

THE U.S. SUPREME COURT'S PERSONAL JURISDICTION PARADIGM SHIFT TO END LITIGATION TOURISM

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The Supreme Court of the United States has redefined the landscape of personal jurisdiction and venue over the past several years to limit where civil litigation can be filed against businesses and other defendants with operations in multiple states. In a series of unanimous or nearly unanimous decisions,¹ the Court established new due process standards for general personal jurisdiction, which is where an entity can be sued for any purpose, and specific personal jurisdiction, which is where an entity can be sued because of the jurisdiction's affiliation with a particular claim.² This attention to

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1. See *Bristol-Meyers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1777 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

2. See *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1779–80 (“Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: ‘general’ (sometimes called ‘all-purpose’) jurisdiction and ‘specific’ (sometimes called ‘case-linked’) jurisdiction.”) (citing *Goodyear*, 564 U.S. at 919).

personal jurisdiction—a subject the Court left largely unchanged for almost seventy years³—appears directed at curbing “forum shopping” or “litigation tourism,” which is the practice of filing a lawsuit in a location believed to provide a litigation advantage to the plaintiff regardless of the forum’s affiliation with the parties or claims.⁴

The high court’s departure from decades-old precedent reflects today’s changing economic and litigation environments. The Court recognized that its previous, permissive approach to personal jurisdiction, namely that a business could be sued wherever it had “minimum contacts” with a forum, had become anachronistic and inconsistent with due process now that even small businesses can have operations and sales in a multitude of states.⁵ The Court also revisited personal jurisdiction boundaries to address modern litigation gamesmanship, where lawyers take advantage of some states’ loose procedural rules, such as joinder and venue, to stockpile claims from around the country into their hand-picked jurisdictions.⁶ Lawyers have sought to leverage the dynamics of filing a large number of claims into a handful of jurisdictions to drive higher awards and settlements than if the claims were filed separately elsewhere.⁷ The theme the Court conveyed across these rulings is that location matters. Under the U.S. Constitution, a lawsuit can be heard only in the states and venues with a legal interest in that dispute. The Court reformulated the due process tests for establishing jurisdiction in order to protect these constitutional limits and rights.

Part I of this article examines the series of personal jurisdiction and venue cases the Court has decided since 2011 and explains their impact on today’s litigation. Part II focuses on key issues regarding the scope and application of the Court’s new standards, as parties wrangle over the impact of the Court’s constitutional directives. Part III discusses the public policy benefits of these cases, including the

3. See *Goodyear*, 564 U.S. at 924–26.

4. See, e.g., Mark A. Behrens & Christopher Appel, *The New Gold Rush: Study Reveals Pharmaceutical Plaintiffs Flocking to California*, 24 No. 10 WESTLAW J. HEALTH L. 2, 2017 WL 471284 (Feb. 7, 2017) (discussing forum shopping in California); Mark A. Behrens & Cary Silverman, *Litigation Tourism In Pennsylvania: Is Venue Reform Needed?*, 22 WIDENER L.J. 29, 36–42 (2012) (discussing forum shopping in Pennsylvania); Victor E. Schwartz et al., *Taking A Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts From Becoming Judicial Hellholes*, 27 AM. J. TRIAL ADVOC. 215, 218–19 (2003) (discussing forum shopping in Mississippi).

5. See *infra* Part I.

6. See *infra* notes 186 through 191 and accompanying text; Part III.

7. See *id.*

enhanced ability for courts to decide claims on their merits. The article concludes that the Court's recent personal jurisdiction rulings should usher in major changes that foreclose many avenues of traditional forum shopping and improve fairness in civil litigation. Whether the Court's rulings will have this intended impact, though, will depend on how lower courts apply the rulings and decide the doctrinal issues this article examines.

I. THE U.S. SUPREME COURT'S PARADIGM SHIFT IN PERSONAL JURISDICTION JURISPRUDENCE

The starting point for the Supreme Court's latest set of personal jurisdiction rulings was reexamining its "pathmarking"⁸ 1945 decision in *International Shoe Co. v. Washington*⁹ and assessing how it applied to modern times. In *International Shoe*, the Court held that a state court had no legal authority to administer a lawsuit against an out-of-state defendant unless the defendant had sufficient "minimum contacts" within that state and hearing the lawsuit there did not "offend traditional notions of fair play and substantial justice."¹⁰ This decision was grounded in the defendant's Fourteenth Amendment right to due process; only under these circumstances would an out-of-state defendant have notice that it could be subject to liability in that state. Applying this standard, the Court determined that the State of Washington had jurisdiction over the Missouri shoe company because the company employed a dozen or so salespeople in Washington. Those contacts, the Court held, were sufficiently "systematic and continuous" that to be sued in Washington did not impose an "unreasonable" burden on the shoe company.¹¹

At the time, businesses, such as International Shoe, had operations in only a few states.¹² The Court's "minimum contacts" standard was intended to loosen the reins and allow lawsuits to be brought in more places than just where the defendant was physically present, which had been the previous standard.¹³ Subsequent decisions applying *International Shoe* differentiated between general personal

8. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

9. 326 U.S. 310 (1945).

10. *Id.* at 316 (internal citation omitted).

11. *Id.* at 320.

12. *See id.* at 313 (stating the shoe company "maintains places of business in several states, other than Washington").

13. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714 (1878).

jurisdiction and specific personal jurisdiction.¹⁴ General personal jurisdiction refers to the state or states where a company has a sufficient amount of contacts that it could be sued there for any reason and by any party. This is referred to as “all purpose” jurisdiction. Specific personal jurisdiction includes the additional states where a company could be sued because its contacts in that state are sufficiently linked to the specific lawsuit. The Supreme Court addressed the constitutional standard for a state to exercise general or specific personal jurisdiction in only a handful of cases in the ensuing decades,¹⁵ maintaining the minimum contacts rubric.¹⁶

As the world grew more interconnected during the latter half of the twentieth century, particularly with the advent of the Internet, the due process rationale for the minimum contacts standard started to lose its constitutional grounding. This rationale was no longer sufficiently limiting, as companies were subject to litigation in a multitude of states. In 2011, the Court decided the first of a trilogy of cases setting forth new due process limits on general jurisdiction in the modern economy.¹⁷ In 2017, the Court revisited the confines of specific jurisdiction¹⁸ and issued an opinion interpreting the venue statute governing patent cases.¹⁹ All of these cases significantly restricted the places where litigation could be filed based on the parties and claims in the case.

A. *General Jurisdiction: Refocusing on Where a Corporation Is “At Home”*

The Court’s reconsideration of general personal jurisdiction began in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.²⁰ In *Goodyear*,

14. See *Goodyear*, 564 U.S. at 919 (citing *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408 (1984) as an example of a case recognizing the distinction between general and specific personal jurisdiction).

15. See, e.g., *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Hall*, 466 U.S. at 408; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Super. Ct.*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

16. See *Asahi Metal Indus. Co.*, 480 U.S. at 108–09 (“[T]he constitutional touchstone’ of the determination whether an exercise of personal jurisdiction comports with due process ‘remains whether the defendant purposefully established minimum contacts in the forum State.’”) (quoting *Burger King Corp.*, 471 U.S. at 474; *Int’l Shoe Co.*, 326 U.S. at 316).

17. See *Goodyear*, 564 U.S. at 915; *Daimler AG*, 571 U.S. at 117; *BNSF Ry. Co.*, 137 S. Ct. at 1549.

18. See *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1777.

19. See *TC Heartland LLC*, 137 S. Ct. at 1514.

20. 564 U.S. 915 (2011).

the parents of two North Carolina teenagers killed in a bus accident in France sought to bring wrongful death claims in North Carolina against the companies that manufactured and sold the tire they alleged caused the accident.²¹ The tire was manufactured in Turkey at a plant of a foreign subsidiary of The Goodyear Tire and Rubber Company (Goodyear USA), an Ohio corporation.²² The parents asserted that because Goodyear USA had plants in North Carolina and regularly engaged in commercial activity in the state, general jurisdiction was properly applied to Goodyear USA as well as three of its foreign subsidiaries incorporated separately in France, Turkey, and Luxembourg.²³

The foreign subsidiaries asserted that they were not subject to suit in North Carolina because they had no connection to the forum other than that of their parent company. They had no place of business, employees, or bank accounts in North Carolina, were not registered to do business in the state, and did not design, manufacture, or advertise any products or solicit business in the state.²⁴ They also did not directly sell or ship tires to North Carolina customers, and only a very small percentage of their tires were distributed in the state by other Goodyear USA affiliates.²⁵ Further, the tire involved in the bus accident was not distributed in North Carolina.²⁶ Nevertheless, a North Carolina appellate court determined that the state could exercise general personal jurisdiction over the foreign subsidiaries because some of the tires made abroad had reached North Carolina through the “stream of commerce,” a “frequently” invoked component of personal jurisdiction derived from *International Shoe*.²⁷

The Supreme Court rejected this “sprawling view of general jurisdiction,” finding that a “connection so limited between the forum and the foreign corporation . . . is an inadequate basis for the exercise of personal jurisdiction.”²⁸ Justice Ginsburg, writing for a unanimous Court, stated that “a court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations” only “when their affiliations with the State are so ‘continuous and systematic’ as to

21. *See id.* at 918.

22. *See id.*

23. *See id.* at 920.

24. *See id.* at 921.

25. *See id.*

26. *See id.*

27. *Id.* at 920, 926 (quoting *Brown v. Meter*, 681 S.E.2d 382, 394 (N.C. Ct. App. 2009)).

28. *Id.* at 919, 927.

render them *essentially at home* in the forum State.”²⁹ The Court explained that “[f]or an individual, the paradigm forum is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”³⁰ The Court held that Goodyear’s foreign subsidiaries were “in no sense at home in North Carolina” and that it would offend due process to allow the claimants to bring them into a North Carolina courtroom to resolve a dispute that occurred outside of North Carolina and had no connection to the state.³¹ Thus, the Court denounced sweeping theories of general personal jurisdiction based on “stream of commerce” or similar doctrines and established an “at home” jurisdictional limitation.

In 2014, the Court returned to the topic of general personal jurisdiction in *Daimler AG v. Bauman*,³² where twenty-two Argentinian residents filed suit in federal district court in California against a German automobile manufacturer (Daimler) “based on events occurring entirely outside the United States.”³³ The claimants sought to hold Daimler vicariously liable for the alleged collaboration of its Argentinian subsidiary with state security forces to kidnap, detain, torture, and kill the plaintiffs or their close relatives.³⁴ The foreign plaintiffs asserted that general personal jurisdiction existed in California based on the extensive contacts of a U.S.-based Daimler subsidiary, Mercedes-Benz USA, LLC (MBUSA). MBUSA distributed Daimler-manufactured vehicles to independent dealerships throughout the United States.³⁵ Therefore, whereas *Goodyear* dealt with whether a foreign subsidiary could be subject to general personal jurisdiction based on the domestic parent company’s contacts with a forum, *Daimler* considered the inverse scenario of whether a foreign parent company could be subject to general personal jurisdiction based on a domestic subsidiary’s contacts with a forum. The Court reinforced its new jurisprudence, stating that as

29. *Id.* at 919 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)) (emphasis added).

30. *Id.* at 924.

31. *Id.* at 929.

32. 571 U.S. 117 (2014).

33. *Id.* at 120.

34. *See id.* at 121.

35. *See id.*

“[i]nstructed by *Goodyear* . . . Daimler is not ‘at home’ in California.”³⁶

Justice Ginsburg also authored this opinion. The Court explained that the connection of a foreign company’s subsidiary to California is irrelevant for a general jurisdiction analysis under the Fourteenth Amendment. “[A] tribunal’s jurisdiction over persons reaches no farther than the geographic bounds of [a] forum.”³⁷ “*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there,” and that with respect to the parent company Daimler, “the place of incorporation and principal place of business are ‘paradig[m] . . . bases for general jurisdiction.’”³⁸ The Court added that these “affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.”³⁹ Accordingly, these affiliations “afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.”⁴⁰ For Daimler, a company headquartered in Stuttgart, Germany and operating principally in Germany, California was not such a forum.⁴¹

In reaching this conclusion, the Court addressed the key public policy considerations favoring this modern, limited approach to general personal jurisdiction. What started as a strict territorial approach had, under *International Shoe*, “yielded to a less rigid understanding, spurred by ‘changes in the technology of transportation and communication, and the tremendous growth of interstate business activity.’”⁴² Justice Sotomayor, who concurred in judgment only, agreed with this premise. She stated that in “the era of *International Shoe*, it was rare for a corporation to have such substantial nationwide contacts that it would be subject to general jurisdiction in a large number of States. . . . Today, that circumstance is less rare.”⁴³ Consequently, the majority held that if Daimler’s business in California “sufficed to allow adjudication” in the state, “the same global reach would presumably be available” in every other state in

36. *Id.* at 122.

37. *Id.* at 125 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)).

38. *Id.* at 137 (quoting *Goodyear*, 564 U.S. at 924).

39. *Id.*

40. *Id.*

41. *See id.* at 121, 137–39.

42. *Id.* at 126 (quoting *Burnham v. Super. Ct. of Cal., County of Marin*, 495 U.S. 604, 617 (1990)).

43. *Id.* at 156–57 (Sotomayor, J., concurring).

which its subsidiary's sales were "sizable."⁴⁴ The Court cautioned that such "exorbitant exercises" of all-purpose jurisdiction would make it nearly impossible for foreign defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."⁴⁵

Three years later, the Court decided *BNSF Railway Co. v. Tyrrell*, the final case in its recent trilogy of general personal jurisdiction rulings.⁴⁶ This case involved two consolidated personal injury actions under the Federal Employers' Liability Act (FELA) that were filed in Montana state court against an American railroad company, BNSF. In one of the actions, a North Dakota railroad worker sought to recover damages for knee injuries allegedly sustained while working as a BNSF fuel-truck driver.⁴⁷ In the other, a South Dakota widow of a BNSF employee sought to recover damages related to her husband's alleged workplace exposure to toxic chemicals.⁴⁸ Neither plaintiff alleged injuries arose from, or related to, work in Montana. Rather, both asserted that Montana could exercise general personal jurisdiction over BNSF based on the company's business activities in the state.⁴⁹ Montana had developed a reputation for being a plaintiff-friendly state for FELA actions and the plaintiffs believed they could obtain better results there than in other jurisdictions.⁵⁰

Although BNSF is a Delaware corporation with its principal place of business in Texas,⁵¹ there is no doubt regarding its regular operations in Montana. In Montana, BNSF had more than 2,000 miles of railroad track (about 6% of the company's total track mileage), around 2,100 workers (less than 5% of the company's total workforce), and an automotive facility (one of the company's twenty-four total automotive facilities).⁵² The company also generated almost 10% of its total revenue in the state.⁵³ The plaintiffs argued that these contacts were sufficiently "continuous and systematic" to warrant the exercise of general personal jurisdiction in Montana. They also claimed that a Montana statute authorized state courts to exercise

44. *Id.* at 139.

45. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

46. 137 S. Ct. 1549 (2017).

47. *See id.* at 1554.

48. *See id.*

49. *See id.*

50. *See infra* note 213 and accompanying text.

51. *See BNSF Ry. Co.*, 137 S. Ct. at 1554.

52. *See id.*

53. *See id.*

personal jurisdiction over railroads “doing business” in the state, and that state rules of civil procedure permitted state courts to assert jurisdiction over “[a]ll persons found within . . . Montana.”⁵⁴ The Montana Supreme Court agreed with the plaintiffs, finding that general jurisdiction was proper under both Montana law and the FELA statute based on BNSF’s “substantial, continuous, and systematic contacts with Montana.”⁵⁵

Justice Ginsburg, once again writing for the Court, reversed the Montana Supreme Court’s ruling, stating “the Fourteenth Amendment’s Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not ‘at home’ in the State and the episode-in-suit occurred elsewhere.”⁵⁶ The Court reiterated that the “‘paradigm’ forums in which a corporate defendant is ‘at home’ . . . are the corporation’s place of incorporation and its principal place of business.”⁵⁷ It also made clear that *Daimler*’s “constraint” on due process “applies to all state-court assertions of general jurisdiction over nonresident defendants” and “does not vary with the type of claim asserted or business enterprise sued.”⁵⁸

The Court, elaborating on a footnote from *Daimler*, additionally stated that although the exercise of general jurisdiction is not necessarily limited to a business’s place of incorporation and principal place of business, it would have to be an “exceptional case” for operations in another state to be “so substantial and of such a nature as to render the corporation at home in that State” as well.⁵⁹ The Court’s example of such an “exceptional case” was *Perkins v. Benguet Consolidated Mining Co.*, in which World War II had “forced” the defendant to relocate temporarily from the Philippines to Ohio, making Ohio “the center of the corporation’s wartime activities.”⁶⁰

Collectively, the *Goodyear*, *Daimler*, and *BNSF* decisions represent a major shift in the Court’s due process approach to general personal jurisdiction. The previous method of subjecting a business to jurisdiction in all states where it has “minimum contacts” has given

54. *See id.*

55. *See Tyrrell v. BNSF Railway Co.*, 373 P. 3d 1, 8 (Mont. 2016).

56. *BNSF Ry. Co.*, 137 S. Ct. at 1554.

57. *Id.* at 1558.

58. *Id.* at 1558–59.

59. *Id.* (quoting *Daimler AG*, 571 U.S. at 139 n. 19).

60. *Id.* (quoting *Daimler AG*, 571 U.S. at 130 n. 8).

way to determining the one or two states in which a company is “at home.”⁶¹ This change addressed the Court’s concern that the modern economy would facilitate “sprawling” and “exorbitant” uses of general jurisdiction, requiring cases to be heard in locations that do not have a legal interest in a matter. As a result, companies that operate in multiple states could “structure their primary conduct” and operations such that they would know where they could face all-purpose liability.⁶²

B. *Specific Jurisdiction: Reassessing the Scope of Contacts “Related” to a Legal Action*

A few weeks after *BNSF* in 2017, the Court decided *Bristol-Meyers Squibb Co. (BMS) v. Superior Court*, which restrained forum shopping based on specific or “case-linked” personal jurisdiction.⁶³ The Court explained that a state that does not have general personal jurisdiction over a defendant can still exercise specific personal jurisdiction against it if the claim at issue “aris[es] out of or relat[es] to the defendant’s contacts with the forum.”⁶⁴ Such a state has a legitimate legal interest in the dispute because there is “an affiliation between the forum and the underlying controversy.”⁶⁵ Specific jurisdiction, as the name implies, is specific to each claim. A state may have specific jurisdiction over an out-of-state manufacturer for claims by its citizens for products purchased in the state, but not for claims of other state’s residents—even when they are suing the same manufacturer over the same products. Otherwise, the Court explained, the line between specific and general jurisdiction would be nonexistent.⁶⁶

In *BMS*, the Court reviewed eight separate mass actions against the pharmaceutical company, Bristol Myers Squibb, in California. The plaintiffs in each case alleged injury from taking a BMS drug to prevent blood clots after a recent heart attack or stroke.⁶⁷ In each mass action, scores of out-of-state plaintiffs joined their lawsuits to California-based claims in hopes of having their cases heard in California. Collectively, the claims included 86 California residents

61. *Goodyear*, 654 U.S. at 919, 923 (quoting *Int’l Shoe*, 326 U.S. at 316).

62. *See supra* note 45 and accompanying text.

63. 137 S. Ct. 1777, 1178 (2017).

64. *Id.* at 1780 (quoting *Daimler AG*, 571 U.S. at 127).

65. *Id.* (quoting *Goodyear*, 564 U.S. at 919).

66. *See id.* at 1178–79 (rejecting “sliding scale” approach to specific personal jurisdiction).

67. *See id.* at 1778.

and 592 residents from thirty-three other states.⁶⁸ The non-California claimants did not allege they obtained the drug through California physicians or pharmacies, or that they received treatment for their alleged injuries in California.⁶⁹ Rather, their theories for both general and specific jurisdiction were based solely on BMS's operations and sales in California.⁷⁰

It was clear to the California appellate courts that under *Daimler*, the state did not have general jurisdiction over BMS.⁷¹ BMS is incorporated in Delaware, headquartered in New York, and maintains most of its operations in New York and New Jersey.⁷² BMS's connections with California, however, included several research and laboratory facilities, employing around 250 people, for some of its other products in the state, as well as a small state-government relations office.⁷³ BMS also generated more than \$900 million in revenue from the sale of the drug at issue in California between 2006 and 2012, which amounted to a little more than one percent of the company's nationwide sales revenue.⁷⁴ The California Supreme Court held that the combination of significant sales of the drug in California and similarities among the in- and out-of-state claimants justified California's exercise of specific personal jurisdiction over all of the claims in the mass actions. In so doing, the California Supreme Court articulated a "sliding scale approach to specific jurisdiction."⁷⁵ It held that "the nature of the defendant's activities in the forum and the relationship of the claim to those activities" is "inversely related" such that the "more wide ranging the defendant's forum contacts," the less direct the relationship needs to be to those contacts.⁷⁶ Three justices of the California Supreme Court dissented, stating that this novel rule "weaken[ed] the [case-linked] relatedness requirement" and "expand[ed] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction."⁷⁷

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *Bristol-Myers Squibb Co. v. Super. Ct.*, 206 Cal.Rptr.3d 636, 650, 654 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

76. *Id.* (quoting *Snowney v. Harrah's Ent., Inc.*, 112 P.3d 28, 37 (Cal. 2005)).

77. *Id.* at 663 (Werdegar, J., dissenting).

The U.S. Supreme Court reversed the ruling, agreeing with the dissent and characterizing the sliding scale approach as “a loose and spurious form of general jurisdiction.”⁷⁸ Indeed, Justice Ginsburg warned in oral argument in *BMS* that this case appeared to be an attempt by claimants “to reintroduce general jurisdiction, which was lost in *Daimler*, by the backdoor” of specific jurisdiction.⁷⁹ Justice Alito wrote the *BMS* opinion for the near-unanimous Court; Justice Sotomayor was the only dissenter. As with general jurisdiction, the Court’s primary concern remained the “burden on the defendant.”⁸⁰ A defendant has a due process right not to be subject to a state’s judicial system for claims that have no sufficient nexus to that state.⁸¹ In addition, the Court explained that jurisdiction invokes the “territorial limitations on the power of the respective States.”⁸² Federalism bars one state from over-reaching and hearing claims that should be heard elsewhere. In this regard, defendants must be protected from “the coercive power of a State that may have little legitimate interest in the claims in question.”⁸³ Accordingly, California was not permitted to exercise specific personal jurisdiction over *BMS* “without identifying any adequate link between the State and the nonresidents’ claims.”⁸⁴

The Court further clarified that “general connections with the forum are not enough.”⁸⁵ Therefore, *BMS*’s sales in California, regardless of how extensive, failed to establish a connection between California and the nonresidents’ claims. In addition, the “mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California—and allegedly sustained the same injuries as did the nonresidents” did not give California jurisdiction over the out-of-state claims.⁸⁶

C. *Venue: Limiting Forum Shopping in Patent Disputes*

In 2017, the Court also restricted forum shopping in a federal

78. *Bristol-Meyers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1777, 1781 (2017).

79. Oral Argument, *Bristol-Myers Squibb Co. v. Super. Ct.*, No. 16-466, Apr. 25, 2017, at 54 (statement of Justice Ginsburg).

80. *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagon*, 444 U.S. at 292).

81. *See id.*

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

83. *Id.*

84. *Id.* at 1781.

85. *Id.*

86. *Id.* (emphasis in original).

venue case, *TC Heartland LLC v. Kraft Foods Group Brands LLC*.⁸⁷ Here, a business brought a patent infringement claim in federal district court in Delaware against a competitor in the flavored drink market.⁸⁸ The defendant, a company incorporated and headquartered in Indiana, sought to transfer the suit to a federal court in Indiana on the basis that Delaware was not the proper venue because the company did not “reside” in Delaware within the meaning of the patent venue statute.⁸⁹ The U.S. Court of Appeals for the Federal Circuit rejected this argument, finding that the defendant “resides” in Delaware under the statute because the U.S. District Court of Delaware could exercise personal jurisdiction over the claim.⁹⁰

The Supreme Court unanimously reversed this decision. It determined that the patent venue statute’s definition of “resides” limits venue for domestic corporations “only to the State of incorporation.”⁹¹ As a result, a plaintiff alleging patent infringement can bring suit in only two places authorized by the statute: 1) the defendant’s state of incorporation, or 2) where the defendant “committed acts of infringement and has a regular and established place of business.”⁹² These venue requirements—providing a type of “all-purpose” and “case-linked” venue—parallel the Court’s constitutional limitations for general and specific personal jurisdiction.

The impact of *TC Heartland* was felt disproportionately in the U.S. District Court for the Eastern District of Texas, which had become a popular destination for patent cases—housing more than forty percent of all patent cases in the United States.⁹³ The court had become known as the “rocket docket” for pushing patent disputes to trial faster than other jurisdictions.⁹⁴ Because the court’s procedures favored quick settlements, the court became the preferred forum for

87. 137 S. Ct. 1514 (2017).

88. *See id.* at 1517.

89. *See id.*

90. *See id.* at 1520.

91. *Id.* at 1521.

92. *Id.* at 1519 (quoting 28 U.S.C. § 1400(b)).

93. *See* Lisa Shuchman, *Eastern Texas Had an ‘Astounding’ Number of Patent Cases in 2015*, CORP. COUNS., Jan. 7, 2016, at <https://www.law.com/corpcounsel/almID/1202746460787/Eastern-Texas-Had-an-Astounding-Number-of-Patent-Cases-in-2015/> (reporting that 2,540 patent lawsuits, or approximately 44% of U.S. patent cases, were filed in the Eastern District of Texas in 2015).

94. *See* Mark Curriden, *The ‘Rocket Docket’ Starts to Fizzle*, HOUS. CHRON., Jan. 27, 2017, at <https://www.houstonchronicle.com/business/article/The-rocket-docket-starts-to-fizzle-10890604.php>.

thousands of highly speculative “patent troll” cases, as well as traditional patent claims.⁹⁵ In the wake of *TC Heartland*, hundreds of defendants in these patent cases sought to transfer their cases out of East Texas.⁹⁶ The number of new patent filings in this court plummeted by more than sixty-five percent in the year following *TC Heartland*.⁹⁷

Eastern District of Texas Judge Rodney Gilstrap, who presided over a quarter of the nation’s patent lawsuits in 2015 and 2016,⁹⁸ issued a ruling after *TC Heartland* that sought to keep many of these cases in his courtroom.⁹⁹ In this case, *Raytheon Co. v. Cray, Inc.*, Judge Gilstrap developed an expansive four-factor test for determining whether a company had “a regular and established place of business” where acts of patent infringement were committed.¹⁰⁰ He suggested that a defendant’s “physical location in the district is not a prerequisite to proper venue”; it is only “a persuasive factor for courts to consider” along with the defendant’s representations, interactions with consumers, and benefits in the forum.¹⁰¹

The U.S. Court of Appeals for the Federal Circuit granted mandamus review of the case in which Judge Gilstrap announced this test and struck it down.¹⁰² The Federal Circuit pointed out that “litigants and courts are raising with increased frequency” the issue of physical location in an effort to bypass the Supreme Court’s holding in *TC Heartland*.¹⁰³ But the court indicated that requiring a physical, geographical nexus to alleged acts of patent infringement reflected the spirit of *TC Heartland*. The purpose of the Supreme Court’s ruling

95. *See id.*

96. *See* Paul M. Janicke, *The Imminent Outpouring from the Eastern District of Texas*, 2017 PATENTLY-O PAT. L.J. 1, 9, available at https://cdn.patentlyo.com/media/2017/03/Janicke.2017.Venue_.pdf (estimating at least 500 cases in which venue is improper and not waived).

97. *See* Mark Curriden, *Patent Filings Plummet in East Texas*, HOUS. CHRON., May 22, 2018, at <https://www.chron.com/business/article/Patent-filings-plummet-in-East-Texas-12932436.php>.

98. *See* John Browning, *Is the Rocket Docket Crashing?*, DMAGAZINE, Oct. 2017, at <https://www.dmagazine.com/publications/d-ceo/2017/october/eastern-district-texas-patent-cases/>; Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation’s Patent Cases*, VICE: MOTHERBOARD, May 5, 2016, at https://motherboard.vice.com/en_us/article/aek3pp/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases.

99. *See* Yar Chaikovsky & Wei Wang, *Gilstrap’s Venue Test: The 4 Factors And What They Mean*, LAW360, July 12, 2017, at <https://www.law360.com/articles/943450/gilstrap-s-venue-test-the-4-factors-and-what-they-mean>.

100. 258 F. Supp. 3d 781 (E.D. Tex.), *vacated*, 871 F.3d 1355 (Fed. Cir. 2017).

101. *Id.* at 797.

102. *See In re Cray Inc.* 871 F.3d 1355, 1357 (Fed. Cir. 2017).

103. *Id.* at 1359.

was to confine venue to established places of operation such as a business's place of incorporation in a "new era" where "not all corporations operate under a brick-and-mortar model" and business may be conducted virtually.¹⁰⁴

Taken collectively, these five Supreme Court cases—*Goodyear*, *Daimler*, *BNSF*, *BMS*, and *TC Heartland*—re-focused and limited where civil lawsuits can and should be brought. However, as with Judge Gilstrap and patent venue cases, some courts and litigants around the country have been trying to narrow the Court's personal jurisdiction rulings to maintain the status quo.

II. DOCTRINAL ISSUES ARISING IN THE AFTERMATH OF THE U.S. SUPREME COURT'S PERSONAL JURISDICTION DECISIONS

A number of new battlegrounds have arisen in the wake of the Supreme Court's new constitutional standards for personal jurisdiction. This section examines some of these issues, both as they have played out in pending litigation and as they are expected to arise in the near future.

A. *Waiver of Personal Jurisdiction Challenges in Pending Litigation*

The first jurisdictional issue to arise involves the application of the Court's new standards to pending cases: can defendants successfully move to have their claims dismissed or transferred to appropriate jurisdictions? In some states, there are hundreds or even thousands of such pending cases. Often, the defendant did not challenge personal jurisdiction when the case was filed because the application of precedents derived from *International Shoe* would likely have allowed the claims to be filed in those states. Plaintiffs have argued that the failure to object to personal jurisdiction then resulted in the waiver of any right to make such objections for the remainder of the litigation. Courts addressing this waiver issue have reached different conclusions.¹⁰⁵

In 2014, the U.S. Court of Appeals for the Second Circuit, in *Gucci*

104. *Id.*

105. See *BMS Battlegrounds: Practical Advice for Litigating Personal Jurisdiction After Bristol-Myers*, U.S. Chamber Inst. for Legal Reform (June 2018), at 22, available at <http://www.instituteforlegalreform.com/research/bms-battlegrounds-research> [hereafter *BMS Battlegrounds*] (discussing waiver issue); *At Least Listen to Us Now – Waiver & Personal Jurisdiction*, Drug & Device Law, Apr. 23, 2018, at <https://www.druganddevicelawblog.com/2018/04/at-least-listen-to-us-now-waiver-personal-jurisdiction.html> (same).

America, Inc. v. Weixing Li, held that “a defendant does not waive a personal jurisdiction argument—even if he does not make it in the district court—if the ‘argument that the court lacked jurisdiction over [the] defendant would have been directly contrary to controlling precedent’” at the time.¹⁰⁶ This case involved claims of counterfeiting against a foreign company and efforts to freeze its accounts in the Bank of China, which had a branch in New York. “Prior to *Daimler*,” the court explained, “controlling precedent in this Circuit made it clear that a foreign bank with a branch in New York *was* properly subject to general personal jurisdiction here.”¹⁰⁷ Because *Daimler* reversed this outcome, the court rejected the plaintiff’s waiver argument.

As a federal district court explained in another case, “[i]t was only after the Supreme Court issued its decision in *Daimler* that the scope of *Goodyear*’s ‘at home’ test was appreciated.”¹⁰⁸ Here, the court found that plaintiffs would not suffer any prejudice by allowing a defendant to assert a general personal jurisdiction challenge.¹⁰⁹ Other courts have reached the same result.¹¹⁰

The U.S. Court of Appeals for the Tenth Circuit reached the opposite conclusion in *American Fidelity Assurance Co. v. Bank of New York Mellon*.¹¹¹ The court rejected the New York bank’s assertion that it did not waive its challenge to general personal jurisdiction in Oklahoma. To support this ruling, the court suggested that the “*Goodyear* standard was not new; it summarized a longstanding jurisdictional rule.”¹¹² As a result, it held that the bank waived its right to object to jurisdiction even under the recently articulated standards.

The notion that the general jurisdiction rules under *Goodyear* and *Daimler* are “not new” is at odds with the Justices’ view of the cases. For example, Justice Sotomayor, in her concurring opinion in *Daimler*,

106. 768 F.3d 122, 135–36 (2d Cir. 2014).

107. *Id.* at 136 (emphasis in original).

108. *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 243 (D.D.C. 2015).

109. *See id.*

110. *See, e.g.*, *Strauss v. Credit Lyonnais, S.A.*, 175 F. Supp. 3d 3, 14–15 (E.D.N.Y. 2016); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 WL 4634541, at *31 (S.D.N.Y. Aug. 4, 2015); *7 West 57th St. Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 1514539, at *5–7 (S.D.N.Y. Mar. 31, 2015) (“*Gucci America* unequivocally holds . . . that *Daimler* effected a change in the law, providing defendants . . . with a personal jurisdiction defense that was previously unavailable to them.”).

111. 810 F.3d 1234 (10th Cir. 2016).

112. *Id.* at 1238; *see also Sloan v. Gen. Motors, LLC*, 287 F. Supp. 3d 840, 856 (N.D. Cal. 2018) (finding personal jurisdiction challenge waived).

expressed her opposition to the majority's general personal jurisdiction analysis, but still recognized the Court's shift from minimum contacts to the at home test represented a "new rule of constitutional law."¹¹³

A similar split has arisen in cases involving waiver of specific personal jurisdiction. For instance, a federal district court in California determined that although *BMS* "was not announcing a new rule in regards to the principles of specific jurisdiction . . . it is not clear that [the defendant] would have had a viable basis for challenging personal jurisdiction" with respect to certain plaintiffs under the then-existing law.¹¹⁴ A federal district court in Illinois similarly found that a specific personal jurisdiction challenge "was not 'then available' to defendants" prior to *BMS*, and that "even if defendants had waived this defense, the Court finds that it would be appropriate to excuse the forfeiture."¹¹⁵ Other courts, however, have agreed with plaintiffs' waiver arguments that *BMS* "involves only the 'straightforward application' of 'settled principles'" of jurisdiction doctrine and was not a "game changing" or "transformative" decision.¹¹⁶

The waiver issue affects only cases filed before the Supreme Court's rulings, but the briefings and rulings provide the first window into the views of litigants and courts about their impact on state claims and can influence other outstanding issues that are certain to arise.

B. *Jurisdiction by Consent Based on Compliance with State Business Registration Laws*

One of the first theories for reducing or negating the impact of the Supreme Court's general personal jurisdiction rulings is based on consent. The argument is that when a company registers to do

113. 571 U.S. at 160 (Sotomayor, J., concurring).

114. *Feller v. Transamerica Life Ins. Co.*, 2017 WL 6453262, at * 4 (C.D. Cal. Dec. 11, 2017).

115. *Prac. Mgmt. Support Servs., Inc. v. Cirque de Soleil, Inc.*, 301 F. Supp. 3d 840, 863 (N.D. Ill. 2018).

116. *Thomas v. Kellogg Co.*, 2017 WL 5256634, at *1 (W.D. Wash. Oct. 17, 2017). Still other courts have determined that, irrespective of the import of *BMS*, defendants waived their jurisdictional challenges because they simply failed to make them in a timely manner. *See Alvarez v. NBTY, Inc.*, 2017 WL 6059159, *4-7 (S.D. Cal. Dec. 6, 2017) ("With or without *Bristol-Myers*, Defendants could have argued that this Court lacks personal jurisdiction over non-resident Defendants Because of their failure to do so, Defendants waived this argument."); *PS Kids LLC v. Paymaster Bus. Servs., Inc.*, 2018 WL 999973, at *4 (E.D. Mo. Feb. 21, 2018) (finding personal jurisdiction arguments waived).

business in a state it consents to be subject to that state’s laws, including the state’s exercise of general personal jurisdiction.¹¹⁷ Commercial entities must generally register to conduct any business in a state. Consequently, if registration were interpreted as consent, a company would be subject to all-purpose jurisdiction in a number of states, not solely where they are “at home.”

Most courts have rejected the notion of “jurisdiction by consent” for mere compliance with a business registration law.¹¹⁸ The U.S. Court of Appeals for the Second Circuit, in *Brown v. Lockheed Martin Corp.*, explained that if “mere” registration and appointment of an agent in a state were enough to grant general jurisdiction, “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.”¹¹⁹ The court stated that in *Daimler*, the Supreme Court “rejected the idea that a corporation was subject to general jurisdiction in every state in which it conducted substantial business.”¹²⁰ The court also pointed out that this “expansive” view of registration statutes “could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done *no business at all*, so long as it had registered.”¹²¹

The Delaware Supreme Court similarly rejected a jurisdiction-by-consent argument under the state’s registration statutes. The court concluded that “after *Daimler*, it is not tenable to read Delaware’s registration statutes” the same way as the court did under its prior rulings.¹²² “*Daimler* makes plain that it is inconsistent with principles of due process to exercise general jurisdiction over a foreign corporation that is not ‘essentially at home’ in a state for claims

117. See BMS Battlegrounds, *supra* note 105, at 21.

118. See 50 State Survey On General Jurisdiction Through Consent By Registration To Do Business: Putting Bauman and Baseball Back Together, Drug & Device Law, Dec. 18, 2017, at <https://www.druganddevicelawblog.com/2017/12/quasi-guest-post-50-state-survey-on-general-jurisdiction-through-consent-by-registration-to-do-business-putting-bauman-and-baseball-back-together.html> (reporting that courts in around 40 jurisdictions have rejected personal jurisdiction based on compliance with business registration laws).

119. 814 F.3d 619, 640 (2d Cir. 2016).

120. *Id.*

121. *Id.* (emphasis in original).

122. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016); see also *Humphries v. Allstate Ins. Co.*, 2018 WL 1510441, at *3 (D. Ariz. Mar. 27, 2018) (“A categorical assertion of general jurisdiction where the corporation complies with a state’s registration and appointment laws would essentially contradict *Daimler* and *BNSF*’s limitation of general jurisdiction to a corporation’s place of incorporation, principal place of business, and exceptional cases where contacts with the forum state are substantial and of such nature to render it at home.”).

having no rational connection to the state.”¹²³ According to the court, Delaware’s registration statute does not grant general jurisdiction; it solely “provid[es] a means for service of process.”¹²⁴ The state high court additionally reasoned that “it is critical to the efficient conduct of business, and therefore to job- and wealth-creation, that individual states not exact unreasonable tolls simply for the right to do business.”¹²⁵ “If all of our sister states were to exercise general jurisdiction over our many corporate citizens, who often as a practical matter must operate in all fifty states and worldwide to compete, that would be inefficient and reduce legal certainty.”¹²⁶ The result would be a “collective detriment of the common good.”¹²⁷

Courts in four states—Iowa, Minnesota, Nebraska and Pennsylvania—have reached the opposite conclusion. They determined that a corporate defendant’s registration to do business in the state, and designation of an agent upon whom process may be served, is sufficient to subject that defendant to general personal jurisdiction.¹²⁸ The courts generally relied on precedents predating the recent line of general personal jurisdiction decisions and marginalized *Daimler*.¹²⁹ For example, a Nebraska court suggested that *Daimler* “circumscribes the extent to which a defendant can be *compelled* to submit to general jurisdiction, but it does nothing to limit the defendant’s capacity to consent to jurisdiction—and therefore, it does nothing to upset well-settled law regarding what acts may operate to imply consent.”¹³⁰ In Pennsylvania, jurisdiction by consent is based on

123. *Id.* at 128.

124. *Id.* 148.

125. *Id.* at 127.

126. *Id.* at 142–43.

127. *Id.* at 143.

128. *See supra* note 118.

129. In this regard, the U.S. Court of Appeals for the Eighth Circuit’s decision in *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990), has proven particularly influential. There, the court, applying Minnesota law, held that the “appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state.” *Id.* at 1200. *See, e.g.*, *Spanier v. Am. Pop Corn Co.*, 2016 WL 1465400, at *4 (N.D. Iowa Apr. 14, 2016) (relying on *Knowlton*); *Ally Bank v. Lenox Fin. Mortg. Corp.*, 2017 WL 830391, at *3 (D. Minn. Mar. 2, 2017) (same); *Consol. Infrastructure Grp., Inc. v. USIC, LLC*, 2017 WL2222917, at *7 (D. Neb. May 18, 2017) (same); *Perrigo Co. v. Merial Ltd.*, 2015 WL 1538088, at *7 (D. Neb. Apr. 7, 2015) (same).

130. *Perrigo*, 2015 WL 1538088, at *7 (emphasis added); *see also Spanier*, 2016 WL 1465400, at *4 (stating that neither *Daimler* nor *Goodyear* “contains any meaningful discussion of consent to jurisdiction and neither defendant consented to suit in the forum state”); *Ally Bank*, 2017 WL 830391, at *3 (“The *Daimler* court addressed the limits of general jurisdiction over a foreign corporation, not the limits of a defendant’s capacity to consent to personal jurisdiction.”).

a unique corporate registration statute that expressly states that the “carrying on of a continuous and systematic part of [a company’s] general business” in the Commonwealth “shall constitute a sufficient basis of jurisdiction.”¹³¹ Even with this particular registration statute, several federal district courts have suggested that in light of *Daimler*, mere compliance with the statute may no longer be sufficient to establish jurisdiction by consent.¹³² In the weeks before this article’s publication, the Supreme Court of Pennsylvania agreed to hear this issue.¹³³

As with the waiver issue, most courts recognize that the Supreme Court intended its personal jurisdiction holdings to be transformative. They rightfully view compliance with a registration statute as insufficient to consent to general jurisdiction; holding otherwise, they have concluded, would “distort the language and purpose” of the Court’s rulings.¹³⁴ That most courts have rejected jurisdiction by consent when confronted with the issue provides strong evidence that the Court’s rulings are taking root.

C. *General Jurisdiction Battleground: Scope of the “Exceptional Cases” Exception*

As indicated, the Supreme Court’s “at home” rule for general personal jurisdiction provides a straightforward standard for courts to apply: any case may be brought in a corporate defendant’s state of

131. 42 Pa. Cons. Stat. Ann. § 5301; *Webb–Benjamin, LLC v. Int’l Rug Grp., LLC*, 2018 WL 3153602, at *5 (Pa. Super. Ct. June 28, 2018); *see also* *Youse v. Johnson & Johnson*, 2019 WL 233884, at *4 (E.D. Pa. Jan. 16, 2019) (holding “registration to do business in Pennsylvania is sufficient to create general personal jurisdiction” in asbestos case involving exposure to talc products).

132. *See Antonini v. Ford Motor Co.*, 2017 WL 3633287, at *2 n.2 (M.D. Pa. Aug. 23, 2017) (stating that registration plus other contacts “more closely resemble those found insufficient to establish general jurisdiction”); *McCaffrey v. Windsor at Windermere Ltd. P’ship*, 2017 WL 1862326, at *4 (E.D. Pa. May 8, 2017) (recognizing registration to do business insufficient for general jurisdiction under *Daimler*).

133. *See Hammons v. Ethicon, Inc.*, Case No. 458 EAL 2018 (accepted for review Apr. 10, 2019).

134. *In Re: Zofran (Ondansetron) Prods. Liab. Litig.*, 2016 WL 2349105, at *4 (D. Mass. May 4, 2016) (applying Missouri law); *see also* *Keeley v. Pfizer Inc.*, 2015 WL 3999488, at *4 n.2 (E.D. Mo. July 1, 2015) (stating consent to jurisdiction based on compliance with state registration statutes is “contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction.”); *see also* *Beard v. Smithkline Beecham Corp.*, 2016 WL 1746113, at *2 (E.D. Mo. May 3, 2016) (“The Court recognizes the line of older cases that have found that personal jurisdiction can be based upon having a registered agent in the forum state” but “agrees with more recent judicial precedent from the United States Supreme Court and this district that have determined that more substantial contacts are required to hale a litigant into the court’s forum.”).

incorporation or principal place of business. But the Court also discussed an “exceptional case” caveat where “a corporate defendant’s operations in another forum ‘may be so substantial and of such a nature as to render the corporation at home in that State.’”¹³⁵ The Court identified only one such “exceptional case,” where war had “forced” a corporation to temporarily relocate from the Philippines to Ohio.¹³⁶ In Justice Sotomayor’s opinion in *BNSF* concurring and dissenting in part, she stated that the majority’s decision “could be understood to limit [the exceptional case] exception to the exact facts” of the wartime illustration.¹³⁷ Her concern that the Court’s interpretation was “so narrow as to read the exception out of existence entirely” offers some insight into how narrow the Court intended the exception to be.¹³⁸

Nevertheless, claimants have begun arguing that their cases fit this exception.¹³⁹ Courts, though, have read the exception as extremely

135. *BNSF Ry. Co.*, 137 S. Ct. at 1558.

136. *Id.*

137. *Id.* at 1561 (Sotomayor, J., concurring and dissenting in part).

138. *Id.*

139. See, e.g., *Kaz. v. Ketebaev*, 2018 WL 2763308, at *14 (N.D. Cal. June 8, 2018) (finding that foreign government’s federal action against alleged computer hackers from several other foreign countries did not constitute “exceptional case” allowing exercise of general personal jurisdiction in California); *Perry v. JTM Cap. Mgmt., LLC*, 2018 WL 1635855, at *3 (N.D. Ill. Apr. 5, 2018) (“[T]he court concludes that there is no exceptional circumstance warranting general jurisdiction over defendant in Illinois.”); *Data Research & Handling, Inc. v. Vongphachanh*, 310 F. Supp. 3d 956, 962 (N.D. Ind. Feb. 27, 2018) (finding national trade association not sufficiently “at home” in Indiana so as to subject it to personal jurisdiction and that action was “not . . . an exceptional case” envisioned by the U.S. Supreme Court); *Pinnacle Ins. & Fin. Servs., LLC v. Sehnoutka*, 2017 WL 3193641 (M.D. Fla. July 27, 2017) (“the Court determines that this is not one of those ‘exceptional cases’ where Defendants’ contacts with Florida are so substantial as to render them effectively ‘at home’ here”); *Strauss v. Crédit Lyonnais, S.A.*, 175 F. Supp. 3d 3, 17 (E.D.N.Y. 2016) (“The Court has little difficulty concluding that the facts here do not present an exceptional case.”); *Farber v. Tennant Truck Lines, Inc.*, 84 F. Supp. 3d 421, 433 (E.D. Pa. 2015) (stating that defendant’s payment of withholding and corporate taxes, among other contacts with a forum, “‘plainly do[es] not approach’ the threshold level of contact required by *Goodyear* and *Daimler*; this payment does not create the ‘exceptional case’ in which general jurisdiction in a state other than the state of incorporation and principal place of business would be justified”) (quoting *Daimler*, 571 U.S. at 139 n.19); *Ritchie Cap. Mgmt., L.L.C. v. Costco Wholesale Corp.*, 2015 WL 13019620, at *5 (S.D.N.Y. Sept. 15, 2015) (“A review of Plaintiffs’ own allegations and the documents they have submitted to support their arguments in favor of jurisdiction demonstrate that this case is far from exceptional.”); *In re Libor-Based Fin. Instruments Antitrust Litig.*, 2015 WL 4634541, at *21 (S.D.N.Y. Aug. 5, 2015) (“We conclude without hesitation that none of [defendant’s] contacts with New York and Virginia comprises an ‘exceptional case where [the defendant’s] contacts with [those states] are so substantial as to render it ‘at home’ in that state.”) (quoting *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 223 (2d Cir. 2014)); *Thackurdeen v. Duke Univ.*, 130 F. Supp. 3d 792, 799 (S.D.N.Y. 2015) (“Plaintiffs have failed to explain why this represents an exceptional case to the general rule . . .”).

narrow.¹⁴⁰ As one federal district court concluded, “the Supreme Court has found only one such ‘exceptional case’ in the last 70 years.”¹⁴¹ The U.S. Court of Appeals for the Second Circuit’s decision in *Brown v. Lockheed Martin Corp.*, provides a thoughtful discussion on this exception.¹⁴² Here, a deceased Air Force mechanic argued that Lockheed Martin’s physical presence and operations in Connecticut “for at least 30 years” presented such an “exceptional case.”¹⁴³ The court explained that *Daimler* “considerably altered the analytic landscape for general jurisdiction and left little room” for arguments that a large corporation’s substantial operations in a particular state could subject it to general jurisdiction.¹⁴⁴ “[W]hen a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how ‘systematic and continuous,’ are extraordinarily unlikely to add up to an ‘exceptional case.’”¹⁴⁵ The court further reasoned that because corporations frequently “have presences in multiple states exceeding that of [the defendant] in Connecticut, general jurisdiction would be quite the opposite of ‘exceptional’ if such contacts were held sufficient to render the corporation ‘at home’ in the state.”¹⁴⁶ Rather, the exception is reserved for the unique situation in which the proposed forum is a “surrogate principal place of business.”¹⁴⁷

A survey of cases discussing the Supreme Court’s “exceptional case” doctrine reveals no clear illustration of the exception other than the wartime example provided by the Court despite numerous cases in which claimants have argued exceptional circumstances based on a

140. See, e.g., *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30, 39 (2d Cir. 2014) (acknowledging U.S. Supreme Court’s “exceptional case” exception to general jurisdiction “beyond a corporation’s state of incorporation and principal place of business,” but stating “[t]his is not that case” because defendant’s “scant contacts with Vermont do not come close”); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014) (“[T]his is clearly not ‘an exceptional case’ where the [defendant’s] contacts are ‘so continuous and systematic as to render [it] essentially at home in the forum.’”); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (“This is not such an exceptional case.”); see also *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (noting that it is “incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.”).

141. *Jackson v. Bank of Am., N.A.*, 2018 WL 2381888, at *4 (W.D. N.Y. May 25, 2018); see also *Adams v. Horton*, 2017 WL 2493127, at *2 (D. Vt. June 8, 2017) (noting “the Second Circuit has yet to find such a case”).

142. 814 F.3d 619, 627 (2d Cir. 2016).

143. *Id.* at 628.

144. *Id.*

145. *Id.* at 629.

146. *Id.* at 630.

147. *Id.* (internal citation omitted).

corporate defendant's relationship to a forum.¹⁴⁸ The notion that there can be only one possible surrogate principal place of business appears most plausible given the Court's decision to limit the exercise of general personal jurisdiction against corporate defendants to only two potential forums—the place of incorporation and the principal place of business—in the “ordinary,” unexceptional case.

D. *Specific Jurisdiction Battleground: Sufficient Affiliations to Establish Jurisdiction*

The Supreme Court's test for specific personal jurisdiction is not as crystal clear as the “at home” requirement for general personal jurisdiction. The Court in *BMS* held that there must be an “affiliation between the forum and the underlying controversy” for the court to exercise specific jurisdiction over the claim, but it did not explain what constitutes a sufficient “affiliation.”¹⁴⁹ What the Court made clear is that general business activities, regardless of how extensive, and joinder of an unaffiliated claim with someone else's valid claim do not suffice.¹⁵⁰ The Court also rejected the *BMS* plaintiffs' “last ditch” effort to establish specific jurisdiction in California because *BMS* used a California supply chain distributor.¹⁵¹ The fact that *BMS* contracted with a California distributor was “not enough to establish personal jurisdiction” over out-of-state claims.¹⁵² If it were, it would have created a major issue with respect to any business's contracting with a distributor or other entities for services such as product advertising, consulting, tax preparation, or legal services. Instead, the court suggested that relationships with third parties are insufficient to establish specific jurisdiction over a claim.

So, what kind of connections are necessary and how strong do those connections need to be in order to be considered an “affiliation” for specific jurisdiction purposes? Plaintiffs, not surprisingly, have sought to push these limits in order to maintain some ability to choose among a greater number of forums. For example, to keep out-of-state cases in St. Louis—a preferred destination for out-of-state claims¹⁵³—plaintiffs have alleged that if a company's marketing strategy for a product, its labeling and

148. *See supra* notes 139 and 140.

149. *BMS*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919).

150. *See id.* at 1781.

151. *Id.* at 1783.

152. *See id.*

153. *See* discussion *infra* Section III.C.

regulatory approval, or early clinical trials have any connection to Missouri then Missouri courts can exercise specific jurisdiction over out-of-state claims related to those products.¹⁵⁴ A federal district court in Missouri rejected such efforts, finding these connections “too attenuated.”¹⁵⁵ In another case, the court explained that it is “of no consequence” that Missouri “happened to be” where the product was first marketed, particularly when out-of-state plaintiffs did not see the marketing.¹⁵⁶ There simply is no specific personal jurisdiction when the plaintiff was not injured in the state.

Plaintiffs’ efforts to push the limits of establishing specific jurisdiction also implicate how much discovery a claimant may obtain from a corporate defendant for the preliminary purpose of establishing personal jurisdiction.¹⁵⁷ Allowing broad discovery on purely jurisdictional matters, before the merits of any alleged claim are considered, could create an undue burden on the defendant and lead to litigation tactics where the plaintiff’s lawyer seeks to leverage the imposition of significant jurisdictional discovery costs in order to secure a settlement.¹⁵⁸ As courts examining this issue have appreciated, such “jurisdictional discovery is not available merely because the plaintiff requests it,” but rather is reserved for particularized factual disputes.¹⁵⁹ One federal appellate court cautioned that “a plaintiff may not . . . undertake a fishing expedition based only upon bare allegations, under the guise of jurisdictional discovery.”¹⁶⁰ Another federal appellate court observed the substantial costs that may be implicated, finding in a case that “[j]urisdictional discovery yielded over 5.8 million pages of documents, including almost a million pages of contract documents,

154. See *Hinton v. Bayer Corp.*, 2018 WL 3725776, at *2 (E.D. Mo. July 27, 2018) (citing cases); *Dyson v. Bayer Corp.*, 2018 WL 534375, at *2 (E.D. Mo. Jan. 24, 2018).

155. *Dyson*, 2018 WL 534375, at *5.

156. *Hinton*, 2018 WL 3725776, at *4.

157. See *BMS Battlegrounds*, *supra* note 105, at 14–16 (discussing case examples).

158. See *id.* at 15 (jurisdictional discovery may be “unduly burdensome and costly for defendants forced to litigate in a court that has no business exercising jurisdiction, even when jurisdictional discovery is supposedly ‘limited’”).

159. *Malik v. Cabot Oil & Gas Corp.*, 710 Fed. Appx. 561, 565 (3d Cir. 2017) (quoting *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 108 n.38 (3d Cir. 2015)); see also *Aviation One of Fla., Inc. v. Airborne Ins. Consultants (PTY), Ltd.*, 722 Fed. Appx. 870, 878 (11th Cir. 2018); *Rippon v. Smigel*, 158 A.3d 23, 32 (N.J. App. Div. 2017) (“Generally, the record must support the existence of disputed or conflicting facts to warrant jurisdictional discovery.”).

160. *Id.* (quoting *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 157 (3d Cir. 2010)).

and 34 witness depositions.”¹⁶¹ Such costs counter the Supreme Court’s “primary concern” in *BMS* of excessive defense burdens.¹⁶²

Consideration of, and discovery into, a corporate defendant’s potential affiliations with a forum that permit the exercise of specific personal jurisdiction underscore courts’ need to evaluate specific jurisdiction as it applies to each claim asserted by a plaintiff.¹⁶³ The same concern about grouping together similar claims of in- and out-of-state plaintiffs to establish jurisdiction over all claims, which was expressly rejected in *BMS*, applies with equal force to attempts to use the existence of specific jurisdiction over one type of claim to exercise specific jurisdiction over disparate claims. A plaintiff may be able to establish specific jurisdiction over one claim against a defendant, such as deceptive advertising, but not other claims, such as product design liability. As a result, plaintiffs may be limited to where they can bring an action for all of their claims, which could significantly impact asbestos litigation and other mass tort litigation involving a multitude of claims. Courts, both before and after *BMS*, have recognized that “[p]ersonal jurisdiction must exist for each claim asserted against a defendant.”¹⁶⁴ *BMS* adds a more rigorous evaluation of a corporate defendant’s connections that give rise to the claim on top of this existing claim-by-claim jurisdictional analysis.

A faithful application of *BMS*, therefore, counsels a direct affiliation with a forum, limited jurisdictional discovery, and rigorous claim-by-claim analysis to guard against the bootstrapping of

161. In re: KBR, Inc., 893 F.3d 241, 254 (4th Cir. 2018); see also *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 780–81 (3d Cir. 2018) (finding plaintiffs “entitled to limited entitled to limited jurisdictional discovery to explore their alter ego theory”).

162. *BMS*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

163. See Putting the “Specific” Back in Specific Jurisdiction: The Importance of Claim-By-Claim Jurisdictional Analysis in a Post-BMS Landscape, *Drug & Device Law*, Jan. 11, 2018, at <https://www.druganddevicelawblog.com/2018/01/guest-post-putting-the-specific-back-in-specific-jurisdiction-the-importance-of-claim-by-claim-jurisdictional-analysis-in-a-post-bms-landscape.html> (stating that claim-by-claim jurisdiction is “well recognized in the pre-*BMS* case law and should not be forgotten in the post-*BMS* landscape”).

164. *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); see also *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 (5th Cir. 2006) (“[P]laintiff bringing multiple claims that arise out of different forum contacts must establish specific jurisdiction for each claim.”); *Remick v. Manfredy*, 238 F.3d 248, 256–60 (3d Cir. 2001) (conducting specific jurisdiction analysis for each alleged cause of action); *Moncrief Oil Int’l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013) (“[S]pecific jurisdiction requires us to analyze jurisdictional contacts on a claim-by-claim basis.”); *Blume Law Firm PC v. Pierce*, 741 N.W.2d 921, 925 (Minn. Ct. App. 2007) (“When multiple claims are raised, personal jurisdiction must be established for each claim.”).

unrelated claims for jurisdictional purposes.¹⁶⁵ There will always be a rightful place to bring a lawsuit, namely where the defendant is at home or the injury occurred. These states have a legal interest in administering the litigation, and juries of these states have an obligation to help the parties resolve their disputes. Allowing claims to migrate to other states, predicated on tangential business activity, violates the rights of states with jurisdiction to hear these claims and of defendants not to be hauled into courts lacking a meaningful affiliation with the claims.¹⁶⁶

E. *Application of Personal Jurisdiction Decisions to Other Types of Cases*

Each of the recent Supreme Court personal jurisdiction cases discussed above involved individual state claims against corporate defendants. They did not involve class actions (whether brought in state or federal court), Multi-District Litigation (MDL), or purely federal actions.¹⁶⁷ How the Court's rulings apply in these other types of cases is already being litigated.

1. Class Actions

Courts have taken very different approaches with respect to applying the Court's jurisprudence to class actions.¹⁶⁸ The key question is whether an individual who cannot establish general or specific jurisdiction in a state over the defendant can, nonetheless, be included in a class action in that state. It is a foundational element of class action law, under federal and state rules of civil procedure, that a person who does not have a claim individually—whether for substantive or procedural reasons—cannot leverage class action rules to gain such a right of action.

165. See *BMS*, 137 S. Ct. at 1782 (“The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State.”).

166. See *Lawson v. Simmons Sporting Goods, Inc.*, 2019 Ark. 84 (2019) (establishing a new state standard for determining specific personal jurisdiction to comport with *Bristol-Meyers Squibb*).

167. See *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1789, n. 4 (Sotomayor, J., dissenting) (“The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”).

168. See *Prac. Mgmt. Support Servs., Inc. v. Cirque de Soleil, Inc.*, 301 F. Supp. 3d 840, 860 (N.D. Ill. 2018) (stating that “the applicability of *Bristol-Myers* to class actions is far from a settled issue”), *rev'd on other grounds*, 2018 WL 3659349 (N.D. Ill. Aug. 2, 2018).

Nevertheless, courts such as the U.S. District Court for the Northern District of California have rejected the application of *BMS* to a nationwide class action.¹⁶⁹ The named plaintiffs in a consumer class action alleging deceptive marketing of a soft drink could establish specific personal jurisdiction in California, but eighty-eight percent of the class members were not California residents and would not have the right to sue the defendant in California on their own. The court held that the class could remain intact because “in class actions, the citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes.”¹⁷⁰ In issuing this opinion, the court fully recognized that the inclusion of this “decidedly lopsided” number of nonresidents with two named California plaintiffs “was undoubtedly done to distinguish this case from *Bristol-Myers*.”¹⁷¹ But it allowed this “manipulat[ion]” because the “plaintiffs are the masters of their complaint.”¹⁷²

The U.S. District Court for the Eastern District of Louisiana also rejected the application of the U.S. Supreme Court’s personal jurisdiction jurisprudence to a proposed class action.¹⁷³ Here, the court distinguished *BMS*, which was an aggregation of individual claims, from class actions. It suggested that “a class action has different due process safeguards” than individual cases because, under Rule 23 of the Federal Rules of Civil Procedure, there are additional safeguards for class certification, namely numerosity, commonality, typicality, adequacy of representation, predominance and superiority.¹⁷⁴ As a result, the court concluded *BMS* is not needed, or required, to protect defendants’ constitutional rights.¹⁷⁵ The court also asserted that *BMS* should not interfere when the class mechanism is the more efficient and preferred means for resolving a dispute.

Other courts have rejected these rationales.¹⁷⁶ As the U.S. District Court for the Northern District of Illinois explained, *BMS*

169. See *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

170. *Id.*

171. *Id.*

172. *Id.*

173. See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 5971622, at *12–16 (E.D. La. Nov. 30, 2017).

174. *Id.* at *14.

175. *Id.*

176. See *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 874 (N.D. Ill. 2017) (rejecting application of *BMS* to putative class action brought by California and Illinois residents for financial losses from failed bitcoin exchange); *Prac. Mgmt. Support Servs., Inc. v. Cirque du*

“announced a general principle—that due process requires a ‘connection between the forum and the specific claims at issue,’” which applies with “equal force whether or not the plaintiff is a putative class representative.”¹⁷⁷ The court elaborated in another case, “it is more likely than not based on the Supreme Court’s comments about federalism that the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in a forum . . . where there is no general jurisdiction over the Defendants.”¹⁷⁸ Further, the public policy rationale in *BMS* applied equally to class actions: “possible forum shopping is just as present in multi-state class actions.”¹⁷⁹ As this court suggests, the issue here is not *whether* a corporation can be subject to multi-state class actions, but *where* the class actions can be filed. Multi-state class actions can always be filed where a company is at home and is subject to general personal jurisdiction. Other states likely will not have jurisdiction over the entire class’s claims.

3. Multi-District Litigation

Similar personal jurisdiction questions have arisen in MDLs, specifically for claims filed directly with an MDL.¹⁸⁰ MDLs are products of federal statutory law whereby civil actions involving common questions of fact that are pending in federal district courts may be transferred to a specific district court for coordinated or consolidated pretrial proceedings.¹⁸¹ The MDL statute itself does not confer jurisdiction for direct MDL filings, but does provide the MDL judge or “transferee court” with extra-jurisdictional authority to “exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions” which could, in theory, imply broader jurisdictional authority.¹⁸² Some courts have treated such direct filed cases “as if they were transferred from a judicial district

Soleil, Inc., 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018) (stating in proposed class action alleging violations of federal Telephone Consumer Protection Act that “it is not clear how [plaintiff] can distinguish the Supreme Court’s basic holding in *Bristol-Myers* simply because this is a class action”), *rev’d on other grounds*, 2018 WL 3659349 (N.D. Ill. Aug. 2, 2018); McDonnell v. Nature’s Way Prods., LLC, 2017 WL 4864910, at *4 (N.D. Ill. Oct. 26, 2017) (rejecting application of *BMS* to proposed class action alleging deceptive practices in marketing of energy bar supplements as “Made in the U.S.A.”).

177. *Greene*, 289 F. Supp. 3d at 874 (quoting *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1781).

178. *DeBernardis v. NBTY, Inc.*, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018).

179. *Id.*

180. See MDL Direct Filing & Personal Jurisdiction, Drug & Device Law, Oct. 16, 2017, at <https://www.druganddeviceblog.com/2017/10/mdl-direct-filing-personal-jurisdiction.html>.

181. See 28 U.S. Code § 1407.

182. See 28 U.S. Code § 1407(b).

sitting in the state where the case originated.”¹⁸³ Others have held that the jurisdictional basis for MDL direct filing is rooted in “acquiescence – and thus the waiver – of the defendant(s) being sued.”¹⁸⁴ Legal commentators have expressed “serious[] doubt that Congress intended to hide any jurisdictional elephants in MDL statutory mouseholes.”¹⁸⁵

Allowing direct filed MDL cases without personal jurisdiction limits could have a substantial impact on mass tort litigation. As Chief Judge Clay Land, of the U.S. District Court for the Middle District of Georgia, observed when overseeing an MDL involving medical products, MDLs comprise “a growing percentage of the federal civil docket” and “seem to be the norm for cases involving common issues of law and fact.”¹⁸⁶ Few cases are remanded back to their original courts, meaning “many of the most significant civil disputes on the federal docket are being resolved in a distant venue by a hand-picked judge, typically through some type of global settlement.”¹⁸⁷ The judge noted that MDLs, which are increasingly becoming “alternative dispute resolution forum[s] for global settlements,” often have unintended consequences.¹⁸⁸ Specifically, they can produce “incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action.”¹⁸⁹ “Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached . . . allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action.”¹⁹⁰ Thus, MDLs can generate a “perverse result”: instead of promoting judicial economy, they can clog dockets with claims that

183. See *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348 (5th Cir. 2017) (quoting *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Prods. Liab. Litig.*, 2011 WL 1375011, at *6 (S.D. Ill. April 12, 2011)); see also *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 5971622, at *17–20 (stating that while the “jurisdiction of state courts are cabined by its state’s geography . . . federal court jurisdiction is broader based” such that personal jurisdiction concerns regarding out-of-state plaintiffs may be inapplicable with respect to federal actions, nationwide class actions, and MDLs”).

184. *Supra* note 180.

185. *Id.*

186. *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705807, at *1 (M.D. Ga. Sept. 7, 2016).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

“never would have entered the federal court system without the MDL.”¹⁹¹

Faithful application of general and specific due process requirements could provide MDL judges with an important case management tool against abusive direct filings. As Judge Land explained, transferee courts can exercise caution and “consider approaches that weed out non-meritorious cases early, efficiently, and justly.”¹⁹²

3. Federal Cases

Plaintiffs seeking to impose jurisdiction over foreign companies in federal courts have argued that the Court’s personal jurisdiction rulings do not apply to their cases. Jurisdiction for state causes of action are based on due process protections in the Fourteenth Amendment, whereas jurisdiction in federal courts is grounded in due process in the Fifth Amendment. They point out that in *BMS*, the Court expressly left “open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”¹⁹³ The U.S. District Court for the Southern District of New York, though, has explained that courts have “uniformly rejected arguments that the general jurisdiction analysis under the Fifth Amendment differs from the principles set forth by the Supreme Court in *Goodyear* and *Daimler*.”¹⁹⁴ Courts have also rejected such distinctions with respect to specific personal jurisdiction.¹⁹⁵ In doing so, judges have appreciated that the “language and policy considerations of the Due Process Clauses of the Fifth and Fourteenth Amendments are virtually identical” and “decisions interpreting the Fourteenth Amendment’s Due Process Clause guide [courts] in determining what due process requires in the Fifth Amendment jurisdictional context.”¹⁹⁶

191. *Id.*

192. *Id.* at *2.

193. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2016 WL 1268267, at *4 (S.D.N.Y. Mar. 31, 2016); *BMS*, 137 S. Ct. at 1184.

194. *Id.*; *see also Daimler*, 571 U.S. at 125 (“Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.”).

195. *See, e.g., Fitzhenry-Russell*, 2017 WL 4224723, at *4 (finding “no merit” to plaintiffs’ argument that *BMS* does not apply to federal courts “because federal courts routinely apply the specific jurisdiction analysis to defendants in cases that are before them solely on the basis of diversity”).

196. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2016 WL 1268267, at *4 (quoting *Schulman v. Inst. for Shipboard Educ.*, 624 Fed. Appx. 1002, 1006 (11th Cir. 2015)).

III. SO WHAT HAPPENS—OR SHOULD HAPPEN—NEXT?

The Supreme Court's recent series of personal jurisdiction decisions should have a major constructive impact on where cases are heard. Under the Court's rulings, there are three archetypal places for suing a business: 1) the state where it is incorporated; 2) the state where it has its principal place of business; or 3) the state where the plaintiff sustained his or her injury. These are the limited jurisdictions where the state and its taxpayers have a legal interest in adjudicating the suit,¹⁹⁷ and the defendant has notice as to where it may be subject to liability and for which types of legal actions.¹⁹⁸ Thus, if the Court's reasoning and intent are properly embraced by state courts, these rulings can be powerful weapons against forum shopping and litigation tourism.

As Justice Sotomayor observed in her *BMS* dissent, the Court's series of rulings provide "substantial curbs" that should result in more "piecemeal litigation,"¹⁹⁹ where claims are heard in their proper states rather than concentrated in a few specific, plaintiff-chosen jurisdictions. This more diversified litigation environment can promote fairness, and facilitate each claim being resolved on its own merits.²⁰⁰ Should both sides see value and efficiency in litigating similar cases in a single jurisdiction, rather than in small actions around the country, they can agree to the filings and waiver of personal jurisdiction.

A. Limiting "Judicial Hellholes" or "Magic Jurisdictions"

If plaintiffs can file their cases in only a limited number of states, the jurisdictions that have become popular destinations for lawsuits should lose their pull. Dickie Scruggs, a well-known former plaintiffs' lawyer, called these places his "magic jurisdiction[s]."²⁰¹ In a moment of candor, Mr. Scruggs explained:

What I call the "magic jurisdiction," [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court

197. See *BMS*, 137 S. Ct. at 1780–81 (discussing competing interests of proposed forum state).

198. See *Daimler*, 571 U.S. at 139.

199. *BMS*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

200. See discussion *infra* Section III.B.

201. Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (quoting Richard Scruggs).

judges; they're popul[ists]. . . . And, so it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places.²⁰²

A tort reform group is less diplomatic in naming these jurisdictions "Judicial Hellholes."²⁰³ Every year since 2003, the American Tort Reform Foundation (ATRF) has issued its Judicial Hellholes report to shine a spotlight on abusive practices in these select jurisdictions.

The quintessential example of forum shopping is in asbestos litigation. Any manufacturer with a remote historic connection to an asbestos-containing product or workplace faces lawsuits in Madison County, Illinois, which hosts one-quarter of the nation's asbestos litigation.²⁰⁴ Very few of these claims, though, have any connection to Madison County. In 2015, only seventy-five of 1,224 asbestos cases filed there were on behalf of Illinois residents, and only six cases involved Madison County residents.²⁰⁵ Scholars have suggested that the ability to file asbestos-related claims in Madison County and other chosen jurisdictions is a key reason asbestos litigation, which should have been in decline, is growing in scope and intensity.²⁰⁶ Years earlier, when the ATRF first named Madison County a Judicial Hellhole, Judge DeLaurenti, who served in Madison County for twenty-seven years until 2000 said, "There's some merit to the accusation of bias in Madison County. . . . When people come from hither and thither to file these cases, there's gotta be an inducement, doesn't there? They're not coming to see beautiful Madison County."²⁰⁷

For a number of years, Philadelphia became a prime location to file lawsuits against pharmaceutical manufacturers. In 2009, the Court of Common Pleas President Judge undertook a "public campaign to lay out the welcome mat for increased mass torts filings."²⁰⁸ The

202. *Id.*

203. See Judicial Hellholes, Am. Tort Reform Found., at <https://www.judicialhellholes.org/>.

204. See KCIC, Asbestos Litigation: 2016 Mid-Year Update (2016), at 3. <http://riskybusiness.kcic.com/wp-content/uploads/2016/09/KCIC-Asbestos-Mid-Year-Report-2016-1.pdf>.

205. See Heather Isringhausen Gvillo, *Madison County Asbestos Filings Total 1,224; Only 6 Percent Filed on Behalf of Illinois Residents*, MADISON-ST. CLAIR RECORD, Mar. 23, 2016.

206. See generally Mark D. Plevin, et al., *Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11-7 Mealey's Asb. Bankr. Rep. 24 (2012).

207. Martin Kasindorf, *Robin Hood is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, Mar. 8, 2004.

208. Amaris Elliott-Engle, *Common Pleas Court Seeing More Diabetes Drug Cases*, LEGAL INTELLIGENCER, Mar. 19, 2009, at 1.

reported goal of this effort was to make the Complex Litigation Center for mass torts more attractive to attorneys to “tak[e] business away from other courts.”²⁰⁹ In 2015, out-of-state plaintiffs accounted for eighty-one percent of new pharmaceutical cases filed in Philadelphia courts, with that number dipping to sixty-five percent in 2016.²¹⁰ Local lawyers attribute this decrease to the initial impacts of *Daimler*.²¹¹

In addition, a handful of states host most of the unfair trade practices claims against manufacturers. A report issued by the U.S. Chamber of Commerce Institute for Legal Reform found that more than seventy-five percent of consumer lawsuits targeting food makers are filed in only four states.²¹² As indicated above, Montana has become a destination for FELA claims because the Montana Supreme Court has adopted a more liberal interpretation of the statute of limitations than several federal circuits and has a reputation for “empathizing with injured railroad workers” as compared to other states.²¹³

The impact of faithfully applying *Daimler* can be seen in Delaware. Before *Daimler*, out-of-state plaintiffs with no meaningful connection to Delaware increasingly filed asbestos claims there.²¹⁴ *Daimler* reversed this trend; asbestos claims filed in New Castle, Delaware fell from 219 in 2014 to 124 in 2015, a decline of forty-three percent.²¹⁵ The Delaware Supreme Court found that “it is not tenable” after *Daimler* to exert personal jurisdiction over a manufacturer where the claims “had nothing to do with its activities in Delaware,” merely because the corporation registered to do business and

209. Amaris Elliott-Engle, *Philadelphia Courts May See Substantial Layoffs*, LEGAL INTELLIGENCER, Jan. 29, 2009.

210. See Max Mitchell, *Out-of-State Pharma Filings Dip as Phila. Mass Torts Remain Steady*, LEGAL INTELLIGENCER, July 25, 2016.

211. See *id.*

212. See Cary Silverman & James Muehlberger, *The Food Court Trends in Food and Beverage Class Action Litigation 8* (U.S. Chamber Inst. for Legal Reform 2017). *Daimler* has proven effective in dismissing or narrowing claims where there is no connection to the state. See, e.g., *Weisblum v. Prophase Labs, Inc.*, 88 F.Supp.3d 283 (S.D.N.Y. 2015) (dismissing consumer class action fraud claims by California residents for lack of general jurisdiction over defendant while retaining such claims by New York residents).

213. Paul Bovarnick, *On the Tracks: Helping Injured Railroad Workers*, Trial Lawyer, at 33 (Fall 2012) (“[O]nce the railroad realized we could file . . . in Great Falls, they offered a generous settlement.”); see also *Anderson v. BNSF Ry.*, 354 P.3d 1248 (Mont. 2015), *cert. denied*, 136 S. Ct. 1495 (2016).

214. See *In re Asbestos Litig.*, 929 A.2d 373, 378 (Del. 2006) (finding out-of-state asbestos claims filed in Delaware courts began in May 2005 and quickly reached 129 claims).

215. See KCIC, *Asbestos Litigation*, *supra* note 204, at 5.

appointed an agent to receive service of process in the state.²¹⁶ The court further explained, “we have long ago become a truly national—even international—economy, and the ability of foreign corporations to operate effectively throughout our nation is critical to our nation’s economic vitality and ability to create jobs.”²¹⁷ “It is in the context of this global economy,” the court continued, “that the U.S. Supreme Court issued its rulings in *Goodyear* and *Daimler*.”²¹⁸

B. *Removing Injustices from “Stockpiling” Claims in Single Jurisdictions*

Minimizing the consolidation of claims into a single jurisdiction, regardless of where, also advances the interests of justice, as claims would be more likely decided on their own merits. When hundreds, or even thousands, of claims are stockpiled into a court system, the focus even of well-intentioned judges can shift from dispensing justice to clearing cases from the docket. Sometimes these judges take shortcuts to temporarily fix a clogged docket. Experience, however, has shown that “mov[ing] large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings.”²¹⁹

Some lawyers have developed techniques to take advantage of these dynamics. As discussed above, MDL Judge Land expressed concerns about such tactics undermining the ability of a court to achieve justice.²²⁰ He was administering the MDL against Mentor Corporation over its mesh medical devices. Litigation over mesh, which is used to treat pelvic floor disorders in women, has become one of the largest mass torts in the country. There are several mesh manufacturers, more than one hundred mesh products, and now more than one hundred thousand claims alleging injuries from these products. Judge Land found that lawyers generated this mass of claims through an “onslaught of lawyer television solicitations,” but did such “little pre-filing preparation” that most of the cases were meritless

216. *Genuine Parts Co v. Cepec*, 137 A.3d 123, 125–26 (Del. 2016) (finding no personal jurisdiction over manufacturer incorporated in Georgia with principal place of business in Atlanta in asbestos claim brought by Georgia plaintiff who worked in Florida warehouse).

217. *Id.* at 137.

218. *Id.*

219. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

220. *See supra* notes 186 through 192 and accompanying text.

and “should never have been brought.”²²¹ He explained that the lawyers were leveraging the mass filings to create a presumption among judges, juries, and the media that there must be merit to the allegations and then generate mass settlements without the individual merit of their cases being scrutinized.²²² If cases are heard individually in appropriate jurisdictions, such warehousing techniques will not work.

Even when a case is heard individually and on its merits, the commitment of ensuring a fair trial can wane when the parties are from out-of-state. The Supreme Court has repeatedly appreciated that when a defendant company is from out-of-state, there is “the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”²²³ Further, when all parties are out-of-state, jurors can be frustrated that the sacrifice they make by serving on a jury is not going to address an alleged wrong in their communities. A jury’s mission is to provide a voice for its community, establish facts of a case, and ensure parties are treated neutrally and equally. An overwhelming majority of Americans have high regard for the jury system, but do not want to make professional and personal sacrifices for disputes having nothing to do with them.²²⁴ These concerns of injustice go to the heart of the fair play and substantial justice reasons the Court imposed new jurisdictional limits.

C. *Focusing on State Legal Climate and Venue Reform*

Finally, there has been an increase in attention to state liability laws, including attempts to tighten loose venue laws that would stop forum shopping within a state. Consider, for example, Missouri. Since 2015, St. Louis, Missouri had become the destination of choice for thousands of filings by nonresident plaintiffs alleging injuries against various out-of-state product manufacturers.²²⁵ The Missouri Office of State Courts Administrator issued statistics showing that, from 2014 to

221. *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705807, at *1 n. 2.

222. *See id.* at *1.

223. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (identifying “prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident”).

224. *See* Mark A. Behrens & Cary Silverman, *Improving the Jury System in Virginia: Jury Patriotism Legislation is Needed*, 11 GEO. MASON L. REV. 657, 667–68 (2003).

225. *See* St. Louis, Missouri, Judicial Hellholes, American Tort Reform Foundation, at <http://www.judicialhellholes.org/2017-2018/st-louis-missouri/>.

2015, filings in the City of St. Louis increased from around 3,000 to nearly 13,000.²²⁶ In 2016, more than 140 mass tort cases were pending in St. Louis, with 8,900 plaintiffs having no connection to the City.²²⁷ *Bloomberg Businessweek* observed this development, reporting that “[h]undreds of plaintiffs with product liability claims . . . have been flocking to downtown St. Louis to a venue that over the past three years has developed a reputation for fast trials, favorable rulings, and big awards.”²²⁸

For example, in 2016, more than 2,100 claims were grouped together in 260 lawsuits around the country alleging that talcum powder causes ovarian cancer.²²⁹ More than two-thirds of the claimants filed in St. Louis against the New Jersey-based manufacturer. Four of the first five trials in the City of St. Louis Circuit Court in 2016 and 2017 resulted in multi-million dollar plaintiff verdicts that cumulatively totaled more than \$300 million.²³⁰ The plaintiff in each of the five cases hailed from a state other than Missouri, including Alabama, South Dakota and California.²³¹ By contrast, the initial talc cases heard in New Jersey were dismissed after the court determined that the plaintiffs’ experts, who testified in St. Louis, were not qualified to testify.²³² Although a Missouri appellate court applying *BMS* overturned one of the initial talc verdicts in 2017 for want of specific personal jurisdiction in the City of St. Louis,²³³ these rulings continue to be overshadowed by large trial

226. Compare 2015 Annual Statistical Report – Circuit Profiles, Missouri Courts, Table 25, available at <https://www.courts.mo.gov/page.jsp?id=296> (reporting 12,887 civil cases filed in the City of St. Louis in 2015) with 2014 Annual Statistical Report – Circuit Profiles, Missouri Courts, Table 25 (reporting 3,168 civil cases filed in the City of St. Louis in 2014).

227. See Reply Brief of Relator Abbott Labs, Inc. at 9 n.4, State ex rel. Abbott Labs, Inc. v. Ohmer, No. SC96718 (Mo. 2018) (reporting analysis of Missouri case records on pending mass tort cases in City of St. Louis); see also Phil Goldberg, Goldberg Testifies in Missouri for Venue and Joinder Legislation, Progressive Policy Inst., Feb. 8, 2017, at <https://www.progressivepolicy.org/blog/goldberg-testifies-missouri-venue-joinder-legislation/> (reporting 140 mass tort cases pending in St. Louis involving 8,400 out-of-state plaintiffs).

228. Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, BLOOMBERG BUSINESSWEEK, Sept. 29, 2016.

229. See City of St. Louis, Missouri, Judicial Hellholes, at <http://www.judicialhellholes.org/2016-2017/city-of-st-louis-missouri/>.

230. See Joel Currier, *Talcum Powder Lawsuits Find a Home in St. Louis - For Now*, St. Louis Post-Dispatch, May 21, 2017, at A1, available at 2017 WLNR 15792696.

231. See *id.* (reporting that the respective plaintiffs were residents of Alabama, South Dakota, California, Tennessee, and Virginia).

232. See Brendan Pierson, *After \$195 million in Talc Verdicts, J&J Strives to Change Court*, REUTERS, Nov. 6, 2016, at <https://www.reuters.com/article/us-johnson-johnson-cancer-lawsuit-analys-idUSKBN13114F>.

233. See Corey Schaecher, David Weder and Taylor Essner, *Missouri Talc Decision Could*

court verdicts.²³⁴ In 2018, for instance, a St. Louis jury awarded \$4.7 billion to twenty-two plaintiffs in a consolidated talc case.²³⁵

Other mass tort cases brought in the City of St. Louis have produced similar outcomes. In 2016, plaintiffs from Alaska, Michigan and Oklahoma who alleged PCBs caused their non-Hodgkin's lymphoma obtained a \$46 million verdict against Monsanto Company.²³⁶ Comparable lawsuits in Los Angeles and St. Louis County resulted in defense verdicts.²³⁷

A variety of factors enable large awards and contribute to the City of St. Louis's emergence as a jurisdiction of choice to file claims.²³⁸ Missouri had loose standards and practices over the admissibility of expert evidence and maintains a standard for awarding punitive damages that is among the weakest in the country.²³⁹ Courts have also not properly enforced the joinder and venue laws on the books, which has allowed the mass aggregation of claims in St. Louis.²⁴⁰ In addition to being named a "Judicial Hellhole," a 2017 survey of 1,300 corporate litigators and senior executives done for the U.S. Chamber of Commerce ranked Missouri's liability system 49th in the country.²⁴¹ This legal climate created a reputational problem for Missouri, as eighty-five percent of the executives surveyed said a state's litigation climate impacts their company's decisions about where to locate and expand.²⁴²

Signal Mass Tort Sea Change, Law360, Apr. 18, 2018, at <https://www.law360.com/articles/1034577/missouri-talc-decision-could-signal-mass-tort-sea-change> (discussing decision by Missouri's Eastern District Court of Appeals overturning trial court's \$72 million talc verdict for want to specific personal jurisdiction against defendant).

234. See Max Mitchell, *St. Louis Jury Issues \$4.7 Billion Verdict After Trial Linking Talc to 22 Cancer Cases*, NAT. L.J., July 13, 2018, at <https://www.law.com/nationallawjournal/2018/07/13/st-louis-jury-issues-4-7-billion-verdict-after-trial-linking-talc-to-22-cancer-case/>.

235. See *id.*

236. See Joel Currier, *St. Louis Jury Orders Monsanto to Pay \$46.5 million in Latest PCB Lawsuit*, ST. LOUIS POST-DISPATCH, at https://www.stltoday.com/news/local/metro/st-louis-jury-orders-monsanto-to-pay-million-in-latest/article_08e25795-0d36-5155-999c-c6bd954a6c2e.html.

237. See *id.*

238. See Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, BLOOMBERG BUSINESSWEEK, Sept. 29, 2016.

239. Missouri adopted gatekeeper rules on the admission of expert evidence in 2017. See Mo. S.B. 43 (Reg. Sess. 2017) (codified at MO. REV. STAT. § 213.010).

240. Trial Lawyers, Inc.: Missouri Update, Manhattan Inst. (Jan. 2018), available at <https://www.manhattan-institute.org/html/trial-lawyers-inc-update-missouri-10918.html>.

241. See 2017 Lawsuit Climate Survey: Ranking the States, U.S. Chamber of Commerce Institute for Legal Reform, at 1, available at <https://www.instituteforlegalreform.com/research/2017-lawsuit-climate-survey-ranking-the-states->.

242. See *id.* at 8; see also Dan Mehan, *Greitens and Unified Legislature Making Sure Missouri Isn't the "Sue-Me State"*, KAN. CITY STAR (Oct. 8, 2017).

As a result, the call for reform in Missouri has been loud, particularly over venue and joinder reforms.²⁴³ Legislation introduced in 2018 sought to clarify that an out-of-state claim cannot be joined to an in-state claim in order to defeat the state's venue laws. The jurisdiction must be a proper venue for a claim in order to be joined with any other claim in that jurisdiction. Similarly, a defendant can be joined to a case only when each plaintiff can establish jurisdiction and venue against that defendant. If a claim is misjoined, it can still be heard, but it must be sent to the proper venue, whether in Missouri or in another state.

This legislation gained renewed importance given the Missouri Supreme Court's ruling in *Barron v. Abbott Laboratories, Inc.*,²⁴⁴ in which the court weakened the enforcement mechanism for a case heard in an improper Missouri venue. The court held that even if a plaintiff intentionally files a claim in the wrong Missouri venue, the defendant's challenge on appeal will be granted only if the defendant can prove specific prejudice in the wrong venue.²⁴⁵ This is a near impossible bar to meet. Old habits die hard.

In early 2019, the situation in Missouri improved significantly. The Missouri Supreme Court, in *State ex rel. Johnson & Johnson v. Burlison*,²⁴⁶ held that permissive joinder of a personal injury claim is not permitted in a venue where the claim would not have otherwise been proper. In this case, a St. Louis City resident had brought a product liability action against an out-of-state manufacturer. Dozens of non-resident claims were then joined to the resident's action, seeking to have their claims heard in St. Louis City as well. The court granted the manufacturer's writ of prohibition to sever the non-resident claims and transfer them to St. Louis County where venue may be proper.²⁴⁷ A few months later, the Missouri General Assembly enacted a version of the venue reform legislation introduced in 2018.²⁴⁸ The legislation expressly adopted the holding of *Burlison* and established other venue and jurisdictional requirements to make clear

243. See S.B. 546 (Mo. 2018).

244. 529 S.W.3d 795 (Mo. 2017).

245. See *id.* at 789–90.

246. 567 S.W.3d 168 (Mo. 2019).

247. See *id.* at 171–74.

248. See S.B. 7 (Mo. 2019) (pending Governor's signature at the time of publication); see also Crystal Thomas, *Missouri Passes Bill to Limit Lawsuits Filed in Plaintiff-Friendly St. Louis*, KAN. CITY STAR, May 2, 2019, at <https://www.kansascity.com/news/politics-government/article229929024.html>.

that courts should not hear claims that belong elsewhere.²⁴⁹ Thus, progress to curb forum-shopping continues to be made.

CONCLUSION

The Supreme Court's reevaluation of the constitutional limits of personal jurisdiction, after a seventy-year hiatus, marks a turning point away from "sprawling" theories of general and specific jurisdiction toward an exacting analysis of where a business may be subject to a lawsuit. A clear impetus for this paradigm-shift in jurisprudence was the Court's desire to curb forum shopping and litigation tourism, which plaintiffs engage in to obtain an advantage unrelated to a claim's merits. The Court's jurisprudence reflects the modern economy, where many corporate defendants maintain a national or global presence, as well as the modern litigation environment, where plaintiffs' lawyers have developed tactics based on the ability to stockpile claims in chosen jurisdictions.

Peering out on the horizon, the Court's personal jurisdiction decisions should produce an even-handed distribution of litigation in the United States. As courts wade through the outstanding issues regarding the scope and application of the Court's decisions—issues which have been discussed in this article—the full import of this jurisprudence will likely emerge. There is no doubt that plaintiffs' lawyers will put forth creative arguments for maintaining their forum shopping advantage and that some courts will try to keep out-of-state cases in their jurisdictions. A straightforward reading of the Court's new personal jurisdiction rulings, however, requires courts to reject these attempts at forum shopping and uphold the due process rights of corporate defendants.

249. *See id.*