TOO BIG FOR PERSONAL JURISDICTION? A PROPOSAL TO HOLD COMPANIES ACCOUNTABLE FOR IN-STATE CONDUCT IN ACCORDANCE WITH DUE PROCESS PRINCIPLES

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INTRODUCTION

For the last decade, the Supreme Court of the United States has issued decisions that narrow the circumstances under which courts can exercise personal jurisdiction against large companies.[1] In 2017, the Court issued two more decisions that further limit a plaintiff's ability to sue an out-of-state corporation in state court.[2] In *Bristol-Myers Squibb Co. v. Superior Court of California* (*BMS*),[3] the Court reversed the California Supreme Court and dismissed the claims of 592 non-California residents who sued the pharmaceutical company in the state's courts over injuries they allegedly sustained from Plavix, a drug manufactured by Bristol-Myers.[4] The Court held that, because those plaintiffs did not allege that their injuries occurred in California, or had

1 *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

2 *See* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

3 137 S. Ct. 1773.

4 *Id.*

anything to do with California, the Court could not exercise specific jurisdiction over these plaintiffs' claims.[5]

Although the facts of *BMS* left the Court with no choice but to find that California courts lacked jurisdiction over the non-California resident plaintiffs,[6] the opinion's broad language is problematic for future plaintiffs looking to sue large corporations in states where the plaintiffs may not have suffered an injury, but where the states are linked to the harm in some other way. The *BMS* opinion's reasoning will likely be overapplied and used to limit an individual's ability to sue *any* corporation that has a large presence in multiple (or even all) states, but lacks the requisite connection to the state that *BMS* required.[7] If overapplied, this decision will serve as an additional bar to plaintiffs seeking to challenge the actions of a large corporation that affect citizens of more than one state. Taken to its logical extreme, the Court's opinion provides that, for any alleged injury caused by a corporation, the corporation can be sued in a maximum of three states: (1) the state in which the corporation is incorporated; (2) the state in which the corporation is headquartered; and (3) the state where the alleged injury occurred.[8]

This Note discusses the potential negative effects that *BMS* can have on future plaintiffs' ability to sue large corporations in states where the corporations have a major presence but in which they are neither incorporated nor headquartered.[9] Part I outlines the history of personal jurisdiction case law. Part II looks to the different approaches that the majority and dissenting opinions in *BMS* took in examining the question of jurisdiction. It also looks at the sliding scale test that the

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5 *Id.* at 1782.

6 *See* Erin Bosman, Julie Park & Janet Kim, Bristol-Myers Squibb*: The Aftermath*, LAW360 (Aug. 3, 2017, 2:54 PM), https://www.law360.com/articles/950781/bristol-myers-squibb-the-aftermath [https://perma.cc/Q2MV-PN9J].

7 *Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.").

8 *See id.*; *see also* Andrew Chung, *U.S. Supreme Court Again Limits Where Companies Can Be Sued*, REUTERS (June 19, 2017, 12:42 PM), https://www.reuters.com/article/usa-court-bristol-myers/u-s-supreme-court-again-limits-where-companies-can-be-sued-idUSL1N1JG0YJ [https://perma.cc/56XX-MFMY]; Richard Levick, *The Game Changes: Is* Bristol-Myers Squibb *the End of an Era?*, FORBES (July 11, 2017, 2:21 PM), https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/#38963fa82e83 [https://perma.cc/45KX-DZLN].

9 Because such corporations are neither incorporated nor headquartered in these states, the companies are not subject to general jurisdiction there. *See infra* Section I.B.

California Supreme Court used to allow the nonresident plaintiffs to sue within the state's courts.[10] Section II.B then considers the effect that *BMS* has had on lower courts thus far by looking at how various federal district and state courts have applied the decision, particularly in the context of claims involving false advertising and medical mass torts. It continues by examining cases where judges have distinguished *BMS* and the potential openings this can leave for future plaintiffs to eventually challenge *BMS* at the Supreme Court. Part III proposes an expansion of personal jurisdiction principles to allow courts to hear cases in which plaintiffs sue corporations in a state that has a proximate connection to the harm alleged and an analysis for when and how to analyze the proximate connection. This Part also discusses the complexities of third-party connections to a state and concerns about forum shopping, arguing that the former can be enough of a connection despite *Walden v. Fiore*,[11] and that the latter is a persistent problem that no amount of limiting access to courts can seriously prevent.

I. BACKGROUND

Establishing that a court has jurisdiction over a defendant is an important step for litigants seeking review of their claims on the merits.[12] Lack of personal jurisdiction is both a defense and ground for a court to dismiss an action in all jurisdictions in the United States, both state and federal.[13] Because of its ability to end a proceeding before it even starts, it is an important threshold question in any litigation.[14] Although statutes and local courts dictate rules for jurisdiction, the issue

10 The California Supreme Court's so-called "sliding scale test" for personal jurisdiction was expressly rejected by the Supreme Court. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781.

11 571 U.S. 277 (2014); *see also infra* Section I.D.3.

12 Nancy J. Brent, *What is Personal Jurisdiction?*, CPH & ASSOCIATES, https://www.cphins.com/what-is-personal-jurisdiction [https://perma.cc/R8G7-5FD3] (last visited Dec. 29, 2018) ("Personal jurisdiction is a court's power to bring an individual into the judicial process.").

13 *See, e.g.*, FED. R. CIV. P. 12(b)(2); N.Y. C.P.L.R. 3211(a)(8) (McKinney 2006); CAL. CIV. PROC. CODE § 418.10(a)(1) (Deering 2018).

14 *See* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 533–34 (2015) (discussing thresholds for specific and general jurisdiction).

is often unclear and leaves more questions than answers.[15] As a result, courts have grappled with identifying and articulating a workable and appropriate standard for personal jurisdiction.

A. *Early Personal Jurisdiction Jurisprudence*

Although the doctrine has been revised and rewritten since the Supreme Court's earliest opinions, modern personal jurisdiction cases still look to early personal jurisdiction cases as the backbone of their analyses on the issue.[16] For example, concern about limiting the coercive power of the state has remained a consistent theme throughout history.[17]

1. Actual Presence

Any discussion of personal jurisdiction necessarily begins with the infamous case of *Pennoyer v. Neff*.[18] In *Pennoyer*, the Court held that, in order for a court to exercise in personam jurisdiction[19] over a defendant, the defendant must be served in the state in which the court is located.[20]

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15 Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 626–33 (2017) (discussing jurisdiction's (at a minimum) three identities: (1) basic power or authority; (2) defined set of effects; and (3) positive law).

16 *See infra* Sections I.A.1–I.A.4.

17 *See, e.g.*, cases citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945): BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017); Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1779 (2017); Walden v. Fiore, 571 U.S. 277, 283 (2014); Daimler AG v. Bauman, 571 U.S. 117, 142 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918–19 (2011).

18 95 U.S. 714 (1877); *see* Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 570 (1958) (calling *Pennoyer* responsible for "the origins of our modern law of jurisdiction").

19 In personam jurisdiction allows a court to exercise jurisdiction over a person. *In Personam*, BLACK'S LAW DICTIONARY (10th ed. 2014). *Compare id.*, *with In Rem*, BLACK'S LAW DICTIONARY (10th ed. 2014) (in rem jurisdiction allows a court to exercise its power over an object or property).

20 *Pennoyer*, 95 U.S. at 734 ("[D]ue process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.") (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 405 (1st ed.1868)). The

The *Pennoyer* Court established the principle that, in order for a court to be able to exercise its jurisdiction over a defendant, there must be due process.[21] To the *Pennoyer* Court, this required a defendant's appearance or personal service on the defendant before they could be bound by any judgment.[22] *Pennoyer* further stands for the proposition that a state's sovereignty grants it exclusive jurisdiction over the inhabitants and property within its borders.[23]

2. Minimum Contacts

Nearly seventy years after *Pennoyer*, the Court again looked at due process in a personal jurisdiction analysis in *International Shoe Co. v. Washington*.[24] In *International Shoe*, the Court found that Washington state could exercise jurisdiction over an out-of-state corporation because of the activities that the corporation conducted within the state's borders.[25] *International Shoe* held that a defendant must have certain "minimum contacts" with a state, such that maintaining a lawsuit against it does not offend "traditional notions of fair play and substantial justice."[26] The Court measured International Shoe's presence

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Court also held that a defendant's voluntary appearance within the state would justify the state exercising jurisdiction over the defendant. *Id.* at 726, 734.

21 *See* Kurland, *supra* note 18, at 572–73; *see also* George Rutherglen, *Personal Jurisdiction and Political Authority*, 32 J.L. & POL. 1, 7–9 (2016).

22 *Pennoyer*, 95 U.S. at 734. In *Pennoyer*, because defendant Neff did not have notice of the initial lawsuit against him, the judgment against him, which caused his property to be auctioned off, was found to be invalid. *Id.* at 728. Mitchell, the initial plaintiff against Neff, published notice of the lawsuit in a newspaper in Oregon, where Neff did not reside. *Id.* at 733. As a result, the *Pennoyer* Court found that the service by publication was insufficient to establish personal jurisdiction over a nonresident. *Id.* at 727–28 ("No person is required to answer in a suit on whom process has not been served, or whose property has not been attached.") (quoting Webster v. Reid, 52 U.S. 437, 459 (1850)).

23 *Id.* at 722 (finding that a state possesses "exclusive jurisdiction and sovereignty over persons and property within its territory").

24 326 U.S. 310 (1945). In *International Shoe*, Washington state sued International Shoe Company for failing to pay taxes on the activities the company conducted within the state. The corporation contested the state's authority to tax it because it was not "present" in the state. *Id.* at 315–16.

25 *Id.* at 313–15, 320. International Shoe was a Delaware corporation with its principal place of business in St. Louis, Missouri and no offices in Washington state. *Id.* at 313.

26 *Id.* at 316 (internal quotation marks omitted). The case did not specify what exactly "fair play and substantial justice" meant; however, later cases discussed factors to consider when

by the activities of agents acting on the corporation's behalf.[27] It found that the company's activities in the state were "neither irregular nor casual," but rather "systematic and continuous."[28]

The "minimum contacts" requirement is rooted in the Due Process Clause of the U.S. Constitution.[29] When a corporation conducts activities within a state, it enjoys certain benefits and protections of that state's laws, such as the ability to use its roads and make sales within the state.[30] In exchange for the privileges and protections the state provides, the corporation takes on certain obligations, including being subject to suit in the state for activities conducted within its borders.[31] *International Shoe* held that the inquiry into whether due process allows a state to exercise personal jurisdiction over a defendant requires analyzing the "quality and nature" of the defendant's activities within the state in relation to the purpose of the Due Process Clause.[32] The Court further clarified that a single, isolated, or casual connection to a

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deciding whether a court's exercise of personal jurisdiction was reasonable. *See, e.g.*, discussion of *Burger King infra* Section I.C.

27 *Int'l Shoe*, 326 U.S. at 316–17. The Court looked to the activities of salesmen employed by the company. During the time period in question, the company employed eleven to thirteen salesmen directly supervised by sales managers in Missouri. These salesmen resided in Washington, primarily sold shoes in the state, and were compensated by the company for those sales. *Id.* at 313–14.

28 *Id.* at 320 ("It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.").

29 *Id.* at 316.

30 Francis U. Seroogy, *State Expansion of Personal Jurisdiction Under* International Shoe *and* McGee *Cases*, 42 MARQ. L. REV. 537, 541 (1959) (describing how International Shoe Co.'s benefitting from a "substantial volume of interstate business" in Washington was a justification for the Court's exercise of personal jurisdiction). Relatedly, International Shoe undoubtedly benefitted from the use of Washington state's roads to transport its salesmen, merchandise, and access its potential customers within the state. In addition, the corporation could rely on the state protecting it from unlawful activity directed at the corporation by another party.

31 *Int'l Shoe*, 326 U.S. at 319 ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."). In *International Shoe*, Washington state sued over the company's tax obligation to the state. *Id.* at 321.

32 *Id.* at 319 (comparing its holding with that of *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

state is not sufficient for its courts to have jurisdiction over a party for activities not arising out of those isolated actions.[33]

3. Purposeful Availment

After *International Shoe*, courts grappled with what exactly constituted a "minimum contact" sufficient to allow a court to exercise personal jurisdiction over a party. In *McGee v. International Life Insurance*,[34] the Supreme Court found that an out-of-state defendant's single contract with a state's resident was enough to establish personal jurisdiction because the contract deeply related to the underlying cause of action.[35] Due process supported exercising jurisdiction[36] even though the defendant may experience some inconvenience in defending the lawsuit.[37] The Court noted that (at the time) modern transportation and communication systems made it much less burdensome for a party to defend against lawsuits in a state where it conducts economic activity even if the party does not reside in that state.[38] It also identified the state's undeniable interest in providing similarly situated residents a means of redress for their harm.[39]

One year later, the Court added "purposeful availment" to the personal jurisdiction analysis.[40] In *Hanson v. Denckla*,[41] the Court rejected a forum's exercise of personal jurisdiction over a defendant who did not benefit from its laws and protections and therefore was not subject to jurisdiction in the state.[42] Although also involving a

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33 *Id.* at 317–18.

34 355 U.S. 220 (1957).

35 *Id.* (where defendant, a Texas insurance company, sent mail to deceased policyholder in California and received premiums from California, the state had authority to enter binding judgment against defendant from lawsuit arising out of California-connected actions). Because the California courts properly exercised jurisdiction over the defendant, the judgment entered against it was proper, and Texas courts had to give it full faith and credit. *Id.* at 221.

36 *Id.* at 223 ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.").

37 *Id.* at 224 ("Of course there may be inconvenience to the insurer if it is held amenable to suit in California . . . but certainly nothing which amounts to a denial of due process.").

38 *Id.* at 223.

39 *Id.*

40 Hanson v. Denckla, 357 U.S. 235 (1958).

41 *Id.*

42 *Id.* at 253–54 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

nonresident defendant's single contract with a state resident, the Court distinguished *Hanson* from *McGee* because the defendant did not unilaterally solicit an agreement with a resident of the state where jurisdiction was sought.[43]

4. Stream of Commerce and Foreseeability

The "stream of commerce" theory applies when a corporation manufactures, sells, or markets a product in one state, the product ends up in another state, and the product injures someone in that other state.[44] The question the courts must ask is whether the corporation has purposefully availed itself of jurisdiction within the state where one suffers an injury.[45]

In *World-Wide Volkswagen Corp. v. Woodson*,[46] the Court again analyzed whether a business's connections to a state subjected it to jurisdiction within the forum.[47] It viewed the due process question in terms of foreseeability by asking whether defendants' connection to a state could lead them to reasonably anticipate being haled before a court in that state.[48] Because the defendants (a New York dealership and distributor) did not avail themselves of the privileges of conducting business in Oklahoma, they could not be subject to jurisdiction in

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43 *Id.* at 251–52 (distinguishing *Hanson* from *McGee* because the latter involved a contract with a resident of the state, accepted in the state, and premiums mailed to the resident in the state). The agreement at issue in *Hanson* was executed in Delaware by a Delaware trust and a settlor domiciled in Pennsylvania. *Id.* The "connection" to Florida arose when the settlor moved to Florida years later and the trustee remitted income to her new address in Florida. *Id.* (finding that, although this connection seems similar to the premiums paid in *McGee*, the defendant's relationship with the state is substantially different from the "solicitation in *McGee*").

44 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980); *see also* A. Kimberley Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 241 (1987).

45 Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945).

46 444 U.S. 286.

47 *Id.*

48 *Id.* at 297–98. In *World-Wide Volkswagen*, the plaintiffs sued a New York car dealership, Seaway, and the dealership's regional distributor, World-Wide, for injuries stemming from a car accident in Oklahoma involving a vehicle that the plaintiffs purchased from Seaway in New York. *Id.* at 288. The lawsuit was filed in state court in Oklahoma. *Id.*

Oklahoma's courts.[49] Although the product purchased—an automobile—is mobile by its very nature, this was not enough to lead the dealership to "foresee" that the car could end up in another forum.[50] The car ended up in Oklahoma due to the unilateral activity of the party claiming the connection to the state (plaintiffs), which is not a sufficient connection to subject a defendant to jurisdiction after *Hanson v. Denckla*.[51]

B. *Distinguishing Between General and Specific Jurisdiction*

The Court clarified the distinction between specific and general jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[52] A court has specific jurisdiction when a controversy "arises out of" a defendant's contacts with the forum, creating a relationship between the defendant, the forum, and the litigation.[53] In contrast, a state asserts general jurisdiction when a lawsuit's controversy does not arise out of or relate to the defendant's contacts or activities in the forum,[54] but rather out of the defendant's domicile, incorporation, or principal place of business in the forum.[55]

In *Helicopteros*, survivors and representatives of victims of a helicopter crash in Peru sued the Colombian company that owned the helicopter in Texas court.[56] The Supreme Court held that the company's connections to the state were not sufficient enough for the state to exercise personal jurisdiction over the foreign defendant,[57] pointing to

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49 *Id.* at 295 (finding a "total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction"). Neither the dealership nor the distributor closed any sales or performed any services in Oklahoma. *Id.* Both of them were located and incorporated in New York. *Id.* at 288–89.

50 *Id.* at 295–96.

51 *Id.* at 298. The Court also noted that the parties presented no evidence that the dealership sold or advertised its cars outside of the tri-state area. *Id.*

52 466 U.S. 408 (1984).

53 *Id.* at 414 n.8 (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–64 (1966)).

54 *Id.* at 414 n.9 (citing von Mehren & Trautman, *supra* note 53).

55 Daimler AG v. Bauman, 571 U.S. 117 (2014).

56 *Helicopteros*, 466 U.S. at 410–12.

57 *Id.* at 409–10, 418 n.12 (finding no general jurisdiction against the foreign corporation and not ruling on whether specific jurisdiction was present). Helicopteros's connections to Texas were limited to: a trip its chief executive officer took to negotiate a contract in the state; purchasing helicopters and spare parts in the state; sending prospective pilots to train in the

the connections that the corporation did *not* have with Texas.[58] Furthermore, neither the representatives who brought the lawsuit nor their decedents were domiciled in Texas.[59] As a result, Texas courts could not exercise "general jurisdiction" over the corporation.[60]

C. *Fairness Factors in Personal Jurisdiction Analysis*

In *Burger King v. Rudzewicz*,[61] the Court found that Florida could assert its long-arm jurisdiction over a defendant on the basis of a single contract within the state, notwithstanding the fact that the defendant had never been to Florida.[62] Justice Brennan's majority opinion identified the following factors to look to when examining the fairness of a state's assertion of jurisdiction over a party: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the 'shared interest of the several States in furthering fundamental substantive social policies.'"[63]

The Supreme Court found that the Florida court's assertion of personal jurisdiction over the nonresident defendant did not offend due process.[64] When the defendant, a Michigan resident, entered into a franchise agreement with a Florida corporation, he began a voluntary relationship that envisioned "continuing and wide-reaching contacts" with Florida and was being haled into the state's court on the basis of a

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state; and receiving payments from a Houston bank in furtherance of the contract. *Id.* at 410–11.

58 *Id.* at 411–16 (noting that Helicopteros did not have an office in Texas, was never licensed to do business in the state, and never performed any helicopter operations, solicited business, signed a contract, owned property, sold products that reached the state, or had an employee based there).

59 *Id.* at 411–12. The decedents were employed by a consortium based in Houston, but this was not enough to establish jurisdiction over Helicopteros. *Id.*

60 *Id.* at 416–19.

61 471 U.S. 462 (1985).

62 *Id.* The Court noted that Rudzewicz's potential business partner went to Florida for a training in furtherance of the contract but did not rule on whether this subjected Rudzewicz to jurisdiction in the forum. *Id.* at 479 n.22.

63 *Id.* at 476–77 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

64 *Id.* at 478–79. For a discussion of how Justice Sotomayor applied these factors to the personal jurisdiction inquiry in her *BMS* dissent, see *infra* note 135.

dispute arising from that contract.[65] Justice Brennan's "fairness factors"[66] provided a complicated yet comprehensive analysis that balanced the dual interests of territorial federalism and defendant-oriented liberty protections.[67]

D. *Moving Toward Well-Defined Rules*

Nearly 150 years after *Pennoyer*, the Supreme Court had a long list of personal jurisdiction cases, but few clear rules.[68] Beginning in 2011, the Court began further narrowing the scope of personal jurisdiction with opinions that reshaped its jurisprudence in this area.[69]

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65 *Id.* at 479–82. The contract also contained a Florida choice of law provision, which supported finding that the defendant "purposefully availed himself of the benefits and protections of Florida's laws." *Id.* at 482 (finding that a choice of law provision, though not sufficient on its own to confer jurisdiction, coupled with a twenty-year relationship with plaintiff's Miami headquarters, demonstrated that defendant had reasonable foreseeability of a possible litigation in the state) (internal quotation marks omitted). Writing in dissent, Justices Stevens and White found that jurisdiction in Florida was unfair because of the contract's boilerplate language, the unequal bargaining power between the parties, and the fact that the defendant's business activities took place solely in Michigan. *Id.* at 487, 489–90 (Stevens, J., dissenting).

66 *See* Frank Deale, J. McIntyre *and the Global Stream of Commerce*, 16 CUNY L. Rev. 269, 293–94 ("Although identifying the fairness factors in *World-Wide Volkswagen*, the majority opinion by Justice White did not apply them in that case . . . . In *Burger King Corp. v. Rudzewicz*, Justice Brennan convinced a majority of the Court [to use] the fairness factors . . [despite a] lesser showing of minimal contacts than would otherwise be required . . . .").

67 *See* Charles W. Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 246–47 (2014) (discussing *Asahi*'s application of the fairness factors two years after *Burger King* was decided).

68 *See* Rutherglen, *supra* note 21, at 29–37 (discussing the Court's hesitation in framing specific jurisdiction rules, and its move toward a more conservative view of jurisdiction). Part of the reason for this may be the fact that, by definition, the Court hears the most difficult personal jurisdiction questions. *See supra* text accompanying notes 12–15.

69 Rutherglen, *supra* note 21, at 29 (noting that the Court's last specific jurisdiction opinion was *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), where the Court allowed exercise of jurisdiction because the defendant was served within the state where the lawsuit was brought). *See also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011) (noting "[t]he rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi*[]").

1. *McIntyre*: More Than a Single Sale

In *J. McIntyre Machinery, Ltd. v. Nicastro*,[70] a worker was seriously injured while using a machine manufactured by a British company, McIntyre.[71] Justice Kennedy's opinion held that, although McIntyre's machine ended up in New Jersey's stream of commerce, the Court lacked jurisdiction over the company because it did not intentionally target that *particular* state.[72] Justice Kennedy reasoned that the legislature, as opposed to the Court, had greater power to establish jurisdiction over McIntyre.[73] Justice Breyer's more narrow opinion[74] found that a single, isolated sale, without more, was insufficient to establish the minimum contacts with a forum state.[75]

Justice Ginsburg's dissent argued that McIntyre purposefully availed itself of the jurisdiction by taking steps to deliberately target the United States as a single market.[76] Therefore, it availed itself of the privilege of conducting business in all states where its products were

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70 564 U.S. 873. Although the Court failed to obtain a majority opinion, two-thirds of the Justices joined the judgment. *Id.*

71 *Id.* at 878–79 (noting that the machine was also manufactured in England and delivered to a U.S. distributor who then sold the machine to McIntyre's employer in New Jersey).

72 *Id.* at 886–87 (plurality opinion) ("These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market."). Justice Kennedy also noted that, while four of its machines ended up in New Jersey, the fact that its agents attended trade shows in other states and did not have an office in New Jersey supports the theory that the company did not purposefully target the state. *Id.*

73 *Id.* at 885–86 ("A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."); *see also* Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 604–06 (2012) (discussing legislative proposals to allow U.S. nationals to sue foreign corporations in the United States).

74 According to the rule established in *Marks v. United States*, Justice Breyer's narrow opinion is viewed as the holding of the Court. Marks v. United States, 430 U.S. 188, 193 (1977). Justice Breyer was joined by Justice Alito. *McIntyre*, 564 U.S. at 887–93 (Breyer, J., concurring).

75 *McIntyre*, 564 U.S. at 888–89. *See also* Rutherglen, *supra* note 21, at 32 ("The plurality and the concurring opinions, read together, yield the conclusion that simply placing goods 'in the stream of commerce' does not, without more, support specific jurisdiction, even if the goods cause injury in the forum state and even if the defendant knew that they might well end up there. The plaintiff must prove something more to establish a connection between the defendant and the forum.").

76 *McIntyre*, 564 U.S. at 896–908 (noting that the company used a U.S. distributor with a similar name, McIntyre Machinery America, Ltd., to potentially avoid manufacturer's liability in the country) (Ginsburg, J., dissenting).

sold by an exclusive distributor.[77] Although arguably an extension of the Court's earlier personal jurisdiction rulings, this opinion aptly identified issues the Court continues to face in the increasingly interconnected world.[78]

2. *Goodyear*: General Jurisdiction Where Corporations are "At Home"

In a lawsuit involving foreign entities and a bus accident in Europe, Justice Ginsburg reversed course from her *McIntyre* dissent and found a lack of personal jurisdiction against a foreign corporation in the United States in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[79] Although the defendants' subsidiaries had some minor connections to North Carolina,[80] Justice Ginsburg found them limited and not an adequate basis to subject the companies to suit there.[81] Citing *Helicopteros*, the Court ruled that the foreign subsidiaries are not "at home" in the state and, thus, are not subject to general jurisdiction before its courts.[82] Although unanimous on these facts, the Court's opinion did not identify contacts relevant to the personal jurisdiction analysis, leaving questions open for future consideration.[83]

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77 *Id.* at 905–06.

78 *See* Rutherglen, *supra* note 21, at 33–34 (arguing the dissent went too far, should have focused on actions by McIntyre UK that would have amounted to "implied consent," and that the company must have accepted the benefits of the state to be subject to judgment in its courts); Silberman, *supra* note 73.

79 564 U.S. 915 (2011) (unanimous) (holding that foreign subsidiaries of a United States tire manufacturer were subject to neither specific nor general jurisdiction in North Carolina in lawsuit brought by the estates of two minors killed in a bus accident in France). The defendants included indirect subsidiaries of an Ohio corporation (Goodyear USA), incorporated and based in Luxembourg, Turkey, and France, respectively. *Id.* at 920–21.

80 The appeals court found that some of the companies' tires reached the state. *Id.* at 922.

81 *Id.* at 919–21. The Court also noted that the company did not: design, manufacture, or advertise its products in the state; did not have an office, a bank account, or employees in the state; and did not solicit business or themselves sell or ship tires to the state. *Id.*

82 *Id.* at 929–30 (finding that the foreign companies' "attenuated connections" to the state "fall far short of . . . 'the continuous and systematic general business contacts'" necessary to allow the state to render judgment against them) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

83 *See* Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C. L. REV. 617, 635 (2012); Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 241 (2011) (concluding that *McIntyre* and *Goodyear* "may serve to increase the confusion of the lower courts about the requirements for

3. *Walden v. Fiore*: Connection by More than the Plaintiff

A defendant's connection to a forum must come from more than the mere fact that a plaintiff is located there.[84] If a defendant has no connection to the state and the harm allegedly suffered occurred outside of the state's boundaries, the state does not have jurisdiction to hear the lawsuit.[85] The defendant's connection to the forum "must arise out of contacts that the 'defendant *himself*' creates" with it, beyond the defendant's connections to the plaintiff.[86]

4. *Daimler*: Limiting General Jurisdiction

In the last major personal jurisdiction case before the 2017 term, the Court issued what was viewed as the most restrictive general jurisdiction definition to date in *Daimler AG v. Bauman*.[87] The Court rejected the plaintiff's assertion that Daimler should be subject to jurisdiction in California because of its connection to a United States distributor, MBUSA.[88] Even assuming that MBUSA was "at home" in California, this relationship is still not enough to subject Daimler to general jurisdiction in the state.[89] The companies' contacts in the state

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establishing both general and specific jurisdiction" because the Court failed to identify the kinds of contacts that might be relevant to the minimum contacts analysis).

84 Walden v. Fiore, 571 U.S. 277 (2014) (unanimous). In *Walden*, airline passengers sued a Drug Enforcement Agent in Nevada over allegedly tortious conduct that took place in Georgia. *Id.* at 279–80.

85 *Id.* at 279. The court's analysis was unchanged by the fact that plaintiffs were in Georgia borading a flight to Las Vegas. *Id.* at 288–89.

86 *Id.* at 284 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

87 571 U.S. 117 (2014). Argentinian workers sued a German company for events in Argentina allegedly committed by an Argentinian subsidiary (MB Argentina) during Argentina's "Dirty War" in 1976–1983. *Id.* at 120–22. Plaintiffs alleged jurisdiction on the basis of the Alien Tort Statute. *Id.* at 119; *see also* Rhodes & Robertson, *supra* note 67; Stephen Kinnaird et al., *Supreme Court in* Daimler AG v. Bauman *Limits General Jurisdiction over Foreign Companies*, AM. BAR ASS'N (June 25, 2014), https://www.americanbar.org/publications/infrastructure/2013-14/spring/supreme_court_daimler_ag_v_bauman_limits_general_jurisdiction_over_foreign_companies.html [https://perma.cc/5ARM-U3LR].

88 *Daimler*, 571 U.S. at 121. MBUSA is a subsidiary of Daimler incorporated in Delaware, with its principle place of business in New Jersey. *Id.* It was not a party to the lawsuit. *Id.*

89 *Id.* at 136–39. Although MBUSA is incorporated in Delaware and has its principal place of business in New Jersey, it has some facilities in California. *Id.* at 123. Because Daimler failed

were not "continuous and systematic" enough to make them "essentially at home" there.[90] The foreign corporation could not be sued in California for activities that occurred outside the state's borders.[91] Allowing California to render judgment over such a corporation would not comply with the "fair play and substantial justice" that due process demands.[92]

Daimler strengthened the notion that only a "limited set of affiliations" with a forum render a defendant amenable to "all-purpose jurisdiction" there.[93] For example, a corporation may be sued on "any and all claims" in the state where it is incorporated and where it has its principal place of business.[94]

Justice Sotomayor, the only Justice who did not join the majority opinion, concurred in the judgment, but expressed concern that the holding should only apply to *Daimler*'s "unique circumstances."[95] Justice Sotomayor argued that the general jurisdiction inquiry involved two questions: (1) whether a defendant has sufficient contacts to a forum to support personal jurisdiction; and (2) whether the forum's exercise of jurisdiction would be reasonable under the circumstances.[96] Her analysis found that MBUSA's considerable contacts with

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to object to plaintiffs' assertion that MBUSA is its agent, the Court assumed this relationship, and that MBUSA was "at home" in California in its analysis. *Id.* at 133–34.

90 *Id.* at 137–39 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011)). Neither corporation was incorporated nor had its main headquarters in California. *Id.*

91 *Id.* at 133–34 (noting that plaintiffs never attempted to fit the specific jurisdiction category). In articulating the question before the Court, the opinion reiterated that the lawsuit involved only foreign plaintiffs and conduct alleged to have occurred entirely abroad. *Id.* at 124–25. Justice Ginsburg found this result to be consistent with her dissent in *McIntyre* because the opinion addressed whether a foreign corporation was subject to specific jurisdiction in the state where its product ended up. *Id.* at 131–32 (citing J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 893–914 (2011) (Ginsburg, J., dissenting)).

92 *Id.* at 142.

93 *Id.* at 137–38 (citing *Goodyear*, 564 U.S. 915).

94 *Id.* (identifying predictability as a goal of simpler jurisdiction rules) (citing Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010)). In contrast, a natural person is subject to general jurisdiction where they are domiciled. *Id.* (citing *Goodyear*, 564 U.S. 915). To be domiciled, one has a physical presence in a location with the intent to, at least for a certain time, make the place home. *See* Lea Brilmayer, Jennifer Haverkamp & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728–30 (1988).

95 *Daimler*, 571 U.S. at 142 (Sotomayor, J., concurring).

96 *Id.* at 144 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–78 (1985)).

California[97] demonstrate that it had taken advantage of the state's laws and protections, thereby meeting the first prong.[98] However, the plaintiffs failed to show that it would be more convenient to litigate the case in California rather than in Germany, so the plaintiffs failed on the reasonableness prong.[99]

Justice Sotomayor disagreed with the majority's analysis and argued that it improperly looked at the corporation's connections to the state *in comparison to* its connection to other states.[100] Citing an article on which the *Goodyear* and *Daimler* majority opinions both relied, she reasoned that the defendants should not be considered less amenable to suit in one state merely because they have stronger business contacts to other states, as this other activity is "virtually irrelevant" to the general jurisdiction question.[101]

While the majority maintained that predictability concerns supported its holding and prevented companies from being subject to lawsuits in too many fora,[102] Justice Sotomayor countered that a company's substantial contacts with a state should allow it to predict that it could be subject to jurisdiction there.[103] Sotomayor further asserted that allowing Daimler to be subject to general jurisdiction in every state in which MBUSA has sizeable sales is an "inevitable consequence" of seventy years of due process case law on the issue.[104]

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97 *Id.* at 142–43 (relying on the fact that it has its regional headquarters in the state and generates billions of dollars from the tens of thousands of cars it sells there).

98 *Id.*

99 *Id.* at 145–46 (citing Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987)).

100 *Id.* at 149–52 (citing International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) and Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984)) ("After all, the degree to which a company intentionally benefits from a forum state depends on its interactions with that State, not its interactions elsewhere.").

101 *Id.* at 151–52 (quoting Brilmayer et al., *supra* note 94, at 742).

102 *Id.* at 136–39 (stating that too much "all-purpose" jurisdiction would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit'") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)); *see also supra* text accompanying note 94.

103 *Daimler*, 571 U.S. at 154–55 (Sotomayor, J., concurring) (arguing that "there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one").

104 *Id.* at 155–56.

Justice Sotomayor expressed concern that the majority's rule will lead to "deep injustice" in four ways: (1) curtail a state's sovereign authority to adjudicate disputes against corporate defendants with continuous and substantial business ties within its borders; (2) unfairly create greater immunity for large corporations with more extensive ties to a state than a small business running a much smaller operation; (3) expose a state's one-time visitors to jurisdiction[105] while freeing a large corporation from exposure to suit if it is not "at home" in the state per the majority's definition; and (4) shift the risk of loss from multinational corporations to individuals harmed by their actions.[106] Such unfair results, Sotomayor opined, deemed Daimler "too big for general jurisdiction."[107]

II. ANALYSIS

A. *Specific Jurisdiction in the 2017 Term*

The 2017 Supreme Court term saw the Court issue two decisions that can have major implications for plaintiffs suing large corporations.[108] Both *BMS* and *BNSF Railway* limit when courts can exercise specific jurisdiction over out-of-state defendants.[109]

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105 This is so because of *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). *Daimler*, 571 U.S. at 158. Although these decisions will have major ramifications for pending and future litigation, they come as no surprise when considering the Court's more recent jurisprudence on the issue.

106 *Daimler*, 571 U.S. at 157–59.

107 *Id.* at 143.

108 *See* Andrew Chung, *Supreme Court Tightens Rules on Where Companies Can Be Sued*, REUTERS (May 30, 2017, 10:22 AM), https://www.reuters.com/article/us-usa-court-bnsf-rlwy-ptt/supreme-court-tightens-rules-on-where-companies-can-be-sued-idUSKBN18Q1N7 [https://perma.cc/S8MU-VH4K]; Sarah Karlin-Smith, *Supreme Court Ruling in Drug Case Could Have Big Implications for Product Liability*, POLITICO (June 19, 2017, 10:34 AM), http://www.politico.com/story/2017/06/19/supreme-court-bristol-myers-squib-239712 [https://perma.cc/RQ9B-YQH9].

109 Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

1. *Bristol-Myers Squibb Co. v. Superior Court of California*

In *BMS*, over 600 plaintiffs[110] filed a civil action in California state court, asserting state law claims against drug manufacturer Bristol-Myers Squibb for alleged injuries they suffered while taking the drug Plavix.[111] Bristol-Myers is incorporated in Delaware and headquartered in New York; therefore, *Daimler* precluded California courts from exercising general jurisdiction over the company for actions not connected to the state.[112]

a. The California Supreme Court's Sliding Scale Approach

A majority of the California Supreme Court adopted a sliding scale approach to specific jurisdiction, recognizing that the more wide-ranging a defendant's contacts with a forum are, the greater the connection between the forum contacts and the claim alleged.[113] The court ruled that, where minimum contacts with the forum are established, it could exercise jurisdiction over claims involving less direct connections between the defendant's forum activities and claims alleged than might otherwise be required.[114] The court cited Bristol-Myers' sizeable revenues from the sale of Plavix and other products in California to support its finding that all of the plaintiffs' claims arose from or were related to the company's connections with the state.[115] It found that there was "no question" that Bristol-Myers purposely availed itself of the privilege of conducting activities in California by marketing and advertising Plavix in the state, employing sales representatives in the state, contracting with a California-based distributor, operating research and laboratory facilities in the state, and having an office in the

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110 Eighty-six of the plaintiffs were residents of California while 592 plaintiffs were residents of thirty-three other states. This decision concerns only the California state court's power to exercise jurisdiction over the claims of the latter group of plaintiffs. *Bristol-Myers Squibb*, 137 S. Ct. at 1778–79.

111 *Id.* at 1777–78. The plaintiffs sued for products liability, negligent misrepresentation, and misleading advertising claims. *Id.* at 1778.

112 *Id.* The California state courts also found general jurisdiction was not present because of *Daimler*. *Id.*

113 Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 889 (Cal. 2016) (citing Vons Cos., Inc. v. Seabest Foods, Inc., 926 P.2d 1085, 1098 (Cal. 1996)), *overruled by* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017).

114 *Id.* at 889–90.

115 *Id.* at 889.

state capital for the purpose of lobbying politicians on the company's behalf.[116]

The court concluded that it could exercise jurisdiction over the resident and nonresident plaintiffs' claims.[117] The majority reasoned that Bristol-Myers' marketing, promotion, and distribution of Plavix created a "substantial nexus" between the non-California resident plaintiffs' claims and Bristol-Myers' activities in California related to Plavix.[118] Three justices dissented, finding that the nonresident plaintiffs' claims did not substantially relate to Bristol-Myers' contacts with California.[119] They reasoned that mere similarity of claims alleged by the nonresident plaintiffs to the resident plaintiffs' claims was not a substantial enough nexus between the nonresidents' claims and Bristol-Myers' activities in the state.[120]

b. The Supreme Court Rejects the Sliding Scale Test

Six months after granting certiorari,[121] the U.S. Supreme Court issued a decisive 8-1 opinion expressly rejecting the California Supreme Court's sliding scale test for specific jurisdiction and likening it to a "loose and spurious form of general jurisdiction" not supported by the Court's precedent.[122] The Court reiterated that a corporation's continuous activity in a state is not enough to make it amenable to lawsuits not arising from that state-connected activity.[123] The Court held that California could not exercise specific jurisdiction against the company over the nonresidents' claims because these plaintiffs were not prescribed Plavix in California, did not purchase it in California, did not

116 *Id.* at 886–87.

117 *Id.* at 894.

118 *Id.* at 888.

119 *Id.* at 898 (Werdegar, J., dissenting).

120 *Id.* at 898–99 (arguing that, because nonresident plaintiffs did not buy or receive their Plavix prescriptions in California, Bristol-Myers' advertising in the state was irrelevant to their claims).

121 Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 894 (Cal. 2016), *cert. granted sub nom.* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 827 (2017).

122 Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1781 (2017).

123 *Id.* (finding that the California Supreme Court improperly found specific jurisdiction without identifying an adequate link between the nonresidents' claims and the state) (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 927 (2011)).

ingest it in California, and did not suffer their alleged injuries from the drug in California.[124]

The majority incorrectly rejected both the California Supreme Court and plaintiffs' argument that the fact that other plaintiffs were prescribed, purchased, or ingested the same drug and allegedly suffered the same injuries as the nonresident plaintiffs allowed the state to exercise jurisdiction over all of the claims.[125] Citing *Walden v. Fiore*, the Court held that, standing alone, a defendant's connection to a third party is not a sufficient basis for a state to exercise jurisdiction over a defendant.[126] While the California Supreme Court held that the similarity of the claims supported the state's exercise of jurisdiction over all of the plaintiffs' claims in light of judicial economy principles,[127] eight justices of the U.S. Supreme Court suggested that the nonresident plaintiffs could instead sue in their thirty-three separate home states or where the company is subject to general jurisdiction (New York or Delaware).[128] Such a "solution" is far from the most efficient course of conduct in terms of time and risks courts finding thirty-three different assessments of the company's liability for the same conduct and activity: producing, marketing, and selling a drug that caused the plaintiffs' injuries.[129]

The majority also rejected Bristol-Myers' third-party connection to McKesson, a California company it contracted with to distribute Plavix nationally, as being an insufficient basis for California courts to exercise jurisdiction over the claims against Bristol-Myers.[130] The majority found no allegations that McKesson and Bristol-Myers together engaged in acts that lead to the nonresident plaintiffs' injuries or that Bristol-Myers

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124 *Id.*

125 *Id.*

126 *Id.* The Court was also not convinced that Bristol-Myers' Plavix-related activities in California warranted the state's exercising personal jurisdiction because they did not specifically relate to the nonresident plaintiffs' alleged injuries. *Id.*

127 Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 893 (Cal. 2016) (finding that "overall savings of time and effort to the judicial system, both in California and interstate, far outweigh the burdens placed on the individual forum court").

128 *Bristol-Myers Squibb*, 137 S. Ct. at 1783–84.

129 *See* Neil Tyler & Claudia Vetesi, Bristol-Myers Squibb*: A Dangerous Sword*, LAW360 (Apr. 25, 2018, 2:11 PM), https://www.law360.com/articles/1037204/bristol-myers-squibb-a-dangerous-sword [https://perma.cc/J7QZ-U4SP] (warning defendants that filing a motion to dismiss based on *BMS* may not be the most favorable or efficient course of action).

130 *Bristol-Myers Squibb*, 137 S. Ct. at 1783.

was subject to derivative liability for McKesson's actions.[131] Yet, contracting with a California corporation was another example of Bristol-Myers' ties to the state.[132]

c. Justice Sotomayor's Dissent

Echoing her *Daimler* concurrence,[133] Justice Sotomayor's *BMS* dissent maintained that the majority's decision improperly reduced the availability of specific jurisdiction without considering fairness to the parties.[134] Justice Sotomayor argued that in order for a court to validly exercise specific jurisdiction, (1) the defendant must purposefully avail itself of the privilege of conducting activities within the state, or purposefully direct its conduct at the forum state; (2) the plaintiff's claim must arise out of or relate to the defendant's forum conduct; and (3) exercising jurisdiction must be reasonable under the circumstances.[135] Sotomayor found "no dispute" that Bristol-Myers purposefully availed itself of the privilege of conducting business in California.[136] The second prong was satisfied because the nonresidents'

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131 *Id.* (citing Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014)) ("The bare fact that [Bristol-Myers] contracted with a California distributor is not enough to establish personal jurisdiction in the State."). *Cf.* GEOFFREY M. WYATT & JORDAN M. SCHWARTZ, READING THE TEA LEAVES OF EARLY POST-*BRISTOL-MYERS* PERSONAL JURISDICTION DECISIONS 2 (2017) (describing the connection to McKesson a "last ditch contention").

132 *Bristol-Myers Squibb*, 137 S. Ct. at 1784, 1786 (Sotomayor, J., dissenting) (arguing that California has jurisdiction because all claims are based on Bristol-Myers' "marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States").

133 Daimler AG v. Bauman, 571 U.S. 117, 142–60 (2014) (Sotomayor, J., concurring).

134 *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) (arguing that "[a] core concern in th[e] Court's personal jurisdiction cases is fairness").

135 *Id.* at 1785–86 (citing 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, A. BENJAMIN SPENCER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1069 (4th ed. 2015)). The dissent identified "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies" as the factors relevant to the reasonableness inquiry in the third prong. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477–78 (1985)). In contrast, the majority identified "the burden on the defendant" as the primary concern in assessing whether personal jurisdiction is warranted. *Id.* at 1780 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

136 *Id.* at 1786 (purposeful availment is demonstrated by virtue of the company employing over 400 people in the state, maintaining six facilities in the state, contracting with a California-based distributor, and selling and profiting from Plavix being sold in the state) (Sotomayor, J., dissenting).

claims involved "materially identical" conduct to actions the company took in California.[137] The alleged injuries arose from a nationwide course of conduct involving the same essential acts and affecting residents in multiple states.[138] Lastly, the third prong was satisfied because litigating identical claims in a single forum is reasonable for both the state and defendant.[139]

Justice Sotomayor correctly disagreed with the majority's contention that it followed precedent in coming to its decision, arguing that both precedent and common sense required a different result.[140] The majority's reliance on *Walden* was irrelevant because the nearly $1 billion that Bristol-Myers earned from selling Plavix in California during the relevant time period demonstrated that the company purposefully availed itself of the privilege of conducting business there.[141]

The dissent focused on the consequences of the majority's decision, fearing that the majority's holding would effectively eliminate mass actions in states other than where a corporation is subject to general jurisdiction, which might not be a convenient or easily accessible forum for plaintiffs with relatively few means and small claims.[142] The majority's decision could also make it impossible for plaintiffs to sue defendants headquartered or incorporated in different states or not "at home" in any state.[143]

The strong disagreement between the majority and dissent's reasoning illustrates the difficulty in defining whether conduct "relates to" a forum and what conduct is being discussed.[144] The majority defined the conduct alleged as Bristol-Myers' marketing the drug in the

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137 *Id.* at 1786. Bristol-Myers itself conceded that the plaintiffs' claims were "materially identical." *Id.* at 1785.

138 *Id.* at 1786.

139 *Id.* at 1786–87 (finding that Bristol-Myers would be less burdened by litigating the claims in one forum, and that California has an interest in regulating the conduct of companies like nonresident Bristol-Myers and resident McKesson).

140 *Id.* at 1787.

141 *Id.* at 1787 (citing *Walden* opinion, lower court decision, and *Walden* parties' briefing) ("*Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a defendant's contacts with a forum resident to establish the necessary relationship.").

142 *Id.* at 1789.

143 *Id.*

144 *Compare* majority opinion, *with* dissenting opinion in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

state in which the nonresident plaintiffs obtained Plavix or suffered their injuries.[145] In contrast, the dissent defined the conduct as a nationwide advertising campaign that targeted multiple states and injured parties there.[146] One cannot deny that a corporation's conduct in a state and substantial financial benefit obtained from access to its markets creates a connection to the state. If a corporation has the means to offer its products to a state in such large quantities, it has certainly purposefully availed itself of being subject to personal jurisdiction within the state's borders.[147]

2. *BNSF Railway Co. v. Tyrrell*

In *BNSF Railway Co. v. Tyrrell*, the Supreme Court issued another almost unanimous opinion on personal jurisdiction, where two railroad employees brought actions against their employer, BNSF Railway, in Montana state court for injuries sustained while working for the company.[148] Because BNSF Railway is incorporated in Delaware and has its principle place of business in Texas, the company was not subject to general jurisdiction in Montana.[149] Finding that neither plaintiff was injured in or alleged harm in Montana, the majority ruled that the business BNSF Railway conducted in Montana did not subject it to specific jurisdiction for activities unrelated to its Montana activities.[150] The Court relied mainly on *Daimler* and *International Shoe*.[151]

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145 *Id.* at 1782 (holding that because nonresident plaintiffs did not suffer their injuries in California, they could not sue Bristol-Myers in the state).

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

147 *Worldwide Facilities*, BRISTOL-MYERS SQUIBB, https://www.bms.com/about-us/our-company/worldwide-facilities.html [https://perma.cc/3JK5-MAHC] (last visited Dec. 30, 2018) (identifying company facilities in Puerto Rico and six U.S. states, including California).

148 BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1553–54 (2017). The Montana state courts consolidated the two cases, and the Supreme Court decided them together. *Id.* at 1554–55.

149 *Id.* at 1554, 1559. Justice Sotomayor concurred in part and dissented in part, stating that she would have remanded the case to the state courts to conduct a fact-intensive inquiry under a proper legal framework to determine whether the facts of the case presented the "exceptional case" contemplated in *Daimler* that would allow Montana courts to exercise general personal jurisdiction. *Id.* at 1560–62 (Sotomayor, J., concurring in part and dissenting in part).

150 *Id.* 1558–59 (majority opinion). The plaintiffs were residents of South Dakota and North Dakota. *Id.* at 1554.

151 *See id.* at 1553–59.

Justice Sotomayor dissented in part, calling the majority's view of *International Shoe* "overly restrictive" and previewing her opinion in *BMS*.[152] Her dissent criticized the *Daimler* majority's comparative contacts analysis, where the Court compared a company's connections to a state in relation to its connections to other states, as inappropriate under *International Shoe*.[153] Justice Sotomayor argued that the relative percentage of a defendant's contacts to a forum state is irrelevant, and that the personal jurisdiction inquiry under *International Shoe* should focus on the "quality and quantity" of the defendant's contacts with the forum state.[154] As with her *BMS* dissent, Justice Sotomayor criticized the majority for the "jurisdictional windfall" it granted to large or multinational corporations operating in many jurisdictions and for the difficulty the opinion created in subjecting them to personal jurisdiction.[155]

B. Bristol-Myers Squibb*'s Effect on the Courts*

Although seemingly logical on the facts of the case, *BMS* provides a blueprint for courts to exercise their jurisdiction in illogical ways.[156] This Section analyzes some early case law following *BMS* and the harmful effects the case can have on access to courts. Consider the following hypothetical: A and B are next door neighbors in a suburb of Minnesota. Both A and B buy a car from a national dealership incorporated in and with its principal place of business in Michigan and

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152 *Id.* at 1561 n.2 (Sotomayor, J., concurring in part and dissenting in part) (arguing that there is no material difference between the "continuous and systematic" terminology used for what is now called specific jurisdiction and the "substantial" terminology now used for what is called general jurisdiction).

153 *Id.* at 1561 (arguing that the majority "makes [too] much" of BNSF's contacts in Montana compared with its contacts in other jurisdictions); *see also supra* note 100 and accompanying text.

154 *BNSF*, 137 S. Ct. at 1561 (demonstrating that the *International Shoe* Court only evaluated the strength of International Shoe Co.'s connections to Washington and not its connection to any other state).

155 *Id.* at 1560.

156 *See* James M. Beck, *Stream-of-Commerce Personal Jurisdiction Dries Up Following* Bristol-Myers Squibb, AM. BAR ASS'N (Apr. 16, 2018), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2018/summer2018-stream-of-commerce-personal-jurisdiction-dries-up-following-bristol-myers-squibb.html [https://perma.cc/S4MS-58UE].

with a substantial presence in Wisconsin and Minnesota.[157] Assume that the car was manufactured in Canada.

While A is driving to visit a friend in Chicago, A gets into an accident on a highway in Wisconsin and suffers injuries and damage to the car. The cause of the accident is a structural defect in the car. B, owning a car of the same make and model, gets into the same type of accident a few blocks from where A and B live in Minnesota, and suffers the same injuries. According to *BMS*, only B can sue the dealership in Minnesota, because B's injuries "arise" out of events that took place within the state's borders.[158] A would only be able to sue the dealership in Wisconsin (where the accident occurred) and Michigan (where the dealership is subject to general jurisdiction). Under *BMS*, A could not sue in Minnesota despite the fact that the dealership has a substantial presence in the state, sells the exact make and model car that caused A's injuries to other Minnesota residents, and has been responsible for at least one accident and injuries in the state (B's accident).[159] In order to bring its action, A must travel across state lines to bring an action, at great time and expense to A, who is an individual plaintiff with fewer resources than a multi-state corporation. In contrast, it is not nearly as inconvenient, unfair, or unreasonable to subject the national dealership, which purposefully availed itself of the privilege of doing business in Minnesota, to a lawsuit in the state for injuries related to actions that took place in the state. And yet, *BMS* forbids such a result.[160]

Justice Sotomayor's dissent in *BMS* cautioned that the majority's decision would curtail, and potentially eliminate, plaintiffs' ability to hold corporations accountable for their nationwide conduct.[161] This

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157 For the purposes of this hypothetical, assume that the "substantial" presence includes dozens of dealerships and hundreds of employees. This connection is significant enough to demonstrate that the company purposefully availed itself of the privilege of doing business in at least these four states. The dealerships carry and sell the same make and model car that A and B purchased.

158 *See* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1779–80 (2017).

159 *Id.* at 1781–82 (no jurisdiction in California because nonresident plaintiffs were not prescribed Plavix, did not purchase the drug, did not ingest the drug, and did not suffer their alleged injuries as a result of the drug in the state).

160 *Compare id.* (majority holding California courts lacked jurisdiction over out-of-state residents' claims against large multinational corporation), *with id.* at 1784 (Sotomayor, J., dissenting) ("[T]here is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.").

161 *Id.* at 1789 (Sotomayor, J., dissenting).

Section examines the effect of the majority's decision on lower courts analyzing the propriety of exercising personal jurisdiction over defendants.

1. Specific Jurisdiction After *Bristol-Myers Squibb*

In a decision issued less than two weeks after *BMS*, a district court in Missouri dismissed a case involving very similar facts, where eight Missouri residents and eighty-six non-Missouri residents sued for injuries allegedly caused by the anti-clotting drug Praxada.[162] The court found that *BMS* clarified the specific jurisdiction inquiry, allowing it to decisively dismiss the nonresident plaintiffs' claims.[163] It analyzed the company's connections to the state (as the *BMS* Court did) and found that because the non-Missouri resident plaintiffs were not prescribed Praxada in the state, did not purchase the drug in the state, and did not suffer any injury or receive any treatment in Missouri, their claims were not connected to and did not arise out of the defendants' activities in Missouri.[164]

Echoing *BMS*, the Missouri court ruled this way despite the fact that the defendant drug company widely marketed and sold Praxada in Missouri.[165] The court held that, under *BMS*, due process forbids the state from exercising personal jurisdiction over the nonresidents' claims.[166] However, Boehringer itself advertised its connection to Missouri on its corporate website.[167] The presence of one of the company's subsidiaries and operations within the state undermines its claim that it did not have a substantial connection to Missouri, and that

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162 Siegfried v. Boehringer Ingelheim Pharms., Inc., No. 4:16-CV-1942-CDP, 2017 WL 2778107, at *1 (E.D. Mo. June 27, 2017). The court cited *BMS* in support of its decision to deny exercising personal jurisdiction over the nonresident plaintiffs' claims. *Id.* The cases were originally filed in Missouri state court; defendants removed the case to federal court on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a). *Id.* at *1–*2.

163 *Id.* at *1–*2 (stating that a recent decision (*BMS*) made the "personal jurisdiction issue in this case much easier to decide").

164 *Id.* at *4–*5 (comparing nonresidents' claims to claims of nonresidents in *BMS*).

165 *Id.*

166 *Id.* at *5.

167 *Our Businesses*, BOEHRINGER INGELHEIM, https://www.boehringer-ingelheim.us/our-story/our-businesses [https://perma.cc/DL7M-R2V3] (last visited Dec. 30, 2018) (identifying St. Joseph, Missouri as the headquarters of one of its subsidiaries).

litigating in the state would be inconvenient and unfair to the company.[168]

The same court held that *BMS* altered the state of affairs for out-of-state plaintiffs suing in mass tort[169] and products liability actions.[170] In *Jordan v. Bayer Corp.*, the Missouri federal court found it could not exercise specific jurisdiction over nonresident plaintiffs' claims against a nonresident corporation because the corporation did not develop, manufacture, package, or create the marketing strategy for the product complained of within the state.[171] The court described Bayer's general business activities as insufficient to subject it to personal jurisdiction in the state and cited *Siegfried* as a case that made the personal jurisdiction inquiry much more straightforward.[172] Bayer's corporate website lists only a New Jersey address as its U.S. location;[173] however, the company advertised jobs located in Missouri.[174] Even if its operations in the state are minor, Bayer has substantially benefitted from its presence in the United States with billions of dollars' worth of sales.[175] The plaintiffs suing Bayer do not have access to such resources and wealth, yet the

168 *Id.*

169 Livaudais v. Johnson & Johnson, No. 4:17-CV-1851-SNLJ, 2017 WL 3034701 (E.D. Mo. July 18, 2017) (court not squarely ruling on issue because defendants failed to timely file motion). This decision was issued a few weeks after *Siegfried*. *Compare Siegfried*, 2017 WL 2778107, *with Livaudais*, No. 4:17-CV-1851-SNLJ, 2017 WL 3034701. *See also* Richard Levick, *The Game Changes: Is* Bristol-Myers Squibb *the End Of An Era?*, FORBES (July 11, 2017, 2:21 PM), https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/#38963fa82e83 [https://perma.cc/G9CB-PEV3] ("Before *Bristol-Myers Squibb*, some courts might have taken a more relaxed approach to assessing jurisdiction. Those days are over.").

170 Jordan v. Bayer Corp., No. 4:17-CV-865 (CEJ), 2017 WL 3006993, at *1, *4 (E.D. Mo. July 14, 2017) (action for injuries regarding an implanted medical device).

171 *Id.* at *4. The court exercised jurisdiction over the claim of a non-Missouri resident who had the device implanted in the state. *Id.*

172 *Id.* at *2, *4.

173 *Contact*, BAYER, https://www.bayer.com/en/contact.aspx [https://perma.cc/TJ9Z-X959] (select "USA" from the drop-down menu under "Contact addresses") (last updated Nov. 27, 2018).

174 *See Job Search*, BAYER CAREER USA, https://career.bayer.us/en/job-search/?fulltext=&accessLevel=&functional_area=&country=US&location=sap_lo_84000024&division= [https://perma.cc/J9MJ-W3Y4] (last visited Oct. 31, 2018) (filter jobs to MO state).

175 *Bayer Worldwide*, BAYER, https://www.bayer.com/en/North-America.aspx [https://perma.cc/D69E-YH9K] (last updated Dec. 14, 2018) ("In 2017 Bayer's 13,000 employees in [North America] generated sales of approximately €10,1 billion.").

courts appear to ignore this imbalance when analyzing the "burden" on a defendant in litigation.[176]

In a case where the defendant's connections to the forum state were arguably weaker than Bristol-Myers's connections to California,[177] a New York state trial court cited *BMS* to support the proposition that a corporate defendant's contacts with a state need to be connected to the claim before the court.[178] The court found that defendant's only connection to New York was the plaintiff's residence, which is insufficient to support it exercising specific jurisdiction under *BMS* and *Walden*.[179] The New York court described *BMS*'s central holding as having "universal application" that would allow a court to deny exercising jurisdiction even when a defendant has connections to a state.[180] This strong language demonstrates the reality and risk of *BMS* being overapplied to cases where, for example, corporations are sued in states where they have a substantial presence but are not headquartered.[181]

In a puzzling opinion, the Ninth Circuit found that a corporation's purposeful actions in a state, over which the plaintiff sued, did not give the forum state specific jurisdiction over the case.[182] In *Morrill v. Scott*

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176 *See* Karlin-Smith, *supra* note 108 ("Alito's decision expressed 'a greater concern for the burden on corporation' than courts have expressed for individuals facing out-of-state lawsuits.").

177 *Compare* Nextengine Ventures, LLC v. Network Sols., LLC, No. 153341/17, 2017 WL 4569679, at *2–*4 (N.Y. Sup. Ct. Oct. 13, 2017) (New York customers represent only 6.48% of defendant's domain registration clients, and defendant has no real property, bank accounts, offices, or employees in the state), *with* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1778 (2017) (defendant's sale of Plavix in California comprised little over 1% of the company's nationwide sales revenue, but it had five research and laboratory facilities, employs around 160 employees and 250 sales representatives in the state, and maintains a state government advocacy office in the capital). *See also supra* note 116 and accompanying text.

178 *Nextengine*, 2017 WL 4569679, at *3 (citing *Bristol-Myers Squibb*, 137 S. Ct. 1773).

179 *Id.* at *3–*4 (New York trial court declining to exercise jurisdiction pursuant to the state's long-arm statute). *See also* N.Y. C.P.L.R. 302(a)(3) (McKinney 2008).

180 *Nextengine*, 2017 WL 4569679, at *3 (describing *BMS*'s central holding as demonstrating that there are "constitutional roadblocks to state long-arm statutes that would otherwise permit the exercise of specific jurisdiction based upon an entity's general connections with the chosen forum").

181 *See* Sarah Karlin-Smith, *supra* note 108.

182 Morrill v. Scott Fin. Corp., 873 F.3d 1136 (9th Cir. 2017). The dispute stemmed from plaintiffs (attorneys and a law firm) representing defendants' opponents in a Nevada lawsuit. *Id.*

Financial Corp.,[183] where defendants initiated an action to enforce a subpoena against plaintiffs in Arizona, the plaintiffs countersued and alleged abuse of process and wrongful institution of civil proceedings.[184] Despite the defendants specifically targeting plaintiffs in the state and knowing the plaintiffs would feel harm there, the court held that the defendants' alleged tortious acts had very little to do with Arizona and only took place in the state because it was where the plaintiffs resided.[185]

This analysis is odd when considering the conduct the plaintiffs alleged of the defendants, including commencing civil actions, filing an opposition to the plaintiffs' motion to quash subpoenas, appearing *pro hac vice* in the Arizona proceedings, and opposing the plaintiffs' appeals.[186] Seemingly ignoring the defendants' intentional acts, the court reasoned that the case was more similar to *Walden v. Fiore* than *Calder v. Jones*.[187] However, the Supreme Court's holding in *Calder* perfectly fits the facts of *Morrill*. *Calder* presents a test for whether a court can exercise jurisdiction over alleged intentional torts.[188] The *Calder* "effects" test requires that a defendant: (1) committed an intentional act; (2) expressly aimed at the forum state; and (3) caused harm that the defendant knew would likely be suffered in the forum state.[189] Under *Calder*, the *Morill* court should have exercised jurisdiction based on the defendants' actions intentionally targeting Arizona.

While the *Morill* defendants' connection to Arizona began with the plaintiffs, its *purposeful and intentional* actions targeting the state's residents, and utilization of the state's courts, gave rise to the lawsuit. Therefore, it does not violate due process to forbid these plaintiffs from pursuing a lawsuit over these actions that took place in Arizona in the state's courts.[190] The court's reasoning followed the general trend of courts exercising personal jurisdiction in fewer cases, echoing the reasoning in *BMS*.[191]

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183 *Id.*

184 *Id.* at 1139–41.

185 *Id.* at 1145–46.

186 *Id.* at 1142–43.

187 *Id.* at 1145.

188 Calder v. Jones, 465 U.S. 783 (1984).

189 *Id.*

190 *Morrill*, 873 F.3d at 1149–56 (Kleinfeld, J., dissenting).

191 The majority in *Morrill* did not cite *BMS* in its reasoning. *Morrill*, 873 F.3d 1136. *See supra* text accompanying notes 68–69.

A federal court in New York cited *BMS* to support dismissing a class action complaint against a defendant, Burkhart, even though *BMS* did not address whether its holding applied to class actions.[192] The court described the company—a defendant in a lawsuit alleging price fixing and unfair competition—as a small, regional distributor that only holds about three percent of the national market.[193] The court reasoned that Burkhart never registered to do business in New York, had any offices or employees in the state, owned or maintained assets there, or conducted direct advertising or marketing activities in New York; therefore, the company could not foresee that its products would end up in the state.[194] Echoing *BMS*, the judge found that although Burkhart sold products in New York, those sales were not connected to the antitrust claim at issue.[195]

Although *BMS* did not involve a class action, this court extended its holding to prevent more litigants from finding remedies for their harms in a nearby court. It described *BMS* as "tightening the reins on this analysis" for specific jurisdiction, and itself shrunk the possible claims that could be brought in the forum.[196] This court improperly considered the company's ties to New York comparatively, as opposed to its ties to New York in general.[197] An Illinois district court that dismissed claims of false advertising brought on behalf of non-Illinois residents took the same view, finding *BMS* instructive on the matter.[198]

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192 In re Dental Supplies Antitrust Litig., No. 16-CIV-696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) ("The constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class."). Moreover, Justice Sotomayor's *BMS* dissent expressly pointed to the fact that the majority did not address whether its holding applied in the class action context. Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1789 n.4 (2017) (Sotomayor, J., dissenting). *Cf.* Tal J. Lifshitz & Rachel Sullivan, *Why 'Bristol Myers' Doesn't Apply to Class Actions*, DAILY BUS. REV. (July 10, 2018, 10:00 AM), https://www.law.com/dailybusinessreview/2018/07/10/why-bristol-myers-doesnt-apply-to-class-actions [https://perma.cc/GYQ2-VPSU].

193 *Dental Supplies Antitrust Litigation*, 2017 WL 4217115, at *1–*2. Perhaps the most important fact is that, at the time of the alleged conspiracy, Burkhart had not made a single sale to New York dentists after being in business for well over 100 years. *Id.* at *8.

194 *Id.* at *5–*8.

195 *Id.* at *6–*8 (finding that plaintiff's complaint and opposition do not allege that Burkhart tried to directly or indirectly serve the New York market).

196 *Id.* at *8.

197 *Compare id.*, *with* Bristol-Myers Squibb, 137 S. Ct. at 1784–89 (Sotomayor, J., dissenting).

198 McDonnell v. Nature's Way Prods., LLC, No. 16-C-5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017) (punitive class action involving vitamins manufactured by defendants falsely

As one of the only federal appeals courts to consider this issue,[199] the Ninth Circuit ruled that California could not exercise specific jurisdiction over a foreign corporation for alleged copyright infringement stemming from an email received by residents of the state.[200] The email was received by 343 people, fewer than ten of whom resided in California.[201] The court held that the primary concern in the specific jurisdiction inquiry is the burden on the defendant, and cited *BMS* to support this proposition.[202] The defendant's single contact with California (one email received by a few of its residents) was too attenuated to permit the state to exercise specific jurisdiction.[203] While the number and ratio of California residents who received the email were small, the court's inquiry should not stop there; it should look to the quality and consistency of the defendant's relationship to the state and not solely the numbers. Furthermore, the Supreme Court's jurisprudence provides several factors to consider in the personal jurisdiction inquiry in addition to the burden on the defendant.[204]

2. Courts Distinguishing *Bristol-Myers Squibb*

On the same day that a Missouri court declined to exercise personal jurisdiction over non-Missouri residents in its courts,[205] the Northern District of California distinguished *BMS* and exercised personal jurisdiction against Bristol-Myers and AstraZeneca Pharmaceuticals in actions for alleged injuries from Type-2 diabetes

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labeled "Made in USA"). Nature's Way offered a refund for the products to its customers in California but not purchasers in other states. *Id.* at *1.

199 Accurate as of January 2019. *See* Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895 (10th Cir. 2017) (manufacturer did not purposefully direct its activities at Colorado residents such that it was subject to specific personal jurisdiction in insurer's action over airplane accident).

200 Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064 (9th Cir. 2017) (noting that most of the 343 recipients resided in Western Europe).

201 *Id.*

202 *Id.* at 1068.

203 *Id.* at 1070–71.

204 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473–77 (1985); discussion *supra* Section I.C.

205 Siegfried v. Boehringer Ingelheim Pharms., Inc., No. 4:16-CV-1942-CDP, 2017 WL 2778107 (E.D. Mo. June 27, 2017); *see also supra* notes 162–66 and accompanying text.

drug Saxagliptin.[206] The court applied essentially the same three-part test Justice Sotomayor used in *BMS* when considering that the defendants conducted clinical trials, testing and studying, and inadequate reporting of the drug in California.[207] Although the companies conducted clinical trials in other jurisdictions, the court identified the conduct that took place in California as a "but for" cause of the plaintiffs' injuries.[208] Assuming the plaintiffs' allegations were true, if the drug had never been developed, tested, or approved, the plaintiffs would never have been injured.[209] The defendants' actions in California were part of the "unbroken chain of events" that led to the plaintiffs' alleged injuries.[210] In allowing the lawsuit to continue, the court maintained the plaintiffs' access to justice without increasing the defendants' burden of litigating in the state. Unlike the *BMS* court, it correctly found that the defendants' extensive connections to California did not make it inconvenient for them to litigate in the state, and the actions that took place there were tied to the causes of action.[211] Since the Astrazeneca Pharmaceuticals already has a big operation in California, they are well-equipped to defend the lawsuit in the forum.

A California federal court disagreed with the *Dental Supplies Antitrust Litigation* and *McDonnell* courts when it found that the *BMS* Court left open the question of whether its holding applied in a class action context.[212] A few weeks later, the same court ruled that *BMS*

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206 Cortina v. Bristol-Myers Squibb Co., No. 17-CV-00247-JST, 2017 WL 2793808 (N.D. Cal. June 27, 2017); Dubose v. Bristol-Myers Squibb Co., No. 17-CV-00244-JST, 2017 WL 2775034 (N.D. Cal. June 27, 2017). Cortina is a citizen and resident of New York. Bristol-Myers is a Delaware corporation with its principal place of business in New York. AstraZeneca is a Delaware limited partnership and also has its principal place of business there. *See Cortina*, 2017 WL 2793808, at *1. Dubose is a citizen and resident of South Carolina. *Dubose*, 2017 WL 2775034, at *1. Although the court declined to dismiss the actions for lack of personal jurisdiction, it transferred the venue of both lawsuits to New York and South Carolina, respectively. *Cortina*, 2017 WL 2793808, at *4–*6; *Dubose*, 2017 WL 2775034, at *4–*6; *see* Bosman et al., *supra* note 6.

207 *Cortina*, 2017 WL 2793808, at *1–*2; *Dubose*, 2017 WL 2775034, at *1–*2; *see also supra* notes 133–39 and accompanying text.

208 *Cortina*, 2017 WL 2793808, at *4 ("This linkage between [d]efendants' in-state clinical trial activity and [p]laintiff's injury is sufficient to satisfy the Ninth Circuit's 'but for' test."); *Dubose*, 2017 WL 2775034, at *4 (same).

209 *Cortina*, 2017 WL 2793808, at *3; *Dubose*, 2017 WL 2775034, at *3.

210 *Cortina*, 2017 WL 2793808, at *3; *Dubose*, 2017 WL 2775034, at *3.

211 *Cortina*, 2017 WL 2793808; *Dubose*, 2017 WL 2775034.

212 *Compare* In re Dental Supplies Antitrust Litig., No. 16-CIV-696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017), *and* McDonnell v. Nature's Way Prods., LLC, No. 16-C-5011, 2017

applied only to mass actions and *not* class action cases alleging tortious causes of action.[213]

The court allowed the plaintiffs' lawsuit, which alleged false and misleading advertising that Canada Dry Ginger Ale contained actual ginger in it, to continue against the non-California corporation.[214] It held that *BMS* did not apply to non-California residents' claims because all named plaintiffs in the class action were California residents.[215] The court distinguished mass tort actions (where every plaintiff must be named) from class actions (where the citizenship of unnamed plaintiffs is not considered in the diversity of citizenship analysis).[216] This court, too, did not look merely at numbers when considering the fairness of jurisdiction, as the defendant's sales and presence in California belies any claim that it is inconvenient for it to defend a lawsuit in the state.[217] If the company arranged to sell and profit from its products being sold in California, it can defend a lawsuit there.

A Wisconsin federal court took the most drastic departure from the *BMS* holding in an action involving a Pennsylvania car accident that left one plaintiff a quadriplegic.[218] The court found that Ford Motor's extensive connections to Wisconsin related to the plaintiffs' claims even though the car involved was not purchased or manufactured in Wisconsin.[219] The company's link to Wisconsin was not based on any "random, fortuitous, or attenuated" contacts and did not arise solely

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WL 4864910 (N.D. Ill. Oct. 26, 2017), *with* Broomfield v. Craft Brew All., Inc., No. 17-CV-01027-BLF, 2017 WL 3838453 (N.D. Cal. Sept. 1, 2017) (finding that the question didn't need to be decided then), *and* In re Nexus 6P Prods. Liab. Litig., No. 17-CV-02185-BLF, 2017 WL 3581188 (N.D. Cal. Aug. 18, 2017) (noting that the question was left open, but not ruling on the question of jurisdiction at that stage).

213 Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-CV-00564-NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017).

214 *Id.* at *1–*5.

215 *Id.* at *5.

216 *Id.* at *5 (finding the mass tort action case "meaningfully distinguishable" from class actions, where the citizenship of the unnamed plaintiffs is not taken into account for the purposes of diversity).

217 *Fitzhenry-Russell*, 2017 WL 4224723.

218 Thomas v. Ford Motor Co., 289 F. Supp. 3d 941 (E.D. Wis. 2017). This opinion is most similar to this Note's proposal. *See infra* Part III.

219 *Thomas*, 289 F. Supp. 3d at 946–48. The vehicle at issue was designed and developed in Michigan, assembled in Canada, and initially purchased by a rental car company in California from a dealership in Oklahoma. *Id.* at 943. The court noted that it was not clear how the vehicle ended up in Wisconsin, but this missing fact did not guide or disturb the court's inquiry. *Id.*

from its connection to the plaintiffs.[220] The court focused on Ford's *willingness* to serve and sell its products to Wisconsin customers, its "pervasive" marketing in the state, and the actual benefit it derived from selling its vehicles to Wisconsin customers to support its conclusion that Ford could reasonably anticipate being haled before a Wisconsin court.[221] Ford also had 122 dealerships in Wisconsin.[222] The court's foreseeability analysis properly focused on the defendant's connection to the state, not a comparison of the strength of its connections to *other* states.[223] This foreseeability meant that subjecting Ford to lawsuits in Wisconsin from a car that it sold in the Wisconsin market did not violate the Due Process Clause.[224]

III. PROPOSAL

As the decisions discussed in Part II of this Note demonstrate, trial and appellate courts now cite *BMS* to deny exercising personal jurisdiction over non-citizen defendants with a potentially large presence in the forum.[225] The decision's strong language about its clear and obvious result gives lower courts confidence and credibility to apply the holding in a wide range of situations, including those that warrant ruling the other way and exercising jurisdiction over a foreign or out-of-state defendant.[226] After reviewing the effects of *BMS* on lower courts throughout the country, this Note proposes a solution that espouses familiar principles of personal jurisdiction case law and takes into

220 *Id.* at 947–48.

221 *Id.* at 948.

222 *Id.* at 946.

223 *Id.* at 947–48.

224 *Id.* at 947–48 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)) (finding the fact that Ford did not initially sell the Thomases the vehicle "wholly irrelevant" to the personal jurisdiction inquiry). Ford cited *Bristol-Myers Squibb* in support of its motion to dismiss for lack of personal jurisdiction, arguing that its contacts with Wisconsin have nothing to do with the *plaintiffs*' Ford vehicle. *Id.* at 946.

225 *See supra* Section II.B.

226 *See, e.g.*, Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064 (9th Cir. 2017) (copyright infringement); Siegfried v. Boehringer Ingelheim Pharms., Inc., No. 4:16-CV-1942-CDP, 2017 WL 2778107 (E.D. Mo. June 27, 2017) (products liability action involving anti-clotting drug); In re Dental Supplies Antitrust Litig., No. 16-CIV-696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017) (class action alleging price fixing among dental supply and equipment distributors); Nextengine Ventures, LLC v. Network Sols., LLC, No. 153341/17, 2017 WL 4569679, at *2–*3 (N.Y. Sup. Ct. Oct. 13, 2017) (dispute over domain names).

account the modern, interconnected nature of business activities in multiple states.[227]

If a nonresident company takes a substantial step to target a forum, such as manufacturing, advertising, or selling its products within a state's borders,[228] and a plaintiff sues for injuries resulting from the product, courts should hold that exercising specific jurisdiction over the company does not violate due process, even when considering the claims of nonresident plaintiffs who do not allege injuries in the state. In such a situation, although the injury itself may not have occurred within the borders of the forum state, the company's in-state actions should be analyzed as part of the but-for chain of events that lead to the injuries in several fora.[229] Accordingly, the forum in which the company took a significant step that led to a plaintiff's injury elsewhere is an adequate forum for the plaintiff's claims to be heard. Such a result does not violate the Due Process Clause because it looks to the defendant's own conduct to evaluate the adequacy of exercising personal jurisdiction over them.[230]

Similarly, the California Supreme Court suggested a plausible outline for when to exercise specific jurisdiction in mass tort cases involving pharmaceuticals: a state where drugs are manufactured, from which drugs are distributed both within and outside of the state's borders, could exercise specific jurisdiction over all claims related to that drug because such claims "arise from" the defective manufacturing

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227 For an explanation of supply chain economics, see Jayant Rajgopal, *Supply Chains: Definitions & Basic Concepts*, U. PITTSBURGH DEP'T INDUS. ENGINEERING (2016), https://www.pitt.edu/~jrclass/sca/notes/1-Overview.pdf [https://perma.cc/7GV3-8S7Z]; *Supply Chain—Explained*, MANUFACTURING & TECH. ENTERPRISE CTR. (Sept. 15, 2017), https://mfgtec.org/supply-chain-explained [https://perma.cc/6TDY-YYN7].

228 The threshold for jurisdiction because a company sells products in a state's borders should be higher, since modern supply chain economics could mean companies are not necessarily aware of where their products could end up on the market. *Cf.* Lee Goldman, *From* Calder *to* Walden *and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357, 380 n.184 (2015) (discussing awareness related to intent in cases where actual malice is a necessary element of plaintiffs' claim, like *Calder*'s claim involving defamation).

229 *See supra* notes 205–10 and accompanying text.

230 *See supra* notes 84–86 and accompanying text. *See also* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1787–88 (2017) (Sotomayor, J., dissenting) ("*Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a defendant's contacts with a forum resident to establish the necessary relationship.").

that occurred in the state.[231] In the products liability and false advertising context, a company should be subject to suit in the states where it developed and approved a product or advertising campaign that went to market and caused harm, regardless of where the harm occurred. If the product was never developed, approved, or marketed (or a certain advertising decision was never made), the alleged harms would never have occurred. If a company chooses to take a major action in a particular state, it should be subject to suit for harms arising directly from that action. Such a proposal is not inconsistent with the Court's personal jurisdiction case law,[232] but may appear to clash with its recent preference for bright-line rules.[233]

The traditional personal jurisdiction inquiry and the *Calder* effects test are consistent with this Note's proposal. In order to exercise specific jurisdiction, a court must find that (1) the defendant purposefully availed itself of the privilege of conducting activities in the forum state or purposefully directed its conduct at the state; (2) the plaintiff's claim arises out of or relates to the defendant's conduct in the forum; and (3) exercising jurisdiction is reasonable under the circumstances.[234] The *Calder* effects test requires that the defendant (1) committed an intentional act; (2) expressly aimed at the forum state; and (3) caused harm that the defendant knew would likely be suffered in the forum state.[235] A company's choice to advertise and sell its products in a state is an intentional act aimed at the forum, from which the company hopes to derive some sort of advantage or

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231 Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 899 (Cal. 2016) (Werdegar, J., dissenting), *rev'd sub nom.* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017) (finding that "[i]n Bristol-Meyers [*sic*], no such connection to California can be established for the non-California plaintiffs").

232 *See* Anne Gruner, *Consultant Contracts Can Create California Connection*, LAW360 (Nov. 17, 2017, 12:11 PM), https://www.law360.com/articles/986365/consultant-contracts-can-create-california-connection [https://perma.cc/W4FW-BQW4] (identifying California state trial courts' recent rejection to extend *BMS*'s holding to all product liability as "not necessarily a novel approach to questions of specific jurisdiction"); *supra* text accompanying notes 13–16.

233 *See* Gruner, *supra* note 232 (California state trial court's approach is seemingly contrary to Supreme Court specific jurisdiction principles when considering the Court's trend in narrowing personal jurisdiction); *supra* text accompanying notes 13–16.

234 *See* 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, A. BENJAMIN SPENCER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1069 (4th ed. 2015); *see also supra* note 135 and accompanying text.

235 Calder v. Jones, 465 U.S. 783 (1984); *see also supra* notes 188–89 and accompanying text.

profit.[236] Just as a company expects to receive benefits from doing business in a state, it should anticipate that if something goes wrong with its product, the effects will be felt wherever that product is sold. Put differently, the potential harms will be felt wherever the company acted to have its product placed. Thus, the third *Calder* prong is met because the company knowingly took steps to put its product on the market in various jurisdictions.[237] Accordingly, under this Note's proposal, a corporation can reasonably anticipate being haled before courts in the states where jurisdiction is proper.[238]

Corporate defendants may strongly disavow and exaggerate the potential breadth of this proposal as subjecting them to jurisdiction everywhere they conduct business or make even an isolated sale. However, this Note does not look to upend well-settled principles of personal jurisdiction,[239] including the longstanding notion that a single, isolated sale is insufficient to subject a company to suit before a state's courts unless the lawsuit arises from that specific sale.[240] Injecting a product into the stream of commerce is a willful act,[241] although companies would argue that they do not always have control over where their products end up. The fairness factors identified in Justice Brennan's *Burger King* opinion ensure that personal jurisdiction is not exercised too broadly in circumstances where defendants do not avail themselves of lawsuits in distant courts.[242]

While the *BMS* decision and courts that agree with its holding would disagree with this proposal because the harm that a particular plaintiff suffered may not have happened in or relate to the lawsuit's forum, they fail to take into account several of the fairness factors

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236 The profit derived can speak to purposefully availing oneself of the privilege of doing business within a state. *See supra* Section I.A.3 (collecting cases where courts found that a company purposefully availed itself of the privilege of conducting business in a state). *Cf.* Goldman, *supra* note 228, at 380 (advocating for a strict definition of "willful" conduct).

237 *See supra* note 235 and accompanying text.

238 *See supra* note 48 and accompanying text.

239 *See* Gruner, *supra* note 232.

240 Int'l Shoe Co. v. Wash., 326 U.S. 310, 317–18 (1945); *see supra* note 33 and accompanying text.

241 *Cf.* Goldman, *supra* note 228, at 380 (defining willful targeting); *see also supra* Section I.D.1.

242 *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (declining to exercise personal jurisdiction over foreign defendant for injuries caused by machine, sold by various intermediaries, to customer in the forum state); *supra* Section I.C.

identified in *Burger King*, specifically: (1) the forum state's interest in adjudicating the dispute; (2) the interstate judicial system's interest in obtaining the most efficient resolution of disputes; and (3) the shared interest of the states in furthering substantive social policies.[243]

In the context of mass torts, state courts see a large number of plaintiffs complaining of similar harms allegedly committed by a single or small group of defendants. If a number of the state's residents complain of that harm, the state has an interest in preventing the harm from spreading to more residents.[244] The court must already hear its residents' claims and, since the company purposefully availed itself of the privilege of doing business in the forum by intentionally targeting it, allowing the forum's court to hear the nonresidents' claims related to conduct that the company *also committed in the state* (e.g., false advertising, manufacturing a harmful drug, or some other alleged intentional misconduct) does not violate due process principles.[245] It is much more efficient for a single state to hear a group of nearly identical cases than to risk inconsistent outcomes from litigation in all fifty states, with potentially different interpretations of a company's liability in each.[246] This consolidation of the claims is also much more efficient for a defendant, who would not have to defend against lawsuits in multiple jurisdictions.[247]

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243 *See supra* Section I.C; *see also supra* note 63 and accompanying text.

244 McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (identifying the state's undeniable interest in providing similarly situated residents a means of redress for their harm).

245 *See supra* text accompanying notes 16–17.

246 *See* Order Denying Defendants DePuy Orthopaedics, Inc., Johnson & Johnson Services, Inc. and Johnson & Johnson's Motion to Quash Service of Summons Based on Lack of Personal Jurisdiction, Coordination Proceeding Special Title Rule 3.550c v. DePuy Orthopaedics, No. CGC-11-509600, 2017 Cal. Super. LEXIS 551 (Cal. Super. Ct. Nov. 1, 2017); *see also* Order Denying Defendants DePuy Orthopaedics, Inc., Johnson & Johnson Services, Inc. and Johnson & Johnson's Motion to Dismiss Based on Forum Non Conveniens, *DePuy Orthopaedics*, 2017 Cal. Super. LEXIS 552 (identifying trial scheduled within six months as a reason to retain nonresident plaintiffs' claims against a nonresident defendant in a mass tort suit).

247 Tyler & Vetesi, *supra* note 129 (warning defendants looking to use *BMS* as a sword in litigation that filing a motion to dismiss based on *BMS* may not be the most favorable or efficient move). The California Supreme Court came to a similar conclusion in deciding to exercise jurisdiction over all the plaintiffs' claims in *BMS*. *See supra* note 127 and accompanying text.

A. *Third-Party Connections to a Forum State*

BMS upholds *Walden v. Fiore*'s principle that a defendant's connection to a forum state must arise from the defendant's own activities, not the activities of the plaintiff or a third party.[248] However, this Note acknowledges the reality of modern commerce, where a product can potentially go through dozens of corporate entities before causing a consumer harm and potentially leave the final injured consumer without adequate redress.[249] In the DePuy ASR Hip System Cases,[250] a California state trial court ruled in accordance with this Note's proposal in what was considered a move away from the Supreme Court's trend of limiting jurisdiction.[251] The state court exercised personal jurisdiction over a non-California defendant on the basis of design and consulting work performed by California-based residents and companies.[252] It found that private and public interests weighed in favor of litigating the Connecticut residents' claims in California and identified the presence of potential witnesses in California as a justification for keeping the claims in California.[253] The court distinguished *BMS* by describing the design of the hip implant at issue as "significantly" tied to California.[254] Though it goes against the Supreme Court's recent preference to limit the availability of this type of

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248 Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1781 (2017) ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.") (citing Walden v. Fiore, 571 U.S. 277, 286 (2014) (unanimous)); *supra* Section I.D.3.

249 *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 920–21 (2011) (unanimous) (lawsuit involving French bus company and bus consisting of parts from companies based in Ohio, Luxembourg, Turkey, and France); *see also supra* notes 79 and 227.

250 Order Denying Defendants DePuy Orthopaedics, Inc., Johnson & Johnson Services, Inc. and Johnson & Johnson's Motion to Quash Service of Summons Based on Lack of Personal Jurisdiction, *DePuy Orthopaedics*, 2017 Cal. Super. LEXIS 551.

251 Gruner, *supra* note 232 (identifying the *DePuy* court's decision as a "relative outlier" in the Court's overall trend to restrict personal jurisdiction against corporate defendants outside of where they are located or where the alleged injury occurred).

252 Order Denying Defendants DePuy Orthopaedics, Inc., Johnson & Johnson Services, Inc. and Johnson & Johnson's Motion to Quash Service of Summons Based on Lack of Personal Jurisdiction, *DePuy Orthopaedics*, 2017 Cal. Super. LEXIS 551 (lawsuit involving defective hip implants).

253 *Id.*

254 *Id.*; *see also* Order Denying Defendants DePuy Orthopaedics, Inc., Johnson & Johnson Services, Inc. and Johnson & Johnson's Motion to Dismiss Based on Forum Non Conveniens, *DePuy Orthopaedics*, 2017 Cal. Super. LEXIS 552.

suit, the California court's decision is consistent with traditional notions of fair play and substantial justice.[255] The reasonableness factors of personal jurisdiction can be applied to quell fears of a court's potential overreach.[256]

B. *Forum Shopping Concerns*

Forum shopping concerns explain the reason for the strong majority in *BMS*[257] and other cases involving nonresident plaintiffs.[258] Although this proposal to expand when states can exercise specific jurisdiction would appear to raise concerns about forum shopping, the practice is simply a reality of litigation, and not a problem that can ever be completely solved.[259] Corporations often take great care to incorporate their businesses and maintain their headquarters in states considered friendlier to business and less friendly to consumers in order to avoid being subject to general jurisdiction in states they feel could rule against them.[260] The notion of subjecting a corporation to personal

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255 *See supra* Part I.

256 *See supra* note 242 and accompanying text.

257 Levick, *supra* note 8 ("It is significant that Justice Sotomayor was not joined in her dissent by the other liberal justices on the Court. It suggests that concern among such judges over forum-shopping abuses now outweighs their socio-political affinities.").

258 *See* Mary Anne Mellow, Timothy R. Tevlin & Steven T. Walsh, *Supreme Court Strikes Another Blow to Litigation Tourism in* Bristol-Myers Squibb, DEF. COUNS. J., Apr. 2018, at 2–4; Robert D. Phillips, Jr., Colin K. Kelly & Sarah O'Donohue, *U.S. Supreme Court Decisions Curb Forum Shopping in State Courts*, ALSTON & BIRD LLP (July 5, 2017), https://www.alston.com/en/insights/publications/2017/07/supreme-court-decisions-curb-forum-shopping [https://perma.cc/PYM8-UFZS]; Emily Pincow, *9th Circ. Endangers Mass Action Removal Under CAFA*, LAW360 (Oct. 26, 2017, 12:21 PM), https://www.law360.com/articles/978478/9th-circ-endangers-mass-action-removal-under-cafa- [https://perma.cc/A6C6-Z6QF] ("It is well understood that plaintiffs [sic] attorneys tend to flock to particular venues that have acquired a reputation for applying laws and court procedures to the advantage of plaintiffs, in hopes for better results.").

259 Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QUINNIPIAC L. REV. 25, 25 n.1 (2005) ("[I]n reality, every litigant who files a lawsuit engages in forum shopping when he chooses a place to file suit.") (quoting Tex. Instruments, Inc. v. Micron Semiconductors, Inc., 815 F. Supp. 994, 996 (E.D. Tex. 1993)).

260 *See* William J. Carney, George B. Shepherd & Joanna Shepherd Bailey, *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 125 (2012) (discussing how businesses incorporate in Delaware because its laws are viewed as friendlier to their interests, even if that is not actually the case); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U.

jurisdiction connected with express acts it took within a forum would merely align the law to ordinary expectations. It is not unreasonable to think that if a company takes substantial steps in a forum to bring products to other markets, it has purposefully targeted the forum and should expect to be sued there if a party experiences a harm related to the company's decisions arising from actions that took place in the forum.[261] Such an exercise of jurisdiction also complies with traditional notions of fair play and substantial justice.[262]

CONCLUSION

The United States Supreme Court has dramatically narrowed the situations in which a company can be sued in both federal and state court.[263] While traditional fairness and due process principles remain, the Court's more recent personal jurisdiction jurisprudence seems to prefer rigid, bright-line rules over more realistic, flexible standards.[264] These inflexible rules risk violating the very principles on which personal jurisdiction is based[265] and create inconsistency.[266] Following

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RICH. L. REV. 1129, 1143 n.54 (2008) (citing Stephen P. Ferris, Robert M. Lawless & Gregory Noronha, *The Influence of State Legal Environments on Firm Incorporation Decisions and Values*, 2 J.L. ECON. & POL'Y 1, 8 (2006)) (discussing the prevalence of corporations incorporating in Delaware because its laws are viewed as more business-friendly).

261 This is especially so if the company has sufficient ties to have purposefully availed itself of the privilege of doing business in the state. *See* Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773, 1784 (2017) (Sotomayor, J., dissenting) (noting Bristol-Myers's advertising was national in scope).

262 *See* Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945); *see also supra* Sections I.A.2 & I.A.4.

263 *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Daimler AG v. Bauman, 571 U.S. 117 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); *see also* Richard Dean & Michael Ruttinger, *How* Bristol-Myers Squibb *May Transform Class Actions*, LAW360 (Oct. 11, 2017, 10:39 AM), https://www.law360.com/articles/973105/how-bristol-myers-squibb-may-transform-class-actions [https://perma.cc/EUT7-7Q9T] ("When Bristol-Myers is viewed in context with the high court's other recent decisions, such as its general jurisdiction companion, BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017), it seems clear that the court is constricting its personal jurisdiction jurisprudence."); Gruner, *supra* note 232 ("Recent U.S. Supreme Court decisions have . . . narrowed the places where multinational corporations may be sued in the past few years.").

264 *See Personal Jurisdiction—General Jurisdiction*—Daimler AG v. Bauman, 128 HARV. L. REV. 311 (2014).

265 *See supra* Part I.

BMS, future plaintiffs suing large multinational corporations stand to have their access to courts restricted because of an overly broad reading of the decision. The Court's strong language, taken together with its general trend and practice of limiting courts' exercise of personal jurisdiction, moves to further limit plaintiffs' access to courts to prosecute real harms that can affect large groups of people. When a company's connections and conduct in a state are so persistent and render it benefits to the tune of millions of dollars in profit, subjecting it to personal jurisdiction in the forum with those contacts does not violate due process standards. Courts should apply *BMS* cautiously and take care to analyze a defendant's connection to a state individually—not in relation to its connection to other states.

266 *See* Dodson, *supra* note 15, at 619 ("Jurisdiction is experiencing an identity crisis.").