SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 71 | Issue 3 Article 6

2021

23 and Me: *Bristol-Myers Squibb*, Federal Class Actions & the Non-Party Approach

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— Note —

23 AND ME: *BRISTOL-MYERS SQUIBB*, FEDERAL CLASS ACTIONS & THE NON-PARTY APPROACH

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INTRODUCTION

Nationwide class actions have played a significant role in the U.S. legal system.[1] When a company participates in misconduct that affects a large group of people, the class action is one of the best vehicles for vindicating that group's rights.[2] Due to recent developments in personal-jurisdiction jurisprudence, the class-action device is being threatened with a blow that would severely limit its application. To best understand, consider the following hypothetical: Hurricane Katrina decimated much of the lower eastern quarter of the United States. Massive rebuilding efforts—and the Florida housing bubble—caused drywall to be in short supply.[3] To fix the shortage, drywall from China was imported to the U.S. and used in homes throughout the coastal states.[4] Not long after installation, the drywall began to give off unpleasant odors, corrode wiring, and cause homeowners to feel physically ill.[5] Imagine a Florida resident has been adversely affected by the use of the drywall in her home. Meanwhile, a class action based on the same grievances as our Florida resident is filed in a Louisiana federal court and passes the certification process. Assume the Florida resident is one of several thousand unnamed plaintiffs in the class action from out of state. The defendant moves to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2).[6] After *Bristol-Myer Squibb Co. v. Superior Court*[7] ("*BMS*")—holding that a California court lacked personal jurisdiction over out-of-state-plaintiff claims in a mass-tort action—should the federal court grant the motion to dismiss?

In her dissenting opinion in *BMS*, Justice Sotomayor made clear that the Supreme Court did not reach the question of whether its ruling applied to class actions.[8] And after *BMS*, federal courts are split on the issue. Out of 104 cases, fifty federal courts have held that *BMS* extends

1. Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205, 206 (2019).

2. *Id.*

3. *Contaminated Drywall: Examining the Current Health, Housing and Product Safety Issues Facing Homeowners*: *Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, and Ins. of the S. Comm. on Com., Sci., and Transp.*, 112th Cong. 2 (2011) (statement of Sen. Roger F. Wicker).

4. *Id.*

5. *Id.*

6. *See, e.g.*, *In re* Chinese Manufactured Drywall Prods. Liab. Litig., No. 09-2047, 2017 WL 5971622, at *1–3 (E.D. La. Nov. 30, 2017). Facts proposed in the hypothetical are loosely based on the facts of this case.

7. 137 S. Ct. 1773 (2017).

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

to class actions, forty did not reach a holding, and fourteen held that *BMS* does not extend to class actions.[9] Some have argued that the question is not whether *BMS* applies to class actions but rather how it applies.[10] Rather than examining each and every context in which a class action may arise in federal court and altering the analysis accordingly, this Note endorses a simpler resolution to the problem: *BMS* does not apply to unnamed plaintiffs in class actions in federal court because absent class members are not parties to the lawsuit for personal-jurisdiction purposes.[11]

The non-party approach was previously affirmed by the Supreme Court with regard to subject matter jurisdiction in class actions, and the rationale the Court applied for doing so applies equally in the personal-jurisdiction context.[12] Moreover, the non-party approach to personal jurisdiction in class actions has been adopted by several federal district courts as well as a federal court of appeals.[13] Failure to apply this rule would be contrary to judicial efficiency and conflict with ease of administration—two of the core purposes of the class device.[14] While this Note assumes that *BMS* likely applies to named plaintiffs, categorizing absent class members as non-parties significantly diminishes *BMS*'s effects on class actions. Under this approach, the out-of-state status of an unnamed plaintiff would be irrelevant. As a result, all the plaintiff class would need to do to satisfy personal jurisdiction would be to file the action in a federal court in any state,[15] a federal court in

9. Wilf-Townsend, *supra* note 1, at 212–13.

10. *Id.* at 208.

11. Throughout the remainder of this Note, I will refer to this as the "non-party approach" or "the non-party rule."

12. *See* Devlin v. Scardelleti, 536 U.S. 1, 10 (2002). In Devlin, the Court reasoned:

> The rule that nonnamed class members cannot defeat complete diversity is likewise justified by the goals of class litigation. Ease of administration of class actions would be compromised by having to consider the citizenship of all class members, many of whom may even be unknown, in determining jurisdiction. Perhaps more importantly, considering all class members for these purposes would destroy diversity in almost all class actions. Nonnamed class members are, therefore, not parties in that respect.

Id. (citation omitted).

13. *See* Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018); Jones v. Depuy Synthes Prods., Inc., 330 F.R.D. 298, 311 (N.D. Ala. 2018); *see also* Mussat v. IQVIA Inc., 953 F.3d 441, 447 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021).

14. *Al Haj*, 338 F. Supp. 3d at 822.

15. This is when the Fifth Amendment applies for personal jurisdiction. *See infra* Part I.B.2.b.

a state to which the named plaintiff has a connection, or a state where the defendant is incorporated or has its principal place of business.[16]

Part I of this Note discusses modern personal-jurisdiction juris–prudence and highlights recent developments in the law. Part II gives an overview of *BMS* and a brief description of class actions, detailing the certification process and describing a major difference between class actions and mass tort actions. Part III introduces the non-party approach and its application in other areas of class actions, and explains why it should be extended to personal jurisdiction. Lastly, Part IV responds to common arguments against applying the non-party rule to personal jurisdiction in class actions.

I. PERSONAL JURISDICTION TODAY

The modern era of the personal-jurisdiction doctrine began in 1945 with the landmark case of *International Shoe Co. v. Washington*.[17] In *International Shoe*, the Court abandoned the territorial sovereignty theory to focus solely on the Due Process Clause of the Fourteenth Amendment.[18] In doing so, the Court developed the well-known minimum contacts test used for specific jurisdiction today.[19]

Since *International Shoe* was decided in 1945, the personal jurisdiction doctrine has gone through many changes. The two cases that have attracted the most attention recently—*BMS* and *Daimler AG v. Bauman*[20]—were decided by the Supreme Court in 2017 and 2014, respectively. While *Daimler* concerned issues of general personal jurisdiction and *BMS* addressed specific personal jurisdiction, both cases narrowed the circumstances in which courts can exercise personal jurisdiction over defendants. To best understand the current state of both specific and general personal jurisdiction, it is best to analyze each separately.

16. These latter two are when the Fourteenth Amendment applies. *See infra* Part I.B.2.a.

17. 326 U.S. 310 (1945). *See also* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 12 (2006) (describing *International Shoe* as "the fountainhead of modern personal jurisdiction doctrine").

18. Parrish, *supra* note 17, at 12.

19. *Int'l Shoe*, 326 U.S. at 316 ("[D]ue process requires only that in order to subject a defendant to a judgement *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). *See infra* Part I.B.

20. 571 U.S. 117 (2014).

A. General Personal Jurisdiction

General personal jurisdiction allows a court to hear "any and all claims" against a foreign defendant regardless of whether those claims arose from the defendant's in-state activity.[21] Prior to 2014, the general personal jurisdiction analysis was primarily "contact-based."[22] The theory was that if a defendant had "continuous and systematic contacts" in the forum state, then general personal jurisdiction over the defendant was warranted.[23] In 2014, the Supreme Court threw a wrench in the general personal jurisdiction framework in its decision in *Daimler*.[24] Now, for general personal jurisdiction to exist, the defendant must be "at home" in the forum state, or in other words, the forum state must be the defendant's state of incorporation or where its principal place of business is located.[25]

B. Specific Personal Jurisdiction

A court that lacks general personal jurisdiction may still have specific personal jurisdiction over a party. Unlike general personal jurisdiction, specific jurisdiction does not allow a court to hear any and all claims against the defendant. Instead, the plaintiff's claims must arise out of the defendant's in-forum activity.[26]

The specific personal jurisdiction analysis is a multi-step framework that varies depending on whether a case is in state or federal court. The first step of the analysis, however, is usually the same regardless of the forum. That is, courts will determine whether the exercise of personal

21. Foreign in this context refers to a defendant from either a different state or foreign country. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (defining foreign as "sister-state or foreign country").

22. *Id.* ("A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." (quoting *Int'l Shoe*, 326 U.S. at 317)).

23. *Id.* at 922 (citation omitted).

24. 571 U.S. at 138–39.

25. *Id.* at 137, 139.

26. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). The Court explained:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [the] "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities.

Id. (footnote omitted) (first quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984); and then quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

jurisdiction in a case is authorized by the appropriate legislative body.[27] If a court finds that personal jurisdiction was authorized, the court must then determine "whether the exercise of jurisdiction 'comports with the limits imposed by . . . due process.'"[28]

1. Authorization by the Appropriate Legislative Body

To determine whether Congress authorized the exercise of personal jurisdiction in a particular instance, federal courts will look to either the federal statute under which the claim arises or the Federal Rules of Civil Procedure.[29] Rule 4 of the Federal Rules of Civil Procedure governs personal jurisdiction in federal court.[30] Under Rule 4(k), there are several ways a federal court can establish jurisdiction over a defendant. First, federal courts may exercise jurisdiction over defendants who are subject to personal jurisdiction in the state in which the federal court sits through service of process or the filing of a waiver of service.[31] If a case is in state court the state's long-arm statute dictates whether the exercise of personal jurisdiction is appropriate.[32] Some states have liberal long-arm statutes that confer jurisdiction to the full extent authorized by the Due Process Clause of the Fourteenth Amendment. For example, California's long-arm statute provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[33] Other states may take a more restrictive approach, limiting the scenarios where jurisdiction exists. New York is an example of a state that has a long-arm statute that is more limited in scope.[34]

27. If it is a federal question case in federal court, courts will look to the federal statute under which the claim arises or more generally the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 4(k)(1)(A). If the case is in state court, courts will look to the state's long-arm statute. *See* Walden v. Fiore, 571 U.S. 277, 283 (2014) (looking first to Nevada's statutory law to determine to what extent it authorizes personal jurisdiction over defendants).

28. *Walden*, 571 U.S. at 283 (quoting *Daimler*, 571 U.S. at 125).

29. *See* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 (4th ed. 2019).

30. *See id.*

31. FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.").

32. *See* 4 WRIGHT & MILLER, *supra* note 29, § 1069.

33. CAL. CIV. PROC. CODE § 410.10 (West 2019).

34. N.Y. C.P.L.R. 302 (McKinney 2008). The statute provides:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-

Another way for a federal court to establish personal jurisdiction over a defendant is under Rule 4(k)(2), which provides that a federal court has personal jurisdiction in a federal question case if "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and exercising jurisdiction is consistent with the United States Constitution and laws."[35]

The last way for a federal court to establish jurisdiction over a defendant is if the assertion of jurisdiction was authorized by Congress in the statute giving rise to the cause of action.[36] For example, the Employee Retirement Income Security Act (ERISA) authorizes jurisdiction in "the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."[37]

2. Due Process Standards

Legislative authorization to exercise personal jurisdiction over a particular defendant alone is insufficient. The exercise of jurisdiction must also comport with constitutional due-process requirements. The due-process standard that applies differs depending on the case. The

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> domiciliary, or his executor or administrator, who in person or through an agent:
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> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

Id.

35. FED. R. CIV. P. 4(k)(2).

36. FED. R. CIV. P. 4(k)(1)(C) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . when authorized by a federal statute.").

37. 29 U.S.C. § 1132(e)(2) (2012).

key determination is whether the Fifth or the Fourteenth Amendment governs.

a. Fourteenth Amendment Due Process

The Due Process Clause of the Fourteenth Amendment controls the personal jurisdiction analysis when: (1) the case is in state court; (2) the case is heard by a federal court sitting in diversity jurisdiction applying state law; or (3) the federal statute under which the claim is brought does not authorize personal jurisdiction.[38]

Minimum Contacts, Purposeful Availment, and Connection

Under the Fourteenth Amendment, for a court to exercise specific personal jurisdiction over a defendant, the defendant first must have "contacts, ties, or relations" in the forum.[39] This is often referred to as the minimum-contacts requirement.[40] Predicting whether a defendant has sufficient contact with a forum to satisfy this test can be difficult, as the Supreme Court itself has struggled to give a clear answer as to exactly what constitutes minimum contacts.[41] Ultimately, the inquiry is highly fact-specific and will vary from case to case.

The presence of minimum contacts alone, however, is not sufficient to support personal jurisdiction. The defendant must also have purposefully availed itself to the forum—a requirement which is said to "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or third person.'"[42] Purposeful availment occurs when a defendant has "deliberately . . . engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum."[43]

38. FED. R. CIV. P. 4(k). *See also* 4 WRIGHT & MILLER, *supra* note 29, § 1064.

39. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

40. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) ("Once it has been decided that a defendant purposefully established *minimum contacts* . . . .") (emphasis added).

41. *See*, *e.g.*, Shaffer v. Heitner, 433 U.S. 186, 227–28 (1977) (Brennan, J, concurring in part and dissenting in part) (disagreeing with the majority's approach to a minimum-contacts analysis).

42. *Burger King*, 471 U.S. at 475 (first quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 773–74 (1984); then quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1979); and then quoting Helicopters Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).

43. *Id.* at 475–76 (first quoting *Keeton*, 465 U.S. at 781; and then quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950)).

Lastly, the claims brought against a defendant must also arise from the defendant's contacts within the state. In other words, there has to be a connection between the forum and underlying legal controversy that establishes jurisdiction.[44] In *BMS*, the Court made it clear that this requirement could not be relaxed just because a defendant has extensive contacts within a state.[45] Despite maintaining widespread business operations in the state, the out-of-state plaintiffs could not show a connection between their claims, the state, and Bristol Myers Squibb, and therefore the Court held that there was no jurisdiction.[46]

Traditional Notions of Fair Play and Substantial Justice

If a defendant is found to have purposefully established minimum contacts within a state and the plaintiff's claims arise out of those contacts, courts then consider a number of other factors to decide whether the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice."[47] 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 several States in furthering fundamental substantive social policies."[48]

b. Fifth Amendment Due Process Personal Jurisdiction Standards

The Fifth Amendment, rather than the Fourteenth, controls the personal jurisdiction analysis in federal question cases in which: (1) the defendant is out of reach of any state's long-arm statute; or (2) the federal statute under which the claim arises authorizes personal jurisdiction and nationwide service of process.[49] In the absence of either, even if a case is in federal court, the Fourteenth Amendment applies.[50]

44. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017).

45. *Id.* at 1781 (rejecting a sliding-scale approach).

46. *Id.* at 1779, 1781.

47. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (quoting Miliken v. Meyer, 311 U.S. 457, 463 (1940)).

48. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980) (citations omitted).

49. *See* FED. R. CIV. P. 4(k)(1)–(2); 4 WRIGHT & MILLER, *supra* note 29, § 1068.1.

50. 4 WRIGHT & MILLER, *supra* note 29, § 1068.1.; *see also* FED. R. CIV. P. 4(k)(1)(A) (making personal jurisdiction dependent on whether a state

What limitations the Fifth Amendment places on the ability of federal courts to assert personal jurisdiction over a defendant is a question that the Court left open in *BMS*[51] and did not address on two other occasions.[52] While lower courts have addressed the issue, they have reached varying conclusions as to what the Fifth Amendment personal-jurisdiction framework looks like.[53]

In federal question cases, the Fifth Amendment personal-jurisdiction inquiry changes to a national-contacts test.[54] For a federal court to exercise jurisdiction over a defendant under the national-contacts test, the defendant must have minimum contacts in the United States.[55] This analysis is similar to the requirements imposed by the Fourteenth Amendment, the key difference being that the scope is na–tional rather than confined to the borders of an individual state.[56] One unclear part of the Fifth Amendment personal-jurisdiction standard is what weight should be given to the fairness factors, if any.[57] The fairness test incorporates notions from the Fourteenth Amendment iterated in *International Shoe*[58], and allows the exercize of jurisdiction when:

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court of general jurisdiction could exercise jurisdiction under the Fourteenth Amendment).

51. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1784 (2017) ("[W]e leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.").

52. *See* Omni Cap. Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (acknowledging the unsettled Fifth Amendment argument); Asahi Metal Indus. Co., v. Superior Ct., 480 U.S. 102, 113 n.* (1987) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over . . . defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.").

53. *Compare* Saudi v. Northrop Grumman Corp., 427 F.3d 271, 275 (4th Cir. 2005) (finding sufficient contacts constitutionally necessary for the exercise of a court's jurisdiction under Rule 4(k)(2)), *with* Bally Gaming, Inc. v. Kappos, 789 F. Supp. 2d 41, 45 (D.D.C. 2011) ("[W]hen this Court derives its personal jurisdiction over a defendant from a federal statute's nation–wide-service-of-process provision, the Due Process Clause of the Fifth Amendment does not require that the defendant also have minimum contacts with this district.").

54. 4 WRIGHT & MILLER, *supra* note 29, § 1068.1.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–19; *see also* 4 WRIGHT & MILLER, *supra* note 29, § 1068.1.

> The combination of the federal interest in furthering fundamental social policies, the judicial system's interest in the efficient resolution of controversies, the particular forum's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief outweigh the burden on the defendant.[59]

For federal courts that use the fairness approach, personal jurisdiction will be upheld if the defendant has both minimum contacts in the United States and if doing so is consistent with traditional notions of "fair play and substantial justice."[60] For courts that do not incorporate the fairness approach under the Fifth Amendment, the personal-jurisdiction framework can be understood as due process allowing the assertion of jurisdiction so long as "the federal interest in furthering fundamental objectives or policies rises to a constitutional level."[61]

II. OVERVIEW OF *BRISTOL-MYERS SQUIBB* AND RULE 23 CLASS ACTIONS

A. Bristol-Myers Squibb*: The Beginning of a New Limitation*

BMS was a mass-tort action brought in a California state court based on a products-liability claim.[62] The plaintiffs alleged that BMS's drug Plavix adversely affected their health.[63] Most of the 678 plaintiffs were not residents of California.[64]And while BMS had extensive business operations in the state, the out-of-state plaintiffs did not ingest or purchase Plavix in California and therefore had no connection to the state.[65] The Court's analysis in part focused on the burden placed on the defendant if forced to litigate the case in California.[66] According to the Court, determining the burden on a defendant under the personal-jurisdiction analysis is just as much about "territorial limitations on the power of the respective States" as it is not wanting to subject a defendant to "inconvenient or distant litigation."[67]

59. 4 WRIGHT & MILLER, *supra* note 29, § 1068.1.

60. *Id.*

61. *Id.*

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

63. *Id.*

64. *Id.*

65. *Id.* at 1781.

66. *Id.* at 1780.

67. *Id.* (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

In reaching its holding, the Court rejected what it referred to as a "sliding scale" approach used by the California Supreme Court.[68] The California Supreme Court opined that the greater the defendant's contacts in the state, the less need there was for a strong connection between the claims and the forum state.[69] BMS employed over 400 people, maintained six research, development and policymaking facilities, and enjoyed $1 billion in sales in California.[70] Nevertheless, the Court held that there was no personal jurisdiction.[71] The dispositive fact was the lack of connection between the nonresident plaintiffs' claims and the forum.[72]

It did not take long for the effects of *BMS* to trickle down to the lower courts. Hours after *BMS* was decided, a judge in St. Louis, Missouri, granted a mistrial in a wrongful death suit against Johnson & Johnson.[73] The underlying claim was that Johnson & Johnson's talcum powder caused ovarian cancer, which allegedly led to the deaths of all three plaintiffs.[74] At trial, the plaintiffs were awarded $72 and $55 million.[75] But just after *BMS* was decided, Johnson & Johnson moved for a mistrial, claiming that the court lacked jurisdiction over the plaintiffs' claims because two of the three plaintiffs were from out of state and did not use or purchase the talcum powder in Missouri.[76] The plaintiffs argued that Johnson & Johnson sold the product in the state, so their claim related to the defendant's contact in the forum.[77] Because of *BMS*, however, the judge ruled in favor of Johnson & Johnson.[78] While the Johnson & Johnson case is a prime example of *BMS*'s effects

68. *Id.* at 1781.

69. *Id.* at 1778.

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

71. *Id.* at 1783 (majority opinion).

72. *Id.* at 1781 ("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.").

73. Richard Levick, *The Game Changes: Is* Bristol-Myers Squibb *the End of an Era?*, FORBES (Jul. 11, 2017, 02:21 PM), https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/#18fabed32e83 [https://perma.cc/VRV7-MLJG].

74. Jane Akre, *J&J Granted Mistrial in Latest Talc Case in MO.*, MESHNEWSDESK (July 19, 2017), https://www.meshmedicaldevicenewsdesk.com/articles/jj-granted-mistrial-latest-talc-case-mo [https://perma.cc/4J9M-QLJT].

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

on forms of joined representation that are very similar to mass actions, the question left open after *BMS* is in what other contexts outside of mass-tort actions does its holding apply.

B. Rule 23 Class Actions

The class-action device serves an important role in our legal system. The rationale for having such a form of legal representation is to efficiently resolve the claims of several individuals in a single action.[79] The idea is that by consolidating claims into a single action, courts can avoid repetitive litigation, inconsistent outcomes on claims based on related events, and provide relief for individuals who could not vindicate their rights in individual law suits.[80] Before a case can move forward as a class action, the party seeking class treatment must file for class certification.[81]

1. Four Types of Class Actions

There are four different forms of classes under Rule 23.[82] First, Rule 23(b)(1)(A) classes are warranted when the adjudication of individual cases would result in "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class."[83] The purpose of Rule 23(b)(1)(A) is to shield the party opposing the class from inconsistent judgments.[84]

Second, Rule 23(b)(1)(B) classes are appropriate when the adjud–ication of individual cases would potentially result in "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."[85] The text of the rule makes clear that the purpose of Rule 23(b)(1)(B) is to protect the members of the class.[86]

79. 7A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1754 (3d ed. 2002 & Supp. 2020).

80. *Id.*

81. Libby Jelinek, *The Applicability of the Federal Rules of Evidence at Class Certification*, 65 UCLA L. Rev. 280, 282 (2018).

82. Robert H. Klonoff, *The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 Miss. Coll. L. Rev. 261, 263 (2005).

83. Fed. R. Civ. P. 23(b)(1)(A). *See also* Klonoff, *supra* note 82, at 263.

84. Klonoff, *supra* note 82, at 263.

85. Fed. R. Civ. P. 23(b)(1)(B). *See also* Klonoff, *supra* note 82, at 263.

86. Klonoff, *supra* note 82, at 263.

Third, a Rule 23(b)(2) class is proper when the "party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[87] Rule 23(b)(2) classes are often used in civil rights cases and "other suits seeking primarily structural relief."[88]

Lastly, a Rule 23(b)(3) class is fitting in two situations. First, when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members," and second, when the court determines that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[89]

Regardless of what type of class is appropriate under 23(b), the party seeking class status must first satisfy all the requirements in Rule 23(a). Rule 23(a) states that there must be: (1) numerosity; (2) com–monality; (3) typicality; and (4) adequacy.[90] Numerosity requires that the plaintiff prove the class size is so large that joinder of all members would be impracticable.[91] To prove commonality, plaintiffs must show that members' claims include "questions of law or fact common to the class."[92] Typicality requires the plaintiff(s) to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[93] And adequacy requires the plaintiff(s) to demonstrate that the "representative parties will fairly and adequately protect the interests of the class."[94] If the proposed class can survive 23(a), it must then fulfill the conditions of one of the three subcategories of 23(b).[95]

2. Named and Unnamed Plaintiffs: Class Actions Distinguished from Mass Actions

BMS began as eight separate actions that were eventually consolidated into a mass action tort lawsuit under section 404 of the

87. FED. R. CIV. P. 23(b)(2). *See also* Klonoff, *supra* note 82, at 263.

88. Klonoff, *supra* note 82, at 263.

89. FED. R. CIV. P. 23(b)(3). *See also* Klonoff, *supra* note 82, at 263.

90. FED. R. CIV. P. 23(a).

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

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

California Civil Procedure Code.[96] In a section 404 mass action, there are no "absentee litigants," or in other words, every plaintiff in the case is a named party.[97] The effect of this is that "each joined plaintiff may make different claims requiring different responses."[98] Unlike mass actions, in class actions there are two categories of plaintiffs: the representatives of the class (named plaintiffs), and the absent class members (unnamed plaintiffs).[99] Because of Rule 23(a)'s requirements, after certification, the defendant is presented with a "unitary, coherent claim to which it need respond only with a unitary, coherent defense."[100] In several of the cases addressing the application of *BMS* to class actions, courts have focused on the distinction between the two, and rightfully so.[101]

III. THE NON-PARTY APPROACH

At the time this Note is being written, the issue of whether *BMS* applies to class actions has come before two circuit courts of appeals. First, in *Mussat v. IQVIA*, the Seventh Circuit unanimously held that *BMS* does not apply to unnamed plaintiffs in class actions.[102] That court took a similar position to the one argued in this Note—that unnamed class members should not be considered parties for personal-jurisdiction purposes.[103] The court explained that considering only named plaintiffs for personal jurisdiction has always been the approach, and there is nothing to indicate that *BMS* changed anything with regard to class actions.[104] The Supreme Court, in several cases involving nationwide class actions where the basis for personal jurisdiction was specific personal jurisdiction, did not raise a jurisdictional issue with regard to

96. Mussat v. IQVIA, Inc., 953 F.3d 441, 446 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021).

97. CAL. CIV. PROC. CODE § 404 (West 2019).

98. Knotts v. Nissan N. Am. Inc., 346 F. Supp. 3d 1310, 1334 (D. Minn. 2018)

99. 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:5 (5th ed. 2020).

100. Sanchez v. Launch Tech. Workforce Sols., L.L.C., 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

101. *See id.*; Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 815, 819 (N.D. Ill. 2018); Jones v. Depuy Synthes Prods., Inc., 330 F.R.D. 298, 311 (N.D. Ala. 2018).

102. 953 F.3d 441, 443 (7th Cir. 2020).

103. *Id.* at 447.

104. *Id.* at 445.

the unnamed class members' claims.[105] The Seventh Circuit also reasoned that it would be illogical to take a non-party approach for subject matter jurisdiction and venue in class actions, but not personal jurisdiction.[106]

Meanwhile, in *Molock v. Whole Foods Market Group, Inc.*, the D.C. Circuit declined to address whether *BMS* applied to class actions in federal court.[107] Instead, the court held that because the class was not yet certified, a ruling on the merits of the defendant's motion to dismiss the nonresident putative class members' claims for lack of personal jurisdiction was premature because putative class members were not parties before the court.[108] A dissenting judge concluded that *BMS* applies to class actions in federal court.[109] The dissenter rejected the plaintiff's argument that absent class members are not parties for the purposes of personal jurisdiction.[110] He reasoned that for purposes of personal jurisdiction, "the party status of absent class members seems to . . . be irrelevant," because "[a] court that adjudicates claims asserted on behalf of others in a class action exercises coercive power over a defendant just as much as when it adjudicates claims of named plaintiffs in a mass action."[111]

A. Judicial Affirmance of the Non-Party Rule in other Class Action Contexts

The notion that unnamed plaintiffs in certified class actions are parties to a litigation for some purposes and not others is by no means novel.[112] In *American Pipe & Construction Co. v. Utah*, the issue before the Court was whether unnamed plaintiffs were considered parties for the purpose of tolling the statute of limitations.[113] Although the Court concluded that unnamed plaintiffs were parties for statute-of-limitation purposes, it did so because it said to rule otherwise would require every absent class member to intervene and preserve their claims and such a requirement would be inconsistent with Rule 23.[114]

105. *Id.* (citing Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338 (2011); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); and Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

106. *Id.* at 447.

107. 952 F.3d 293, 306–07 (D.C. Cir. 2020).

108. *Id.* at 295.

109. *Id.* at 306 (Silberman, J., dissenting).

110. *Id.*

111. *Id.* at 307.

112. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551 (1974).

113. *Id.* at 540.

114. *Id.* at 550.

Likewise, in *Devlin v. Scardelletti*, the Court reaffirmed that unnamed class members may be considered parties for some purposes and not for others and that the determination was context-specific and "justified by the goals of class action litigation."[115] The Court stated that unnamed plaintiffs are not considered parties with regard to diversity of citizenship because such a requirement would require courts to consider the citizenship of every class member, thereby defeating one of the main goals of class actions—"[e]ase of administration."[116] The Court also noted that considering the citizenship for all class members "would destroy diversity in almost all class actions" and render Rule 23 unworkable.[117]

Lower courts have also recognized that unnamed plaintiffs in class actions may be parties for certain purposes and not for others. For example, in *Neale v. Volvo Cars of North America, LLC*, the Third Circuit held that unnamed plaintiffs in class actions are not parties for Article III standing purposes.[118] The court explained that class actions are a representative form of litigation and that the named plaintiffs are the parties seeking to invoke the court's jurisdiction and are responsible for establishing jurisdiction.[119] Additionally, in *Appleton Electric Co. v. Advance-United Expressways*, the Seventh Circuit held that absent class members are not required to establish venue because imposing such a requirement "would eliminate the use of the class-action route in all cases where a defendant class is appropriate."[120]

B. The Non-Party Rule Applied to Personal Jurisdiction: Judicial Efficiency and Ease of Administration

Class actions serve as an "efficient and fair" way to solve legal claims once, rather than multiple times, avoiding "piecemeal litigation."[121] It is also widely agreed that federal courts have an interest in discouraging repetitive litigation "not only within a single district but within the entire system."[122] Requiring every unnamed class

115. 536 U.S. 1, 10 (2002).

116. *Id.*

117. *Id.*

118. 794 F.3d 353, 367 (3d Cir. 2015) ("Quite simply, requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23.").

119. *Id.* at 364.

120. 494 F.2d 126, 140 (7th Cir. 1974) (quoting Rsch. Corp. v. Pfister Assoc. Growers, Inc., 301 F. Supp. 497, 501 (N.D. Ill. 1969)).

121. Chicago Tchrs. Union, Local No. 1 v. Bd. of Educ. of Chicago, 797 F.3d 426, 444 (7th Cir. 2015).

122. Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 720 (2d Cir. 1980).

member to be from the state, or have suffered an injury in the state, would destroy jurisdiction in almost all cases. This would essentially be the end of the class-action device, the inevitable result of which would be an increase in piecemeal litigation to resolve legal claims based on the same underlying issue.

Similar to subject matter jurisdiction, forcing unnamed plaintiffs in class actions to satisfy the requirements for personal jurisdiction would also be inconsistent with another major policy justification behind Rule 23—ease of administration.[123] If the non-party rule were rejected, courts would have to consider each individual class member's connection to the forum in order to properly conduct the personal-jurisdiction analysis.[124] Such a task would be just as burdensome and inefficient as examining citizenship of each absent class member to determine whether complete diversity exists, an approach that the Supreme Court rejected in *Devlin*.[125]

IV. Common Counterarguments to the Non-Party Approach

The non-party approach to personal jurisdiction in class actions has received some pushback from courts and legal commentators. The compilation of defenses below was gathered from articles, judicial opinions, and briefs filed in cases involving the application of *BMS* to class actions.

A. What about Defendant's Due Process Rights?

The dissenting opinion in *Molock* stated that "[a] defendant is . . . entitled to due process protections—including limits on assertions of personal jurisdiction—with respect to all claims in a class action for which a judgment is sought."[126] Of course, defendants are not stripped of due process rights in a class action, including protection from overly broad assertions of personal jurisdiction. But once a class is certified, there are no longer any individual class-member claims. Certification means that "key elements of the claim, and the key defenses, are common to the class,"[127] and as a result the defendant is presented with

123. Devlin v. Scardelletti, 536 U.S. 1, 10 (2002).

124. This pertains to cases where the Fourteenth, rather than the Fifth, Amendment applies.

125. *Devlin*, 536 U.S. at 10.

126. Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 307 (D.C. Cir. 2020) (Silberman, J., dissenting).

127. Brief of Amicus Curiae American Association for Justice in Support of Plaintiff-Appellant and Reversal at 17, Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020) (No. 19-1204), 2019 WL 1422419.

a "unitary, coherent claim to which it need respond only with a unitary, coherent defense."[128] Under the non-party approach, the defendant can still challenge the exercize of personal jurisdiction with respect to the plaintiffs who are bringing that unitary claim, i.e., the named plaintiffs. This ensures that there is sufficient connection to the forum for the claim being brought and therefore the defendant's due process rights are protected. This approach is consistent with other forms of litigation in which representatives of others sue in their own names.[129] For example, in suits involving trustees, executors, or guardians, a court will examine personal jurisdiction with regard to the representative, not the person being represented.[130] Therefore, requiring a rule where every absent class member must be examined for personal jurisdiction would be as "pointless as it is radical" because the defendant's due process rights are already adequately protected in a class action by other class device features.[131]

When a defendant's due process rights are already protected by other requirements set forth in Rule 23, courts have been hesitant to create new rules. For example, in *Mullins v. Direct Digital LLC*, the Seventh Circuit rejected the application of a heightened "ascer–tainability" requirement in class actions.[132] The defendants in *Mullins* argued that such a requirement would allow defendants in class action to "challenge the reliability of evidence submitted to prove class membership," a step necessary to protect a defendant's due process rights.[133] The court disagreed, holding that a defendant's due process rights are already protected by a "careful and balanced" application of Rule 23.[134]

B. Rule 4(k)(1)(A)

The defendants in *Mussat* argued that allowing the unnamed plaintiffs' claims to go forward would be inconsistent with Rule

128. Sanchez v. Launch Tech. Workforce Sols., L.L.C., 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

129. *Mussat*, 953 F.3d at 448.

130. *Id.*

131. Brief of Amicus Curiae American Association for Justice, *supra* note 127, at 16, 17 ("To be certified as a class action under Rule 23 . . . a 'suit must satisfy due process procedural safeguards that do not exist in mass tort actions.' These include Rule 23's requirements of 'numerosity, commonality, typicality, adequacy of representation, predominance and superiority.'" (internal citations omitted) (quoting Knotts v. Nissan N. Am., Inc., 346 F. Supp. 3d 1310, 1333 (D. Minn. 2018))).

132. 795 F.3d 654, 657 (7th Cir. 2015).

133. *Id.* at 669.

134. *Id.* at 672.

4(k)(1)(A).[135] That rule provides that "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[136] The argument is that because out-of-state unnamed class members could not bring their claims in a court of general jurisdiction in the state, they may not do so in federal court.[137] As *Mussat* properly noted, and as described above,[138] Rule 4(k)(1)(A) does allow federal courts to exercise personal jurisdiction over defendants in some cases.[139] But that is not to say that Rule 4(k)(1)(A) limits the jurisdiction of federal courts in every case. There are other scenarios under Rule 4 in which a federal court may have jurisdiction even if a state court of general jurisdiction where the federal court is located does not.[140] Even assuming that Rule 4(k)(1)(A) limits the jurisdiction of federal courts in every case, a federal court would still not need personal jurisdiction over an absent class member under the non-party rule because they are not parties to the litigation.[141]

C. The Rules Enabling Act

Another common objection to the non-party approach is that it violates the Rules Enabling Act.[142] The Rules Enabling Act provides that the Federal Rules of Civil Procedure cannot "abridge, enlarge or modify any substantive right."[143] The argument is that if unnamed plaintiffs are not parties, defendants cannot challenge their claims for lack of personal jurisdiction—claims for which they may be liable—therefore depriving the defendant of a substantive right.[144] The first issue with this defense is that Federal Rules of Civil Procedure 4 and 23 do not violate the Rules Enabling Act.

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135. *Mussat*, 953 F.3d at 447.

136. FED. R. CIV. P. 4(K)(1)(A).

137. *Mussat*, 953 F.3d at 445.

138. *See supra* pp. 1129–33.

139. *Mussat*, 953 F.3d at 448 ("It is true that, with certain exceptions, a federal district court has personal jurisdiction only over a party who would be subject to the jurisdiction of the state court where the federal district court is located.").

140. *See supra* pp. 1129–33.

141. *See, e.g.*, *Mussat*, 953 F.3d at 447.

142. Brief of Washington Legal Foundation as Amicus Curiae in Support of Appellees, Urging Affirmance at 22, *Mussat*, 953 F.3d 441 (No. 19-1204), 2019 WL 1883613.

143. 28 U.S.C. § 2072(b) (2018).

144. Brief of Washington Legal Foundation, *supra* note 142, at 22–24.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Supreme Court interpreted the Rules Enabling Act as a

> limitation [that] means that the Rule must "really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." The test is not whether the Rule affects a litigant's substantive rights; most procedural rules do. What matters is what the Rule itself *regulates*: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.[145]

The Court went on to state that, like Federal Rules of Civil Procedure 18, 20, and 42(a), Rule 23 is procedural because it "merely enables a federal court to adjudicate claims of multiple parties at once . . . . And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."[146] Like Rule 23, personal jurisdiction in federal courts is also procedural and "a proper subject of rulemaking."[147] Rule 4 addresses when a federal court may exercise personal jurisdiction over a defendant, and it only addresses the methods and manner by which a federal court may do so. Therefore, because both Rule 23 and Rule 4 are purely procedural rules under the *Shady Grove* test, they do not violate the Rules Enabling Act.

D. Federal Rule 82

Another commonly asserted defense is that the non-party approach violates Federal Rule of Civil Procedure 82.[148] Rule 82 provides that "[t]hese rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."[149] The argument is that by classifying unnamed plaintiffs as non-parties, Rule 23 creates personal jurisdiction in situations where it otherwise would not exist and thus

145. 559 U.S. 393, 407 (2010) (citations omitted) (first quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941); then quoting Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445 (1946); and then quoting *id.* at 446).

146. *Id.* at 408.

147. *See* Reply Brief of Plaintiff-Appellant Florence Mussat, M.D., S.C. at 24, *Mussat*, 953 F.3d 441 (No. 19-1204), 2019 WL 2090500.

148. Bexis, *The Latest on Personal Jurisdiction and Class Actions*, DRUG & DEVICE LAW (Oct. 21, 2019), https://www.druganddevicelawblog.com/2019/10/the-latest-on-personal-jurisdiction-and-class-actions.html [https://perma.cc/6VE5-9K6N].

149. FED. R. CIV. P. 82.

expands jurisdiction.[150] For example, if absent class member *X* could not sue defendant *Y* in federal court in an individual suit, a case proceeding through Rule 23 cannot create personal jurisdiction because Rule 82 forbids it, or so the argument goes.[151] But this argument falls short because Rule 82 was not intended to apply to personal jurisdiction. The use of the word "jurisdiction" in Rule 82 refers only to subject matter jurisdiction.[152] This is especially apparent when examining the Advisory Committee's notes to Rule 82, which mention that if the rule included "personal or quasi-in rem jurisdiction" it would be a "flat lie."[153] Additionally, defining "jurisdiction" in Rule 82 narrowly to mean subject matter jurisdiction is consistent with the Supreme Court's interpretation of the rule.[154]

Lastly, this argument assumes that federal courts lack personal jurisdiction over claims by out-of-state plaintiffs in the first place. If there is a case before a federal court in which the Fifth Amendment applies for personal jurisdiction, the out-of-forum status of a plaintiff is irrelevant because the proper inquiry involves nationwide, not in-state, contacts, and therefore the defendant would be subject to the jurisdiction of any federal court, regardless of the state in which it sits.[155] While an exercise of jurisdiction over an out-of-state plaintiff's claims seems like an expansion if a court can do so only pursuant to Rule 4(k)(1)(A), again, under the non-party approach, federal courts do not need jurisdiction over absent class members at all because they are not parties.[156]

E. Abusive Forum Shopping and Principles of Federalism

In its amicus brief in *Mussat*, the United States Chamber of Commerce argued that the non-party rule would promote "abusive

150. Bexis, *supra* note 148.

151. *Id.*

152. *See* FED. R. CIV. P. 82 advisory committee's notes; Corrected Brief of Plaintiffs-Appellees at 34, Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020) (No. 18-7162), 2019 WL 1469051.

153. FED. R. CIV. P. 82 advisory committee's notes.

154. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) ("[R]ules shall not be construed to extend . . . the subject-matter jurisdiction of the United States district courts.") (quoting FED. R. CIV. P. 82); *see also* Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 445 (1946) ("Rule 82 must be construed . . . as referring to venue and jurisdiction of the subject matter of the district courts . . . .").

155. *See supra* pp. 1129–33.

156. Mussat v. IQVIA, Inc., 953 F.3d 441, 447 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021).

forum shopping" and "violate[] basic principles of federalism."[157] The federalism argument is that lawsuits would be allowed to go forward in forums that have no legitimate interest in the outcome of a case because one named plaintiff with a connection to the forum could represent thousands of class members who have no connection whatsoever.[158] As support, the Chamber cited *Braver v. Northstar Alarm Services, L.L.C.*, in which a federal district court rejected the application of *BMS* to a class action in Oklahoma.[159] In *Braver*, a single Oklahoma resident was the named plaintiff representing a class of 239,630 people from all across the country.[160] The Chamber argued that even if the "class members [were] proportionally distributed across the country, then almost 99% of the claims have no connection to the forum."[161]

First, this argument assumes that the Fourteenth Amendment applies for personal jurisdiction in all cases in federal court. This is a necessary, and incorrect, assumption because if there is a case in federal court where the Fifth Amendment controls the personal jurisdiction analysis, the connection needed is to the nation, not a particular state.[162] Second, even assuming the Fourteenth Amendment does apply for personal jurisdiction purposes, the case is still in federal court, and therefore the federalism concerns that supported the Court's decision in *BMS* are not present.[163] Surely a federal court has an interest in the adjudication of controversies properly before it under diversity or federal question jurisdiction.

157. Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Defendant-Appellee at 34, *Mussat*, 953 F.3d 441 (No. 19-1204), 2019 WL 1883614.

158. *Id.* at 31–32.

159. 329 F.R.D. 320, 326 (W.D. Okla. 2018).

160. *Id.*

161. Brief of the Chamber of Commerce of the United States, *supra* note 157, at 34.

162. *See supra* notes 54–56 and accompanying text.

163. Sanchez v. Launch Tech. Workforce Sols., L.L.C., 297 F. Supp. 3d 1360, 1367 (N.D. Ga. 2018). The court explained:

> In this case, federalism concerns do not apply. *Bristol-Myers* is about limiting a state court's jurisdiction when it tried to reach out-of-state defendants on behalf of out-of-state plaintiffs in a mass action suit. That scenario is inapplicable to nationwide class actions in federal court . . . . [A] nationwide class action in federal court is not about a state's overreaching, but rather relates to the judicial system's handling of mass claims involving numerous . . . parties.

Id. (quoting Chinese-Manufactured Drywall Prods. Liab. Litig., 2017 WL 5971622, at *20 (E.D. La. Nov. 30, 2017)).

Under the non-party rule, the lawyers representing the plaintiff class would simply need to file the lawsuit in the state where the named representative resides or where they were injured to satisfy personal jurisdiction requirements (or a state where their injury had some connection to the forum). This type of forum shopping is no different than the forum shopping the Supreme Court permitted in *Keeton v. Hustler Magazine, Inc.*[164] In *Keeton*, the Court allowed a libel claim against a nationwide magazine distributor in a forum state selected because of its "unusually long statute of limitations."[165] The Court permitted this type of forum shopping, referring to it as "no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local popu–lations."[166]

F. The Supreme Court Has Already Rejected the Non-Party Rule in Shutts

Some have argued that the Supreme Court has already rejected the non-party approach to personal jurisdiction in class actions.[167] This argument invokes *Phillips Petroleum Co v. Shutts*.[168] In *Shutts*, one of many issues before the Court was whether a state may exercise personal jurisdiction over the claims of unnamed plaintiffs in class actions, even though those plaintiffs do not possess the minimum contacts within the forum normally required for personal jurisdiction to exist.[169] The class consisted of 28,000 members, 97% of whom had no connection to Kansas, the state in which the action was brought.[170] The Court ulti–mately held that it had personal jurisdiction over unnamed plaintiffs' claims despite the absence of minimum contacts.[171]

Opponents of the non-party theory construe *Shutts* to stand for the notion that unnamed plaintiffs must be parties for the purpose of personal jurisdiction because the Court stated that unnamed plaintiffs were "entitled to *some* protection from the jurisdiction of a forum State

164. 465 U.S. 770 (1984).

165. *See id.* at 773–75. *See also* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1682 (1990).

166. *Keeton*, 465 U.S. at 779.

167. *See, e.g.*, J. Gordon Cooney, Brian Ercole, Ezra Church & Jospeh Fay, *Applying* BMS *to Federal Class Actions: Due Process Matters*, LAW 360 (Jan. 12, 2018, 11:45 AM), https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2018/applying-bms-to-federal-class-actions-12jan18.ashx [https://perma.cc/2UNR-9ZLF].

168. 472 U.S. 797 (1985).

169. *Id.* at 811.

170. *Id.* at 801, 815.

171. *Id.* at 811.

which seeks to adjudicate their claims."[172] The problem with this argument is that the *Shutts* Court focused primarily on the due process rights of the unnamed plaintiffs, not the defendants.[173] As the Court explained, the power of a state to exercise jurisdiction over out-of-state plaintiffs is different from its power to exercise jurisdiction over out-of-state defendants.[174] In *BMS*, the Court already rejected the application of *Shutts*, stating that it has no application with regard to the due process rights of defendants.[175] Therefore, the reliance on *Shutts* to determine the party status of unnamed plaintiffs to exercise personal jurisdiction over a defendant is misplaced.

CONCLUSION

The Court's decision in *Shady Grove* managed to slip under the media's radar for the most part.[176] While excusable because the case involved a complex procedural issue, the impact the case had on class actions deserved far more attention than it received.[177] The Court essentially saved the federal class action from destruction by holding that Rule 23 preempts state class-action statutes in federal diversity cases.[178] Had the Court ruled differently, the class-action device would have been severely undermined if not completely crushed.[179] We are at a similar crossroad currently. If *BMS* were to extend to unnamed plaintiffs in class actions, the effect would be catastrophic. The non-party approach offers a simple and sensible solution: Absent class

172. *Id.* (emphasis added).

173. *Id.*

174. *Id.* at 808–09. The Court wrote:

> The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. . . .
>
> . . . .
>
> In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment.

Id. at 808.

175. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1783 (2017) ("Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.").

176. Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448, 448 (2011).

177. *Id.* at 448–49.

178. *Id.* at 448.

179. *Id.* at 449.

members are not parties for personal jurisdiction purposes and therefore out-of-state status is irrelevant. By adopting this rule, *BMS*'s impact on class actions would be greatly diminished. While it is true that *BMS* still likely applies to the named plaintiffs in class actions, the attorneys representing the plaintiff class can easily navigate around this by filing in a federal court where the named representative was injured or affected.

There already exist too many barriers preventing claimants, especially the indigent, from vindicating their rights in court.[180] If *BMS* is held to apply to class actions, the uphill battle plaintiffs face in bringing claims against corporations would become even steeper. Now that federal appellate courts have begun to hear cases involving the issue,[181] the Supreme Court will presumably have an opportunity to weigh in. Until then, even with the Seventh Circuit's ruling in favor of the non-party rule,[182] *BMS* at the very least will continue to make attorneys think twice about where they should file class actions for the foreseeable future.[183]

Bryce Saunders[†]

180. Levick, *supra* note 73.

181. *See e.g.*, Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 296 (D.C. Cir. 2020); Mussat v. IQVIA, Inc., 953 F.3d 441, 443 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021).

182. *Mussat*, 953 F.3d at 443.

183. Wilf-Townsend, *supra* note 1, at 226.

† J.D., 2021, Case Western Reserve School of Law. I would like to thank my fiancé, Kacie, and my mother, Lori Saunders, for their continuous love and support.