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AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS

FEDERAL TRENDS AFFECTING AGGREGATE LITIGATION IN THE STATE COURTS

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Executive Summary

Professor Rave's paper focuses on two parallel trends that have had great impact on aggregate litigation brought in state courts: the expansion of federal court jurisdiction effected by both legislation and the actions of the federal courts themselves; and the constriction, by essentially the same process, of state court personal jurisdiction.

In Part I, "Expanding Federal Subject Matter Jurisdiction," Professor Rave explains the background and main provisions of the Class Action Fairness Act (CAFA), which is the most significant expansion of federal subject matter jurisdiction over aggregate litigation. CAFA extends diversity jurisdiction over class actions and facilitates their removal to federal court, where they face increased requirements to achieve certification. As a result, class action plaintiffs look for ways to avoid the effects of CAFA, for instance by satisfying one of the Act's exceptions, limiting the amount in controversy, dividing classes into smaller groups, or bringing class actions as counterclaims.

In Part II, "Constricting State Court Personal Jurisdiction," Rave reviews the ways in which the U.S. Supreme Court has employed constitutional doctrine to restrict the jurisdiction of state courts in all types of litigation, whether aggregate or not. He traces the evolution of personal, general, and specific jurisdiction doctrine, with particular attention to Daimler A.G. v. Bauman *and* Bristol-Myers Squibb v. Superior Court. *In* Daimler, *the Supreme Court rejected jurisdiction over a defendant with very substantial business ties to the forum state. In* Bristol-Myers, *the Court rejected a California court's assertion of specific jurisdiction over non-resident plaintiffs in a*

* George A. Butler Research Professor, University of Houston Law Center. Portions of this paper are drawn, with permission, from Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251 (2018). To facilitate readability, I will not make extensive use of quotation marks or block quotations.

nationwide mass tort action of just under 600 plaintiffs, filed in state court, alleging injuries and deaths resulting from their ingestion of the blood-thinning medication Plavix.

In Part III, "Open Questions after CAFA, Daimler*, and* Bristol-Myers*," Professor Rave considers questions left unanswered by the legislation and court decisions. These include how closely the plaintiffs' claims must be related to the forum state; whether a class action may be maintained only where a state can exercise general jurisdiction over the defendant; the utility of "settlement classes" (in which defendants consent to jurisdiction); and whether corporate registration statutes can confer general jurisdiction.*

In Part IV, "What's Left for the State Courts in Aggregate litigation?", Rave briefly describes six types of aggregate litigation that may still be maintainable in state court: single-state class actions raising state law claims; single-state mass joinders raising state law claims; multistate class actions in the defendant's home state where more than a third of the class members are also from that state; nationwide mass joinders in the defendant's home state; multistate settlement class actions where the defendant consents to personal jurisdiction; and parens patriae *actions or other public enforcement actions by state governments.*

Professor Rave concludes that, after years of restrictive legislation and court decisions, aggregate litigation will be found increasingly in federal court. However, important questions do remain open, as do several avenues for state court aggregation.

INTRODUCTION

Recent trends in federal law have important effects on aggregate litigation in the state courts. This paper focuses on two trends: (1) the expansion of federal court subject matter jurisdiction and (2) the constriction of state court personal jurisdiction. Both trends have restricted the availability of state courts as a viable forum for many forms of large-scale aggregate litigation. And the result, as litigants adjust to the changing incentive structures that these trends create, may be to push more aggregate litigation into federal court—particularly federal multidistrict litigation (MDL), which has been growing explosively in recent years.

Of course, these trends do not spell the end of aggregate litigation in state courts, which still handle the lion's share of work in our dual-sovereign system. Many important questions—particularly about how the U.S. Supreme Court's recent personal jurisdiction decisions will play out—remain open. And state courts will have to adjust and work cooperatively with their federal counterparts to handle the aggregate litigation that remains under their purview.

This paper begins by surveying recent trends in federal law on subject matter and personal jurisdiction. And it finishes by highlighting some of the open questions left by these changes in federal law and cataloging the types of aggregate cases that are likely to remain in state court.

I. EXPANDING FEDERAL SUBJECT MATTER JURISDICTION

The most significant expansion of federal subject matter jurisdiction over aggregate litigation

was the Class Action Fairness Act (CAFA).[1] The story of CAFA has been well told elsewhere, so I will move quickly and paint with a broad brush.[2] But having a basic grasp on what CAFA did and how it works is essential to understanding the U.S. Supreme Court's more recent constrictions of personal jurisdiction.

A. CAFA's Origins and Main Provisions

Congress passed CAFA in 2005 in response to a perceived problem with how some state courts were handling class actions. While the federal courts were becoming less hospitable to class actions in the late 1990s and early 2000s, some state courts—known as "magic jurisdictions" or "judicial hellholes," depending on your perspective—became magnets for nationwide class actions.[3] The concern was that a handful of state courts were particularly solicitous of class actions and willing to certify even questionable classes in situations where the vast majority of state and federal courts would never have dreamed of doing so.[4] Thus an outlier state court—often applying its own substantive law under the U.S. Supreme Court's loose constitutional limits on choice of law—could effectively rule on the defendant's conduct nationwide and subject the defendant to potentially firm-threatening liability.[5]

Congress's solution was to expand federal subject matter jurisdiction over class actions and to make it easier for defendants to remove them from state court to federal court. CAFA does two basic things with respect to class actions (subject to exceptions discussed below). First, it extends federal diversity jurisdiction over putative class actions with 100 or more class members where at least one class member is diverse from at least one defendant and where the aggregate amount in controversy exceeds $5 million.[6] So, unlike the regular diversity statute, which requires every plaintiff to be diverse from every defendant,[7] CAFA requires only minimal diversity. And instead of requiring the class representative's claim to meet the $75,000 amount-in-controversy requirement individually,[8] CAFA looks to the aggregate amount that the class is seeking.

Second, CAFA makes it easier for defendants to remove class actions to federal court by loosening some of the procedural restrictions in the ordinary removal statute.[9] Under CAFA's new removal statute, *any* defendant may remove a putative class action that meets CAFA's jurisdictional requirements to federal court.[10] This includes home-state defendants, who are normally

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[1] 28 U.S.C. § 1332(d).

[2] For just a few of the many excellent academic treatments of CAFA, see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247 (2007); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

[3] Much of this discussion about CAFA's background is drawn from Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1264-68 (2018).

[4] *See* SENATE REPORT, CLASS ACTION FAIRNESS ACT OF 2005, S. REP. NO. 109-14, at 22-27 (2005).

[5] Bradt & Rave, *supra* note 3, at 1264-65; *see also* In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766-67 (7th Cir. 2003), *abrogated by* Smith v. Bayer Corp., 564 U.S. 299 (2011).

[6] 28 U.S.C. § 1332(d).

[7] *See id.* § 1332(a).

[8] *See* Exxon Mobil Corp. v. Allapattah Servs. Inc., 545 U.S. 546 (2005).

[9] *See generally* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:14 (5th ed. June 2019 update).

[10] 28 U.S.C. § 1453(b).

barred from removing cases.[11] Unlike the ordinary removal statute, CAFA does not require the consent of all defendants to remove.[12] And there is no one-year time limit on CAFA removals.[13] Further, the federal district court's decision to remand the case to state court—which is ordinarily unreviewable—is subject to discretionary appellate review under CAFA.[14]

In part because not all states have class-action rules and in part to prevent plaintiffs from circumventing removal through creative efforts at non-class joinder, CAFA also allows the removal of "mass actions."[15] CAFA defines a "mass action" as a civil action where the monetary claims of 100 or more plaintiffs "are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."[16] But to be removable as a mass action, the plaintiffs have to be the driving force behind the consolidation. Removable mass actions exclude claims that are "joined upon the motion of a defendant,"[17] claims that are "consolidated or coordinated solely for pretrial proceedings,"[18] claims that are consolidated (even for trial) *sua sponte* by the state courts,[19] and *parens patriae* actions brought by state public officials.[20]

CAFA's ostensible aim was to move nationwide class actions into federal court on the theory that controversies that are national in scope belong in national courts.[21] But support for CAFA fell starkly along plaintiff/defendant lines, with defense-side interest groups being the primary drivers behind the law's passage.[22] And the more cynical view of CAFA is that its sends class actions to federal court to die there.[23] The critical doctrinal roadblock is that nationwide or multistate class actions based on state law will typically involve applying many different states' substantive laws to different class members.[24] When faced with fifty different sets of applicable substantive law, most federal courts will not certify a class action because common questions do not predominate over individual questions, as required by Federal Rule of Civil Procedure 23(b)(3).[25] And because the federal courts retain jurisdiction under CAFA even if class certification is denied, removal can sound the death knell for a putative class action.[26]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* § 1453(c).

[15] *See* 2 NEWBERG, *supra* note 9 § 6:24.

[16] 28 U.S.C. § 1332(d)(11)(B)(i).

[17] *Id.* § 1332(d)(11)(B)(ii)(II).

[18] *Id.* § 1332(d)(11)(B)(ii)(IV).

[19] Koral v. Boeing Co., 628 F.3d 945, 947 (7th Cir. 2011); *see also* 2 NEWBERG *supra* note 9 § 6:17.

[20] Mississippi ex re. Hood v. AU Optronics Corp., 571 U.S. 161 (2014).

[21] SENATE REPORT, CLASS ACTION FAIRNESS ACT OF 2005, S. REP. NO. 109-14, at 24–27.

[22] *See, e.g.*, Burbank, *supra* note 2, at 1528.

[23] *See, e.g., id.*; Purcell, *supra* note 2, at 1918; Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006) ("[It should be] apparent to any sentient reader of the statute's statement of findings and purposes. . . . [that] [t]hey are, at best, window dressing. Less charitably, they meet the philosopher Harry Frankfurt's definition of 'bullshit,' because they are made with apparent indifference to their truth content.").

[24] Bradt & Rave, *supra* note 3, at 1265; Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2034 (2008).

[25] *See, e.g.*, Cole v. Gen. Motors Corp., 484 F.3d 717, 724 (5th Cir. 2007); In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015-16 (7th Cir. 2002); Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009).

[26] Although there are some outliers, this appears to be the consensus approach. *See* 2 NEWBERG, *supra* note 9 § 6:18; Louisiana v. American Nat. Property Cas. Co., 746 F.3d 633, 639 (5th Cir. 2014) ("Every circuit that has addressed the question has held that post-removal events do not oust CAFA jurisdiction."); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 444 n.281 (2018) (collecting cases). One exception is worth

The federal courts have only grown less hospitable to class actions in the years since CAFA's passage with decisions like *Wal-Mart v. Dukes*[27] and *Comcast Corp. v. Behrend*[28] raising the bar for showing commonality and predominance under Federal Rule of Civil Procedure 23.[29] These developments have sparked efforts by plaintiffs, who often prefer state court, to structure their aggregate claims to avoid removal under CAFA.[30]

B. Avoiding CAFA

Plaintiffs have several strategies for avoiding CAFA and keeping their aggregate claims in state court. If they are content to file single-state class actions, plaintiffs may be able to keep their cases in state court under CAFA's exceptions for local controversies. If plaintiffs wish to pursue aggregate litigation in state court on a nationwide or multistate basis, however, they have two basic strategies for avoiding CAFA: they can limit the amount in controversy or they can limit the number of plaintiffs by breaking up the litigation into smaller bundles. Additionally, a new strategy has recently emerged: file a class action as a counterclaim.

I discuss each of these strategies below. On the whole, the federal courts have been fairly tolerant of these strategies, even when they are rather transparent attempts to evade CAFA. Congress, not the federal courts themselves, has been leading the charge to expand federal subject matter jurisdiction.

1. Fitting Into CAFA's Exceptions

While CAFA sought to move large-scale multistate class actions to federal court, it preserved a role for state courts to adjudicate class actions that are more local in nature. The statute thus contains exceptions to federal jurisdiction when all or most of the parties are from the forum state.

If more than two-thirds of the class members are citizens of the forum state, a federal court *must* decline subject matter jurisdiction under CAFA when either (1) the primary defendant is also from the forum state or (2) a significant defendant is from the forum state, the plaintiffs' principal injuries were incurred in that state, and no other class action has been filed in the preceding three years.[31] If more than one-third, but less than two-thirds of the class members are citizens of the forum state and the primary defendants are also citizens of that state, the federal court *may*, in the interest of justice, decline jurisdiction under CAFA.[32] Thus, when a defendant is sued at home in

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further elaboration: If, after removal, the federal court finds that the plaintiff class lacks Article III standing (as many defendants have argued since the U.S. Supreme Court's decision in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016)), most courts will remand the class action back to the state court from which it was removed (which, of course, is not limited by Article III standing doctrine). *See, e.g.*, Terrell v. Costco Wholesale Corporation, 2017 WL 2169805, at *1-2 & n.2 (W.D. Wash. 2017); Barnes v. ARYZTA, LLC, 2017 WL 6947882, at *4 (N.D. Ill. 2017); Mocek v. Allsaints USA Limited, 220 F. Supp. 3d 910, 913 (N.D. Ill. 2016); 2 NEWBERG *supra* note 9, § 6:15. *But see* St. Louis Heart Center, Inc. v. Nomax, Inc., 2017 WL 1064669, at *3 (E.D. Mo. 2017).

[27] 564 U.S. 338, 356 (2011).

[28] 569 U.S. 27, 34 (2013).

[29] *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

[30] Bradt & Rave, *supra* note 3, at 1268.

[31] 28 U.S.C. § 1332(d)(4).

[32] *Id.* § 1332(d)(3). Courts apply a totality of the circumstances test when exercising their discretion to decline jurisdiction, guided by six factors listed in the statute: "(A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally

state court, the likelihood of federal jurisdiction existing goes down as the percentage of in-state class members goes up.[33]

In applying these exceptions, issues can arise in determining the citizenship of class members because "citizenship" for federal diversity purposes is based on the subjective concept of domicile. The simplest way for plaintiffs to avoid those issues and make sure that they fit into one of these exceptions is to define the class as citizens of the forum state, thereby aligning the class definition with the statutory requirement.[34]

CAFA also contains exceptions for class actions against state governments or officials[35] and class actions involving most securities and corporate law cases (the so-called "Delaware carve-out").[36]

2. Limiting the Amount in Controversy

Another way that plaintiffs have attempted to avoid CAFA, even in multistate cases, is to limit the amount in controversy to less than $5 million. If the plaintiff class alleges less than $5 million in damages or does not specify the amount in controversy, the defendant can still remove under CAFA, so long as it can allege in good faith that the true amount in controversy is greater.[37] But if the plaintiffs seek a remand, the defendant must show by a preponderance of the evidence that the true amount in controversy exceeds $5 million.[38] Genuinely small claims will remain in state court, but plaintiffs cannot avoid federal court simply by understating or failing to specify their damages in the complaint.

Some plaintiffs, however, have attempted to avoid removal by stipulating that the class will seek no more than $5 million in damages. A unanimous U.S. Supreme Court rejected this strategy in *Standard Fire Insurance Co. v. Knowles*.[39] The Court held that a "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified."[40] Therefore, while the stipulation might tie the named plaintiff's hands, it could not limit the amount in controversy for the rest of the class. Though *Standard Fire* may say more about the nature of class actions—that a self-appointed putative class representative cannot bind absentees before the proposed class is certified by a court—than it does about federal jurisdiction.[41]

3. Breaking Up Aggregate Litigation into Smaller Bundles

Plaintiffs have had more success with another strategy for avoiding CAFA: eschewing class actions altogether, breaking up their aggregate claims into bundles of 99 or fewer plaintiffs to avoid CAFA's trigger for "mass actions," and then filing a series of largely identical complaints

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filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed." *Id.*

[33] 2 NEWBERG, *supra* note 9 § 6:19.

[34] *Id.* (collecting cases).

[35] 28 U.S.C. § 1332(d)(5).

[36] *Id.* § 1332(d)(9).

[37] Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81 (2014).

[38] *Id.*

[39] 568 U.S. 588 (2013).

[40] *Id.* at 593.

[41] *See also* Smith v. Bayer Corp., 564 U.S. 299, 314 (2013) ("Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.").

in state court. If the actions are then consolidated through state court procedures, this slice-and-dice strategy will have succeeded in effectively recreating a CAFA-proof nationwide aggregation.

While defendants often object to this slice-and-dice strategy as a transparent attempt to circumvent CAFA's mass action provision, the federal courts have been largely tolerant. So long as the plaintiffs do not propose to try the bundles of cases jointly, the federal circuit courts have uniformly held that when the same lawyers file separate but largely identical complaints each with 99 or fewer plaintiffs, that does not create a mass action under CAFA.[42] This is so even when the plaintiffs' lawyers are quite transparent about what they are doing.[43]

Whether this strategy will be successful in recreating a large aggregate litigation in state court depends greatly on who seeks coordination or consolidation of the sliced-and-diced case bundles. If the plaintiffs propose that the bundles be tried jointly, they will trigger CAFA's mass action provision and the defendant can remove.[44] But CAFA is explicit that if the defendant moves to join the claims, there is no federal jurisdiction.[45] And generally if the state courts decide to consolidate or coordinate the cases *sua sponte*, there is no federal jurisdiction.[46]

CAFA is also explicit that there is no removable "mass action" if "the claims have been consolidated or coordinated solely for pretrial proceedings."[47] So if a state has a multidistrict litigation procedure that mirrors the federal model and consolidates cases for pretrial purpose only (like Texas and New York[48]), then the plaintiffs' lawyers can safely break their claims up into identical 99-plaintiff complaints and then move to consolidate them in state court for pretrial proceedings. But in states that have multidistrict litigation procedures that consolidate cases for all purposes, including trial (like California and many other states[49]), plaintiffs cannot move to consolidate without risking removal to federal court.[50] Instead, they have to hope that the defendant or court will initiate the consolidation.

4. Bringing Class Actions as Counterclaims

A final strategy for avoiding CAFA has emerged recently, but it is only available under certain conditions. That strategy is to wait to be sued for something and then file a class action as a counterclaim or third-party claim. This strategy was first proposed by Professor Jay Tidmarsh in a law review article,[51] and it was blessed by the U.S. Supreme Court this term in *Home Depot U.S.A.*,

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[42] 2 NEWBERG, *supra* note 9 § 6:17; *see, e.g.*, Anderson v. Bayer Corp., 610 F.3d 390, 392 (7th Cir. 2010); Tanoh v. Dow Chemical Co., 561 F.3d 945, 953 (9th Cir. 2009); Scimone v. Carnival Corp., 720 F.3d 876, 879, 881 (11th Cir. 2013); Abrahamsen v. ConocoPhillips, Co., 503 Fed. App'x. 157 (3d Cir. 2012); *cf.* Atwell v. Boston Scientific Corp., 740 F.3d 1160, 1161 (8th Cir. 2013).

[43] *See* 2 NEWBERG, *supra* note 9 § 6.17 (describing *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009), where the plaintiffs' lawyers had broken their case inventory up alphabetically into a series of seven identical 99-plaintiff complaints (i.e., A-F in one complaint, G-J in the next, and so on), but the court still held that remand was appropriate).

[44] *See Atwell*, 740 F.3d at 1161.

[45] 28 U.S.C. § 1332(d)(11)(B)(ii)(II).

[46] *See, e.g.*, Koral v. Boeing Co., 628 F.3d 945, 947 (7th Cir. 2011).

[47] 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

[48] *See* Tex. Gov. Code § 74.162; N.Y. Ct. Rules § 202.69; *see also* 28 U.S.C. § 1407.

[49] *See* Cal. Civ. Proc. Code § 404. For more on state multidistrict litigation procedures, see Zachary D. Clopton & D. Theodore Rave, *MDL and the States* (manuscript on file with author).

[50] *But see* Romo v. Teva Pharmaceuticals USA, Inc., 731 F.3d 918, 923 (9th Cir. 2013) (holding that plaintiff's petition under California's MDL procedure to coordinate cases for all purposes did not constitute a motion for the actions to be tried jointly because the "clear focus of the [coordination] petition is on pretrial matters").

[51] Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim*

Inc. v. Jackson.[52]

In *Jackson*, Citibank filed a debt collection action against Jackson in North Carolina state court. Jackson counterclaimed against Citibank and brought a third-party class action claim against Home Depot and Carolina Water Systems, alleging that they had engaged in an unlawful scheme to inflate the price of water treatment systems that he had bought with his Citibank-issued credit card.[53] Home Depot removed the case to federal court, but the U.S. Supreme Court held that a third-party counterclaim defendant like Home Depot is not a "defendant" under either the general removal statute (28 U.S.C. § 1441) or CAFA's removal statute (28 U.S.C. § 1453(b)), and thus Home Depot was not entitled to remove the class action claims filed against it.[54] The case was thus remanded to state court where the class action against Home Depot can proceed, even though it would fall within CAFA's jurisdictional grant.

Obviously, this strategy for keeping class actions in state court has limited application—you have to wait to get sued before you can use it. But there may be many instances where consumers who are defendants in debt collection claims in state court could bring class action counterclaims against their creditors on behalf of other similarly situated consumers. And under the holding and logic of *Jackson*, consumers who wish to avoid CAFA removal are not limited to bringing class actions against the creditor that sued them; they can also bring class actions against impleaded third parties.

II. CONSTRICTING STATE COURT PERSONAL JURISDICTION

At the same time that Congress has expanded federal subject matter jurisdiction, the U.S. Supreme Court has been using constitutional doctrine to cut back on state court personal jurisdiction. Restrictions on personal jurisdiction have taken the front seat in recent years with major decisions on both general and specific jurisdiction.

The Court's latest personal jurisdiction decision, *Bristol-Myers Squibb Co. v. Superior Court*,[55] has the potential to reshape possibilities for aggregate litigation in state courts and create incentives for plaintiffs to file more cases in federal court. But lots of open questions remain.

A. Evolution of Personal Jurisdiction Doctrine

Way back in 1878, the U.S. Supreme Court declared in *Pennoyer v. Neff* that a state court's exercise of personal jurisdiction over a defendant is a matter of federal constitutional due process.[56] Since then, the constitutional law of personal jurisdiction has continued to evolve in fits and starts to accommodate the need to resolve disputes in an increasingly interconnected national and international marketplace.[57] The Court's 1945 decision in *International Shoe Co. v. Washington* marks the beginning of the modern era of personal jurisdiction.[58] There Chief Justice Stone explained that a state's authority to exercise jurisdiction over a defendant was a function of fairness, not

Class Action, 35 W. ST. U. L. REV. 193 (2007).

[52] 587 U.S. __, 2019 WL 2257158 (2019).

[53] *Id.* slip op. at 3-4.

[54] *Id.* slip op. at 5-6, 9-11.

[55] 137 S. Ct. 1773 (2017).

[56] 95 U.S. 714 (1878).

[57] Much of this discussion of the evolution of personal jurisdiction doctrine is drawn from Bradt & Rave, *supra* note 3, at 1268-74.

[58] 326 U.S. 310 (1945).

territorial borders: hence the catechism that a state's jurisdiction depends on whether the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[59]

Having been freed from the rigid territorial conceptions of *Pennoyer*, the states passed "long-arm" statutes to extend their jurisdictional reach as far as they could, sometimes quite literally to the constitutional limit.[60] And over the next several decades, the U.S. Supreme Court sporadically decided personal-jurisdiction cases in an attempt to put meat on the bones of the *International Shoe* test.[61] The Court continued in this vein throughout the 1980s, but after two cases in which a majority opinion could not emerge, the Court, for whatever reason, did not decide another personal jurisdiction case for twenty years.[62]

With the benefit of hindsight, two aspects of the cases from the 1970s and 1980s seem to have been the most important. First, the Court settled on a two-step analysis for personal jurisdiction: (1) an assessment of "minimum contacts" among the forum, the defendant, and the dispute, and then (2) an assessment of whether a state's assertion of jurisdiction was nevertheless unreasonable, based on a laundry list of factors synthesized by Justice Brennan in *Burger King Corp. v. Rudzewicz*.[63]

Second, the Court had come to embrace the concepts of "general" and "specific" jurisdiction as a mode of analysis springing from *International Shoe*.[64] Without belaboring the point, general jurisdiction is all-purpose jurisdiction over a defendant. If a state has general jurisdiction over a defendant, that defendant can be sued in that state on any claim, regardless of whether there is any connection between the state and the claim. Specific jurisdiction, as the label would suggest, is far narrower and requires a link between the facts of the case and the forum state. Without such a link, the state cannot assert jurisdiction over the defendant without its consent.[65]

In 2011, the Supreme Court broke its twenty years of silence and got back into the personal jurisdiction business with two new cases: *Goodyear Dunlop Tires v. Brown*[66] and *J. McIntyre Machinery, Ltd. v. Nicastro*,[67] both of which reversed state courts' assertions of jurisdiction, one for lack of general jurisdiction and the other for lack of specific jurisdiction. Since then, the Court

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[59] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[60] *See, e.g.*, Cal. Civ. Code Proc. 410.10; Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, 49 AM. J. COMP. L. 203, 210 (2001) ("[T]he greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping . . . .").

[61] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463 (1985); Calder v. Jones, 465 U.S. 783, 784 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980); Rush v. Savchuk, 444 U.S. 320, 322 (1980); Shaffer v. Heitner, 433 U.S. 186, 189 (1977); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221 (1957).

[62] Burnham v. Superior Court, 495 U.S. 604, 607 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987).

[63] These factors include: "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." 471 U.S. at 477 (quotation marks omitted).

[64] In *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*, 466 U.S. 408, 414 (1984), the Court adopted Arthur von Mehren and Donald Trautman's framework for interpreting *International Shoe*. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). And it is now the centerpiece of the Court's jurisdictional analysis. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 611 (1988).

[65] *See, e.g.*, Daimler, A.G. v. Bauman, 571 U.S. 117, 126 (2014).

[66] 564 U.S. 915, 920 (2011).

[67] 564 U.S. 873, 877 (2011).

has exhibited a newfound vigor when it comes to policing the states—and plaintiffs' attempts at forum shopping. Indeed, the Court has now heard six personal jurisdiction cases since 2011, and in each it has concluded that the trial court exceeded the limitations of the Fourteenth Amendment.[68] The Court's rather aggressive reentry into the fray after two decades of benign neglect has generated a series of new questions, in large part because the Court has been rather obscure about the purposes of jurisdictional limitations underlying its new doctrinal rules.[69]

B. Developments in General Jurisdiction

Until recently, the scope of general jurisdiction was thought to be quite broad.[70] Drawing from language in *International Shoe*, a state was thought to have general jurisdiction over a defendant when "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[71] Although the U.S. Supreme Court did little to clarify the concept, the kind of operations that most courts treated as justifying a state's exercise of general jurisdiction tended to roughly correspond with doing business in the state—so if a corporation had a significant footprint in the state, such as through employees, sales, or physical plants, general jurisdiction was thought to exist.[72]

That understanding changed radically with *Goodyear*. Writing for a unanimous Court, Justice Ginsburg explained that general jurisdiction is almost always limited to the states in which a defendant is "essentially at home."[73] For a corporation, that typically means the state of incorporation and the state where the defendant's principal place of business is located. This result was a surprising shift and unsettled quite a lot of case law.[74]

But in case there was any lingering doubt about the Court's intentions, the Court has twice reiterated that general jurisdiction over a corporate defendant will almost always be limited to those two states: its principal place of business and state of incorporation. Although it left open the possibility that in an "exceptional case" a corporation could be "at home" in a third state, the Court held in *Daimler A.G. v. Bauman* that California lacked general jurisdiction over an automobile manufacturer that had multiple facilities and sold billions of dollars' worth of cars in the state.[75] And it reiterated the point in *BNSF Railway Co. v. Tyrrell*, where it held that Montana lacked general jurisdiction over a railroad with more than 2000 employees and 2000 miles of track in the state.[76] Simply doing a substantial amount of business in a state will no longer suffice for general jurisdiction.

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[68] *Bristol-Myers*, 137 S. Ct. at 1777; BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1554 (2017); Walden v. Fiore, 571 U.S. 277 (2014); *Daimler*, 571 U.S. at 121; *Goodyear*, 564 U.S. at 920; *Nicastro*, 564 U.S. at 877.

[69] *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1179 (2018); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 5 (2010).

[70] *See* Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012) (noting that "lower courts widely embraced the notion that any corporation 'doing business' in a state was subject to general jurisdiction there").

[71] *Int'l Shoe*, 326 U.S. at 318.

[72] *See* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 533 (2012).

[73] 564 U.S. at 919.

[74] *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 347 (2013); Stein, *supra* note 72, at 532.

[75] 571 U.S. 117, 123 (2014).

[76] 137 S. Ct. 1549, 1559 (2017).

C. Developments in Specific Jurisdiction

In part because the dominant pre-*Goodyear* conception of general jurisdiction was so broad, the questions that reached the U.S. Supreme Court during the 1980s tended to deal with states' assertions of specific jurisdiction over defendants whose *only* contact with the forum related to the particular lawsuit.[77] The central question, as the Court put it in *World-Wide Volkswagen Corp. v. Woodson* was whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum state."[78] The question of how related that particular lawsuit must be to the forum state was not addressed until very recently.[79]

1. Purposeful Availment

On the question of what constitutes purposeful availment, the Court has achieved little clarity or consensus. After fragmenting in the 1980s, the Court was still divided in *Nicastro* in 2011, which failed to produce a majority opinion.[80] Instead, the Court split four-to-two-to-three, with Justice Kennedy's plurality opinion generating more confusion than it resolved. The Court rejected New Jersey's exercise of specific jurisdiction over a British manufacturer when one of its machines injured a New Jersey resident in the state. Justice Kennedy reasoned that the manufacturer's contacts with New Jersey were insufficient to show purposeful availment because it sold its machines through a distributor and had targeted the U.S. market as a whole, not New Jersey specifically.[81]

Following *Nicastro*, the Court again appeared to narrow the meaning of purposeful availment in *Walden v. Fiore*.[82] There it held that a police officer who confiscated money at the Atlanta airport from a pair of gamblers on their way home to Nevada did not have sufficient minimum contacts with Nevada (where he had never been), even though he knew that his conduct would cause harm to the plaintiffs in Nevada.[83]

2. Relatedness

While interesting, questions of purposeful availment have only limited impact on most aggregate litigation. Far more important have been developments on the relatedness prong of specific jurisdiction. After *Goodyear* restricted the scope of general jurisdiction, the question of relatedness came to the fore: How related to the forum state does a plaintiff's claim have to be when the defendant purposefully avails itself of the markets in every state through a nationwide course of conduct? The U.S. Supreme Court squarely addressed this question for the first time in *Bristol-Myers Sqibb Co. v. Superior Court*.[84]

The *Bristol-Myers* litigation involved a nationwide mass tort action carefully structured to avoid removal under CAFA. Five-hundred and ninety-two plaintiffs from around the country joined together with 86 Californians to file eight separate, but largely identical, complaints (each with fewer than 100 plaintiffs) in California state court against the pharmaceutical giant Bristol-

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[77] *E.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980).

[78] *Volkswagen*, 444 U.S. at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[79] *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, 629 (2012).

[80] 564 U.S. 873 (2011).

[81] *Id.* at 886.

[82] 571 U.S. 277 (2014).

[83] *Id.* at 288-89.

[84] 137 S. Ct. 1773 (2017).

Myers Squibb (a Delaware corporation with its principal place of business in New Jersey) and California-based distributor McKesson alleging injuries from the blood-thinning drug Plavix.[85] The actions were assigned as a coordinated matter to a single judge. Bristol-Myers challenged the California court's personal jurisdiction over it with respect to the out-of-state plaintiffs' claims (though it conceded that the court had jurisdiction for the Californian's claims).

The California Supreme Court acknowledged that Bristol-Myers was not subject to general jurisdiction despite its extensive contacts with the state—namely its nearly one billion dollars in sales of Plavix in California, its registration to do business in the state, and therefore, its appointment of an agent to receive service of process, and its operation of five offices and employment of some four-hundred people in the state—because, under *Goodyear*, Bristol-Myers was not "at home" in California.[86]

But the California Supreme Court held that Bristol-Myer was subject to *specific* jurisdiction with respect to the out-of-state plaintiffs' claims. In reaching that determination, the California Supreme Court applied a "sliding scale approach," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[87] Because Bristol-Myers's contacts with California were extensive, the California courts could exercise specific jurisdiction on a lesser showing of how the claims were related to California. In the California Supreme Court's view, the fact that Bristol-Myers marketed and sold large quantities of the same drug in California to some of their co-plaintiffs was sufficient to establish the relatedness of the out-of-state plaintiffs' claims.[88]

In an 8-1 decision, the U.S. Supreme Court roundly rejected the California court's sliding scale approach to specific jurisdiction, calling it a "loose and spurious form of general jurisdiction."[89] Writing for the Court, Justice Alito explained that specific jurisdiction requires a connection between *each* plaintiff's claim and the forum.[90] And that connection was lacking here because the out-of-state plaintiffs did not reside in California, were not prescribed Plavix in California, did not ingest the drug in California, and did not suffer injury in California.[91] "The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the non-residents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."[92]

3. The Impact of Bristol-Myers

The *Bristol-Myers* decision is likely to have profound effects on aggregate litigation in the state courts. It significantly limits plaintiffs' menu of forums for bringing a nationwide or multistate aggregated action—either as a class action or nonclass mass joinder—in state court.[93] Plaintiffs can no longer engage in large-scale multistate aggregation in the state courts of their choice just because some of them were injured in, or reside in, that state (as they tried to do in the *Bristol-Myers* litigation).[94]

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[85] *Id.* at 1778.
[86] Bristol-Myers Squibb v. Superior Court, 377 P.3d 874, 887 (Cal. 2016).
[87] *Id.* at 889.
[88] *Id.*
[89] *Bristol-Myers*, 137 S. Ct. at 1781.
[90] *Id.*
[91] *Id.* at 1782.
[92] *Id.* at 1781.
[93] Bradt & Rave, *supra* note 3, at 1282-94.
[94] *Id.* at 1291.

If plaintiffs from around the country want to aggregate their claims in state court, they will have to do so on defendants' terms.[95] They can sue in the defendant's home state, where it has chosen to incorporate or locate its principal place of business and is thus subject to general jurisdiction.[96] Or, if there is a single state where the defendant engaged in conduct that gave rise to all of the plaintiffs' claims nationwide (such as designing or manufacturing a defective product), a nationwide aggregation of plaintiffs might be able to invoke specific jurisdiction in the state where the defendant chose to engage in that conduct.[97]

Indeed, in some cases, there may be no state where plaintiffs from around the country can aggregate their cases. As Justice Sotomayor pointed out in her dissent in *Bristol-Myers*, if there are two defendants with their headquarters and principal places of business in different states, no single state would have general jurisdiction over both.[98] Similarly, no state would have general jurisdiction over a defendant incorporated and headquartered abroad.[99]

Plaintiffs can, of course, still sue individually in the states where they suffered injury. But to do so, they have to give up the benefits that come with aggregation, e.g., the ability to pool resources, spread costs, share risk, and potentially offer the defendant peace in exchange for a premium.[100] And suing individually may be cost-prohibitive in many types of cases, like consumer cases, where recoveries are typically small, or mass tort cases, where litigation costs are typically very high.[101]

Smaller groups of plaintiffs can "probably sue together" if they were injured or reside in a single state; that state would likely have specific jurisdiction over all of their claims.[102] But by doing so, they give up the economies of scale and leverage that come with being part of a nationwide aggregation.[103] And many of these single-state aggregations brought outside of the defendant's home state will be removable to federal court, unless the plaintiffs can properly join a local defendant or recruit a non-diverse co-plaintiff.[104] The latter strategy is made more difficult by the relatedness requirement of *Bristol-Myers*; the plaintiff who is citizen of the same state as the defendant must have a claim that is sufficiently related to the forum state to make specific jurisdiction proper.[105] In short, single-state aggregations may be viable in some states where large numbers of plaintiffs reside or were injured and where they can join a nondiverse defendant. But in many states, plaintiffs may not find such strategies economically viable.

Given the choice between aggregate litigation on the defendant's home turf and individual (or small group) litigation in the state where the plaintiff resides or was injured, many plaintiffs may abandon the state courts altogether. Instead, these plaintiffs may file their cases in (or allow them to be removed to) federal court, where they will be transferred and consolidated under 28 U.S.C.

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[95] *Id.*

[96] *Id.*

[97] *Id.* at 1291-92.

[98] *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

[99] *Id.*

[100] *See* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192-98 (2013).

[101] *See, e.g.*, Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017) ([T]he anticipated cost of litigating [a plaintiff's] science- or medicine-intensive case may exceed $250,000. Even a claimant with a strong claim may have trouble finding a contingent fee lawyer eager to gamble that much money and time on the client's case.").

[102] *Bristol-Myers*, 137 S. Ct. at 1783. The Court was noncommittal on this point.

[103] Bradt & Rave, *supra* note 3, at 1292.

[104] *Id.* at 1293.

[105] *See Bristol-Myers*, 137 S. Ct. at 1781.

§ 1407 into a federal MDL action.[106] Plaintiffs may prefer nationwide aggregation in federal court to either individual litigation or aggregation on the defendant's home in state court.

Federal MDL is not subject to the same personal jurisdiction constraints as state court aggregation. Although Federal Rule of Civil Procedure 4(k) ties the personal jurisdiction of the federal district courts to the states in which they sit, MDL gets around this limit because of the unique way it is constructed. Because transfer into an MDL is limited to pretrial proceedings only, and the cases will have to be remanded to the districts where they were originally filed for trial, MDL is "simply not encumbered by considerations of in personam jurisdiction and venue."[107] It's the personal jurisdiction of the transferor court that matters. As long as the cases were originally filed in (or removed to) a federal district court that has personal jurisdiction, the MDL transferee court doesn't need an independent basis for personal jurisdiction over the temporarily transferred cases.[108] But once the cases have been consolidated into the MDL, they are generally litigated on an aggregate basis and almost always resolved in the MDL court—only a small fraction (less than 3%) are ever sent back.[109]

If this prediction is correct, then much of the mass-tort litigation that has been aggregated in state courts will wind up in federal MDL.[110] The combination of *Goodyear*, *Daimler*, and *Bristol-Myers* restricts plaintiffs' options for filing aggregate litigation in state court to those forums they are likely to find lease attractive. And CAFA's expansion of federal subject matter jurisdiction combined with MDL's personal jurisdiction flexibility makes the federal courts more accommodating of aggregate litigation. Plaintiffs who wish to aggregate their claims nationwide may prefer to do so in front of a federal MDL judge chosen by the Judicial Panel on Multidistrict Litigation rather than in front of a state court judge in the defendant's home state.

III. OPEN QUESTIONS AFTER CAFA, *DAIMLER*, AND *BRISTOL-MYERS*

The developments in subject-matter and personal jurisdiction at the federal level—particularly in the wake of *Bristol-Myers*—raise many unanswered questions. Justice Alito's opinion in *Bristol-Myers* professed modesty and purported to make no new law.[111] But in crafting such a narrow opinion, the Court ducked several thorny questions. Most importantly for our purposes: (1) Exactly how related must the claims be to the forum to establish specific jurisdiction? And (2) what about class actions? The new limitations on specific jurisdiction in aggregate litigation announced in *Bristol-Myers* also put pressure on courts and litigants to resolve a question left open after *Daimler*: (3) Do defendants consent to general jurisdiction by registering to do business in a state and

[106] Bradt & Rave, *supra* note 3, at 1294-95.

[107] In re FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

[108] Bradt & Rave, *supra* note 3, at 1296; *see also* In re Library Editions of Children's Books, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969). The defendant is not prejudiced, according to the Federal Judicial Panel on Multidistrict Litigation, because it can still object to the transferor court's personal jurisdiction or venue in the transferee court. *Id.* at 1142. Other federal courts have held that § 1407 functions like a nationwide service of process statute authorizing the MDL transferee court to exercise personal jurisdiction over plaintiffs nationwide. *E.g.*, Howard v. Sulzer Orthopedics, Inc., 382 F. App'x 436, 442 (6th Cir. 2010); In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425, 1432 (2d Cir. 1993); In re Agent Orange Prods. Liab. Litig., 818 F.2d 145, 163 (2d Cir. 1987). The MDL court's exercise of personal jurisdiction is also limited by the Fifth Amendment's Due Process Clause, which the Supreme Court noted in *Bristol-Myers* may operate differently from the Fourteenth Amendment's Due Process Clause. 137 S. Ct. at 1783-84. For further elaboration on these issues see Bradt & Rave, *supra* note 3, at 1296-99 and Bradt, *supra* note 69, at 1213-29.

[109] *See, e.g.*, Elizabeth Chamblee Burch, *Remanding Multidistict Litigation*, 75 LA. L. REV. 399, 400 (2014).

[110] Bradt & Rave, *supra* note 3, at 1294.

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

appointing an agent to receive service of process?

A. How Closely Related Must the Plaintiffs Claims Be to the Forum State?

While the U.S. Supreme Court in *Bristol-Myers* held that a state has no specific jurisdiction over the claims of plaintiffs who did not reside, purchase or use the defendant's product, or suffer injury in that state, it never explains what sorts of contacts *would* be sufficient. Could residents sue for injuries that occurred out of state? Could a plaintiff who purchased a product in another state sue in the state where he was injured (and where the defendant sells identical products to other consumers)? Could he sue in the state where he bought the product but did not suffer injury? At times the Court suggests that any of those connections might be enough.[112] But the Court never clarifies what kind of a "connection between the forum and the specific claims at issue" specific jurisdiction requires.[113]

The U.S. Supreme Court did not adopt Bristol-Myers's argument that the defendant's purposeful contacts with the forum state must be the "proximate cause" of the plaintiff's alleged injury—an approach that would have wreaked havoc on even simple claims arising out of products that cross state lines.[114] And the Court is careful to use the phrase "arises out of or relates to"—not just "arises out of"—when it refers to that prong of the specific jurisdiction analysis.[115] But the Court never explained exactly how "related" the plaintiffs' claims must be to the defendant's contacts with the forum state.[116]

B. What About Class Actions?

1. Litigation Classes

In *Bristol-Myers*, the U.S. Supreme Court did not address the question of personal jurisdiction in class actions.[117] Although the Court purports to leave the question open,[118] it is difficult to see how, under the logic of *Bristol-Myers*, most nationwide or multistate class actions could be maintained outside of a state where the defendant is subject to general jurisdiction. If specific jurisdiction over the defendant requires a connection between each plaintiff's claim and the forum state, then it will be difficult to find a single state (other than the defendant's home state) that would have the requisite connection with every class member's claim in a nationwide class.[119]

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[112] *Id.* at 1783 ("Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States.").

[113] *Id.* at 1781.

[114] *See id.* at 1788 n.3 (Sotomayor, J., dissenting) ("Bristol-Myers urges such a rule upon us . . . but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by [*Volkswagen*]."). For elaboration on the mischief that a "proximate cause" conception of the relatedness requirement would cause, see Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, Brief of Amicus Curiae Civil Procedure Professors in Support of Respondents 14-18, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466), *available at* https://ssrn.com/abstract=2955343.

[115] *Bristol-Myers*, 137 S. Ct. at 1780 (majority op.).

[116] Bradt & Rave, *supra* note 3, at 1280.

[117] *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting).

[118] *Id.* at 1782-83 (majority op.) (distinguishing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) as addressing the question of personal jurisdiction over absent class members, not over the defendant).

[119] Bradt & Rave, *supra* note 3, at 1282-85.

There may be some cases where all of the conduct that causes the class members' injuries nationwide occurred in some other single state (perhaps where the defendant has its manufacturing operations or directs a nationwide policy), and thus that state would have specific jurisdiction over all of the class members' claims. But, except in these sorts of circumstances, *Bristol-Myers* suggests that a multistate or nationwide class action may only be maintained in a state that can exercise general jurisdiction over the defendant—or in a state where the defendant consents to personal jurisdiction.[120]

While no federal circuit court has yet addressed the issue, several federal district courts have declined to apply *Bristol-Myers* to multistate class actions.[121] Some have simply ducked the issue, saying that *Bristol-Myers* addressed a mass action and has no direct impact on class actions.[122] Others have distinguished *Bristol-Myers* by characterizing absent class members as non-parties for the purposes of personal jurisdiction analysis; thus as long as the class representative's claim has a sufficient connection to the forum state there is personal jurisdiction over the class's claims, even if the class includes out-of-staters.[123]

This approach is plausible. *Bristol-Myers* did not overrule *Phillips Petroleum Co. v. Shutts*, which held that Oklahoma had personal jurisdiction over a nationwide class of plaintiffs (jurisdiction over the out-of-state defendant was not contested, most likely because everyone assumed it was subject to general jurisdiction in the days before *Goodyear*).[124] And the U.S. Supreme Court has, in the past, treated absent class members as parties for some purposes and not for others.[125] Having left the question open, the Court could treat the class more like an entity than an aggregation of individual claims, and look only to the class representative's claims when assessing personal jurisdiction, much as it ignores the citizenship of absent class members when assessing diversity jurisdiction under 28 U.S.C. § 1332(a).[126]

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[120] *Id.* at 1285.

[121] The D.C. Circuit is close to addressing the issue, having certified an appeal in *Molock v. Whole Foods Market, Inc.*, 317 F.3d 1 (D.D.C. 2018). What federal courts say about this issue is relevant to state courts. Even though *Bristol-Myers* suggests that the Fifth Amendment Due Process Clause need not be interpreted in lockstep with the Fourteenth Amendment, so long as Federal Rule of Civil Procedure 4(k) continues to tie the federal district court's personal jurisdiction to the states in which they sit, the federal courts are deciding same question presented to state courts. *See* Bradt & Rave, *supra* note 3, at 1286-87.

[122] *See, e.g.*, Molock v. Whole Foods Market, Inc., 297 F. Supp. 3d 114, 125 (D.D.C. 2018), motion to certify appeal granted, 317 F. Supp. 3d 1 (D.D.C. 2018); Brotz v. Simm Assoc., Inc., 2018 WL 4963692, at *2-3 (M.D. Fla. Oct. 15, 2018); *cf.* In re Chinese-Manufactured Drywall Products Liability Litigation, 2017 WL 5971622, at *17-19 (E.D. La. 2017) ("[I]t is clear and beyond dispute that Congress has constitutional authority to shape federal court's jurisdiction beyond state lines to encompass nonresident parties. And Congress has done so repeatedly—with Rule 4, MDLs, and class actions. Under Defendants' premise, [*Bristol-Myers*] would require plaintiffs to file fifty separate class actions in fifty or more separate district courts across the United States—in clear violation of congressional efforts at efficiency in the federal courts.").

[123] *See, e.g.*, Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 815, 819-20 (N.D. Ill. 2018); Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc., 2017 WL 4224723, at *5 (N.D. Cal. 2017); Feller v. Transamerica Life Insurance Company, 2017 WL 6496803, at *17 (C.D. Cal. 2017).

[124] 472 U.S. 797, 814 (1985).

[125] *Compare* Devlin v. Scardelletti, 536 U.S. 1, 4 (2002) (considering absent class members parties for purposes of appeal), *and* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 540 (1974) (treating absent class members as parties for statute-of-limitations tolling), *with* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 365-67 (1921), *overruled on other grounds in part by* Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 127 (1941) (not treating absent class members as parties for the complete diversity requirement).

[126] *Ben Hur*, 255 U.S. at 365–67. CAFA modifies these rules for the class actions it covers. *See* 28 U.S.C. § 1332(d) (2012). On the idea of a class action as an "entity," see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998). Judge Diane Wood has argued that personal jurisdictional

But, given recent trends in the Supreme Court's approach to personal jurisdiction, subject matter jurisdiction, and class action law, I wouldn't bet on it.[127] The more likely outcome is the one adopted by several other federal district courts: *Bristol-Myers* applies to class actions and makes multistate class actions difficult to sustain in states where the defendant is not subject to general jurisdiction.[128] The state courts do not appear to have given much consideration to whether *Bristol-Myers* applies to multistate class actions—most likely because CAFA largely keeps those cases out of state court.

The decision's apparent limitation on nationwide or multistate class actions is probably more consequential for the federal courts than for the state courts. CAFA had already moved most multistate class actions of any significant size to federal court anyway.[129] And *Bristol-Myers* poses no new obstacles for single-state class actions suing in the state where the class members were injured or reside[130]—though even these may be removable under § 1332(a) or CAFA. Indeed, *Bristol-Myers* may render CAFA largely superfluous in many of the scenarios the statute was intended to address. After *Bristol-Myers*, the central problem that CAFA aimed to fix—plaintiffs forum shopping for a rogue state court that would certify a tenuous nationwide class action to determine liability at a national scale—no longer exists.[131] Multistate class actions outside of the defendant's home state are largely a thing of the past. And CAFA is relegated primarily to allowing hometown defendants to remove multistate class actions filed in states where they are subject to general jurisdiction and mopping up single-state class actions that join non-diverse defendants.[132]

2. Settlement Classes

One type of multistate class action that can survive in state court after *Bristol-Myers*, however, is the settlement class action. While *Bristol-Myers* limits plaintiff-side forum shopping when the defendant objects, the defendant can always consent to personal jurisdiction in any state.[133] Because of this, state court judges need to be alert to the possibility that settlement class actions might be the product of the collusive practice known as a "reverse auction," where the defendant essentially shops a class action settlement around to the lowest bidder.[134]

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analysis should vary depending on the type of class action. For pure representational classes, like small-claims class actions and those seeking indivisible injunctive relief, specific jurisdiction over the named plaintiff's claims against the defendant should usually be sufficient for jurisdiction over the entire class's claims. For joinder-style classes, like most mass torts, it should not. Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 616-18 (1987).

[127] Bradt & Rave, *supra* note 3 at 1286; *see also* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. REV. 1313, 1367-74 (2005); Wood, *supra* note 126, at 614-18.

[128] *See, e.g.*, Mussat v. IQVIA, Inc., 2018 WL 5311903, at *3-6 (N.D. Ill. Oct. 26, 2018); DeBernardis v. NBTY, Inc., 2018 WL 461228 (N.D. Ill. Jan. 18, 2018); McDonnell v. Nature's Way Products, LLC, 2017 WL 4864910, at *4 (N.D. Ill. 2017); Wenokur v. AXA Equitable Life Insurance Company, 2017 WL 4357916, at *4 n.4 (D. Ariz. 2017); In re Dental Supplies Antitrust Litig., 2017 WL 4217115, at *9 (E.D.N.Y Sept. 20, 2017).

[129] *See supra* notes 6-30, and accompanying text.

[130] Though the Court is noncommittal on this point. *See Bristol-Myers*, 137 S. Ct. at 1783 ("[T]he plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could *probably* sue together in their home States.") (emphasis added); Bradt & Rave, *supra* note 3, at 1288; *see also* 2 NEWBERG, *supra* note 9 § 6:26.

[131] Bradt & Rave, *supra* note 3, at 1288.

[132] *Id.*; *see also* 28 U.S.C. §§ 1332(d), 1453.

[133] *See, e.g.*, ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY 176 (2007).

[134] *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282-83 (7th Cir. 2002) (Posner, J.) (describing how a

As a rule, defendants hate aggregation until the time comes to settle, and then they want as much aggregation as they can get.[135] A class action settlement binds all class members who do not opt out, forming a valuable shield for defendants from future liability.[136] Recognizing the peace that a class action settlement can provide and knowing that there are multiple plaintiffs' lawyers out there who would be delighted to serve as class counsel, the defendant can strike a deal with the lawyer willing to take the smallest sum for the largest class and then shop around for a state court willing to certify the class and approve the settlement (even if a state or federal court in its home state would not have).[137] The implicit bargain is that class counsel will collect a hefty fee award for little work and the defendant maximizes the preclusive effect of the class action settlement on the cheap.[138]

*Bristol-Myers'*s constriction of specific jurisdiction and the resulting limits on plaintiff-side forum shopping does little to limit the ability of the defendant and class counsel to shop for a forum that will approve their collusion at the expense of absent class members.[139] Defendants are not limited to settling class actions in their home states because they can consent to personal jurisdiction in any state. But under *Phillips Petroleum Co. v. Shutts*, absent class members will be deemed to have consented to the personal jurisdiction of the defendant and class counsel's handpicked state court, unless they opt out.[140] Class action settlements in state court are binding on class members and will have preclusive effect in all other courts, state and federal, even if they resolved claims that could never have been litigated there because the defendant would have objected to personal jurisdiction or some of the claims are beyond the state court's subject matter jurisdiction.[141] And CAFA does not allow absent class members to intervene and remove the class action to federal court to short circuit this sort of forum shopping.[142]

State courts must be on guard for this sort of collusion. If the defendant is consenting to personal jurisdiction in order to settle a nationwide class action, red flags should go up—particularly if there is parallel litigation pending in other states or in the federal courts that the settlement might undercut. This is not to say that every deal will be a bad deal. Peace can have value for both sides and a class action settlement is a good way to achieve peace.[143] But when parties start acting in ways that aren't consistent with their normal strategic moves, it's worth a close look.

C. Can Corporate Registration Statutes Support General Jurisdiction?

All states require out-of-state corporations to register if they want to do business in the state and use that state's court system.[144] And many states, in their registration statutes, require the out-

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reverse auction works); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-73 (1995); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2040 (2008).

[135] Bradt & Rave, *supra* note 3, at 1289.

[136] *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002).

[137] Coffee, *supra* note 134.

[138] Bradt & Rave, *supra* note 3, at 1289.

[139] *Id.*

[140] 472 U.S. at 813-14.

[141] *See Matsushita*, 516 U.S. at 367.

[142] *See* Robert H. Klonoff & Mark Hermann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1710 (2006) (noting that Congress considered and rejected including a provision in CAFA allowing any class member to remove class actions.).

[143] *See, e.g.*, Rave, *supra* note 100.

[144] *See* Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration" Statutes*, 73 N.Y.U.

of-state corporation to appoint an in-state agent to receive service of process.[145] These registration statutes raise the question: is registration and appointment of an agent to receive service of process enough to deem the corporation to have consented to general jurisdiction in the state? If the answer is "yes," then plaintiffs could aggregate nationwide claims against a corporation in any state where the defendant registered to do business, effectively circumventing *Goodyear* and *Daimler*.

Since *Pennoyer*, consent has always been a traditional basis for personal jurisdiction.[146] Over one hundred years ago, the U.S. Supreme Court held that a corporation's appointment of an in-state agent to receive service of process (as required by a state registration statute) could constitutionally be construed as consent to general jurisdiction within that state.[147] And since then, courts in a handful of states have interpreted their corporate registration statutes to confer general jurisdiction.[148] But the ground has shifted significantly with the Court's decisions in *Goodyear* in 2011 and *Daimler* in 2014. And it is an open question whether those earlier decisions survive the recent changes in personal jurisdiction doctrine. Since *Daimler*, courts have done one of three things:

(1) Many courts have attempted to duck the constitutional question by reading corporate registration statutes narrowly as consent to only *specific* jurisdiction or as simply a procedural mechanism for securing service of process with no jurisdictional effect (sometimes overruling prior decisions that had suggested a broader reading).[149] These courts reason that a registration statute that only requires appointment of an in-state agent to receive service of process does not give the corporation fair notice that it is implicitly consenting to be sued on any cause of action arising anywhere in the world.[150] Most corporate registration statutes are easily amenable to such a reading, as only Pennsylvania's statute expressly requires consent to general jurisdiction.[151] Though

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ANNUAL SURVEY OF AM. LAW 159, 159 (2018).

[145] *See* Kevin D. Benish, Note, Pennoyer's *Ghost: Consent, Registration Statutes and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. REV. 1609, 1647-61 (2015) (listing and summarizing all state registration statutes); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1345, 1363 n.109 (2015) (collecting statutes).

[146] Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

[147] Penn. Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93, 94-96 (1917).

[148] *See* Monestier, *supra* note 145, at 1366 n.125 (citing cases in Arizona, Delaware, Florida, Georgia, Iowa, Kansas, Mississippi, New Jersey, New Mexico, New York, Pennsylvania, and Vermont holding that corporate registration confers general jurisdiction). *But see* Genuine Parts Co. v. Cepec, 137 A.3d 123, 126 (Del. 2016) (subsequently holding that Delaware's registration statute does not confer general jurisdiction); Waite v. All Acquisition Corp., 901 F.3d 1307, 1318-1322 (11th Cir. 2018) (subsequently reading Florida Supreme Court case narrowly and holding that Florida's registration statute does not confer general jurisdiction); Dutch Run-Mays Draft, LLC v. Wolf Block, LLP, 164 A.3d 435, 446 (N.J. Super. Ct. 2017) ("In light of *Daimler*, we reject [an earlier] holding as allowing general jurisdiction solely based on the fiction of implied consent by a foreign corporation's compliance with New Jersey's business registration statute."). The Kansas statute that had been interpreted to confer general jurisdiction has since been repealed. *See* Monestier, *supra* note 145, at 1368 n.121.

[149] *See, e.g.*, Brown v. Lockheed Martin Corp., 814 F.3d 619, 623 (2d Cir. 2016) (reading Connecticut's registration narrowly); Waite v. All Acquisition Corp., 901 F.3d 1307, 1318-1322 (11th Cir. 2018) (reading Florida's registration statute narrowly); Figueroa v. BNSF Rwy. Co., 390 P.3d 1019 (Or. 2017) (en banc) (reading Oregon's statute narrowly); Delaware Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016) (overruling *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988), and reading Delaware's statute narrowly).

[150] *See, e.g.*, *Brown*, 814 F.3d at 640-41 (contrasting Connecticut's statute, which says nothing about general jurisdiction with Pennsylvania's, which expressly provides for general jurisdiction, and New York's, which has been authoritatively interpreted by the state courts to require consent to jurisdiction); *cf. id.* ("If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief.").

[151] 42 PA. CONS. STAT. § 5301; *see* Monestier, *supra* note 145, at 1367-68.

the state courts in a small number of other states have definitively construed their registration statutes to require consent to general jurisdiction, which could arguably give corporations adequate notice.[152]

(2) Other courts have refused to recognize corporate registration statutes as a basis for general jurisdiction. These courts reason that using registration statutes to force corporations to consent to general jurisdiction as a condition of doing business within the state runs contrary to *Daimler* and *Goodyear's* limitations on general jurisdiction.[153] In fact, in June 2019, a federal district court in Pennsylvania held that Pennsylvania's corporate registration statute, which expressly requires consent to general jurisdiction, is unconstitutional.[154] Other federal and state courts in Pennsylvania have reached contrary conclusions.[155]

(3) Finally, a handful of courts have recognized corporate registration statutes as implicit consent to general jurisdiction.[156] These courts reason that *Daimler* said nothing about consent and left intact the U.S. Supreme Court's 1917 decision in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, recognizing that registering to do business and appointing an agent to receive service of process amounts to consent to general jurisdiction.[157] These courts see no unfairness in conditioning the privilege to do business in a state on out-of-state corporations consenting to the same jurisdiction that in-state corporations are subject to. And because consent is an independent basis for exercising jurisdiction, *Daimler's* "at home" analysis does not apply.[158] Indeed, implied consent may be the foundation for holding a corporation subject to general jurisdiction in its state of incorporation, where it may have no other contacts whatsoever.[159]

It is worth noting that the vast majority of states have not interpreted their corporate registration statutes to require consent to general jurisdiction. And no state has amended its corporate registration statute since *Goodyear* to expressly require consent to general jurisdiction, though there has been some movement in that direction in the New York legislature.[160] So, constitutional questions aside, most states will not find themselves playing host to multistate aggregate litigation against out-of-state defendants who have registered to do business in the state.

It remains an open question whether even corporate registration statutes that expressly require consent to general jurisdiction could survive a federal constitutional challenge. Aside from the due process argument that such statutes are inconsistent with *Goodyear* and *Daimler*, the statutes would also have to survive challenges based on unconstitutional conditions and the dormant

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[152] *See, e.g.*, Steuben Foods, Inc. v. Oystar Grp., 2013 WL 2105894, at *3 (W.D.N.Y. May 14, 2013) ("For more than sixty years, New York courts have determined that general jurisdiction may be asserted over a corporation solely on the basis that it has registered to do business in the forum."). *But see* Amelius v. Grand Imperial LLC, 64 N.Y.S. 3d 855 (N.Y. Sup. Ct. 2017) (refusing to follow earlier understanding of New York's registration statute after *Daimler*).

[153] *Cf.* Cepec, 137 A.3d at 147 ("*Daimler*'s reasoning indicates that such a grasping assertion of state authority is inconsistent with principles of due process, and impliedly, with interstate commerce.").

[154] In re Asbestos Prods. Liability Litig. (No. VI), __ F. Supp. 3d __, 2019 WL 2399738 (E.D. Pa. June 6, 2019).

[155] *See, e.g.*, Allstate Ins. Co. v. Electrolux Home Prods., 2018 WL 3707377, at *4 (E.D. Pa. Aug. 3, 2108) ("In the wake of *Daimler*, federal district courts in Pennsylvania have consistently found that the Third Circuit's decision in *Bane* remains good law and that Pennsylvania's consent-by-registration statute remains a proper basis for personal jurisdiction."); Webb-Benjamin, LLC v. Int'l Rug Grp., LLC, 192 A.3d 1133, 1139 (Pa. Super. Ct. 2018).

[156] *See, e.g.*, Rodriguez v. Ford Motor Co., __ P.3d __, 2018 WL 6716038 (N.M. Ct. App. Dec. 20, 2018) (interpreting New Mexico registration statute to confer general jurisdiction and finding that constitutional).

[157] 243 U.S. 93, 94-96 (1917).

[158] *See Rodriguez*, 2018 WL 6716038, at *5.

[159] *See* Chase, *supra* note 144, at 188.

[160] *See id.* at 196; Clopton, *supra* note 26, at 442.

Commerce Clause.[161] Some have questioned whether a corporation's consent to general jurisdiction could be genuine if it is extracted as a condition of doing business in the state.[162] The U.S. Supreme Court will have to weigh in eventually. It would be a strange irony for the Court to find corporate consent to an explicit registration statute invalid, but to enforce forum selection clauses and arbitration clauses in consumer contracts of adhesion based on a similarly thin reed of consent.[163] But perhaps not a surprising irony.[164]

IV. WHAT'S LEFT FOR THE STATE COURTS IN AGGREGATE LITIGATION?

While recent federal trends in both subject matter and personal jurisdiction doctrine act to limit opportunities for aggregate litigation in state court and may encourage either plaintiffs or defendants or both to invoke federal jurisdiction, several viable avenues remain. What kinds of aggregate cases are likely to be left in state courts? The major forms are likely to be:

- *Single-state class actions raising state law claims*: If the class is composed solely of forum state residents and at least one significant defendant is also a forum state resident, then the state court should have specific jurisdiction over all of the class members' claims under *Bristol-Myers*, and the class action will fit into the CAFA exceptions.
- *Single-state mass joinders raising state law claims*: Similarly, if all of the plaintiffs in a mass joinder are forum state residents, *Bristol-Myers* is likely satisfied, and it shouldn't be hard for the plaintiffs to structure the action to avoid CAFA. The real question is whether these cases are economically viable for plaintiffs' lawyers or whether they would prefer some form of multistate aggregation in a different forum.
- *Multistate class actions in the defendant's home state where more than a third of the class members are also from that state*: Personal jurisdiction is no obstacle when the defendant is sued at home, but a significant number of class members will also have to be from the forum state to fit into CAFA's exceptions. This may be a small set of cases, as the exception to CAFA is discretionary until the proportion of home-state class members reaches two thirds, and personal jurisdiction would become a problem if the plaintiffs tried to join an out-of-state defendant.
- *Nationwide mass joinders in the defendant's home state*: Again, personal jurisdiction is no obstacle when the defendant is sued at home, and plaintiffs should be able to structure their actions to avoid CAFA. But personal jurisdiction becomes a problem again if plaintiffs try

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[161] *See, e.g.*, In re Asbestos, 2019 WL 2399738, at *8-9; D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1 (1990); T. Griffin Vincent, *Toward A Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 482-85 (1989).

[162] *See, e.g.*, Monestier, *supra* note 145, at 1347.

[163] *See* Chase, *supra* note 144, at 182-83 (discussing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), where the Court enforced a forum selection clause in a contract of adhesion and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), where the Court enforced an arbitration clause with a class action waiver in a contract of adhesion).

[164] *Compare* Am. Express Co. v. Italian Colors, 570 U.S. 228 (2013) (enforcing arbitration clause with class action waiver even when it afforded the plaintiffs no realistic opportunity to vindicate their rights), *with* Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) ("Such exorbitant exercises of 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.") (quotation marks omitted) *and* BNSF Ry. Co. v. Tyrell, 137 S. Ct. 1549 (2017) (holding that Federal Employee Liability Act does not subject railroad corporations to general jurisdiction in states where they do business).

to join an out-of-state defendant. And plaintiffs may prefer to file in federal court and allow their claims to be consolidated into an MDL than to litigate on the defendant's home turf.

- *Multistate settlement class actions where the defendant consents to personal jurisdiction*: If both the defendant and class counsel wish to resolve a multistate class action through settlement, they can do so in the state court of their choice by consenting to personal jurisdiction and not invoking CAFA. State courts should be alert to the possibility that these are collusive settlements.
- *Parens patriae actions or other public enforcement*: When a state sues in its own courts on behalf of its own citizens, CAFA does not apply, and personal jurisdiction is unlikely to be a serious obstacle.

CONCLUSION

Recent federal trends have made it more difficult to maintain many forms of aggregate litigation in state court. CAFA's expansion of federal subject matter jurisdiction has opened the federal courts to more forms of aggregate litigation and made it easier for defendants to remove aggregate litigation from the state courts, even if plaintiffs would prefer to litigate there. The U.S. Supreme Court's recent constriction of both general and specific personal jurisdiction has further limited which states will be available to hear aggregate claims on a nationwide basis. Although several important questions remain open, the combined effect of these changes will likely drive more aggregate litigation into federal court. Still, several viable avenues for state court aggregation remain open.