2017 WL 4023348, at *7–8 (N.D.N.Y. Sept. 12, 2017) (dismissing claims of out-of-state plaintiffs who failed to show a “connection between their claims and Chrysler’s contacts with New York”).

Despite the split within the lower courts, circuit courts have yet to address the application of BMS to class actions. Thus, the question of whether and how BMS might apply in the class-action context remains unsettled. For the time being, application of BMS to a class action will be a largely fact- and forum-specific inquiry.

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