MASS CHAOS: *BRISTOL-MYERS SQUIBB* AND ITS APPLICATION TO CLASS ACTIONS

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I. INTRODUCTION

In June of 2017, the United States Supreme Court issued an opinion in *Bristol-Myers Squibb v. Superior Court*[1] (*BMS*) that caused the class action litigation world to wildly speculate about the future of the nationwide class action.[2] The opinion discussed the case of nearly seven hundred plaintiffs that had brought a mass tort action suit against the large pharmaceutical company due to the unpleasant side effects they had suffered from using a drug Bristol-Myers Squibb manufactured.[3] The Court held that the plaintiffs, who were from all around the country, were not able to join together and sue the company in California due to the California court not having personal jurisdiction over the claims of non-Californians.[4] Not long after the decision was published, legal scholars began to opine about what *BMS* would mean for class actions, and the answer has been anything but clear.

In the almost four years since *BMS*, countless federal district courts have considered how the Court's holding should be applied in the class action context.[5] While a strong majority have found that the distinctions between class actions and mass actions do not warrant extending the holding, there are a significant number of courts that have found the opposite.[6] More

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[1] Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).

[2] Richard Levick, *The Game Changes: Is Bristol-Myers Squibb the End of an Era?*, FORBES (July 11, 2017, 2:21 PM), https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/?sh=19f50cf62e83 [https://perma.cc/RQD3-KPDG]; Robert Channick & Becky Yerak, *Supreme Court Ruling Could Make it Harder to File Class-Action Lawsuits Against Companies*, CHI. TRIB. (June 22, 2017, 11:28 AM), https://www.chicagotribune.com/business/ct-supreme-court-ruling-mass-actions-illinois-0625-biz-20170622-story.html [https://perma.cc/G6BD-DEA9].

[3] *Bristol-Myers Squibb*, 137 S. Ct. at 1778.

[4] *Id*. at 1781.

[5] *E.g.*, Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815 (N.D. Ill. 2018); Dolan v. JetBlue Airways Corp., 385 F. Supp. 3d 1338 (S.D. Fla. 2019); Practice Mgmt. Support Services, Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018).

[6] Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE

recently, multiple federal appeals courts have been presented with the issue.[7] Unfortunately, only the Seventh Circuit has made a decisive ruling that held *BMS* should not apply, while the other circuits have side-stepped the issue.[8]

Should the Supreme Court return to the issue and decide to extend *BMS*'s holding to class actions, as well as mass actions, the result would be a massive change in the United States' legal landscape.[9] The nationwide class action has been a key player in the enforcement of laws governing consumer protection, civil rights, antitrust, and securities regulation.[10] Class actions provide consumers with a method for holding large corporations accountable at a level that actually deters illegal behavior and compensates injured consumers in a way that is not otherwise available.[11]

In Part II of this Note, the necessary background and history that sets the stage of the *BMS* case will be discussed, including the background and history of class and mass actions and the background and history of personal jurisdiction in the United States. Part III of this Note will provide an in-depth analysis of the *BMS* opinion and dissent, followed by a discussion and analysis of the cases subsequent to *BMS* concerning application to class actions. Part IV of this Note will discuss why the holding from *BMS* is not validly applied to unnamed class members in a class action. Finally, Part V of this Note will conclude that while the opinion in *BMS* is sound, the application of its holding to class actions is not.

II. BACKGROUND AND HISTORY

To better understand the impact of the *BMS* case on class actions, it is important to know and understand both the difference between mass actions and class actions, and the judicial history of personal jurisdiction in the American legal system.

L.J. F. 205, 213 (2019).

[7] Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020); Molock v. Whole Foods Market Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020); *see generally* Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020).

[8] *Mussat*, 953 F.3d 441; *Molock*, 952 F.3d 293; *Cruson*, 954 F.3d 240.

[9] Wilf-Townsend, *supra* note 6, at 206.

[10] *Id*.

[11] *Id*.

A. Mass Actions vs. Class Actions

1. Class Actions

The class action is a procedural tool that allows one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group.[12] The Supreme Court expressed several justifications for the use of class actions in *United States Parole Comm'n v. Geraghty*, which include "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims."[13] Additionally, the modern rule for class actions was drafted with the "rights of groups of people who individually would be without effective strength to bring their opponents into court at all" in mind.[14] The class action tool has given plaintiffs the ability to confront some of the biggest issues facing the United States throughout history, including: segregation, women's rights, workplace discrimination, and harms to the environment.[15]

The idea of class action litigation has existed in the United States since the mid-nineteenth century.[16] Justice Joseph Story wrote a series of treatises that discussed the importance of necessary parties being present for litigation, but with an important exception: Situations where the parties are "exceedingly numerous" and [it is] "impracticable to join them without . . . delays[,] which would obstruct, and probably defeat, the purpose of justice . . . ."[17] In 1854, the United States Supreme Court declared that, for the sake of convenience and justice, the court should permit "a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court."[18] This general rule permitting class actions has taken different forms throughout the years, being written into the

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[12] Legal Info. Inst., *Class Actions*, CORNELL L. SCH., https://www.law.cornell.edu/wex/class_action [https://perma.cc/JM3X-P3GQ].

[13] U.S. Parol Comm'n v. Geraghty, 445 U.S. 338, 403 (1980).

[14] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).

[15] Grant McLeod, *In a Class of its Own: Bristol-Myers Squibb's Worrisome Application to Class Actions*, 53 AKRON L. REV. 721, 731 (2019); *see* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Roe v. Wade, 410 U.S. 113 (1973); Jenson v. Eyelith Taconite Co., 130 F.3d 1287 (8th Cir. 1997); *see also In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2nd Cir. 1987).

[16] JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA 78–81 (2d ed. 1840).

[17] *Id.*

[18] Smith v. Swormstedt, 57 U.S. 288 (1854).

Federal Rules of Civil Procedure in 1938, and reaching its current form as Rule 23 in 1966.[19]

Rule 23 of the Federal Rules of Civil Procedure allows cases to be certified as class actions so long as they meet the 23(a) certification requirements and fit into one of the three 23(b) categories.[20] Rule 23(a) allows a class to be certified if it satisfies four due process safeguards.[21] First, the class must be so numerous that joinder of all members is impracticable.[22] Second, there must be questions of law or fact that are common to all of the class.[23] Third, the claims or defenses of the representative parties must be typical of the claims or defenses of the class.[24] And finally, the representative party must fairly and adequately represent the interests of the class.[25] The Supreme Court believed that by ensuring that each of these requirements was met due process would not be disregarded for each of the absent members of the class.[26] The rule is a "measured response to the issue of how the due process rights of absentee interests can be protected."[27]

Rule 23(b) describes three different categories, one of which a putative class action must fit into.[28] First, 23(b)(1) allows class actions if separate prosecution of claims would create a risk of either inconsistent judgments or judgments that would substantially impede others' ability to protect their own interests.[29] Rule 23(b)(2) allows class actions in which injunctive or declaratory relief is sought.[30] Lastly, Rule 23(b)(3) is a catch-all category allowing any other class action to be certified if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members," and that a class action is the most efficient and fair way to adjudicate the controversy.[31]

The class action is a distinct tool provided by the Federal Rules of Civil Procedure that allows one or more plaintiffs to bring an action on behalf of a class. Rule 23 has several requirements for a class to be certified, ensuring that the due process rights of absent class members and defendants are not

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[19] Legal Info. Inst., *supra* note 12.
[20] FED. R. CIV. P. 23(a); FED. R. CIV. P. 23(b).
[21] FED. R. CIV. P. 23(a).
[22] FED. R. CIV. P. 23(a)(1).
[23] FED. R. CIV. P. 23(a)(2).
[24] FED. R. CIV. P. 23(a)(3).
[25] FED. R. CIV. P. 23(a)(4).
[26] *In re* GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995).
[27] *Id*.
[28] FED. R. CIV. P. 23(b).
[29] FED. R. CIV. P. 23(b)(1).
[30] FED. R. CIV. P. 23(b)(2).
[31] FED. R. CIV. P. 23(b)(3).

violated. This Note will now look at mass actions and discuss how they compare.

2. Mass Actions

Mass actions and class actions, while both methods for a group of plaintiffs to litigate against a single entity, have some key differences. First, in a mass action, every single plaintiff is a named party to the suit.[32] In class actions, only the plaintiffs that have chosen to represent the class are named parties.[33] A mass action is made up of several lawsuits between each individual plaintiff and the defendant joined together, as opposed to a class action, in which there is only one suit between the class of plaintiffs and the defendant.[34] Second, the certification requirements of class actions (numerosity, commonality, typicality, adequacy of representation, predominance, and superiority) do not apply to mass actions.[35] Often times, a mass tort action is used as the litigation vehicle because the matter was unable to meet the certification requirements to become a class action.[36] Because commonality and typicality are not required for mass actions, the litigation that results could have "significant variations" between each plaintiff's claim,[37] as opposed to class actions that typically result in a "unitary, coherent claim."[38]

B. Personal Jurisdiction Under the Due Process Clause

In 1945, the Supreme Court decided *International Shoe Co. v. Washington*, and with it decided that to subject a defendant to the jurisdiction of the forum, there must be "certain minimum contacts" with the forum state such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[39] A court's assertion of personal jurisdiction exposes the defendant to a State's coercive power, and therefore should be subject to review under the Due Process Clause of the Fourteenth

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[32] Molock v. Whole Foods Mkt, Inc., 297 F. Supp. 3d 114, 126 (D.D.C 2018).

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., No. MDL 09-2047, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017).

[37] Morgan v. U.S. Xpress, Inc., No. 3:17-cv-00085, 2018 WL 3580775, at *5 (W.D. Va. July 25, 2018).

[38] Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

[39] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Amendment.[40] The Due Process Clause guarantees that no State may deprive any person of life, liberty, or property, without due process of law.[41] From the *International Shoe* decision, the concepts of general and specific jurisdiction were born. For a court to exercise general jurisdiction, the defendant's contacts must be so systematic and continuous that the defendant can be sued for any claim in the state.[42] For a court to exercise specific jurisdiction, the claim must arise out of, and relate to, the defendant's specific contact within the forum state.[43] In the years that have passed since *International Shoe*, the doctrines of general and specific personal jurisdiction have been interpreted by the Supreme Court and shifted away from what they once were.

1. General Jurisdiction

As stated in *International Shoe*, general jurisdiction began as a broad grant of jurisdiction based on the idea that a defendant's contact with a state is so systematic and continuous that claims unrelated to the defendant's contacts could be brought there.[44] Quickly though, this broad grant of jurisdiction was narrowed. In 1954, *Perkins v. Benguet Consolidated Mining Co.* held that, when exercising personal jurisdiction over claims that are unrelated to the defendant's contact with the forum state, the issue is whether the contacts made in the state were "sufficiently substantial" and "of such a nature to permit" the state to entertain a cause of action against them.[45] In *Perkins*, the Court found that a Philippine mining company had "sufficiently substantial" contacts with Ohio, the forum state, due to the operations of the company being moved completely to Ohio by the company president.[46] Thirty-two years later, the court returned to the decision in *Perkins* and further defined what kind of substantial and continuous contacts are necessary to create general jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[47] In this case, a Colombia corporation was sued for the wrongful death that resulted from a helicopter crash in Peru. The plaintiffs sued in a Texas district court, and the corporation argued that the Texas courts

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[40] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011) (discussing Int'l Shoe Co. v. Washington).

[41] U.S. CONST. amend. XIV, § 1.

[42] *Int'l Shoe Co.*, 326 U.S. at 317.

[43] *Id.* at 319.

[44] *Id.* at 318.

[45] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952).

[46] *Id.*

[47] Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 418 (1984).

did not have personal jurisdiction over it.[48] The Supreme Court agreed with the defendant, finding that, although the corporation had conducted business negotiations, purchased helicopters in, and taken training trips to Texas, these general business contacts were not sufficiently continuous and systematic to warrant general jurisdiction over it.[49] Together, these two cases helped to define the outer limits of general jurisdiction as falling somewhere between making regular purchases in the state (insufficient, as in *Helicopteros*) and a temporary but complete relocation to the state (sufficient, as in *Perkins*).

The final blows to general jurisdiction came in 2011 and 2014 from two separate cases that greatly reduced its stretch. In 2011, the Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown* held that a foreign corporation was not subject to general jurisdiction in North Carolina, despite the corporation placing its product into the stream of commerce to end up in North Carolina.[50] The opinion stated that for a court to exercise general jurisdiction over a foreign (state or country) defendant, the defendant's "affiliation with the State must be so 'continuous and systematic' as to render them essentially at home in the forum State."[51] The court further states to make clear that for an individual, exercise of general jurisdiction is proper in his or her domicile, and for a corporation, exercise of general jurisdiction is proper in its principal place of business or the place of incorporation.[52] Three years later, the Court held that California could not exercise general jurisdiction over a German corporation despite its U.S. subsidiary being located there in *Daimler AG v. Bauman*.[53] *Daimler* made clear that the use of the terms "continuous and systematic" apply only when the defendant's contacts also give rise to the present claim, therefore, only in specific jurisdiction situations; and, contacts that warrant general jurisdiction must be "continuous" and "so substantial."[54] The court again recognized that only a limited set of affiliations with a state will render a defendant subject to general jurisdiction; for an individual, the state being their domicile, and for a corporation, the state being one in which the corporation is "fairly regarded as at home."[55] This rule is at least partly motivated by the Court's desire to give plaintiffs predictability and provide

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[48] *Id*. at 412.
[49] *Id*. at 418.
[50] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011).
[51] *Id*. at 919.
[52] *Id*. at 924.
[53] Daimler AG v. Bauman, 571 U.S. 117, 139 (2014).
[54] *Id*. at 138.
[55] *Id*. at 137.

at least one clear and certain forum for a corporate defendant to be sued in for any and all claims.[56]

Looking at the *International Shoe* version of general jurisdiction, a defendant could be sued in any state in which they had systematic and continuous contacts.[57] Under this view, a nationwide corporation could have easily been sued in any of the fifty states, so long as they maintained continuous and systematic contacts.[58] Over seventy years later, the general jurisdiction that was once known is gone and has been replaced by the *Goodyear* and *Daimler* standards where a defendant is subject to general jusridiction only if they are being sued in a forum state that is "essentially at home" for them.[59] Some legal scholars have opined that the narrowing in scope of general jurisdiction was necessary—due to the "deep bite" it had—in order to be consistent with the Due Process Clause.[60] They believed that the narrowing in scope of general jurisdiction would be balanced and accompanied by the broadening in scope of specific jurisdiction, a belief that has not yet reached fruition.[61]

2. Specific Jurisdiction

Under *International Shoe*, specific jurisdiction was allowed in cases where the defendant had some contact with the forum state, and the claim arose out of—or was connected with—the activities within the state.[62] The court stated that due process being satisfied depended on the "quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[63]

In 1958, the court laid out its first restraint on specific jurisdiction in *Hanson v. Denckla* by requiring a defendant to "purposefully avail" himself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law."[64] In *Hanson*, the court found

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[56] *Id*.

[57] Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

[58] Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2014).

[59] *See* Goodyear Dunlop Tires Operation, S.A. v. Brown, 564 U.S. 915, 919 (2011); *Daimler*, 571 U.S. at 139.

[60] Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 113 (2014) (*citing* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1143–44, 1177–79 (1966)).

[61] *Id*.

[62] *Int'l Shoe Co*., 326 U.S. at 319.

[63] *Id*.

[64] Hanson v. Denckla, 357 U.S. 235, 254 (1958).

that Florida had no jurisdiction over a trustee or her trust because she had not purposefully availed herself in Florida, she did not have an office in Florida, transacted no business in Florida, held no trust assets in Florida, and solicited no business in Florida.[65] The Court declared that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[66] The Supreme Court clarified the concept of "purposeful availment" in *World-Wide Volkswagen v. Woodson*.[67] The Court addressed two reasons for why the standard was impressed upon specific jurisdiction.[68] First, the Due Process Clause may sometimes act to divest the State of its power to render a valid judgment, even if the defendant would not suffer, by acting as an instrument of interstate federalism; second, it gives a defendant "clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected cost onto customers, or . . . severing its connection with the state."[69] *World-Wide Volkswagen* also outlines the application of specific jurisdiction to situations where a corporation delivers its products into the "stream of commerce" with the expectation that they will reach consumers in the forum State.[70] In these situations, specific jurisdiction is proper, according to *World-Wide Volkswagen*, because the defendant corporation has "purposefully availed" themselves in the state.[71] Finally, the Court defines five important "fairness factors" that should be considered when assessing jurisdiction over a defendant: the burden on the defendant; the forum State's interests in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and, finally, the shared interests of the several States in furthering fundamental substantive social policies.[72]

Several lower courts have required defendants to show that the claims at issue arise out of the defendant's conduct in the forum State, rather than just relating to the conduct, even if the defendant has sufficient contacts to prove that they purposefully availed themselves in the State.[73] While the Supreme Court saw this issue in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, it

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[65] *Id*. at 251.
[66] *Id*. at 253.
[67] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).
[68] Genetin, *supra* note 60, at 115.
[69] *World-Wide Volkswagen Corp.*, 444 U.S. at 297.
[70] *Id*. at 298.
[71] *Id*.
[72] *Id*. at 292.
[73] Genetin, *supra* note 60, at 115–16.

did not resolve it because the plaintiffs conceded that their claims did not arise from or relate to the defendant's contacts with the State, and thus the case was argued and decided on general jurisdiction rules.[74] The question of whether a claim must "arise out of" or "relate to" the defendant's contacts with the state, or even if there is a distinction between the two, remains unsettled.

The most recent limit to specific jurisdiction came from *Walden v. Fiore*.[75] In *Walden*, the Court defines the inquiry of whether a State may assert specific jurisdiction over a nonresident defendant as focusing on "the relationship among the defendant, the forum, and the litigation," and emphasizing that the defendant's suit-related conduct must create a substantial connection with the forum state.[76] The case identifies two related aspects of this relationship: First, the relationship must arise out of contacts that the defendant *himself* creates within the forum state;[77] second, the "minimum contacts" analysis looks to the defendant's contacts with the forum state itself, not the contacts with persons who live there.[78] This point of view shifts the analysis away from the "fairness factors" articulated in *World-Wide Volkswagen*, and the due process liberty interests of defendants, instead looking at it from an interstate federalism point of view by focusing on the "territorial limitations on the power of the respective States[.]"[79]

The simultaneous narrowing of scope of both general and specific jurisdiction has had far reaching implications.[80] Prior to *Goodyear* and *Daimler*, a nationwide corporation could be subject to general jurisdiction in states in which it regularly conducted business due to its continuous and systematic contacts with the forum.[81] These cases limit general jurisdiction over nationwide corporations to the states where they are "essentially at home," almost always meaning the State that they are incorporated in and the State where their principal place of business is.[82] Specific jurisdiction has been equally narrowed, rather than the anticipated broadening of its scope.[83]

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[74] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n.10 (1984).

[75] Walden v. Fiore, 571 U.S. 277 (2014).

[76] *Id*. at 283–84.

[77] *Id*. at 284 (*citing* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

[78] *Id*. at 285 (*citing* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

[79] Genetin, *supra* note 60, at 152 n.363; *Walden*, 571 U.S. at 285 (*citing* Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

[80] McLeod, *supra* note 15, at 738.

[81] Rhodes & Robertson, *supra* note 58, at 214.

[82] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011); Daimler AG v. Bauman, 571 U.S. 117, 139 (2014).

[83] *See generally Goodyear Dunlop*, 564 U.S. at 919; *Daimler*, 571 U.S. at 139.

Hanson and *World-Wide Volkswagen* played a large part in this by requiring defendants to "purposefully avail" themselves in a state in order for that state to exercise specific jurisdiction over them.[84] Additionally, *Walden* added another barrier to specific jurisdiction by having courts look only at the defendant's connection to the state itself to determine specific jurisdiction and shifting the analysis away from established fairness principles.[85]

The now narrow scope of personal jurisdiction helps frame the issue poised by the *BMS* case and the potential effects of it. Nationwide class actions usually depend on a court being able to properly exercise general jurisdiction because the cases typically involve multiple defendants with differing home states, or multiple plaintiffs suffering separate injuries in multiple states, making specific jurisdiction impossible.[86] With the extreme rollback of general jurisdiction and the restriction of specific jurisdiction, the Supreme Court decision in *BMS*[87] ignited panic amongst class action litigators across the county.

III. ANALYSIS

This Note's analysis of whether the *BMS* holding should be applied to class actions begins with a detailed description of the background of the *BMS* case, a discussion of the holding of *BMS*, and a brief discussion of Justice Sotomayor's dissent. Following this is a discussion of how courts have applied the *BMS* holding to class actions since the case was published in 2017.

A. Bristol-Myers Squibb v. Superior Court of California: *A New Limit on Specific Jurisdiction*

1. Background of the *BMS* Case

Bristol-Myers Squibb (BMS) is a large pharmaceutical company that is headquartered in New York, incorporated in Delaware, and maintains substantial operations in New Jersey.[88] The company also has operations in

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[84] Hanson v. Denckla, 357 U.S. 235, 253 (1958); World-Wide Volkswagen v. Woodson, 440 U.S. 286, 294 (1980).

[85] Walden v. Fiore, 571 U.S. 277, 284 (2014).

[86] Rhodes & Robertson, *supra* note 56, at 228.

[87] Bristol-Myers Squibb v. Superior Court, 137 S. Ct. 1773 (2017).

[88] *Id*. at 1777–78.

many other states, including California, where five of the company's research laboratories are located and about four hundred people are employed.[89]

One of the many drugs that BMS manufactures is Plavix, a blood thinner that is used to prevent blood clotting.[90] No part of the development, manufacturing, or marketing of Plavix occurred in California, but the drug is sold in California.[91] Between 2006 and 2012, BMS sold over 187 million pills of Plavix in California, making more than $900 million from these sales.[92] These sales comprise just over 1% of BMS's total sales revenue.[93]

In 2014, a group of 678 plaintiffs, 86 of whom were from California, filed eight separate complaints in the California Superior Court alleging that Plavix had damaged their health.[94] The complaints asserted thirteen different claims under California law, which included products liability, negligent misrepresentation, and misleading advertisements.[95] While the California residents both purchased and were injured by Plavix in California, the plaintiffs who were not residents of California did not claim any connection to the state.[96]

BMS quickly moved to quash the summons on the non-residents' claims, asserting that the California Superior Court did not have personal jurisdiction over it as to these claims, but the trial court did not agree and found that the California courts had general jurisdiction over BMS due to the "extensive activities" BMS engaged in in California.[97] BMS appealed, and the California Court of Appeals agreed with BMS that the California courts did not have general jurisdiction over BMS.[98] Using the *Daimler* test, the extensive activities that BMS had engaged in were not in relation to the claims of non-residents, so general jurisdiction was not proper.[99] However, the California Court of Appeals found that the California courts did have specific jurisdiction over BMS.[100] Again, BMS appealed. The California Supreme Court affirmed the Court of Appeals decision, unanimously agreeing on the general jurisdiction decision, but splitting on the specific jurisdiction

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[89] *Id.* at 1778.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*

decision.[101] The majority opinion applied a "sliding scale approach" to specific jurisdiction.[102] Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[103] By applying this test, the California Supreme Court found that BMS's extensive contacts with California permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiff's claims than might otherwise be required."[104] Three justices dissented, accusing the majority of expanding specific jurisdiction to the point of being indistinguishable from general jurisdiction for many defendants.[105]

2. Supreme Court Decision

The Supreme Court of the United States granted certiorari to determine if the California courts' exercise of personal jurisdiction in the *BMS* case violated the Due Process Clause of the Fourteenth Amendment.[106] The Court delivered an 8-1 majority decision, written by Justice Alito, that disagreed with the California Supreme Court's holding.[107] The Supreme Court found that the "sliding scale approach" used by the California Court had erroneously relaxed the traditional standards of specific jurisdiction.[108] The Court emphasized that an analysis of specific jurisdiction requires a nexus between the claims at hand and the underlying contacts that the defendant had with the jurisdiction, and reiterated the *International Shoe* opinion which stated, "[a] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'"[109] Further, the relationship between BMS, the California residents, and the nonresidents was not sufficient for the California courts to assert personal jurisdiction over BMS.[110] The Court referenced back to *Walden v. Fiore*, and stated that "[t]he mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow

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[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*. at 1779.
[105] Bristol-Myers Squibb v. Superior Court, 377 P.3d 874, 896 (Cal. 2016).
[106] *Bristol-Myers Squibb*, 137 S. Ct. at 1779.
[107] *Id.*
[108] *Id*. at 1781.
[109] *Id*.
[110] *Id*.

the State to assert specific jurisdiction over the nonresidents' claims."[111] The fact that the nonresident claims were identical to the resident claims was immaterial to the personal jurisdiction analysis.[112]

The Court also discussed the variety of interests that must be weighed when making a personal jurisdiction determination.[113] These interests include those of the forum state and the plaintiff, but the Court emphasized that the primary concern is the interests and burden on the defendant.[114] In assessing the burden placed on the defendant, the Court noted that practical problems should be considered, but placed more weight on the interstate federalism concerns that stem from decisions about personal jurisdiction.[115] Quoting *World-Wide Volkswagen*, the Court stated, "even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state . . . the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[116]

Above all else, the Court found that the principal requirement of specific jurisdiction is an underlying connection between the forum state and the claims.[117] Without this connection, there is no proper specific jurisdiction.[118] The Supreme Court found the connection to be nonexistent between BMS's contacts with California and the nonresidents' claims and, therefore, asserting personal jurisdiction over BMS in California violated due process.[119]

3. Justice Sotomayor's Dissent

Justice Sotomayor was the lone dissenter in the *BMS* case. Her dissent expressed her concerns that the *BMS* decision would result in difficulty aggregating claims of nationwide plaintiffs whose claims would be worth little alone, making it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different states.[120] She saw the end result being unnecessary piecemeal litigation and bifurcation of

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[111] *Id*.
[112] *Id*.
[113] *Id*. at 1780.
[114] *Id*.
[115] *Id*.
[116] *Id*. at 1780–81.
[117] *Id*. at 1781.
[118] *Id*.
[119] *Id*.
[120] *Id*. at 1784.

claims.[121] Justice Sotomayor noted that a core concern of the Court in personal jurisdiction cases was fairness, and she felt that there was nothing unfair about subjecting a massive corporation to a suit in a state for nationwide courses of conduct.[122]

Justice Sotomayor noted that Supreme Court precedent had set out three conditions for the exercise of specific jurisdiction: 1) The defendant purposefully availed itself of the privilege of conducting activities within the forum state or purposefully directed its conduct into the forum state; 2) the plaintiff's claim must have arisen out of or related to the defendant's forum conduct; and 3) the exercise of jurisdiction must have been reasonable under the circumstances.[123] Justice Sotomayor believed the majority ignored the reasonableness condition, and had they not then they would have found that California's exercise of specific jurisdiction was proper.[124] The factors that are considered in a reasonableness analysis would include "the burden on the defendant, the forum state's interests in adjudicating the dispute, the plaintiff's interests in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interests of the several States in furthering fundamental substantive social policies."[125]

Justice Sotomayor found it to be clear that BMS had purposefully availed itself in California.[126] She evidenced this through the four hundred people employed by BMS in California and the five research facilities located there.[127] Additionally, she claimed that the marketing and selling of drugs in California are further proof of BMS purposefully availing itself.[128] She also found that the claims of the plaintiffs related to BMS's conduct in California.[129] She argued that the plaintiffs' claims concerned conduct that was materially identical to the conduct that BMS undertook in California, namely marketing and distributing Plavix, which it did in all fifty states.[130] Because all of the plaintiffs alleged that they were injured by the same acts, Justice Sotomayor argued that no further connection was needed.[131]

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[121] *Id*.
[122] *Id*.
[123] *Id*. at 1785–86.
[124] *Id*. at 1786–87.
[125] *Id*. at 1787 (*quoting* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)).
[126] *Id.* at 1786.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*

Lastly, Justice Sotomayor found that there was no question that the exercise of jurisdiction over BMS in California was reasonable.[132] She argued that the alternative—litigating the claims in separate suits in each state—would be unreasonable and impose a greater burden on everyone involved.[133]

Justice Sotomayor noted that the majority's ultimate concern appears to be federalism.[134] She stated that the majority had flipped the conversation on personal jurisdiction to being one of power and not fairness, where even if all the fairness principles lean towards finding jurisdiction, the federalism concerns do not allow it to be so.[135] Justice Sotomayor argued that there is little reason to apply this standard in a case such as this, where a nationwide corporate defendant is being sued for nationwide conduct.[136] No single state has an interest in adjudicating the controversy that the other states do not share.[137] Justice Sotomayor argued that by shifting to this federalism standard, the settled principle of determining jurisdiction through "fair play and substantial justice," established by *International Shoe*, had been set aside.[138]

Justice Sotomayor concluded her dissent by noting the extreme result that the *BMS* decision will have on aggregate claims moving forward.[139] For nationwide consolidated claims, such as the one at hand, plaintiffs now have only two options.[140] They may keep their claims aggregated and sue in the state in which the defendant is "at home", which is likely to be "far flung" and inconvenient for the majority of plaintiffs.[141] Or they must subdivide their claims by state and sue separately, resulting in the risk of inconsistent judgments for essentially the same claims.[142] Additionally, should there be multiple defendants or a foreign defendant who is not "at home" anywhere in the United States, the opportunity to consolidate claims into a nationwide action becomes impossible.[143] In sum, Justice Sotomayor found that the effect of the *BMS* decision, along with previous personal jurisdiction decisions such as *Daimler* that significantly limited general jurisdiction over defendants,[144]

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[132] *Id.*
[133] *Id.*
[134] *Id*. at 1788.
[135] *Id*.
[136] *Id.*
[137] *Id.*
[138] *Id*.
[139] *Id.* at 1788–89.
[140] *Id*. at 1789.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] Daimler AG v. Bauman, 571 U.S. 117 (2014).

was to almost completely eliminate a plaintiff's ability to hold corporations fully accountable for their nationwide conduct.[145] In footnote four to her dissent, Justice Sotomayor raises the question that has haunted personal jurisdiction litigation since the *BMS* decision was published. Does the holding and reasoning in this case also apply to a class action in which a plaintiff injured in the forum state seeks to represent a nationwide class of plaintiffs, not all of whom were injured there?[146]

B. Subsequent Application of Bristol-Myers Squibb *to Class Actions*

Since June of 2017 when the *BMS* opinion was published, countless federal district courts[147] and a few federal appeals courts[148] have confronted the question Justice Sotomayor raised in the footnote to her dissent: Whether the *BMS* decision applies to class actions too. The answers so far have not been unanimous, with each court having a different way of confronting the issue and weighing different legal principles to reach its ultimate decision. Until the Supreme Court decides to revisit the issue (if they do decide to revisit the issue), the opinions from these cases provide the only glimpse into how the Supreme Court may answer the question that has kept many class action litigators up at night worried about the future of their beloved class action.

In general, post-*BMS* litigation has centered on a central distinction, class actions versus mass actions.[149] The different characteristics and treatments of these two types of claims has led to a surplus of discussion. Though most courts center their reasoning on the same principles, the decisions can be categorized into three different holdings: 1) *BMS* has no valid application to class actions, 2) *BMS* is validly applied to named class members, but not to unnamed class members, and 3) *BMS* is validly applied to all members of a class, named or unnamed.[150] The class/mass distinction and the issues that follow are discussed below, followed by a discussion of the three categories of holdings each decision falls into.

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[145] *Bristol-Myers Squibb*, 137 S. Ct. at 1789.

[146] *Id*. at 1789 n.4.

[147] *E.g.*, Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815 (N.D. Ill. 2018); Dolan v. JetBlue Airways Corp., 385 F. Supp. 3d 1338 (S.D. Fla. 2019); Prac. Mgmt. Support Services, Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018).

[148] *E.g.*, Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020).

[149] Wilf-Townsend, *supra* note 6, at 215.

[150] McLeod, *supra* note 15, at 745.

1. The Class Action vs. Mass Action Distinction

As discussed previously in this Note, while appearing similar on their faces, mass actions and class actions have some distinct characteristics that could potentially have an impact on how specific jurisdiction is applied to each.[151] Most importantly to judges, mass actions consist of consolidated claims by many plaintiffs against (usually) a single defendant. Alternatively, Rule 23 class actions consist of a named plaintiff, or multiple named plaintiffs, that *represent* a class of unnamed plaintiffs against (usually) a single defendant. While nuanced, this difference is key to a large majority of judges when determining if *BMS* applies to class actions.[152] While almost every court can agree that the requirements of personal jurisdiction apply to named plaintiffs, whether in a class action or in a mass action, the courts cannot agree on how personal jurisdiction should be determined in regard to the unnamed plaintiffs of a class action. The decisions that turn on this distinction are usually based on the 2002 Supreme Court case *Devlin v. Scardelletti*, which held that unnamed class members in class action suits can be "parties for some purposes and not for others."[153] The decisions also often reference constitutional due process concerns for mass actions and how they compare with the due process safeguards put in place by Rule 23 of the Federal Rules of Civil Procedure.[154] This section will begin by discussing the *Delvin v. Scardelletti* case and its impact on the mass action/class action distinction, and will follow with a discussion of the constitutional due process analysis and its impact on the mass action/class action distinction. Within each section, cases from federal district and circuit courts will be presented that used these legal theories and case holdings to come to a decision as to whether *BMS* is properly applied to class action litigation.

a. Devlin v. Scardelletti *and Its Impact*

While cited often in *BMS*-related litigation, *Devlin v. Scardelletti* is not a case that concerns personal jurisdiction at all. Instead, *Devlin* presented a situation where an unnamed class member was denied the power to challenge the fairness of a settlement on appeal due to lack of standing because he was

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[151] *See supra* Part II.A.
[152] Wilf-Townsend, *supra* note 6, at 215.
[153] Devlin v. Scardelletti, 536 U.S. 1, 10 (2002).
[154] Wilf-Townsend, *supra* note 6, at 217.

not a named representative of the class.[155] The Supreme Court reversed the Fourth Circuit's decision and held that, when a district court approves a settlement for a class action after a fairness hearing, an individual who is not a named representative (such as Mr. Devlin in this case), and who objects in a timely manner to the settlement's approval has the power to appeal the district court's decision to disregard unnamed member's objections without first intervening in the action.[156] In coming to this decision, the Court made a statement of law that has had effect far beyond the main holding of the case: "Nonnamed class members . . . may be parties for some purposes and not for others."[157] The Court stated that the label of "party" is not an absolute characteristic, but rather a conclusion on the applicability of various procedural rules depending on the context.[158] The Court gave the example that unnamed class members are considered "parties" under the federal rules when it comes to statutes of limitations being tolled for them when an action is filed on behalf of the class.[159] The Court gave a counter-example as well, that unnamed class members cannot defeat complete diversity and therefore are not considered "parties" by a court in a diversity analysis.[160] The Court emphasized that, in both of these situations, the differing characterizations of "party" is justified by the goal of class action litigation, namely simplifying litigation involving large numbers of litigants with similar claims.[161] Holding otherwise would require each member to intervene in an action to prevent their individual claim from being barred by statutes of limitations, or would render federal class action claims not based on federal question impossible in most situations and require determination of citizenship for every class member, many of whom are not even known at the time that the action is filed.[162] In *Devlin*, the Court determined that in the case of unnamed class members being able to appeal decisions about class settlements, the fact that the settlement binds the unnamed members and affects their interests requires a court to find that an unnamed class member should be considered a "party," and thus able to object to and appeal the settlement decision, as this is their only means to protect themselves from being bound in a disposition of their rights that they find unacceptable.[163]

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[155] *Devlin*, 536 U.S. at 1.

[156] *Id.* at 15.

[157] *Id.* at 9–10.

[158] *Id.* at 10.

[159] *Id.* (*citing* American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974)).

[160] *Id.* (*citing* 7A C. WRIGHT, A. MILLER, & M. CANE, FEDERAL PRACTICE AND PROCEDURE § 1755 (2d ed. 1986)).

[161] *Id.*

[162] *Id.*

[163] *Id.* at 10–11.

Justice Scalia was the lone dissenter in *Devlin* and expressed concerns that the decision was counter to well-established law that defines "parties" to a judgment as those named as such, as either original plaintiff or defendant in the complaint giving rise to the judgment, or by becoming a party by intervention, substitution, or third-party practice.[164] Justice Scalia quoted the Restatement (Second) of Judgments which states, "[a] person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action,"[165] and:

> the designation of persons as parties is usually made in the caption of the summons or complaint but additional parties may be named in such pleadings as a counterclaim, a complaint against a third party filed by a defendant, or a complaint in intervention.[166]

He noted that in a class action, the only members typically named in the complaint are the class representatives, and thus only these representatives, the named defendants, and those who intervene or otherwise enter the suit should be considered parties to the judgment.[167] Justice Scalia pushed back against the majority's opinion that Supreme Court precedent has "never restricted the right to appeal to named parties to the litigation," and found that, in each prior case that this was allowed, the unnamed party to the action was appealing a collateral order to which they were a named party, not a judgment for the underlying class action to which they were not a named party.[168] He countered the majority's other grounds for their decision as well, finding that the majority's contention that an unnamed class member "should be considered a party to the judgment because as a member to the class he is bound by it," was not supported by current law.[169] He, again, references the Restatement (Second) of Judgments, in § 41—titled Persons Represented by a Party—which lists several examples of persons who are bound by a judgment despite not being parties to the litigation, one of which explicitly describes the nature of the unnamed class member situation found in *Devlin*.[170]

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[164] *Id*. at 15 (*quoting* Karcher v. May, 484 U.S. 72, 77 (1987)).

[165] *Id*. (*quoting* RESTATEMENT (SECOND) OF JUDGMENTS § 34 (1980)).

[166] *Id*. (*quoting* RESTATEMENT (SECOND) OF JUDGMENTS § 34 cmt. a (1980)).

[167] *Id*.

[168] *Id*. at 16–17 (*citing* Blossom v. Milwaukee & Chicago R. Co., 68 U.S. 655 (1864); Hinckley v. Gilman, C., & S. R. Co., 94 U.S. 467 (1877); United States Catholic Conf. v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988)).

[169] *Id.* at 18.

[170] *Id*. at 10 (*citing* RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1980)).

> A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is…The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is member.[171]

The holding from *Devlin*, that unnamed class members can be parties for some purposes but not for others, has given lower courts more freedom in deciding whether a court must have personal jurisdiction over claims of all non-resident unnamed class members.[172] *Delvin* did not proscribe a rule or test for lower courts to follow in determining when unnamed members are parties and when they are not, but instead offered that the determination is context-dependent and based on if the "goals of class action litigation" are properly served by the party classification.[173] As summarized by the Congressional Research Service in "Class Action Lawsuits: A Legal Overview for the 115th Congress," the goals of class action litigation include: 1) economizing litigation, 2) aggregation of individual claims, and 3) protecting defendants from inconsistent judgments.[174]

Several cases that have litigated application of *BMS* to class actions have been decided by federal district court judges, at least in part, through reliance on the holding of *Devlin*. For example, *Knotts v. Nissan North America, Inc.*[175] used *Devlin*'s emphasis on serving the goals of class action litigation when determining whether *BMS* applied. The court held that "[t]he efficient administration of class actions would be compromised by requiring the Court to make personal jurisdiction determinations for every named and potential unnamed plaintiff, particularly at the outset of litigation."[176] This holding led the court to find that unnamed class members are not "parties" when pertaining to personal jurisdiction considerations, and thus *BMS* is not applicable to class action litigation.[177] *Al Haj v. Pfizer Inc.*[178] expanded on the *Devlin* holding and listed several areas of civil procedure where absent class members are not considered parties, including being excluded from the calculation of the amount in controversy for class actions brought under the

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[171] RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) (1980).

[172] Wilf-Townsend, *supra* note 6, at 217 (*citing Devlin*, 536 U.S. at 10).

[173] *Id*. (*citing Devlin*, 536 U.S. at 10).

[174] KEVIN M. LEWIS & WILSON C. FREEMAN, CONGR. RSCH. SERV., CLASS ACTION LAWSUITS: A LEGAL OVERVIEW FOR THE 115TH CONGRESS 3–4 (2018), https://sgp.fas.org/crs/misc/R45159.pdf [https://perma.cc/2H4Q-3CSR].

[175] Knotts v. Nissan North America, Inc., 346 F. Supp. 3d 1311 (D. Minn. 2018).

[176] *Id*. at 1335.

[177] *Id*.

[178] Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815 (N. D. Ill. 2018).

Class Action Fairness Act,[179] not needing Article III standing to be a part of the class,[180] and not being included when determining venue.[181] The court in *Al Haj* found that personal jurisdiction shares a "key feature" with these doctrines: They all govern a court's ability to adjudicate a particular person's or entity's claim against a particular defendant.[182] The court found that because unnamed class members are "along for the ride," it makes logical sense that they not be considered "parties" for the purpose of constitutional and statutory doctrines that decide whether a court has the power to adjudicate their claims.[183] Additionally, the court found that there is a distinct lack of precedence for treating unnamed class members as parties for determining personal jurisdiction prior to *BMS*.[184] Thus, the court in *Al Haj* came to the same conclusion as the court in *Knotts*, finding that unnamed class members should not be characterized as parties for purposes of personal jurisdiction.[185]

b. Constitutional Due Process Analysis and Its Impact

As stated previously in this Note, personal jurisdiction is grounded in due process principles.[186] The Due Process Clause of the Fourteenth Amendment of the Constitution reads, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."[187] *International Shoe* set the standard of due process in personal jurisdiction in 1945 by requiring that for a defendant to be subjected to the jurisdiction of a forum, they must "have certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [188] While personal jurisdiction, both specific and general, has evolved throughout the years,[189] courts have been cognizant of keeping its bounds within the requirements of the Due Process Clause.

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[179] *Id*. at 820 (*citing* 28 U.S.C. § 1332(d); Snyder v. Harris, 394 U.S. 332 (1969)).

[180] *Id*. (*citing* Neale v. Volvo Cars of North America, LLC, 794 F.3d 353 (3d Cir. 2015)).

[181] *Id*. (*citing* Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURES § 1757 (3d ed. 2018) (stating that "[t]he general rule is that only the residence of the named parties is relevant for determining whether venue is proper")).

[182] *Id*.

[183] *Id*.

[184] *Id*. at 818–19.

[185] *Id*. at 819.

[186] *Supra* Part II.B.

[187] U.S. CONST. amend. XIV.

[188] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[189] *Supra* Part II.B.

In analyzing the due process considerations posed by applying *BMS* to class action lawsuits, many courts have rested on the notion that Federal Rule 23[190] ensures due process protection in the context of class actions, which sets them apart from mass actions and the *BMS* holding.[191] The procedures that Rule 23 requires to certify a class action are believed to protect both absent class members' due process rights as well as the due process rights of defendants.[192] For example, Rule 23(b)(3) requires that questions of law or fact common to all class members predominate over any questions affecting individual members.[193] This requirement ensures that defendants are only defending against a single unitary claim, rather than various vaguely related claims, which mitigates any due process burdens put on them.[194] In *Jones v. Depuy Synthes Products*, the court found that this distinction between class actions and mass actions was critical to determining if *BMS* should be applied to class actions.[195] The court compared the true class action suit before it with the mass action claim that *BMS* presented, finding that the risk to the defendant of having to defend itself against a unique claim for each plaintiff in the *BMS* mass action justified the limit on specific jurisdiction that the court created.[196] The *Jones* court found that no such risk was present in the class action before it, or any other class action, due to the protections provided by Rule 23.[197] The court in *Sanchez v. Launch Tech. Workforce Solutions, LLC*[198] agreed with the court in *Jones*, finding that in situations where the defendant must already litigate the very similar claims of in-state plaintiffs in a particular state, there is little hardship added for the defendant to litigate the claims of out-of-state plaintiffs in that state as well, given that Rule 23 protections will limit the claims such that the final nationwide class action is "unitary and coherent."[199] Both of the courts in *Jones* and *Sanchez* came to the conclusion that the Rule 23 certification requirements provide enough protection, to both the unnamed, absent class members and the defendant, that the due process concerns present in *BMS* and other mass

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[190] FED. R. CIV. P. 23.

[191] *E.g.*, Jones v. Depuy Synthes Prods., Inc., 330 F.R.D. 298, 312 (N.D. Ala. 2018); Swinter Group, Inc. v. Service of Process Agents, Inc., No. 4:17-CV-2759, 2019 WL 266299, at *5 (E.D. Mo. Jan. 18, 2019).

[192] *Depuy Synthes Products*, 330 F.R.D. at 312.

[193] FED. R. CIV. P. 23(b)(3).

[194] *Depuy Synthes Products*, 330 F.R.D. at 312.

[195] *Id*. at 311.

[196] *Id*. at 311–12.

[197] *Id*. at 312.

[198] Sanchez v. Launch Tech. Workforce Solutions, LLC , 297 F. Supp. 3d 1360 (N.D. Ga. 2018).

[199] *Id*. at 1366.

actions are prevented and mitigated, and application of the *BMS* holding is not warranted in class action suits.[200]

There have been several cases that have returned the opposite verdict from *Jones* and *Sanchez* despite also using due process as their main reasoning.[201] Many of these cases refer to the principle that a defendant's due process rights should stay the same no matter what type of suit is against them, be it an individual suit, a mass action, or a class action.[202] The court in *Leppert v. Champion Petfoods USA Inc.* conceded that the due process concerns are considerably less for a class action than for a mass action, but held that the general principle that *BMS* stands for—that due process requires a connection between the forum state and the specific claims at issue—still applies to out-of-state claims in a multistate class action brought in federal court.[203] A few courts have utilized the Rules Enabling Act[204] in order to apply *BMS* to class actions. The Rules Enabling Act was enacted in 1934 and gives the Supreme Court the power to prescribe general rules of practice and procedure and rules of evidence for the United States District Courts and Courts of Appeals, so long as the rules that are prescribed do not "abridge, enlarge, or modify any substantive right."[205] Some courts have found that if a defendant's due process rights would preclude a claim from being brought by individuals without the class action vehicle, it would be a violation of the Rules Enabling Act for Rule 23 class actions to allow the claim, as it would abridge the due process rights of defendants.[206] *Practice Management Support Services v. Cirque Du Soleil, Inc.*[207] was one such case that used this line of reasoning. That court noted that *BMS* precluded non-resident plaintiffs that were injured outside the forum from aggregating their claims in a mass action with an in-forum resident in an effort to ensure the defendants' due process rights remained intact, and held that under the Rules Enabling Act the due process rights of defendants should remain the same in the class action context.[208]

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[200] *Depuy Synthes Products*, 330 F.R.D. at 312; *Sanchez*, 297 F. Supp. 3d at 1366.

[201] *E.g.*, Leppert v. Champion Petfoods USA Inc., No. 18 C 4347, 2019 U.S. Dist. LEXIS 7585, at *12 (N.D. Ill. Jan. 16, 2019); America's Health & Res. Center, Ltd. v. Promologics, Inc., No. 16 C 9281, 2018 WL 3474444, at *7 (N.D. Ill. July 19, 2018).

[202] *Leppert*, 2019 WL 216616, at *12.

[203] *Id*.

[204] 28 U.S.C. § 2072.

[205] *Id*.

[206] Wilf-Townsend, *supra* note 6, at 218.

[207] Practice Mgmt. Support Services v. Cirque Du Soleil, Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018).

[208] *Id*. at 861.

2. The Three Categories of Holdings

a. BMS *has no valid application to class actions.*

Several courts have determined that there is no valid application of the *BMS* holding to class actions.[209] Most of these cases focus on the material distinctions between class and mass actions discussed above.[210] Several courts grounded their opinion simply on the fact that *BMS* was a mass action and therefore it had no application to class actions.[211] Other courts dove deeper into the analysis and followed the reasoning discussed above: Class actions benefitted from the Rule 23 requirements that protect due process rights, and therefore do not require the *BMS* holding to ensure that unnamed class members' and defendants' rights are preserved.[212]

Another rationale offered by several courts that refused to apply *BMS* is that the federalism concerns discussed in the *BMS* decision are not brought up in federal class action litigation.[213] *BMS* was a state case and the personal jurisdiction analysis that results from that is at least partially affected by interstate federalism and the interest that each state has in adjudicating a particular case.[214] In federal class actions, these federalism concerns are not implicated due to Rule 23 effectively handling any conflicts of law, no state having an interest in the dispute greater than another.[215]

b. BMS *is validly applied to named class members, but not unnamed class members.*

A few courts have taken the *BMS* holding and applied it to class actions in order to provide additional due process protection to defendants in class actions, while still acknowledging the due process safeguards that Rule 23

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[209] *E.g.*, Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc., No. 17-cv-00564 NC, 2017 WL 4224723 (N.D. Ill. Aug. 22, 2017); Chinese-Manufactured Drywall Prod. Liab. Litig., No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017).

[210] *Supra* Part III.B.1.

[211] *See Chinese-Manufactured Drywall*, 2017 WL 5971622, at *2–4 (E.D. La. Nov. 30, 2017) ("*Bristol-Myers Squibb* is not a change in controlling due process law, does not apply to federal class actions, and Congress and the courts have generally approved of using class actions.").

[212] Mussat v. IQVIA, Inc., 953 F.3d 441, 445–48 (7th Cir. 2020) (detailed discussion as to why *BMS* is not properly applied to class actions).

[213] McLeod, *supra* note 15, at 747.

[214] Wilf-Townsend, *supra* note 6, at 220.

[215] *Chinese-Manufactured Drywall*, 2017 WL 5971622, at *20.

has in place for unnamed class members.[216] These courts have declined to apply *BMS* to the unnamed class members, but have found that the central holding of *BMS*—that there must be an affiliation between the forum and the underlying controversy—should apply to every named class member. These courts have invoked *Devlin v. Scardelletti*[217] and held that named class members are parties for procedural purposes, therefore personal jurisdiction analysis should be conducted on their claims.[218]

A court in the Northern District of Illinois used this application of *BMS* in the case *Al Haj v. Pfizer Inc.*[219] In *Al Haj*, two named representatives, Al Haj and Woodhams, were seeking to certify a class for an action against Pfizer for alleged violations of several states' consumer protection laws.[220] Al Haj was a resident of Illinois and Woodhams was a resident of Michigan. Pfizer sought a dismissal of Woodhams's claims due to lack of personal jurisdiction on the basis that none of the events that led to Woodhams's action against Pfizer occurred in Illinois.[221] The *Al Haj* court agreed with Pfizer and dismissed Woodhams's claim, finding that despite having an identical claim to an Illinois resident, Woodhams's claim had no nexus between Pfizer's activities in Illinois and his injury.[222]

c. BMS *is validly applied to every member of the class, named or unnamed.*

Finally, several courts have applied the *BMS* holding to all class members in a class action, whether they are absent or named.[223] There are three major rationales that these courts have advanced in favor of applying *BMS* in this way: 1) federalism concerns, 2) challenges to Rule 23 under the Rules Enabling Act, and 3) forum shopping concerns.[224]

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[216] *E.g.*, Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 741 (N.D. Ill. 2018); Sumsung Galaxy Smartphone Mktg. & Sales Practices Litig., No. 16-cv-06391-BLF, 2018 WL 1576457 (N.D. Cal. Mar. 30, 2018).

[217] Devlin v. Scardelletti, 536 U.S. 1 (2002).

[218] *Al Haj*, 338 F. Supp. 3d at 752.

[219] *Id.* at 741.

[220] *Id*. at 746–47.

[221] *Id.*

[222] *Id*. at 753.

[223] Mussat v. IQVIA, Inc., No. 17 C 8841, 2018 WL 5311903 (N.D. Ill. Oct. 26, 2018) (reversed and remanded by Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020)); Greene v. Mizuho Bank Ltd., 289 F. Supp. 3d 870 (N.D. Ill. 2017); Practice Mgmt. Support Services v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840 (N.D. Ill. 2018).

[224] McLeod, *supra* note 15, at 750.

In *DeBernardis v. NBTY Inc.*,[225] the court stated, "based on the Supreme Court's comments about federalism . . . the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in a form, such as in this case, where there is no general jurisdiction over the Defendants."[226] Other courts have shared this sentiment and found that the federalism concerns in *BMS* are equally present in nationwide class actions. The court in *Chavez v. Church & Dwight Co.* seemed to suggest that *BMS* should be used as a tool to either limit nationwide class actions to the states of general jurisdiction or handle the cases in individual states where only one applicable law could be applied.[227]

As discussed above,[228] the Rules Enabling Act has been one of the most commonly used arguments for supporting application of *BMS* to class actions. The Rules Enabling Act requires that the Federal Rules of Civil Procedure cannot "abridge, enlarge, or modify any substantive right" of parties to a lawsuit.[229] Many courts have suggested that allowing class actions to circumvent personal jurisdiction analysis through the Rule 23 requirements abridges a substantive right of defendants, and therefore violates the Rules Enabling Act.[230]

The final rationale courts have often used to support application of *BMS* to all class members revolves around the concern courts have for forum shopping.[231] In *BMS*, at least a small part of the decision was based on the Court's concern that a large number of non-California resident plaintiffs were bringing their case in the California courts due to the favorable consumer protection laws there.[232] Many courts that have considered applying *BMS* to class actions have found that the same concerns are present.[233]

Something to note about the majority of the cases that fully apply *BMS* is that almost all of them have either come from the same court, the Northern District of Illinois, or have based their holdings on earlier cases from the Northern District of Illinois. At first glance, it may seem that there are a multitude of opinions that support this application of *BMS*, but in reality there are likely only a few judges in Northern Illinois that truly feel this way. A

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[225] DeBernardis v. NBTY Inc., No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018).

[226] *Id.*

[227] Chavez v. Church & Dwight Co., No. 17 C 1948, 2018 WL 2238191 (N.D. Ill. May 16, 2018).

[228] *Supra* Part III.B.1.b.

[229] 28 U.S.C. § 2072 (2020).

[230] Mussat v. IQVIA, Inc., No. 17 C 8841, 2018 WL 5311903 (N.D. Ill. Oct. 26, 2018).

[231] *Id.*

[232] Bristol-Myers Squibb v. Superior Court, 137 S. Ct. 1773, 1781 (2017).

[233] DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018) ("There is also the issue of forum shopping . . . as a basis for distinguishing mass torts from class actions, but possible forum shopping is just as present in multi-state class actions.").

2019 qualitative survey of the post-*BMS* decisions found that between June 2017 and September 2019, there were fourteen decisions that held that *BMS* was validly applied to class actions.[234] Of those fourteen decisions, eleven of them were from the Northern District of Illinois and four of them were from the same judge.[235]

IV. RESOLUTION

While Supreme Court Justice Alito found his words in *Bristol-Myers Squibb v. Superior Court* to be a "straightforward application . . . of settled principles of personal jurisdiction,"[236] much of the class action litigation world was startled by the opinion.[237] In the more than three and a half years since the decision, attorneys and large corporate entities that are commonly the defendants in nationwide class actions have waited and watched as the federal courts have considered the issue. As federal district courts delivered differing opinions on the matter, a strong majority opinion emerged: *BMS* does not apply to class actions.[238] A few of these cases made their way to the federal courts of appeals.[239] While the D.C. and Fifth Circuits found ways to avoid the issue,[240] the Seventh Circuit ruled decisively that the *BMS* holding did not apply in *Mussat v. IQVIA*.[241] In January of 2021, the Supreme Court denied certiorari of the *Mussat* case, allowing the debate of whether to apply *BMS* to class actions to rage on.[242]

Courts that have applied the *BMS* decision to class actions have done so under the guise of federalism concerns, preventing violation of the Rules Enabling Act, and preventing forum shopping.[243] These concerns are unnecessary. When crafting and recrafting the Class Action mechanism in the Federal Rules of Civil Procedure, the authors took into consideration these potential problems and built in provisions to protect against them.[244]

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[234] Wilf-Townsend, *supra* note 6, at 213.

[235] *Id*.

[236] *Bristol-Myers Squibb*, 137 S. Ct. at 1783.

[237] Levick, *supra* note 2; Channick & Yerak, *supra* note 2.

[238] Wilf-Townsend, *supra* note 6, at 213.

[239] Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020); Mussat v. IQVIA, 953 F.3d 441 (7th Cir. 2020); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020).

[240] *Molock*, 952 F.3d 293 (held that deciding whether *BMS* applied was premature when the class was not yet certified); *Cruson*, 954 F.3d 240 (held that the merits of a jurisdictional appeal could not be addressed for the first time on appeal).

[241] *Mussat*, 953 F.3d at 448.

[242] *Id., cert. denied*, 141 S. Ct. 1126 (2021).

[243] *Supra* Part III.B.2.c.

[244] Newton v. Merrill Lynch, Pierre, Fenner & Smith, Inc., 259 F.3d 154, 182 n.27 (3d Cir. 2001).

The federalism concerns are handled by both the *Erie* Doctrine and Rule 23 requiring that class actions be adjudicated using the respective law that applies to each class member, and the Class Action Fairness Act allowing for filing and easy removal of class actions to federal court to avoid the sway of state courts.[245] When the *Erie* Doctrine analysis is applied to nationwide class action cases in federal court, the result is that courts are unable to apply just one state's law to the entire class and, instead, the appropriate substantive law is applied to each individual class member.[246] Additionally, the Rule 23 certification of a class requires that "questions of law or fact [must be] common to class members,"[247] which allows a class to not be certified if the difference between state laws is too much. Mass actions, like the *Bristol-Myers Squibb* case, don't have these same protections and therefore the federalism issue of California adjudicating controversies that emerged from other states was implicated and needed curing. There is no such possibility of a state overreaching its judicial authority in class actions.

The Rules Enabling Act argument is equally unpersuasive. The Supreme Court has continuously affirmed Rule 23's validity under the Rules Enabling Act.[248] Most recently, in 2010, the Supreme Court held that when Federal Rules of Civil Procedure are challenged under the Rules Enabling Act, the rule is valid if it regulates "the manner and the means" by which litigants' rights are enforced, and not valid if it regulates "the rules of decision by which [the] court will adjudicate [those] rights."[249] Using this test, the Supreme Court has rejected every statutory challenge to a federal rule, even when the rule in question has a practical effect on parties' rights.[250] The Court found that Rule 23 (and other rules that allow multiple claims to be joined together) do not violate the Rules Enabling Act because they only modify how claims are processed and have no effect on a plaintiff's entitlement to relief or abridge any defendants' rights.[251] This rationale can be extended to resolve the *BMS* application issue as well. As stated above, a federal rule violates the Rules Enabling Act only if it changes the rules of decisions by which the court will adjudicate rights.[252] Rule 23 has no such effect. Personal jurisdiction analysis must still be applied in class actions and differs from mass actions in that only named class members are subjected to the analysis.

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[245] 28 U.S.C. § 1453 (2020).
[246] McLeod, *supra* note 15, at 756.
[247] FED. R. CIV. P. 23(a)(2).
[248] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).
[249] *Id*. at 406 (*quoting* Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 446 (1946)).
[250] *Id*. at 407–08.
[251] *Id*. at 408.
[252] *Id*. at 407–08.

This difference in procedure has no effect on how the court will adjudicate the rights of the parties.

Forum shopping was a major concern of the Supreme Court in *BMS* and seemed to be one of the reasons behind the Court's holding in that case.[253] The Court notes in its conclusion that the case would have been perfectly valid had it been brought in a state that had general jurisdiction over Bristol-Myers Squibb, e.g., New York or Delaware.[254] Implied is the Court's understanding that the case was brought in California in order to take advantage of California's consumer protection laws. The potential for forum shopping in nationwide class actions, though, is not as prevalent. The Class Action Fairness Act was created to specifically combat the dangers of class action forum shopping and does so by allowing easier filing in and removal of class actions to federal courts which prevents the sway of certain state courts that may seem more advantageous to plaintiffs.[255] Additionally, the choice of law analysis done at the certification stage that requires the court to apply the appropriate state law to each plaintiff mitigates the threat of a class choosing to bring a class action in a state based solely on advantageous laws.

In sum, there is no valid rationale for extending the holding in *BMS*—that state courts lack jurisdiction over non-resident plaintiffs' claims that did not arise from, or relate to, the defendant's contacts with the state—to unnamed class members in a class action. The rationales proffered by courts that have attempted to do so are easily mitigated by the Rule 23 requirements, the *Erie* Doctrine, and the Class Action Fairness Act.

V. CONCLUSION

In *Bristol-Myers Squibb*, the Supreme Court correctly diagnosed and remedied the issue of non-resident plaintiffs joining with resident plaintiffs in a mass action against a non-resident defendant and how it offended the due process rights of the defendant. The same cannot be said for class action defendants. Rule 23 of the Federal Rules of Civil Procedure provides an aggressive protection of due process rights for both unnamed class member and defendants in class action suits through its certification requirements.[256] Should the holding be applied to class actions, nationwide groups of plaintiffs seeking to hold large corporations accountable would only be able to sue in

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[253] *See* Bristol-Myers Squibb v. Superior Court, 137 S. Ct. 1773 (2017).

[254] *Id*. at 1783.

[255] *See* S. REP. NO. 109-14, at 10–21 (2005); 28 U.S.C. § 1332(d)(2)(A)–(C) (2020); 28 U.S.C § 1453 (2020); 28 U.S.C § 1711–15 (2020).

[256] *Supra* Part III.B.1.b.

a state that the defendant is "at home" in, or would have to subdivide by state and sue separately. Ultimately, both of these options create a more inefficient judicial system and would place a larger burden on both the defendant and the plaintiffs. Though federal district courts have been split on the decision for a variety of reasons, early courts of appeals cases lean towards recognizing that the key differences between mass and class actions require the *BMS* holding not be applied to class actions. Unfortunately, the answer will remain unclear until more circuits address the question head-on, or the Supreme Court revisits the issue.[257]

[257] On January 11, 2021, the Supreme Court denied certiorari in *Mussat v. IQVIA*, the only court of appeals case that has issued a decisive opinion on the issue. 953 F.3d 441, 448 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021).