



U.S. CHAMBER
Institute for Legal Reform



BMS Battlegrounds

*Practical Advice for Litigating Personal
Jurisdiction After Bristol-Myers*

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U.S. CHAMBER
Institute for Legal Reform

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Executive Summary

The U.S. Supreme Court's decision last year in *Bristol-Myers Squibb Co. v. Superior Court*¹ was a clear statement that the days of blatant, unchecked plaintiff forum shopping in search of enormous, unreasonable verdicts are at an end. Read in connection with its other recent personal jurisdiction decisions, *Goodyear Dunlop Tires Operations, S.A. v. Brown*² and *Daimler AG v. Bauman*,³ *Bristol-Myers* marks a paradigm shift in how the Supreme Court evaluates personal jurisdiction, focused on ensuring fairness and predictability for corporate defendants.

But this paradigm shift necessarily means there was an old paradigm. For decades, the proposition that large, multinational corporations could be sued just about anywhere for just about anything was ingrained in the legal psyche. Plaintiffs regularly sued corporations in states where they had no actual presence, to litigate against defendants who had no ties to the state, while asserting claims that had nothing to do with the state. In a number of jurisdictions, this tactic went unchallenged. As a result, savvy plaintiffs' lawyers pressed their advantage, finding the most plaintiff-friendly forums in the country and filing as many cases as possible there.

Defendants found themselves—for no good reason other than plaintiff preference—litigating in rural Mississippi, or Cook County, Illinois, or Philadelphia, where they faced often hostile juries and the threat of giant verdicts. The plaintiffs' end game, of course, was settlement pressure.

Until relatively recently, corporations rarely raised personal jurisdiction as a defense against this gamesmanship. But now, with explicit direction from the Supreme Court, they must ensure that this paradigm shift takes root. After all, plaintiffs' lawyers lost this round, but that does not mean they are picking up their ball and going home.

We focus here on providing practical advice for corporations defending against a plaintiffs' bar intent on minimizing the impact of the Supreme Court's holding in *Bristol-Myers*. First, this paper discusses how we got here: the rapid expansion of forum shopping in the 1990s and early 2000s and the defense bar's nascent attempts to fight back. Second, the paper examines the Supreme Court's personal jurisdiction jurisprudence, culminating in its decision in *Bristol-Myers*, where it said

"enough" and shut the courthouse door on litigation tourism and forum shopping. Third, this research analyzes lower courts' implementation of *Bristol-Myers* and what is happening in the trenches. Specifically, this section looks at battlegrounds in which plaintiffs are trying to limit the reach of *Bristol-Myers*, including through arguments over jurisdictional discovery, derivative liability, the applicability of *Bristol-Myers* to class actions, and "consent jurisdiction."

How We Got Here: The Rise of Forum Shopping and a Defense Bar Caught Off Guard

Plaintiffs' use of forum shopping to chase enormous verdicts—and to leverage such verdicts into massive settlements—is actually a relatively new phenomenon, one that can be traced to a 1996 trial in Jackson, Mississippi that had nothing to do with forum shopping. That case, *O'Keefe v. Loewen Group*,⁴ was ostensibly a straightforward contract dispute: a Mississippi funeral home sued a Canadian chain of funeral homes for breach of contract, seeking \$5 million in damages. The defendant fought the claims through to trial.⁵

But the trial itself barely touched on the underlying breach of contract claim. O'Keefe's lawyer was a man named Willie Gary, who rose from childhood poverty in the rural South to *Ebony* magazine's list of "100 Most Influential Black Americans."⁶ In front of the jury, Gary wove a story about a large, foreign corporation coming into a small town to kick around the little guy, even calling as witnesses local community leaders to vouch for the character of the owner of the local funeral home.⁷ And the jury ate it up. The jury foreman later described the owner of the Canadian chain as a "rich, dumb Canadian politician who thought he could come down and pull the

wool over the eyes of a good ole Mississippi boy."⁸ The dispute may have started as a breach of contract case, but it quickly morphed into a fight about societal power. Gary turned the lawsuit into a battle about Americans versus foreigners and the powerful taking advantage of the powerless.

The jury took almost no time to deliberate and awarded O'Keefe more than \$500 million in compensatory and punitive damages.⁹ The defendant could not afford the \$625 million bond to appeal the verdict, and settled for \$175 million, an amount that still wound up pushing the company into bankruptcy.¹⁰

“As a practical matter, this meant that plaintiffs could sue a large company with substantial sales or a continuous presence in a state for any reason.”

Admittedly, *O’Keefe* was not itself about forum shopping. The plaintiff lived in Mississippi, and the alleged breach of contract occurred there. But enterprising plaintiffs’ lawyers took note. They saw Willie Gary spin a straightforward contract case into a story of vigilante justice, an opportunity for the powerless to take on the powerful and redistribute wealth.¹¹ Taking a page from Gary’s strategy, those lawyers started chasing verdicts in plaintiff-friendly jurisdictions, even when the plaintiffs and claims had no ties to it.

Plaintiffs’ lawyers’ key tactic was to take advantage of judicial opinions setting up a loose standard for general jurisdiction, by which they could sue a corporation for any and all matters in a forum state if the

company had “continuous and systematic” contacts with it.¹² As a practical matter, this meant that plaintiffs could sue a large company with substantial sales or a continuous presence in a state for any reason. For many large national and international companies, a broad reading of this standard subjected them to general jurisdiction in all 50 states.

Plaintiffs’ counsel had a relatively straightforward approach in litigating these cases. First, they would amass a large inventory of cases with little regard for the likelihood of success on the merits for each case. Then, they would choose a jurisdiction known for large jury verdicts. And, after the passage of the Class Action Fairness Act (CAFA) in 2005, they would file complaints with fewer than 100 plaintiffs to avoid removal,¹³ nevertheless making sure that a handful of plaintiffs resided in the chosen forum state and at least one plaintiff hailed from the same state as the defendant, thus destroying diversity.

Cases using this model came pouring into the Mississippi Delta and other similar areas around the country: Beaumont County, Texas; Madison and Cook Counties in Illinois; San Francisco and Los Angeles Counties in California; and Orleans Parish, Louisiana. Plaintiffs’ lawyers were not litigating these cases on the underlying

“First, they would amass a large inventory of cases with little regard for the likelihood of success on the merits for each case. Then, they would choose a jurisdiction known for large jury verdicts.”

facts. They instead framed the cases as an opportunity to “send a message” to large corporations. They started winning, and winning big.

For example, in a 2003 asbestos case in Madison County, Illinois, a jury awarded \$250 million to an Indiana plaintiff with no ties to Illinois who allegedly developed mesothelioma after exposure to asbestos by U.S. Steel, a Pennsylvania company.¹⁴ Following this verdict, plaintiffs’ lawyers filed an incredible number of asbestos cases in Madison County, with over 90 percent of plaintiffs coming from out of state, resulting in hundreds of millions of dollars in judgments.¹⁵ Similarly, in a 2006 case against Merck involving the prescription drug Vioxx, a New Orleans jury, after fewer than four hours deliberating, awarded \$51 million to a 62-year-old South Carolina resident with no ties to Louisiana who had a heart attack after taking the drug.¹⁶ Vioxx aside, the plaintiff had myriad heart attack risks, so his counsel focused elsewhere, playing up allegations that Merck had broadly misled consumers around the country as to the drug’s risk. These cases and others followed the *O’Keefe* script: a focus on retribution, wealth redistribution, and encouragement for juries to “send a message” to big, greedy corporations.

For a while, defendants did not seem to know what hit them, and their response tactics suffered. Defendants brought in established older lawyers from the Northeast. Their adversary, however, was often a local lawyer who every Sunday served as a leader in the church where the jury pool worshipped.

“ *But when defendants made gains in one jurisdiction, others popped up in its place. Defendants were playing whack-a-mole. And they were losing.* ”

After repeated, crushing losses, defendants started to wise up. They diversified their trial teams and brought in effective local lawyers as co-counsel. Their legal theories improved as well. Defendants fought joinder of multiple plaintiffs into single actions, tested fraudulent misjoinder of local defendants, challenged lax venue rules, developed new and creative theories to remove cases to federal court, and began appealing runaway verdicts.

Just as important, if not more so, corporate defendants made gains outside the courtroom, coupling increasing knowledge about plaintiff-friendly jurisdictions with concerted political efforts to level the playing field. And defendants began to identify systemic issues in jurisdictions such as the Philadelphia Court of Common Pleas, St. Louis City Circuit Court, and Central Civil West Division of the Los Angeles Superior Court, where enormous jury verdicts went unchecked. Defendants were able to use this knowledge not just to fight better in the courtroom, but also to

achieve tort reform in state legislatures. But when defendants made gains in one jurisdiction, others popped up in its place. Defendants were playing whack-a-mole. And they were losing.

All the while, an underlying question lurked in the background, too often unasked: Why should we have to litigate here in the first place?

Goodyear, Daimler, and the Start of a Paradigm Shift

Against this backdrop, enter *Goodyear* and *Daimler*. These cases signified the Supreme Court's gradual shift against forum shopping, particularly in tort cases.

At bottom, *Goodyear* was a tort case about a bus accident. But the issue that ultimately reached the Supreme Court was general personal jurisdiction: whether a North Carolina court could exercise jurisdiction over Goodyear's foreign affiliates (from France, Turkey, and Luxembourg) for tort claims brought by the families of two local boys alleging that faulty tires caused their deaths in a bus accident in France.¹⁷ While these foreign entities did no business in North Carolina, and the alleged tort took place in a foreign country, North Carolina courts held that jurisdiction was proper.

In a 9-0 decision issued in 2011, the U.S. Supreme Court disagreed, finding that the invocation of jurisdiction in these circumstances was a bridge too far. Writing for the Court, Justice Ginsburg opined that a corporation can be subject to general jurisdiction only where it is "fairly regarded as at home," and held that these foreign corporations were not at home in North Carolina.¹⁸ The Supreme Court expressly rejected the "sprawling view of general jurisdiction" that many state and lower federal courts had adopted.¹⁹

Two points bear noting. First, Goodyear's American affiliate, the Ohio-based Goodyear USA, failed to challenge North Carolina's exercise of jurisdiction over it.²⁰ This failure was not unique to Goodyear USA; as mentioned above, many if not most large companies left personal jurisdiction issues unchallenged. Second, neither the Supreme Court nor lower courts really batted an eye when the decision came down. Even Justice Sotomayor, who ultimately penned the only dissent in *Bristol-Myers*, signed on to Justice Ginsburg's opinion in *Goodyear*. In other words, while its significance is clear today, it was much less so at the time.

Some companies did dip their toe into the water with personal jurisdictional challenges post-*Goodyear*. But the case did not expressly define what "at home" meant for any corporation. And it did not tackle the policy arguments in favor of a paradigm shift, which is likely why Justice Sotomayor signed on. Lower courts continued to reject defendants' challenges to general jurisdiction, acknowledging *Goodyear*'s holding but blind to the

beginnings of a paradigm shift.²¹ In many plaintiff-friendly jurisdictions, business as usual continued.

Daimler started to change all that. Decided only three years later, this was the Supreme Court's "we really meant it" case. Justice Ginsburg again wrote for the Court, this time for eight of the nine justices, holding that a corporation was "fairly at home" (with some limited exceptions) in only two places: its state of incorporation and the state in which it has its principal place of business.²² The Court noted that defendants need predictability in where they can be sued, so they can "structure their primary conduct with some minimum assurance to where that conduct will and will not render them liable for suit."²³ Only Justice Sotomayor disagreed with this rationale, concurring in the judgment but expressing her view that plaintiffs should be able to sue most large businesses just about anywhere for just about any conduct.²⁴

Though the implications of *Daimler* and *Goodyear* now seemed clearer, resistance among lower courts remained, likely for the following reasons:

- Both *Goodyear* and *Daimler* involved foreign defendants, not U.S. companies, allowing plaintiffs to point to the cases as exceptions rather than the rule;²⁵
- Justice Ginsburg's "at home" standard contained an exception for "exceptional circumstances," which lower courts could interpret broadly;²⁶
- The Court said little in either case about specific jurisdiction, an area in which the case law provided little clarity. For example, the operative specific jurisdiction test demanded only that the cause of action "arise out of or relate" to a defendant's contacts with a state. This gave courts latitude to determine what those words mean. Once again, many courts interpreted them broadly.

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Bristol-Myers: The Supreme Court Says “Enough”

The *Bristol-Myers* case itself began pre-*Daimler* but gained momentum after that decision. Plaintiffs had filed cases in San Francisco Superior Court with several dozen claimants each—but below the CAFA threshold—and made sure each case included at least one or two California residents and one or two New York residents (to destroy diversity with New York-based Bristol-Myers).

The first personal jurisdiction motions were heard in the trial court between *Goodyear* and *Daimler*.²⁷ The defense lost in a two-page decision. The defense then filed a writ petition to the California Court of Appeal, and that court, too, summarily denied it. But on the same day of that denial, the U.S. Supreme Court decided *Daimler*.

Defendants asked the California Supreme Court to require the Court of Appeal to take the writ, and the California high court did just that.

Until this point, there had been very little mention of specific jurisdiction. But shortly before the argument, the Court of Appeal asked the parties to address several specific jurisdiction cases. Ultimately, the Court of Appeal agreed with defendants that no *general* jurisdiction existed, but relying on California’s expansive test for specific jurisdiction, found *specific*

jurisdiction to apply.²⁸ In the defendants’ view, the Court of Appeal had simply replaced the old view of general jurisdiction with a broad take on specific jurisdiction.

The California Supreme Court granted defendant’s petition for review, but four of its seven justices agreed with the Court of Appeal. In its decision, the California high court defined specific jurisdiction with a “sliding scale” test for large corporations that essentially conferred jurisdiction over parallel, out-of-state tortious conduct—if an in-state plaintiff could sue a company for a harm caused by a pharmaceutical product, any other plaintiffs articulating similar claims could also sue.²⁹

This was forum shopping in its purest form: the plaintiffs’ lawyers brought the suits in California because they thought they could get more favorable rulings there than they would in their clients’ home states. Of the

678 plaintiffs whose claims were before the California Supreme Court, only 86 were California residents. In fact, there were more Texas residents (92) than in-state plaintiffs. The California Supreme Court took no issue with that.

The U.S. Supreme Court disagreed. Describing the facts of the case and the Court's rationale, Justice Alito wrote:

[T]he nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a ... third party,

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“ [The Court] grounded its decision in a clear policy rationale: that personal jurisdiction should be predictable and fair for both plaintiffs and defendants. ”

standing alone, is an insufficient basis for jurisdiction.” *Walden*, 571 U.S., at ___ (slip op., at 8). This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.³⁰

The Court thereby removed the specific jurisdiction escape clause that plaintiffs had been using to undercut its decisions in *Goodyear* and *Daimler*. And it grounded its decision in a clear policy rationale: that personal jurisdiction should be predictable and fair for both plaintiffs and defendants.³¹

What is perhaps most interesting about *Bristol-Myers* is the area in which the Supreme Court remained silent. Justice Alito, writing for an 8–1 majority, saw this as an easy case and did not describe the result as closing a loophole from *Daimler*.

The opinion includes hardly any mention of what this type of mass tort litigation looks like in the trenches, or why this form of forum shopping is unfair to defendants. The Court did not articulate a clear test for lower courts to use, noting without further explication that “[o]ur settled principles regarding specific jurisdiction control this case.”³² It also did not resolve what exactly it means for a claim to “arise out of or relate to” a defendant’s contacts with a forum. Though the Court decisively rejected the plaintiffs’ arguments,³³ it did not expressly cut the forum shopping lifeline.

With this background in mind, we now turn to the practical effects of the *Bristol-Myers* decision in the lower courts. Specifically, we provide some practical advice to corporate defendants on how best to stave off plaintiffs’ lawyers’ attempts to minimize the reach and impact of *Bristol-Myers*.

Litigating *Bristol-Myers* in the Trenches: Winning the Current and Future Personal Jurisdiction Battlegrounds

Nearly a year since the Supreme Court's decision in *Bristol-Myers*, state appellate and federal trial courts have issued more than 260 opinions analyzing its applicability in a variety of contexts.

Most of these rulings have been in federal courts, with over one-third of all cases arising out of just six districts:

- Eastern District of Missouri (36 cases);
- Northern District of California (19 cases);
- Northern District of Illinois (18 cases);
- Southern District of Illinois (8 cases);
- Southern District of California (8 cases);
- and
- Eastern District of Louisiana (7 cases).

“Nevertheless, a minority of courts have found limitations to the decision's reach, reinforcing the need for corporate defendants to remain vigilant.”

So far many courts, even those historically hostile to personal jurisdiction challenges, have viewed *Bristol-Myers* as part of a paradigm shift designed to stop plaintiff forum shopping. Nevertheless, a minority of courts have found limitations to the decision's reach, reinforcing the need for corporate defendants to remain vigilant. For a point of comparison, we need look no further than the districts with the most cases analyzing *Bristol-Myers*.

The Eastern District of Missouri has historically proven resistant to personal jurisdiction challenges. But in a recent series of talc cases involving out-of-state plaintiffs, defendants have seen major personal jurisdiction wins in Missouri in a variety of contexts, in both federal and state court:

- A state court judge in St. Louis, on the very day *Bristol-Myers* was decided, granted a mistrial in a talc tort case involving an out-of-state plaintiff because the court lacked personal jurisdiction over the defendant;³⁴

- A state appellate court reversed a \$72 million jury verdict for lack of personal jurisdiction;³⁵
- A federal judge in the Eastern District granted a motion to dismiss on personal jurisdiction grounds after the case was removed to federal court and before deciding a pending remand motion, noting that *Bristol-Myers* made personal jurisdiction “much easier to decide.”³⁶

These cases show that defendants should consider *every* court, even courts that have in the past viewed personal jurisdiction motions with skepticism, as a forum to apply *Bristol-Myers* and dismiss out-of-state plaintiff claims.

But other courts have taken an opposite approach, as two cases from the Northern District of California illustrate. In *Cortina v. Bristol-Myers*³⁷ and *Dubose v. Bristol-Myers*,³⁸ a Northern District judge found a loophole in an offhand example that Justice Alito provided in *Bristol-Myers*. Justice Alito noted that the plaintiffs there failed to allege a variety of facts that could tie their claims to the forum, such as the existence of in-state clinical trials for the drug at issue.³⁹ Nowhere in the opinion did Justice Alito indicate, however, that the mere allegation of such in-state clinical trials would suffice for jurisdiction—rather, the opinion included this as an example of the dearth of *any* allegations that could tie the plaintiffs’ claims directly to California.

But the Northern District court held in *Cortina* and *Dubose* that the mere

allegation of a California clinical study site was enough to confer personal jurisdiction. Several other judges in the Northern District have favorably cited those cases in denying motions to dismiss for lack of jurisdiction, a troubling trend that shows the staying power of even one or two adverse decisions.

There nevertheless can be consequences to plaintiffs (and their counsel) who attempt to push the envelope after *Bristol-Myers* and unreasonably seek personal jurisdiction in places where none exists. Some courts have refused to toll the statute of limitations in a case that was initiated in a court that lacked jurisdiction. For example, a state trial court in Los Angeles County held that under California law “a plaintiff’s mistaken decision to sue California defendants in a foreign forum that has no jurisdiction over them provides no justification for equitable tolling.”⁴⁰ This is because, the court noted, the decision to seek adjudication of the action in another forum was “an error of [plaintiff’s] own making.”⁴¹

Savvier plaintiffs’ counsel of course want to avoid exposure to such claims, and so are fighting multi-pronged battles to limit *Bristol-Myers*’ effect and keep cases in plaintiff-friendly jurisdictions. Winning these battles is critical for corporate defendants to put the Supreme Court’s paradigm shift into practice and truly crack down on litigation tourism and forum shopping. We explore six of these issues in greater depth below.

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Jurisdictional Discovery

Some in the plaintiffs’ bar view the real issue in *Bristol-Myers* not as insufficient contacts between the company and the forum, but as the plaintiffs’ failure to adequately develop a factual basis for jurisdiction through discovery. Although the plaintiffs in *Bristol-Myers* took very limited discovery on jurisdictional issues,⁴² and the opinion itself discusses possible jurisdictional allegations that the plaintiffs failed to plead,⁴³ this perspective undercuts the ruling’s import, particularly since Justice Ginsburg was fairly clear in *Daimler* that jurisdiction should be an easy-to-determine, threshold issue.

Most courts have rejected plaintiffs’ attempts to take jurisdictional discovery, recognizing that it would only increase costs for defendants and prolong litigation in an inappropriate forum. Judges in the Eastern District of Missouri have tended to apply bright-line rules to requests for

jurisdictional discovery, posing two questions: (1) Is the discovery sought relevant to allegations in the operative complaint?; and (2) If the plaintiffs obtain the discovery they are seeking, will the facts they seek, if true, support personal jurisdiction? If the answer to either question is “no,” the court should deny the request.

In *Jinright v. Johnson & Johnson Co.*, a talc case, the judge did just that. The plaintiffs argued that they needed “additional time to conduct discovery into Johnson & Johnson’s contacts with Missouri to establish specific personal jurisdiction.”⁴⁴ Specifically, the plaintiffs contended that a third party sent raw talc to a processing plant in Missouri where, at the direction of J&J, “the talc is processed, bottled and labeled without [a] warning, creating the defect in Missouri.”⁴⁵ The court held that even if the plaintiffs could obtain evidence to show this, it would not establish personal jurisdiction “because it does not establish a connection between Plaintiffs’ injuries, the products which caused harm in this matter, and Defendants’ contacts in Missouri.”⁴⁶

That is because even if the plaintiffs had obtained this evidence, they would have been unable to link the Missouri products to the specific plaintiffs in the litigation. They could not allege that J&J acted together with this in-state company, or that the in-state company was an agent of J&J, with regard to any products that the plaintiffs actually used. Accordingly, the plaintiffs’ proposed discovery looked just like what the Supreme Court rejected in *Bristol-Myers*: “the bare fact that [Bristol-Myers] contracted with a California

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distributor is not enough to establish personal jurisdiction” absent allegations that the company engaged in relevant acts together in-state or that the out-of-state company is derivatively liable for the in-state company’s conduct.⁴⁷

In *Dyson v. Bayer Corp.*, the court took this analysis a step further. In that case, unlike in *Jinright*, plaintiffs actually pleaded that the defendants worked in Missouri on both the drug’s regulatory approval and marketing campaign, and sought discovery to “prove” these connections to Missouri.⁴⁸

The court rejected this argument and outlined the reasons why these claims, even if proven through jurisdictional discovery, were too attenuated. The presence of in-state clinical trials, regulatory approval work, or marketing campaigns was not enough to show specific jurisdiction; rather, this evidence would “serve more properly as evidence of *general* personal jurisdiction.”⁴⁹ The opinion dealt a blow not just to the plaintiffs’ attempt to take wide-ranging discovery in *Dyson*, but also to arguments that plaintiffs are making across the country about what contacts suffice for specific jurisdiction.

These rulings align with the practical considerations outlined in *Bristol-Myers*, particularly the “primary concern” about “the burden on the defendant.”⁵⁰ By focusing on not only the plaintiffs’ failures to allege sufficient jurisdictional facts, but also their inability to show jurisdiction even if the discovery sought proved fruitful, defendants have effectively quashed these fishing expeditions.

The problems with the converse approach are evident. Jurisdictional discovery drains the resources of courts, which have to actively manage the discovery. And it is unduly burdensome and costly for defendants forced to litigate in a court that has no business exercising jurisdiction, even when jurisdictional discovery is supposedly “limited.”

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An instructive case comes from the Northern District of California. In *In re Nexus 6P Products Liability Litigation*, the court granted Texas company Huawei USA, Inc.’s motion to dismiss the complaint for lack of jurisdiction, but subject to the plaintiffs seeking jurisdictional discovery.⁵¹ Though not pleaded in the complaint, the plaintiffs alleged in response to the motion to dismiss that Huawei had a production facility in California. The court held that the plaintiffs’ allegations “leave room for the possibility that Huawei either did or did not perform relevant development of the Nexus 6P in California,” even though the allegations were not specific to the product at issue.⁵²

The court approvingly cited the *Cortina* case (which found the mere allegation of a clinical trial in-state sufficient for personal jurisdiction) and granted leave for the plaintiffs to seek the jurisdictional discovery. It permitted discovery about *any* link between the plaintiffs’ claims and Huawei’s contacts with California, despite the allegation of the existence of just one in-state facility. This order gave the plaintiffs free rein to blur the line between jurisdictional and merits discovery, while subjecting the defendant to a substantial burden based on one allegation of in-state presence.

In re Atrium Medical Corp. C-Qur Mesh Products Liability Litigation, a case from the District of New Hampshire, was similar. There, the court granted a motion for jurisdictional discovery based on the plaintiffs’ argument that they needed information about the defendant’s relationship with its subsidiaries to prove jurisdiction.⁵³ The plaintiffs proposed over 100 document requests and 30(b)(6)

“ When litigating jurisdictional discovery requests, defendants should demand that plaintiffs spell out what evidence they are seeking, and then show the court why that evidence would not support jurisdiction even if found. ”

depositions of the company’s chairman and CFO. Although the court ordered plaintiffs to narrow these discovery requests, it also permitted additional defense challenges to them, requiring further court intervention.⁵⁴

Neither *In re Nexus 6P* nor *In re Atrium* focused on what specific discovery the plaintiffs wanted and whether that information, if uncovered, would support jurisdiction. But as cases from the Eastern District of Missouri demonstrate, the opposite approach conforms to the “fairness to Defendant” rationale that Justice Alito articulated in *Bristol-Myers*, while also conserving judicial resources. When litigating jurisdictional discovery requests, defendants should demand that plaintiffs spell out what evidence they are seeking, and then show the court why that evidence would not support jurisdiction even if found.

Derivative Liability

Plaintiffs also name any in-state party they can find—doctors, pharmacies, distributors, and the like—to argue for derivative liability for the out-of-state company. This is not only inconsistent with *Bristol-Myers*, but it also burdens businesses generally, requiring in-state companies with no ties to the litigation to hire counsel and litigate the claims.

Plaintiffs' theory for derivative liability relies on a couple of lines from *Bristol-Myers*. The *Bristol-Myers* plaintiffs had named McKesson, a California distributor, as a defendant, despite admitting that they could not trace any particular pill taken by a particular plaintiff to McKesson.⁵⁵ The Supreme Court noted that plaintiffs had pleaded only that Bristol-Myers entered into a contract with a California company, and this "bare fact" is not enough to establish personal jurisdiction.⁵⁶ The plaintiffs had not "alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California."⁵⁷ Plaintiffs' lawyers have latched onto this language as an invitation to plead *any* relationship between an out-of-state defendant and an in-state company to support jurisdiction.

But this relies on a misreading of the Court's reasoning. The Court did not say *any* ties between an out-of-state and in-state company are sufficient for jurisdiction; rather, the Court said allegations about the actions that an out-of-state company took in the forum are necessary. The Court made this even clearer later in the opinion, when it reiterated its longstanding view that personal jurisdiction must be shown as to each defendant:

"The requirements of *International Shoe* . . . must be met *as to each defendant* over whom a state court exercised jurisdiction. . . . A defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."⁵⁸

The Court went so far as to call the plaintiffs' attempt to tie Bristol-Myers to McKesson "last ditch."⁵⁹

Nonetheless, plaintiffs are now arguing that the Supreme Court invited lower courts to exercise jurisdiction over out-of-state companies based on tenuous and often irrelevant ties to an in-state party.

When responding to these attempts, defendants should focus on the Supreme Court's admonishment that jurisdiction must be based on the *conduct* of each defendant, not its mere *contact* with another company. A recent case in the Northern District of Illinois illustrates this approach. In *Livingston v. Hoffman-La Roche, Inc.*, an Illinois resident sued a drug manufacturer and an Illinois doctor for claims related to his use of the acne

“ [D]efendants should focus on the Supreme Court's admonishment that jurisdiction must be based on the conduct of each defendant, not its mere contact with another company. ”

treatment Accutane and its generic version Claravis.⁶⁰ But the plaintiff was not prescribed Accutane in Illinois. Rather, his branded prescriptions were written in Wisconsin and Ohio, and he was put on the generic version, which Hoffman-La Roche did not make, after moving to Illinois. He filed his case in Cook County and argued that the presence of the doctor defendant destroyed diversity.

Hoffman La-Roche removed on fraudulent misjoinder grounds and moved to dismiss based on personal jurisdiction. The court agreed. It was not enough, the court held, that the plaintiff was now a resident of Illinois, nor that Hoffman La-Roche regularly sold and marketed Accutane in Illinois. “Regardless of whether the defendants sold Accutane in Illinois, there is no allegation tying the Roche Defendants’ business in the forum to the injury allegedly suffered by Plaintiff in Wisconsin and Illinois.”⁶¹ Not only did the court reject plaintiff’s residence in the forum as sufficient for jurisdiction, but it also refused to allow plaintiff to manufacture jurisdiction by naming an in-state physician because the claims against the physician were distinct from those against Hoffman La-Roche.⁶²

Class Actions and Unnamed Class Members

The effects of the Supreme Court’s paradigm shift in personal jurisdiction jurisprudence are not limited to mass torts. The rationale underpinning *Bristol-Myers*, *Goodyear*, and *Daimler*—that a company’s place for suit should be predictable, easy to figure out, and decided early in the litigation so as to eliminate unnecessary expenses—applies with equal force to other types of cases, including class actions. Despite this, some courts have refused to apply *Bristol-Myers* to class actions, holding that they fundamentally differ from other mass actions and merit disparate treatment.

Justice Sotomayor’s dissent in *Bristol-Myers* has encouraged this line of thinking. She noted in a footnote that “[t]he Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum state seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”⁶³ Courts adopting this view have relied on earlier lower court findings that the residency of unnamed class members is immaterial for jurisdictional purposes in class actions.⁶⁴

For example, in *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, a Northern District of California court considered whether it had jurisdiction over a nationwide class of plaintiffs, nearly 90

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percent of whom were not California residents or injured in California.⁶⁵ In denying the motion to dismiss the claims of the non-resident plaintiffs, the court found that in a mass action, each plaintiff is named in the complaint, while in a class action only the “named plaintiffs” matter, as they seek to represent the interests of the unnamed class members.⁶⁶ And in *In re Chinese-Manufactured Drywall Products Liability Litigation*, an Eastern District of Louisiana court agreed with *Fitzhenry-Russell* that class actions are different, and declined to dismiss the claims of non-resident plaintiffs.⁶⁷

At least one court has taken this a step further and refused to dismiss the claims of unnamed class members. In *Sanchez v. Launch Technical Workforce Solutions, LLC*, a Northern District of Georgia court agreed with the *Fitzhenry-Russell* and *Chinese Drywall* line of argument, holding that the claims of unnamed class members are “unitary and coherent” with those of in-state class members, in contrast to mass actions, where claims likely “present significant variation.”⁶⁸

Other courts, focused on the similarities between the litigations and the policy rationale of *Bristol-Myers*, have come out the other way. In *Bristol-Myers*, the plaintiffs brought claims based on their alleged injuries suffered by ingesting the same product. The Supreme Court rejected the idea that the similarity of the plaintiffs’ claims alone supported jurisdiction. Rather, it held that federalism concerns matter, too: “even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a

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valid judgment.”⁶⁹ These same concerns are present where a party seeks to adjudicate a nationwide class action of claims in a forum to which most of those plaintiffs have no tie whatsoever.

A prime example of this application of *Bristol-Myers* comes from the Northern District of Illinois. In *DeBernardis v. NBTY, Inc.*, plaintiffs sought a nationwide class for injuries from dietary supplements.⁷⁰ The court, while recognizing differences between class actions and mass tort actions, surmised that “it is more likely than not based on the Supreme Court’s comments about federalism that the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in a forum, such as this case, where there is no general jurisdiction over the Defendants.”⁷¹ The court noted that forum shopping is as great a concern in multistate class actions as in mass torts, rejecting *Chinese Drywall*’s argument that forum shopping somehow occurs only in the latter.⁷²

Similarly, in *Spratley v. FCA US LLC*, a Northern District of New York court dismissed the claims of all but one named plaintiff in a proposed class action because they were brought by out-of-state residents. The plaintiffs argued that the court should exercise pendent jurisdiction over their claims because they were similar to the claims of the one in-state named plaintiff.⁷³ The court rejected this secondary end-around *Bristol-Myers* and held that only an in-state named plaintiff could bring suit in that jurisdiction.⁷⁴ And in another Northern District of Illinois case, *LDGP, LLC v. Cynosure, Inc.*, the court dismissed all claims involving out-of-state plaintiffs, stating succinctly that “[t]hough the nonresidents’ claims are similar to those of resident plaintiffs, the difference... is fundamental: the events that led to the nonresidents’ claims took place outside of Illinois.”⁷⁵

The Supreme Court has made clear that courts should not merely consider whether litigating multi-plaintiff actions is easier in a single forum, but whether requiring defendants to do so is fair and predictable. From a policy perspective, a group of Ohio plaintiffs litigating a class action in California despite having no ties there looks the same to a defendant as 100 Ohio plaintiffs litigating a mass tort action there. Neither comports with due process. The more compellingly defendants make this argument, the better they will fare in the class action arena.

Applicability of *Bristol-Myers* to Federal Courts

One area in which courts appear to agree is the applicability of *Bristol-Myers* to federal courts. Nonetheless, plaintiffs have seized on a line in the final paragraph of the Court’s opinion, where it “leave[s] open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court” as the Fourteenth Amendment does on a state’s courts.⁷⁶ Given this opening, plaintiffs have encouraged lower courts to find *Bristol-Myers* inapplicable in the federal courts—but so far this argument has not gained a toehold. Even in *Fitzhenry-Russell*, in which the court refused to apply *Bristol-Myers* to out-of-state class members, the court found “no merit” in the plaintiffs’ argument that *Bristol-Myers* applies only to state courts.⁷⁷ It noted that the practical problems of a defendant having to litigate in an inappropriate forum and “submit... to the coercive power of a State that may have little legitimate interest in the claims in question...do not disappear” simply because a case is in federal court.⁷⁸ At least on this point, defendants can agree that *Fitzhenry-Russell* got *Bristol-Myers* correct.

Though courts have yet to accept plaintiffs’ arguments here, defendants should be ready to argue why the policies animating *Bristol-Myers* and the Court’s personal jurisdiction paradigm shift apply to

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corporations forced to litigate in far-flung federal courts just as forcefully as in far-flung state courts.

Jurisdiction by Consent

Given the Supreme Court's limitation on the use of specific jurisdiction, plaintiffs are retreading attempts to manufacture general jurisdiction over companies that do business nationwide. One such argument—"consent by registration"—posits that a company consents to jurisdiction in a forum just by registering to do business there, availing itself of the benefits of accessing the state's markets. This argument, if adopted, would prove a real problem for any company doing business nationwide: all 50 states require such registration.

Most states have read the tea leaves following *Goodyear*, *Daimler*, and *Bristol-Myers* and abandoned their statutory or common law doctrines permitting courts to exercise jurisdiction based solely on registration. But four states have not: Iowa, Minnesota, Nebraska, and Pennsylvania.⁷⁹

“ Pennsylvania is even more concerning: along with Philadelphia's Court of Common Pleas' status as a venue favoring plaintiffs, the state has a general jurisdiction statute codifying consent by registration. ”

Iowa, Minnesota, and Nebraska sit in the Eighth Circuit, which, along with the state courts there, has interpreted those states' laws to permit consent by registration.⁸⁰ Troublingly, some of these decisions post-date *Goodyear* and *Daimler*. But Pennsylvania is even more concerning: along with Philadelphia's Court of Common Pleas' status as a venue favoring plaintiffs, the state has a general jurisdiction statute codifying consent by registration.⁸¹

On the flip side, defendants have successfully challenged such consent by registration statutes as a basis for jurisdiction in several states following *Goodyear* and *Daimler*, including Colorado, Illinois, and Missouri.⁸² For example, the Missouri Supreme Court made clear in *State ex rel. Norfolk Southern Railway Co. v. Dolan* that such statutes cannot stand in the face of the Supreme Court's ruling in *Daimler*: “A broad inference of consent based on registration would allow national corporations to be sued in every state, rendering *Daimler* pointless.”⁸³

Defendants should look to build upon these wins in the states in which courts have yet to reject consent by registration.⁸⁴ To do otherwise would threaten to eviscerate *Bristol-Myers* and permit backdoor permissive general jurisdiction for companies that register to do business, regardless of whether or not they actually conduct business in those jurisdictions.

Waiver

Even today, cases are pending that predate *Bristol-Myers* in which defendants failed to challenge personal jurisdiction, even though these cases would now fall within the ambit of *Bristol-Myers*. Although plaintiffs will surely argue that such arguments are waived, not all is lost for defendants who act quickly to raise personal jurisdiction as a defense for the first time.

In the wake of *Goodyear* and *Daimler*, defendants that failed to challenge personal jurisdiction faced similar waiver arguments. Some courts rejected them, permitting defendants to raise jurisdictional challenges following a new Supreme Court decision. For example, in the 2014 case of *Gucci America, Inc. v. Weixing Li*, the Second Circuit held that a defendant does not waive a personal jurisdiction argument if the argument, prior to the new decision, would have been “contrary to controlling precedent” in the Circuit.⁸⁵

Granted, not all courts have followed this path. In *Sloan v. General Motors*, a post-*Bristol-Myers* case from the Northern District of California, the defendant failed to challenge personal jurisdiction at its first appearance. At that time, *Bristol-Myers* was pending before the Supreme Court but not yet decided. The defendant argued that the personal jurisdiction defense was “previously unavailable” to it because it would have been contrary to governing

Ninth Circuit law. But the court held otherwise, noting that *Bristol-Myers* was decided two weeks before the hearing on the initial motion to dismiss and that the defendant failed to raise the issue before the Court.⁸⁶

But a number of other courts have rejected waiver arguments in the wake of *Bristol-Myers*. For example, in *Practice Management Support Services v. Cirque du Soleil, Inc.*, decided in March 2018, the Northern District of Illinois found no waiver of a personal jurisdiction objection to the claims of unnamed, non-resident class members.⁸⁷ It held that such an argument would have been “futile” prior to *Bristol-Myers*, and that the defendant timely raised the defense in the months after *Bristol-Myers* was decided.⁸⁸

Although the Supreme Court referred in *Bristol-Myers* to “settled principles”⁸⁹ of its personal jurisdiction jurisprudence, many lower courts, particularly state courts, disagreed with those principles, having previously decided cases under contrary precedent. Accordingly, defendants should raise personal jurisdiction as a defense in these jurisdictions, even if they failed to do so before *Bristol-Myers*. But fair warning that this defense has a limited shelf life: at some point, courts will say that too much time has passed since *Bristol-Myers*.

“ [D]efendants should raise personal jurisdiction as a defense in these jurisdictions, even if they failed to do so before *Bristol-Myers*. ”

Conclusion

Bristol-Myers signifies the culmination of the Supreme Court's paradigm shift in personal jurisdiction jurisprudence. It marks the Court's clearest statement yet that jurisdictional forum shopping and verdict chasing are disfavored, and that courts should carefully evaluate personal jurisdiction challenges to ensure fairness and predictability for corporate defendants.

But plaintiffs' counsel continue to try and chip away at *Bristol-Myers*, given its potential impact on their previously tried-and-true strategies. And although most courts have recognized the paradigm shift, some courts, particularly at the trial level, have not. Corporations and defense

counsel must accordingly remain diligent in litigating personal jurisdiction issues in lower courts, particularly those courts historically skeptical of such arguments, to ensure that the Supreme Court's directives in *Bristol-Myers* are implemented nationwide.

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Endnotes

- † Adam Kretz also contributed to writing this paper while at Arnold & Porter.
- 1 *Bristol-Myers Squibb Co. v. Superior Court*, — U.S. —, 137 S. Ct. 1773 (2017).
- 2 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).
- 3 *Daimler AG v. Bauman*, 571 U.S. —, 134 S. Ct. 746 (2014).
- 4 *O’Keefe v. Loewen Group, Inc. et al.*, Case No. 91-677-423, First Judicial Dist. of Hinds Cty. (Miss. 1993).
- 5 See Chris Hamby, A Homegrown Disaster: How a Mississippi Funeral Home Showdown Freaked Out the White House, BuzzFeed, Sept. 1, 2016, available at https://www.buzzfeed.com/chrishamby/homegrown-disaster?utm_term=.ftKxbx5jm#.nimrProkg (last accessed May 7, 2018).
- 6 See Hamby, *supra* note 5.
- 7 *Id.*
- 8 See Nina Bernstein, Brash Funeral Chain Meets Its Match in Old South, N.Y. Times, Jan. 27, 1996, available at <https://www.nytimes.com/1996/01/27/us/brash-funeral-chain-meets-its-match-in-old-south.html> (last accessed May 7, 2018).
- 9 *Id.*
- 10 See Hamby, *supra* note 5.
- 11 *Id.* (noting that Gary called O’Keefe an “American hero standing up for his community against a foreign interloper” and invoked O’Keefe’s service in the armed forces following the attack on Pearl Harbor).
- 12 This standard dates back to *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).
- 13 See 28 U.S.C. § 1332(d)(11)(B)(i) (permitting removal of “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact”).
- 14 See *Whittington v. U.S. Steel*, Case No. 02-L1113 (3d Jud. Cir. Ct.); see also Alex Berenson, 2 Large Verdicts in New Asbestos Cases, N.Y. Times (Apr. 1, 2003) (describing the case as one of “the largest verdicts yet” in asbestos litigation).
- 15 Madison County had the largest asbestos docket in America for many years, with filings peaking in 2003 right after the verdict in *Whittington*. And few of these cases involved Illinois residents or companies. As noted by the Illinois Civil Justice League, 90 percent of asbestos claims brought in Madison County between 2003 and 2007 were brought by out-of-state plaintiffs. See *Litigation Imbalance III*, Ill. Civ. Justice League (Apr. 2015) at 2, available at <http://www.icjl.org/icjl-litigationindex3.pdf> (last accessed May 7, 2018).
- 16 See Mary Foster, Jury Orders Drugmaker to Pay Man \$51 Million, The Oklahoman (Aug. 18, 2006), available at <http://newsok.com/article/2832680> (last accessed May 7, 2018).
- 17 *Goodyear*, 564 U.S. at 918.
- 18 *Id.* at 924.
- 19 *Id.* at 929.
- 20 *Id.* at 918 (“Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court’s jurisdiction over it”).
- 21 See, e.g., *Hess v. Bumbo Int’l Trust*, 954 F. Supp. 2d 590, 593-96 (S.D. Tex. 2013) (finding that distribution of a baby seat product in Texas established a continuous and systematic presence in the state sufficient for general jurisdiction regarding claims about that baby seat brought by an Arizona resident where the seat in question was purchased in Arizona and the claims at issue had no ties to Texas); *McFadden v. Fuyao N. Am., Inc.*, 2012 WL 1230046, at *3-4 (E.D. Mich. Apr. 12, 2012) (finding personal jurisdiction over a foreign company because that company shipped glass to Michigan based on a purchase contract with a local company); *Ashbury Int’l Grp., Inc. v. Cadex*

- Defence, Inc.*, 2012 WL 4325183, at *3-6 (W.D. Va. Sept. 20, 2012) (despite noting that the requirements to establish general jurisdiction are “fairly high,” the Court found that a company that “regularly solicited” business in Virginia and maintained “ongoing contacts with numerous Virginia-based customers” was subject to general jurisdiction in that state).
- 22 *Daimler*, 571 U.S. —, 134 S. Ct. at 760 (“With respect to a corporation, the place of incorporation and principal place of business are ‘paradig[m] . . . bases for general jurisdiction.’”) (internal citations omitted).
- 23 *Id.* at 762.
- 24 *See id.* at 767-71 (“[I]t is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum states that it is ‘essentially at home’ in each one.”) (Sotomayor, J., concurring in the judgment).
- 25 Justice Sotomayor gave credence to this argument in her concurrence, arguing that the “State’s exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct.” *See id.* at 764 (Sotomayor, J., concurring in the judgment).
- 26 *Id.* at 761 n.19 (“We do not foreclose the possibility that in an exceptional case . . . a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”)
- 27 *See* 2013 WL 6150251, at *1-2 (Cal. Super. Sept. 23, 2013) (denying motion to quash for lack of personal jurisdiction).
- 28 *See* 228 Cal. App. 4th 605 (Cal. Ct. App. July 30, 2014) (affirming trial court order); *see also* 1 Cal. 5th 783, 791 (2016) (describing procedural history).
- 29 1 Cal. 5th at 806 (stating that the Court has “adopted a sliding scale approach to specific jurisdiction in which [the Court] recognized that ‘the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim’”) (citing *Vons Cos., Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 455 (1996)).
- 30 137 S. Ct. at 1781.
- 31 *Id.* (“In order for a court to exercise specific jurisdiction over a claim, there must be an ‘affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State. . . .’ When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.”); *see also id.* at 1783 (“Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware.”)
- 32 *See id.* at 1781.
- 33 *See id.* at 1783 (“Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up.”)
- 34 *See Swann v. Johnson & Johnson Co.*, Case No. 1422-CC09326-01 (St. Louis Cir. Ct. June 19, 2017).
- 35 *Estate of Fox v. Johnson & Johnson Co.*, 2017 WL 4629383 (Mo. Ct. App. Oct. 17, 2017).
- 36 *Siegfried v. Boehringer Ingelheim Pharms., Inc.*, 2017 WL 2778107, at *3 (E.D. Mo. June 27, 2017).
- 37 *Cortina v. Bristol-Myers Squibb Co.*, 2017 WL 2793808, at *4-5 (N.D. Cal. June 27, 2017).
- 38 *Dubose v. Bristol-Myers Squibb Co.*, 2017 WL 2775034, at *4-5 (N.D. Cal. June 27, 2017).
- 39 137 S. Ct. at 1781.
- 40 *Mass. Mut. Life Ins. Co. v. Mozilo*, Case No. BC482950 at 7-10 (L.A. Cty. Sup. Ct. Mar. 10, 2014) (citing *Gordon v. Law Offices of Aguirre & Meyer*, 70 Cal. App. 4th 972, 980 n.8 (2007)).
- 41 *Id.* at 8.
- 42 It was not until the Supreme Court had already heard oral argument in *Bristol-Myers* that plaintiffs then sought extensive jurisdictional and merits discovery in a last-ditch attempt to create jurisdiction out of whole cloth. The trial court correctly rejected this request as untimely.
- 43 137 S. Ct. at 1781, 1783.
- 44 *Jinright v. Johnson & Johnson, Inc.*, 2017 WL 3731317, at *4 (E.D. Mo. Aug. 30, 2017).
- 45 *Id.*

- 46 *Id.*
- 47 137 S. Ct. at 1783.
- 48 *Id.*
- 49 *Jinright*, 2017 WL 3731317, at *5.
- 50 137 S. Ct. at 1780.
- 51 *See In re Nexus 6P Prods. Liab. Litig.*, 2018 WL 827958, at *5 (N.D. Cal. Feb. 12, 2018).
- 52 *Id.*
- 53 *In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig. (MDL No. 2753)*, — F. Supp. 3d —, 2017 WL 5514193 (D.N.H. Nov. 14, 2017); *see also* Richard Tabura, You Can't Have All That!: Jurisdictional Discovery After Bristol-Myers Squibb, ABA Mass Torts Litig. (Jan. 31, 2018) *available at* <https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2018/jurisdictional-discovery-post-bristol-myers-squibb.html> (last accessed May 7, 2018).
- 54 *See also In re Baltimore City Asbestos Litig. (Smith v. Automotive Prods. Co.)*, Case No. 24X13000333 (Baltimore City Cir. Ct. June 7, 2017) (after the court granted “limited” jurisdictional discovery, plaintiffs sought reconsideration of the order to obtain additional information, requiring the court to engage in further case management and motion practice).
- 55 *See* 137 S. Ct. at 1783 (“It is not possible to trace a particular pill to a particular person It is not possible for us to track particularly to McKesson.”) (citing Tr. of Oral Arg. at 33).
- 56 *Id.* at 1783.
- 57 *Id.*
- 58 *Id.*
- 59 *Id.*; *see also Walden v. Fiore*, 134 S. Ct. 1115, 1121-23 (2014) (“The primary focus of our personal jurisdiction inquiry is the defendant’s relationship to the forum state.”)
- 60 *Livingston v. Hoffman-La Roche, Inc.*, — F. Supp. 3d —, 2018 WL 1183762, at *2-3 (N.D. Ill. Mar. 7, 2018).
- 61 *Id.* at *5 (citing *Bristol-Myers*, 137 S. Ct. at 1781); *see also id.* at 6 (“The plaintiff cannot be the only link between the defendant and the forum”).
- 62 *Id.* at *6 (“Nor does plaintiff’s claim with respect to the Physician Defendants confer jurisdiction over the Roche Defendants. . . . The claim against the Physician Defendants involves a different theory of liability Plaintiff’s claims against the Roche Defendants have no connection to Illinois.”)
- 63 *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting) (internal citations omitted).
- 64 *See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).
- 65 *Id.* at *1.
- 66 *Id.* at *5.
- 67 *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 5971622, at *9-16 (E.D. La. Nov. 30, 2017).
- 68 *Sanchez v. Launch Tech. Workforce Solutions, LLC*, — F. Supp. 3d —, 2018 WL 942963, at *2 (N.D. Ga. Feb. 14, 2018).
- 69 137 S. Ct. at 1781.
- 70 *DeBernardis v. NBTY, Inc.*, 2018 WL 461228, at *1 (N.D. Ill. Jan. 18, 2018).
- 71 *Id.* at *2.
- 72 *Id.*; *see also McDonnell v. Nature’s Way Prods., LLC*, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017) (dismissing non-resident class claims regarding alleged mislabeling of a vitamin supplement for similar policy reasons as *DeBernardis*).
- 73 *Spratley v. FCA US LLC*, 2017 WL 4023348, at *6 (N.D.N.Y. Sept. 12, 2017).
- 74 *Id.* at *7-8.
- 75 *LDGP, LLC v. Cynosure, Inc.*, Case No. 15 C 50148 (N.D. Ill. Jan. 16, 2018) at 3-4.
- 76 137 S. Ct. at 1784.
- 77 *Fitzhenry-Russell*, 2017 WL 4224723, at *4.
- 78 *Id.*
- 79 *See* James M. Beck & Kevin Hara, 50 State Survey on General Jurisdiction Through Consent by Registration to Do Business, Drug & Device Law Blog (Dec. 18, 2017), *available at* <https://www.druganddevicelawblog.com/2017/12/quasi-guest-post-50-state-survey-on-general-jurisdiction-through-consent-by-registration-to>

do-business-putting-bauman-and-baseball-back-together.html (last accessed Apr. 3, 2018).

- 80 See *Spanier v. Am. Pop Corn Co.*, 2016 WL 1465400, at *4 (N.D. Iowa Apr. 14, 2016) (permitting general jurisdiction over a company that registered to do business in the state, and finding that the court need not engage in a due process analysis); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (“appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state”) (emphasis added); *Mittlestadt v. Rouzer*, 328 N.W.2d 467, 469 (Neb. 1982) (“By designating an agent upon whom process may be served within [Nebraska], a defendant has consent to the jurisdiction *in personam* by the proper court”); *Ytuarte v. Gruner & Jahr Printing & Pub’g Co.*, 935 F.2d 971, 973 (8th Cir. 1991) (applying Nebraska law and finding, like for Minnesota, registration of an agent gives consent to the state courts to exercise jurisdiction even for claims outside the state).
- 81 42 Pa. Cons. Stat. Ann. § 5301 (corporate registration statute that confers “general jurisdiction” over non-resident corporations that register to do business in the state).
- 82 *Magill v. Ford Motor Co.*, 379 F.3d 1033, 1038-39 (Colo. 2016) (after *Daimler*, rejecting argument that a company registering to do business in the state was sufficient for jurisdiction); *Am. Ins. Co. v. Interstate Warehousing, Inc.*, — N.E. 3d —, 2017 WL 4173349, at *5 (Ill. Sept. 21, 2017) (holding after *Daimler* that Illinois law did not require foreign companies to consent to general jurisdiction by registering to do business, and holding that registration does not waive due process challenges to the exercise of jurisdiction by the state); *State ex rel. Norfolk So. Railway Co. v. Dolan*, 512 S.W. 3d 41, 51-53 (Mo. 2017) (noting that to hold otherwise would result in “universal personal jurisdiction” for corporations doing business nationwide).
- 83 *Dolan*, 512 S.W. 3d at 51.
- 84 For a discussion on utilizing the Dormant Commerce Clause as another avenue to challenge consent by registration regimes, see John F. Pries, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 Ia. L. Rev. 121 (2016); see also *In re Syngenta AG MIR 162 Corn Litig. (MDL No. 2591)*, 2016 WL 2866166, at *4 (D. Kan. May 17, 2016) (finding Kansas’s registration statute fails to comport with the Dormant Commerce Clause).
- 85 *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135-36 (2d Cir. 2014) (“[A] defendant does not waive a personal jurisdiction argument—even if he does not make it in the district court—if the ‘argument that the court lacked jurisdiction over [the] defendant would have been directly contrary to controlling precedent in this Circuit.’”).
- 86 *Sloan v. Gen. Motors, LLC*, — F. Supp. 3d —, 2018 WL 784049, at *3 (N.D. Cal. Feb. 7, 2018).
- 87 — F. Supp. 3d —, 2018 WL 1255021 (N.D. Ill. Mar. 12, 2018), at *17.
- 88 See *id.*; see also *Feller v. Transamerica Life Ins. Co.*, 2017 WL 6453262, at *4 (C.D. Cal. Dec. 11, 2017) (rejecting waiver because defendant could not have reasonably challenged personal jurisdiction before *Bristol-Myers* was decided).
- 89 137 S. Ct. at 1783.



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