This week the D.C. Circuit and Seventh Circuit issued decisions addressing a question that has been hotly debated by class action lawyers on the plaintiffs’ and defense sides: whether the Supreme Court’s decision on personal jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017) (blog post) applies to class actions, and if so, how. *Bristol-Myers* held that in a mass action, a California state court lacked personal jurisdiction (specific jurisdiction) over claims made by non-California residents that involved no harm in California and no harm to California residents. Following that decision, defendants have argued that trial courts lack jurisdiction over putative class members, or over claims alleged on their behalf, that lack sufficient connection to the forum jurisdiction. The first appellate decisions on these issues came down this week. Thus far, defendants have not prevailed, but I think the litigation of these issues is far from over.

In *Molock v. Whole Foods Market Group, Inc.*, No. 18-7162, 2020 WL 1146733 (D.C. Cir. Mar. 10, 2020), the plaintiff employees sought to bring a nationwide class action for alleged lost wages. The district court denied the defendants’ motion to dismiss based on *Bristol-Myers*, and an interlocutory appeal was allowed. The D.C. Circuit, in a 2-1 decision, ruled that the question of whether and how *Bristol-Myers* applies to class actions is premature prior to a decision on class certification because, until a class is certified, putative class members are not parties. The...
majority relied on *Smith v. Bayer Corp.* and *Standard Fire Ins. Co. v. Knowles*, both of which recognized that putative class members cannot be bound by decisions made or actions taken in a putative class suit that has not yet been certified as a class action. The majority did not interpret Whole Foods’ position as asserting that there was a lack of jurisdiction over specific claims, and therefore did not address that question. I read *Molock* as potentially supporting an argument by defendants that, at class certification, the scope of any certified class should be limited to claims arising out of harm in jurisdictions where a named plaintiff was harmed. The line of argument would be that a class action must be litigated in a manner that ultimately leads to a binding outcome on the absent class members, which logically requires personal jurisdiction over the absent class members and the claims asserted on their behalf.

Judge Silberman of the D.C. Circuit dissented on various grounds, and would have ruled in favor of the defendant. He viewed Whole Foods’ argument as focusing not on whether there was personal jurisdiction over the absent putative class members, but rather seeking dismissal of those claims alleged by the named plaintiffs that related to injuries occurring outside the District of Columbia. He pointed out that courts have generally recognized and decided motions to dismiss or strike a portion of alleged class claims. Judge Silberman expressed a practical concern that, if adjudication of the scope of the class in this respect is postponed until class certification, a defendant can be subjected to unduly burdensome discovery (the majority opinion recognizes, however, that the district court could decide the *Bristol-Myers* issue in the context of a discovery dispute). Judge Silberman would have reached the merits of the *Bristol-Myers* issue and held that a named plaintiff cannot pursue claims of putative class members with no connection to the forum state. His reasoning included that: (1) personal jurisdiction must be analyzed on a claim-by-claim basis; (2) logically, a class action is a type of joinder and should not be treated differently than a mass action on this issue; (3) Rule 23 cannot alter jurisdictional requirements; and (4) Congress, in Rule 4(k)(1)(A), has limited federal district courts’ exercise of personal jurisdiction to that of a state court where the district court is located. Judge Silberman also would have concluded that absent class members are parties for purposes of personal jurisdiction over a defendant.

In *Mussat v. IQVIA, Inc.*, No. 19-1204 (7th Cir. Mar. 11, 2020), the plaintiff filed a putative nationwide class action under the Telephone Consumer Protection Act. The district court granted the defendant’s motion to strike the class definition insofar as it alleged a nationwide class, based on *Bristol-Myers*. The Seventh Circuit agreed to hear an appeal from this ruling under Fed. R. Civ. P. 23(f), and held that *Bristol-Myers* did not apply to a nationwide class action in federal court under a federal statute. The Seventh Circuit wrote that “[o]nce certified, the class as a whole is the litigating entity, and its affiliation with a forum depends only on the named plaintiffs.” Slip op. at 5 (citation omitted). The Seventh Circuit did not address the issue raised by the D.C. Circuit about whether adjudication of this issue was premature where no class had been certified. The Seventh Circuit noted that the Supreme Court had repeatedly adjudicated nationwide class action cases without addressing the *Bristol-Myers* issue (although the issue does not appear to have been raised by parties in any of those cases), and that the Supreme Court stated in *Bristol-Myers* that it was applying “settled principles of personal jurisdiction.” Slip op. at 7. The Seventh Circuit also noted that absent class members are not treated as parties.
for ordinary diversity jurisdiction purposes, or in determining venue. The Seventh Circuit also analogized class actions to situations where an executor, administrator or trustee sues in a representative capacity, and courts analyze personal jurisdiction only with respect to the representative.

These are complicated issues and it will be interesting to see how the law develops as additional circuits are asked to weigh in. I expect the Supreme Court will take this up within the next few years. There are additional issues in play that were not raised or addressed by the D.C. Circuit or the Seventh Circuit. One of those that comes to mind is the fact that the Class Action Fairness Act (which is the basis for subject matter jurisdiction in many federal court class actions) requires consideration of the citizenship of putative class members for various purposes, including exceptions to jurisdiction. See 28 U.S.C. 1332(d)(3), (4). Putative class member claims are also aggregated for determining whether the amount in controversy requirement is satisfied. Id. § 1332(d)(6). These provisions seem to run counter to part of the Seventh Circuit’s reasoning that putative class members should be treated as irrelevant for jurisdictional purposes.

As highlighted by these decisions, there are strategic decisions defendants need to make in deciding how (and whether) to litigate this issue. One strategic decision is whether to present the question as an issue of personal jurisdiction over the absent class members themselves, or over a certain portion of the claims asserted by the named plaintiff against the defendant (i.e., the “out-of-state” claims), or both. Another strategic consideration is whether or how any positions taken might impact a class action settlement later in the litigation.

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