Legal Update Article

Appeals Court Creates Circuit Split on Whether *Bristol-Myers* Applies to Collective Actions

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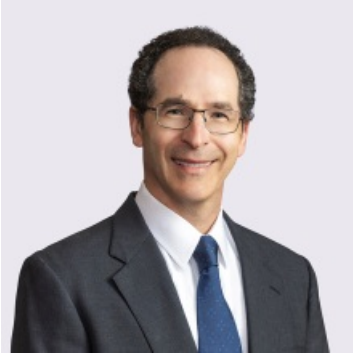

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In its 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal*, the U.S. Supreme Court held that a state court could not exercise specific personal jurisdiction over nonresident plaintiffs' claims against a nonresident company. Left unresolved 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 Section 216(b) and the Age Discrimination in Employment Act.

In the intervening years, federal district courts have issued conflicting rulings on *Bristol-Myers'* applicability to each. In 2021, several federal appeals courts weighed in. Now, with a January 13, 2022, decision by the U.S. Court of Appeals for the First Circuit, a circuit split exists with respect to the applicability of *Bristol-Myers* to collective actions.

First Circuit Decision

In *Waters v. Day & Zimmermann NPS, Inc.*, the First Circuit (which covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) affirmed a Massachusetts federal court's order denying an employer's motion to dismiss out-of-state opt-in plaintiffs for lack of personal jurisdiction. Hearing the case on an interlocutory appeal, a divided panel held that nonresident employees could join an FLSA overtime collective action.

More than 100 employees opted in to the underlying suit, including employees that resided outside of Massachusetts. The employer moved to dismiss the claims of opt-in plaintiffs outside the state. Citing *Bristol-Myers*, the employer argued that, notwithstanding that it was properly served, the court lacked either general or specific personal jurisdiction over the out-of-state employees. However, the district court concluded that *Bristol-Myers* did not apply to collective actions filed in federal court.

Affirming the decision, the First Circuit noted that unlike class actions under Rule 23, opt-ins to a collective action become parties to a suit when they file a consent in writing, regardless of whether the court grants conditional certification. Further, the appeals court observed, *Bristol-Myers* addressed out-of-state residents pursuing state claims in a state court where they do not reside, not federal claims being pursued in federal court. The majority also reasoned that excluding nonresident plaintiffs ran counter to the FLSA's purpose, which "was to allow efficient enforcement of wage and hour laws against large, multistate employers[.]"

FRCP 4(k)

Much of the First Circuit's analysis focused on Federal Rule of Civil Procedure 4(k)(1)(A), which lays out the requirements for service of summons for purposes of establishing personal jurisdiction over a defendant. The employer argued that Rule 4(k) "incorporates the Fourteenth Amendment's limits on the jurisdiction of federal courts wherever a federal

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statute does not provide for nationwide service of process." And, because the FLSA does not authorize nationwide service of process, Rule 4(k) makes *Bristol-Myers* applicable to collective actions.

The appeals court, however, rejected the contention that Rule 4(k)(1) limits personal jurisdiction after a summons is properly served. According to the majority, there was no basis in the text or history of Rule 4 to suggest that the provision deals with anything other than initial service of summons or constrains a federal court's power to act once a summons has been served.

Circuit Split

The First Circuit decision is in direct conflict with the Sixth Circuit's holding in *Canaday v. Anthem Cos., Inc.* (2021 U.S. App. LEXIS 24523) and Eighth Circuit decision in *Vallone v. CJS Solutions Group, LLC* (2021 U.S. App. LEXIS). Those courts held that Rule 4(k) does act to limit a federal court's exercise of personal jurisdiction in collective actions. In *Canady*, the Sixth Circuit held that because the FLSA lacks a nationwide service of process provision, Rule 4(k)(1)(A) was the sole basis for establishing jurisdiction. The Eighth Circuit in *Vallone* concluded it was "a given" that Rule 4 limits federal court jurisdiction with respect to all of the claims, including those of the opt-in plaintiffs. (Dissenting in the First Circuit's *Waters* decision, Judge Barron thought the majority should refrain from deciding an important issue of first impression on interlocutory appeal – particularly in a manner that creates a conflict with two other circuit courts.)

Takeaway

Employers facing class and collective actions increasingly are raising a *Bristol-Myers* defense in an effort to reduce the burden and expense of litigating a nationwide lawsuit and to limit potential exposure. However, there may be important strategic reasons not to raise the defense. Moreover, the success of the defense may vary considerably by jurisdiction. In addition to the circuit split on whether the Supreme Court precedent applies to Section 216(b) collective actions, the fact that most circuit courts have not yet weighed in on these questions leaves much room for uncertainty. Given their growing significance, these jurisdictional questions may soon be teed up for Supreme Court consideration, giving the Justices an opportunity to clarify the scope of its landmark precedent.

For a detailed look at recent case law developments related to *Bristol-Myers* jurisdiction, see our Strategic Perspectives report, "It's been a busy month for *Bristol-Myers*."