Edging Toward a Circuit Split

Specific Personal Jurisdiction and Nationwide Class Actions

By Michael J. Ruttinger

Does the inability to establish specific personal jurisdiction impede the formation of nationwide class actions?

Can a federal court certify a nationwide class action when some of the absent class members would not be able to establish personal jurisdiction over their claims? In any other month, in any other year, a trio of federal appellate court decisions addressing this important issue would draw many eyes. It stands then as a testament to the pandemic-dominated news cycle that March passed with relatively limited comment about the three decisions issued by the D.C. Circuit, the Seventh Circuit, and the Fifth Circuit in *Molock v. Whole Foods Market Group*, 952 F.3d 293 (D.C. Cir. 2020), *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), and *Cruson v. Jackson National Life Insurance Co.*, No. 18-40605, ___ F.3d ___, 2020 WL 1443531 (5th Cir. Mar. 25, 2020), respectively.

Bristol-Myers and Confusion Among Federal District Courts

Molock, *Mussat*, and *Cruson* were nearly three years in the making, each growing out of the Supreme Court's milestone personal jurisdiction decision in *Bristol-Myers Squibb Co. v. Superior Court of California*. 137 S. Ct. 1773 (2017). *Bristol-Myers*, of course, was a decision about specific personal jurisdiction and noteworthy mainly for the blow that the Supreme Court struck against so-called "litigation tourism" by holding that "for a state to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum," meaning, "there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* at 1780 (emphasis added). Thus, the Supreme Court explained, the mere fact that a nonresident plaintiff's claim is similar to the claim brought by a plaintiff who *can* establish specific jurisdiction is not enough to extend the jurisdictional umbrella to that second plaintiff's claim, too. *Id.*at 1782 ("What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.").

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In particular, it was Justice Sotomayor's lonely dissent (in an 8–1 decision) that drew class action lawyers' attention. Like the Wizard proclaiming "Pay no attention to the man behind the curtain," Justice Sotomayor dropped an attention-grabbing footnote, observing that the Supreme Court left open "the question whether its opinion here would apply to a class action." *Id.* at 1789 n.4. Naturally, class action lawyers immediately asked, "What *about* class actions?" Specifically, could the *Bristol-Myers* holding be used to defeat certification of nationwide classes, considering that absent class members may not be able to establish specific personal jurisdiction over their claims? If courts view the Federal Rule of Civil Procedure 23 class action mechanism as "just another kind of joinder"—and many do—then what reason would courts have *not* to apply the same personal jurisdiction rules to both mass actions, such as *Bristol-Myers*, and class actions? True, the Supreme Court had not addressed the issue before, but, as Justice Alito's majority opinion explained, that was because the issue had not been *raised* in its prior cases. *See id.* at 1783 & n.3 (noting that the issue could have been addressed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), but for "the fact… that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it," perhaps because Phillips "believed at the time that the Kansas court had general jurisdiction.").

The district courts took it from there; it took just months to develop a well-defined fault between those courts that reasoned that "[p]ersonal jurisdiction in class actions must comport with due process just the same as any other case," *In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696 (BMC) (GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017), and those that distinguished class actions, from "mass actions" similar to the one in *Bristol-Myers*. *See Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) ("*Bristol-Myers* is meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff.").

Two districts in particular—the Eastern District of New York, and the Northern District of Illinois—have led the way in refuting a distinction between mass actions, such as *Bristol-Myers*, and class actions. As the U.S. District Court for the Eastern District of New York explained in the *In re Dental Supplies* case, "[t]he constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class." 2017 WL 4217115, at *9. Numerous other courts followed that lead, concluding that *Bristol-Myers* was a significant impediment to nationwide class actions. *See, e.g.*, *Peroutka v. Yeti Coolers, LLC*, No. 18-CV-6827, 2020 WL 1283148, at *6 ("The likelihood that this Court cannot exercise specific personal jurisdiction over the defendant for claims by non-residents unrelated to the defendant's activities in New York weighs strongly in favor of transfer to Texas—a state in which the defendant is subject to general personal jurisdiction."); *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (concluding it is "more likely than not" that "courts will apply [*Bristol-Myers*] to outlaw nationwide class actions… where there is no general jurisdiction over the Defendants"); *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018) ("'The Supreme Court has emphasized that 'Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the rules of procedure 'shall not abridge, enlarge, or modify any substantive right.'… Under the Rules Enabling Act, a defendant's due process interest should be the same in the class context.") (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 592 (1997)); *McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 WL 4864910, at *4 (N.D. Ill. Oct. 26, 2017) (holding that an in-state plaintiff's connection with the forum "cannot provide a basis for the Court to exercise personal jurisdiction over the claims of nonresidents").

In contrast, the Northern District of California and the Eastern District of Louisiana have spearheaded the side declining to "extend" *Bristol-Myers* to class actions. Courts in both jurisdictions have found a meaningful distinction between mass actions on the one hand, and class actions on the other, as proposed in *Fitzhenry-Russell*. *See, e.g.*, *Allen v. ConAgra Foods, Inc.*, No. 3:13-cv-01279-WHO, 2018 WL 6460451, at *7 (N.D. Cal. Dec. 10, 2018) ("In addition, functional differences set class actions apart; the plaintiffs here must meet the Rule 23 requirements of numerosity, commonality of law or fact, typicality of claims or defenses, and adequacy of representation in order to achieve certification."). Other jurisdictions—in particular, the Eastern District of Louisiana—have adopted this same distinction. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017) ("This Court is cognizant of the superficial similarities between mass tort actions (like in *BMS*) and a class action in which every class member is a named plaintiff—as is the case here. But there is, nevertheless, a significant difference: a class action has different due process safeguards."); *Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods., Inc.*, No. 1702161, 2018 WL 1377608, at *5 (E.D. La. Mar. 19, 2018) (agreeing with courts that "have declined to extend the holding in *Bristol-Myers* to class actions," given "the material differences between mass tort actions and class actions.").

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Meanwhile, class action lawyers and jurisdiction junkies wait with anticipation not just for appellate guidance, but for a potential return engagement before the Supreme Court, which this split seems to portend. They will have to wait a little longer. *Molock*, *Mussat*, and *Cruson* provide some answers, but nothing near resolution. Only one of the courts—the Seventh Circuit in *Mussat*—even reached the merits; *Molock* and *Cruson* stalled out over questions about waiver and the proper stage at which a party may raise a personal jurisdiction challenge to class certification. Still, *Molock*, *Mussat*, and *Cruson* are invaluable first steps, addressing several of the preliminary procedural questions and clearing the path for what still seems to signal an inevitable circuit split.

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Molock v. Whole Foods Market Group, Inc.

The D.C. Circuit was the first court to act, in an appeal based on Whole Foods's alleged manipulation of an incentive-based bonus program for its employees. Several current and former Whole Foods employees sought to represent a nationwide class of "past and present employees of Whole Foods" in a lawsuit filed in the U.S. District Court for the District of Columbia. *Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114, 119 (D.D.C. 2018). Whole Foods challenged the geographic scope of the class from the outset, arguing in a motion to dismiss that putative class members outside of the District of Columbia could not be included in the class consistent with *Bristol-Myers*.

At the district court level, the parties disagreed over whether *Bristol-Myers* applied to class actions as well as to mass actions, with the court siding with the *Fitzhenry-Russell* line of cases out of the Northern District of California. *Id.* at 126 ("The Court agreed with Plaintiffs and concludes that *Bristol-Myers* does not apply to class actions.") (citing *Fitzhenry-Russell*, 2017 WL 4224723, at *5; *In re Chinese-Manufactured Drywall*, 2017 WL 5971622, at *12–14). The district court therefore denied the motion to dismiss, "join[ing] the other courts that have concluded that *Bristol-Myers* does not require a court to assess personal jurisdiction with regard to all non-resident putative class members." *Molock*, 297 F. Supp. 3d at 127.

The D.C. Circuit affirmed the denial of the motion to dismiss, but on grounds that will reenergize those who argue *Bristol-Myers* limits national class actions. Specifically, the D.C. Circuit short-circuited the lower court's reasoning, describing it as "premature" because "[p]utative class members become parties to an action—and thus subject to dismissal—only *after* class certification." *Molock*, 952 F.3d at 298. The court thus provided crucial guidance about the timing and process that lower courts should follow if they apply *Bristol-Myers* to putative nationwide classes. Until certification, a court is without power to dismiss putative class members. Once it reaches the certification stage, however, the question "whether the putative nonresident class members are parties to the action is 'logically antecedent' to whether the court has authority to exercise personal jurisdiction over them." *Id.* at 299. Most importantly for the *Molock* defendants, it gave them another chance to fight the *Bristol-Myers* battle on a later day. *Id.* at 298 ("Only after the putative class members are added to the action—that is, "when the action is certified as a class under Rule 23,"… should the district court entertain Whole Foods's motion to dismiss the nonnamed class members.") (internal citation omitted).

Molock stands out as the only nonunanimous decision among the three March appellate decisions. Judge Silberman, writing in dissent, expressed a full-throated embrace of the argument that *Bristol-Myers* applies to nationwide class actions and would have addressed the issue based on the pleadings. He disagreed with the majority's prematurity holding, emphasizing the burdens it could have on defendants: "If the majority were correct that such motions are premature, then a hypothetical named plaintiff would be entitled to extensive class discovery even after an on-point decision by the Supreme Court concluding, as I do, that the principles in *Bristol-Myers* extend to class actions." *Id.* at 304. Indeed, preventing a defendant from raising the *Bristol-Myers* question until after plaintiffs file a motion for class certification could prejudice defendants by preventing them from raising a host of meritorious objections to otherwise onerous discovery requests. It also could discourage plaintiffs from seeking resolution of class-certification issues "at an early practicable time," as Rule 23(c)(1)(A) itself suggests, in order to seek broader discovery before the court addresses jurisdictional objections.

The meat of Judge Silberman's *Molock* dissent, however, lies in his discussion of the merits. "Although the Supreme Court avoided opining on whether its reasoning in the mass action context would apply also to class actions," he writes, "it seems to me that logic dictates that it does. After all, like the mass action in *Bristol-Myers*, a class action is just a species of joinder, which 'merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.'" *Id.* at 306 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010)). Judge Silberman also downplayed arguments that applying *Bristol-Myers* would work a significant change in the law, reasoning that "the limits that *do* follow from applying *Bristol-Myers* to class actions in federal court are not different from the limits that apply when individual plaintiffs sue on their own behalf," and "procedural tools like class actions and mass actions are not an exception to ordinary principles of personal jurisdiction." *Id.* at 309 (emphasis in original).

Mussat v. IQVIA, Inc.

The very next day, the Seventh Circuit issued a relatively short and unanimous decision that reads in many ways as a

rebuttal to Judge Silberman's *Molock* dissent. It is the only appellate court to reach the merits and emphasizes that "[c]lass actions, in short, are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class." *Mussat*, 953 F.3d at 446–47.

On its face, *Mussat* bears procedural similarities to *Molock*. The defendant, IQVIA, challenged the geographic scope of the class by filing a motion to strike the plaintiffs' class definition, based on the pleadings. Interestingly, however, it was not IQVIA's first Rule 12 motion; the defendant had previously moved to dismiss the complaint under Rule 12(b)(6) earlier in 2018, leading the plaintiffs to argue that it had waived the personal jurisdiction defense. The district court rejected that waiver argument, however, noting that "on its face, *Bristol-Myers* did not apply to class actions." *Mussat v. IQVIA, Inc.*, No. 17 C 8841, 2018 WL 5311903, at *2 (N.D. Ill. Oct. 26, 2018). Instead, the district court concluded that "IQVIA timely raised the defense following" intervening district court cases applying *Bristol-Myers* to class actions. *See id.* (citing *Practice Mgmt. Support Servs.*, 301 F. Supp. 3d 840)).

The U.S. District Court for the Northern District of Illinois struck the plaintiffs' allegations on behalf of the non-Illinois class members, reasoning that under *Bristol-Myers*, not only the named plaintiffs but also the unnamed class members must be able to demonstrate minimum contacts between the defendant and the forum state. *Id.* at *1 ("The focus of the personal jurisdiction inquiry, however, is the defendant's relationship to the forum state, and because Mussat's lawsuit does not arise out of or relate to IQVIA's contacts with this forum, the Court grants its motion to strike Mussat's class definition."). In doing so, it engaged in a detailed examination of the "core reasoning" of *Bristol-Myers*, as well as the district court decisions applying it: "Following the Supreme Court's lead in *Bristol-Myers* and applying its core reasoning here, due process, as an 'instrument of interstate federalism,' requires a connection between the forum and the specific claims at issue. This recognition bars nationwide class actions in fora where the defendant is not subject to general jurisdiction." *Mussat*, 2018 WL 5311903, at *5 (quoting *Bristol-Myers*, 137 S. Ct. at 1780-81).

In reversing the U.S. District Court for the Northern District of Illinois, the Seventh Circuit expressed concern that applying *Bristol-Myers* to bar specific jurisdiction over nationwide classes would be "a major change in the law of personal jurisdiction and class actions." 953 F.3d at 448. "Before the Supreme Court's decision in *Bristol-Myers*," the court explains, "there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant." *Id.* at 445. Consequently, nothing in *Bristol-Myers*—which, the court repeatedly emphasizes, was *not* a class action—changed the law. *Id.* ("The current debate was sparked by the Supreme Court's decision in *Bristol-Myers*—a case that did *not* involve a certified class action, but instead was brought under a different aggregation device."). "Class actions, in short, are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class." *Id.* at 446–47.

While advocates of using *Bristol-Myers* to limit class actions will look at *Mussat* as a defeat, it is worth noting that the decision may have a relatively limited effect on the greater debate. The claims at issue in *Mussat* arose under a federal statute—the Telephone Consumer Protection Act (TCPA), 47 U.S.C. §227. Likewise, even though the Seventh Circuit's discussion of *Bristol-Myers* painted with broad strokes, the caselaw on which it grounded its conclusion that "absent class members are not considered parties" also involved the application of federal statutes. *See Mussat*, 953 F.3d at 447 (citing *Devlin v. Scardelletti*, 536 U.S. 1 (2002) (holding that absent class members were not considered parties for assessing diverse citizenship under 28 U.S.C. §1332); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005) (relying on 28 U.S.C. 1367)). Recognizing this, the Seventh Circuit expressly limited its holding to conclude "that the principles announced in *Bristol-Myers* do not apply to a nationwide class action *filed in federal court under a federal statute*." *Id.* at 443 (emphasis added).

Additionally, it is worth considering whether the Seventh Circuit's observation is true that before *Bristol-Myers*, "there was a general consensus that due process principles did not prohibit" nationwide classes. *See id.* at 445. That observation seems inconsistent with Justice Alito's majority opinion in *Bristol-Myers*, which included a discussion of an earlier Supreme Court decision affecting class actions and jurisdiction, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Bristol-Myers*, the plaintiffs pointed to *Shutts*, a case involving the due process rights of *plaintiffs*, to suggest that the court's decision implicitly permitted the exercise of jurisdiction over nonresident plaintiffs' claims. In rejecting the comparison to *Shutts*, the majority observed that the defendant in *Shutts* did not object to the exercise of personal jurisdiction and—indeed—that "the Court stated specifically that its 'discussion of personal jurisdiction [did not] address class actions.'" *Bristol-Myers*, 137 S. Ct. at 1783. This suggests that the possibility of a personal jurisdiction objection to nonresident plaintiffs' class claims has remained a live—if generally unasserted—issue since 1985.

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Cruson v. Jackson National Life Insurance Co.

The longest awaited appellate decision on *Bristol-Myers* was also the last to issue. On March 25, the Fifth Circuit issued its decision in *Cruson v. Jackson National Life Insurance Co.*, which had been argued nearly eleven months earlier. Unlike

Molock and *Mussat*, *Cruson* dealt with a purely procedural issue: waiver. Specifically, Jackson National Life Insurance did not raise personal jurisdiction generally, or *Bristol-Myers* specifically, when it moved to dismiss the claims made by fourteen Texas residents, who had filed a nationwide class action challenging Jackson's calculation of so-called "surrender charges" on their annuity contracts. *Cruson*, 2020 WL 1443531, at *1. Jackson only raised *Bristol-Myers* later, at the class certification stage, prompting the plaintiffs to argue that Jackson had waived the issue.

The court concluded that the defense of personal jurisdiction was not an "available" defense within the meaning of Rule 12 because the absent class members "were not yet before the court when Jackson filed its Rule 12 motions."

The lower court, the U.S. District Court for the Eastern District of Texas, quickly perceived that the application of *Bristol-Myers* to a nationwide class action was an issue for Fifth Circuit guidance. The court thus granted Jackson's emergency motion to stay the case pending an interlocutory appeal: "Given the novelty of this matter and significant lack of precedent regarding the application of *Bristol-Myers*, the Court finds that Jackson has made a substantial case on the merits." *Cruson v. Jackson National Life Ins. Co.*, No. 4:16-CV-00912, 2018 WL 2937471, at *4 (E.D. Tex. June 12, 2018).

The Fifth Circuit, however, provided little of the guidance sought by the district court. Instead, its decision largely aligns with the D.C. Circuit's decision in *Molock*. The court concluded that the defense of personal jurisdiction was not an "available" defense within the meaning of Rule 12 because the absent class members "were not yet before the court when Jackson filed its Rule 12 motions." *Id.* at *5. Indeed, the Fifth Circuit cited the *Molock* appellate decision as part of its no-waiver holding, while confirming that "[w]hat brings putative class members before the court is certification." *Id.* at *5 (citing *Molock*, 2020 WL 1146733, at *3). But similar to the D.C. Circuit in *Molock*, the Fifth Circuit did not reach the merits. Having concluded that Jackson did not waive its personal jurisdiction objection, the court "decline[d] Jackson's request to address the merits of its personal jurisdiction defense for the first time on appeal." *Id.* at *4 n.7. Instead, the court rejected class certification on other grounds—an insufficient showing of "predominance" under Rule 23(b)(3)—and offered that "Jackson is free to raise the defense again should plaintiffs seek to re-certify a class." *Id.* A return trip to the Fifth Circuit, if not in *Jackson*, then in another case, thus seems inevitable.

Questions and (Some) Answers

Together, *Molock*, *Mussat*, and *Cruson* offer some answers, but they raise more questions. Before these decisions issued, many defendants wrestled with *when* to raise *Bristol-Myers* as an objection to a putative nationwide class. *Molock* and *Cruson* instruct that a personal jurisdiction challenge to class certification is not ripe until the certification stage, *and* a defendant who does not raise the issue early does not waive it. At the same time, however, the decision in *Mussat* casts doubt. If the Seventh Circuit had followed the same reasoning as the D.C. and Fifth Circuits, it might have held the issue, which was raised via a motion to strike, was premature. Instead, by reaching the merits, the Seventh Circuit has suggested that jurisdiction over a class *is* ripe at the pleadings stage, leaving a circuit split, though not the one that was expected.

The timing component put at issue by *Molock* and *Cruson* has significant importance for defendants. Extensive class discovery can put a resource strain on parties, driving up costs and putting a potential obstacle in the path of resolution. Judge Silberman recognized the implications in his *Molock* dissent:

> The plaintiffs intend to take discovery of payroll records from more than 200 Whole Foods grocery stores in order to certify the nationwide class. And if the alleged misconduct appears to extend to related operating companies, the plaintiffs intend to amend their complaint to expand the class to include employees of nearly 300 other stores. Then comes class discovery about *those* stores. If the named plaintiffs' nationwide class allegation is dismissed, however, that number shrinks to the five stores operated by Whole Foods in the District.

952 F.3d at 304 (emphasis in original). The D.C. Circuit majority's reasoning seems to be, "Too bad." *Id.* at 299. ("Whole Foods complains about the burdens of class discovery. But concerns about discovery costs must yield to Supreme Court precedent, which makes clear that putative class members are nonparties prior to class certification."). Given the expenses involved, it would not be at all surprising to see defendants seek Supreme Court review of the timing component of a *Bristol-Myers* class action challenge even before a split on the merits squarely emerges.

Nor do any of the recent circuit court decisions answer whether *Bristol-Myers* somehow "changed" personal jurisdiction or class action law; but they do raise the question: Does it *matter*? Clearly it mattered for the Seventh Circuit, which characterized the defendant's position as a "major change in the law." But not everyone agrees. In his dissent from *Molock*, Judge Silberman seemingly agrees that *Bristol-Myers* changed nothing, even while he comes to a different merits conclusion. He did, however, speculate on an answer in a footnote at the conclusion of his dissent:

> Since the Court made clear in *Bristol-Myers* that it was merely applying settled law, … it is rather puzzling that challenges to class actions on these grounds were not raised until recently. *Bristol-Myers* seems to have focused the attention of defendants on the *implications* of the Court's prior personal jurisdiction decisions.

Molock, 2020 WL 116116, at *12 n.13 (Silberman, J., dissenting).

While *Molock*, *IQVIA*, and *Cruson* do not present a circuit split on the merits of

applying *Bristol-Myers* to nationwide class actions, they do suggest that one remains likely. The same issue could recur in *Molock* and *Cruson* on remand. And in the D.C. Circuit, we know that there is at least one judge prepared to rule in defendants' favor on the issue. Even though the Fifth Circuit did not reach the merits, the court nevertheless recognized rampant confusion among the federal courts on both the district court and appellate levels. *Cruson*, 2020 WL 1443531, at *2 n.4 (collecting cases).

Other circuits still need to weigh in. The Second Circuit Court of Appeals will be an important voice, given the number of New York district court decisions that have applied *Bristol-Myers* to limit nationwide class actions; it seems only a matter of time before the issue arrives before it. And there is at least one more domino to fall in the nearer term. In August 2019, the U.S. District Court for the Southern District of California certified a class in *Moser v. Health Insurance Innovations*, which the Ninth Circuit has since accepted on a Rule 23(f) appeal. *Moser v. Health Insurance Innovations*, No. 17:cv-1127-WQH-KSC, 2019 WL 3719889 (S.D. Cal. Aug. 7, 2019). The case presents many of the same issues as in *Cruson*, including waiver arguments premised on the defendant's not raising personal jurisdiction in its Rule 12 motion. Thus, the Ninth Circuit may dispose of the case on procedural grounds, but the decision, which may well arrive later this year, should further clarify the appellate courts' direction as we await a still-likely circuit split on the merits.