

Preventing Plaintiffs From Circumventing Personal Jurisdiction Requirements Post-*BMS*

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In *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), the Supreme Court restricted a plaintiff's ability to file suit in a state that has no relationship to the plaintiff's claim. Since *BMS*, plaintiffs have become more creative in trying to create personal jurisdiction for non-resident plaintiffs in plaintiff-friendly forums. For instance, some plaintiff's lawyers have filed multi-plaintiff complaints that combine resident and non-resident plaintiffs and then claim that personal jurisdiction exists for the entire complaint—even for the non-resident plaintiffs. Recently, courts have used Federal Rule of Civil Procedure 21—which permits a court to “add or drop a party”—to thwart this tactic and enforce the jurisdictional limits of *BMS*.

The Supreme Court's Holding in *Bristol-Myers Squibb Co. v. Superior Court*

In *Bristol-Myers Squibb Co. v. Superior Court of California*, the plaintiffs brought suit against BMS in California state court after allegedly sustaining injuries from the blood-thinning drug, Plavix.[1] The vast majority of plaintiffs were not California residents.[2] As a result, Bristol-Myers moved to quash service on the grounds that the Superior Court lacked personal jurisdiction over the claims of the non-California plaintiffs.[3]

The U.S. Supreme Court held that California lacked jurisdiction over the non-resident plaintiffs' claims due to the lack of “a connection between the forum and the specific claims at issue.”[4] In particular, the Court found relevant that the non-resident plaintiffs “were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.”[5] Thus, personal jurisdiction did not exist because “for a court to exercise specific jurisdiction over a claim, there must be an ‘affiliation between the forum and the underlying controversy, principally, [a]n activity or an occurrence that takes place in the forum State.’”[6] The *BMS* decision significantly limited a plaintiff's ability to forum shop.

Plaintiffs' Attempts to Circumvent *BMS*

Since *BMS*, plaintiffs have become more creative in attempting to create jurisdiction in forums that have no obvious relationship to their claims.[7] One tactic involves filing large multi-plaintiff complaints, which include a few plaintiffs

from the defendant's home state to defeat diversity and a few plaintiffs from the forum state, to attempt to create personal jurisdiction for all plaintiffs. This is what the plaintiffs tried to do in *Hannah v. Johnson & Johnson Inc.*, 2020 WL 3497010, at *2 (D.N.J. June 29, 2020), *reconsideration denied sub nom. AMY JOHNSON, et al., Plaintiffs, v. JOHNSON & JOHNSON INC., et al., Defendants. MAUREEN KASSIMALI, et al., Plaintiffs*, 2021 WL 165099 (D.N.J. Jan. 19, 2021).

The Court's Rulings in the *Hannah* and *Johnson* cases

In *Hannah*, the plaintiffs filed several large multi-plaintiff complaints in an effort to defeat diversity and establish personal jurisdiction in a state court that they perceived as plaintiff-friendly (Jefferson County, Missouri).[8] The claims all centered on the allegation that Johnson & Johnson's baby powder caused ovarian cancer.[9]

The cases were removed and transferred to an MDL, and the plaintiffs filed motions to remand. Thus, the MDL court was tasked with determining jurisdictional issues and other threshold issues like fraudulent joinder.[10] After an initial opinion found that the non-Missouri plaintiffs who did not purchase the product in Missouri lacked personal jurisdiction as to certain defendants, the plaintiffs moved for reconsideration.[12] In particular, the plaintiffs took issue with the court's use of Rule 21 to sever plaintiffs from the multi-plaintiff complaints into individual cases and then evaluate personal jurisdiction based on each individual plaintiff.[13]

On reconsideration, the plaintiffs argued that the court's use of FRCP 21 to sever claims "violates the long-accepted practice that the plaintiff is the master of his complaint." [14] The court recognized the doctrine but held that no rule or doctrine "protect[s] plaintiffs who employ thinly veiled litigation strategy to avoid participation in MDL proceedings." [15]

The plaintiffs also argued that "the plain language of Rule 21 does not permit severance of plaintiffs properly joined in a multi-plaintiff complaint," and "that severance of a party to preserve diversity jurisdiction is permitted only where the action was originally filed in federal court, as opposed to removed from state court." [16] The court rejected both arguments citing several cases establishing that Rule 21 "allows a district court to dismiss so-called 'jurisdictional spoilers' — parties whose presence in the litigation destroys jurisdiction — if those parties are not indispensable and if there would be no prejudice to the parties." [17]

Notably, the court expressed "increasing concern with the manner in which seemingly unrelated plaintiffs and non-diverse plaintiffs have joined their claims in single multiple-plaintiff actions." [18] The court cautioned that the *BMS* decision "cannot be sidestepped through the permissive joinder of plaintiffs who have no connection to that forum." [19] In sum, "[t]he joinder of large numbers of unrelated plaintiffs who are citizens of different states creates a snarl of personal jurisdictional issues, as the Supreme Court has stressed that personal jurisdiction must be evaluated on a plaintiff-by-plaintiff basis." [20]

Once the plaintiffs were severed into individual cases, the jurisdictional analysis under *BMS* became much clearer. Plaintiffs who were Missouri citizens or alleged that they purchased the product in Missouri were severed from the non-Missouri plaintiffs and remanded to Missouri state court, while the non-Missouri citizens were dismissed for lack of personal jurisdiction as to certain defendants and permitted to re-file in the appropriate district court or directly in the MDL using a short-form complaint. [21]

Other Courts Have Similarly Used FRCP 21

Other courts have similarly used Rule 21 to avoid "a snarl of personal jurisdictional issues." For example, as part of the *In re NuvaRing* MDL, the court invoked Rule 21 where "jurisdiction [was] not proper in the Eastern District of Missouri for the claims of the non-resident Plaintiffs" because only one of the plaintiffs in the action was a Missouri resident and the remaining four plaintiffs were nonresidents. [22] As a result, the nonresident plaintiffs were dismissed and could re-file in a court with proper jurisdiction. [23]

As plaintiffs have become more creative in attempting to establish personal jurisdiction in plaintiff-friendly forums, defendants should keep in mind that Rule 21 can provide a helpful tool in enforcing the jurisdictional limits of *BMS*.

[1] *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal.5th 783, 789 (Cal. 2016).

[2] *Id.*

[3] *Id.* at 790.

[4] *Bristol-Myers Squibb Co.*, 137 S. Ct. 1773, 1781 (2017).

[5] *Id.*

[6] *Id.* (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

[7] See, e.g., Clinical Trials and Specific Jurisdiction: A Review of the Post-BMS Legal Landscape, <https://www.law360.com/articles/1210793>.

[8] See *Hannah*, 2020 WL 3497010, at *2.

[9] *Id.* at *3.

[10] *Id.* at **1-2.

[11] The opinions in this case address issues other than Rule 21. The Drug and Device blog has excellent posts on other aspects of this case. See James M. Beck, *A New Talc Personal Jurisdiction Mess*, Drug & Device Law Blog, July 27, 2020, <https://www.druganddevicelawblog.com/2020/07/a-new-talc-personal-jurisdiction-mess.html>.

[12] *AMY JOHNSON, et al., Plaintiffs, v. JOHNSON & JOHNSON INC., et al., Defendants. MAUREEN KASSIMALI, et al., Plaintiffs*, 2021 WL 165099, at **1-3 (D.N.J. Jan. 19, 2021).

[13] See *id.* at **3-4.

[14] *Id.* at *4.

[15] *Id.*

[16] *Id.* at **3-4.

[17] *Id.* at *3.

[18] *Id.* at *4.

[19] *Id.*

[20] *Id.*

[21] *Hannah*, 2020 WL 3497010, at **2, 25; *AMY JOHNSON, et al., Plaintiffs*, 2021 WL 165099, at *7 & n.5.

[22] *Alday v. Organon USA, Inc.*, 2009 WL 3531802, at *1-2 (E.D. Mo. Oct. 27, 2009).

[23] *Id.* at *2.

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