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## In a Class of Its Own: *Bristol-Myers Squibb's* Worrisome Application to Class Actions

Grant McLeod

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**IN A CLASS OF ITS OWN: *BRISTOL-MYERS SQUIBB*'S  
WORRISOME APPLICATION TO CLASS ACTIONS**

*Grant McLeod\**

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## I. INTRODUCTION

There is something fundamentally American about the class action. One can almost hear those commercials as they drift from our radios and televisions: “If you or a loved has been harmed by . . . you may be entitled to compensation . . .” The class action allows the masses to have accountability for multi-jurisdictional wrongs. It allows redress to be swift, efficient, and applicable to all those harmed, no matter how far away. Although the class action has been central to some of the largest societal changes experienced in the United States, the tool has faced constant challenges as it enters its 52nd year of modern use.<sup>1</sup> While the class action has faced continued scrutiny, one recent challenge stands out among the rest. That challenge comes in the form of the Supreme Court’s opinion in *Bristol-Myers Squibb Co. v. Superior Court of California*<sup>2</sup>, which suggests that money damages class actions may not proceed, absent the forum’s specific personal jurisdiction over defendant with respect to the claim of each absent class member. *Bristol-Myers Squibb* suggests that unless the claim by each absent class member arose from defendant’s conduct in the forum, the forum lacks personal jurisdiction to adjudicate

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1. “Modern” in this case is referring to the modern promulgation of Rule 23 after the 1966 Revision. See *infra* Part I.A.1.

2. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

that class member's claims against the defendant.<sup>3</sup> That's strong dicta, and if courts interpret the *Bristol-Myers Squibb* decision to apply to absent class members, it could threaten the nationwide money damages class action as we have come to know it.

The *Bristol-Myers Squibb* Court held that the California state courts lacked jurisdiction over non-resident plaintiffs' claims because the claims of the non-resident plaintiffs did not arise from, or relate to, Bristol Myers Squibb's contacts with the state of California.<sup>4</sup> However, the *Bristol-Myers Squibb* case was not a class action. Instead, it arose from the joinder under Rule 20(a) of over 600 persons as named plaintiffs in the action.<sup>5</sup> This joinder formed what is known as a "mass action," where a large group of plaintiffs aggregate through traditional joinder rules and not through the class action rules. Class actions were not at issue in the *Bristol-Myers Squibb* case. Thus, the Supreme Court left unanswered whether this limited personal jurisdiction analysis would apply to cases filed in federal court.<sup>6</sup> In her lone dissent, Justice Sotomayor noted that the Court's opinion failed to address whether the ruling would be applied to class actions where "a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."<sup>7</sup>

The Supreme Court's 2017 decision in *Bristol-Myers Squibb* has drastically altered the litigation playing field. Following the 8–1 decision disavowing California's assertion of personal jurisdiction over drug manufacturer Bristol Myers Squibb, waves of motions to dismiss for lack of personal jurisdiction have begun to overwhelm plaintiffs in mass tort actions.<sup>8</sup> Personal jurisdiction arguments in "mass" as opposed to "class" actions are much more straightforward. A mass action is a large group of aggregated plaintiffs who are all named parties to the action. On the other hand, a class action is a procedural tool which allows a few representatives to initiate a suit on behalf of absent class members, and comes with its own set of rules and procedure under Federal Rule of Civil Procedure 23.<sup>9</sup> While both plaintiffs and defendants in *mass* actions have shifted their focus to meet the jurisdictional standards outlined by the Supreme Court,

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3. *Id.* at 1783.

4. *Id.* at 1779–81.

5. *Id.* at 1778.

6. *Id.* at 1784.

7. *Id.* at 1789 n.4 (Sotomayor, J., dissenting).

8. Weil, Gotshal & Manges LLP, *Litigation Trends 2018*, at 22 (2018), [https://www.weil.com/~media/publications/alerts/2018/litigation\\_trends\\_2018\\_report.pdf](https://www.weil.com/~media/publications/alerts/2018/litigation_trends_2018_report.pdf) [<https://perma.cc/UN2X-PRXC>].

9. *See* FED. R. CIV. P. 23.

one major question has been left open: whether the ruling applies to *class* actions.

Determining the answer to this question poses an immense challenge. The answer could come in one of three varieties, each of which has been embraced by the district courts that have dealt with the issue.<sup>10</sup> Specifically, courts are divided on how to apply the opinion to the parties representing the class and the absent class members (the parties who are not present in the case, yet who would be bound by the judgement). First, some courts have held that the personal jurisdiction analysis of *Bristol-Myers Squibb* is not applicable to either named class representatives or absent class members.<sup>11</sup> Second, some district courts have held that the *Bristol-Myers Squibb* personal jurisdiction analysis applies to named representatives, who are in much the same position as mass action plaintiffs, but not absent class members.<sup>12</sup> Finally, a small group of courts, mostly originating from the Northern District of Illinois, have concluded that the limiting personal jurisdiction analysis of *Bristol-Myers Squibb* applies to both named representatives *and* absent class members—perhaps warranting another sighting of the death of the class action, or at least the nationwide money damages class action.<sup>13</sup> With its far-reaching implications, the Seventh and D.C. Circuit Court of Appeals have been the first to offer limited guidance.<sup>14</sup>

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10. Christopher Murphy & Elizabeth Rowe, *Federal Courts Diverge on Bristol-Myers and Class Actions*, LAW 360 (Sept. 26, 2018), <https://www.law360.com/articles/1086278/federal-courts-diverge-on-bristol-myers-and-class-actions> [<https://perma.cc/AS7E-B6ZH>].

11. See *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723 (N.D. Ill. Aug. 22, 2017); *In re Chinese-Manufactured Drywall Products Liab. Litig.*, No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017); *Allen v. ConAgra Foods, Inc.*, No. 3:13-cv-01279, 2018 WL 6460451 (N.D. Cal. Dec. 10, 2018); *Sloan v. General Motors, LLC*, 287 F. Supp. 3d 840 (N.D. Cal. 2018); *Ochoa v. Church & Dwight Co.*, No. 5:17-cv-02019, 2018 WL 4998293 (C.D. Cal. Jan. 30, 2018); *Tickling Keys, Inc. v. Transamerica Fin. Advisors, Inc.*, 305 F. Supp. 3d 1342, (M.D. Fla. 2018); *Becker v. HBN Media, Inc.*, 314 F. Supp. 3d 1342 (S.D. Fla. 2018).

12. See *Al Haj v. Pfizer Inc.*, 338 F. Supp. 3d 741 (N.D. Ill. 2018) [hereafter *Al Haj I*]; *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114 (D.D.C. 2018); *Lee v. Branch Banking & Tr. Co.*, No. 18-21876, 2018 WL 5633995, (S.D. Fla. Oct. 31, 2018).

13. See *Mussat v. IQVIA, Inc.*, No. 17 C 8841, 2018 WL 5311903 (N.D. Ill. Oct. 26, 2018); *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870 (N.D. Ill. 2017); *In re Dental Supplies Antitrust Lit.*, No. 16 Civ. 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017); *Practice Mgmt. Supp. Services v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018); *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018); *McDonnell v. Nature's Way Products, LLC*, No. 16 C 5011, 2017 WL 4864910, (N.D. Ill. Oct. 26, 2017); *Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191 (N.D. Ill. May 16, 2018); *Wenokur v. AXA Equitable Life Ins.*, No. CV-17-00165, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017).

14. See *Beaton v. SpeedyPC Software*, 907 F.3d 1018 (7th Cir. 2018); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020).

I conclude that the *Bristol-Myers Squibb* ruling should not be applied to non-resident class members in class actions. In this Note, I will demonstrate that there is no reason to shoehorn the *Bristol-Myers Squibb* opinion to apply in class action litigation because the major concerns cited by courts applying the opinion to absent class members' claims are either insignificant or adequately handled by other procedural tools. Those concerns include: (1) a concern that nationwide class actions pose federalism concerns; (2) challenging Rule 23 under the Rules Enabling Act; and (3) forum shopping concerns.

In Part II, I will provide a brief history of the class action in American practice by showing its growth as a procedural tool and the recent restrictions on its use. This is vital to understanding the scrutiny class actions face in current practice. Further, I will provide the framework of important decisions regarding personal jurisdiction issued by the Supreme Court. Both are crucial to understanding the rationale of the *Bristol-Myers Squibb* opinion and its potential application to class actions.

In Part III, I will analyze the *Bristol-Myers Squibb* opinion and show the reasoning behind the Court's holding. I will detail both the majority Court and Justice Sotomayor's analysis of California's exercise of specific jurisdiction and how this ruling implicates an application to class actions. I will further demonstrate the growing district court divide in resolving this question by detailing the three categories of decisions that have arisen in applying *Bristol-Myers Squibb* to class actions.

Finally, in Part IV I will argue why the three major concerns presented by courts applying *Bristol-Myers Squibb* to absent class members are unwarranted. First, federalism concerns are not present in federal class actions, as there are procedural safeguards ensuring a single nationwide or multistate class does not violate due process. Second, failing to apply a personal jurisdiction analysis to absent class members does not modify rights in violation of the Rules Enabling Act, as the Supreme Court affirmed use of Rule 23 in *Shady Grove Orthopedic Association*. Finally, forum shopping concerns have little merit, as class members cannot procedurally take advantage of one forum's substantive law to their claim, and the Class Action Fairness Act allows immediate removal to federal forums.

Ultimately, I conclude in Part V that because these concerns are not present or pose an insignificant risk in class actions, courts should not apply *Bristol-Myers Squibb* to dismiss the claims of absent class members.

## II. THE RECEDING POWER OF CLASS ACTIONS AND THE RESTRICTION TO SPECIFIC JURISDICTION.

To better understand *Bristol-Myers Squibb*'s application to class actions, it is important to understand two consistently developing bodies of law: the growth and restrictions to the class action under Rule 23, and the Supreme Court's narrowing view of both general and specific jurisdiction.

### A. *The Growth and Recession of the American Class Action*

From the modern revision of Rule 23 in 1966 through the late 1980's, the class action has experienced a period of great growth and optimism for its ability to adequately handle large aggregated claims, especially large claims against a single defendant.<sup>15</sup> Following large restrictions in the early 2000's in response to abuse of the tool, the filing of class actions has been more closely scrutinized.<sup>16</sup> It is against these developments that the *Bristol-Myers Squibb* opinion becomes so critical for the class action's future.

#### 1. The Creation, Rise, and Golden Era of the Class Action Lawsuit (1820–1990).

The class action, tracing its origins back to English law, found its way to the New World and was introduced through a series of treatises issued by Justice Story in the early 19th century.<sup>17</sup> These treatises, while recognizing the general rule that necessary parties to the controversy must be present before the court, theorized one important exception:

Another exception to the general rule, as to parties, is where they are exceedingly numerous, and it would be impracticable to join them without almost, interminable delays and other conveniences, which would obstruct, and probably defeat, the purpose of justice . . . . The most usual cases arranging themselves under this head of exceptions are, (1.) where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole, (2.) where the parties form a voluntary association for public or private purposes, and those, who sue or defend, may fairly be presumed to represent the rights and interests of the whole, where the parties are very numerous, and though

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15. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736 (2013).

16. See, e.g., *id.*

17. See STEVEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 218–221 (1987).

they have, or may have, separate and distinct interest; yet it is impracticable to bring them all before the Court.<sup>18</sup>

Following these treatises, the first rule for interest-based representation, Federal Equity Rule 48, brought a rudimentary form of the class action into practice.<sup>19</sup> Subsequent caselaw demonstrated a strong desire to apply an equitable rule to allow a party to represent others with aligned interests when normally these absent parties would be deemed “necessary parties” and required to be involved in the suit.<sup>20</sup> Federal Equity Rule 48 (which later became Equity Rule 38) was eventually adopted into the Federal Rules of Civil Procedure through Rule 23 in 1938.<sup>21</sup> As American society industrialized, and its economy grew larger, our changing ways of life prompted a need for a procedural tool that would allow small claims to be efficiently joined together into a consolidated action.<sup>22</sup>

The original draft of Rule 23 in 1938 brought with it a period of great optimism for representative classes.<sup>23</sup> A new generation of lawyers and scholars envisioned the class action as a procedural method to supplement government regulatory efforts and aid in compliance.<sup>24</sup> Legal scholars

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18. 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).

19. See *Smith v. Swormstedt*, 57 U.S. 288, 303 (16 How. 1853) (describing Federal Rules of Equity 48 as: “For convenience, therefore, and to prevent a failure of justice, a court of equity permits 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.”). See also YEAZELL, *supra* note 17, at 238.

20. See *Swormstedt*, 57 U.S. 288, 302–03 (16 How. 1853) (allowing both plaintiffs and defendants to represent different regional branches of the Methodist Episcopal Church over objection for “want of proper parties to maintain the suit”); *American Steel & Wire Co. v. Wire Drawers’ & Die Makers’ Unions Nos. 1 and 3*, 90 F. 608, 617–19 (C.C.N.D. Ohio 1898) (allowing labor union leaders to represent union members in action for injunction); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363–67 (1921) (noting the availability of class suits, and held that members of fraternal organization could properly represent unnamed members in suit for dispersal of funds); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 385–89 (1922) (recognizing that class tool could be used to sustain judgement against miners and groups of labor organizations even though they were unincorporated).

21. FED. R. CIV. P. 23.

22. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (“Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.”).

23. See *id.*

24. *Id.* at 717; see also FED. R. CIV. P. 23.

heralded the class action, noting that “the class suit [is] a way of redressing group wrongs [and] is a semi-public remedy administered by the lawyer in private practice.”<sup>25</sup> Rule 23 soon began to cement itself as a necessary tool to allow private parties to organize and pursue legal violations alongside public agencies.<sup>26</sup>

However, practical problems with the rule still needed to be addressed. The main issue became the original rule’s three rigid categories of possible class actions—which were based on “the abstract nature of the interests involved”—and how to apply a final judgement to the class.<sup>27</sup> These categories—“true,” “hybrid,” and “spurious,”—were early attempts to categorize the potential types of class actions.<sup>28</sup> The “true” category was reserved for classes where a common right was shared amongst all parties and the individual with the primary right refuses to enforce that right. This allows a class member to represent all others situated, such as shareholders of a company suing corporate officers when the company refuses to do so.<sup>29</sup> The “hybrid” class dealt with multiple parties sharing individual rights, but was a form of case consolidation for when those rights concerned a shared piece of property: a good example being multiple creditors’ claims against a corporation in receivership.<sup>30</sup> Finally, the “spurious” class represented parties who had individual rights, but a common question of law or fact was shared among the class and common relief was sought.<sup>31</sup> For example, multiple landowners sustaining property damage by the single conduct of a railroad defendant could be consolidated into a spurious class. As with the other categories, judgment for the spurious class would only bind those who were “original parties, who intervened, and who were in privity.”<sup>32</sup>

Practical problems in utilizing the tool’s three categories eventually ensued. Specifically, there was difficulty in determining exactly when a class fit into one of the rigid categories, and once judgement was rendered,

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25. Kalven & Rosenfield, *supra* note 22, at 717.

26. *Id.* at 721 (concluding that our system should utilize class litigation to enforce administrative and regulatory laws, and act as a private sector supplement to these regulatory agencies).

27. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

28. *Id.*

29. James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised By The Preliminary Draft*, 25 GEO. L.J. 551, 572–73 (1937). See RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 233 (1985). See, e.g., *Smith v. Swormstedt*, 57 U.S. 288 (16 How. 1853); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

30. Moore, *supra* note 29, at 574. See also MARCUS & SHERMAN, *supra* note 29, at 234.

31. Moore, *supra* note 29, at 574–75. See also MARCUS & SHERMAN, *supra* note 29, at 234.

32. Moore, *supra* note 29, at 575. See also MARCUS & SHERMAN, *supra* note 29, at 234.

how exactly to administer a judgment to the potential class members.<sup>33</sup> This confusion prompted commentators to question whether use of the class tool was practical and worth the effort of attempting to determine under what category a class fell.<sup>34</sup> Scholars and practitioners were frustrated that while the “spurious” class seemed to allow flexibility, it still only reserved judgement to parties who successfully intervened in the action—somewhat defeating the purpose of the tool.<sup>35</sup>

These practical problems in application of the rule led to the major overhaul of Rule 23 in 1966.<sup>36</sup> In effect, the 1966 revision of Rule 23 became a proper and practical way to maintain a lawsuit representing a class of individuals. The new Rule 23 required that judgment apply to all individuals the court determined to be in the class, despite whether that judgement was favorable or not.<sup>37</sup> Further, the 1966 revision removed the original types of classes and allowed cases to certify as class actions so long as they met the 23(a) certification requirements and fell into one of three classes outlined in 23(b).<sup>38</sup>

To meet the 23(a) requirements, a potential class must meet a set of due process safeguards to be certified as a class. First, the class must be so numerous that joinder under Rule 20 would be impracticable.<sup>39</sup> Second, the class as a whole must share common questions of law or fact.<sup>40</sup> Third, the claims or defenses of the party representing the class must be typical of the claims or defenses of the class members as a whole.<sup>41</sup> Finally, it must be shown that the representative parties will “fairly and adequately protect the interests of the class.”<sup>42</sup> These certification requirements act as

33. See FED. R. CIV. P. 23 advisory committee’s notes to 1966 amendment.

34. In his 1950 lecture to University of Michigan Law School, Professor Zechariah Chafee Jr. famously demonstrated criticism of the original Rule 23’s categories, noting: “the situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity . . . .” ZECHARIAH CHAFEE JR., SOME PROBLEMS OF EQUITY: FIVE LECTURES DELIVERED AT THE UNIVERSITY OF MICHIGAN APRIL 18, 19, 20, 21, AND 22, 1949 at 200 (1950).

35. Compare J.W. MOORE, FEDERAL PRACTICE ¶ 23.10 p. 3444 (2d ed. 1963) (arguing that the spurious class was still a more efficient means of easy joinder, even if judgement was not binding on all members involved), with FLEMING JAMES, CIVIL PROCEDURE 500 (1963) (theorizing that having binding judgment under the spurious class tool would be capable of handling widespread injury caused from a single event and even race-relations problems by minimizing litigation).

36. See FED. R. CIV. P. 23 advisory committee’s notes to 1966 amendment. See also MARCUS & SHERMAN, *supra* note 29, at 234.

37. FED. R. CIV. P. 23 advisory committee’s notes to 1966 amendment.

38. *Id.*

39. FED. R. CIV. P. 23 (a)(1).

40. FED. R. CIV. P. 23 (a)(2).

41. FED. R. CIV. P. 23 (a)(3).

42. FED. R. CIV. P. 23 (a)(4).

due process safeguards in using the class tool. It ensures that there are so many parties involved that other joinder rules cannot be readily used.<sup>43</sup> Because questions of law, facts, claims, or defenses are shared by the class as a whole, an individual party will not be deprived of his rights if his controversy is represented through the class.<sup>44</sup> Additionally, because a representative can adequately represent the class members' interests, class members are assured that their interests are adequately heard, even though they are not present.<sup>45</sup> These requirements ensure that under proper circumstances, a party may represent a larger absent class without offending due process.<sup>46</sup>

The new rule also prescribed three types of potential class actions. First, the (b)(1) class was available for situations where the potential class members all had similarly held interests in the litigation, such as individual beneficiaries suing a trust organization.<sup>47</sup> Second, the (b)(2) class allowed injunctive or declaratory relief for a class as a whole.<sup>48</sup> Finally, the (b)(3) class, acting as a catch-all, allowed any class to be certified as long as "questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>49</sup> These new certification requirements, paired with class categories that were not as mutually exclusive as the old rules, allowed for greater utilization of the class action in American practice.<sup>50</sup>

With this tool in hand, a new generation of litigators used class actions to give injured plaintiffs an efficient forum for redress, just as the early adopters had envisioned.<sup>51</sup> This is especially so with the (b)(3) money damages class, which allowed plaintiffs who had small claims to

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43. See FED. R. CIV. P. 23(a)(1).

44. See FED. R. CIV. P. 23(a)(2)–(3).

45. See FED. R. CIV. P. 23(a)(4).

46. See *Newton v. Merrill Lynch, Pierre, Fenner & Smith, Inc.*, 259 F.3d 154, 182 n.27 (3d Cir. 2001) (explaining that the Rule 23 certification prerequisites demonstrate that it would not offend due process to commence the action without the class members being present. "The rule thus represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation.").

47. FED. R. CIV. P. 23(b)(1).

48. FED. R. CIV. P. 23(b)(2).

49. FED. R. CIV. P. 23(b)(3).

50. MARCUS & SHERMAN, *supra* note 29, at 235.

51. See generally Kalven & Rosenfield, *supra* note 22.

aggregate and pool resources against a single defendant.<sup>52</sup> In this spirit, the modern class action tackled some of American society's biggest woes, including widespread racial segregation of public schools,<sup>53</sup> a women's access to contraceptive options,<sup>54</sup> discrimination in the workplace,<sup>55</sup> and harm to both humans and the environment.<sup>56</sup> While class litigants enjoyed a long golden period, the procedural tool would soon enter a new period of heightened scrutiny and restriction.

## 2. The Receding Power of Class Actions, and Growing Restrictions (1990 to Present).

Starting in the 1990's, the class action began losing the wide latitude it had enjoyed in earlier decades. Several key pieces of rule revisions, legislation, and federal circuit court opinions scrutinized the procedural mechanisms and added new hoops to jump through for class actions. While many of these changes are beyond the scope of this Note, two changes are worth discussing.

### a. Rule 23(f) allowing interlocutory appeal of certification decisions.

The first major change came through the 1998 revision of Rule 23 to add section 23(f).<sup>57</sup> Prior to the 1998 amendment, parties could rarely appeal a court order granting or denying class certification.<sup>58</sup> As a result, following class certification, defendants were far more likely to settle the claims to avoid costly litigation and a potentially unfavorable judgement.<sup>59</sup> The 1998 amendment to Rule 23 added 23(f), which gave broad discretion to federal appellate courts to grant interlocutory appeals

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52. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. REV. 497, 497 (1969) (noting the revisions creating the (b)(3) money damages class "provide[d] means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"). See also *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (stating "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (internal citations omitted).

53. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

54. *Roe v. Wade*, 410 U.S. 113 (1973).

55. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997).

56. *In re Agent Orange Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145 (2nd Cir. 1987); *In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex.*, 808 F. Supp. 2d 943 (E.D. La. 2011).

57. FED. R. CIV. P. 23 advisory committee's notes to 1998 amendment.

58. Klonoff, *supra* note 15, at 739.

59. *Id.*

to contested orders granting or denying class certification.<sup>60</sup> With a new tool to immediately appeal orders granting or denying certification, parties were far more likely to appeal certification issues and receive guidance from appellate courts.

This rule change had the inadvertent effect of adding heightened scrutiny to the filing and certification of class actions. Rule 23(f) opened the door for the federal appellate courts to weigh in on Rule 23's procedural requirements. This has led to hundreds of opinions clarifying the Rule 23 requirements for class actions.<sup>61</sup> Numerous opinions have added heightened scrutiny regarding the threshold requirements of class certification, and this new caselaw has made it increasingly difficult to successfully certify class actions.<sup>62</sup> As Robert Klonoff outlines in his work, *The Decline of Class Actions*, now that federal appellate courts have gained greater exposure to decide certification issues, "they have adopted troublesome new standards applicable to plaintiffs seeking class wide relief."<sup>63</sup> These developments include new standards and caselaw applying to threshold evidentiary burdens, class definitions, numerosity requirements, commonality requirements, adequacy of representation, and predominance requirements.<sup>64</sup> As Klonoff further details: "the Rule 23(a) and (b) criteria, by their terms, have not changed in any significant way since 1966, but some courts have become increasingly skeptical in reviewing whether a particular case satisfies those requirements."<sup>65</sup> District courts continue to struggle with these heightened scrutiny levels, and certain jurisdictions have become more favorable for the certifying of class actions.<sup>66</sup>

- b. The 2005 Class Action Fairness Act opened federal courts to hear more class actions.

Congress's enactment of the Class Action Fairness Act (CAFA) drastically altered the potential forums available for class litigation and opened up the federal forum to preside over most substantial class actions. CAFA reworked the standards for diversity jurisdiction for class actions and ensured that parties could either file or remove class actions to federal court so long as there was minimal diversity between the parties, and the

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60. FED. R. CIV. P. 23(f).

61. Klonoff, *supra* note 15, at 745–46.

62. *Id.* at 745–815.

63. *Id.* at 745.

64. *Id.* at 746, 745–815.

65. *Id.* at 746–47.

66. *Id.* at 828.

amount in controversy exceeds \$5,000,000.<sup>67</sup> This change was inspired both by accounts of abuse of the class action from state court judges permitting easy certification of nationwide classes in state forums and the particular difficulty of removing class actions to the federal courts based upon diversity jurisdiction.<sup>68</sup> This resulted in a change of viable forums to file as “the vast majority of significant class actions were heard in federal court.”<sup>69</sup>

*B. The Supreme Court’s evolving interpretation of personal jurisdiction under the Due Process Clause.*

While *Bristol-Myers Squibb* is first and foremost about California’s exercise of personal jurisdiction, the decision has created implications for class actions. It is therefore useful to understand the Supreme Court’s continuing interpretation of personal jurisdiction under the Due Process Clause to understand *Bristol-Myers Squibb*’s development.

In the 74 years since the delivery of its seminal decision in *International Shoe*, the Supreme Court has limited the application of both general and specific jurisdiction. General jurisdiction was the first to be majorly restrained through the Court’s opinion in *Goodyear* and *Bauman*.<sup>70</sup> There, the Court added additional scrutiny to the requirements of general jurisdiction by requiring that a defendant’s continuous and systematic contact with the forum render it “essentially at home.”<sup>71</sup> This was a drastic step, and it widely limited the available forums available under general jurisdiction.<sup>72</sup> As most commentators believed that specific jurisdiction would pick up the slack, it too faced restrictions by the Court. The Court’s first restriction to specific jurisdiction came with requiring that the defendant must have purposefully availed himself to the jurisdiction.<sup>73</sup> As caselaw developed, the Court began to limit what factors it looked to in determining specific jurisdiction, and the fairness factors inherent in *International Shoe* began to take a back seat to a strict analysis of the defendant’s contact with the forum and the “relatedness” of the

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67. See 28 U.S.C. 1332 (d)(2)(A)–(C) (2018); 28 U.S.C. 1453 (2018); 28 U.S.C. 1711–1715 (2018).

68. Klonoff, *supra* note 15, at 743–45.

69. *Id.* at 745.

70. Bernadette Bollas Genetin, *The Supreme Court’s New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 107–08 (2015). See also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

71. See *Goodyear*, 564 U.S. at 929; *Bauman*, 571 U.S. at 139.

72. Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2015).

73. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

claims to that contact.<sup>74</sup> This restriction of specific jurisdiction culminated in *Bristol-Myers Squibb*, where the majority Court failed to take fairness factors into consideration and instead relied upon a strict analysis of the relatedness of the claims to the defendants' contact in California.<sup>75</sup>

Any discussion of personal jurisdiction logically starts with *International Shoe*. Here, in its seminal decision, the Supreme Court determined that to subject a defendant to the jurisdiction of the forum, "he [must] have certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" <sup>76</sup> From these contacts we derive either general jurisdiction, when the contacts are so substantial and continuous that defendant may be sued for any claim,<sup>77</sup> and specific jurisdiction, where the claims must arise out of and relate to the defendant's specific contact with the forum.<sup>78</sup> Both doctrines have evolved over the decades as the Court has continued to modify and interpret its holding in *International Shoe*.

#### 1. The Restriction of General Jurisdiction.

General jurisdiction was originally quite broad. As stated in *International Shoe*, general jurisdiction was based around the notion that a defendant's contact with a jurisdiction was so systematic and continuous that claims unrelated to that contact could be brought in that forum.<sup>79</sup> It followed that as long as a defendant had continuous and systematic contact with the forum, say a large corporation who operates regionally, they could be sued for any claim in those forums. However, early Supreme Court opinions began to limit this broad exercise of jurisdiction. Specifically, the Court in *Perkins v. Benguet Consolidated Mining Company* held that when exercising jurisdiction over claims unrelated to the defendant's contact in the forum, the central inquiry is whether the defendant's contact was "sufficiently substantial and of such a nature" to comport with due process.<sup>80</sup> In *Perkins*, the Court used this inquiry to determine whether a Philippine mining company whose operations were halted by the Japanese occupation during the Second World War had substantial and continuous connection to Ohio when the interim president

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74. See *Walden v. Fiore*, 571 U.S. 277, 284–89 (2014).

75. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783 (2017).

76. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

77. *Id.* at 317.

78. *Id.* at 320.

79. *Id.* at 318.

80. *Perkins v. Benguet Cons. Mining Co.*, 342 U.S. 437, 447 (1952).

operated the company from offices in Ohio.<sup>81</sup> Because the operations of the company had been fully relocated to Ohio, this justified the exercise of general jurisdiction by the Ohio courts.<sup>82</sup>

This holding was echoed by the Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*. The Court returned to *Perkins* to characterize the type of substantial and continuous contacts with the forum required to subject a defendant to general jurisdiction. While a foreign corporation had purchases “occurring at regular intervals” in Texas and had sent personnel for training in the state, this was insufficient to create general jurisdiction over them.<sup>83</sup> Thus, both the *Perkins* and *Helicopteros* Court recognized that even under the broad language of *International Shoe*, general jurisdiction had its outer limits.

This ebb became final in 2014 when the Court drastically restricted what forums were available for an assertion of general jurisdiction. This came through the Court’s dual opinions in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *Daimler AG v. Bauman*. In *Goodyear*, the Court declined to find that North Carolina could exercise general jurisdiction over a foreign subsidiary of the Goodyear Corporation simply because they had continually conducted business in North Carolina.<sup>84</sup> Relying upon its decisions in *Perkins* and *Helicopteros*, the Court concluded that “unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners *are in no sense at home* in North Carolina.”<sup>85</sup> Further, the court reiterated that the foreign subsidiary’s “attenuated connections to the State” resembled those in *Helicopteros*, and fell short of “the continuous and systematic general business contacts” necessary to create general jurisdiction.<sup>86</sup>

The Court echoed this restriction in *Bauman*. There, the Court held that California could not exercise general jurisdiction over Daimler AG, a publicly traded German corporation, because of the forum contact of its subsidiary (Mercedes-Benz USA) in California.<sup>87</sup> The Court reiterated that under *International Shoe*, the main inquiry is whether “instances in which the continuous corporate operations within a state are so substantial and of such a nature as to justify suit on cause of action arising from dealings entirely distinct from those activities.”<sup>88</sup> Returning to *Goodyear*,

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81. *Id.* at 447–48.

82. *Id.* at 448.

83. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984).

84. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 (2011).

85. *Id.* at 929 (emphasis added).

86. *Id.* (citing *Helicopteros*, 466 U.S. at 416).

87. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).

88. *Id.* at 138 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

the critical inquiry for general jurisdiction is what “affiliations with the State are so ‘continuous and systematic’ as to render [the defendant] *essentially at home in the forum State*.”<sup>89</sup> These limited available jurisdictions were proffered by the Court in *Bauman* as an “individual’s domicile” or, for a corporation, “the place of incorporation and principle place of business.”<sup>90</sup>

In the wake of *Goodyear* and *Bauman*, general jurisdiction had been drastically reduced.<sup>91</sup> General jurisdiction had once been based on simple systematic and continuous contact, and in that form, many nationwide corporations could be subject to suit in all 50 states.<sup>92</sup> General jurisdiction was now characterized by where the defendant was “essentially at home” and generally limited available forums to the state of domicile for individuals or state of incorporation/principle place of business for corporations.<sup>93</sup> However, this limitation to general jurisdiction was originally envisioned to be supplemented with an expansion of specific jurisdiction.<sup>94</sup> This expansion of specific jurisdiction never came: the doctrine of specific jurisdiction similarly became restricted from its original view under *International Shoe*.

## 2. The Restriction of Specific Jurisdiction.

*International Shoe* originally held that specific jurisdiction could be exercised over a defendant so long as the defendant had some contact with the forum and the claim “arise[s] out of or are connected with the activities within the state.”<sup>95</sup> In the same breath, the Court noted that this inquiry was not to be “simply mechanical or quantitative,” but “whether due process is satisfied must depend rather upon 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.”<sup>96</sup> It was originally thought that specific jurisdiction, while relating to the contact the defendant had with the jurisdiction, could still be found depending upon the nature of the case and the types of contact defendant had with the

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89. *Id.* at 139 (citing *Goodyear*, 564 U.S. at 919) (emphasis added).

90. *Id.* at 137.

91. Genetin, *supra* note 70, at 108.

92. Rhodes & Robertson, *supra* note 72, at 6.

93. *See Goodyear*, 564 U.S. at 919; *Bauman*, 571 U.S. at 139.

94. Genetin, *supra* note 70, at 114 (citing Arthur T. Von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1141–45, 1177–79 (1966)).

95. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

96. *Id.*

jurisdiction. Early commentators to *International Shoe* noted that the court should take into consideration other factors, including:

(1) the character of the defendant's activity that led to the controversy, which included the nature of the claim at issue; (2) whether the defendant was "a corporation [ ] whose economic activities and legal involvements were pervasively multistate" or "a natural . . . person whose economic activities and legal involvements were essentially local;" (3) whether the "defendant's activity foreseeably involved the risk of harm to individuals in communities other than his own"; (4) whether the plaintiff was a nonresident, or whether "[the plaintiff's] . . . affairs . . . were spread out over several jurisdictions including the defendant's home;" and (5) "litigational and enforcement" issues such as the convenience of witnesses and ease of determining controlling law.<sup>97</sup>

Following *International Shoe*, specific jurisdiction slowly became restricted. In *Hanson v. Denkla*, the Court added the requirement that to satisfy minimum contacts, the defendant must have "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law."<sup>98</sup> As explained in *World-Wide Volkswagen v. Woodson*, this requirement of purposeful availment was added for two major concerns. First, purposeful availment acts as a safeguard to interstate federalism concerns by "divest[ing] the State of its power to render a valid judgment," even if that forum would be reasonable to handle the claim.<sup>99</sup> Second, a purposeful availment requirement gives "clear notice" that a defendant would be subject to suit in that particular state in relation to his contact there.<sup>100</sup> It should be noted that this requirement was not originally outlined in *International Shoe* and acts as a restriction on the doctrine of specific jurisdiction.<sup>101</sup>

The Court then began to scrutinize the "relatedness" of the claims in question but provided no clear analysis as to what constituted claims *related* to the defendant's contact.<sup>102</sup> *Helicopteros* originally noted that the parties conceded to the fact that the claims did not "arise out of" and were not "related to" the defendant's forum activities.<sup>103</sup> The Court noted

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97. Von Mehren & Trautman, *supra* note 94, at 1164, 1166–69.

98. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319).

99. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (citing *Hanson*, 357 U.S. at 254). *See also Hanson*, 357 U.S. at 250–54.

100. *World-Wide*, 444 U.S. at 297.

101. *See Int'l Shoe*, 326 U.S. at 310.

102. Genetin, *supra* note 70, at 115–16.

103. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984).

the confusion and lack of clear standard to the relatedness requirement, yet declined to address the issue in that case.<sup>104</sup>

The final major restriction to personal jurisdiction came through the Court's opinion in *Walden v. Fiore*. There, the Court noted that the critical inquiry in determining specific jurisdiction was "the relationship between the defendant, the forum, and the litigation."<sup>105</sup> The Court did look to the quality and nature of defendant's contact with the forum as instructed by *International Shoe*, but they did so through the lens of the *defendant's* actions that connected him to the forum.<sup>106</sup> Thus, the Court diminished the fairness factors analysis and instead focused on interstate federalism and a strict contact analysis to drive personal jurisdiction.<sup>107</sup>

This limitation of general jurisdiction and subsequent limitation to specific jurisdiction has large and far reaching implications. As noted, general jurisdiction was once broad enough to allow nationwide corporations who operate in multiple states to be subject to general jurisdiction simply because of their continuous and systematic contact with the forum.<sup>108</sup> *Goodyear* and *Bauman* limited available general jurisdiction forums to only the select few forums where there are such continuous and systematic contacts to render the defendant "essentially at home."<sup>109</sup> As noted, commentators expected a limitation of general jurisdiction would be followed by a broadening of specific jurisdiction to correct for this limitation.<sup>110</sup> Instead, specific jurisdiction has found itself restricted as well; whether it be from the requirements that the defendant purposefully availed himself to the forum, or scrutinizing only the defendant's connection to the forum and focusing on interstate federalism as the primary driver behind the personal jurisdiction analysis.<sup>111</sup>

In their piece, *Toward a New Equilibrium for Personal Jurisdiction*, Charles "Rocky" Rhodes and Cassandra Burke Robertson note why this limitation of general and specific jurisdiction is so important.<sup>112</sup> Both

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104. *Id.*

105. *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (citing *Keeton v. Hustler Mag. Inc.*, 465 U.S. 770, 775 (1984)).

106. *Id.* at 288–89. *See also* Genetin, *supra* note 70, at 152.

107. Genetin, *supra* note 70, at 152.

108. Rhodes & Robertson, *supra* note 72, at 6.

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

110. Genetin, *supra* note 70, at 152.

111. *See Walden v. Fiore*, 571 U.S. 277, 284 (2014); *World-Wide Volkswagen Corp. v. Woodson*, 440 U.S. 286, 294 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

112. *See generally* Rhodes & Robertson, *supra* note 72.

authors in 2014 pointed to the precise problem that is the central issue to this Note.<sup>113</sup> They state:

Plaintiffs who want to litigate outside of the defendant's home states will look for a jurisdictional hook, and they will be highly incentivized to do so: nationwide class actions, for example, often depend on the existence of general jurisdiction, since the cases typically involve multiple defendants with different home states. Now, plaintiffs will be searching for new jurisdictional grounds . . . . As a result, plaintiffs will work harder to establish another ground for personal jurisdiction, forcing courts to clarify and resolve some of the remaining questions about the scope of personal jurisdiction.<sup>114</sup>

The elimination of broad general jurisdiction, restriction of specific jurisdiction, and the growth and subsequent restriction of class actions form the background of the *Bristol-Myers Squibb* opinion. It was against these restrictions that the Court had to decide an issue exactly on point to the hypothetical proposed by Rhodes and Robertson.<sup>115</sup> Will the nationwide money damages class fail, not because class action procedure is inappropriate, but because the claims of the absent class members are not related to the defendant's substantial contacts with the forum? While this question was not addressed in *Bristol-Myers Squibb*, certainly it must have been contemplated by the Justices.

### III. *BRISTOL-MYERS SQUIBB'S* WORRISOME APPLICATION TO CLASS ACTIONS.

#### A. *The Court's analysis in Bristol-Myers Squibb*

*Bristol-Myers Squibb* centered around personal jurisdiction, but the opinion issued by the Court has had implications for class actions and has led to a standard that the federal district courts have struggled to apply.

*Bristol Myers Squibb*, a large American pharmaceutical company incorporated in Delaware with its headquarters in New York, produced the drug Plavix.<sup>116</sup> The company did not produce or manufacture Plavix in the state of California, but it received more than one percent of its total nationwide sales revenue from drug sales in California.<sup>117</sup> In 2012, a group of 678 plaintiffs filed eight separate amended complaints in the San

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113. *Id.* at 20–21.

114. *Id.*

115. *Id.*

116. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1777–78 (2017).

117. *Id.*

Francisco Superior Court alleging that Plavix had damaged their health.<sup>118</sup> The group of plaintiffs brought 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising.<sup>119</sup> Importantly, these plaintiffs consisted of a large inter-state group—86 California residents and over 592 other plaintiffs from 33 other states.<sup>120</sup> The plaintiffs' contacts with California are critical to the issues in this case; while the resident plaintiffs purchased and were injured by Plavix in California, the non-resident plaintiffs *did not* allege that they bought or were injured by the drug in California.<sup>121</sup>

Bristol Myers Squibb immediately moved to quash service of summons on the non-resident's claims by asserting the California courts lacked personal jurisdiction regarding the non-resident's claims.<sup>122</sup> This issue would be the main contention of the litigation and would be the subject of multiple appeals and eventual review by the Supreme Court.

Originally, the California Superior Court denied Bristol Myers Squibb's motion, claiming that the California courts could exercise general jurisdiction over the company.<sup>123</sup> The California Court of Appeals, while disagreeing with the Superior Court's finding of general jurisdiction, believed that the California courts had specific jurisdiction over the non-resident's claims.<sup>124</sup> The appellate court believed that while general jurisdiction was lacking, specific jurisdiction was met because Bristol Myers Squibb had such continuous contact with California and all the plaintiffs were harmed in the course of identical nationwide conduct.<sup>125</sup> Under this "sliding scale" approach, the court found that Bristol Myers Squibb had established minimum contacts by deriving a substantial amount of economic benefits from the State and an extensive physical presence.<sup>126</sup> Further, the court found a "substantial" relationship between Bristol Myers Squibb's contact with California and the non-resident claims because, while the non-resident plaintiffs were not harmed in California, their injuries resulted from a nationwide course of action by

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118. *Id.* at 1778 (citing *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal.5th 783, 790–91 (2017)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* (finding California Superior Courts could exercise general jurisdiction "[b]ecause [it] engages in extensive activities in California.>").

124. *Id.* (citing *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal.Rptr.3d 412 (Cal. Ct. App. 2014)).

125. *Bristol-Myers Squibb Co.*, 175 Cal.Rptr.3d at 434–35.

126. *Id.* at 433.

the drug company that was identical to all the plaintiffs.<sup>127</sup> Bristol Myers Squibb again appealed this determination.

The Supreme Court of California eventually weighed in on the issue. The majority court agreed with the appellate court, stating that under a “sliding scale approach” to contacts with the forum, the state had personal jurisdiction over the nonresident claims.<sup>128</sup> Under this approach, the more contact the defendant had with the forum (even if it was unrelated to the claim at hand), the “more readily is shown the connection between the forum contacts and the claim.”<sup>129</sup> Using this sliding scale approach, the majority believed that because the company had extensive contacts with California, this had moved Bristol Myers Squibb “up the scale,” and afforded plaintiffs an exercise of specific jurisdiction “based on a less direct connection between Bristol Myers Squibb’s forum activities and plaintiffs’ claims that might otherwise be required.”<sup>130</sup> The court therefore believed that since the claims of the non-resident plaintiffs were based on the same nationwide conduct, and the California plaintiff’s jurisdiction was uncontested, specific jurisdiction had been met.<sup>131</sup>

The United States Supreme Court granted certiorari to determine whether this exercise of personal jurisdiction was proper.<sup>132</sup> The 8–1 majority decision, authored by Justice Alito, disagreed with the California Supreme Court’s holding that California could exercise specific jurisdiction over Bristol Myers Squibb regarding the non-resident claims.<sup>133</sup> The Court believed that California’s application of a “sliding-scale approach” to relax the traditional standards of specific jurisdiction was incorrect, as an analysis of specific jurisdiction requires a nexus between the claims at hand, and the underlying contacts defendant had with the jurisdiction.<sup>134</sup> The defendant’s relationship with the plaintiff or third party *alone* will not be a basis for specific jurisdiction.<sup>135</sup> In their analysis, the Court noted that above all other factors, precedent requires that for specific jurisdiction to be found, there must be an underlying connection between the forum and the claims.<sup>136</sup> Thus, the Court did not

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127. *Id.* at 434.

128. *Id.* (citing *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal.5th 786, 806 (2017)).

129. *Id.*

130. *Id.* at 1779 (citing *Bristol-Myers Squibb Co.*, 1 Cal.5th 783 at 803–06).

131. *Id.*

132. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (order granting writ of certiorari).

133. *Id.* at 1783.

134. *Id.* at 1781 (emphasis added). *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

135. *See* *Walden v. Fiore*, 571 U.S. 277, 286 (2014).

136. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781 (citing *Goodyear*, 564 U.S. at 919).

believe that the non-resident plaintiff's claims related to Bristol Myers Squibb's contact in California: their alleged injury occurred entirely elsewhere, and the fact that the claims are materially identical to the resident plaintiffs does not create jurisdiction.<sup>137</sup>

Having determined that the non-residents could not rely upon the claims of the resident plaintiffs, the Court determined that the connection between the non-resident claims and California were almost non-existent.<sup>138</sup> These plaintiffs were not California residents, claimed no harm within the State, and all the relevant activity leading up to their claims happened elsewhere.<sup>139</sup> Returning to *Goodyear*, the Court noted that "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."<sup>140</sup> Bristol Myers Squibb's continuous economic activity within California was insufficient to create jurisdiction for claims that are not directly related to that contact. Therefore, determining California had specific jurisdiction over their claims would be incompatible with due process.<sup>141</sup>

Justice Sotomayor, authoring the lone dissenting opinion in the case, expressed deep concerns with the majority's conclusions. She believed that while the majority Court focused on defendant's contacts with the forum as the central inquiry, they failed to address reasonableness as a separate core concern. In applying specific jurisdiction, three separate inquiries are required: whether the defendant purposefully availed himself to the forum,<sup>142</sup> whether the plaintiff's claim arises out of or relates to the defendant's contact with the forum,<sup>143</sup> and whether "the exercise of jurisdiction [is] reasonable under the circumstances."<sup>144</sup> Under these parameters, Justice Sotomayor believed that the California courts had properly exercised specific jurisdiction.

First, Bristol Myers Squibb's adequately availed itself to California as a forum by engaging in the state economy, contracting with distributors in the state, and deriving a substantial amount of its revenues from the

137. *Id.*

138. *Id.* at 1782. *See also* *Walden*, 571 U.S. at 286.

139. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1782.

140. *Id.* at 1781 (citing *Goodyear*, 564 U.S. at 931) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

141. *Id.* *See also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

142. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1785–86 (Sotomayor, J., dissenting) (citing *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011)).

143. *Id.* at 1786 (Sotomayor, J., dissenting) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

144. *Id.* (Sotomayor, J., dissenting) (citing *Asahi Metal Indus. Co. v. Super. Ct. Cal.*, 480 U.S. 102, 113–14 (1987)) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985)).

state.<sup>145</sup> Second, the non-resident claims related to Bristol Myer Squibb’s California conduct because all the claims dealt with a nationwide course of identical advertising and distribution of drugs across all 50 states.<sup>146</sup> Just because the non-resident plaintiffs were injured in another state, their claims still relate to “the same essential acts” of Bristol Myers Squibb that also injured plaintiffs in California.<sup>147</sup> Accordingly, precedent requires “no connection more direct than that.”<sup>148</sup> While the majority Court relied upon *Walden* to demonstrate that the non-resident claims did not relate to Bristol Myers Squibb’s California contact, this was incorrect as *Walden* dealt with “purposeful availment” rather than the requirement that “a plaintiff’s claim ‘arise out of or relate to’ a defendant’s forum contacts.”<sup>149</sup>

Third, California’s exercise of jurisdiction over Bristol Myers Squibb was reasonable. Both Bristol Myers Squibb and the plaintiffs in the case had a strong interest in litigating together in California.<sup>150</sup> Bristol Myers Squibb would have to defend only one action compared to numerous piecemeal actions, and plaintiffs had an interest in pooling resources under shared counsel to “maximize recoveries on claims that may be too small to bring on their own.”<sup>151</sup> Additionally, California had an interest in efficiently handling matters that concerned its residents and a non-resident corporation doing business within its borders.<sup>152</sup> Taking all three factors into consideration, exercising jurisdiction over Bristol Myers Squibb in California did not offend due process.<sup>153</sup>

Having shown that an exercise of jurisdiction over Bristol Myers Squibb would comport with due process, Justice Sotomayor noted that the majority seemed to rely upon federalism as a central concern.<sup>154</sup> By relying upon *World-Wide Volkswagen*, the majority seemed to suggest that “‘Territorial limitations on the power of the respective States’ . . . may—and today do—trump . . . concerns about fairness to the parties.”<sup>155</sup> The majority Court would suggest that even in situations where all the fairness factors weigh toward finding jurisdiction,

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145. *Id.* at 1786 (Sotomayor, J., dissenting).

146. *Id.* at 1784 (Sotomayor, J., dissenting).

147. *Id.* at 1786 (Sotomayor, J., dissenting).

148. *Id.*

149. *Id.* at 1787 (Sotomayor, J., dissenting).

150. *Id.* at 1786–87 (Sotomayor, J., dissenting).

151. *Id.*

152. *Id.*

153. *Id.* at 1787 (Sotomayor, J., dissenting).

154. *Id.* at 1788 (Sotomayor, J., dissenting).

155. *Id.* (citing internally *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017)).

federalism concerns bar a finding of jurisdiction.<sup>156</sup> Considering *Bristol Myers Squibb* was engaged in a nationwide course of marketing Plavix, Justice Sotomayor argued no single state had an interest in the controversy and relying upon a strict federalism analysis was unwarranted.<sup>157</sup> Noting a departure from the usual standard, she stated: “I would measure jurisdiction first and foremost by the yardstick set out in *International Shoe*—‘fair play and substantial justice.’ The majority’s opinion casts that settled principle aside.”<sup>158</sup>

Justice Sotomayor concluded by noting a concern for the Court’s limitation on consolidated actions against a defendant who engaged in a single nationwide course of action.<sup>159</sup> She feared that these limitations would prevent nationwide consolidated claims by restricting plaintiffs to filing either in “far flung” forums where a defendant has general jurisdiction or bringing their claims separately in multiple state actions.<sup>160</sup> This concern extended to nationwide class actions, with the Justice noting: “[T]he 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 who were injured there.”<sup>161</sup>

*B. The confusion in applying the Bristol-Myers Squibb opinion to class actions, and the growing district court divide.*

The *Bristol-Myers Squibb* opinion is another important case setting the limits on a court’s exercise of personal jurisdiction. However, the language of the opinion has worrisome implications to class actions, as it would allow absent class members’ claims to be dismissed as if they were normal parties to an action.<sup>162</sup> In the three years following the opinion, a

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156. *Id.* (citing internally *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780–81).

157. *Id.*

158. *Id.* (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

159. *Id.* at 1789.

160. *Id.*

161. *Id.* at 1789 n.4. *See also* *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002) (stating “nonamed class members . . . may be parties for some purposes and not for others”); *see also* Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 *IND. L.J.* 597, 616–617 (1987).

162. *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781 (2017) (stating “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 third parties (here the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents.” (internal citations omitted)); Further, the Court entertains Respondent’s argument under *Schutts* which concerned personal jurisdiction analysis in class actions. Had the Court not had their eyes set on potentially applying the opinion to class actions, they would have dismissed the citation as totally irrelevant because it concerned a class action, rather than a mass action. *See id.* at 1782–83.

host of federal district courts have entertained motions to dismiss class action claims based upon a personal jurisdiction analysis originating from *Bristol-Myers Squibb*.<sup>163</sup> These courts have issued differing decisions regarding whether the opinion can be applied to class actions, and to what degree.

Three major categories of district court decisions have emerged. First are the courts that believe that *Bristol-Myers Squibb* has no application to absent class members in class actions because of the material differences between the mass actions and class litigation. Second are the courts which apply a “hybrid” approach, where the *Bristol-Myers Squibb* opinion may be applied to named representatives of the class, but not to the potential class members. Finally, certain courts have applied the opinion to absent class members in class actions, allowing a defendant to limit class size to only representatives and class members who were affected within the forum. These categories are discussed in further detail below.

1. Courts which have refused to apply the *Bristol-Myers Squibb* opinion to class actions.

While the *Bristol-Myers Squibb* analysis requires “an affiliation between the forum and the underlying controversy,”<sup>164</sup> the first category of courts has denied application of this analysis to any parties in class actions.<sup>165</sup> These courts reason that class actions are procedurally distinct from the mass actions at issue in *Bristol-Myers Squibb*.<sup>166</sup> So long as plaintiffs have adequately met the class requirements of Rule 23,<sup>167</sup> *Bristol-Myers Squibb* should not be applied to class actions.<sup>168</sup> While

163. Weil, Gotshal & Manges LLP, *supra* note 8, at 22.

164. See *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780.

165. See *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723 (N.D. Ill. Aug. 22, 2017); *Chinese-Manufactured Drywall Products Liab. Litg.*, No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017); *Allen v. ConAgra Foods, Inc.*, No. 3:13-cv-01279, 2018 WL 6460451 (N.D. Cal. Dec. 10, 2018); *Sloan v. General Motors LLC.*, 287 F. Supp. 3d. 840 (N.D. Cal. 2018); *Ochoa v. Church & Dwight Co.*, No. 5:17-cv-02019, 2018 WL 4998293 (C.D. Cal. Jan. 30, 2018); *Tickling Keys v. Transamerica Fin. Advisor Inc.*, 305 F. Supp. 3d. 1342 (M.D. Fla. 2018); *Becker v. HBN Media, Inc.*, 314 F. Supp. 3d. 1342 (S.D. Fla. 2018).

166. See *Allen*, 2018 WL 6460451, at \*6 (“The Supreme Court could not have intended to severely narrow the forum choices available to *class* actions plaintiffs when it decided a case involving a *mass* action.”); *Ochoa*, 2018 WL 4998293, at \*9 (“However, *BMS* was not a class action, it was a mass tort action in state court. This factor alone materially distinguishes [the current case from *Bristol-Myers Squibb*] . . .”). See also *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723, at \*3 (N.D. Cal. Sept. 22, 2017); *In re Chinese-Manufactured Drywall Products Liab. Litg.*, No. 09-2047, 2017 WL 5971622, at \*12–17 (E.D. La. Nov. 30, 2017).

167. For a detailed discussion of the Rule 23 requirements see *supra* Part II.A.1.

168. *Fitzhenry-Russell*, 2017 WL 4224723 at \*5.

numerous courts have accepted this theory, I would not advance this approach because named representatives *are* parties for procedural purposes, and their personal jurisdiction can be challenged using the *Bristol-Myers Squibb* analysis.<sup>169</sup>

Two early district court opinions following the *Bristol-Myers Squibb* opinion, one from the Northern District of California and the other from the Eastern District of Louisiana, tended to deny that the opinion had any applicability to class actions.<sup>170</sup> Just as Justice Sotomayor worried, defendants attempted to use the opinion to dismiss class action claims on the basis that the courts did not have personal jurisdiction over defendants regarding out of state class members' claims.<sup>171</sup> However, these two courts did not apply *Bristol-Myers Squibb*, and a number of courts began following suit and barred application of the opinion to class actions.<sup>172</sup>

Their refusal was grounded in the elementary differences between the mass actions at the center of the *Bristol-Myers Squibb* opinion and class actions. First, these courts have routinely noted that the *Bristol-Myers Squibb* opinion centered around mass actions and have found this fact sufficient to warrant not applying the opinion to class action suits.<sup>173</sup> Second, class actions are materially different than the mass actions at the center of *Bristol-Myers Squibb*. The class certification requirements outlined in Rule 23 act as due process safeguards in allowing a named party to represent a possible nationwide class of similarly affected individuals, whereas these certification requirements are rarely met for mass actions, requiring each party to be a named party in the action.<sup>174</sup>

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169. See *infra* Part III.B.2. There, I discuss application of the opinion to named representatives, while shielding unnamed class members from a personal jurisdiction analysis.

170. See *Fitzhenry-Russell*, 2017 WL 4224723, at \*3; *Chinese-Manufactured Drywall*, 2017 WL 5971622, at \*12–17.

171. *Fitzhenry-Russell*, 2017 WL 4224723, at \*3 (“Dr. Pepper moves to dismiss the complaint on the ground that the Court lacks personal jurisdiction over it, or at least over Dr. Pepper as to the non-California class members.”).

172. See *Chinese-Manufactured Drywall Products Liab. Litg.*, No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017); *Allen v. ConAgra Foods, Inc.*, No. 3:13-cv-01279, 2018 WL 6460451 (N.D. Cal. Dec. 10, 2018); *Ochoa v. Church & Dwight Co.*, No. 5:17-cv-02019, 2018 WL 4998293 (C.D. Cal. Jan. 30, 2018); *Tickling Keys v. Transamerica Fin. Advisor Inc.*, 305 F. Supp. 3d 1342 (M.D. Fla. 2018); *Becker v. HBN Media, Inc.*, 314 F. Supp. 3d 1342 (S.D. Fla. 2018); *Thompson v. Transamerica Life Ins. Co.*, No. 2:18-cv-05422, 2018 WL 6790561, (C.D. Cal. Dec. 26, 2018); *Gasser v. Kiss My Face, LLC.*, No. 17-cv-01675, 2018 WL 4538729 (N.D. Cal. Sep. 21, 2018).

173. See *Chinese-Manufactured Drywall Products Liab. Litg.*, No. 09-2047, 2017 WL 5971622, at \*2–4 (E.D. La. Nov. 30, 2017).

174. *Id.* at \*14.

This distinction is critical and warrants not applying the opinion to class actions.<sup>175</sup>

Further, the federalism concerns present in the *Bristol-Myers Squibb* opinion are not present in federal class litigation. The *Bristol-Myers Squibb* opinion concerned the exercise of a state court's power over a controversy that had no connection to the forum.<sup>176</sup> While a federal court sitting in diversity would still apply substantive state law to a controversy, these courts have left open whether the opinion applies in federal court.<sup>177</sup> Importantly, the *In re Chinese Manufactured Drywall* court noted that because traditional choice of law principles and Rule 23's subclass tool adequately handle conflicts of law without dismissing the action and creating multiple suits, these federalism concerns are not present in federal class actions.<sup>178</sup>

In sum, these courts have held that *Bristol-Myers Squibb* should not be applied to any parties in class actions. As Judge Eldon E. Fallon noted in his opinion in *In re Chinese Manufactured Drywall Products Liability Litigation*: "*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."<sup>179</sup> Therefore, defendants cannot use the opinion to break up and limit potential multi-state class actions.

## 2. Courts which have applied a "hybrid" approach when analyzing class actions.

The second category of courts have been applying the *Bristol-Myers Squibb* opinion to class actions but limiting the analysis to only named representatives of the class.<sup>180</sup> Courts employing this hybrid approach have done so because named representatives of a class action are named parties for procedural purposes, and a personal jurisdiction analysis must be conducted on their claims. Thus, these courts have adopted a "hybrid" approach to applying the opinion by dismissing named representatives

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175. See *Tickling Keys*, 305 F. Supp. 3d at 1350–51; *Ochao*, 2018 WL 4998293, at \*10; *Allen*, 2018 WL 6460451, at \*7; *Becker*, 314 F. Supp. 3d at 1345.

176. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

177. *Allen*, 2018 WL 6460451, at \*5–6.

178. *Chinese-Manufactured Drywall Products Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at \*14 (E.D. La. Nov. 30, 2017).

179. *Id.* at \*21.

180. See *Al Haj v. Pfizer Inc.*, 338 F. Supp. 3d 741 (N.D. Ill. 2018) [hereafter *Al Haj I*]; *Samsung Galaxy Smartphone Mktg. & Sales Practices Litig.*, No. 16-cv-06391-BLF, 2018 WL 1576457 (N.D. Cal. Mar. 30, 2018); *Reitman v. Champion Petfood USA, Inc.*, No. CV 18-1736-DOC (JPRx), 2018 WL 4945645 (C.D. Cal. Oct. 10, 2018).

under the rationale but shielding application to unnamed class members. I propose this is the correct approach to applying the *Bristol-Myers Squibb* opinion to class actions.

While only a few courts have advanced this approach, an instructive case on the hybrid application is *Al Haj v. Pfizer Inc.*<sup>181</sup> This case concerned a putative class action in the Northern District of Illinois wherein two named representatives, Karmel Al Haj and Timothy Woodhams, brought suit against Pfizer Inc. alleging violations of multiple states' consumer protection laws.<sup>182</sup> Pfizer Inc. moved to dismiss plaintiff Woodhams's claims for lack of personal jurisdiction.<sup>183</sup> Pfizer argued lack of personal jurisdiction related to Woodhams's claims because Woodhams was a citizen and resident of Michigan, and the events leading up to his consumer protection claim all occurred in Michigan.<sup>184</sup> As such, Illinois could not exercise jurisdiction over his claims.<sup>185</sup> In determining whether specific jurisdiction existed over Pfizer in regards to Woodhams's claims, the court noted that Woodhams had not shown that there was "a nexus between [Pfizer's activities in Illinois] and his injury."<sup>186</sup> Woodhams's alleged injury and his contact with Pfizer all occurred in Michigan, rather than Illinois.<sup>187</sup> Specifically, Woodhams was a Michigan resident, and he purchased the Robitussin involved in the case at a market in Michigan.<sup>188</sup> While the case was filed in Illinois, Pfizer's contact relating to Woodhams's claims all occurred in Michigan.<sup>189</sup>

The court further rejected any argument that this "nexus" was met because Woodhams's claims and injuries were identical to the other named representative in Illinois. This argument was almost identical to the one offered by the plaintiffs in *Bristol-Myers Squibb*, and the Supreme Court rejected the notion that these facts alone created specific jurisdiction.<sup>190</sup> "The fact that Al Haj 'sustained the same injury' as Woodhams 'does not allow Illinois to assert specific jurisdiction over Woodhams's claims,' given that Woodhams does not 'claim to have suffered harm in Illinois' and 'all the conduct giving rise to his claims

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181. *Al Haj I*, 338 F. Supp. 3d 741 (N.D. Ill. 2018).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 749–50.

186. *Id.* at 751–52. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

187. *Al Haj I*, 338 F. Supp. 3d at 747.

188. *Id.* at 746.

189. *Id.*

190. See *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781–82.

occurred’ in Michigan.”<sup>191</sup> Finally, the district court believed that “nothing in [the *Bristol-Myers Squibb* opinion] suggests that it does not apply to *named plaintiffs* in a class action; rather, the Court reaffirmed a generally applicable principle—that due process requires a ‘connection between the forum and the specific claims at issue.’”<sup>192</sup>

The *Al Haj* court did not initially deal with the issue of applying *Bristol-Myers Squibb* to absent class members. However, after successful use of the opinion to dismiss Woodhams’s claims, Pfizer attempted to apply the opinion to absent class members in a subsequent briefing.<sup>193</sup> Pfizer argued that the opinion could be used to dismiss the complaints of absent class members whose claims had no connection to Pfizer’s activity in Illinois.<sup>194</sup> The court disagreed, siding with the courts that have barred applying the opinion to non-resident class members.<sup>195</sup> Rather, the court acknowledged that before *Bristol-Myers Squibb*, “due process neither precluded nationwide or multistate class actions nor required the . . . jurisdictional inquiry urged by Pfizer,” and “*Bristol-Myers* does not alter that landscape.”<sup>196</sup> Thus, the opinion was merely “a straightforward application . . . of settled principles of personal jurisdiction.”<sup>197</sup> While the opinion could be applied to named representatives, such as Woodhams, the court believed that the opinion’s application to the absent class members had simply not been addressed by the Supreme Court and it could not be applied to the absent class members in the current dispute.<sup>198</sup>

Because the *Al Haj* court applied the *Bristol-Myers Squibb* opinion to named representatives of the class, but not to absent class members, this court falls squarely in the hybrid approach; this court recognized the application of the *Bristol-Myers Squibb* analysis to named representatives as procedural parties,<sup>199</sup> yet recognized that the due process safeguards built into class actions afford absent class members a different treatment.<sup>200</sup> This rationale has been echoed by the few courts that have

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191. *Al Haj I*, 338 F. Supp. 3d at 752 (citing *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781–82).

192. *Id.* (citing *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781) (emphasis added); see *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 874–75 (N.D. Ill. 2017) (applying *Bristol-Myers Squibb* to named plaintiffs in punitive class action).

193. *Al Haj*, 338 F. Supp. 3d. 815, 818 (N.D. Ill. 2018) [hereafter *Al Haj II*].

194. *Id.*

195. *Id.*

196. *Id.* at 818–19.

197. *Id.* (citing *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1783).

198. *Id.* at 819.

199. *Al Haj I*, 338 F. Supp. 3d. at 752.

200. *Al Haj II*, 338 F. Supp. 3d. at 819–20.

applied the analysis to class representatives, yet shielded unnamed class members.<sup>201</sup>

3. Courts which have applied the *Bristol-Myers Squibb* opinion to all parties in class actions.

The final category of courts has applied the *Bristol-Myers Squibb* opinion to all parties in class actions, including absent class members.<sup>202</sup> These courts advance three main theories for doing so: federalism concerns, challenges to Rule 23 under the Rules Enabling Act (REA), and forum shopping concerns.

First, certain courts have taken *Bristol-Myers Squibb* as a signal from the Supreme Court that federalism concerns prompt the end to the nationwide class action outside the defendant's state of general jurisdiction.<sup>203</sup> Just as the *Bristol-Myers Squibb* Court was concerned about California courts finding jurisdiction and adjudicating claims that occurred entirely outside the forum, these courts have been concerned about the same problems occurring in nationwide class actions.<sup>204</sup> These courts view the ruling as a tool to either limit such nationwide class actions

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201. See *Samsung Galaxy Smartphone Mktg. & Sales Practices Litig.*, No. 16-cv-06391-BLF, 2018 WL 1576457, at \*2 (N.D. Cal. Mar. 30, 2018) (“Plaintiffs identify no authority where a court has determined that *Bristol-Myers* does not apply to a named plaintiff seeking to represent a statewide class . . . .”); *Reitman v. Champion Petfood USA, Inc.*, No. CV 18-1736-DOC (JPRx), 2018 WL 4945645, at \*6 (C.D. Cal. Oct. 10, 2018) (“This Court finds that *Bristol-Myers* does apply where, as here, nonresident class representatives assert state-law claims against nonresident defendants on behalf of multistate classes . . . .”).

202. See *Mussat v. IQVIA, Inc.*, No. 17 C 8841, 2018 WL 5311903 (N.D. Ill. Oct. 26, 2018); *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870 (N.D. Ill. 2017); *In re Dental Supplies Antitrust Lit.*, No. 16 Civ. 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017); *Practice Mgmt. Supp. Services v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018); *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018); *McDonnell v. Nature’s Way Products, LLC*, No. 16 C 5011, 2017 WL 4864910, (N.D. Ill. Oct. 26, 2017); *Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191 (N.D. Ill. May 16, 2018); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017).

203. See *DeBernardis*, 2018 WL 461228, at \*2 (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 Defendants); *Chavez*, 2018 WL 2238191, at \*10–11. See, e.g., *McDonnell*, 2017 WL 4864910, at \*4 (“Purchasers of Women’s Alive [products] who live in Florida, Michigan, Minnesota, Missouri, New Jersey, New York, or Washington have no injury arising from Nature’s Way forum-related activities. Instead, any injury they suffered occurred in the state where they purchased the products.”).

204. *DeBernardis*, 2018 WL 461228, at \*2.

to the states of general jurisdiction or handle the cases in individual state class actions where only one applicable law would be applied.<sup>205</sup>

The second major argument is a challenge to Rule 23 under the REA. Under the REA, any of the Federal Rules of Civil Procedure may not “[A]bridge, enlarge or modify any substantive right [of the parties].”<sup>206</sup> Under this argument, if courts were to accept the notion that *Bristol-Myers Squibb* applies only to mass actions rather than class actions, then a personal jurisdiction analysis regarding the claims of the parties would change depending on whether the parties are named individually or as class members. Because parties could avoid personal jurisdiction scrutiny by filing a class action under Rule 23, this would mean that Rule 23 modifies a substantive right of the defendant and violates the REA.<sup>207</sup> Because a defendant’s due process rights should remain the same whether the suit is a mass action or class action, these courts have found *Bristol-Myers* to be applicable to class actions as a way to comport with the REA.<sup>208</sup>

Finally, these courts are concerned with forum-shopping in filing federal class actions.<sup>209</sup> The *Bristol-Myers Squibb* Court was concerned with forum shopping because the case involved a host of non-resident plaintiffs attempting to take advantage of California’s law by aggregating into a state mass action.<sup>210</sup> The courts dealing with class actions believe that the same concerns are present within federally filed class actions attempting to utilize advantageous forums.<sup>211</sup> There is no doubt that the same fears of forum abuse that influenced Congress to pass the Class Action Fairness Act are still present and pushing judges to begin limiting

205. *Chavez*, 2018 WL 2238191, at \*1 (stating “the Court’s concerns about federalism suggest that it seeks to bar nationwide class actions in forums where the defendant is not subject to general jurisdiction”) (internal citations omitted).

206. 28 U.S.C. § 2072 (2018).

207. . See, e.g., *In re Dental Supplies Antitrust Lit.*, No. 16 Civ. 696, 2017 WL 4217115, at \*9 (E.D.N.Y. Sept. 20, 2017) (stating “the constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other”); *Mussat v. IQVIA, Inc.*, No. 17 C 8841, 2018 WL 5311903, at \*6 (N.D. Ill. Oct. 26, 2018) (stating that applying *Bristol-Myers Squibb* to dismiss claims of nonresident class members “ensures that Rule 23—a rule of procedure subject to the [REA’s] limitations—does not violated the [REA] by extending the personal jurisdiction of the federal courts to ‘abridge, enlarge, or modify’ a ‘substantive right’”).

208. *Practice Mgmt. Supp. Services v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d. 840, 861 (N.D. Ill. 2018).

209. *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at \*2 (N.D. Ill. Jan. 18, 2018).

210. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

211. *DeBernardis*, 2018 WL 461228, at \*2.

the power of class actions by restricting the nationwide class action to states of general jurisdiction for the defendant.<sup>212</sup>

What is most striking about these opinions is that the early courts adopting this approach spend very little time illustrating these concerns, sometimes limiting the justification down to a single sentence in the opinion.<sup>213</sup> However, citing these courts as precedent, similar courts have begun to agree and advance the theory that the *Bristol-Myers Squibb* opinion can be applied to class actions.<sup>214</sup>

### C. *Limited Guidance by the Federal Circuit Courts*

This divide within the federal district courts has continued to develop as courts have analyzed the issue through one of the three main categories detailed above.<sup>215</sup> But as litigants are now struggling to re-direct their strategy in response to this debate, this troublesome question of the opinion's application to class actions becomes even more important.<sup>216</sup> As the issue works through the district courts, there has been limited resolution given by the federal circuit courts.

The Seventh Circuit Court of Appeals recently had the opportunity to wade in on the issue in *Beaton v. SpeedyPC* when it reviewed a district court's order granting class certification to a putative class action against a software developer.<sup>217</sup> The defendant raised numerous arguments as to why the certification of the class and individual issues was a mistake, and also raised the argument that under the *Bristol-Myers Squibb* ruling, the district court lacked personal jurisdiction over it regarding the claims of non-resident class members.<sup>218</sup> However, the defendant had not raised this issue of personal jurisdiction in their briefings to the district court, thereby

212. Klonoff, *supra* note 15, at 743–45.

213. . See *DeBernadis*, 2018 WL 461228, at \*2 (agreeing with district courts applying *Bristol-Myers Squibb* to class actions because of federalism and forum shopping concerns); *McDonnell v. Nature's Way Products, LLC*, No. 16 C 5011, 2017 WL 4864910, at \*4 (N.D. Ill. Oct. 26, 2017) (applying *Bristol-Myers Squibb* opinion to consumer class action representing out of state class members without giving justification).

214. See *Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191 (N.D. Ill. May 16, 2018), at \*10 (relying upon *Practice Mgmt.*, *DeBernadis*, and *McDonnell* to apply *Bristol-Myers Squibb* to class actions); *Mussat v. IQVIA, Inc.*, No. 17 C 8841, 2018 WL 5311903, at \*5–6 (N.D. Ill. Oct. 26, 2018) (relying on arguments from earlier cases in the Northern District of Illinois to advance the theory that *Bristol-Myers Squibb* applies to non-resident class members).

215. See, e.g., *Murphy & Rowe*, *supra* note 10.

216. See Richard Levick, *The Game Changes: Is Bristol-Myers Squibb The End Of An Era?*, FORBES (July 11, 2017), <https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/#6bfcfbbb2e83> [<https://perma.cc/BQG9-AAM8>].

217. *Beaton v. SpeedyPC Software*, 907 F.3d 1018 (7th Cir. 2018).

218. *Id.* at 1024.

waiving the issue for appeal.<sup>219</sup> The Seventh Circuit therefore refused to directly consider whether the *Bristol-Myers Squibb* opinion should be extended to class actions.

The D.C. Circuit Court of Appeals provided the first direct circuit court guidance on *Bristol-Myers Squibb*'s application to class actions. *Molock v. Whole Foods Market Inc.* involved a class action of Whole Foods Market employees who brought suit because of the company's failure to uphold contractual provisions provided under their employee "Gainsharing" bonus system.<sup>220</sup> Alongside other arguments in the district court, Whole Foods challenged the court's personal jurisdiction on two grounds. First, Whole Foods argued the court lacked personal jurisdiction over the claims of two named representatives to the action.<sup>221</sup> Second, it argued the court cannot exercise personal jurisdiction over it regarding the non-resident putative class members.<sup>222</sup>

In analyzing the claims of the two named representatives, the district court found that the *Bristol-Myers Squibb* ruling limited their jurisdiction to hear their claims. The claims of the named representatives looked almost identical to the claims at issue in *Bristol-Myers Squibb* because the alleged injury did not occur as a result of Whole Foods's contact with the District of Columbia, and the only connection these two representatives had with the forum was that the other plaintiffs were injured by similar conduct.<sup>223</sup> However, the court did not extend the ruling to the absent class members after noting key distinctions between class actions and mass actions.<sup>224</sup> The D.C. district court agreed with the "few courts that have squarely addressed the issue," and determined that because class members are not parties like named parties to a mass action, and because Rule 23 provides additional due process safeguards, *Bristol-Myers Squibb* should not be applied to dismiss claims of non-resident class members.<sup>225</sup>

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219. *Id.* at 1025 ("Speedy seems to be asking us to extend *Bristol-Myers Squibb* to nationwide class actions. While briefing the issue now before us—class certification—in the district court, neither party raised personal jurisdiction. Thus, we have no need to opine on this question, because it does not bear directly on our determination.").

220. *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 120–21 (D.C.C. 2018).

221. *Id.* at 124.

222. *Id.*

223. *Id.* at 124–25 ("Accordingly, because Bowens's and Strickland's claim, like those of the non-resident plaintiffs in *Bristol-Myers*, arise from conduct outside the forum where they seek to bring suit, this court cannot exercise specific jurisdiction as to their claims.").

224. *Id.* at 126–27.

225. *Id.* Based off the court's application to the ruling to the named representatives, but not the class members, this court would fall squarely into the "hybrid" category I have discussed above, and advocate in this Note.

The issue was made final by the court, and Whole Foods appealed the decision.<sup>226</sup> Briefs by both parties made it clear that determining whether unnamed class members are *parties* for personal jurisdiction and procedural purposes is the central inquiry.<sup>227</sup> The D.C. Circuit sided with the plaintiffs, agreeing that, prior to class certification under Rule 23, unnamed class members are not yet parties to the action.<sup>228</sup> Using a “specific application of the more general principle that personal jurisdiction entails a court’s ‘power over the parties before it,’”<sup>229</sup> the court found that unnamed class members were not parties prior to certification.<sup>230</sup> Parties are those who brought the lawsuit or had the lawsuit brought against or have been joined through some intervention or joinder rule.<sup>231</sup> Prior to certification, class members are simply not parties before the court—they only become subject to dismissal *after* the class has been certified.<sup>232</sup> Because unnamed class members are nonparties prior to class certification, the court concluded that the attempted dismissal using the *Bristol-Myers Squibb* opinion is therefore untimely.<sup>233</sup> This opinion about the status of unnamed class members has

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226. *Molock v. Whole Foods Mkt., Inc.*, 317 F. Supp. 3d 1 (D.D.C. 2018).

227. *Compare* Brief of Plaintiffs-Appellees at 22–25, *Whole Foods Mkt. Grp., Inc. v. Molock et al.*, No. 18-7162 (D.C. Cir. Mar. 29, 2019) (arguing that unnamed class members are not parties for procedural purposes and their claims should not be considered in a personal jurisdiction analysis prior to certification), *with* Reply Brief of Appellant at 3–7, *Whole Foods Mkt. Grp., Inc. v. Molock et al.*, No. 18-7162 (D.C. Cir. May. 10, 2019) (arguing that the party/non-party distinction has no bearing in a personal jurisdiction analysis and that claims of absent class members can be dismissed under *Bristol-Myers Squibb* precedent).

228. *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) (“Because the class in this case has yet to be certified, Whole Foods’ motion to dismiss the putative class members is premature. Only after the putative class members are added to the action—that is, ‘when the action is certified as a class under Rule 23.’”) (citing *Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001)).

229. *Molock*, 952 F.3d at 298 (citing *Lightfoot v. Cendant Mortgage Corp.*, 137 S. Ct. 553, 562 (2017)).

230. *Id.*

231. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (“In general, a party to litigation is one by or against whom a lawsuit is brought or one who becomes a party by intervention, substitution, or third-party practice.”).

232. *See In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006) (“The granting of class certification under Rule 23 authorizes a district court to exercise personal jurisdiction over unnamed class members who otherwise might be immune to the court’s power.”); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001) (“[A] class action, when filed, includes only the claims of the named plaintiff or plaintiffs. The claims of unnamed class members are added to the action later, when the action is certified as a class under Rule 23.”).

233. *Molock*, 952 F.3d at 298. Interestingly, the court implies that the opinion could still be used to dismiss unnamed parties *after* certification. *Id.* (“When the action is certified as a class under Rule 23—should the district court entertain Whole Foods’s motion to dismiss the nonnamed class members.”) (internal citations omitted).

provided the first clear authority on the issue. However, the circuits courts have still yet to address the other three concerns outlined above.

#### IV. *BRISTOL-MYERS SQUIBB* SHOULD NOT BE APPLIED TO ABSENT CLASS MEMBERS IN CLASS ACTIONS.

The Supreme Court's opinion in *Bristol-Myers Squibb* was by no means an incorrect opinion, and this Note does not advance that notion. It was an important clarification to the boundaries of specific jurisdiction and a new addition to the Court's portfolio of cases detailing personal jurisdiction. However, applying *Bristol-Myers Squibb* to limit and break up class actions outside a defendant's forum of general jurisdiction has proven problematic.

Courts applying the *Bristol-Myers Squibb* opinion to absent class members' claims have little reason to do so. The three major concerns cited by these courts—federalism, a violation of the REA, and the dangers of forum shopping—are already adequately handled by Rule 23; using the *Bristol-Myers Squibb* opinion adds nothing new. Shoehorning the opinion to apply to class actions is a blunt attempt to dismiss class actions unless they are filed in the defendant's forum of general jurisdiction. As such, *Bristol-Myers Squibb* should not be applied to absent class members in class action suits.

##### A. *Federalism Concerns are Not Present in Federal Class Actions.*

The federalism concerns present in *Bristol-Myers Squibb* are not present in federal class actions, thus negating use of the opinion against absent class members. California's exercise of jurisdiction over claims which had no connection to the forum created a classic federalism concern because one state was adjudicating claims which happened outside its borders.<sup>234</sup> Although class actions, by their nature, involve adjudicating claims in a single forum, federalism concerns are not present because: (1) class actions must apply the respective law to the class members involved, and (2) CAFA allows for filing or easy removal of class actions to federal court to avoid the sway of state courts. As such, the federalism concerns cited by courts applying *Bristol-Myers Squibb* to class actions are insignificant.

First, federalism concerns are already scrutinized as a component in the class certification process. The Supreme Court's interpretation of the

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234. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

Constitution through *Erie*,<sup>235</sup> *Klaxon Co.*,<sup>236</sup> and *Shutts*<sup>237</sup> has created three major foundations: federal courts sitting in diversity must apply the substantive law of the forum where they sit<sup>238</sup>; choice of law rules are substantive rules of the forum state<sup>239</sup>; and states cannot apply their substantive laws to conduct that occurs outside their borders, even in class actions filed in the forum.<sup>240</sup> Under the REA, district courts cannot use the class device to “negate or make it impossible for one or more of the parties to assert otherwise available claims and defenses” under state law.<sup>241</sup>

So what do these principles mean together? These principles hold that although class actions seek to represent class members from multiple forums, courts are restrained from applying one law to the entire class, and the appropriate substantive law will be applied to each respective class member. Taking these restraints together, there is very little concern for a federalism issue being present in a federally filed class action. Recall that the mass action plaintiffs in *Bristol-Myers Squibb* attempted to take advantage of the substantive state laws of California even though their claims did not result from the defendant’s contact with California.<sup>242</sup> Accordingly, the Supreme Court concluded that the state court’s exercise of jurisdiction over conduct which did not occur there would pose a federalism issue, violating principles of due process and personal jurisdiction. Because district courts cannot apply one substantive law to an entire class in a class action, class action suits are wholeheartedly and procedurally different from the situation that arose in *Bristol-Myers Squibb*.

This safeguard is demonstrated through the rigorous choice of law analysis that must be conducted at the class certifications stage. Rule 23(a)(2) requires that for a class to be certified, there must be questions of law or fact common to the class, and 23(b)(3) requires that there must be “questions of law or fact common to class members [that] predominate over any questions affecting individual members.”<sup>243</sup> Because multiple laws would have to be applied to each member, this forces district courts to conduct a choice of law analysis by identifying which state laws would be applied to the class members, identifying the substantial issues of the

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235. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

236. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

237. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985).

238. *Erie*, 304 U.S. at 78.

239. *Klaxon*, 313 U.S. at 496–97.

240. *Shutts*, 472 U.S. at 823.

241. *See* 28 U.S.C. § 2072 (2018).

242. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017).

243. FED. R. CIV. P. 23(a)(2), (b)(3).

case, and conducting a state-by-state survey on how those legal issues would be affected by each state's laws.<sup>244</sup>

This choice of law analysis embedded in Rule 23 adds two safeguards to protect against federalism concerns. First, because a certified class action must apply the respective state laws to each class member, there is little worry that the court would be handling a case where a single substantive law would be applied to controversies that occurred outside the forum. Second, if a choice of law analysis reveals that there is too great a difference in state laws, the class will be decertified, thus negating any concern over the court handling the case in the first place.<sup>245</sup>

To illustrate this point, suppose that a consumer in State A is injured by the tortious conduct of a corporate defendant headquartered in State B. Consumer files a class action in the appropriate federal court under diversity jurisdiction and seeks to certify a nationwide class of all those injured by the defendant's negligence. As shown, a rigorous choice of law analysis must be done during the certification stage, and a survey of the potential laws to be applied to the respective class members must be conducted. The substantive tort law of State A can only be applied to those class members who were injured in State A; for all other states, the respective state laws will be applied to those controversies. It is at this point that "predominance" of the common issue of law or fact is determined. In this hypothetical, there is no federalism concern implicated by this procedure. Even though the class members' claims are being handled in a central forum, State A is still respecting due process by applying the respective laws to each controversy or decertifying the class if it does not meet 23(a)(2) or (b)(3) requirements.

Additionally, Rule 23's subclass mechanism also adequately handles potential federalism problems. Rule 23(c)(5) allows the district courts to

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244. Holly Kershell, *An Approach to Certification Issues in Multi-State Diversity Class Actions in Federal Court After the Class Action Fairness Act of 2005*, 40 USF L. REV. 769, 783 (2006).

245. *Id.* See *In re Bridgestone/Firestone*, 228 F.3d 1012, 1015, 1018 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3) . . . . Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996) ("Given the multiplicity of individualized factual and legal issues, magnified by choice of law considerations, we can by no means conclude 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.'"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("[A] district court must consider how variation in state law affect predominance and superiority . . . . In a multi-state class action, variation in state law may swamp any common issues and defeat predominance."); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007) (stating "[T]he law on predominance requires the district court to consider variations in state law when a class action involves multiple jurisdictions.").

create “subclasses” which are treated like individual classes.<sup>246</sup> As the Eleventh Circuit held in *Klay v. Humana, Inc.*, it is theoretically possible to take a nationwide class and break it into a series of subclasses which meet certification requirements.<sup>247</sup> Therefore, if a nationwide class faces a conflict of substantive state laws, the class could be broken up into a series of subclasses that aggregate similar state laws together. Just as the requirements of class certification are the plaintiff’s initial burden, the plaintiff must also demonstrate to the court that subclasses are appropriate. This is shown through a rigorous analysis “establishing appropriate subclasses and demonstrating that each subclass meets the Rule 23 requirements . . . the plaintiffs must come forward with the exact definition of each subclass, its representatives, and the reasons each subclass meets the prerequisites of Rule 23(a) and (b).”<sup>248</sup>

Looking back to our earlier illustration, Consumer’s class action may be able to utilize subclasses by showing that the multiple states’ laws applicable to the class members could be grouped into similar subclasses. Therefore, each class would be given a representative, and the plaintiff would have to demonstrate that the subclass standing alone meets Rule 23’s requirements. So, the nationwide class could be broken up into a series of subclasses that group either the common issues of fact (Product A, Product B, Product C subclasses) or the common laws shared among the class (Ohio, Kentucky, Pennsylvania subclasses).

While *Bristol-Myers Squibb* presented an interstate federalism problem, this concern has no application to class actions because a class action must meet a host of due process safeguards to be certified. A choice of law survey will be conducted, and the respective substantive law will be applied to each class member, so long as a common issue of fact or law is shared among the entire class. The sub-classing tool can further be utilized to ensure due process is not offended through maintenance of the suit.

Thus, the federalism concern presented in *Bristol-Myers Squibb* is simply not present in federally filed class actions. There is no concern of a state court overreaching its judicial boundaries in a class action; Supreme Court precedent and Rule 23 limit courts from applying a single substantive law to all members of a class action, and potential class actions with large substantive law conflicts will likely not be granted certification in the first place.

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246. FED. R. CIV. P. 23(c)(5).

247. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004).

248. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (citing *In re* *Electronics Pacing Sys., Inc.*, 168 F.R.D. 203, 221 (S.D. Ohio 1996)).

*B. The Rules Enabling Act Will Not Be Violated*

The second major challenge to class actions using the *Bristol-Myers Squibb* holding comes from a challenge to Rule 23 under the Rules Enabling Act. While *Bristol-Myers Squibb* was first and foremost about personal jurisdiction, the opinion has been shoehorned into class action litigation by arguing that there is a procedural difference between class actions and mass actions. As the *Practice Management Support* court noted, because a personal jurisdiction analysis would not be conducted on all the absent class members in a class action, this arguably modifies a substantive right of the defendant and violates the Rules Enabling Act.<sup>249</sup> It would therefore follow that these courts believe that Rule 23, as a complete mechanism, violates the REA.

This argument fails to recognize the Supreme Court’s interpretation of challenges to the Rules Enabling Act and Rule 23. Illustrative on this point is the Court’s most recent *Erie* doctrine case: *Shady Grove Orthopedic Association v. Allstate Insurance Co.* In *Shady Grove*, the Supreme Court entertained a challenge to Rule 23 when a series of lower courts struggled to apply a New York statute, CPLR § 901, which could dismiss class actions even though the Rule 23 requirements had been met.<sup>250</sup> This conflict eventually wound its way to the Supreme Court, where the Court reinforced the validity of Rule 23 under the Rules Enabling Act.<sup>251</sup>

The Court noted that when analyzing statutory challenges to the Federal Rules, the federal power to prescribe the rules of procedure has always been reinforced so long as the rule regulates matters “rationally capable of classification as procedure.”<sup>252</sup> This comes with the restriction that the rule being challenged must comport with the Rules Enabling Act, i.e. it must not “abridge, enlarge, or modify any substantive right [of the parties].”<sup>253</sup> While there have been multiple challenges to the Rules of Civil Procedure under the REA, the Court has adopted a restrictive reading of the statute.

The language of the Rules Enabling Act has been interpreted to hold that for a rule to be valid, it must “really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of

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249. *Practice Mgmt. Supp. Services v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d. 840, 861 (N.D. Ill. 2018).

250. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 (2010).

251. *Id.* at 409.

252. *Id.* at 406 (citing *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)).

253. *Id.* at 407 (citing 28 U.S.C. § 2072(b) (2018)).

them.”<sup>254</sup> Using this standard, the Court has consistently rejected every statutory challenge to the Federal Rules.<sup>255</sup> This is because, technically, every federal court rule has *some* effect on the substantive rights of the parties involved. But as the *Shady Grove* Court noted: “each [rule] undeniably regulated on the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.”<sup>256</sup>

With this background, the *Shady Grove* Court held that Rule 23 did not violate the Rules Enabling Act. Broadly speaking, Federal Rules which allow multiple claims to be litigated together (Fed. Rule Civ. Proc. 18, 20, and 42) are valid because they do not alter “separate entitlements to relief nor abridge defendants’ rights . . . .”<sup>257</sup> Rather, the rules modify “how the claims are processed.”<sup>258</sup> Because Rule 23 (which can be viewed as a complicated form of joinder) only modifies how a claim involving multiple plaintiffs against a single defendant is processed, the Court found that Rule 23 did not violate the Rules Enabling Act.<sup>259</sup>

Turning to our current analysis, the courts which have applied *Bristol-Myers Squibb* to absent class members in class actions have brought forth a similar statutory challenge to Rule 23. As the *Practice Management Support* court argued, *Bristol-Myers Squibb* laid the foundation that the due process stops nonresident plaintiffs—whose claims do not relate to the defendant’s in-forum conduct—from joining and aggregating claims with an in-forum resident.<sup>260</sup> Therefore, if a personal jurisdiction analysis must be conducted regarding all plaintiffs in a mass action (as in *Bristol-Myers Squibb*), this should not change if the action is instead a class action and the additional plaintiffs are unnamed class members. If a personal jurisdiction analysis is not conducted on all

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254. *Id.* (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). See *Hanna*, 380 U.S. at 464; *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 8 (1987).

255. *Shady Grove*, 559 U.S. at 407. The *Shady Grove* Court noted how numerous challenges to Federal Rules have failed under this standard. These include methods for serving process under Federal Rule 4, requiring litigants to submit for mental or physical examination under Federal Rule 35, the imposition of sanctions for filing frivolous appeals under Federal Rule Appellate Procedure 38, and sanctions for those who sign court papers without a reasonable inquiry into the facts asserted under Federal Rule 11.

256. *Id.* at 407–08.

257. *Id.* at 408.

258. *Id.*

259. *Id.*

260. *Practice Mgmt. Supp. Services v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d. 840, 861 (N.D. Ill. 2018) (citing *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017)).

parties, including absent class members outside the forum, then this would violate the Rules Enabling Act.<sup>261</sup>

While this argument seems to implicate a serious modification of a defendant's due process rights in a class action, it fails to recognize the analysis applied in *Shady Grove*. Again, when the Federal Rules are challenged under the Rules Enabling Act, the Act invalidates a rule which ". . . alters 'the rules of decision by which [the] court will adjudicate [those] rights.'"<sup>262</sup> If a rule only regulates the manner and means by which litigants' rights are enforced, then the rule is valid under the Act.<sup>263</sup> In application, Rule 23 does not modify any due process rights of a potential defendant because the action is filed as a class action, rather than a mass action.

First, for a class action to be filed in federal court, the defendant must still have personal jurisdiction in the selected forum in relation to the *named representatives'* claims.<sup>264</sup> If the defendant lacks personal jurisdiction in relation to the named representatives' claims, then those claims will be dismissed, just as if the action were filed as a mass action.<sup>265</sup> If the class has no named representative in the forum, certification is impossible.<sup>266</sup> This rule is demonstrated by the courts applying the "hybrid" approach and scrutinizing the personal jurisdiction over defendant regarding named representatives' claims.<sup>267</sup>

Second, Rule 23 merely modifies the *manner* in which a defendant's due process rights are enforced. While a personal jurisdiction analysis is not performed on all absent class members to the action, a defendant's due process rights are still protected through the certification requirements of Rule 23. The requirements of Rule 23(a) act as constitutional safeguards for class members because they ensure that due process is not offended by taking an individual plaintiff's claim and instead binding him to a class of

261. *Id.*

262. *Shady Grove*, 559 U.S. at 407 (citing *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

263. *Id.*

264. See NEWBERG ON CLASS ACTIONS § 6:25 (5th ed.) ("A putative class representative seeking to hale a defendant into court to answer to the class must have personal jurisdiction over that defendant just like any individual litigant must.")

265. See, e.g., *id.*

266. See FED. R. CIV. P. 23(a)(3)–(a)(4) (Requiring representatives to represent the class with similar claims).

267. See *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 120–21 (D.D.C. 2018); *Al Haj I*, 338 F. Supp. 3d 741, at 752–753 (N.D. Ill. 2018); *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 874–75 (N.D. Ill. 2017).

those who are similarly situated.<sup>268</sup> In turn, these constitutional safeguards protect defendants as well. Because all certification requirements have to be met to certify a class, a defendant will not be asked to litigate and defend a class action if the proposed class does not meet the 23(a) and (b)(3) requirements.<sup>269</sup> This ensures that only the “worthy” class actions will avoid the normal personal jurisdiction analysis. Theoretically, because the normal personal jurisdiction analysis is supplemented with the class requirements of Rule 23, the certifying and maintenance of a class would not infringe upon the “notions of fair play and substantial justice” that form a defendant’s due process rights.<sup>270</sup>

In sum, the argument that Rule 23 modifies a substantive right of the defendant to assert a lack of personal jurisdiction over all the parties does not hold water. First, the Supreme Court in *Shady Grove* has already reinforced the validity of Rule 23 under the Rules Enabling Act. Second, Rule 23 merely alters the manner in which this right can be enforced; a defendant may still dismiss for lack of personal jurisdiction regarding the *named* representative(s) and challenge that certification requirements have been met. Therefore, a defendant’s due process interests are still protected whether the claim is a class action or not.

### C. *Forum Shopping in Class Actions are Adequately Handled by other Mechanisms*

The final concern is that the *Bristol-Myers Squibb* analysis must be applied to all parties in class actions due to forum shopping concerns. In *Bristol-Myers Squibb*, forum shopping was a major concern of the Supreme Court. *Bristol-Myers Squibb* concerned an aggregated group of plaintiffs, some of whom were residents of California, and most of whom were non-residents.<sup>271</sup> The “mass” action was filed in the State of California against the same defendant, and every plaintiff asserted claims under California law.<sup>272</sup> The Court made this fact the center of its argument, noting that “what is missing [in this case]—is a connection

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268. See *Newton v. Merrill Lynch, Pierre, Fenner & Smith, Inc.*, 259 F.3d 154, 182 n.27 (3d Cir. 2001) (explaining that the Rule 23 certification prerequisites demonstrates that it would not offend due process to commence the action without the class members being present. “The rule thus represents a measured response to the issues of how the [D]ue [P]rocess rights of absentee interests can be protected and how absentees’ represented status can be reconciled with a litigation system premised on traditional bipolar litigation.”).

269. FED. R. CIV. P. 23(a)–23(b).

270. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that “notions of fair play and substantial justice” form the due process rights of the defendant).

271. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017).

272. *Id.*

between the forum and the specific claims at issue.”<sup>273</sup> Thus, while the entire group of aggregated plaintiffs could have brought a combined suit in the defendant’s forums of general jurisdiction (New York or Delaware), such an action could not take advantage of the laws of California, at least not for the entire group of plaintiffs.<sup>274</sup>

In applying the *Bristol-Myers Squibb* opinion to class actions, the *DeBernardis* court noted: “there is also the issue of forum shopping . . . possible forum shopping is just as present in multi-state class actions.”<sup>275</sup> However, this forum shopping concern is also noted by courts refusing to apply *Bristol-Myers Squibb* to class actions by demonstrating that the forum shopping concerns are not usually present in class actions and complex litigation.<sup>276</sup> It would seem that courts are split on just how prevalent forum shopping is in class litigation.

Forum shopping in class actions is already adequately handled by two mechanisms previously mentioned in this Note. First, class actions have built-in mechanisms to handle differences in state laws. Thus, class members cannot take advantage of favorable state law if the action were filed as a class action. This is because class actions cannot apply one law to the entire class, and a rigorous choice of law analysis is done during the certification stage to apply these state laws to the individual class members.<sup>277</sup> Second, the Class Action Fairness Act—created to combat class action forum shopping in state courts—makes it far easier to mitigate forum shopping by removing class actions to federal courts.<sup>278</sup> By reworking federal court diversity standards for class actions, the majority of significant class actions with minimal diversity of parties and an amount in controversy exceeding \$5,000,000 will gain access to the federal courts and avoid advantageous state forums.

First, as previously discussed in Part IV.1., the built-in mechanisms to class actions make it difficult for potential class members to take advantage of forum shopping.<sup>279</sup> While federal courts sitting in diversity must apply the laws of the state where they lie, the Supreme Court has

273. *Id.* at 1781.

274. *See, e.g., id.* at 1783.

275. *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at \*2 (N.D. Ill. Jan. 18, 2018).

276. *In re Chinese-Manufactured Drywall Products Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at \*16. (E.D. La. Nov. 30, 2017).

277. *See supra* Part IV.1.

278. *See* 28 U.S.C. § 1332 (d)(2)(A)–(C) (2018); 28 U.S.C. § 1453 (2018); 28 U.S.C. § 1711–1715 (2018); *see also supra* notes 58–59.

279. *See supra* Part IV.1. (discussing why federalism concerns are not present in federal class actions because class actions have been designed so that one state cannot apply a single substantive law to every class member in the controversy).

held that in the context of a nationwide class action, a state cannot impose its substantive laws onto claims which did not occur within its borders.<sup>280</sup> This holding facilitates a rigorous choice of law analysis to be conducted at some point in the class certification stage of the action, and class members would be sorted into respective groups based on the state law to be applied to them.<sup>281</sup> Under this view, forum shopping is likely a non-existent danger to class actions; because an application of respective state law is done for each group of class members, it is impossible for a class member to take advantage of the laws of another forum—his state’s law will be applied to his controversy.

With respect to forum shopping for advantageous class certification standards, the Class Action Fairness Act made forum shopping significantly harder. As previously mentioned, CAFA expanded the federal court jurisdiction over class actions by making it easier to file or remove class actions to federal courts.<sup>282</sup> As evident by Congressional records, CAFA was passed as a way to combat forum shopping for advantageous state courts and filing nationwide class actions in those courts.<sup>283</sup> With passage of CAFA, the majority of significant class actions can now be filed or removed to federal court to avoid the sway of advantageous state courthouses.<sup>284</sup> It should be noted that CAFA was passed due to concerns with forum shopping in *state courts*, so the ability to seek out federal forums has drastically cut down on litigants hunting for advantageous forums to file.

Finally, some amount of forum shopping for courts with advantageous certification standards is inevitable in class actions. With the federal courts having been granted greater jurisdiction to hear class actions, and appellate review under Rule 23(f), a series of advantageous circuits to file have emerged based on differences in interpreting the rule’s certification requirements.<sup>285</sup> Take for example, the differing requirements for numerosity under Rule 23. Rule 23 requires that for a class action to be filed, the class must be “so numerous that joinder of all

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280. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 64 (1938); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985).

281. See *supra* Part IV.1.

282. See *supra* Part II.B. (describing the Class Action Fairness Act of 2005 as a major milestone in curbing forums selection in state courts).

283. See S. REP. No. 109-14 at 10–21 (2005) (the Senate report noted concerns for lawyers “playing” the system by maneuvering around diversity requirements and filing class actions in advantageous state courts. This facilitated an act by Congress to rework federal court diversity requirements to allow for easier removal by defendants in class actions.).

284. Klonoff, *supra* note 13, at 745.

285. *Id.* at 828.

members is impracticable.”<sup>286</sup> However, as Robert Klonoff notes in *The Decline of Class Actions*, what was once the “least demanding requirement of Rule 23 (a)” now has heightened scrutiny given by certain circuit courts.<sup>287</sup> Courts have diverged on how much evidence is needed to demonstrate numerosity: can the certifying court simply rely on common sense and assumptions based off the class complaint, or does it need hard evidence that the number of people involved in the class meets numerosity standards?<sup>288</sup> While topics like these are collateral to this Note—and worthy of their own separate discussions—it suffices to understand that these splits have emerged for almost every prerequisite of Rule 23.<sup>289</sup> As such, it is inevitable that, based off the underlying facts and legal issues at hand, certain class actions will seek out more advantageous forums to file.

However, these differences can be corrected as caselaw on class certification continues to develop in the federal circuits. As Klonoff further states, “On some issues, courts can alter their approach as a matter of caselaw. On other issues—those on which the Supreme Court has rendered a decision or where there is an unresolved conflict among the circuits—a rule change may be required.”<sup>290</sup> Thus, these splits will only begin to be corrected as class action caselaw continues to develop in the circuit courts. This solution will take time and continued study; something which would be severely cut short through application of *Bristol-Myers Squibb* to immediately bar most nationwide class action.

## V. CONCLUSION

New challenges have reshaped the practice of class actions, and the list of new challenges far exceeds what could be analyzed in one Note. However, applying *Bristol-Myers Squibb* to class actions is a small, yet worrisome trend that should be addressed. Should the opinion be applied to absent class members in class actions, it would bring a whole new challenge that was not previously required; a personal jurisdiction

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286. FED. R. CIV. P. 23(a)(1).

287. Klonoff, *supra* note 15, at 773.

288. *Id.* at 768–73 (Klonoff conducts a thorough analysis of the federal district and circuit courts to conclude there is a split based off of how much concrete evidence courts require to determine that the class is so numerous that traditional joinder would not be practicable).

289. *See, e.g.*, Klonoff *supra* note 15, at 761–68 (detailing heightened requirements for class definition); *id.* at 768–73 (detailing heightened requirements for numerosity); *id.* at 773–80 (detailing heightened requirements for commonality); *Id.* at 780–88 (detailing heightened requirements for representation); *id.* at 792–99 (detailing heightened requirements for predominance based off of the type of claims involved).

290. *Id.* at 829.

challenge which would arguably go against the very purpose of the class tool in the first place. As litigants eagerly await circuit authority on the issue, the application of *Bristol-Myers Squibb* must be addressed to preserve the widespread utility gained from class actions under Rule 23. A first-year law student can open their rulebook and tell you that Rule 23 requires no personal jurisdiction analysis of class members—and it should remain this way. The class action should be preserved as it was imagined; a way for the harmed masses to efficiently organize against the wrong doer, for the many to stand against the few, and to ensure that justice is efficient and fair. Otherwise the “parade of horrors” originally dismissed by the Supreme Court in *Bristol-Myers Squibb* may soon come to fruition.<sup>291</sup>

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291. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1783 (2017).