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Advisory | Class Action Litigation

June 2020

The Perpetuation of Class-Action Forum Shopping? Federal Circuits Address Whether Courts Need Personal Jurisdiction to Hear Nationwide Class Actions

In less than two years, nearly 60 federal district courts have grappled with a previously unaddressed issue — are class actions exempt from personal-jurisdiction scrutiny? This river of litigation springs from the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*.[1] *Bristol-Myers Squibb* involved a "mass tort" where all plaintiffs asserted identical personal injury claims against a defendant. The Court ultimately dismissed all the non-California residents' claims (representing over 87% of the total plaintiffs) because their claims had no factual connection to California.

Within weeks of that decision, defendants across the country began challenging federal courts' jurisdiction to hear nationwide class actions on similar grounds. The issue raised is novel and the legal considerations are complex. But the question itself is succinct: Does a federal court have personal jurisdiction as to nonresident, unnamed class members' claims when the court would otherwise lack personal jurisdiction if those claims were brought individually?

[1] 137 S.Ct. 1773 (2017).

Four federal circuits have now grappled with this question, with markedly different results. The Seventh Circuit addressed the issue head on, holding that the Federal Rules of Civil Procedure do not require courts to have personal jurisdiction over unnamed class members, at least for claims asserted under federal law. The D.C. Circuit and Fifth Circuit held that, before class certification, courts cannot determine whether they have personal jurisdiction as to claims asserted on behalf of nonresident putative class members. In contrast, the Sixth Circuit indicated that a defendant may waive the issue by not raising it until class certification. With these disparate rulings, this question is now one step closer to a likely resolution by the Supreme Court.

EXECUTIVE SUMMARY

The Supreme Court's decision in *Bristol-Myers Squibb* could critically reshape nationwide class actions litigation and potentially end forum-shopping by plaintiffs. But as more district courts and appellate circuits reach different conclusions as to *Bristol-Myers Squibb's* impact, class action defendants with potential challenges to personal jurisdiction must be cognizant of the shifting landscape. This paper addresses the substance of district courts' diverging opinions, the outcome of four federal appeals, and the potential implications for nationwide class actions going forward. While the dust settles, defendants should consider raising and preserving potential personal jurisdiction arguments at the earliest opportunity, or else risk waiving the defense.

OVERVIEW OF PERSONAL JURISDICTION

Bristol-Myers Squibb is one in a series of recent Supreme Court opinions that have significantly clarified—and arguably redefined—the standards for analyzing personal jurisdiction. This recent trend helps explain both *Bristol-Myers Squibb*'s analysis, as well as the lack of historical precedent applying personal-jurisdiction jurisprudence to class actions.

I. PERSONAL JURISDICTION IN A NUTSHELL.

Personal jurisdiction, like subject-matter jurisdiction, is a limit on a court's authority to hear certain claims. Although subject-matter jurisdiction limits the "classes of cases" that might be brought in a given court, personal jurisdiction limits the "persons . . . falling within a court's adjudicatory authority."[2] Subject-matter jurisdiction—at least for federal courts—is rooted in Article III of the Constitution and related federal statutes.[3] Personal jurisdiction, by contrast, is rooted in the Due Process Clauses of both the Fifth and Fourteenth Amendments, precluding a court from exercising jurisdiction over a defendant in a manner that offends "traditional notions of fair play and substantial justice."[4]

Another key distinction between personal jurisdiction and subject-matter jurisdiction is that personal jurisdiction can be waived if not timely raised. It is well established that a party — or even a court *sua sponte* — can raise the lack of subject-matter jurisdiction at any time, even on appeal. By contrast, personal jurisdiction is waivable, and the defendant generally must raise the issue in the first responsive pleading.[5]

Personal jurisdiction comes in two distinct forms — general or specific. General personal jurisdiction, also known as "all-purpose" jurisdiction, exists only when a defendant is "at home" in a given forum. For a

[2] *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).
[3] *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).
[4] *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
[5] *See* Fed. R. Civ. P. 12(b)(2).

natural person, a defendant is at home in the state where they reside.[6] For a corporation, general jurisdiction exists in both the state where the company is considered to be "at home," which is now defined to be where the corporation is incorporated and the state where it maintains its principal place of business.[7] If general jurisdiction exists, a defendant may be sued for any claim, regardless of whether the plaintiff or any relevant facts have any connection to that forum.

If general jurisdiction does not exist, a court must have specific personal jurisdiction. Specific jurisdiction, also known as case-linked jurisdiction, exists when the suit arises out of or relates to the nonresident defendant's contacts within the forum. "In other words, 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."[8] Specific jurisdiction focuses on the *defendant's contact with the forum* and whether those contacts are connected to the underlying suit.

II. RECENT TREND TOWARD STRICT ENFORCEMENT OF PERSONAL JURISDICTION.

The distinction between general and specific jurisdiction has not always been rigid. Traditionally, courts were willing to find general jurisdiction if a company's contacts with a forum were sufficiently pervasive or routine. For large interstate businesses, this meant that they could be hauled into court in any state where they routinely conducted substantial business, even if those routine contacts had nothing to do with the underlying lawsuit.

This broad application of general jurisdiction was rooted in *International Shoe Co. v State of Washington*,[9] a 1945 Supreme Court case that created the rubric for personal jurisdiction. In that case, after distinguishing between all-purpose and case-linked jurisdiction, the Court included the following caveat:

> While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amendable to suits unrelated to that activity . . . there have been instances in which the *continuous corporate operations* within a state *were thought so substantial and of such a nature* as to justify suit against it in causes of action arising from dealings entirely distinct from those activities.[10]

This caveat was reinforced seven years later in *Perkins v. Benguet Consolidated Mining Co.*, when the Court held that a foreign corporation was subject to general jurisdiction in Ohio because it had moved all of its operations there during World War II.[11] Advocates latched onto this alternative ground for general jurisdiction, and frequently asserted that a company's business dealings in a forum were so pervasive or substantial that they justified general jurisdiction.[12]

In two recent cases, the Supreme Court effectively overruled that expansive approach to general jurisdiction. First, in *Goodyear Dunlop Operations, S.A. v. Brown*,[13] the Court clarified that, to assert general jurisdiction, a defendant's "affiliations with the State [must be] so 'continuous and systematic' as

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[6] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).
[7] *Daimler AG v. Bauman*, 571 U.S. 117, 136–38 (2014).
[8] *Bristol-Myers Squibb*, 137 S.Ct. at 1780 (internal quotations omitted).
[9] 326 U.S. 310 (1945).
[10] *Int'l Shoe Co.*, 326 U.S. at 318.
[11] 342 U.S. 437, 447-48 (1952).
[12] For example, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Supreme Court addressed whether a Columbian corporation's contacts in Texas were "the kind of continuous and systematic general business contacts" that would justify imposing general jurisdiction. 466 U.S. 408, 415-16 (1984).
[13] 564 U.S. 915 (2011).

to render them *essentially at home* in the forum State."[14] *Goodyear* itself all-but limited *Perkins* to its facts, noting that for the corporation in *Perkins*, Ohio was its "principal, if temporary, place of business."[15] Second, in *Daimler AG v. Bauman*,[16] the Court clarified that a defendant is not "at home" in every state where it conducts "substantial, continuous, and systematic course of business," noting that such "exorbitant exercises of all-purpose jurisdiction" would permit suit in any state where a company had "sizable" sales.[17]

Thus, within the last ten years, the Supreme Court has largely closed the door to suing defendants in any state where they conduct substantial or continuous business—effectively making specific jurisdiction the only vehicle for suit outside of where a company is headquartered or incorporated.

III. SPARSE HISTORICAL ANALYSIS OF PERSONAL JURISDICTION IN CLASS ACTIONS.

Before *Bristol-Myers Squibb*, there was limited precedent analyzing personal jurisdiction in the class-action context. This dearth of case law may be explained by a historical, albeit false, assumption that general jurisdiction existed in every state where defendants conducted continuous or substantial business. Indeed, defendants who operated the type of large-scale interstate businesses that could give rise to nationwide class actions might reasonably have believed that they were subject to general jurisdiction in dozens of states, making challenges to personal jurisdiction futile.

Whatever the reason, the only previous instance in which the Supreme Court addressed personal jurisdiction in the context of class actions was *Phillips Petroleum Co. v. Shutts*.[18] In that case, a Kansas resident brought a nationwide class action in Kansas state court for allegedly underpaid royalties stemming from natural gas operations in eleven states. The defendant asserted that Kansas lacked personal jurisdiction because "over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas."[19] Defendant, however, framed the issue in an unusual way — asserting that litigating the class action in Kansas violated *putative class members' due process right to personal jurisdiction*. The Court rejected this argument, holding that personal jurisdiction exists to protect defendants, not plaintiffs, and that other procedural requirements for class actions were sufficient to protect class members' due-process rights.[20]

Because *Bristol-Myers Squibb* involved a mass tort, *Shutts* arguably remains the only Supreme Court case to directly address personal jurisdiction in the class-action context. But, as discussed more fully in the next section, the majority opinion in *Bristol-Myers Squibb* strictly limited *Shutts*'s application to plaintiffs' constitutional rights, potentially foreshadowing a different result if framed in terms of defendants' rights.

BRISTOL-MYERS SQUIBB: A NEW CHAPTER IN PERSONAL JURISDICTION

With this background, we turn to the Supreme Court's opinion in *Bristol-Myers Squibb Co. v. Superior Court of California*. First, we outline the background facts of the case and the lower-court's opinion that was appealed. Second, we discuss the majority's opinion — including its distinction of *Shutts*. Finally, we

[14] *Id.* at 919.
[15] *Id.* at 927 (internal quotations omitted).
[16] 571 U.S. 117 (2014).
[17] *Id.* at 139.
[18] 472 U.S. 797 (1985).
[19] *Id.* at 815–16.
[20] *Id.* at 806–07.

discuss Justice Sonia Sotomayor's dissent, and its framing of the unanswered question that now confronts scores of federal courts.

I. CASE BACKGROUND.

Bristol-Myers was a mass tort, filed in California state court, complaining about alleged defects in the prescription drug, Plavix®. The suit involved a group of over 600 plaintiffs, consisting of both California and non-California residents. In the trial court, Bristol-Myers conceded that it was subject to specific jurisdiction for the California residents' claims but moved to dismiss the non-California plaintiffs because their actions arose in other states.

The California Supreme Court affirmed the trial court's denial of this motion, holding that Bristol-Myers was subject to specific jurisdiction for both the California and non-California plaintiffs' claims.[21] The court relied on a "sliding scale approach to specific jurisdiction," which meant that, if a defendant had "extensive contacts with California," then California could exercise personal jurisdiction based "on a less direct connection between [defendant's] forum activities and the plaintiff's claims."[22] Reasoning that "the nonresident plaintiffs' claims bear a substantial connection to [Bristol-Myers'] contacts in California" because they were substantially identical to the resident plaintiffs' claims, the court held that it did not offend traditional notions of fair play and substantial justice to require Bristol-Myers to defend against all plaintiffs in one forum.

II. SUPREME COURT HOLDS THAT PERSONAL JURISDICTION OVER RESIDENT PLAINTIFFS' CLAIMS *CANNOT* JUSTIFY PERSONAL JURISDICTION OVER NONRESIDENTS' CLAIMS.

In an 8-1 decision, the Supreme Court overturned the California Supreme Court and held that allowing non-California residents to bring claims that arose outside of California violated Bristol-Myers's due-process rights under the Fourteenth Amendment.[23] After discussing the distinction between general and specific jurisdiction, the Court emphasized that specific jurisdiction requires that "the *suit* must arise out of or relate to the defendant's contacts with the *forum*."[24] "As we have explained, 'a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction.' This remains true even when the third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents."[25]

The majority acknowledged that there were practical considerations that otherwise favored allowing the case to proceed as a single, nationwide suit. But those practical considerations, the Court held, could not justify altering the personal-jurisdiction analysis:

> [E]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . .; even if the forum State is the most convenient location for litigation, 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.[26]

Finally, the Supreme Court addressed plaintiffs' argument that *Shutts* stood for the proposition that due process is not offended when similar claims are brought in a single forum, even where the majority of

[21] *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 889–90 (Cal. 2016).
[22] *Id.*
[23] *Bristol-Myers*, 137 S. Ct. at 1782.
[24] *Id.* at 1780 (internal quotations omitted).
[25] *Id.* at 1781 (quoting *Walden v. Fiore*, 571 U.S. at 227, 286 (2014)).
[26] *Id.* at 1780–81.

claims have no connection to the forum.[27] Specifically, plaintiffs argued that it "would be 'absurd to believe that [this Court] would have reached the exact opposite result if the [defendant in *Shutts*] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs.'"[28] The Court clearly did not find that proposition absurd, and squarely rejected applying *Shutts* to a defendant's personal-jurisdiction rights. As the Court explained, "the authority of a State to entertain the claims of nonresident class members *is entirely different from its authority to exercise jurisdiction over an out-of-state defendant*."[29] Importantly, even though *Bristol-Myers Squibb* was a mass tort and *Shutts* was a class action, the Court in *Bristol-Myers Squibb* did not imply that such a distinction impacted the personal-jurisdiction analysis.[30]

III. JUSTICE SOTOMAYOR'S DISSENT SETS THE STAGE FOR CLASS ACTIONS.

As the lone dissenting opinion, Justice Sotomayor expressed concern thatthe Court's recent trend of imposing "substantial curbs" in general jurisdiction was now leading to "similar contraction of specific jurisdiction."[31] Justice Sotomayor focused her analysis on the "three conditions for the exercise of specific jurisdiction"—(1) the defendant purposefully availed itself of the benefits of the forum; (2) the plaintiff's claims "arise out of or relate" to defendant's forum conduct; and (3) that exercise of jurisdiction is reasonable under the circumstances. For each of these grounds, she disagreed with the majority and argued that "[n]othing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents."[32]

Justice Sotomayor did not address the majority's distinction between *Bristol-Myers Squibb* and *Shutts*. But she added a final footnote to express her view on the limitations of the issue presented:

> The Court today does not confront the question whether its opinion here would 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.[33]

This footnote became the foundation for many plaintiffs' — and federal district courts' — argument that *Bristol-Myers Squibb* does not apply to class actions.[34]

THE FALLOUT FROM *BRISTOL-MYERS SQUIBB*

I. SOME EMERGING TRENDS IN FEDERAL COURTS.

A. Generally, *Bristol-Myers Squibb* applies in federal courts.

The Court in *Bristol-Myers Squibb* was focused on a state court's ability to reach beyond its borders and exercise personal jurisdiction over a foreign corporation, and the majority acknowledged that its opinion left open "the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."[35] The majority's opinion raised the "consequences of territorial

[27] *Id.* (citing 472 U.S. 797 (1985)).
[28] *Id.* at 1782 (quoting respondent's brief).
[29] *Id.* (citing *Shutts*, 472 U.S. at 808–12) (emphasis added).
[30] *See id.*
[31] *See id.* at 1784 (Sotomoyor, J., dissenting).
[32] *Id.* at 1787.
[33] *Id.* at 1789 n.4 (internal citations omitted).
[34] This is consistent with Justice Sotomayor's opinion in *Daimler*, in which she was the only justice who did not join majority and, concurring only in the judgment, stated that limiting general jurisdiction only to forums where a corporation is "at home" is "wholly foreign to our due process jurisprudence." *Daimler AG*, 571 U.S. at 142-60 (Sotomayor, J. concurring). Thus, Justice Sotomayor has recently been the lone dissenter in the otherwise unanimous trend in the Court to strictly limit personal jurisdiction.
[35] *Bristol-Myers Squibb*, 137 S. Ct. at 1784.

limitations on the power of the respective States" as a factor in its conclusion, observing that "the sovereignty of each State … implie[s] a limitation of the sovereignty of all its sister States."[36] As a result, district courts have had to consider whether the limitations on a state court's exercise of personal jurisdiction following *Bristol-Myers Squib* also apply in the federal context. Many federal courts sitting in diversity have held that *Bristol-Myers Squibb* applies because "personal jurisdiction is governed by the law of the forum state"[37] and "a federal district court will not assert jurisdiction over a foreign corporation in an ordinary diversity case unless that could be done by the state court" where the court sits.[38] As one district court observed, *Bristol-Myers Squibb* "precluded courts sitting in diversity from exercising personal jurisdiction, pendant or otherwise, over any state-law claims against a nonresident defendant for which there is no connection between the forum and the specific claims."[39]

Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure provides another basis for applying *Bristol-Myers Squibb* by courts sitting in diversity or federal question jurisdiction, so long as there is no nationwide service of process provision. That rule provides: "[s]erving a summons . . . establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[40] Thus, Rule 4(l)(1)(A), along with common law diversity principles, support applying *Bristol-Myers Squibb* in federal courts.[41]

B. *Bristol-Myers Squibb* applies to named plaintiffs in class actions.

Some class action plaintiffs have sought to avoid *Bristol-Myers Squibb* by arguing that it does not apply in a class action because the case involved a mass tort. One nonresident plaintiff even argued that, because it was likely that one of the unnamed class members was a resident of the forum, he, as a *named* plaintiff, did not need to establish personal jurisdiction over his individual claim.[42] Courts have uniformly rejected these arguments, holding that *Bristol-Myers Squibb* applies with full force to named plaintiffs in a putative class action.[43] As one district observed, "[t]he constitutional requirements of due process does [sic] not wax and wane when the complaint is individual or on behalf of a class."[44]

II. THE UNANSWERED QUESTION: DOES *BRISTOL-MYERS SQUIBB* APPLY TO UNNAMED PUTATIVE CLASS MEMBERS?

The central question highlighted in Justice Sotomayor's dissent—whether *Bristol-Myers Squibb* applies to class actions where putative class members have no connection to the forum—has divided courts across the country.

As of June 6, 2020, there are at least 59 opinions from 25 different federal districts holding that the court does not need personal jurisdiction over unnamed putative class members' claims.[45] By contrast, there are

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[36] *Id.* at 1780 (citation omitted).
[37] *Leppert v. Champion Petfoods USA, Inc.*, No. 18 C 4347, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019).
[38] *Arrowsmith v. United Press Int'l.*, 320 F.2d 219, 222 (2d Cir. 1963).
[39] *Leppert v. Champion Petfoods USA INC.,* No. 18 C 4347, 2019 WL 216616, *5 (N.D. Ill. Jan. 16, 2019).
[40] Fed. R. Civ. Pro. 4(k)(1)(A).
[41] To be clear, some courts holding that *Bristol-Myers Squibb* does not apply to unnamed class members have relied, at least in part, on the idea that the "federalism" concerns applicable in *Bristol-Myers Squibb* are not present in federal courts. *See, e.g.*, *Pascal v. Concentra, Inc.*, No. 19-cv-02559, 2019 WL 3934936, at *5 (N.D. Cal. Aug. 20, 2019); *Sloan v. Gen. Motors Corp.*, 287 F. Supp. 3d 840, 860-64 (N.D. Cal. 2018). But we have not found a single case in which a court has held that *Bristol-Myers Squibb* does not apply to the named plaintiffs.
[42] *See In re Dental Supplies Antitrust Lit.*, No. 16 Civ. 696, 2017 WL 4217115, at *8–9 (E.D.N.Y. Sept. 20, 2017).
[43] *See, e.g.*, *Chernus v. Logitech*, No. 17-673(FLW), 2018 WL 1981481, at *7 (D.N.J. April 27, 2018).
[44] *In re Dental Supplies Antitrust Lit.*, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).
[45] *Waters v. Zimmerman NPS, Inc.*, __ F. Supp. 3d __, 2020 WL 2924031, at *3-4 (D. Mass. June 2, 2020); *Munsell v. Colgate-Palmolive Co.*, __ F. Supp. 3d __, 2020 WL 3561012, at *8 (D. Mass. May 20, 2020); *Murphy v. Aaron's, Inc.*, No. 19-CV-00601, 2020 WL 2079188, at *8-16 (D. Colo. Apr. 30, 2020); *Torliatt v. Ocwen Loan Servicing, LLC*, No. 19-cv-04303, 2020 WL 1904596, at *5 (N.D. Cal. Apr. 17, 2020); *Sharp v. Bank of Am., N.A.*, No. 19 C 5223, 2020 WL 1543544, at *8 (N.D. Ill. Mar. 31, 2020); *Lacy v.*

at least 16 opinions from six districts holding that *Bristol-Myers Squibb* applies to class actions, thus requiring dismissal of claims asserted on behalf of nonresident class members.[46] There also is a more recent, and increasingly common trend: delaying answering the question altogether. At least 22 opinions have postponed deciding whether personal jurisdiction exists over claims asserted on behalf of non-resident putative class members until class certification.[47]

Comcast Commc'n, LLC, No. 3:19-CV-05007, 2020 WL 1469621, at *2-3 (W.D. Wash. Mar. 26, 2020); *Leszanczuk v. Carrington Mortage Servs., LLC*, Cane No. 19-CV-3038, 2020 WL 1445612, at *2 (N.D. Ill. Mar. 25, 2020) (applying *Mussatt* to diversity class action); *Schertzer v. Bank of Am., N.A.*, __ F. Supp. 3d __, 2020 WL 1046890, at *11-12 (S.D. Cal. Mar. 4, 2020); *Boger v. Citrix Sys., Inc.*, No. 8:19-CV-01234, 2020 WL 1033556, at *7-8 (D. Md. Mar. 3, 2020); *King v. Bumble Trading, Inc.*, No. 18-CV-06868, 3030 WL 663741, at *4 (N.D. Cal. Feb. 11, 2020); *Rosenberg v. LoanDepot.com LLC*, __ F. Supp. 3d __, 2020 WL 409634, at * (D. Mass. Jan. 1, 2020); *Snarr v. Cento Fine Foods Inc.*, No. 19-cv-02627, 2019 WL 7050149, at *6–7 (N.D. Cal. Dec. 23, 2019); *Krumm v. Kittrich Corp.*, No. 4:19-cv-182, 2019 WL 6876059, at *4-5 (E.D. Mo. Dec. 17, 2019); *Murphy v. Aaron's, Inc.*, 19-CV-00601, 2019 WL 5394050, at *7 (D. Colo. Dec. 22, 2019); *Moore v. Compass Grp. USA, Inc.*, No. 4:18CV1962, 2019 WL 4723077, at *7–8 (E.D. Mo. Sept. 26, 2019); *Choi v. Kimberly-Clark Worldwide, Inc.*, No. SA CV 19-0468, 2019 WL 4894120, at *4–5 (C.D. Cal. Aug. 28, 2019); *Pascal v. Concentra, Inc.*, No. 19-cv-02559, 2019 WL 3934936, at *5 (N.D. Cal. Aug. 20, 2019); *Zuehlsdorf v. FCA US LLC*, No. 18-1877, 2019 WL 4422673, at *5 (C.D. Cal. Aug. 8, 2019); *Gress v. Freedom Mortg. Corp.*, 386 F. Supp. 3d 455, 464–65 (M.D. Penn. June 26, 2019); *In re: Takata Airbag Prods. Liability Lit.*, No. 15-02599-MD, 2019 WL 2570616, at *16–17 (S.D. Fla. June 21, 2019); *Benitez v. Powerline Funding, LLC*, No. 8:19-cv-00098, 2019 WL 4284520, at *1–2 (C.D. Cal. June 6, 2019); *Dolan v. Jetblue Airways Corp.*, 385 F. Supp. 3d 1338, 1355 (S.D. Fla. May 29, 2019); *Lyngaas v. Curaden AG*, No. 17-CV-10910, 2019 WL 2231217, at *17–18 (E.D. Mich. May 23, 2019) ; *LaVigne v. First Cmty. Bancshares, Inc.*, No. 1:15-cv-00934, 2019 WL 1075600, at *4 (D.N.M. Mar. 7, 2019); *Sotomayor v. Bank of Am., N.A.*, 377 F. Supp. 3d 1034, 1037–38 (C.D. Cal. May 3, 2019); *Branca v. Bai Brands, LLC*, No. 3:18-cv-00757, 2019 WL 1082562, at *13–14 (S.D. Cal. Mar. 7, 2019); *Cabrera v. Bayer Healthcare, LLC*, No. LA CV17-08525, 2019 WL 1146828, at *7–8 (C.D. Cal. Mar. 6, 2019); *Ross v. Huron Law Grp. W.V., P.C.*, No. 3:18-0036, 2019 WL 637717, at *3–4 (S.D. W. Va. Feb. 14, 2019); *Burke v. Credit One Bank, N.A.*, No. 8:18-cv-00728, 2019 WL 1468536, at *5–6 (M.D. Fla. Feb. 5, 2019); *Curran v. Bayer Healthcare LLC*, No. 17 C 7930, 2019 WL 398685, at *3 (N.D. Ill. Jan. 31, 2019); *Swinter Grp., Inc. v. Serv. of Process Agents, Inc.*, No. 4:17-CV-2759, 2019 WL 266299, at *2–3 (E.D. Mo. Jan. 18, 2019); *Hicks v. Hous. Baptist Univ.*, No. 5:17-CV-629-FL, 2019 WL 96219, at *5–6 (E.D.N.C. Jan. 1, 2019); *Harrison v. Gen. Motors*, No. 17-3128-CV-S-SRB, 2018 WL 6706697, *6 (W.D. Mo. Dec. 20, 2018); *Allen v. ConAgra Foods, Inc.*, No. 3:13-cv-01279, 2018 WL 6460451 (N.D. Cal. Dec. 10, 2018); *Hospital Auth. Of Metro. Gov't of Nashville v. Momenta Pharm., Inc.*, 353 F. Supp. 3d 678, 691–92 (M.D. Tenn. 2018); *Patterson v. RW Direct, Inc.*, No. 18-CV-00055-VC, 2018 WL 6106379, at *1 (N.D. Cal. Nov. 21, 2018); *Lee v. Branch Banking & Trust Co.*, No. 18-21876-CIV, No. 2018 WL 5633995, at *6–7 (S.D. Fla. Oct. 31, 2018); *Dennis v. IDT Corp.*, 343 F. Supp. 3d 1363, 1366–67 (N.D. Ga. 2018); *Richmond v. Nat'l Gypsum Servs. Co.*, No. 18-7453, 2018 WL 5016221, at *2 (E.D. La. Oct. 16, 2018); *Braver v. Northstar Alarm Servs., LLC*, 329 F.R.D. 320, 327 (W.D. Okla. Oct. 15, 2018); *Brotz v. Simm Assocs., Inc.*, No. 6:17-cv-1603, 2018 WL 4963692, at *2 (M.D. Fla. Oct. 15, 2018); *Knotts v. Nissan N. Am., Inc.*, No. 17-cv-05049, 2018 WL 4922360, at *14–15 (D. Minn. Oct. 10, 2018); *Haj v. Pfizer Inc.*, No. 17 C 6730, 2018 WL 3707561, at *1–2 (N.D. Ill. Aug. 3, 2018); *Becker v. HBN Media, Inc.*, 314 F. Supp. 3d 1342, 1344–45 (S.D. Fla. 2018); *Summit Gardens Assocs. v. CSC Serviceworkers, Inc.*, No. 1:17 CV 2553, 2018 WL 8898456, at *3–4 (N.D. Ohio June 1, 2018); *Santos v. Carmax Business Servs., LLC*, No. 17-cv-02447, 2018 WL 7916823, at *4–5 (N.D. Cal. May 8, 2018); *Fabricant v. Fast Advance Funding, LLC*, No. 2:17-cv-05753, 2018 WL 6920667, at *4–6 (C.D. Cal. Apr. 26, 2018); *Tickling Keys, Inc. v. Transamerica Fin. Advisors, Inc.*, 305 F. Supp. 3d 1342, 1350–51 (M.D. Fla. 2018); *Feldman v. BRP U.S., Inc.*, No. 17-CIV-61160, 2018 U.S. Dist. LEXIS 53298, at *14 (S.D. Fla. Mar. 28, 2018); *Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods., Inc.*, No. 17-2161, 2018 WL 1377608, at *4–5 (E.D. La. Mar. 19, 2018) (slip op.); *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126–27 (D.D.C. 2018); *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1364–67 (N.D. Ga. 2018); *Sloan v. Gen. Motors Corp.*, 287 F. Supp. 3d 840, 860–64 (N.D. Cal. 2018); *Ochoa v. Church & Dwight Co.*, No. 5:17-cv-02019, 2018 WL 4998293, at *10 (C.D. Cal. Jan. 1, 2018); *Feller v. Transamerica Life Ins. Co.*, No. 2:16-CV-01378, 2017 WL 6496803, at *16–17 (C.D. Cal. Dec. 11, 2017) (slip op.); *In re Chinese-Manufactured Drywall Prods. Liab. Lit.*, No. 09-2047, 2017 WL 5971622, at *12–21 (E.D. La. Nov. 30, 2017) (slip op.); *Day v. Air Methods Corp.*, No. 5:17-183, 2017 WL 4781863, at *2 n.1 (E.D. Ky. Oct. 23, 2017) (slip op.); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-CV-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

[46] *Davis v. Wendy's Int'l, LLC*, No. 1:19-CV-04003, 2019 WL6769689 (N.D. Ill. Dec. 12, 2019); *Garvey v. Am. Bankers Ins. Co. of Fl.*, No. 17-CV-986, 2019 WL 2076288, at *2 (N.D. Ill. May 10, 2019); *Bakov v. Consol. World Travel, Inc.*, No. 15 C 2980, 2019 WL 1294659, at *13–14 (N.D. Ill. Mar. 21, 2019) (at class cert. stage); *In re: Dicamba Herbicides Lit.*, MDL No. 2820, 2019 WL 460500, at *6 (E.D. Mo. Feb. 6, 2019); *Leppert v. Champion Petfoods USA, Inc.*, No. 18 C 4347, 2019 U.S. Dist. LEXIS 7585, at *11–12 (N.D. Ill. Jan. 16, 2019); *Mussat v. IQVIA Inc.*, No. 17 C 8841, 2018 WL 5311903, at *4–5 (N.D. Ill. Oct. 26, 2018); *Muir v. Nature's Bounty (DE), Inc.*, No. 15 C 9835, 2018 WL 3647115, at *3–5 (N.D. Ill. Aug. 1, 2018); *America's Health & Res. Ctr., Ltd. v. Promologics, Inc.*, No. 16 C 9281, 2018 WL 3474444 (N.D. Ill. July 19, 2018) (slip op.); *Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191, at *10–11 (N.D. Ill. May 16, 2018); *Practice Mgmt. Support Servs., Inc. v. Cirque de Soleil, Inc.*, 301 F. Supp. 3d 840, 860–62 (N.D. Ill. 2018); *Anderson v. Logitech, Inc.*, No. 17-C-6104, 2018 WL 1184729, at *1 (N.D. Ill. Mar. 7, 2018) (slip op.); *DeBernardis v. NBTY, Inc.*, No. 17-C-6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (slip op.); *Howe v. Samsung Elecs. Am., Inc.*, No. 1:16cv386, 2018 WL 2212982, at *3–4 (N.D. Fla. Jan. 5, 2018) (slip op.); *McDonnell v. Nature's Way Prods., LLC*, No. 16-CV-5011, 2017 WL 4864910, at *4 (N.D. Ill. Oct. 26, 2017) (slip op.); *Wenokur v. ACA Equitable Life Ins. Co.*, No. CV-17-99165, 2017 WL 4357916, at *4, n.4 (D. Ariz. Oct. 2, 2017) (slip op.); *In re Dental Supplies Antitrust Lit.*, No. 16 Civ. 696, 2017 WL 4217115, at *8–9 (E.D.N.Y. Sept. 20, 2017).

[47] *Velazquez v. St. Farm Fire & Cas. Co.*, No. 19-CV-3128, 2020 WL 1942784, at *10-11 (E.D. Penn. Mar. 27, 2020); *Penikila v. Sergeant's Pet Care Prod., LLC*, __ F. Supp. 3d __, 2020 WL 1032139, at *1 (N.D. Cal. Mar. 3, 2020); *Lugones v. Pete & Gerry's Organic, LLC*, __ F. Supp. 3d __, 2020 WL 871521, at *4 (S.D.N.Y. Feb. 21, 2020); *Jett v. Warrantech Corp.*, __ F. Supp. 3d __, 2020 WL 525045, at *4 (S.D. Ill. Jan. 20, 2020); *Tirado v. Bank of Am., Nat'l Ass'n*, No. 18-cv-5677, 2019 WL 46494990, at *4–5 (N.D. Ill. Sept. 26, 2019) (specifically waiting for ruling in *Mussatt v. IQVIA*); *Simon v. Ultimate Fitness Grp., LLC*, No. 19 CIV 890,

The rationale underpinning these disparate views is addressed below.

III. FOUR APPEALS THAT WILL TEE UP THE ISSUE FOR THE SUPREME COURT.

Four separate federal circuits have now addressed whether the Supreme Court's analysis in *Bristol-Myers Squibb* applies to class actions. This section summarizes those decisions.

A. D.C. Circuit—*Molock v. Whole Foods Market Group, Inc. v.*[48]

The first case involves a putative nationwide class action based solely under diversity jurisdiction. Plaintiffs allege that the defendant, a multi-state grocery chain, had a nationwide practice of failing to pay employees the full measure of bonuses to which they allege they were entitled. Some of the named class representatives currently or previously worked in defendant's five stores located in the District of Columbia but seek to represent employees from nearly 500 stores nationwide.

In the district court, defendant moved to dismiss both named plaintiffs and unnamed putative class members who never worked in Washington D.C. under Rule 12(b)(2) for lack of personal jurisdiction. The district court granted the motion in part, dismissed the named plaintiffs who neither lived nor worked in the District, but declined to dismiss claims asserted on behalf of nonresident, unnamed class members.[49] In its holding, the district court expressly held that personal jurisdiction analysis is same under the Fifth and Fourteenth Amendments but that courts need not have personal jurisdiction as to claims asserted on behalf of unnamed class members.[50]

Both the district court and the D.C. Circuit granted defendant's motion for permissive, interlocutory appeal on the issue of whether *Bristol-Myers Squibb* applies to putative class members. On appeal, plaintiffs re-raised their argument that *Bristol-Myers Squibb* does not apply in federal court. They also argued for the first time that personal-jurisdiction over unnamed class members is not ripe until class certification.

On March 10, 2020, the D.C. Circuit issued a split opinion. The majority, authored by Judge David S. Tatel and joined by Chief Judge Merrick B. Garland, held that courts cannot, as a matter of law, consider

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2019 WL 4382204, at *3–4 (S.D.N.Y. Aug. 19, 2019) (defendant agrees class certification is appropriate time to address); *Cummings v. FCA US LLC*, No. 5:18-CV-1072, 2019 WL 3494733, at *19–20 (N.D.N.Y. Aug. 1, 2019); *Matic v. United States Nutrition, Inc.*, No. 18-9592, 2019 WL 3084335, at *10 (C.D. Cal. Mar. 27, 2019); *Rojas v. Bosch Solar Energy Corp.*, 2019 2288279, at *10 (N.D. Cal. May 29, 2019); *In re Welspun Litig.*, No. 16 CV 6792, 2019 WL 2174089, at *9 (S.D.N.Y. May 20, 2019); *Bank v. Creditguard of Am.*, No. 18-cv-1311, 2019 WL 1316966, at *12 (E.D.N.Y. Mar. 22, 2019); *Weiss v. Grand Campus Living, Inc.*, No. 1:18-cv-00434, 2019 WL 1261405, at *2 (S.D. Ind. Mar. 19, 2019) (in federal Telephone Consumer Protection Act (TCPA), Court held personal jurisdiction not at issue until plaintiff moves to certify class); *Suarez v. Cal. Nat. Living, Inc.*, No. 17 CV 9857, 2019 WL 1046662, at *6 (S.D.N.Y. Mar. 4, 2019); *Bank v. Solar, Inc.*, No. 18-CV-2555, 2019 WL 2280731 (E.D.N.Y. Feb. 25, 2019) (magistrate specifically recommends deferring ruling on *Bristol-Myers* applicability until class certification because of "unsettled and constantly developing" case law); *Jones v. Depuy Synthes Prods. Inc.*, 330 F.R.D. 298, 309–12 (Nov. 20, 2018) (coming very close to holding *Bristol-Myers* applies to federal courts but not to class actions, but ultimately reserving judgment until plaintiff moves for class certification); *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1024–25 (7th Cir. 2018) (appear to invite briefing on issue, but holding personal jurisdiction "*only tangentially related*" to class certification, so not before the court on class cert appeal), *cert. petition filed on other issues*; *Robison v. Unilever U.S., Inc.*, No. CV 17-3010, 2018 WL 6136139, at *3 (C.D. Cal. June 25, 2018); *Chernus v. Logitech, Inc.*, No. CV 17-673, 2018 WL 1981481, at *7 (D.N.J. Apr. 28, 2018) (declining to address issue at motion to dismiss stage, but stating it will address at class certification); *Campbell v. Freshbev LLC*, 322 F. Supp. 3d 330, 336–37 (E.D.N.Y. 2018) (WF weights-and-measures case where court declined to consider *Bristol-Myers* until plaintiffs moved for class certification); *Gonzalez v. Costco Wholesale Corp.*, 16-CV-2590, 2018 WL 4783962, at *8 (E.D.N.Y. Sept. 29, 2018) (deferring ruling on *Bristol-Myers* until class certification, but language indicates court would hold that it applies); *Gasser v. Kiss My Face LLC*, No. 17-CV-01675, 2018 WL 4538729, at *2 (N.D. Cal. Sept. 21, 2018) (concluding personal jurisdiction of unnamed plaintiffs not determined until class certified).

[48] As a matter of disclosure, Gregory Casas and Alan Hersh, both co-authors of this Article, represent defendant Whole Foods Market Group, Inc. in this case.

[49] *Molock v. Whole Foods Mkt. Grp., Inc.*, 297 F. Supp. 3d 114, 124–27 (D.D.C. 2018).

[50] *Id.*

their jurisdiction over putative class members until after a class is certified.[51] Specifically, the majority held that, before class certification, "putative class members—at issue in this case—are *always* treated as nonparties," and thus any determination as to jurisdiction would be advisory.[52] The majority also held that the Supreme Court's precedent "suggested" that certification issues are always "logically antecedent" to jurisdiction as to the claims asserted on behalf of putative class members.[53] Thus, the majority held that the motion to dismiss was "premature" and properly denied.

In a lengthy dissent, Judge Laurence H. Silberman rejected both the majority's analysis of prematurity and explained that, on the merits, *Bristol-Myers Squibb* applies with full force to class actions.[54] Judge Silberman explained that the party/non-party status of putative class members was "beside the point" because defendant was attacking the *named* plaintiffs' ability to represent a putative nationwide class.[55] As Judge Silberman explained, the named plaintiffs were bringing both their individual claims and their claim to represent a nationwide class, and "a motion challenging class representation need not wait until the plaintiffs move for class certification."[56]

On the merits, Judge Silberman explained that "it seems to me that logic dictates that" *Bristol-Myers Squibb* applies to class actions.[57] "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.'"[58] The dissent again emphasized that the party/non-party status of class members did not impact the court's jurisdiction, and explained that Rule 23's other protections cannot substitute for the constitutional requirements of personal jurisdiction.

The D.C. Circuit has denied Whole Foods' petitions for rehearing and rehearing *en banc*. Whole Foods' petition for rehearing and rehearing *en banc* is currently pending.

B. Fifth Circuit—*Crusson v. Jackson National Life Insurance Co.*

Crusson is a multistate class action relating to alleged improper charges under a standardized insurance contract. Like *Molock*, *Crusson* involves purely state-law claims brought under diversity jurisdiction. Unlike *Molock*, however, *Cruson* is an interlocutory appeal of the district court's order certifying a nationwide class, under Rule 23(f).

The defendant in *Crusson* did not raise personal jurisdiction in its original response, and only argued the merits of personal jurisdiction for nonresident class members in its opposition to class certification.[59] Plaintiffs argued, and the district court held, that the defendants waived the personal jurisdiction defense by failing to argue it until class certification.[60] In the Fifth Circuit, defendants argued that they could not have raised the issue of personal jurisdiction over putative class members until class certification because, until that time, class members were not before the Court.

Approximately two weeks after the D.C. Circuit issued its opinion, the Fifth Circuit followed suit and held that personal jurisdiction over putative class members could not be raised until after a class was

[51] *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 296-99 (D.C. Cir. 2020).
[52] *Id.* at 297 (citing *Smith v. Bayer Corp.*, 564 U.S. 299, 318 (2011)).
[53] *Id.* (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999)).
[54] *Id.* at 300-10 (Silberman, J., dissenting).
[55] *Id.* at 300-01.
[56] *Id.* at 302.
[57] *Id.* at 306.
[58] *Id.* (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010)).
[59] *See Tredinnick v. Jackson Nat'l Life Ins. Co.*, No. 4:16-CV-00912 [Dkt. 96] (E.D. Tex. May 9, 2018). The district court's opinion is not available on either Westlaw or Lexis, but may be accessed through PACER.
[60] *Id.* at 11–13.

certified.[61] Thus, the Fifth Circuit reversed the district court and held that "personal jurisdiction objection respecting merely putative class members was not 'available'" until class certification. The court declined to reach the merits of *Bristol-Myers Squibb* because the district court had not ruled on the issue.[62] The Fifth Circuit, however, also reversed certification on other grounds, thus making it unlikely the district court will address the merits of the *Bristol-Myers Squibb* argument unless it recertifies the class. Neither defendant nor plaintiff moved for rehearing or indicated an intention to file a cert petition to the Supreme Court.

C. Sixth Circuit—*In re Curaden AG*.

Curaden AG is a nationwide "junk fax" class action for alleged violations of the Telephone Consumer Protection Act. Like the Fifth Circuit case discussed above, *Curaden AG* was initially appealed by defendant from an order certifying the nationwide class. Also, like the Fifth Circuit case, the defendant in *Curaden AG* raised personal jurisdiction for the first time in its opposition to class certification.

The district court, however, did not stay the trial proceeding while the interlocutory appeal was pending. In fact, the district court conducted a bench trial while the Sixth Circuit was still deciding whether to accept defendant's request for interlocutory appeal. A final, appealable judgment was recently entered in plaintiffs' favor.

In the wake of these district court developments, the Sixth Circuit denied defendant's request for an interlocutory appeal of class certification.[63] After noting that the posture of the case in the district court weighed against the need for interlocutory appeal, the Sixth Circuit also noted that "Curaden waived the argument [that *Bristol-Myers Squibb* applies to class actions] by not raising it in its original 12(b)(2) motion or its answer."[64] The Sixth Circuit noted that there may be arguments for why waiver should be excused, but those arguments had not been briefed, and therefore "doubts about the presentment of the *BMS* issue create a vehicle problem and therefore also weigh heavily against the exercise of our discretionary review jurisdiction under Rule 23(f)."[65] Defendants have now perfected their appeal from a final judgment.[66] And the Sixth Circuit likely will have no option but to address the *Bristol-Myers Squibb* issue head on.

D. Seventh Circuit—*Mussat v. IQVIA, Inc.*

Like the Sixth Circuit case discussed above, this case is a putative nationwide "junk fax" class action for alleged violations of the Telephone Consumer Protection Act.[67] *Mussat*, however, is unique because the district court held that *Bristol-Myers Squibb* **does apply** to class actions, and therefore struck the class allegations for any putative class members outside Illinois.

On appeal, plaintiff focused on the argument that, when federal jurisdiction is based on a federal statute, the Due Process Clause of the Fifth Amendment permits broader, nationwide personal jurisdiction than the Due Process Clause of the Fourteenth Amendment. According to plaintiff, because a federal court hearing a federal-question case is addressing a statute that applies nationwide, personal jurisdiction is established if the defendant has minimum contacts with the United States as a whole. Thus, according to plaintiffs, *Bristol-Myers Squibbs*'s focus on the federalism concerns that arise when states exercise power

[61] *Crusson v. Jackson Nat'l Ins. Co.*, 954 F.3d 240, 250-51 (5th Cir. 2020) (citing *Molock*, 952 F.3d at 298).
[62] *Id.* at 251 n.10.
[63] *In re Curaden AG*, Case No. 19-108, 2020 U.S. App. LEXIS 524 (6th Cir. Jan. 8, 2020).
[64] *Id.* at *3.
[65] *Id.*
[66] *See Lyngass v. Curaden*, Case No. 20-1199.
[67] 47 U.S.C. § 227.

over state-law claims arising in other jurisdictions does not exist when federal courts are applying federal statutes.

Two days after the D.C. Circuit issued its split opinion, the Seventh Circuit issued a unanimous opinion.[68] This opinion, authored by Chief Judge Diane Wood, held that *Bristol-Myers Squibb* does not apply to putative class members in a class action asserting nationwide claims under federal law. The opinion primarily focused on (1) the lack of historical objection to nationwide class actions based on personal jurisdiction and (2) the procedural distinctions between the mass tort at issue in *Bristol-Myers Squibb* and class actions under Rule 23.[69] Specifically, *Mussat* held that "[p]rocedural formalities matter," and precedent establishes that class members are "parties" for certain purposes and not for others. Finding that personal jurisdiction was more akin to situations—like diversity jurisdiction—where putative class members are not parties, the court held personal jurisdiction protections do not exist in class actions.[70]

The court also rejected defendant's rule-based argument that Federal Rule of Civil Procedure 4(k)(1) limits a federal court's jurisdiction to the personal jurisdiction limits of the state in which it sits.[71] The court reasoned that, because plaintiffs are not required to re-serve summons after a class is certified, Rule 4(k)'s limits based on personal jurisdiction do not apply to putative class members.

Like the D.C. Circuit appeal above, defendant has timely filed a petition for rehearing and rehearing *en banc*. Those motions are currently pending.

THE ARGUMENTS FOR AND AGAINST APPLYING *BRISTOL-MYERS SQUIBB* TO CLASS ACTIONS

Although there are nuances in how the 80+ federal courts have framed the issue, there are three basic categories of arguments for why *Bristol-Myers Squibb* does not apply to class actions; three categories for why it does apply; and, at most, two arguments for waiting to decide personal jurisdiction until class certification. We will address each of these categories, in turn.

I. ARGUMENTS FOR WHY *BRISTOL-MYERS SQUIBB* SHOULD NOT APPLY TO CLASS ACTIONS.

A. Rule 23 provides other due process protections.

Several courts have pointed to the substantive and procedural safeguards afforded in class actions — like the commonality/typicality requirements and plaintiffs' opt-out rights—that do not exist in mass torts or traditional, individual suits.[72] This concept is encompassed in the oft-repeated phrase that "class actions are different from mass torts," and cases often cite *Shutts*'s discussion of the additional due-process protections provided by class actions. At its core, this argument appears to be that the lack of personal jurisdiction can be compensated for by additional due-process protections that are built into class actions.

To be clear, there does not appear to be any precedent to support the notion that personal-jurisdiction protections can be set aside based on other due process considerations. Furthermore, there has not been a clear explanation of how the due process protections afforded in class actions fill the gaps that are supposed to be protected by personal jurisdiction. At best, this argument would suggest that the

[68] *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020).
[69] *Id.* at 445-47.
[70] *Id.* at 447.
[71] *Id.* at 447-49.
[72] *See, e.g.*, *In re Chinese-Manuf. Drywall*, 2017 WL 5971622, at *14–15.

"traditional notions of fair play and substantial justice" underpinning personal jurisdiction must take into account all aspects of due-process, even those that have nothing to do with the defendant's connection to the forum.

If adopted, this rationale would represent a radical departure from specific-jurisdiction jurisprudence. As the Court in *Bristol-Myers Squibb* itself acknowledged, nothing in *Shutts* addresses the due process protections afforded to **defendants** under personal jurisdiction. Therefore, a court would have to conclude that the entirety of personal jurisdiction doctrine does not apply to class actions or, at least, does not apply to claims asserted on behalf of non-resident putative class members. Reconciling that position with nearly eighty years of personal-jurisdiction jurisprudence may prove difficult.

B. Unnamed class members are not "parties" for purposes of personal jurisdiction.

A majority of courts distinguishing *Bristol-Myers Squibb* have concluded that unnamed, putative class members are not "parties" for purposes of personal jurisdiction. Unlike the argument that class actions are exempt from personal-jurisdiction, this distinction has some foundation in precedent.

As Justice Sotomayor mentioned in her dissent, the Supreme Court has previously stated that "[n]onnamed class members . . . may be parties for some purposes and not for others."[73] "The label "party" does not indicate an absolute characteristic, but rather a conclusion about the applicability of various *procedural rules* that may differ based on context."[74]

For certain procedural purposes, unnamed class members are not "parties," but for other substantive purposes, they are. For example, unnamed class members were not historically considered in determining whether diversity jurisdiction existed.[75] Similarly, before class certification, any substantive rulings are not considered *res judicata* that can be used against unnamed class members.[76]

In contrast, unnamed class members are "parties" in the sense that they can appeal the approval of class settlement in certain circumstances.[77] Similarly, "under elementary principles of prior adjudication," named and unnamed class members are bound by both claim and issue preclusion after class certification.[78] Unnamed class members also are parties in the sense that, for the court to have subject-matter jurisdiction to award damages, the unnamed class members must each have standing to bring suit.[79] Finally, unnamed class members are parties in the sense that the filing a class action may toll the statute of limitations for class-members' individual claims.[80]

With the exception of diversity-jurisdiction, this precedent indicates that unnamed class members are "parties" for purposes of issues that touch upon a court's jurisdiction to address the substance of their claims. Because personal jurisdiction is a quintessential jurisdictional issue, precedent suggests that unnamed class members also are "parties" for purposes of personal jurisdiction. Thus, any argument that

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[73] *Bristol-Myers Squibb*, 137 S.Ct. at 1789 n.4 (Sotomayor, J., dissenting) (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002)).
[74] *Devlin*, 536 U.S. at 10 (emphasis added).
[75] *See Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (citing 7A Charles Alan Wright, et al., Federal Practice & Procedures § 1755, pp. 63–64 (2d ed. 1986)).
[76] *Smith*, 564 U.S. at 314.
[77] *See Devlin*, 536 U.S. at 9–11 (holding that unnamed class members are parties).
[78] *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).
[79] *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (court cannot award damages to uninjured member of a class because that member lacks standing); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) (noting that class certification must be interpreted consistently with Article III standing requirement).
[80] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553–54 (1974).

unnamed class members are not "parties" for purposes of deciding whether *Bristol-Myers Squibb* applies will require substantial reconciliation with existing precedent.

C. In class actions, the named plaintiff is asserting a single "claim" that just happens to be on behalf of all class members.

In perhaps the most curious attempt to distinguish *Bristol-Myers Squibb*, some courts have held putative class representatives are asserting a single claim on behalf of themselves and all class members. As the argument goes, the jurisdictional contacts that support specific jurisdiction over the class representative's individual claim automatically support personal jurisdiction over his representative claim for other class members.

Arguably, this contention is more superficial than substantive. *Bristol-Myers Squibb* itself makes clear that one plaintiff's contacts with the forum cannot substitute for lack of contacts of another plaintiff. By merely recasting an in-state class representative's contacts as contacts that exist for the entire class action, courts that adopt this approach appear to be creating an *ipse dixit* exception to *Bristol-Myers Squibb*, while overlooking the actual substance underpinning its analysis.

Furthermore, in similar representative contexts like derivative shareholder actions, courts have held that personal jurisdiction is measured from the standpoint of the company being represented, rather than the shareholder bringing the derivative claim.[81] Therefore, there does not appear to be anything unique about the representative/represented relationship that would change the analysis for how personal jurisdiction is measured for unnamed plaintiffs' claims.

II. WHY *BRISTOL-MYERS SQUIBB* SHOULD APPLY TO CLASS ACTIONS.

A. Rule 23 cannot alter a defendant's due process rights.

A key argument in favor of applying *Bristol-Myers Squibb* to class actions is based on Rule 23, and the rule that it cannot diminish constitutional due process. Personal jurisdiction centers on the protection of a defendant's constitutional right, and the Supreme Court has previously rejected attempts to allow Rule 23 to alter or abridge that constitutional right. "Rule 23's [class action] requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that [federal court] rules of procedure shall not abridge, enlarge, or modify any substantive right."[82] Thus, because Rule 23 cannot diminish a defendant's substantive or constitutional rights, the Fourteenth Amendment due process considerations defined in *Bristol-Myers Squib* should apply equally to protect defendants in class actions, just as they would in any other case.

B. The mass tort vs. class action distinction is irrelevant.

Applying *Bristol-Myers Squibb* to claims asserted on behalf of absent class members also finds support by the general principles adopted in the Court's opinion. In distinguishing *Shutts*, *Bristol-Myers Squibb* never emphasized that *Shutts* was a class action, or indicated that this distinction mattered. Instead, the reason *Shutts* did not apply was because "it concerned the due process rights of *plaintiffs*, [and thus had] no bearing on the question presented"—the due process rights of defendants.[83] Further, the Court

[81] *See Bartkowski v. Foni*, No. 07-1018, 2007 WL 2728844, at *3 (E.D. Penn. Sept. 17, 2007); *see also Practice Management Support Services, Inc. v. Cirque du Soleil Inc.,* 301 F. Supp. 3d 840, 861 (N. D. Ill. 2018) ("Under the Rules Enabling Act, a defendant's due process interest should be the same in the class action context.").
[82] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 592 (1997).
[83] 137 S. Ct. 1773, 1783 (emphasis in original).

explicitly rejected the argument that practical considerations like judicial economy, convenience to the parties, and consistency of rulings should outweigh the need for personal jurisdiction. These are some of the same practical benefits supporting class actions, and there is no reason why a defendant's due process rights should be outweighed by these considerations based on how plaintiffs choose to bring their claims. Indeed, courts that view *Bristol-Myers Squibb* as stating a "general principle—that due process requires a 'connection between the forum and the specific claims at issue,'" unsurprisingly find that this principle applies no matter the type of case.[84] The "primary concern" in determining personal jurisdiction "is the burden on the defendant," and there is no reason this concern should be lessened in a class action where a defendant is not subject to personal jurisdiction of the forum.

C. An unnamed plaintiff should not be allowed to obtain a judgment he could not obtain as a named plaintiff.

Another argument for applying *Bristol-Myers Squib* turns on the fundamental principle that an unnamed plaintiff with no connection to a forum state should not be permitted to obtain a judgment against a defendant that he could not obtain as a named plaintiff. Especially where the focus of personal jurisdiction is protecting defendants, there is no reason that a non-resident, unnamed class member should be allowed to be a party to a suit affecting a defendant's constitutional rights that he would otherwise be unable to bring. And if personal jurisdiction is a limitation on a court's authority to hear certain claims, an unnamed plaintiff should not benefit from a court exercising jurisdiction over a claim it would otherwise be barred from hearing if the plaintiff were identified.

This issue is highlighted in several opinions that have dismissed named plaintiffs' claims under *Bristol-Myers Squibb*, only to have those claims persist as part of the nationwide class.[85] Thus, the same plaintiffs with the same facts seeking the same relief in the same court may be dismissed as named plaintiffs, but defendants are still subject to liability for their claims as absent class members.

III. WAITING UNTIL CLASS CERTIFICATION.

As noted above, there is a recent trend to delay deciding whether the court has personal jurisdiction over absent class members until class certification. Some courts have expressly stated they are waiting for guidance from the federal circuits. Others—including the D.C. Circuit and the Fifth Circuit—have held that the question of personal jurisdiction over class members is not *ripe* until the court separately decides whether to certify the class. The argument is that, until a class is certified, the unnamed class members are not "before" the court, and thus the court cannot issue any ruling regarding whether personal jurisdiction exists.

The primary precedent cited for this approach is *Amchem Products, Inc. v. Windsor*.[86] In that case, the Supreme Court approved the approach of addressing Rule 23's commonality and typicality requirements before reaching defendant's alternative argument that there was a lack of injury-in-fact for most class members. The Court emphasized that, at least in that case, the questions of class certification were "logically antecedent" to the standing analysis, and thus it "[was] appropriate to reach [certification] first." In that same breath, however, the Court emphasized that "[i]f certification issues were genuinely in doubt,

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[84] *See e.g.*, *Greene v. Mizuho Bank, Ltd.,* 289 F. Supp. 3d 870, 874 (N. D. Ill. 2017) (quoting *Bristol-Myers Squibb,* 137 S. Ct. at 1781); *Debernardis v. NBTY, Inc.*, No. 17 C 1625, 2018 WL 461228, *2 (N.D. Ill. Jan. 18, 2018) ("The Court believes that it is more likely than not based on the Supreme Court's comments about federalism that 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").
[85] *See, e.g.*, *Molock*, 297 F. Supp. 3d at 124–26 (dismissing two named plaintiffs, but allowing nationwide class action to go forward).
[86] 521 U.S. 591, 613 (1997).

however, the jurisdictional issues would loom larger." Thus, *Amchem Products* should not be read as a *per se* rule that class certification should always be decided before jurisdictional issues.

To be clear, nothing in the federal rules allow parties or the court to defer ruling on personal jurisdiction until class certification. Federal Rule of Civil Procedure 12 makes clear that personal jurisdiction must be raised at the very initiation of the suit, or else it may be waived. Furthermore, the Supreme Court has repeatedly emphasized that jurisdictional issues—including both subject-matter jurisdiction and personal jurisdiction—should be addressed at the earliest possible opportunity. The reasons are both substantive and practical. Substantively, it would be improper for a court to proceed operating under the assumption that it has jurisdiction to reach issues over which it might ultimately lack authority to decide. Practically speaking, any delay in addressing a court's personal jurisdiction risks wasting substantial resources of both the parties and the court if months or years of litigation are undone by a subsequent determination that court cannot entertain the case.

CONSIDERATIONS

Whenever a new multi-state class action is filed, a defendant should carefully review the facts alleged to see if personal jurisdiction can be challenged and the case or claims dismissed pursuant to *Bristol-Myers Squibb*. To avoid potential wavier, defendants should strongly consider a motion to dismiss or strike out-of-state claims under Rule 12(b)(2), or at least explicit efforts to preserve the defense. Defendants also should be cognizant of potential alternative arguments to reach the same outcome, including a plaintiff's lack of standing to assert any claim based on the law of a state other than his or her own.[87]

Defendants should also keep in mind that a successful personal jurisdiction defense may simply encourage plaintiffs to refile their putative class action in the defendant's home state. Evaluating whether a refiled action could be more or less favorable would require an analysis of a defendant's home-state laws, as well as potential statute of limitations defenses that may be available in light of the Supreme Court's decision in *China Agritech v. Resh*, and the prohibition against putative class members filing follow-on cases where the statute of limitations has otherwise expired.[88] Until the Supreme Court clarifies the impact of *Bristol-Myers Squib* on class actions, defendants with viable challenges to personal jurisdiction would be wise to raise them early and often.

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[87] *See Carpenter v. PetSmart, Inc.*, No. 19-cv-1731-CAB-LL, 2020 WL 996947, at *7-9 (S.D. Cal. Mar. 2, 2020) (dismissing common law claims asserted on behalf of a nationwide class because the California plaintiff lacked standing to assert claims under any other state's law); *Przybylak v. Bissell Better Life LLC*, No. CV 19-2038 PA (GJSx), 2019 WL 8060076, at *3-4 (C.D. Cal. July 19, 2019) (dismissing claims asserted on behalf of a nationwide class for breach of express and implied warranties, unjust enrichment, negligent misrepresentation and fraud, because the California plaintiffs lacked standing to bring claims under the laws of other states).
[88] 138 S.Ct. 1800 (2018).

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