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PERSPECTIVES

# COURTS SHOULD NOT SUBSTITUTE PARTY STATUS FOR PERSONAL JURISDICTION IN CLASS ACTIONS

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Since the US Supreme Court decided *Bristol-Myers Squibb v. Superior Court* in 2017, courts and litigants have grappled with a critical question: can a district court decide the claims of unnamed members of a class action if their claims do not arise out of or relate to the defendant's forum contacts?

The Seventh Circuit – the first and only circuit court to address the question squarely – says "yes". In *Mussat v. IQVIA, Inc*., the court concluded that district courts do not need personal jurisdiction over unnamed class members' claims because they are not considered "parties" for purposes of personal jurisdiction. Instead, a court needs personal jurisdiction only over the class representative's claims.

In May 2020, the full Seventh Circuit declined to reconsider *Mussat* en banc, so it remains the rule in the Seventh Circuit for now. But should other circuits follow *Mussat*'s lead? We think not. *Mussat*'s party-status rationale simply does not support the conclusion that personal jurisdiction over unnamed class members' claims is unnecessary.

*Mussat*'s facts are straightforward. IQVIA sent two faxes to the plaintiff – an Illinois resident – that lacked opt-out language required by the federal Telephone Consumer Protection Act. The plaintiff sued IQVIA – a non-resident – in the Northern District of Illinois and sought to represent a nationwide class of persons who received similar unlawful faxes. But the class was not certified. Instead, the district court struck the plaintiff's class allegations, finding that *Bristol-Myers* prevented it from exercising personal jurisdiction over the claims of absent class members harmed outside of Illinois.

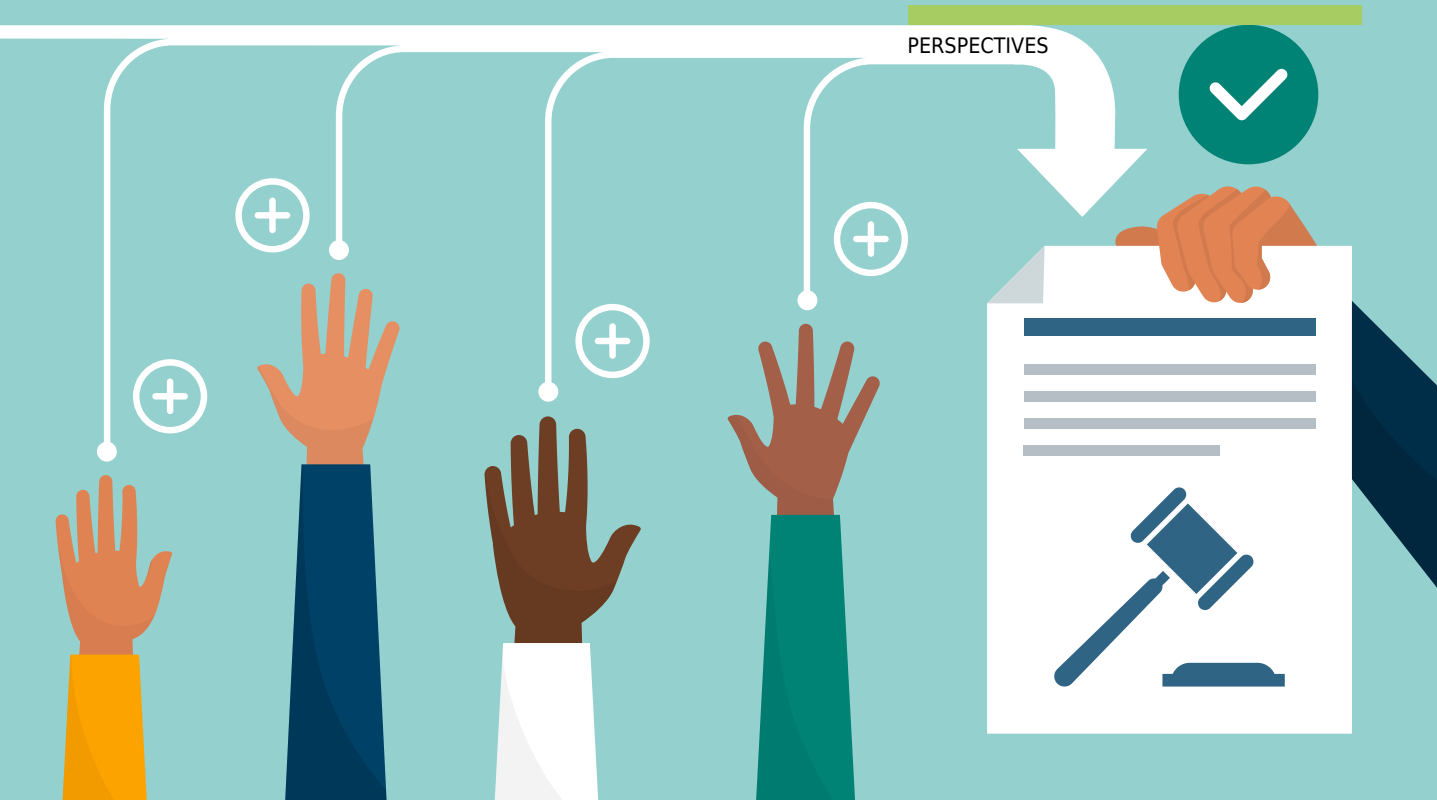
The plaintiff appealed and the Seventh Circuit reversed. Reasoning that unnamed class members are not parties for purposes of personal jurisdiction, the court held that neither *Bristol-Myers* nor Federal Rule of Civil Procedure 4(k) restricts a district court's power to resolve unnamed class members' claims unrelated to the defendant's forum contacts. Only personal jurisdiction over the class representative's claims is needed.

The Seventh Circuit's reliance on party status is flawed. After noting that unnamed members of a certified class are sometimes considered parties and sometimes not, the court identifies three situations in which it contends unnamed class members are not considered parties. First, when unnamed class members do not destroy complete diversity. Second, when courts can exercise supplemental jurisdiction over unnamed class members' claims that do not meet the amount in controversy. Third, when unnamed class members (according to the Seventh Circuit) are not considered for venue purposes.

"[S]ee[ing] no reason why personal jurisdiction should be treated any differently" than diversity jurisdiction and venue, the court concludes that unnamed class members are not parties for purposes of personal jurisdiction. That is the extent of the court's analysis. And that sparse analysis overlooks a critical fact: no homogenised party-status rationale ties those situations together. Instead, each depends on unique considerations unrelated to party status.

Consider complete diversity. It is "hornbook law" that "[d]iversity of citizenship is assessed at the time the action is filed". If complete diversity exists when a suit is filed, the later joinder of non-diverse, dispensable parties does not destroy jurisdiction. Because unnamed class members are not parties until and unless the court certifies the class – after the suit is filed – they generally cannot destroy complete diversity. The Supreme Court's application of black letter jurisdictional law compels that conclusion, not party status.

The same is true in the amount-in-controversy context. Like complete diversity, unnamed class members are not exempt from the amount-in-controversy requirement based on party status. Rather, Congress created explicit statutory exceptions for class actions: section 1332 allows aggregation in some cases and section 1367 extends



supplemental jurisdiction to jurisdictionally deficient claims.

As a general matter, the venue analogy is also flawed. Although both personal jurisdiction and venue are "personal privileges of the defendant" which can be waived, personal jurisdiction "goes to the court's power to exercise control over the parties" while venue "is primarily a matter of choosing a convenient forum". And in the modern venue scheme, class action status is generally irrelevant as to whether venue is proper in a particular forum. The Seventh Circuit does not grapple with those or any other important distinctions between venue and personal jurisdiction.

But the Seventh Circuit does cite one of its earlier decisions – *Appleton Electric Co. v. Advance-United Expressways* – that says establishing venue for unnamed class members is not required. The Seventh Circuit's mere citation to *Appleton Electric*, however, omits a key point: the relevant class in that case was a Rule 23(b)(3) defendant class. Rule 23's notice and opt-out provisions for Rule 23(b)(3) classes satisfied due process because each defendant class member's right to choose whether to litigate in the forum as a class member "fulfill[ed the] requirements of due process to which the class action procedure is of course subject". In *Mussat*, the Seventh Circuit identifies no analogous safety valve for defendants that justifies using *Appleton Electric*'s reasoning to

circumvent the need for personal jurisdiction over unnamed class members' claims.

So why treat personal jurisdiction differently from diversity jurisdiction and venue? Because there is no reason to treat it the same. No statute or rule exempts unnamed class members from the requirements of personal jurisdiction. Nor do defendants have a procedural safety valve. No authority the Seventh Circuit relied upon justifies using party status to circumvent defendants' constitutional rights.

We should call the party-status rationale what it is: improper *ad hoc* rulemaking. Although effectively disregarded by the Seventh Circuit, Rule 4(k)(1)(A) "link[s]" a district court's personal jurisdiction to service on a defendant "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located". So absent an explicit exception, a district court's exercise of personal jurisdiction must "comport[]" with the Fourteenth Amendment's limitations on the forum state's courts. Rule 4(k)(1)(A) makes no exception for class actions, nor does Rule 23. The Seventh Circuit simply made one up.

In doing so, the Seventh Circuit ignored the Rules Enabling Act by construing Rule 23 to strip IQVIA of the rights that specific jurisdiction protects.

Under the Act, procedural rules – like Rule 23 – cannot "abridge, enlarge, or modify" litigants' "substantive right[s]". Rule 23 therefore does not permit the "compromise[]" of class members' "Seventh Amendment rights without their consent".

**"Ultimately, personal jurisdiction should not depend on abstract notions of party status."**

Likewise, it cannot strip defendants of the right to litigate "statutory defenses to individual claims". In short, parties have the same substantive rights in class actions as in individual cases.

Personal jurisdiction is one them. The Supreme Court has long recognised that personal jurisdiction is a "legal right protecting the individual [:]". It "recognizes and protects an individual liberty interest" that "constrains" a court's "authority to bind a non-resident defendant to a judgment ...". The Act does not permit a construction of Rule 23 that authorises courts – or claimants – to sidestep that prohibition.

But that is just what the Seventh Circuit's party-status rationale does. The Seventh Circuit transforms Rule 23 from a joinder rule into one that circumvents

the requirements of personal jurisdiction, effectively eliminating the distinction between general and specific jurisdiction. *Mussat* makes that clear: two faxes sent to Illinois may subject non-resident IQVIA to judgment in Illinois on claims with absolutely no connection to the state – the hallmark of general jurisdiction. The Rules Enabling Act forbids that result.

Ultimately, personal jurisdiction should not depend on abstract notions of party status. The Supreme Court has interpreted the Fourteenth Amendment Due Process Clause to limit the power of state courts to enter judgments against non-resident defendants. And the Federal Rules of Civil Procedure generally apply the same limits on personal jurisdiction to federal district courts. The Seventh Circuit's party-status rationale does not square with those limitations on the exercise of judicial power. Like mass actions, individual actions, and any other action that depends on Rule 4(k)(1)(A) to establish personal jurisdiction, every claim presented in a class action must arise out of or relate to the defendant's forum contacts. CD

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