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A Benefytt or a Curse: Ninth Circuit Holds That Bristol-Myers Does Not Apply Before Class Certification

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In 2017, the Supreme Court held in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), that a defendant in a mass tort action is not subject to specific personal jurisdiction as to the claims of non-resident plaintiffs whose injuries lack a sufficient connection to the forum state. The Court did not decide, however, whether its holding applied to nationwide class actions. And in the four years following *Bristol-Myers*, district courts in the Ninth Circuit have reached highly divergent results:

- Some district courts have "agree[d] . . . that *Bristol-Myers Squibb* applies in the nationwide class action context" and have dismissed claims brought on behalf of putative nationwide classes, reasoning that "a state cannot assert specific personal jurisdiction for the claims of unnamed class members that would not be subject to specific personal jurisdiction if asserted as individual claims." *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020); *see also, e.g.*, *Wenokur v. AXA Equitable Life Ins. Co.*, No. 17-165, 2017 WL 4357916, at *4 (D. Ariz. Oct. 2, 2017) ("The Court notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.").

- Other district courts have declined to extend *Bristol-Myers* to nationwide class actions. Some have reasoned that *Bristol-Myers* likely does not apply in federal courts at all, or at least not in cases arising under federal law. *See, e.g.*, *Pascal v. Concentra, Inc.*, No. 19-2559, 2019 WL 3934936, at *5 (N.D. Cal. Aug. 20, 2019) ("*Bristol-Myers* does not apply in this case because Plaintiff asserts his claim in a federal court and under federal law."); *Massaro v. Beyond Meat, Inc.*, No. 20-510, 2021 WL 948805, at *11 (S.D. Cal. Mar. 12, 2021) (similar). Others have distinguished *Bristol-Myers* on the basis that it involved a mass tort claim and have "decline[d] to extend *Bristol-Myers* to the class action context," reasoning that doing so would "radically alter the existing universe of class action law." *Sotomayor v. Bank of Am., N.A.*, 377 F. Supp. 3d 1034, 1038 (C.D. Cal. 2019); *see also, e.g.*, *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) ("[T]he Supreme Court did not extend

its reasoning to bar the nonresident plaintiffs' claims here, and *Bristol-Myers* is meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff.").

- Still others have sidestepped the question of whether *Bristol-Myers* applies to nationwide class actions by holding that "the claims of unnamed class members are irrelevant to the question of specific jurisdiction" until the court certifies a class. *In re Morning Song Bird Food Litig.*, No. 12-1592, 2018 WL 1382746, at *5 (S.D. Cal. Mar. 19, 2018). These courts have concluded that, "[u]nless and until [the plaintiff] demonstrates that she is entitled to litigate the claims of non-resident potential class members, it is premature for the Court to rule on whether it has jurisdiction over claims belonging to non-resident putative class members." *Robinson v. Unilever U.S., Inc.*, No. 17-3010, 2018 WL 6136139, at *3 (C.D. Cal. June 25, 2018).

On August 10, 2021, the Ninth Circuit issued a published opinion, *Moser v. Benefytt, Inc.*, --- F.4th ----, that endorsed the third approach and held that it is "premature" for a court to determine at the pleading stage whether it can exercise personal jurisdiction over the claims of putative class members. Although *Moser* deprives defendants in nationwide class actions of a potential jurisdictional challenge at the pleading stage, it leaves that challenge open later in the case—and makes clear that a defendant does not waive a *Bristol-Myers* challenge by failing to raise it at the pleading stage.

In *Moser*, a California resident brought a putative class action under the Telephone Consumer Protection Act against Benefytt, a Delaware corporation with its principal place of business in Florida, and sought to represent a nationwide class. Although Benefytt did not raise *Bristol-Myers* in its motion to dismiss, it opposed the plaintiff's motion for class certification by arguing, among other things, that *Bristol-Myers* precluded the court from exercising personal jurisdiction over the claims of non-resident class members. In its order granting the plaintiff's motion for class certification, the district court declined to reach the merits of Benefytt's *Bristol-Myers* challenge, finding instead that Benefytt had waived any objections to personal jurisdiction by failing to raise them in a motion to dismiss or an answer. After granting Benefytt permission to appeal the class certification order pursuant to Federal Rule of Civil Procedure 23(f), the Ninth Circuit vacated the class certification order and held that Benefytt had not waived its *Bristol-Myers* challenge.

After concluding that Rule 23(f) authorized it to review the district court's personal jurisdiction ruling, the Ninth Circuit held that the district court erred by finding that Benefytt had waived its *Bristol-Myers* defense by failing to raise it in a motion to dismiss. The Ninth Circuit reached this conclusion based on two premises: (1) that Federal Rule of Civil Procedure 12(b)(2) only requires defendants to raise a personal jurisdiction defense if it is "available": and (2) that "a class action, when filed, only includes the claims of the named plaintiff." "Putting these points together," the Ninth Circuit reasoned, showed that Benefytt "did not have 'available' a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case." The Ninth Circuit accordingly concluded that Benefytt "could not have moved to dismiss

on personal jurisdiction grounds the claims of putative class members who were not then before the court" and that Benefytt was therefore not "required to seek dismissal of hypothetical future plaintiffs." In so holding, the Ninth Circuit stressed that its conclusion was consistent with the holdings of the Fifth Circuit in *Cruson v. Jackson National Life Insurance Co.*, 954 F.3d 240 (5th Cir. 2020) and the D.C. Circuit in *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293 (D.C. Cir. 2020)—both of which concluded that *Bristol-Myers* does not apply to the claims of nonresident putative class members until and unless a class is certified.

Although the Ninth Circuit held that Benefytt had not waived its *Bristol-Myers* challenge and vacated the district court's class certification order, it declined to reach the underlying question of whether *Bristol-Myers* applies to nationwide class actions and left that issue for the district court to address on remand. In so holding, the Ninth Circuit suggested—albeit in passing—that the analysis may turn on "additional record development," potentially including additional discovery as to the extent of Benefytt's contacts with California. And while the Ninth Circuit did not expressly say so, this conclusion appears inconsistent with the holdings of some district courts that *Bristol-Myers* is categorically inapplicable in federal court or to nationwide class actions. Nonetheless, regardless of how broadly or narrowly one interprets the Ninth Circuit's decision, it makes clear that the *Bristol-Myers* analysis must take place at the class certification stage—and gives defendants comfort that they will not waive their *Bristol-Myers* defenses by waiting until class certification to raise them.

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