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TCPA Trimmer: Yet Another Ruling Finds that Bristol Myers Squibb Requires Dismissal of Out-of-State Rule 23 Class Members

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Last year the US Supreme Court handed down the decision in *Bristol Myers Squibb v. Superior Court*, concluding that out-of-state mass tort Plaintiffs could not sue a Defendant for claims arising outside of that state unless the Defendant was subject to general personal jurisdiction. Although "specific" personal jurisdiction allows in-state claimants to sue an out-of-state Defendant for claims arising in the forum state, no such jurisdiction exists to allow out-of-state residents to sue in that forum.

Bristol Meyer arose in a mass tort setting, not in a Rule 23 class action. The big question following *Bristol Meyer*, therefore, is whether unnamed out-of-state Rule 23 class members can be included in suits against a Defendant brought in states where the Defendant is not subject to general jurisdiction. The logical answer appears to be "no"—Rule 23 cannot confer personal jurisdiction over a Defendant that the constitution says does not exist—but courts have been a bit wishy washy on the issue.

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Notably, although the doctrine of the Supreme Court's decision in *BMS* has far broader application than to just TCPA cases—as is so often the case with procedural issues in federal court—it is TCPA suits that are driving the development of case law in this area. Just last Friday, for instance, the court in *Garvey v. Am. Bankers Ins. Co.*, Case No. 17-CV-986, 2019 U.S. Dist. LEXIS 79753 (N.D. Ill. May 10, 2019) granted a motion to strike unnamed out-of-state class members from a Rule 23 class action in the name of *BMS.*

In *Garvey* the Plaintiff brought a putative nationwide class action against two Florida defendants in Illinois, contending that the Defendants had called the Illinois-resident class representative illegally. This, they argued, conferred jurisdiction upon the court to adjudicate the claims of absent class members in their nationwide class—even those who resided outside of Illinois and did not receive calls within the state. The Court disagreed: "For this Court to exercise specific jurisdiction, the injury of the non-Illinois plaintiffs must arise out of or relate to the defendants' contacts with Illinois. Because the parties do not contend that the non-Illinois residents were injured in Illinois, exercising specific jurisdiction over defendants with respect to the nonresidents' claims would violate defendants' contacts with Illinois. Accordingly, the Court must strike the class definition to the extent it asserts claims of non-residents."

The Court also finds that the ruling striking the class should "streamline discovery and simplify the disputed issues" and overlooks the Defendant's failure to plead the jurisdictional infirmity at the pleadings stage.

Garvey is yet another great ruing demonstrating the power of *BMS* in putative TCPA class actions. Certainly a Defendant would rather face a single-state class than a nationwide class action and *BMS* forces would be nationwide classes into the Defendant's home state for adjudication—assuring easier litigation, if not other forms of home field advantage. Word to the wise, however—assert this defense early in the action to avoid a potential waiver. The *Garvey* court overlooked the Defendant's failure to assert the defense at the pleadings stage, but not every court will. Stay sharp TCPAWorld.