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## Aggregation on Defendants' Terms: *Bristol-Myers Squibb* and the Federalization of Mass-Tort Litigation

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**AGGREGATION ON DEFENDANTS’ TERMS:  
*BRISTOL-MYERS SQUIBB* AND THE  
FEDERALIZATION OF MASS-TORT  
LITIGATION**

ANDREW D. BRADT  
D. THEODORE RAVE

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# AGGREGATION ON DEFENDANTS' TERMS: *BRISTOL-MYERS SQUIBB* AND THE FEDERALIZATION OF MASS-TORT LITIGATION

ANDREW D. BRADT\*  
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**Abstract:** Although it is destined for the personal jurisdiction canon, the Supreme Court's eight-to-one decision in *Bristol-Myers Squibb Co. v. Superior Court* does little to clarify that notoriously hazy doctrine. It does, however, significantly alter the balance of power in complex litigation. *Bristol-Myers* is a landmark case because it makes both mass-tort class actions and mass joinders impracticable in almost any state court outside of the defendant's home states. With federal courts already hostile to class actions, plaintiffs who want to aggregate their claims will have to do so on the defendant's terms: either on the defendant's home turf or in federal multidistrict litigation (MDL). Faced with this choice, we believe that most plaintiffs will turn to MDL. The result will be the culmination of a trend toward the federalization of mass-tort litigation in MDL, which has already grown to make up an astonishing one-third of the federal civil docket. In this Article, we examine why *Bristol-Myers* will have this effect and explain how MDL's hybrid structure facilitates centralized mass-tort litigation in federal court, even as the Court's restrictive view on personal jurisdiction prevents similar aggregation in state court. MDL cuts this Gordian knot by formally adhering to the vision of vertical and horizontal federalism underlying both diversity jurisdiction and *Bristol-Myers*, while al-

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so paradoxically undermining that vision in service of mass resolution. As a result, even more power over mass-tort litigation will be centralized in the hands of the MDL judge and the lead lawyers the judge selects to run the litigation—a prospect that comes with both opportunities and risks.

## INTRODUCTION

Over the last decade, Americans have gone to California in droves, perhaps because of the weather, the booming economy, or the bountiful resources.<sup>1</sup> So too did 592 plaintiffs from around the country who wanted to sue for injuries they suffered after taking the drug Plavix, manufactured by pharmaceutical giant Bristol-Myers Squibb. These plaintiffs joined eighty-six Californians alleging similar injuries in a series of product-liability cases in the Superior Court of San Francisco County.<sup>2</sup> Bristol-Myers, for its part, did not want to litigate those cases in California, whose judges and juries it considered a little too plaintiff-friendly for its taste. For complicated reasons, however, Bristol-Myers could not remove the cases to what it believed were the friendlier confines of federal court. So, Bristol-Myers tried another means of getting out—a motion to dismiss for lack of personal jurisdiction over the claims by the non-Californians, derided as “litigation tourists.”<sup>3</sup>

Rebuffed by the California courts, Bristol-Myers, as the saying goes, took the case all the way to the Supreme Court, contending that the non-Californians’ claims lacked the requisite “minimum contacts” with California.<sup>4</sup> The Supreme Court agreed by an eight-to-one margin in *Bristol-Myers Squibb Co. v. Superior Court*, a decision that is likely to become a staple of first-year Civil Procedure courses everywhere.<sup>5</sup> The Court held that to invoke the California court’s specific jurisdiction, each plaintiff’s claim must have some specific connection to the forum state. Thus, product-liability plaintiffs cannot sue a national product seller in any state just because it sells the same product there. Plaintiffs must either sue in a state that has some specific connection to *their* claim or else in the defendant’s home state, where the defendant is subject to general jurisdiction.<sup>6</sup>

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<sup>1</sup> See, e.g., Katy Murphy, *As California Grows, Menlo Park and Other Bay Area Cities See Population Boom*, SAN JOSE MERCURY NEWS (May 1, 2017), <https://www.mercurynews.com/2017/05/01/as-california-grows-menlo-park-and-other-bay-area-cities-see-population-boom/> [https://perma.cc/RQW6-QXBH].

<sup>2</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017).

<sup>3</sup> See James M. Beck, *Breaking News—Bristol-Myers Squibb Slams the Door on Litigation Tourism*, DRUG & DEVICE L. BLOG (June 19, 2017), <https://www.druganddevicelawblog.com/?s=Bristol-Myers+Squibb+Slams+the+Door+on+Litigation+Tourism> [https://perma.cc/4EGQ-BYCR].

<sup>4</sup> Brief for the Petitioner at 13, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466).

<sup>5</sup> *Bristol-Myers*, 137 S. Ct. at 1777.

<sup>6</sup> *Id.* at 1781–82.

Throughout the litigation, Bristol-Myers faced a key question: what exactly was wrong with California? After all, Bristol-Myers would concededly have to litigate the California plaintiffs' claims there, no matter what the courts concluded about the out-of-staters' claims. Bristol-Myers had a major footprint in California: it employed thousands of people and sold over a billion dollars' worth of Plavix there. Not to mention that San Francisco is eminently accessible, and probably more convenient than many state courts around the country where the out-of-staters might refile.

There was, of course, nothing inconvenient about litigating in California. In reality, the stakes in *Bristol-Myers* had little to do with the traditional concerns underlying limitations on personal jurisdiction, such as distant-forum abuse or state sovereignty, although lip service was dutifully paid to those venerable concepts. *Bristol-Myers* is just the latest move in the chess match going on in mass-torts litigation between plaintiffs who want to aggregate their cases in the state court of their choice and defendants who want to prevent aggregation in the hopes that the cases will go away or to move the cases into federal court before a friendlier audience. Indeed, Bristol-Myers candidly admitted that if the plaintiffs were prevented from aggregating their cases in California, it expected that "a lot of those cases aren't going to get filed," or that they would be removed and transferred to a federal multidistrict litigation, or MDL.<sup>7</sup> In fact, Bristol-Myers enthusiastically endorsed the MDL process, which would consolidate cases filed around the country in a single federal court that could be located virtually anywhere—including in the U.S. District Court for the Northern District of California, right down the street from the Superior Court they were so desperately trying to flee. In Bristol-Myers's view, then, nationwide consolidation in California state court was unconstitutional, but consolidation in federal court in California was perfectly acceptable.<sup>8</sup>

This practice of forum shopping between state and federal courts is age old—plaintiffs will inevitably prefer one, whereas defendants prefer the other.<sup>9</sup> In mass-tort litigation, the battle has continued unabated since new methods of aggregate litigation—like the class action—came on the scene

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<sup>7</sup> Oral Argument at 23:00, *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412 (Ct. App. 2014) (No. 16-466), <https://www.oyez.org/cases/2016/16-466> [<https://perma.cc/FW5H-XN93>].

<sup>8</sup> See Brief for Petitioner, *supra* note 4, at 51 (arguing that multidistrict litigation (MDL) "has been used successfully countless times before").

<sup>9</sup> See generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (2000) [hereinafter PURCELL, BRANDEIS]; EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY* (1992); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (describing the persistent debate over the relative quality of the federal and state courts).

in the 1960s. When, in the 1990s, numerous decisions by federal courts made it difficult to certify mass-tort class actions, plaintiffs' lawyers turned to more accommodating states.<sup>10</sup> To combat that tactic, defense-friendly interest groups convinced Congress to pass the Class Action Fairness Act of 2005 (CAFA), which expanded federal subject matter jurisdiction over class actions to return them to hostile federal courts.<sup>11</sup> But plaintiffs found ways to continue to aggregate in state court all the same by structuring mass joinders that are neither class actions nor fall within diversity jurisdiction, under CAFA or otherwise.<sup>12</sup> So it was that 678 plaintiffs from around the country had managed to come together in a single non-class, mass-tort proceeding in San Francisco. And the Supreme Court sent them home in *Bristol-Myers*.

Although it is already being hailed as a landmark decision,<sup>13</sup> Justice Alito's opinion for the Court tells us surprisingly little about personal-jurisdiction doctrine. Indeed, the opinion pronounces itself modest: it claims to make no new law and explicitly leaves a series of rather thorny questions open.<sup>14</sup> Much ink will undoubtedly be spilled attempting to glean the theoretical underpinnings of the Court's latest effort to police plaintiff forum shopping, whether it is based on sovereignty or fairness, or some combination of the two.<sup>15</sup>

But *Bristol-Myers*'s real impact will not be on the doctrine of personal jurisdiction. Indeed, it may not even be felt in much simple litigation.<sup>16</sup>

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<sup>10</sup> See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 816 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 592 (1997); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1507 (2008) [hereinafter Burbank, *Historical Context*].

<sup>11</sup> 28 U.S.C. § 1332(d) (2012); see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 140 (2017) (noting the "strategy of those proponents of CAFA [the Class Action Fairness Act of 2005] whose actual agenda, in vastly expanding the jurisdiction of federal courts to hear state law claims brought as class actions, was to ensure that the cases were not certified and went away").

<sup>12</sup> See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 809 (2006) (describing mass joinders); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 287 (2016) (same).

<sup>13</sup> See, e.g., Robert Channick & Becky Yerak, *Supreme Court Ruling Could Make It Harder to File Class-Action Lawsuits Against Companies*, CHI. TRIB. (June 22, 2017), <http://www.chicago.tribune.com/business/ct-supreme-court-ruling-mass-actions-illinois-0625-biz-20170622-story.html> [https://perma.cc/42WB-2XJG]; Beck, *supra* note 3.

<sup>14</sup> *Bristol-Myers*, 137 S. Ct. at 1781, 1783–84.

<sup>15</sup> We will not spill that ink here. This Article is not about whether *Bristol-Myers* was right or wrong as a matter of personal jurisdiction theory or the right or wrong way to think about personal jurisdiction. It is about how *Bristol-Myers* fits into the world of complex litigation.

<sup>16</sup> This is not to say that *Bristol-Myers* will have no impact on less complex litigation. Plaintiffs may face new difficulties in cases involving multiple defendants, who now might not all be amenable to jurisdiction in a single state, such as cases pled on a theory of market-share liability. Further, to the extent that states competed to attract mass-tort litigation to their courts, their ability

Instead, *Bristol-Myers* is a landmark case in a different and perhaps bigger story about the balance of power in complex litigation. After the Supreme Court's decision, we predict that cases like *Bristol-Myers* will not be split up and litigated in state courts all over the country, as the Court seemed to contemplate. Instead, they will wind up in MDL, which offers a means of centralizing cases filed around the country before a single federal judge.<sup>17</sup> The cases are centralized for the ostensible purpose of managing coordinated pretrial proceedings, after which they will be sent back to the courts where they were originally filed for trial, but the result is almost always some sort of mass resolution.<sup>18</sup> *Bristol-Myers* is thus more than another chapter in the personal jurisdiction saga; it is a milestone in the ascendancy of MDL as the centerpiece of nationwide dispute resolution in the federal courts.<sup>19</sup>

*Bristol-Myers* may impact some one-on-one litigation—though only a highly motivated forum shopper would try to bring a slip-and-fall case in a state where he neither lived, nor slipped, nor fell—but its effects on complex cases will be substantial. Plaintiffs who have similar claims stemming from a defendant's nationwide course of conduct (like a nationally marketed defective product) and wish to sue together will now face a more limited set of options. As we explain in this Article, although the Court claims to leave the question open, multistate or nationwide class actions based on state tort law are likely off the table in almost any state or federal court that does not have general jurisdiction over the defendant. Essentially, with some exceptions that we will discuss, after *Bristol-Myers*, mass-tort plaintiffs can either (1) assemble a nationwide group to sue together in state court in the defendant's home state or potentially a state where it directed nationwide conduct; (2) sue individually or in smaller groups in their own home states' courts if they can find a way to avoid removal; or (3) sue in, or allow removal to,

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to do so may be significantly hindered by *Bristol-Myers*. See Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 497 (2015) (describing how states compete for mass-tort litigation in their courts); Klerman & Reilly, *supra* note 12.

<sup>17</sup> 28 U.S.C. § 1407 (2012).

<sup>18</sup> See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) [hereinafter Burch, *Monopolies*].

<sup>19</sup> MDL's meteoric rise in the wake of the mass-tort class action's demise has been one of the biggest stories in civil procedure since the turn of the century. See, e.g., JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 155 (2015) (noting that "the most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML [Judicial Panel on Multidistrict Litigation] in 1968"); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation?: Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2248 (2008); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 777 (2010).

federal court (either in their home states or the defendant's) where their cases will be aggregated for pretrial proceedings in an MDL. In short, if the plaintiffs want to aggregate after *Bristol-Myers*, they will have to do so on the defendant's terms—either on the defendant's home turf or in an MDL.

Given this array of options, we think MDL is likely to wind up as the dominant choice. Indeed, for plaintiffs concerned that a defendant has engaged in preemptive forum shopping by selecting friendly places to incorporate and set up its principal place of business, aggregation before a federal judge chosen by the Judicial Panel on Multidistrict Litigation (JPML) may be preferable. The result of *Bristol-Myers* will thus be to vacuum many more cases into MDL's ambit.<sup>20</sup> For their part, defendants are thought to favor MDL because it creates a streamlined opportunity for global settlement without the risks associated with class certification or parochial state courts.<sup>21</sup> Defendants, of course, might prefer a world with no aggregation at all.<sup>22</sup> But, at least as compared to nationwide class actions or mass joinders in plaintiffs' handpicked state courts, MDL appears to be an acceptable alternative.<sup>23</sup>

But why is federal MDL consolidation for pretrial proceedings a feasible option for aggregating these cases in a single court while the federal mass-tort class action failed?<sup>24</sup> The answer, we think, lies in the magic of MDL's hybrid structure. Formally, it is a loose collection of individual cases temporarily brought together for mundane pretrial processing, but very often it functions as a tightly knit aggregation from which a global resolution emerges, whether by settlement or dispositive motion.<sup>25</sup> Indeed, despite MDL's surface-level modesty, less than three percent of cases are ever remanded back to the courts where they were originally filed.<sup>26</sup> This split per-

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<sup>20</sup> Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 221–22 (2015).

<sup>21</sup> See, e.g., Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 414 (2014) [hereinafter Burch, *Remanding*] (explaining why defendants prefer MDL); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 553 (2013) [hereinafter Mullenix, *Death of Democratic*] (same).

<sup>22</sup> See Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 875 (2017) [hereinafter Bradt, *Radical Proposal*] (describing defendants' attempts to block the Multidistrict Litigation Act of 1968's (the "MDL statute") passage).

<sup>23</sup> See John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIGATION, Summer/Fall 2012, at 26, 26 ("Overall, counsel believe that the panel is accomplishing its basic objective of easing the burdens of multiparty, multijurisdictional litigation on parties, counsel, and courts.").

<sup>24</sup> See Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346–47 (2014) ("As reliance on Rule 23 has diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts.").

<sup>25</sup> Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259, 1270 (2017).

<sup>26</sup> Burch, *Remanding*, *supra* note 21, at 400.



sonality permits MDL to accommodate the norms of traditional American one-on-one litigation far better than a class action, even while functioning, at times, like representative litigation.<sup>27</sup>

MDL's hybrid structure allows it to accommodate *Bristol-Myers*. Although *Bristol-Myers* casts doubt on nationwide class actions in almost any court outside of the defendant's home state, MDL is not a class action. Instead, MDL facilitates the transfer of individual state-law cases filed around the country to a single federal court, so long as those cases were filed in (or removed to) a district court that would have personal jurisdiction under applicable state law and the Fourteenth Amendment.<sup>28</sup> Once such jurisdiction is established, the cases can move seamlessly into the MDL, wherever it is located. Because, formally, those cases are in the MDL only for "pretrial proceedings," the transfer is considered temporary—never mind that it is usually permanent. MDL, therefore, fosters nationwide aggregation while paying lip service to the rudiments of individualization and decentralization.<sup>29</sup>

If our prediction that most plaintiffs will turn to MDL as the best available alternative is correct, the result will be a nationalization of mass-tort litigation in federal MDL, even when those claims are brought under state law. In that sense, some fifty years later, this development fulfills the vision of the creators of the MDL statute. And it is consistent with the broader trend towards federalization of mass litigation evident in CAFA and more subtly in the expansion of preemption and other doctrines, as controversies arising in the modern economy routinely cross state and national boundaries.<sup>30</sup> As the creators of MDL intended, national courts are being called upon more and more to handle national controversies.<sup>31</sup>

There is much to be said for handling litigation of nationwide scope in federal court. And MDL succeeds at federalizing mass litigation where CAFA (predictably and probably intentionally) failed because its hybrid structure accommodates the essential features of our federal system in a way that the class action rule could not. Paradoxically, however, by paying lip ser-

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<sup>27</sup> Bradt, *Radical Proposal*, *supra* note 22, at 841.

<sup>28</sup> U.S. CONST. amend. XIV, § 1; FED. R. CIV. P. 4(k).

<sup>29</sup> Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1169 (2018) [hereinafter Bradt, *Long Arm*].

<sup>30</sup> See Geoffrey C. Hazard, Jr., *Has the Erie Doctrine Been Repealed by Congress?*, 156 U. PA. L. REV. 1629, 1629 (2008) (contending that "CAFA asserts that, in certain types of cases, the judicious administration of state law is better entrusted to federal courts"); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1354 (2006) (noting the trend in federalization).

<sup>31</sup> See Bradt, *Radical Proposal*, *supra* note 22, at 839 ("The drafters believed that their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way.").

vice to traditional norms of federalism and individualization, MDL may simultaneously undermine these norms in the name of mass resolution. Aggregate litigation—and especially aggregate settlement—inevitably comes with pressure to smooth out some of the differences in the applicable state laws and water down the policies underlying limitations on state-court jurisdiction. Ultimately, the irony of *Bristol-Myers* is that, for all of its professed concern for interstate federalism and predictability for defendants, what it really facilitates is consolidation of a nationwide set of claims in a single federal court selected by the JPML.

Centralizing mass-tort claims in MDL is aggregation on defendants' terms. Still, we believe that doing so offers potential benefits to plaintiffs and the court system as well by creating opportunities for mass resolution that can benefit all parties.<sup>32</sup> Our view, however, is not entirely sanguine. Channeling more cases into MDL concentrates power in the hands of the MDL judge and lead lawyers who control the litigation and limits potential counterweights in parallel state-court litigation. What will ultimately matter in assessing this development is not the doctrinal niceties of personal jurisdiction, but rather how that power is deployed. Like any procedural device, MDL can be manipulated to the benefit of defendants, plaintiffs, or the lawyers who represent them. *Bristol-Myers* thus increases the need to focus on making sure MDL processes and the outcomes they produce are fair—a project that we, and others, have pursued elsewhere.<sup>33</sup>

This Article proceeds in three parts. In Part I, we lay the groundwork for how we got here in both complex litigation and personal jurisdiction. We then take a deep dive into the *Bristol-Myers* litigation, which provides an extraordinary example of the moves and countermoves typical of modern mass-tort litigation.

Part II does the doctrinal heavy lifting. In it, we discuss how *Bristol-Myers* narrows the options for plaintiffs seeking to aggregate similar claims against a common defendant in a single proceeding. We then show why, given the available alternatives, the key players in mass-tort litigation are likely to channel even more claims into MDL.

In Part III, we examine why MDL thrives as a tool for aggregation of nationwide mass-tort claims in federal court and assess the normative implications of its continuing dominance. We show how the federalization of

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<sup>32</sup> See, e.g., Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 413–18 (2014) (laying out the possible benefits of MDL for plaintiffs); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192–98 (2013) [hereinafter Rave, *Anticommons*] (pointing out that there are advantages for plaintiffs and the courts in MDL).

<sup>33</sup> See, e.g., Bradt & Rave, *supra* note 25.

mass-tort litigation in MDL can be consistent with a coherent view of both the horizontal federalism embodied in *Bristol-Myers* and the vertical federalism embodied in *Erie* and *Klaxon's* approach to diversity jurisdiction. MDL's split personality allows it to accommodate both, while in practice subtly undermining the commitments of these doctrines. We then address some of the opportunities and risks that *Bristol-Myers* creates by increasing the centralization of mass-tort litigation in MDL.

*Bristol-Myers* solidifies MDL as the primary forum for nationwide mass-tort litigation—at least for the time being. But resolving the battle over forum does not end the mass-tort wars; it just changes the terrain. Because MDL is so flexible, there is ample room for innovation and manipulation. The new front line will be how MDL functions, and skirmishes have already begun in courts and in Congress. We close by previewing some of the potential fights to come.

## I. AGGREGATION AND JURISDICTION IN *BRISTOL-MYERS*

To understand what *Bristol-Myers* means for complex litigation, one must understand two trends that have developed in parallel: the rapid growth of federal MDL as the central mechanism for dealing with mass harms that occur on a national scale and the evolution of personal jurisdiction doctrine in a modern, interconnected economy. We set the scene for *Bristol-Myers* here by briefly describing these two trends. We then take a deep dive into the *Bristol-Myers* litigation, which provides a terrific illustration of the interests and strategies of plaintiffs and defendants in modern mass-tort litigation.

### *A. How We Got Here in Complex Litigation*

Nationwide aggregation of claims from around the country in a single, massive proceeding is a relatively recent development, but it has been a central feature of American litigation for the last fifty years, for understandable reasons. For both plaintiffs and the courts, and, to a lesser extent, defendants, there is a strong attraction to aggregating mass-tort claims. Unlike small consumer claims, which typically make no economic sense to pursue outside of a class action, mass torts often involve personal injuries where damages can range in the tens or hundreds of thousands of dollars or higher. But even substantial claims, like those over injuries caused by defective products, can be challenging to bring individually because costly investiga-

tion and expert witnesses can make such cases economically nonviable standing alone.<sup>34</sup>

When a defendant has, for example, marketed an allegedly defective product to a national market, many cases that arise all around the country will share common features. By aggregating similar cases formally or informally, plaintiffs and their lawyers can share information and spread out the costs of discovery and expert witnesses, giving them something approaching resource-parity with the defendant and increasing their leverage in settlement negotiations.<sup>35</sup> Courts also favor aggregation to avoid duplicative proceedings and to reduce backlogs.<sup>36</sup> Defendants, for their part, tend to resist aggregation for all the same reasons that plaintiffs find it advantageous, but given the inevitable pressure to aggregate mass torts, they find some forms of aggregation more threatening than others.<sup>37</sup>

Aggregation of these claims in a single court, federal or state, would have been essentially impossible until the 1960s, when lawmakers developed two new tools: multidistrict litigation and the modern class action—mechanisms largely copied by the states.<sup>38</sup> After a period of popularity and controversy, the prevalence of class actions has declined.<sup>39</sup> Today, the bulk of these mass-tort claims—at least the ones in federal court—have found a home in MDL, which, after several years of staggering growth, makes up more than one-third of the entire federal civil docket.<sup>40</sup> But it wasn't always that way.

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<sup>34</sup> See Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 *FORDHAM L. REV.* 1943, 1952 (2017) (noting that the “cost of litigating [a plaintiff’s] science- or medicine-intensive case may exceed \$250,000”).

<sup>35</sup> E.g., Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 *DUKE L.J.* 381, 386–87 (2000); Rave, *Anticommons*, *supra* note 32, at 1192–93.

<sup>36</sup> E.g., Judith Resnik, *From “Cases” to “Litigation,”* *LAW & CONTEMP. PROBS.*, Summer 1991, at 5, 21 [hereinafter Resnik, *Cases to Litigation*].

<sup>37</sup> See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlements: An Institutional Account of American Tort Law*, 57 *VAND. L. REV.* 1571 (2004) (describing how defendants cut deals with private claims brokers to settle tort claims en masse in the days before formal aggregation procedures like the class action).

<sup>38</sup> Burbank, *Historical Context*, *supra* note 10, at 1486; David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 *WASH. U. L. REV.* 587, 599 (2013).

<sup>39</sup> Robert H. Klonoff, *The Decline of Class Actions*, 90 *WASH. U. L. REV.* 729, 731 (2013) [hereinafter Klonoff, *Decline*]; Linda S. Mullenix, *Ending Class Actions as We Know Them: Re-thinking the American Class Action*, 64 *EMORY L.J.* 399, 401 (2014).

<sup>40</sup> Samuel Issacharoff, N.Y. Univ. Sch. of Law, Snapshot of MDL Caseload Statistics, Address at Duke University School of Law (Oct. 8, 2015), [https://law.duke.edu/sites/default/files/centers/judicialstudies/snapshot\\_md\\_l\\_caseload\\_statistics.pptx](https://law.duke.edu/sites/default/files/centers/judicialstudies/snapshot_md_l_caseload_statistics.pptx) [<https://perma.cc/R9NR-8H7L>] [hereinafter Issacharoff, *Snapshot*]; see Thomas D. Metzloff, *The MDL Vortex Revisited*, *JUDICATURE*, Autumn 2015, at 36, 40 (noting that MDL is “dominated by mass torts”); William B. Rubenstein,

The story of MDL's rise from obscurity to prominence begins in the 1960s when a small group of judges, led by Judge William Becker of the Western District of Missouri and Dean Philip C. Neal of the University of Chicago, drafted an innovative venue transfer statute and shepherded it through Congress.<sup>41</sup> To Neal and Becker, developments in technology, population growth, the interconnection of the national economy, and the accompanying increased potential for widespread harm would combine with new statutory and common-law causes of action to create a massive amount of new litigation—as they called it, a “litigation explosion.”<sup>42</sup> Their prescience was remarkable; among the litigation they accurately predicted were nationwide product-liability cases stemming from defective drugs and automobile components.<sup>43</sup>

To these judges, the solution to the litigation explosion was twofold—and required a radical rethinking of the judicial role. First, the federal courts must be deployed as a single, national body.<sup>44</sup> Rather than allow similar cases to be decentralized across the country, where the same discovery and motion practice would be duplicated over and over, risking inconsistent results, pretrial procedure must be centralized before a single federal district judge acting on behalf of the country.<sup>45</sup> Second, the judges placed in charge of these cases must be disciples of the burgeoning principles of active case management; they must move the cases along efficiently, and not, in Judge Becker's words, allow “litigants [to] run the cases.”<sup>46</sup>

What emerged from these insights was the Multidistrict Litigation Act of 1968.<sup>47</sup> The MDL statute created the Judicial Panel on Multidistrict Litigation and gave it broad discretion to consolidate cases sharing any common question of fact and to transfer them to a single federal district judge for coordinated pretrial proceedings.<sup>48</sup> While the cases are consolidated, the MDL judge has all the powers of any federal district judge to manage discovery and rule on pretrial motions—including dispositive ones, like sum-

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*Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISCOURSE 136, 144 n.40 (2013), <https://www.uclalawreview.org/pdf/discourse/61-10.pdf> [<https://perma.cc/H8BD-B6UY>] (noting that “MDLs have become *the* form for resolution for resolution of mass tort matters”).

<sup>41</sup> Bradt, *Radical Proposal*, *supra* note 22, at 839.

<sup>42</sup> *Id.* at 890.

<sup>43</sup> Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1736 (2017) [hereinafter Bradt, *Less and More*].

<sup>44</sup> Bradt, *Radical Proposal*, *supra* note 22, at 864–65.

<sup>45</sup> *See id.* at 864 (quoting from a speech by Neal to the Seventh Circuit Judicial Conference).

<sup>46</sup> *Id.* at 878. Judith Resnik would later label this approach “managerial judging.” Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 375 (1982).

<sup>47</sup> 28 U.S.C. § 1407.

<sup>48</sup> *Id.* § 1407(d).

mary judgment.<sup>49</sup> At the conclusion of pretrial proceedings, however, the cases must be remanded to the districts where they were originally filed.<sup>50</sup> So the consolidation is nominally temporary; the MDL court cannot try the transferred cases.<sup>51</sup> In reality though, remand rarely occurs. Indeed, some ninety-seven percent of transferred cases have been resolved while consolidated in the MDL court, whether by dispositive motion or settlement.<sup>52</sup>

The MDL statute's architects believed that their solution would become the central mechanism for resolving mass torts in the federal courts.<sup>53</sup> The Civil Rules Advisory Committee that was contemporaneously drafting the revolutionary amendments to Federal Rule of Civil Procedure 23, which created the modern class action, agreed with them. Although the Reporters, Benjamin Kaplan and Albert Sacks, recognized the "adventuresome" nature of some of their innovations to the class action rule—particularly the new opt-out class action in Rule 23(b)(3)—the Rules Committee believed their amendments would have the most impact in cases for injunctive relief, like civil rights cases.<sup>54</sup> MDL—not the class action—was intended to be the primary mechanism for aggregating claims in "mass accident" cases, an understanding memorialized in the Advisory Committee's notes accompanying the amendments.<sup>55</sup> Indeed, the reason there is a "superiority" requirement in Rule 23(b)(3) is because of the Advisory Committee's collective view that in mass-tort cases, MDL would be a more appropriate alternative.<sup>56</sup>

Strangely enough, and to the surprise of the Rules Committee, the 1966 Rule 23 amendments led to an explosion of class actions.<sup>57</sup> Plaintiffs almost immediately grasped the power of the class action mechanism to band together into a formidable litigating force, not only in civil rights and small-claims cases, but also in mass torts.<sup>58</sup> And although class actions had only a brief heyday in the federal courts, they took off in some states. The

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<sup>49</sup> *Id.* § 1407(b); 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3866 (4th ed. 2017) (noting that "the transferee may rule on all dispositive motions").

<sup>50</sup> 28 U.S.C. § 1407(a).

<sup>51</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998).

<sup>52</sup> Burch, *Remanding*, *supra* note 21, at 400–01.

<sup>53</sup> Bradt, *Radical Proposal*, *supra* note 22, at 839.

<sup>54</sup> Marcus, *supra* note 38, at 608.

<sup>55</sup> FED. R. CIV. P. 23, advisory committee note to 1966 amendments; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967).

<sup>56</sup> Bradt, *Less and More*, *supra* note 43.

<sup>57</sup> Burbank, *Historical Context*, *supra* note 10, at 1489.

<sup>58</sup> Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 58–59 (2010); Richard S. Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 500 (2016).

class action revolution—in all its forms—attracted massive attention and dispute, and numerous attempts at reform throughout the 1970s and 1980s.<sup>59</sup> During this time, MDL chugged along in relative obscurity, working rather effectively at consolidating a variety of cases, but always in the shadow of the class action.<sup>60</sup>

When some federal courts began to show enthusiasm in the 1980s and 1990s for using the class action to bring much needed closure to major nationwide mass-tort controversies, such as the asbestos litigation crisis, the Supreme Court stepped in to rebuff those attempts in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*<sup>61</sup> In the years that followed, the federal courts have reached a rough consensus that mass torts like product liability cases typically come with too many individual issues surrounding causation, damages, and frequently the applicable substantive tort law to satisfy the predominance and superiority requirements of Rule 23(b)(3).<sup>62</sup>

With federal courts looking inhospitable, especially in mass-tort cases, much of the action in class actions moved to state courts. Some states, known as “magic jurisdictions” or “judicial hellholes,” depending on your perspective, became magnets for nationwide class actions and the potentially massive verdicts and settlements that go along with them.<sup>63</sup> This resulted in enormous outcry from defense interests. The worry was that a handful of state courts were particularly solicitous of class actions and willing to certify even questionable ones, thus exposing defendants to the risk of firm-threatening liability in situations where the vast majority of state and federal courts would never have dreamed of certifying a class.<sup>64</sup> Thus, an outlier state court—often applying its own substantive law under the Supreme

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<sup>59</sup> See generally Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014) (providing a firsthand account).

<sup>60</sup> Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 886 (2001); Resnik, *Cases to Litigation*, *supra* note 36, at 29–35.

<sup>61</sup> *Ortiz*, 527 U.S. at 816; *Amchem*, 521 U.S. at 592. See generally RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007).

<sup>62</sup> See David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1281 (2007). We do not wish to overstate this point, as class action settlements are sometimes still used to resolve mass torts—though typically within an MDL. See, e.g., *In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 421 (3d Cir. 2016); *In re Oil Spill by Oil Rig "Deepwater Horizon,"* 910 F. Supp. 2d 891, 900 (E.D. La. 2012), *aff'd*, 739 F.3d 790 (5th Cir. 2014). We are hard pressed, however, to think of many instances since *Amchem* and *Ortiz* where the federal courts allowed a mass-tort class action to be certified for litigation through trial, verdict, and appeal.

<sup>63</sup> See generally AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2003), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2003.pdf> [<https://perma.cc/G5U2-ZQK2>] (listing and describing these judicial hellholes).

<sup>64</sup> S. REP. NO. 109-14, at 22–27 (2005).

Court's loose constitutional limits on choice of law—could effectively rule on the defendant's conduct nationwide and subject the defendant to ruinous damages.<sup>65</sup> The solution was legislative, and one of the few successful efforts by Congress to retrench private enforcement of the substantive law.<sup>66</sup> CAFA significantly expanded federal subject matter jurisdiction over putative class actions where there is minimal diversity and the class seeks an aggregate amount in excess of five million dollars.<sup>67</sup> The result was to make nearly all class actions of significant size and any sort of national scope removable.

CAFA's ostensible aim was to move nationwide class actions into federal court on the theory that national courts should handle controversies that are national in scope.<sup>68</sup> But the more cynical view of CAFA is that its supporters intended to move class actions into federal court to die.<sup>69</sup> The critical doctrinal roadblock is that nationwide or multistate class actions based on state law will typically involve the application of many different states' substantive laws to different class members.<sup>70</sup> For the most part, federal courts faced with fifty different sets of applicable substantive law have refused to certify classes because they cannot meet Rule 23(b)(3)'s predominance requirement.<sup>71</sup> Without a uniform federal tort law to go along with federal jurisdiction, nationwide mass-tort class actions are often unmanageable.<sup>72</sup> And because the federal courts retain jurisdiction under CAFA even

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<sup>65</sup> See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–67 (7th Cir. 2003), *abrogated by* *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

<sup>66</sup> BURBANK & FARHANG, *supra* note 11, at 139–41.

<sup>67</sup> 28 U.S.C. § 1332(d).

<sup>68</sup> S. REP. NO. 109-14, at 24–27.

<sup>69</sup> Burbank, *Historical Context*, *supra* note 10, at 1528 (noting that CAFA is motivated by “a desire to give the corporate defendant a choice to seek, not a neutral forum, but a more favorable forum”); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1918 (2008) [hereinafter Purcell, *CAFA*] (noting that CAFA's supporters’ “institutional forum shopping was entirely typical, for they sought not general reform but specific advantage”).

<sup>70</sup> Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 374 (2011); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2034 (2008).

<sup>71</sup> Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009); see, e.g., *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015–16 (7th Cir. 2002).

<sup>72</sup> See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1862, 1867 (2006) (explaining why nationwide class actions will move into the federal courts under CAFA); Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2139 (2008) (noting that there is no one federal tort law to unite a nationwide class action).



if class certification is denied, removal can sound the death knell for a putative class action.<sup>73</sup>

The combination of CAFA and the Court's earlier rulings on class actions was a double whammy.<sup>74</sup> Most class actions could now be removed to federal court, where they would be governed under a hostile regime.<sup>75</sup> The federal courts may have grown even more hostile to class actions in the years since CAFA, and not just in the mass-tort arena, with decisions like *Wal-Mart Stores, Inc. v. Dukes*<sup>76</sup> (an employment case) and *Comcast Corp. v. Behrend*<sup>77</sup> (an antitrust case) increasing the bar for showing commonality and predominance in all class actions.<sup>78</sup> Additionally, the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* interpreted the Federal Arbitration Act to further restrict the availability of class actions in state court when defendants include arbitration clauses with class-action waivers in their consumer or employment contracts.<sup>79</sup> The combination of these factors meant that many class actions—particularly mass-tort class actions—were no longer viable.

But the demise of the mass-tort class action did not mean the demise of mass torts or the pressures to aggregate them. With the class action unavailable, mass torts in the federal courts have overwhelmingly landed in MDL—right where the drafters of the MDL statute and the 1966 Rule 23 amendments intended them to be all along. MDL's growth in recent years has been

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<sup>73</sup> See Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. (forthcoming 2018) (manuscript at 22 n.203) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2832124&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2832124&download=yes) (collecting cases).

<sup>74</sup> Elizabeth J. Cabraser, *Just Choose: The Jurisprudential Necessity to Select a Single Governing Law for Mass Claims Arising from Nationally Marketed Consumer Goods and Services*, 14 ROGER WILLIAMS U. L. REV. 29, 47 (2009) (describing the choice-of-law problem as the “coup-de-grace” for mass-tort class actions); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 49 (2012) (“Congress was plainly concerned that state courts were certifying too many class actions, and it plainly was hoping that fewer would be certified in federal court.”).

<sup>75</sup> The degree of hostility in federal courts, as compared to state courts, is still the subject of debate. See Thomas Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 593 (2006) (assessing whether federal courts display more hostility to class action litigation than state courts).

<sup>76</sup> 564 U.S. 338, 356 (2011).

<sup>77</sup> 569 U.S. 27, 34 (2013). Lower courts, however, seem resistant to applying *Wal-Mart* and *Comcast* in an extreme way, suggesting that they may not mean what those seeking to use them to the hilt say they mean. See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1522–23 (2017) (describing narrower interpretations of those Supreme Court cases).

<sup>78</sup> See Klonoff, *Decline*, *supra* note 39 (detailing the heightened burdens imposed on class action plaintiffs in maintaining their class status); Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 130 (2015) (suggesting that decisions like *Wal-Mart* make it quite difficult to pursue class actions).

<sup>79</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

meteoric to the point where currently more than one-third of all civil cases pending in the federal courts are part of an MDL.<sup>80</sup> And the overwhelming majority of these cases—more than ninety percent—are product liability cases.<sup>81</sup> Recognizing the tremendous savings in federal court resources that consolidated pretrial proceedings can offer, as well as MDL judges' success in shepherding mass torts towards resolution through global settlement, the JPML is quick to create an MDL in tort controversies of any substantial size.<sup>82</sup>

Defendants have been largely amenable to this development. If they have to face aggregation in mass torts, defendants tend to prefer MDL to the class action.<sup>83</sup> MDL allows defendants to avoid the costs of duplicative litigation without the risk that a single classwide verdict will impose firm-threatening liability—a prospect that defendants often argue forces them to settle even questionable claims once a class is certified.<sup>84</sup> And defendants may be able to eliminate wide swaths of claims all at once in an MDL if they can win a dispositive motion on a common issue or exclude critical evidence, such as the plaintiffs' scientific expert.<sup>85</sup> Perhaps most importantly, MDL collects the key players in a single place, making it easier to negotiate a global settlement that will resolve practically all of the claims and allow defendants to move on.<sup>86</sup>

The combination of CAFA and the growth of MDL in federal court, however, did not spell the end of mass torts in state court. Plaintiffs still often preferred to file mass tort claims in state court, in part because they perceived MDL as too defendant-friendly or slow-moving.<sup>87</sup> Additionally,

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<sup>80</sup> Issacharoff, *Snapshot*, *supra* note 40.

<sup>81</sup> *Id.*

<sup>82</sup> Willging & Lee, *supra* note 19, at 798.

<sup>83</sup> Burch, *Remanding*, *supra* note 21, at 414 (“Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.”).

<sup>84</sup> *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995). *But see* Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1360 (2003) (questioning whether defendants are truly coerced into settlement).

<sup>85</sup> *See, e.g.*, *In re Zolof Prods. Liab. Litig.*, 176 F. Supp. 3d 483, 490 (E.D. Pa. 2016), *aff’d*, 858 F.3d 787 (3d Cir. 2017); Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. KAN. L. REV. 219, 221 (2017) (discussing other examples).

<sup>86</sup> *See, e.g.*, Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2208 (2008) (explaining how the MDL process facilitates settlement).

<sup>87</sup> *See* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 994 (2012) (“MDL practice can be frustratingly slow, and judges may effectively block plaintiffs from exiting by postponing adjudication of a motion to remand.”). Indeed, there is a heated debate among complex litigation scholars as to whether MDL more closely resembles a roach motel or a black hole. *Compare* Rubenstein, *supra* note 40, at 146 (attributing

plaintiffs (and their lawyers) can typically retain more control over their individual cases in state court than in a federal MDL, where most of the important decisions are made by a court-appointed Plaintiffs' Steering Committee.<sup>88</sup> Many plaintiffs therefore attempted to aggregate mass-tort claims in state courts by eschewing class actions, joining non-diverse parties, and structuring their non-class aggregations to avoid removal under the complicated exceptions to CAFA.<sup>89</sup>

So, although CAFA prevented plaintiffs from shopping for lenient state procedural rules to certify a nationwide class, plaintiffs, of course, still sought to concentrate cases that could not be removed in a friendly forum. Thus, out of all of the states that could exercise personal jurisdiction over the defendant and the nationwide set of claims, plaintiffs filed their non-class aggregations in states where they thought the judges and applicable law would be most favorable. As we shall see, the plaintiffs in *Bristol-Myers* pursued just such a strategy.

### B. How We Got Here in Personal Jurisdiction

To fully understand the plaintiffs' strategy and why *Bristol-Myers* succeeded, it is necessary to briefly survey the personal jurisdiction landscape. Alongside the developments in mass litigation described above, the law of personal jurisdiction has continued to evolve in fits and starts to accommodate the need to resolve disputes in an increasingly interconnected national and international marketplace.

Though its roots go deeper, the personal jurisdiction story typically begins in 1878 with *Pennoyer v. Neff*.<sup>90</sup> *Pennoyer* is, by turns, fascinating and frustrating. It nods to problems of notice, federalism, inconvenience, and pragmatism, and Justice Field ties himself into knots trying to accommodate all of these concerns within territorial rules and exceptions to those rules. In

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quip to Sam Issacharoff that “[a]n MDL is like a Roach Motel, cases check in but they never check out”), with Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008) (noting that “MDL . . . can resemble a “black hole,” into which cases are transferred never to be heard from again”).

<sup>88</sup> See Burch, *Monopolies*, *supra* note 18, at 85 (outlining the advantages for plaintiffs remaining in state court).

<sup>89</sup> See, e.g., *Anderson v. Bayer Corp.*, 610 F.3d 390, 392 (7th Cir. 2010) (involving an attempt to circumvent the removal process mandated by CAFA).

<sup>90</sup> *Pennoyer v. Neff*, 95 U.S. 714, 719 (1878). See generally Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249 (2017) (explaining *Pennoyer's* lasting importance in the law of personal jurisdiction).

short, *Pennoyer* is an ambitious mess.<sup>91</sup> Its problems remain with us, and they resurface once again in *Bristol-Myers*.

In particular, two aspects of *Pennoyer* continue to loom large: its linkage of the limits of a state's jurisdiction to its territorial sovereignty, and its enshrinement of those limits in the Due Process Clause of the Fourteenth Amendment.<sup>92</sup> As most law students would remember, under the *Pennoyer* regime, limitations on jurisdiction correlated directly with a state's territorial borders—a state's power over people and property within the state was absolute, but its process could not run outside the state.<sup>93</sup>

Though this almost mystical concept was elegant, it simply could not keep up with reality. As time marched on and interstate activity increased, it became clear that a state often had a legitimate interest in deciding cases against out-of-staters. After a period of employing legal fictions to accommodate the *Pennoyer* regime to modern problems,<sup>94</sup> the Supreme Court seemingly abandoned it in 1945 with *International Shoe Co. v. Washington*.<sup>95</sup> In that case, Chief Justice Stone explained that a state's ability to exercise jurisdiction over a defendant was a function of fairness and not territorial borders: hence the catechism that a state's jurisdiction depends on whether the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>96</sup>

Over the next several decades, the Supreme Court sporadically decided personal-jurisdiction cases in an attempt to put meat on the bones of the *International Shoe* test.<sup>97</sup> The states, now freed from having to pay lip ser-

<sup>91</sup> Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 271–72 (“*Pennoyer v. Neff* arouses dismay and even despair. . . . That it survives at all is some kind of monument to American legal thought.”); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289, 310 (1956) (noting that “physical power fails completely as a rationale”).

<sup>92</sup> *Pennoyer*, 95 U.S. at 733; see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 502 (1987).

<sup>93</sup> *Pennoyer*, 95 U.S. at 722.

<sup>94</sup> See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (utilizing the legal fiction of implied consent to establish jurisdiction in a Massachusetts state court); Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 573 (1958) (noting that “[t]he rapid development of transportation and communication . . . demanded a revision” of *Pennoyer*).

<sup>95</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>96</sup> *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); see Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 416 (1980).

<sup>97</sup> See, e.g., *Rush v. Savchuk*, 444 U.S. 320, 322 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 189 (1977); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 221 (1957). After a flurry of cases following *International Shoe*, the Court took a nineteen-year hiatus from deciding personal jurisdiction cases

vice to *Pennoyer's* strictures, had expanded their jurisdictional reach as far as they could, sometimes quite literally to the constitutional limit.<sup>98</sup> As a result, interesting jurisdictional questions percolated up to the Supreme Court. The Court would decide them, sometimes adding or taking away elements of the analysis, and sometimes seeming to narrow or expand the scope of the states' authority. The Court continued in this vein throughout the 1980s,<sup>99</sup> but after two cases in which a majority opinion could not emerge, the Court, for whatever reason, did not decide another personal jurisdiction case for twenty years.<sup>100</sup>

With the benefit of hindsight, three aspects of the cases from the 1970s and 1980s seem to have been the most important. First, the Court settled on a test, albeit one that was quite adaptable depending on the facts of a particular case. Drawing from *International Shoe*, the Court had concluded that jurisdiction required a two-step analysis: first, an assessment of "minimum contacts" among the forum, the defendant, and the dispute, and then an assessment of whether a state's assertion of jurisdiction was nevertheless unreasonable, based on a laundry list of factors synthesized by Justice Brennan in *Burger King Corp. v. Rudzewicz*.<sup>101</sup>

Second, the Court had seemingly rejected federalism as an independent basis for limitations on a state's jurisdiction. Although, dating back to *Pennoyer*, the Court had occasionally said that jurisdictional limitations were a means of preventing a state from overreaching to the detriment of a sister state,<sup>102</sup> by the 1980s the Court seemed to have concluded that limita-

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before its 1977 decision in *Shaffer v. Heitner*, which applied the *International Shoe* test to quasi-in-rem jurisdiction. See Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 34 (1978) (describing the Court's re-entry into the personal jurisdiction fray).

<sup>98</sup> Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, 49 AM. J. COMP. L. 203, 210 (2001) ("[T]he greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping . . .") (footnote omitted). Burbank notes, however, that despite this result, the Court in *International Shoe* may have been attempting to reduce forum shopping by facilitating greater latitude for the exercise of specific jurisdiction alongside a reduction in the scope of general doing-business jurisdiction, an approach that the current Court has, in part, embraced. Burbank, *Historical Perspective*, *supra* note 10, at 1478–80.

<sup>99</sup> *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 463 (1985); *Calder v. Jones*, 465 U.S. 783, 784 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980).

<sup>100</sup> *E.g.*, *Burnham v. Superior Court*, 495 U.S. 604, 607 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987).

<sup>101</sup> *Burger King*, 471 U.S. at 485 (rejecting "any talismanic jurisdictional formulas").

<sup>102</sup> *E.g.*, *Volkswagen*, 444 U.S. at 294 ("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.").

tions on jurisdiction served only to protect individual defendants from the “burdens of litigating in a distant or inconvenient forum.”<sup>103</sup>

Third, the Court had come to embrace the concepts of “general” and “specific” jurisdiction as a mode of analysis springing from *International Shoe*.<sup>104</sup> *International Shoe* does not, of course, use this language. Rather, it originates from Arthur von Mehren and Donald Trautman’s famous 1966 *Harvard Law Review* article interpreting *International Shoe*.<sup>105</sup> But the Court adopted it in 1984 in *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*,<sup>106</sup> and it is now the centerpiece of the Court’s jurisdictional analysis. Without belaboring the point, general jurisdiction is all-purpose jurisdiction over a defendant. If a state has general jurisdiction over a defendant, that defendant can be sued in that state on any claim, regardless of whether there is any connection between the state and the claim. Specific jurisdiction is, as the label would suggest, far more narrow and requires a link between the facts of the case and the forum state. Without such a link, the state cannot assert jurisdiction over the defendant without its consent.<sup>107</sup>

Until recently, the scope of general jurisdiction was thought to be quite broad.<sup>108</sup> Drawing from language in *International Shoe*, a state was thought to have general jurisdiction over a defendant when “the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>109</sup> Although the Supreme Court did little to clarify the concept, the kind of operations that most courts treated as justifying a state’s exercise of general jurisdiction tended to roughly correspond with doing business in the state—so if a corporation had a significant

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<sup>103</sup> *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (“The restriction on state sovereign power described in [*Volkswagen*], however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.”); see also Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1177 (2014) (noting the Court’s “sharp break” with precedent).

<sup>104</sup> See, e.g., Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 611 (1988) (identifying the framework for jurisdictional analysis).

<sup>105</sup> Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

<sup>106</sup> *Helicopteros Nacionales de Colombia, S.A., v. Hall (Helicol)*, 466 U.S. 408, 414 (1984).

<sup>107</sup> *Daimler, A.G. v. Bauman*, 134 S. Ct. 746, 754 (2014) (defining general and specific jurisdiction).

<sup>108</sup> Meir Feder, Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L. REV. 671, 675 (2012) (noting that “lower courts widely embraced the notion that any corporation ‘doing business’ in a state was subject to general jurisdiction there”).

<sup>109</sup> *Int’l Shoe*, 326 U.S. at 318.

footprint in the state, such as through employees, sales, or physical plants, general jurisdiction was thought to exist.<sup>110</sup>

During the 1980s, the questions that reached the Supreme Court tended to deal with states' assertion of specific jurisdiction over defendants whose only contact with the forum related to the particular lawsuit.<sup>111</sup> The central question, as the Court put it in *World-Wide Volkswagen Corp. v. Woodson* was whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum state."<sup>112</sup> The question of how related that particular lawsuit must be to the forum state was not addressed.<sup>113</sup>

All of this changed when the Supreme Court broke its twenty years of silence and got back into the personal jurisdiction business in 2011 with two new cases: *Goodyear Dunlop Tires v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicastro*, both of which reversed state courts' assertions of jurisdiction, one for lack of general jurisdiction and the other for lack of specific jurisdiction.<sup>114</sup>

*Goodyear* was perhaps the more surprising of the two. Writing for a unanimous Court, Justice Ginsburg explained that general jurisdiction is almost always limited to the states in which a defendant is "essentially at home."<sup>115</sup> For a corporation, that typically means the state of incorporation and the state where the defendant's principal place of business is located. This result was a surprising shift and unsettled quite a lot of case law.<sup>116</sup> But in case there was any lingering doubt about the Court's intentions, the Court has twice reiterated that general jurisdiction will almost always be limited to the two home states of a corporate defendant.<sup>117</sup> And in so doing, the Court has come back under "*Pennoyer's* sway," suggesting that the re-

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<sup>110</sup> Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 533 (2012).

<sup>111</sup> *E.g.*, *Asahi*, 480 U.S. at 105; *Volkswagen*, 444 U.S. at 287.

<sup>112</sup> *Volkswagen*, 444 U.S. at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

<sup>113</sup> Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617, 629 (2012).

<sup>114</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011).

<sup>115</sup> *Goodyear*, 564 U.S. at 919.

<sup>116</sup> See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 347 (2013) (arguing the decisions in *Goodyear* and *Nicastro* "clearly signaled a desire to contract the constitutional ambit of that jurisdiction"); Stein, *supra* note 110, at 532 (noting that *Goodyear* "limit[ed] significantly the operation of general jurisdiction").

<sup>117</sup> *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–59 (2017); *Daimler*, 134 S. Ct. at 760–61.

striction on general jurisdiction is rigid and, at least in part, territorially based.<sup>118</sup>

With respect to specific jurisdiction, the Court in 2011 seemed to once again be divided. The *Nicastro* case failed to produce a majority opinion. Instead, the court split four-to-two-to-three, with Justice Kennedy writing a plurality opinion that generated more confusion than it resolved.<sup>119</sup> Justice Kennedy's opinion, which rejected New Jersey's assertion of jurisdiction over a British manufacturer when one of its machines injured a New Jersey resident in the state because its contacts with the state were insufficient to show purposeful availment, seemed to bring territoriality and federalism back into the specific jurisdiction analysis as well.<sup>120</sup>

The 2011 duo of cases has turned out to be just the beginning. The Supreme Court has repeatedly returned to personal jurisdiction in the years since. Overall, the Court has exhibited a newfound vigor when it comes to policing the states—and plaintiffs' attempts at forum shopping. Indeed, the Court has now heard six personal jurisdiction cases since 2011, and in each it has concluded that the trial court exceeded the limitations of the Fourteenth Amendment.<sup>121</sup> The Court's rather aggressive reentry into the fray after two decades of benign neglect has generated a series of new questions, in large part because the Court has been rather obscure about the purposes of jurisdictional limitations underlying its new doctrinal rules.<sup>122</sup>

Among the open questions was the one presented by the *Bristol-Myers* case: How related to the forum state does a plaintiff's claim have to be when the defendant purposefully avails itself of the markets in every state through a nationwide course of conduct?<sup>123</sup> The plaintiffs' carefully con-

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<sup>118</sup> *Daimler*, 134 S. Ct. at 757–58 (“Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized.”); Linda Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 677 (2015).

<sup>119</sup> *Nicastro*, 564 U.S. at 877.

<sup>120</sup> *Id.* at 884.

<sup>121</sup> *Bristol-Myers*, 137 S. Ct. at 1777; *BNSF*, 137 S. Ct. at 1554; *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014); *Daimler*, 134 S. Ct. at 751; *Goodyear*, 564 U.S. at 920; *Nicastro*, 564 U.S. at 877.

<sup>122</sup> See Bradt, *Long Arm*, *supra* note 29, at 1179 (“[T]he Supreme Court does not seem to have a clear consensus on what its personal jurisdiction doctrine is trying to do, or how it is supposed to operate.”); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 5 (2010) (“[T]he Court has unhelpfully opined that the forum state's interests in providing a forum matter except when they don't, that burdens on nonresident defendants are material except when they aren't, and that the plaintiff's interest in finding a convenient forum is important except when it isn't.”) (footnotes omitted).

<sup>123</sup> *E.g.*, *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222 n.32 (11th Cir. 2009) (“[C]ourts have developed somewhat rigid approaches for answering the relatedness question.”);



structed attempt in *Bristol-Myers* to avoid federal jurisdiction under CAFA forced the issue.

### C. *The Bristol-Myers Litigation*

On the substance, *Bristol-Myers* is something of a standard defective-drug case. Bristol-Myers, a major international pharmaceutical company incorporated in Delaware, with its principal place of business in New York, developed and manufactured a blood-thinning drug called clopidogrel, marketed as Plavix.<sup>124</sup> To say that Plavix was a success would be an understatement; it was, for a time, the best-selling prescription drug in the country.<sup>125</sup> In 2011 alone, the year before its patent expired, allowing for generic competition, U.S. sales totaled over seven billion dollars, and the drug generated over forty billion dollars in revenue for Bristol-Myers.<sup>126</sup> Unfortunately, at least some users taking Plavix allegedly suffered severe side effects, including heart attacks, strokes, and internal bleeding. As a result, litigation has proliferated nationwide against Bristol-Myers.<sup>127</sup>

Much of that litigation was (and remains) in federal court, consolidated in an MDL assigned to Judge Freda Wolfson in the District of New Jersey.<sup>128</sup> That is, the cases that were either filed in or properly removed to federal courts around the country were transferred under 28 U.S.C. § 1407 to the Garden State for consolidated pretrial proceedings. Any plaintiffs (or lawyers) who hoped to avoid MDL would have to construct a case outside the subject-matter jurisdiction of the federal courts—that is, a case whose claims arose under state law and was not removable as a diversity case, whether under the general diversity statute or CAFA. *Bristol-Myers* was such a case.

#### 1. The California Courts

Apparently preferring California state court to the federal MDL, 678 individuals joined in eight separate complaints against Bristol-Myers in Superior Court in San Francisco, California. Eighty-six of those plaintiffs were

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Dudnikov v. Chalk & Vermilion Fine Arts, Inc. 514 F.3d 1063, 1078 (10th Cir. 2008) (describing the three different approaches courts have adopted).

<sup>124</sup> *Bristol-Myers*, 137 S. Ct. at 1777–78.

<sup>125</sup> *Id.* at 1778 (noting that between 2006 and 2012, Bristol-Myers sold nearly 187 million Plavix pills and accumulated over \$900 million in sales).

<sup>126</sup> Katie Thomas, *Plavix Set to Lose Patent Protection*, N.Y. TIMES, May 16, 2012, at B1 (noting that Plavix was “one of the behemoth drugs that really defined the drug industry in the ‘90s”).

<sup>127</sup> *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.* (No. II), 923 F. Supp. 2d 1376, 1377 (J.P.M.L. 2013).

<sup>128</sup> *Id.* at 1379–80.

from California; the other 592 hailed from thirty-three other states.<sup>129</sup> Pursuant to California procedural rules, the actions were assigned as a coordinated matter to a single judge. The cases could not be removed for two reasons. First, because the plaintiffs joined a second defendant, the California-based distributor, McKesson, there was not complete diversity, and the cases therefore could not be removed unless they fell within the ambit of CAFA, which requires only minimal diversity. Second, the cases were carefully constructed to avoid CAFA. Not only were the cases not styled as class actions, but each complaint joined fewer than one-hundred plaintiffs, meaning that they could not be removed under CAFA's provision for removal of "mass actions," which requires one-hundred plaintiffs.<sup>130</sup> Ultimately, then, the plaintiffs were able to construct a functional nationwide mass-tort action in California state court including almost seven-hundred plaintiffs that could not be removed.<sup>131</sup>

Stuck in state court, Bristol-Myers moved to dismiss the claims of the non-Californian plaintiffs for lack of personal jurisdiction on the ground that there were not sufficient contacts between those plaintiffs' claims and California. That is, because Bristol-Myers was not at home in California, there was no general jurisdiction, and because these plaintiffs were both domiciled and allegedly injured by Plavix that was prescribed and consumed in other states, there was no specific jurisdiction.

Prior to 2011, Bristol-Myers's motion would have been a non-starter. Until *Goodyear*, Bristol-Myers would almost certainly have been subject to general jurisdiction in California, based simply on the scope and continuousness of its contacts with the state: to wit, its nearly one billion dollars in sales of Plavix in California, its registration to do business in the state, and therefore, its appointment of an agent to receive service of process, and its operation of five offices and employment of some four-hundred people in the state. It was only after the Supreme Court announced *Goodyear's* rule limiting general jurisdiction to states in which the defendant corporation was "essentially at home" that Bristol-Myers had a leg to stand on in contesting jurisdiction.<sup>132</sup>

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<sup>129</sup> *Bristol-Myers*, 137 S. Ct. at 1778.

<sup>130</sup> 28 U.S.C. § 1332(d)(11)(B)(i).

<sup>131</sup> Early on in the litigation, Bristol-Myers tried removal and was rebuffed by the federal district court. *In re Plavix Prod. Liab. & Mktg. Litig.*, No. 3:13-cv-2418-flw, 2014 WL 4544089, at \*1 (D.N.J. Sept. 12, 2014).

<sup>132</sup> *Goodyear*, 564 U.S. at 919.

In fact, the trial court, perhaps having not yet adjusted to the new paradigm under *Goodyear*, found general jurisdiction.<sup>133</sup> But the Court of Appeals affirmed on different grounds.<sup>134</sup> It held that, although general jurisdiction was lacking, California did have *specific* jurisdiction over the claims asserted by the out-of-staters because Bristol-Myers's "sale of more than a billion dollars of Plavix to Californians . . . is substantially connected to the [out-of-staters'] claims, which are based on the same alleged wrongs as those alleged by the California resident plaintiffs."<sup>135</sup> And, in the court's view, Bristol-Myers had not established that it would be unreasonable for California to assert jurisdiction over it. The court explained that Bristol-Myers "seeks dismissal of their claims in order to force [plaintiffs] to refile in other states, allowing [Bristol-Myers] to try again to remove the cases to federal courts and then have them transferred to the MDL court, where its defenses might be more favorably received than in state courts."<sup>136</sup> The court roundly rejected the notion that those interests are protected by the constitutional limits on personal jurisdiction: "[Bristol-Myers's] due process rights do not include discouraging plaintiffs who may or may not have meritorious claims from pursuing them in an appropriate forum. Nor does due process entitle [Bristol-Myers] to avoid the differences in procedures that exist between state and federal courts . . . ."<sup>137</sup>

The Supreme Court of California affirmed by a four-to-three vote.<sup>138</sup> The majority concluded that the scope of Bristol-Myers's activities in California, although insufficient for general jurisdiction under *Goodyear* and *Daimler*, clearly constituted purposeful availment of the California market.<sup>139</sup> In determining specific jurisdiction, the majority adopted a "sliding scale approach," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."<sup>140</sup> The court found that because Bristol-Myers's "contacts with California are substantial and the company has enjoyed sizeable revenues from the sales of its product here—the very product that is the subject of the claims of all of the plaintiffs," the company's "extensive

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<sup>133</sup> Plavix Prod. & Mktg. Cases, No. JCCP4748, 2013 WL 6150251, at \*2 (Cal. Super. Ct. Sept. 23, 2013). California's long-arm statute provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 2017).

<sup>134</sup> *Bristol-Myers*, 175 Cal. Rptr. 3d at 415.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 437 n.20.

<sup>137</sup> *Id.*

<sup>138</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 878 (Cal. 2016).

<sup>139</sup> *Id.* at 887.

<sup>140</sup> *Id.* at 889 (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1091 n.3 (Cal. 1996)).

contacts with California establish minimum contacts based on a less direct connection between [its] forum activities and plaintiffs' claims than might otherwise be required."<sup>141</sup>

With minimum contacts established, the California Supreme Court turned to whether California's assertion of jurisdiction was nevertheless unreasonable and made two points worth raising here. First, the court noted, accurately, that Bristol-Myers had not argued that California was an unduly inconvenient or burdensome location to litigate.<sup>142</sup> Second, the court explained that the several states' shared interest in "fair, efficient, and speedy administration of justice" for all parties weighed in favor of California's accepting jurisdiction over all of the plaintiffs' claims.<sup>143</sup> In sum, California saw nothing wrong with deciding the claims of plaintiffs from all over the country in its courts.<sup>144</sup>

## 2. The U.S. Supreme Court

Inevitably a cert petition followed.<sup>145</sup> It is necessary to linger on how Bristol-Myers briefed and argued the case because doing so provides insight into the Court's opinion and its effect on aggregate litigation.

Bristol-Myers's plea to the Supreme Court was not the usual grist for personal jurisdiction mill. It did not argue that the plaintiffs' choice of California state courts was a kind of "distant forum abuse" or that litigating the cases in California would be inconvenient, expensive, or burdensome.<sup>146</sup> How could it? Bristol-Myers had a substantial presence in California and had to defend the identical claims of California plaintiffs there. Bristol-Myers suggested that allowing out-of-state plaintiffs to sue in California would "rob corporate defendants of the predictability that the Due Process Clause is supposed to provide them."<sup>147</sup> But what predictability did Bristol-Myers mean? After all, Bristol-Myers acknowledged that at the time of the events at issue in the case (prior to *Goodyear* and *Daimler*) it would have been subject to

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 892.

<sup>143</sup> *Id.* at 893.

<sup>144</sup> *Id.* at 894. Justice Werdegar's lengthy and scholarly dissent trains its fire on the lack of a "concrete factual relationship between [the non-Californians'] claims and [Bristol-Myers's] contacts with the forum state . . ." *Id.* at 895 (Werdegar, J., dissenting). It can be summed up by its closing question: "On the critical question of why a Texan's claim he was injured in Texas by taking Plavix prescribed and sold to him in Texas should be adjudicated in California, rather than Texas (or in Delaware or New York, [Bristol-Myers's] home states), the majority offers no persuasive answer." *Id.* at 910.

<sup>145</sup> Petition for Writ of Certiorari at 1, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466).

<sup>146</sup> *Id.* at 28.

<sup>147</sup> *Id.* at 30.

general jurisdiction “in every state where [it] had systematic and continuous operations.”<sup>148</sup> And even under a narrow view of specific jurisdiction, it was entirely predictable that it could be sued in California—it sold millions of Plavix pills that allegedly caused injury there.

What Bristol-Myers was most worried about was plaintiffs’ ability to aggregate nationwide claims in a single state’s courts other than the ones in which it had chosen to incorporate or base its operations. It was explicitly and especially concerned about California, which is both “the largest market in the country” and “plaintiff-friendly.”<sup>149</sup> If California’s approach to specific jurisdiction could prevail, corporate defendants would be put to the Hobson’s choice of facing a nationwide set of claims in California state court or “pulling out of the California market altogether.”<sup>150</sup>

Thus, Bristol-Myers’s primary argument was not that litigating in California was geographically inconvenient or unconstitutionally burdensome, but that its courts were too plaintiff-friendly—too hostile to an out-of-state corporate defendant—to be trusted with a nationwide aggregation of cases.<sup>151</sup> What emerges, then, is a personal jurisdiction argument more akin to those advanced in favor of federal diversity jurisdiction.

For example, the cert petition emphasized that courts in the Ninth Circuit would be unlikely to adopt California’s new “sliding scale,” thus creating a “specific enticement to forum-shop.”<sup>152</sup> That is, if California state courts would assume a broader scope of jurisdiction than federal courts sitting in the same state, then plaintiffs would “shop their claims to the more hospitable courthouse” by adding a non-diverse defendant to prevent removal, as these plaintiffs had by joining McKesson.<sup>153</sup> This doctrinal inconsistency would be “practically important for corporate defendants,” because plaintiffs would be “allow[ed] . . . to shop claims with no causal connection to a defendant’s California activities to what their counsel view as the more plaintiff-friendly California courts. . . . Plaintiffs should not be allowed to take their case to the most hospitable forum they can think of.”<sup>154</sup>

Bristol-Myers implicitly reaffirmed this notion in its merits brief, which argued that, although aggregation of a nationwide set of claims in California *state* court was unacceptable, a federal MDL would be just fi-

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<sup>148</sup> *Id.* at 29.

<sup>149</sup> *Id.* at 31–32.

<sup>150</sup> *Id.* at 30.

<sup>151</sup> *Id.* at 18.

<sup>152</sup> *Id.* at 19–20.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 30, 32.

ne.<sup>155</sup> According to Bristol-Myers, a federal MDL would capture the efficiency benefits of nationwide aggregation while avoiding the jurisdictional limitations of California.<sup>156</sup> What makes this argument odd from a personal jurisdiction perspective is that the JPML could have established an MDL consolidating pretrial proceedings for all Plavix claims in *any* federal court, including the Northern District of California, a block away from the state court whose jurisdiction Bristol-Myers was vigorously contesting. Bristol-Myers's enthusiasm for MDL, then, amplified that their problem with California was its state courts, not its geographic location.

Indeed, at oral argument, when Justice Kagan asked Bristol-Myers's attorney why litigating these cases in California would be unconstitutionally unfair, he responded that the problem was that California's supposedly biased procedural and choice-of-law rules would govern the set of cases.<sup>157</sup> Plaintiffs would therefore have the opportunity to "play by least common denominator rules and file Ohio claims in California or Alaska."<sup>158</sup> When Justice Breyer recognized that such a conclusion might threaten the viability of nationwide class actions or even MDL in federal courts, Bristol-Myers responded: "[W]e think you should write an opinion for us that doesn't deal with multidistrict litigation or class actions . . . ."<sup>159</sup>

Eventually, the Court took this suggestion, reversing the Supreme Court of California by a vote of eight-to-one, with Justice Sotomayor as the lone dissenter.<sup>160</sup> Justice Alito's opinion for the Court was short and purportedly modest. It proclaimed that no new law was necessary; a straightforward application of prior precedent would suffice to reverse.<sup>161</sup> In some respects, Justice Alito's opinion is, in fact, quite clear. But below the surface, it provokes significant questions.

The Court roundly rejected California's "sliding scale" approach, calling it a "loose and spurious form of general jurisdiction."<sup>162</sup> To the contrary, "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the non-residents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."<sup>163</sup> In short, "[w]hat is needed—and what is miss-

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<sup>155</sup> See Brief for the Petitioner, *supra* note 4, at 51 (specifically alluding to the possibility of MDL).

<sup>156</sup> *Id.* (noting that MDL has "been used successfully countless times before").

<sup>157</sup> Transcript of Oral Argument at 11, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466).

<sup>158</sup> *Id.* at 14.

<sup>159</sup> *Id.* at 18.

<sup>160</sup> *Bristol-Myers*, 137 S. Ct. at 1773.

<sup>161</sup> *Id.* at 1783.

<sup>162</sup> *Id.* at 1781.

<sup>163</sup> *Id.*

ing here—is a connection between the forum and the specific claims at issue.”<sup>164</sup> Because the plaintiffs here “are not California residents,” “do not claim to have suffered harm in that State,” and “the conduct giving rise to the nonresidents’ claims occurred elsewhere,” specific jurisdiction is lacking.<sup>165</sup> In the Court’s view, no more needed to be said, and no new law needed to be made.

The Court should be applauded, at least, for brevity, but perhaps inevitably, the opinion raises numerous questions. First, it does not clarify what kind of a “connection between the forum and the specific claims at issue” specific jurisdiction requires.<sup>166</sup> To be sure, the Court says that there is no specific jurisdiction in California over claims by plaintiffs who neither reside nor were injured in the state, but the Court does not say what sort of contacts would be sufficient. The Court did not adopt Bristol-Myers’s argument that the defendant’s purposeful contacts with the forum state must be the “proximate cause” of the plaintiff’s alleged injury—an approach that would have wreaked havoc on even simple claims arising out of products that cross state lines.<sup>167</sup> But the Court never explained exactly how “related” the plaintiffs’ claims must be to the defendant’s contacts with the forum state.

Second, the Court does not clearly explain the rationale for rejecting jurisdiction in California. In fact, the Court is quite obscure; it says only that specific jurisdiction requires a consideration of a “variety of interests.”<sup>168</sup> The “primary concern” remains the “burden on the defendant” and “the practical problems resulting from litigating in the forum.”<sup>169</sup> The Court never, however, suggests that any such problems exist in this case—indeed, to do so would be to make an argument that Bristol-Myers never asserted. But, as the Court says, there is also something else to consider: “the more

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1782.

<sup>166</sup> *Id.* at 1781.

<sup>167</sup> *See id.* at 1788 n.3 (Sotomayor, J., dissenting). Justice Sotomayor explained:

Bristol-Myers urges such a rule upon us . . . but its adoption would have consequences far beyond those that follow from today’s factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State’s courts to redress his injuries—a result specifically contemplated by [*Volkswagen*]. *See* Brief for Civil Procedure Professors as *Amici Curiae* 14–18 . . . .

*Id.* We explained some of the mischief that such a proximate cause rule could create in the amicus brief that Justice Sotomayor cites. *See* Amicus Brief of Civil Procedure Professors in Support of Respondents, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466).

<sup>168</sup> *Bristol-Myers*, 137 S. Ct. at 1780.

<sup>169</sup> *Id.*

abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”<sup>170</sup> Harkening back to language in *Hanson v. Denckla* and *World-Wide Volkswagen*—and seemingly forgetting about language in *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, which rejected federalism as a basis for limitations on jurisdiction—the Court proclaimed interstate federalism as a potentially “decisive” reason why a state may not exercise jurisdiction.<sup>171</sup> That is, personal jurisdiction here works as a limitation on states’ overreaching to the detriment of sister states—a justification thought to have been off the table.

But even if one accepts (as we must) that Justice Alito is correct that interstate federalism is integral to the jurisdictional analysis, the Court never gets around to explaining why California’s assertion of jurisdiction in this case is either harmful to other states, or to the defendant. Instead, the Court says only that the contacts are insufficient under the *International Shoe* rule. There is no conclusion to the argument—instead, the reader is left to close the loop herself.

Finally, as Justice Sotomayor points out in her dissent,<sup>172</sup> and the Court itself acknowledges, the opinion leaves a number of questions open. For instance, as Bristol-Myers suggested at oral argument, the Court never addressed the impact this case might have on class actions. And the Court further avoids the problem of the impact on MDL in the federal courts on the ground that limits on the personal jurisdiction of federal courts under the Fifth Amendment’s Due Process Clause are not implicated.<sup>173</sup> But it is in precisely the types of cases that the Court tried to duck, that its decision may have the most profound impact.

## II. BRISTOL-MYERS’S IMPACT ON AGGREGATE LITIGATION

Although *Bristol-Myers* does not purport to affect the law of aggregate litigation, its impacts in that area are likely to be far greater than on ordinary one-on-one litigation. Most plaintiffs in one-off cases are probably content to file at home or in the state where they suffered injury (if the two forums are even different). And the Court’s refusal to adopt the defendant’s proposed proximate cause test means that plaintiffs will still be free to sue

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1788 (Sotomayor, J., dissenting).

<sup>173</sup> *Id.* at 1783 (majority opinion).



in their home states—or at least as free as they were under *Nicastro*.<sup>174</sup> But plaintiffs who wish to band together in some form of aggregate litigation will see the impacts of *Bristol-Myers* almost immediately.

The *Bristol-Myers* decision significantly limits plaintiffs' menu of forums for filing an aggregated action—either as a class action or a mass joinder—in state court. Indeed, after *Bristol-Myers*, in most instances it is unlikely that plaintiffs could maintain a multistate class action or mass joinder in state court anywhere other than the defendant's home state(s). If plaintiffs want to bring aggregate litigation outside of the defendant's home state after *Bristol-Myers*, their only practical option may be federal MDL. Aggregation, if it is going to happen, will be on defendants' terms.

To understand why *Bristol-Myers* will have this effect, it is necessary to walk through the various aggregation possibilities.

### A. Class Actions

Although the Supreme Court leaves the question open, after *Bristol-Myers*, it is difficult to see how most nationwide or multistate class actions could be maintained outside of the defendant's home state where it is subject to general jurisdiction, unless it directs its nationwide conduct from another single state or consents to being sued. *Bristol-Myers*'s restriction of plaintiffs' ability to shop for the most advantageous forum to litigate a class action is unquestionably significant, from the plaintiffs' perspective, but it is not necessarily alarming or even all that surprising. Indeed, then Professor (now Judge) Diane Wood predicted this outcome thirty years ago in an article suggesting that the nationwide class action was in significant tension with the personal jurisdiction doctrine then emanating from the Supreme Court.<sup>175</sup> And since CAFA, most multistate class actions of any consequence have already wound up in federal courts widely perceived as less hospitable to class actions than some of their more accommodating state counterparts.<sup>176</sup> But the defendant's ability to consent to personal jurisdiction in any state for purposes of *settling* a class action is far more consequential and potentially alarming. After *Bristol-Myers*, most class actions

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<sup>174</sup> Of course, the plaintiff in *Nicastro* both resided and was injured in New Jersey, but a majority of the Court held that New Jersey did not have jurisdiction over the British manufacturer of the allegedly defective machine. *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011). *Bristol-Myers* does nothing to improve Mr. Nicastro's situation; it may in fact make it worse, to the extent that there was any room left under *Nicastro* to sue in some other state.

<sup>175</sup> Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 *IND. L.J.* 597, 614–18 (1987).

<sup>176</sup> See *supra* notes 34–89 and accompanying text.

will likely either be litigated in federal court in the defendant's home state or settled in the state court of the defendant's choosing.

The problem is not jurisdiction over the plaintiff class. *Phillips Petroleum Co. v. Shutts* established that it does not violate the Fourteenth Amendment for state courts to exercise personal jurisdiction over nonresident absent class members.<sup>177</sup> So long as absent class members are given notice and the opportunity to opt out, and are at all times adequately represented by the named plaintiff (and lawyer) for the class, it does not matter that they have no minimum contacts with the forum state or that their claims against the defendant arose elsewhere.<sup>178</sup> The state court has the power to adjudicate plaintiff class members' rights and dispose of their claims.

For that reason, *Shutts* has been widely viewed as an enabling decision for multistate class actions.<sup>179</sup> And since it was decided in 1985, countless nationwide and multistate class actions have been filed, certified, and resolved in state courts. Indeed, nationwide class actions in state court became a favorite tool of forum shopping plaintiffs because it only takes one anomalous state court to certify a questionable class for the plaintiffs to be able to threaten the defendant with a massive judgment. This is the problem at which CAFA was ostensibly aimed—removing nationwide class actions to federal court to avoid certification in anomalous state courts.<sup>180</sup>

*Bristol-Myers* does not overrule *Shutts*; indeed, it barely engages *Shutts*.<sup>181</sup> But, as the *Bristol-Myers* plaintiffs argued, it is difficult to square the result in *Bristol-Myers* with the type of nationwide class action that *Shutts* enabled. The difficulty lies, not in personal jurisdiction over the nonresident class members—the particular question *Shutts* addressed—but in jurisdiction over the *defendant* to adjudicate nonresident class members' claims.

*Shutts* involved a class of 28,000 gas-lease royalty owners from all fifty states who brought suit in Kansas state court against Phillips Petroleum, a Delaware corporation headquartered in Oklahoma.<sup>182</sup> The plaintiff class

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<sup>177</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814 (1985).

<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. REV. 1313, 1320–21, 1323 (2005); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 7 (1986).

<sup>180</sup> S. REP. NO. 109-14, at 22–25.

<sup>181</sup> See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1789 n.4 (2017) (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.”).

<sup>182</sup> *Shutts*, 472 U.S. at 799.

sought to recover unpaid interest on royalty payments that they were due from gas leases operated by Phillips Petroleum in eleven states. Less than 0.25% of those leases were in Kansas, less than 4% of the class members were Kansas residents, and, although Shutts was a Kansas resident, none of the named plaintiffs owned leases in Kansas. The largest group of plaintiffs was, as in *Bristol-Myers*, from Texas.<sup>183</sup>

Interestingly, it was the defendant that objected to the Kansas court's personal jurisdiction over absent class members, not the class members themselves. Phillips Petroleum had standing to raise this argument, the Supreme Court held, because a class action judgment might subject it to one-way preclusion: Absent class members who later successfully challenged the Kansas court's personal jurisdiction would be free to sue Phillips Petroleum in another court, whereas Phillips Petroleum would be bound by *res judicata*. Phillips Petroleum's argument that Kansas lacked jurisdiction over absent class members unless they affirmatively opted into the class action failed to persuade the Court.<sup>184</sup> But Phillips Petroleum made no argument that the Kansas court lacked jurisdiction over itself, even with respect to claims by plaintiffs with no connection to Kansas. Likely because they were operating under the more expansive understanding of general jurisdiction before *Goodyear*, no one involved seemed to question the court's jurisdiction over the *defendant*.<sup>185</sup> Indeed, it would have been exceedingly odd for Phillips Petroleum to have made the derivative challenge to the Kansas court's personal jurisdiction over the absent class members if personal jurisdiction over itself was seriously questioned.

Yet after *Bristol-Myers*, it is difficult to see how the Kansas court could have had personal jurisdiction over Phillips Petroleum for the vast majority of the class members' claims. Under *Goodyear* and *Daimler*, it is clear that Kansas did not have general jurisdiction over Phillips Petroleum. Although Phillips Petroleum "own[ed] property and conduct[ed] substantial business in the State," it was not at home there, and "only a few leases in issue [were] located in Kansas."<sup>186</sup> And under *Bristol-Myers*, it is hard to see how Kansas could have had specific jurisdiction over the defendant with respect to most of the class members' claims. The claims of Texas (or Oklahoma, or any other state for that matter) royalty owners for interest due on Texas gas leases did not "arise out of or relate to" Phillips Petroleum's operations in Kansas. There was no "connection between the forum and the

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<sup>183</sup> *Id.* at 799–801.

<sup>184</sup> *Id.* at 805–06.

<sup>185</sup> See Wood, *supra* note 175, at 613–16 (summarizing the formerly expansive understanding of general jurisdiction).

<sup>186</sup> *Shutts*, 472 U.S. at 819.

specific claims at issue”,<sup>187</sup> nothing happened to the Texas class members in Kansas. And the fact that the Texas class members’ claims were materially identical to the claims of hundreds of Kansas plaintiffs suing over Kansas gas leases doesn’t seem to matter under the logic of *Bristol-Myers*.<sup>188</sup>

In short, if the exercise of specific jurisdiction under *Bristol-Myers* requires a connection between each plaintiff’s claim and the forum state, then it is hard to see how a state court other than the defendant’s home state could have specific jurisdiction over most multistate class actions. There may be some cases where all of the conduct that causes the class members’ injuries nationwide occurred in a single state that is not the defendant’s “home” under *Goodyear* and *Daimler* (perhaps a state where the defendant has its manufacturing operations or conducted critical research or clinical trials), and thus that state would have specific jurisdiction over all of the class members’ claims. Under *Bristol-Myers*, it would seem that, except in these sorts of circumstances, a multistate or nationwide class action may only be maintained in a state that can exercise general jurisdiction over the defendant—or in a state where the defendant consents.

The Court did not expressly decide the fate of multistate class actions in *Bristol-Myers*. Justice Alito distinguished *Shutts* by saying that “the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.”<sup>189</sup> And he stressed that the defendant in *Shutts* “did not assert that Kansas improperly exercised personal jurisdiction over it.”<sup>190</sup> Having declined to address the question, the Court could, in a future case, carve class actions out from the rule in *Bristol-Myers* by treating the class more as an entity than as an aggregation of individual claims.<sup>191</sup> The Supreme Court has, in the past, treated absent class members as parties for some purposes, but not for others.<sup>192</sup> The door

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<sup>187</sup> *Bristol-Myers*, 137 S. Ct. at 1781.

<sup>188</sup> *Shutts*, 472 U.S. at 819.

<sup>189</sup> *Bristol-Myers*, 137 S. Ct. at 1783 (citation omitted).

<sup>190</sup> *Id.*

<sup>191</sup> See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998). Wood argues that personal jurisdictional analysis should vary depending on the type of class action. For pure representational classes, like small-claims class actions and those seeking indivisible injunctive relief, specific jurisdiction over the named plaintiff’s claims against the defendant should usually be sufficient for jurisdiction over the entire class’s claims. For joiner-style classes, like most mass torts, it should not. Wood, *supra* note 175, at 616–18.

<sup>192</sup> Compare *Devlin v. Scardelletti*, 536 U.S. 1, 4 (2002) (considering absent class members parties for purposes of appeal), and *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 540 (1974) (treating absent class members as parties for statute-of-limitations tolling), with *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 365–67 (1921), *overruled on other grounds in part by* *Toucey*

remains open for the Court to look only to the named plaintiffs' claims when assessing the connection between the litigation and the forum state, much like it ignores absent class members and looks only to the citizenship of the named plaintiffs for the purposes of diversity jurisdiction under § 1332(a).<sup>193</sup> But, given recent trends in personal jurisdiction,<sup>194</sup> subject matter jurisdiction,<sup>195</sup> and class action law,<sup>196</sup> we would not bet on it, at least in the mass-tort context.<sup>197</sup>

Would multistate class actions fare any better in federal court? The Supreme Court in *Bristol-Myers* expressly left "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."<sup>198</sup> Although there may be no constitutional problem with a federal court exercising personal jurisdiction over a multistate class action challenging a nationwide course of conduct, we do not think that paves the way for multistate class actions in federal court outside

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v. N.Y. Life Ins. Co., 314 U.S. 118, 127 (1941) (not treating absent class members as parties for the complete diversity requirement).

<sup>193</sup> *Ben Hur*, 255 U.S. at 365–67; see also *Snyder v. Harris*, 394 U.S. 332, 340 (1969) ("Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant . . ."). CAFA modifies these rules for the class actions it covers. See 28 U.S.C. § 1332(d) (2012).

<sup>194</sup> See *supra* notes 90–123 and accompanying text.

<sup>195</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005). There is some tension between *Ben Hur*'s disregard of absent class members' citizenship when asking if the parties are completely diverse and *Allapattah*'s assertion that the presence of nondiverse parties would "contaminate" the federal court's original jurisdiction under § 1332, even as it relied on § 1367 to assert supplemental jurisdiction over absent class members who failed to meet the amount in controversy requirement. *Id.* at 562. But both *Allapattah* and *Ben Hur* are statutory decisions. Neither pushed the outer bounds of the federal courts' constitutional power under Article III. If Congress wishes to pass jurisdictional statutes that make no sense, that is its prerogative.

<sup>196</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Klonoff, supra* note 39. But see *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (preserving viability of securities class actions by endorsing fraud-on-the-market theory); Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 972 (2017).

<sup>197</sup> Professor Andrews doesn't think so either. Andrews, *supra* note 179, at 1367–74. Alternatively, perhaps the Court could hold that corporations consent to general jurisdiction by registering to do business and appointing an agent to receive service of process under state registration statutes. See *id.* at 1360–67. But most courts considering the question have rejected such expansive interpretations of general jurisdiction since *Goodyear* and *Daimler*. See, e.g., *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 623 (2d Cir. 2016); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016). But see *Snyder Ins. Servs., Inc. v. Sohn*, No. 16-CV-2535-ddc-qlr, 2016 WL 6996265, at \*3–4 (D. Kan. Nov. 30, 2016); see also *Clopton, supra* note 73 (providing a discussion of the post-*Goodyear* cases).

<sup>198</sup> *Bristol-Myers*, 137 S. Ct. at 1784; see also *id.* at 1789 (Sotomayor, J., dissenting) ("The plaintiffs here . . . might have been able to bring a single suit in federal court (an 'open . . . question').").

of the defendant's home state—at least without further action from Congress or the Advisory Committee.

The federal courts are, of course, courts of a different sovereign than the state courts.<sup>199</sup> And every plaintiff's claim in a nationwide class could have a connection to the United States as a whole, even if they did not all have a sufficient connection to a single state.<sup>200</sup> So a nationwide class action could be constitutionally feasible in federal court, even if the Fifth Amendment imposes the same relatedness requirement on federal courts that *Bristol-Myers* read into the Fourteenth Amendment for state courts—a question the Court left open in *Bristol-Myers*.<sup>201</sup>

But even if there would be no constitutional problem with federal courts exercising specific jurisdiction over a nationwide class action, Rule 4(k) of the Federal Rules of Civil Procedure ties the personal jurisdiction of the federal courts to the jurisdictional reach of the states in which they sit.<sup>202</sup> In other words, except in cases where Congress says otherwise, Rule 4(k) applies the Fourteenth Amendment's limitation on state courts' personal jurisdiction to the federal courts.<sup>203</sup> And those limitations now include the relatedness requirements of *Bristol-Myers*. Perhaps Congress could expand the federal court's personal jurisdiction over multistate class actions by passing a nationwide service of process statute for class actions, but it has not done so yet.<sup>204</sup> So in federal court, as in state court, if plaintiffs want to bring a multistate class action, most of the time they will likely have to do so in a forum that has general jurisdiction over the defendant or where the defendant consents.

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<sup>199</sup> See *Nicastro*, 564 U.S. at 884 (“Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”).

<sup>200</sup> The Supreme Court has never actually decided whether minimum contacts with the nation as a whole are sufficient for the federal courts to exercise personal jurisdiction without violating the Fifth Amendment. See, e.g., *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.5 (1987) (reserving question); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (same). Most courts and commentators, however, assume that they would be. See, e.g., FED. R. CIV. P. 4 advisory committee's note to the 1963 amendment; *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) (“[D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court.”); *Miss. Publ'g Co. v. Murphree*, 326 U.S. 438, 442 (1946); *Andrews*, *supra* note 179, at 1376–77; Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769, 776 (2015).

<sup>201</sup> *Bristol-Myers*, 137 S. Ct. at 1784.

<sup>202</sup> FED. R. CIV. P. 4(k)(1)(A).

<sup>203</sup> See *Andrews*, *supra* note 179, at 1381.

<sup>204</sup> While CAFA presumes the existence of nationwide class actions, it is not a nationwide service of process statute. CAFA deals exclusively with subject matter jurisdiction and says nothing about the personal jurisdiction of the federal courts. 28 U.S.C. § 1332(d).

After *Bristol-Myers*, plaintiffs could probably still bring smaller, single-state class actions outside of the defendant's home forum, if all of the class members' claims were sufficiently connected to the forum state. So, for example, if all of the class members were injured by the defendant's conduct in the forum state, that state would likely have specific jurisdiction over the class action under *Bristol-Myers*. The same is probably true if all class members are residents of the forum state—though the Court was non-committal on that point in *Bristol-Myers*.<sup>205</sup> But even if plaintiffs could maintain a single-state class action outside of the defendant's home state, the defendant will usually be able to remove class actions of any significance to federal court, as federal jurisdiction would be appropriate either under § 1332(a) or under CAFA.

*Bristol-Myers* thus continues the trend evident in CAFA towards federalization of mass litigation. In fact, *Bristol-Myers* may render CAFA obsolete as a practical matter in many of the circumstances that CAFA was intended to address. CAFA aimed primarily to prevent plaintiffs from obtaining certification of nationwide class actions in particularly friendly state courts, thereby allowing a single outlier court to determine liability on a nationwide scale. CAFA ensured that these sorts of class actions would be removable to federal courts, where class certification standards are more uniform, and (at least perceived to be) more difficult to meet.<sup>206</sup> After *Bristol-Myers*, however, the central problem that CAFA aimed to solve no longer exists. Multistate class actions outside of the defendant's home state are largely a thing of the past. CAFA is relegated primarily to mopping up single-state class actions that join a nondiverse defendant and allowing hometown defendants to remove multistate class actions filed in states where they are subject to general jurisdiction.<sup>207</sup>

The upshot, if our analysis is correct, is that nearly all nationwide or multistate class actions will end up in federal court in the defendant's home state or states where it is subject to general jurisdiction (unless the defendant has engaged in conduct directed nationwide in another state or consents to personal jurisdiction elsewhere). Single-state class actions might still be viable in other states, but will almost always be removable to federal court as a matter of ordinary diversity jurisdiction or under CAFA.

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<sup>205</sup> *Bristol-Myers*, 137 S. Ct. at 1783 (“Alternatively, the plaintiffs who are residents of a particular State—for example the 92 plaintiffs from Texas and the 71 from Ohio—could *probably* sue together in their home States.”) (emphasis added); see also *id.* at 1789 (Sotomayor, J., dissenting) (“The plaintiffs here . . . could ‘probably’ have subdivided their separate claims into 34 lawsuits in the States in which they were injured . . .”).

<sup>206</sup> See *supra* notes 34–89 and accompanying text (discussing the effects of CAFA).

<sup>207</sup> 28 U.S.C. §§ 1332(d), 1453.

At least that's the case for litigated class actions. Settlement class actions are a different matter. Because defendants can consent to personal jurisdiction in any state, the collusive practice known as a "reverse auction," where the defendant essentially shops a class action settlement around to the lowest bidder, is still possible.<sup>208</sup> As a rule, defendants hate aggregation until the time comes to settle, and then they want as much aggregation as they can get. A class action settlement binds all class members who do not opt out and thus precludes them from bringing their claims in any other court, forming a valuable shield for defendants from future liability.<sup>209</sup> Recognizing the peace that a class action settlement can provide and knowing that there are multiple plaintiffs' lawyers out there who would be delighted to serve as class counsel, the defendant can strike a deal with the lawyer willing to take the smallest sum for the largest class and then shop around for a state court willing to certify the class and approve the settlement (even if a federal court in its home state would not have).<sup>210</sup> The implicit bargain, of course, is that class counsel will collect a hefty fee award for little work and the defendant maximizes the preclusive effect of the class action settlement on the cheap.

*Bristol-Myers's* constriction of specific jurisdiction and the resulting limits on plaintiff-side forum shopping thus does little to limit the ability of the defendant and class counsel to shop for a forum that will approve their collusion at the expense of absent class members. Defendants are not limited to settling class actions in their home states because they can consent to personal jurisdiction in any state.<sup>211</sup> But under *Shutts*, absent class members will be deemed to have consented to the personal jurisdiction of the defendant and class counsel's handpicked state court, unless they opt out.<sup>212</sup> Class action settlements in state court are binding on class members and will have preclusive effect in all other courts, state and federal, even if they resolved claims that could never have been litigated there because the defendant

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<sup>208</sup> See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282–83 (7th Cir. 2002) (Posner, J.) (describing how a reverse auction works); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–73 (1995); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2040 (2008).

<sup>209</sup> See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996) (assessing the binding nature of a class action settlement); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002) (explaining the consequences of a class action settlement).

<sup>210</sup> Coffee, *supra* note 208.

<sup>211</sup> See, e.g., ARTHUR T. VON MEHREN, *ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY* 176 (2007).

<sup>212</sup> *Shutts*, 472 U.S. at 813–14.



would have objected to personal jurisdiction or some of the claims are beyond the state court's subject matter jurisdiction.<sup>213</sup>

The combination of *Bristol-Myers* and *Shutts* thus creates an asymmetry in opportunities for forum shopping that may come at the expense of absent class members. Further, CAFA does not permit absent class members to intervene and remove the case to federal court to short circuit this sort of settlement forum shopping.<sup>214</sup> Savvy class action lawyers might file in federal court to begin with, where competing class actions can be consolidated in an MDL. They might then ask the federal judge to enjoin competing state court class actions as a way to fend off competitors who might try to undercut them in a reverse auction. But federal courts can only enjoin ongoing state court proceedings if they can fit the request into an exception to the Anti-Injunction Act.<sup>215</sup> And if the defendant reaches a collusive settlement with the federal class action lawyer before certification, at least some courts will allow them to voluntarily dismiss the federal action and refile in a more pliable state court where the defendant can consent to jurisdiction.<sup>216</sup>

Going forward, *Bristol-Myers* will result in class action aggregation on defendants' terms. Defendants will be able to dictate the states in which they can be sued in multistate class actions by where they choose to incorporate and locate their operations. They can choose between federal and state courts under CAFA. And defendants will still have the option of set-

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<sup>213</sup> *Matsushita*, 516 U.S. at 367.

<sup>214</sup> See Robert H. Klonoff & Mark Hermann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1710 (2006) (noting that Congress considered and rejected including a provision in CAFA allowing any class member to remove class actions).

<sup>215</sup> 28 U.S.C. § 2283 (2012); see, e.g., *Smith v. Bayer Corp.*, 564 U.S. 299, 305 (2011) (explaining exceptions to the Anti-Injunction Act); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 194 (3d Cir. 1993) (enjoining competing state-court class action while class certification and settlement approval were pending in federal court); *In re Eagle-Picher Indus. Inc.*, 134 F.R.D. 32, 33 (E.D.N.Y. 1990) (enjoining competing state-court class actions to protect a limited fund); Lonny Sheinkopf Hoffman, Syngenta, Stephenson, and the *Federal Judicial Injunctive Power*, 37 AKRON L. REV. 605, 606 (2004).

<sup>216</sup> See *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069, 1073 (8th Cir. 2017); see also Alison Frankel, *8th Circuit Says Forum Shopping Is Fine, as Long as It's Bilateral*, REUTERS (July 28, 2017), <http://www.reuters.com/article/us-otc-forum-idUSKBN1AD2GG> [<https://perma.cc/DD3L-T6Y7>]; cf. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 137 (3d Cir. 1998). The Third Circuit specifically noted:

In *GM I*, we vacated the class certification order and set aside the settlement . . . . However, instead of proceeding further in the Eastern District of Pennsylvania, the parties to the settlement repaired to the 18th Judicial District for the Parish of Iberville, Louisiana, . . . restructured their deal, and submitted it to the Louisiana court, which ultimately approved it.

*Gen. Motors*, 134 F.3d at 137.

ting class actions in any state court, so long as they can find a willing partner in class counsel.

### B. Mass Joinder in State Courts

*Bristol-Myers* effectively spells the end for mass joinder of claims by plaintiffs from multiple states in most state courts outside of the defendant's home state. In other words, the plaintiffs' strategy in *Bristol-Myers* is out. Plaintiffs cannot engage in large-scale multistate aggregation in the state courts of their choice just because some of them reside in or were injured in that state. If they want to aggregate claims of plaintiffs from around the country in state court, they will have to do so on defendants' terms. They can sue in a state where the defendant has chosen to incorporate or locate its principal place of business or, if there is a single state where the defendant engaged in conduct that gave rise to all of the plaintiffs' claims nationwide, in the state where the defendant chose to engage in that conduct.

Indeed, as Justice Sotomayor points out in her dissent, there may be no state in which plaintiffs from around the country can aggregate their claims against two or more defendants who are incorporated and have their principal places of business in different states, as no single state would have general jurisdiction over both defendants.<sup>217</sup> Similarly, it may be impossible for plaintiffs from different states to join together to sue a foreign defendant in any state court, as a defendant not headquartered or incorporated in the United States is not at home in any state.<sup>218</sup>

Of course, *Bristol-Myers* does not mean the end of mass-tort litigation in state courts. There are still several avenues available for individuals or groups of plaintiffs to remain in state court. And plaintiffs or their lawyers might prefer these options to federal MDL under certain circumstances.

*Bristol-Myers* leaves open the possibility of multistate aggregation in a state where the defendant engaged in conduct directed nationwide, even if the defendant is not subject to general jurisdiction there. In *Bristol-Myers*, the defendant had not engaged in any California conduct sufficiently linked to the out-of-state plaintiffs' claims.<sup>219</sup> But suppose *Bristol-Myers* had designed or manufactured the drug there. Under those circumstances, one could imagine that there might be specific jurisdiction over *Bristol-Myers* for a nationwide set of claims, regardless of the residences of the plaintiffs or the locations of their injuries. But even if the plaintiffs were able to structure such an action to avoid removal to federal court (by, for example, join-

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<sup>217</sup> *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 1781–82 (majority opinion).

ing nondiverse parties and breaking their actions up to avoid CAFA's mass action provisions), the aggregation would be more on defendants' terms than the options open before *Bristol-Myers*. The defendants still possessed the opportunity to preemptively designate the forum as a potential place where it might be sued. That is, going forward, defendants can choose to engage in conduct directed nationwide in states where they deem the risk of suit on claims relating to that conduct acceptable—a sort of *ex ante* forum shopping.

Plaintiffs can, of course, still sue individually in the states where they suffered injury; those states will have specific jurisdiction over the plaintiffs' claims so long as the defendant has purposefully availed itself of the state's markets.<sup>220</sup> The Court in *Bristol-Myers* did not adopt the defendant's argument that specific jurisdiction requires the defendant's purposeful contacts with the forum state to have proximately caused the plaintiff's injury.<sup>221</sup> So presumably plaintiffs can still sue in the states where they live and were injured, even if the particular product that injured them was purchased out of state (though the Court does not say so definitively).<sup>222</sup> Suing individually, however, may be cost prohibitive in many mass-tort cases, where expensive expert testimony is often a prerequisite to any hope of recovery. Indeed, *Bristol-Myers* candidly admitted that it anticipated that if plaintiffs had to file individually, "a lot of those cases aren't going to get filed."<sup>223</sup>

Smaller groups of plaintiffs who reside or were injured in a single state can, the Court lets on, "probably sue together," as that state would likely have specific jurisdiction over all of their claims.<sup>224</sup> And some plaintiffs' lawyers may prefer the independence of controlling their own small-group litigation to joining a nationwide aggregation. But by suing in small groups, plaintiffs give up the leverage and economies of scale that come with nationwide aggregation. And most of the time, the nonresident defendant will be able to remove those single-state aggregations to federal court and have them transferred under § 1407 to an MDL, if one is pending (and it will be in a mass tort of any significant size).<sup>225</sup>

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<sup>220</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>221</sup> *Bristol-Myers*, 137 S. Ct. at 1788 n.3 (Sotomayor, J., dissenting).

<sup>222</sup> *Id.* at 1783 (majority opinion) (suggesting that the plaintiffs "could probably sue together in their home States").

<sup>223</sup> Oral Argument, *supra* note 7.

<sup>224</sup> *Bristol-Myers*, 137 S. Ct. at 1783.

<sup>225</sup> Cases removed under CAFA's mass-action provision cannot be transferred to an MDL without the plaintiffs' consent. 28 U.S.C. § 1332(d)(11)(C)(1). So plaintiffs that manage to join a nondiverse defendant, but not to break up their claims into groups of fewer than one hundred plaintiffs to remain in state court, can avoid MDL.

Plaintiffs might be able to keep their individual or small-group claims in state court if they are able to join a local defendant—like the distributor, McKesson, in *Bristol-Myers*.<sup>226</sup> Likewise, if they could recruit a plaintiff who was a citizen of the same state as the defendant, but was injured in the forum state or had some other sufficiently close connection to the forum state to make specific jurisdiction proper under *Bristol-Myers*, they might be able to frustrate removal. But such options are no way to organize mass litigation on a national scale. Aside from the added cost of such procedural maneuvering, the plaintiffs' ability to resist removal depends on the fortuity of being able to properly join an in-state defendant or recruit a nondiverse co-plaintiff. And the doctrine against fraudulent joinder—which Congress is considering strengthening—will prevent plaintiffs from getting too adventuresome.<sup>227</sup>

Finally, there may be times when plaintiffs will find aggregation in the defendant's home state appealing. Most obviously, the defendant may have chosen to incorporate or locate its principal place of business in a relatively plaintiff-friendly state. Litigation risk is not always the dominant consideration in choosing a principal place of business; labor markets, access to resources, the location of the CEO's summerhouse, or any number of other considerations might be more important. Corporations that have elected to base themselves in California come to mind.<sup>228</sup> And even when defendants have engaged in a bit of preemptive forum shopping, some plaintiffs may nevertheless decide to accept the defendant's home-field advantage and file there anyway in order to avoid a federal MDL—perhaps because of the identity of the transferee judge or the leadership of the plaintiffs' steering committee. Every litigation presents a unique set of challenges that require strategic tradeoffs, and under some circumstances one such tradeoff may be to decide to venture into unfriendly territory.

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<sup>226</sup> Federal jurisdiction under 28 U.S.C. § 1332(a) requires complete diversity unless it falls within the class- or mass-action provisions of § 1332(d). See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that complete diversity is a requirement for establishing diversity jurisdiction in federal court).

<sup>227</sup> See, e.g., *In re Briscoe*, 448 F.3d 201, 206 (3d Cir. 2006); see also *Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3624 Before the Subcomm. on Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 21 (2015) (statement of Lonny Hoffman); Arthur D. Hellman, *The Fraudulent Joinder Prevention Act of 2016: A New Standard and a New Rationale for an Old Doctrine*, 17 FEDERALIST SOC'Y REV. 34, 34 (2016).

<sup>228</sup> See, e.g., Kriston Capps, *Tech Startups Will Never Leave Silicon Valley—Here's Why*, BUS. INSIDER (Dec. 26, 2015), <http://www.businessinsider.com/tech-startups-will-never-leave-silicon-valley-heres-why-2015-12> [<https://perma.cc/YEM7-RDEJ>].

But much of the time, the defendant's home state may be very unfriendly territory.<sup>229</sup> The types of corporations that find themselves as mass-tort defendants—Big Tobacco, Big Pharma, Big Anything—are often major political and social players in their home states. Even if they did not choose their headquarters to minimize litigation risk, they may have powerful lobbies in the state legislature and, over time, may seek protective substantive or procedural legislation and work to help shape the (often elected) state judiciary. Similarly, local jurors may not be eager to put a major local employer and economic engine out of business. None of this is meant to suggest that state courts in the defendant's home state cannot be fair or are in the defendant's pocket. But, to the extent that forum matters in litigation—and both sides think it matters quite a bit—there are reasons to believe that plaintiffs will often prefer to avoid the defendant's home state.

In short, some plaintiffs in large states where they can join a non-diverse defendant may still find it economical to aggregate on a single-state basis. And some plaintiffs might be content to sue the defendant in its home state. But, bigger picture, the result will be what *Bristol-Myers* candidly admitted that it hoped for in the California Court of Appeals.<sup>230</sup> Many plaintiffs who cannot join a nationwide mass litigation in state court will either find it cost prohibitive to sue on their own in the state where they were injured or will find themselves swept up into the federal MDL. Given that the alternative is to litigate on the defendant's home turf, many plaintiffs will prefer to take their chances in the federal MDL. *Bristol-Myers* thus continues what CAFA began: moving mass-tort aggregation to federal court.

### C. MDL as the Likely Alternative

If our reading of *Bristol-Myers* is correct, much of the mass-tort litigation that has previously been aggregated in state courts is likely to end up in MDL. Unless plaintiffs want to litigate alone or on the defendant's home turf, they will file in (or allow their claims to be removed to) federal court in their home states or the states where they were injured, and those cases will then be consolidated under § 1407 in an MDL. Given these options, plaintiffs may not even try to avoid federal jurisdiction by joining non-diverse defendants or structuring their claims to circumvent CAFA. Plain-

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<sup>229</sup> See Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85. S. CAL. L. REV. 1551, 1554, 1574–75 (2012) (showing through economic analysis that a jurisdictional rule that limits suits to the defendant's home state would drive defendants to choose states with inefficiently lenient product liability regimes and encourage states to weaken their product liability laws to attract businesses).

<sup>230</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412, 436 n.20 (Ct. App. 2014).

tiffs might even file directly in the federal MDL court if the defendant consents to such an arrangement (as many do).<sup>231</sup>

That MDL would become the primary destination for mass-tort litigation would not come as a surprise to those who developed the statute and saw their creation as the antidote to the “litigation explosion.”<sup>232</sup> The only surprise would be that it took so long to get to this point. But with class actions no longer a viable or attractive option and state-court aggregations severely limited by *Bristol-Myers*, MDL will often be the only realistic means left to aggregate tort claims arising around the country in a single courtroom. Although plaintiffs might have preferred class or nonclass aggregation in state court (and defendants might have preferred no aggregation at all), MDL has emerged as the best available alternative—for plaintiffs, defendants, and the courts. For plaintiffs, MDL offers the advantages of aggregation: streamlined proceedings, cost sharing, and, for lead lawyers, additional common-benefit fees.<sup>233</sup> For defendants, MDL offers litigation in a single forum and the possibility of global peace without the risk of a classwide verdict.<sup>234</sup> And, of course, for the courts there is the efficiency of litigation being handled by a single judge rather than over and over again throughout the country.<sup>235</sup>

But why, after *Bristol-Myers*, is it feasible to consolidate nationwide litigation in the MDL court? One might think that because Rule 4 makes the federal courts’ personal jurisdiction the same as the states in which they sit, the limitations on specific jurisdiction imposed by *Bristol-Myers* would hinder MDL just as it will hinder state courts.<sup>236</sup> After all, if personal jurisdiction now stands as an often insuperable obstacle to consolidating nationwide litigation in a class action or mass joinder outside the defendant’s home state, why would the same obstacle not stand in the way of putting exactly the same set of claims into an MDL, which, under the statute, can be located anywhere in the country? The answer is in the magic of how MDL is built.

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<sup>231</sup> See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multi-district Litigation*, 88 NOTRE DAME L. REV. 759, 764–65 (2012) [hereinafter Bradt, *Shortest Distance*] (explaining the process of direct filing in the MDL court).

<sup>232</sup> See Bradt, *Radical Proposal*, *supra* note 22, at 839.

<sup>233</sup> See Bradt & Rave, *supra* note 25, at 1267 (laying out the advantages of MDL for plaintiffs).

<sup>234</sup> See *id.* (setting forth the advantages of MDL for defendants).

<sup>235</sup> See, e.g., Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 718–19 (1995) (identifying the judicial economy rationale for MDL).

<sup>236</sup> FED. R. CIV. P. 4(k)(1)(A).

MDL is characterized by an inherent split personality. While it acts as a powerful aggregating force from which parties cannot escape and within which individual litigants have limited control over their cases, formally MDL preserves the individual nature of the transferred cases that are consolidated within it.<sup>237</sup> Each plaintiff has retained a lawyer, each case is separately filed and docketed, and at the end of pretrial proceedings (if that time ever comes) each case will be sent back to the court in which it was originally filed for trial.<sup>238</sup>

Because—formally at least—transfer to the MDL court is limited to pretrial proceedings, the JPML has held that MDL is “simply not encumbered by considerations of in personam jurisdiction and venue.”<sup>239</sup> Instead, it is the jurisdiction of the *transferor* court that matters. So long as the cases were originally filed in (or removed to) a district court that has personal jurisdiction under Rule 4 (and thus *Bristol-Myers*), the MDL transferee court does not need an independent basis for personal jurisdiction over the temporarily transferred cases.<sup>240</sup>

And that is exactly what the drafters of the MDL statute intended. One of the prime motivations for inventing MDL was that the general transfer statute, 28 U.S.C. § 1404, allowed transfers only to districts in which cases might have originally been brought—that is, districts that were both proper venues and had jurisdiction. Because the drafters of the MDL statute envisioned nationwide consolidation, they understood that there would rarely be a single district that would qualify under the venue statute.<sup>241</sup> So they wrote the statute to provide for pretrial consolidation in *any* federal district so long as “such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>242</sup> And, in practice, the JPML does not consider personal jurisdiction in choosing the MDL transferee court for a nationwide mass tort; when the claims are dispersed throughout the country virtually any district will do.<sup>243</sup>

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<sup>237</sup> Bradt & Rave, *supra* note 25, at 1270–73.

<sup>238</sup> See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 29 (1998) (holding that the MDL judge cannot try transferred cases and must remand them at the close of pretrial proceedings).

<sup>239</sup> *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

<sup>240</sup> *In re Library Editions of Children’s Books*, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969). The defendant is not prejudiced, according to the JPML, because it can still object to the *transferor* court’s personal jurisdiction or venue in the transferee court. *Id.* at 1142.

<sup>241</sup> Bradt, *Radical Proposal*, *supra* note 22, at 875.

<sup>242</sup> 28 U.S.C. § 1407(a) (2012); Bradt, *Long Arm*, *supra* note 29, at 1203–04.

<sup>243</sup> See, e.g., *In re Takata Airbag Prods. Liab. Litig.*, 84 F. Supp. 3d 1371, 1372 (J.P.M.L. 2015) (“The litigation is nationwide in scope. . . . No one district stands out as the geographic focal point.”); *In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices, and Prods. Liab. Litig.*, 996 F. Supp. 2d 1380, 1383 (J.P.M.L. 2014) (“This litigation is nationwide in

Of course, the idea that an MDL transfer is somehow temporary and limited is little more than a fiction. During the consolidated pretrial proceedings, the MDL court has all of the powers of the transferor court, including the power to grant dispositive motions.<sup>244</sup> And the practical reality is that cases rarely return to the transferor court. Essentially, MDL masquerades as a temporary consolidation of individual cases that were filed in courts with proper personal jurisdiction and venue for the limited purpose of managing pretrial proceedings. Never mind that nothing important ever happens in those courts. Pretrial proceedings are where all the action is. Nevertheless, this fiction of limited transfer allows MDL to get around the limits that Rule 4 places on a federal court's personal jurisdiction over a class action or mass joinder.

But what about the Constitution? A federal MDL is in the courts of the United States, so the relevant question is not whether all of the claims are sufficiently related to any particular state to satisfy Fourteenth Amendment Due Process as interpreted by *Bristol-Myers*. Rather, the question is whether the unique kind of consolidation in an MDL is an acceptable exercise of federal power under the Due Process Clause of the Fifth Amendment. We believe the answer is yes, and the handful of federal courts that have so far addressed the question agree with us, though they have not yet settled on a compelling reason for why that is.<sup>245</sup>

The federal courts' territorial sovereignty is presumably much broader than that of any individual state; it covers the entire nation.<sup>246</sup> And it should not be difficult to find a connection between a nationwide set of claims and the United States, assuming that the rule in *Bristol-Myers* applies to the Fifth Amendment as well. Thus, several courts have held that personal jurisdiction poses no obstacle to the JPML consolidating all claims around the country in a single federal district.<sup>247</sup> In these courts' view, § 1407 operates like a statute that provides for nationwide service of process, such as interpleader or the Securities Act.<sup>248</sup>

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scope, and thus almost any district would be an appropriate forum."); *In re Actos Prods. Liab. Litig.*, 840 F. Supp. 2d 1356, 1356–57 (J.P.M.L. 2011) (choosing the U.S. District Court for the Western District of Louisiana when "allegations in this nationwide litigation do not have a strong connection to any particular district, and related actions are pending in numerous districts across the country").

<sup>244</sup> 28 U.S.C. § 1407(b).

<sup>245</sup> This question is discussed in greater detail in Bradt, *Long Arm*, *supra* note 29, at 1213–14.

<sup>246</sup> *Cf. Nicastro*, 564 U.S. at 884.

<sup>247</sup> *Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. 2010); *In re Agent Orange Prods. Liab. Litig.*, 996 F.2d 1425, 1432 (2d Cir. 1993); *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987).

<sup>248</sup> *Howard*, 382 F. App'x at 442 (referring to the MDL statute as providing for "nationwide service of process").



But this analysis has several problems. First, the Court has never explicitly authorized nationwide service of process, though it has not ruled it out either.<sup>249</sup> Second, as the Court has reiterated on several other occasions, including last term in *BNSF Railway Co. v. Tyrrell*, when Congress wishes to provide for nationwide service of process, it must do so clearly in the relevant statute because “a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction.”<sup>250</sup> The MDL statute has no such provision for nationwide service of process. That is why, absent consent by the defendant, a plaintiff may not simply file a case directly into an MDL unless the MDL district has jurisdiction.<sup>251</sup> The plaintiff—as acknowledged by the JPML—must file in (or the defendant must remove to) an appropriate federal district under Rule 4, after which the case must be transferred into the MDL.<sup>252</sup> Finally, to say that Congress intended that the MDL statute authorize a sort of nationwide jurisdiction only begs the question of whether doing so complies with the Fifth Amendment.<sup>253</sup>

Whether the Fifth Amendment permits the MDL scheme is an open question, though perhaps the Court’s acknowledgment in *Bristol-Myers* that due process may work differently under the Fifth Amendment than the Fourteenth Amendment signals a receptiveness to MDL.<sup>254</sup> Currently, the MDL court’s exercise of personal jurisdiction over the cases consolidated before it seems to depend on some combination of the fiction of limited transfer and the broad territorial reach of the national sovereign. The better argument for jurisdiction in MDL, in our view, is based on recognition of the national interest in efficient dispute resolution, balanced against a reasonable opportunity to be heard in the MDL forum.<sup>255</sup> That is, the benefits of MDL on all sides will typically outweigh the costs in terms of centralizing nationwide litigation in a single geographic location.

This analysis suggests, however, that the Fifth Amendment imposes some limitations on where an MDL can be located to ensure that the parties have a reasonable opportunity to be heard. It might be fundamentally unfair, for instance, for the JPML to locate an MDL involving a Florida defendant being sued by plaintiffs throughout the southeast in, say, the District of

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<sup>249</sup> *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1555–56 (2017); see also *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106–07 (1987) (declining to validate nationwide service of process).

<sup>250</sup> *Tyrrell*, 137 S. Ct. at 1556.

<sup>251</sup> *In re Fresinius GranuFlo/Naturalyte Dialysate Prods. Liab. Litig.*, 111 F. Supp. 3d 103, 104 (D. Mass. 2015); Bradt, *Shortest Distance*, *supra* note 231, at 863.

<sup>252</sup> Fallon et al., *supra* note 87, at 2324.

<sup>253</sup> Bradt, *Long Arm*, *supra* note 29, at 1215.

<sup>254</sup> *Bristol-Myers*, 137 S. Ct. at 1783–84.

<sup>255</sup> Bradt, *Long Arm*, *supra* note 29, at 1228.

Alaska.<sup>256</sup> Or it might be fundamentally unfair to force plaintiffs to litigate far from home when the argument for consent is so thin. After all, the plaintiffs may have filed their cases in appropriate state courts, and the defendant may have removed them and successfully sought transfer to an MDL located far across the country. In that sense, MDL plaintiffs are even worse off than absent class members under *Shutts*, who could at least opt out and go it alone in the forum of their choice.<sup>257</sup> MDL plaintiffs are stuck in the MDL forum until the MDL judge determines that pretrial proceedings are over and lets them go. MDL must therefore be structured in a manner that will ensure that plaintiffs from around the country can effectively participate in the litigation.

In any event, our intent is not to assess whether MDL passes constitutional muster—a distinct question beyond the scope of our argument here.<sup>258</sup> What is more important for our purposes is that courts have not yet been troubled by questions of personal jurisdiction in MDL, despite its somewhat tenuous relationship to the underpinnings of jurisdictional doctrine. This is because the magic of MDL lies in its ability to facilitate aggregation without offending otherwise applicable litigation norms. MDL's ability to accommodate traditional norms of individual litigation has been the key to its success. In other words, because MDL can be shoehorned into the doctrinal limitations on individual lawsuits, it avoids the underlying, and more difficult, theoretical questions. The ease with which MDL facilitates nationwide aggregation while accommodating the jurisdictional limits of our federal system has allowed it to fulfill its destiny. *Bristol-Myers* only furthers that trend.

### III. IMPLICATIONS OF MDL'S ASCENDANCY

After *Bristol-Myers*, if plaintiffs want to aggregate a nationwide set of claims, they will likely have to do so on the defendant's terms—either in a state where the defendant has chosen to base its operations or a federal MDL. If our prediction is correct that most plaintiffs will prefer MDL, the result will be increased federalization of mass-tort litigation. Some fifty years after its passage, the MDL statute's architects' vision will have come to fruition: nationwide disputes—even those involving state-law claims—will be handled together in national courts.

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<sup>256</sup> *Id.*

<sup>257</sup> *Cf. Shutts*, 472 U.S. at 812 (providing class action plaintiffs with the option to leave the class and file on their own in state court).

<sup>258</sup> For one of our thoughts on this question, see Bradt, *Long Arm*, *supra* note 29, at 1228–29.

This federalization of mass-tort litigation is not just a story about MDL; it is part of a broader trend toward federalization of disputes arising out of national economic activity. Most obviously, Congress has been expanding federal regulation over the national economy ever since the New Deal.<sup>259</sup> But, as Samuel Issacharoff and Catherine Sharkey point out, trends toward federalization have played out more subtly across a number of doctrines.<sup>260</sup> Preemption displaces state-law claims with federal law.<sup>261</sup> The Supreme Court's punitive damages decisions impose federal constitutional limits on state-law remedies.<sup>262</sup> Expansive views of federal question jurisdiction transform some state-law claims with federal ingredients into federal claims, while supplemental jurisdiction sweeps other state-law claims into federal court.<sup>263</sup> Even the Supreme Court's recent Federal Arbitration Act jurisprudence moves state-law cases out of state court and into arbitration, which is ultimately overseen by the federal courts.<sup>264</sup>

And, of course, CAFA moved state-law class actions of national scope into federal courts.<sup>265</sup> By making nationwide aggregation in state courts impracticable, except in the states that plaintiffs find least desirable, *Bristol-Myers* continues the trend towards federalization of aggregate litigation. If we are correct that *Bristol-Myers* means that far more mass-tort litigation will be consolidated in federal MDL, this development raises two questions: does federal MDL fit within our inherited notions of federalism, and what should we think of MDL's dominance as a normative matter?

### A. How MDL Facilitates Federalization of State-Law Claims

Consolidation of a mass tort in MDL presents attractive opportunities to plaintiffs, defendants, and the courts. Most importantly, federal MDL offers the possibility of a complete resolution of all related claims. Although all sides may prefer other alternatives—defendants may prefer no aggrega-

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<sup>259</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (allowing regulation of intrastate possession of marijuana); *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (permitting regulation of home-grown wheat not intended for sale).

<sup>260</sup> Issacharoff & Sharkey, *supra* note 30, at 1356–57.

<sup>261</sup> See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530 (1992) (holding that state law personal injury claims were not preempted by federally mandated warnings about smoking).

<sup>262</sup> E.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003); *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 563 (1996).

<sup>263</sup> E.g., *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 549 (2005); *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 310 (2005).

<sup>264</sup> See, e.g., *Kindred Nursing Ctrs., L.P. v. Clark*, 137 S. Ct. 1421, 1425 (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

<sup>265</sup> See Purcell, *CAFA*, *supra* note 69, at 1921 (“CAFA accelerated the growing centralization of American law.”).

tion at all and plaintiffs may prefer the leverage that comes with class certification—MDL may be a middle ground on which all sides begrudgingly agree.<sup>266</sup> That plaintiffs and defendants gravitate toward MDL as the best available option for handling and resolving mass litigation, however, is not sufficient for its success. After all, both plaintiffs and defendants favored the class-action settlements that the Supreme Court invalidated in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*<sup>267</sup> For MDL to work it must also sufficiently “fit” with norms of due process and federalism, which developed in the context of one-on-one litigation. MDL thrives because it can facilitate aggregation while maintaining fidelity to those norms, at least on the surface. Perhaps ironically, MDL may simultaneously undermine those norms in subtle but profound ways. But that is the magic of MDL. In a very real sense, MDL “works” because it allows for aggregation, where CAFA “failed” because it causes most class actions to be dismissed.<sup>268</sup>

*Bristol-Myers*—and its interaction with choice of law—is a superb illustration of this dynamic. As discussed above, *Bristol-Myers* opened a new avenue for contesting personal jurisdiction. Rather than focus on the burden on the defendant or the unpredictability of litigating in the forum, *Bristol-Myers*’s candid position throughout the litigation was that aggregation of the nationwide set of claims in California was unconstitutionally unfair because California’s courts would be too friendly to the plaintiffs.<sup>269</sup> Indeed, a primary reason why the California Court of Appeals rejected *Bristol-Myers*’s position was that it did not consider the company’s interest in avoiding a plaintiff-friendly forum to be one recognized or protected by personal jurisdiction doctrine.<sup>270</sup>

The U.S. Supreme Court obviously came to a different conclusion, but it had a difficult time justifying why it would be better for the cases to be dispersed in state courts around the country rather than consolidated in California. The Court did not seem to think that the burden on *Bristol-Myers* of

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<sup>266</sup> See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (framing MDL as the middle ground for plaintiffs and defendants); Mullenix, *Death of Democratic*, *supra* note 21, at 552 (characterizing MDL as the preferred means for settling huge liabilities).

<sup>267</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 825 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 601 (1997).

<sup>268</sup> CAFA, of course, was designed to fail, and MDL was designed to succeed—albeit by two different sets of statutory drafters with very different purposes. See Bradt, *Radical Proposal*, *supra* note 22, at 913; Burbank, *Historical Context*, *supra* note 10, at 1517.

<sup>269</sup> See Transcript of Oral Argument, *supra* note 157, at 15 (arguing that plaintiffs chose California because it was “jurisdictionally advantageous for them, either procedurally or substantively”).

<sup>270</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412, 436 n.20 (Ct. App. 2014).

litigating in California was great.<sup>271</sup> And even assuming that interstate federalism may act as an independent limitation on a state court's jurisdiction, the Court never explained why California's exercise of jurisdiction was offensive or which sister states could have rightly taken offense.<sup>272</sup>

Perhaps one reason for this confusion is that *Bristol-Myers* sounded more like it was arguing in favor of federal diversity jurisdiction than for limitations on personal jurisdiction. The assumption underlying *Bristol-Myers*'s position is that California judges cannot be presumed to treat an out-of-state defendant like *Bristol-Myers* fairly. As a result, although *Bristol-Myers* must accept litigating in California courts when it comes to injuries to Californians, to require it to face litigation there arising from injuries to residents of other states is unfair. Such an argument hews more closely to the traditional justification for including diversity jurisdiction in Article III, namely, that state courts cannot be trusted to treat out-of-staters evenhandedly.<sup>273</sup> Here, of course, the argument is deployed in service of dismissing claims against *Bristol-Myers* brought by fellow out-of-staters, but the concern seems to be that California's bias either extends to all plaintiffs, or that its preference for its own citizens will spill over onto an out-of-state corporation. The subtext of *Bristol-Myers*'s position is that if it faces a nationwide set of claims, only the judges of its home state or a federal judge overseeing an MDL can be presumed to treat *Bristol-Myers* fairly. The Supreme Court apparently agreed.

Imposing these diversity-esque arguments on the personal jurisdiction framework makes for an odd fit. The Court suggests that a reason why California may not hear the out-of-state plaintiffs' claims is that doing so would interfere with the prerogatives of sister states.<sup>274</sup> Although the Court does not elaborate, one might argue that California simply has an insufficient interest in adjudicating those claims, and to do so in the face of stronger interests of other states would be imperialistic. Nevertheless, despite the

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<sup>271</sup> See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (emphasizing the federalism interest, while at the same time deemphasizing the inconvenience of litigating in a distant forum).

<sup>272</sup> See *id.* (declining to address which other states retained an interest in the litigation).

<sup>273</sup> See, e.g., *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) (Marshall, J.) (accepting the argument that diversity jurisdiction guards against prejudice in the state courts); THE FEDERALIST NO. 80 (Alexander Hamilton) (justifying the need for federal courts and their power to hear diversity jurisdiction cases); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 (1928) (exploring the historical reasons for assigning diversity jurisdiction cases to the federal courts).

<sup>274</sup> *Bristol-Myers*, 137 S. Ct. at 1780–81. Indeed, at oral argument, Justice Gorsuch was particularly concerned about this point, asking *Bristol Myers*'s counsel "what implications there are for the interests, say, of Ohio in administering its own procedures with respect to its own citizens for torts that occur in its own State." Transcript of Oral Argument, *supra* note 157, at 25.

Court's apparent concern for horizontal federalism, it implicitly endorses nationwide aggregation in the *federal* courts through MDL. The Court is not worried about the vertical-federalism implications of its decision. To put it bluntly, the Court is quite concerned about California taking cases that should rightfully be decided by other states, but it is wholly unconcerned about those cases being decided by a single federal court in MDL, whether it is located in California or anywhere else.

The Court's conclusion in this regard echoes the non-cynical rationale for CAFA—that federalization of nationwide or multistate class actions is appropriate for cases of national scope.<sup>275</sup> And, indeed, there are legitimate and compelling arguments that the courts of a single state should not govern the nation and that the national interest in efficient adjudication is appropriately effectuated by federal jurisdiction.

Of course, the cynical reading of CAFA is that Congress intended to shift nationwide class actions into federal courts, where they would be dead on arrival because the questions of fact and law common to the class would never predominate.<sup>276</sup> Under the rule of *Klaxon v. Stentor*, a federal court to which a class action is removed under CAFA must apply the choice-of-law rules of the state in which it sits.<sup>277</sup> If that state's rules dictate that different substantive law must be applied to different plaintiffs within the class, then under the dominant view of Rule 23(b)(3), the disparate questions of law overwhelm the common ones. As a result, class actions based on state law removed to federal court are unlikely to be certified unless the federal court can find some way to massage the choice-of-law analysis to dictate the application of a uniform substantive law.<sup>278</sup> In fact, that was one reason CAFA was thought to be devastating for plaintiffs.<sup>279</sup>

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<sup>275</sup> S. REP. NO. 109-14, at 27; Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1766 (2008).

<sup>276</sup> See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006) (“[It should be] apparent to any sentient reader of the statute’s statement of findings and purposes. . . . [that] [t]hey are, at best, window dressing. Less charitably, they meet the philosopher Harry Frankfurt’s definition of ‘bullshit,’ because they are made with apparent indifference to their truth content.”) (footnote omitted).

<sup>277</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

<sup>278</sup> Silberman, *supra* note 70, at 2034; York-Erwin, *supra* note 71, at 1794.

<sup>279</sup> Edward Purcell elaborates:

Requiring federal courts to apply state law when adjudicating state-created rights, *Erie* forced daunting choice of law problems to the forefront in those actions and thereby became a major obstacle to class certification. It was precisely the obstacle that *Erie* created, of course, that made CAFA such an effective pro-defendant statute.

Purcell, *CAFA*, *supra* note 69, at 1925 (footnote omitted).

MDL, however, is not burdened by the limitations of Rule 23(b)(3). Judge Becker, the primary advocate for the MDL statute, fought vigorously *against* adding a predominance requirement sought by corporate defendants, explicitly because he did not want to see individual questions of fact and law prevent the aggregation that he thought was necessary to counter the coming litigation explosion in mass torts. Even in 1967, Becker understood that, in cases based on state law, different choice-of-law rules could prevent aggregation under any rule that required predominance.<sup>280</sup>

Doctrinally, the lack of a predominance requirement means that the “fifty-state-law problem” that has plagued the mass-tort class action is no obstacle to aggregation in MDL. And because there is no requirement in MDL that the law applicable to all of the component cases be the same, there is no pressure to alter the choice-of-law rules that would otherwise apply in order to facilitate aggregation. Formally, MDL can leave undisturbed the law applicable to each individual case within the collective.<sup>281</sup>

Perhaps more important than MDL’s ability to aggregate while accommodating *Klaxon* doctrinally is its consistency with *Klaxon*’s underlying theory of vertical federalism. This is the key to understanding how the Court in *Bristol-Myers* can assert an aggressive defense of personal jurisdiction as a means of policing interstate federalism, while also ignoring the likely effect of its decision—that the cases will ultimately wind up out of state courts altogether and in federal MDLs. *Bristol-Myers* prevents states like California from infringing the prerogative of other states to decide cases in which they have a greater interest or connection, but it facilitates aggregation of those claims in a single federal district court.

*Klaxon*, of course, is an early progeny of *Erie Railroad Co. v. Tompkins*.<sup>282</sup> The holding in *Klaxon*—that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits—was thought to be a necessary corollary of *Erie* itself for two reasons articulated by Justice Reed in his opinion for a unanimous Court. First, if a federal court could apply its own independently determined choice-of-law rules, it would be a threat to the principle of intrastate vertical uniformity. If different choice-of-law rules apply in federal and state courts, the courts might reach different outcomes solely because of the “accident of diversity.”<sup>283</sup> Such a result

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<sup>280</sup> Bradt, *Less and More*, *supra* note 43.

<sup>281</sup> Bradt, *Shortest Distance*, *supra* note 231, at 793 (“MDL accommodates well both the *Klaxon/Van Dusen* framework and its underlying policies.”).

<sup>282</sup> *See id.* at 769–77 (providing a detailed discussion of the history of *Klaxon*); *see also* Roosevelt, *supra* note 74.

<sup>283</sup> *Klaxon*, 313 U.S. at 496.

would risk recreating the forum shopping that the Court rejected in *Erie*.<sup>284</sup> Central to Justice Brandeis's thinking in *Erie* was the recognition that corporations used removal to shop for attractive law in the business-friendly federal courts.<sup>285</sup> Hence, the famous abuse in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, where a monopolist reincorporated in a neighboring state to create diversity because the federal courts would enforce its exclusive contract and enjoin its competitor when the state courts would not.<sup>286</sup> If federal courts could choose to apply law different from that which would apply in state court, then the evils of *Swift v. Tyson* would be replicated.<sup>287</sup> Second, the Court in *Klaxon* recognized that a state's choice-of-law rules are substantive law reflecting state policy. For federal courts to preempt those views, without direction from Congress, would be a threat to states' prerogatives and an overreach reminiscent of the "general law."<sup>288</sup>

*Klaxon*, combined with *Bristol-Myers* and MDL, promotes a coherent idea of federalism, both horizontal and vertical. *Bristol-Myers* effectively eliminates aggregation of nationwide claims in states that would have only a tenuous interest in the claims of out-of-state plaintiffs. Those claims now must be filed in a state that would have a sufficient interest—whether that is a state with specific or general jurisdiction under the Court's current framework. In theory, then, the state in which the case is filed will also have a sufficient interest in applying its choice-of-law rules (and potentially fo-

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<sup>284</sup> *Id.*

<sup>285</sup> Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in CIVIL PROCEDURE STORIES 1, 50 (Kevin M. Clermont ed., 2d ed. 2008) ("Brandeis's progressive orientation led him to the view that the *Swift* doctrine . . . was one of the principal jurisprudential tools that the anti-progressive federal judiciary had used in shaping the law to favor corporate interests. . . . He was determined to see it abolished.")

<sup>286</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting).

<sup>287</sup> The Court drew much of its reasoning from Judge Calvert Magruder's opinion in *Sampson v. Channell*, 110 F.2d 754, 761 (1st Cir. 1940). Judge Magruder notes, mellifluously, that if a federal court could ignore a state's choice-of-law rules "then the ghost of *Swift v. Tyson* still walks abroad, somewhat shrunken in size, yet capable of much mischief." *Id.* (citation omitted); see also Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1647 (1992) ("Federalized choice-of-law standards, in the absence of federalized state choice-of-law, are a return to *Swift*—vintage forum-shopping opportunities.") (footnote omitted).

<sup>288</sup> *Klaxon*, 313 U.S. at 496. The Court specifically addressed concerns of federalism:

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.



rum law where permissible) to the claims asserted. In that sense, *Bristol-Myers*'s policing of forum shopping also serves to police law shopping in the vein that the Court has long followed. This is especially true in a world in which actually policing law shopping through constitutional limitations on choice of law has proven unworkable.

As we have noted, however, most of these cases are likely not going to remain in state court. Instead, they will be removed and transferred into an MDL. But the MDL court is required to apply the choice-of-law rules of the state of the district court from which the case was transferred.<sup>289</sup> As a result, MDL facilitates a nationwide aggregation while accommodating both the vertical uniformity demanded by *Klaxon* and *Erie*, and the horizontal federalism of *Bristol-Myers*. MDL is, therefore, fundamentally different from CAFA—federal jurisdiction is employed to promote aggregation while maintaining fidelity to state law. Where CAFA was a Trojan horse, sending nationwide disputes to federal court to perish on the spear of Rule 23's predominance requirement, *Bristol-Myers* channels nationwide disputes into a procedural vehicle in federal court that is actually designed to handle them—MDL. *Bristol-Myers* gets the best of all worlds—a federal judge it presumes to be unbiased, a forum that permits aggregation without the risk of class certification, and assurance that a single plaintiff-friendly state law will not apply to a nationwide set of claims. As a matter of federalism, MDL threads the needle between the policies of interstate comity demanded by *Bristol-Myers* and intrastate uniformity demanded by *Erie* and *Klaxon*.<sup>290</sup>

### B. Is MDL's Shape-Shifting Beneficial?

Although MDL pushes all of the right doctrinal buttons, whether it actually promotes the policies underlying *Bristol-Myers* and *Klaxon*, and whether it is good litigation policy more generally, are different questions. What should we think of federalizing nationwide mass litigation—even that which involves state-law claims—and centralizing it before a single federal judge for coordinated proceedings?

In many ways, it makes a lot of sense for the nation's courts to handle disputes that are nationwide in scope. Centralization of control over aggregate litigation in a single forum has many advantages for both the parties involved

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<sup>289</sup> *Van Dusen v. Barrack*, 376 U.S. 612, 615 (1964); see Bradt, *Shortest Distance*, *supra* note 231 (explaining that the choice-of-law rules of the transferor state apply).

<sup>290</sup> Cf. Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309, 320 (1991) (“[I]dentifying a single governing law . . . may be challenged as inappropriately intrusive on historic federalism interests and the rights of states to establish and enforce their own policy decisions.”).

and the judicial system. But it also creates risks, both in terms of the federalism policies MDL facially advances and to the parties who are caught up in it. Although MDL's great asset is its ability to accommodate traditional litigation norms, the combination of *Bristol-Myers* and MDL centralizes power in the federal MDL system. Whether that turns out to be good or bad will depend on how that power is channeled and wielded in the MDL process.

## 1. MDL's Fit with Federalism

Structurally, MDL avoids the choice-of-law problems that plague class actions. Because the necessity of applying different states' laws does not prevent aggregation, MDL can flourish without demanding any rethinking of *Klaxon*. In practice, however, *Klaxon* may really be honored only in the breach. Ironically, the very aggregation that MDL's formal adherence to *Klaxon* allows, inevitably leads to some smoothing out of differences in the applicable law.

To be sure, choice of law matters in MDL. When dispositive motions are decided, they must be decided according to the state law that the transferor court would have applied.<sup>291</sup> And when juries are instructed in bellwether trials, they must be instructed according to the law that would have applied absent the transfer, even if the parties have consented to trial in the MDL court.<sup>292</sup>

At the same time, however, MDLs are often resolved without fine-grained attention to state law. Dispositive motions are sometimes decided in relation to so-called "consolidated complaints" that make only cursory distinctions between the laws applicable to different plaintiffs' claims.<sup>293</sup> And when an MDL judge grants summary judgment because the plaintiffs' proposed causation expert did not pass muster under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, that is done according to the federal standard.<sup>294</sup> Perhaps more importantly, when cases are resolved by global settlement agreement, those agreements—at least those made public—do not typically value the claims based on differences in the

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<sup>291</sup> *E.g.*, *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir. 2010) ("When a diversity case is transferred by the multidistrict litigation panel, the law applied is that of the jurisdiction from which the case was transferred . . .").

<sup>292</sup> *Bradt, Shortest Distance*, *supra* note 231, at 791–95; Alexandra Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. (forthcoming 2018).

<sup>293</sup> *Smith*, *supra* note 85, at 228.

<sup>294</sup> *E.g.*, *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 968 (D. Minn. 2008) (granting summary judgment after excluding plaintiffs' expert under *Daubert*); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 289 F. Supp. 2d 1230, 1236–38 (W.D. Wash. 2003).

applicable state law.<sup>295</sup> That said, if an individual claimant believes he would do better at a trial decided under the applicable state law, he can always choose to reject the settlement and take his chances on remand. That this occurs so rarely probably has more to do with the dynamics of mass settlement than any detailed assessment of choice of law by claimants and their lawyers.<sup>296</sup>

Finally, applying so many different states' laws and choice-of-law rules is an extraordinarily complicated judicial task. As Larry Kramer has demonstrated, the pressure to avoid such complexity may create an irresistible temptation to elide the differences in state law.<sup>297</sup> Although such a concession to the shortness of life is not in keeping with the spirit of *Klaxon*, one can hardly blame judges faced with the enormity of a massive MDL for making their assignment as simple as possible. Indeed, more and more lawyers on both sides opt to directly file their cases into MDLs, without regard to the choice-of-law implications of doing so (often to their clients' detriment), suggesting that attorneys may be motivated by similar incentives to simplify.<sup>298</sup>

Because so many MDLs are settled without regard to the variations in state law that would apply if the claims were litigated individually, the differences in state law so studiously respected by *Klaxon* tend to be smoothed out. What results is not something as blunt as Judge Jack Weinstein's attempt to forge a "national consensus law" in *In re Agent Orange Product Liability Litigation*,<sup>299</sup> but something more subtle—an undermining of the *Klaxon* principle while formally following it. This is the brilliance of MDL in a nutshell—it facilitates a nationwide aggregation that formally respects

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<sup>295</sup> None of the twelve publicly available non-class MDL settlements surveyed by D. Theodore Rave in *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175 (2017) [hereinafter Rave, *Closure Provisions*], explicitly accounted for choice of law or drew distinctions among the states in which claimants lived or were injured when determining payments. One, however, did condition the defendant's walkaway right on participation by timely claims and applied different time limits to claimants from different states, reflecting differences in the applicable statutes of limitations. Master Settlement Agreement § 10.02(B)(6) & app'x J, *In re NuvaRing Prods. Liab. Litig.*, No. 08-MD-1964, 2009 WL 4825170 (E.D. Mo. Feb. 7, 2014). Even in MDLs resolved by way of a class action settlement, courts have not insisted on fine-tuning settlement terms to differences in state law. *See, e.g., Sullivan v. D.B. Invs., Inc.*, 667 F.3d 273, 304 (3d Cir. 2011) (upholding approval of settlement that made no distinction between antitrust plaintiffs from states that allowed indirect purchasers to recover and those that did not, noting that "state law variations are largely 'irrelevant to certification of a settlement class'").

<sup>296</sup> Bradt, *Shortest Distance*, *supra* note 231.

<sup>297</sup> Larry Kramer, *Choice of Law in Complex Litigation*, 71 *N.Y.U. L. REV.* 547, 576 (1996).

<sup>298</sup> Bradt, *Shortest Distance*, *supra* note 231, at 764.

<sup>299</sup> 580 F. Supp. 690, 713 (E.D.N.Y. 1984); *see also* PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 128–29 (1988) (describing Judge Weinstein's "strikingly bold and inventive" approach to choice of law in the Agent Orange lawsuits).

our inherited norms while also sweeping them aside in the name of mass resolution. It is, in other words, a federalization of tort law without saying so—and in fact, saying quite the opposite.

Whether this is a good or bad thing is somewhat beside the point. The deed is done. By channeling nationwide aggregation into MDL, the Supreme Court in *Bristol-Myers* has amplified this federalization trend. And there is potentially much to be said for it.

There are benefits to resolving litigation of nationwide scope in federal court instead of state court. Nationwide mass torts—even those based entirely on state law—often implicate federal law. Medical devices, drugs, automobiles, and many other consumer products that are frequently the subject of mass-tort litigation are regulated by a host of federal agencies (e.g., Food and Drug Administration (FDA), National Highway Traffic and Safety Administration (NHTSA), Consumer Product Safety Commission (CPSC)), and courts handling these claims will often have to interpret the preemptive force of these regulations.<sup>300</sup> Further, whether or not the defendant complied with federal regulations will often impact its liability under state tort law. For example, some states treat failure to comply with FDA regulations as negligence *per se*. Although the Supreme Court has said that this sort of federal ingredient in a state law claim is usually insufficient to invoke federal question jurisdiction, there is a risk that state courts might reach conflicting interpretations of the same federal laws.<sup>301</sup> Similarly, when it comes to federal constitutional limits on punitive damages (another regular feature of mass torts), different state courts might reach different interpretations as to what those limits are, potentially subjecting defendants to multiple punishments for the same conduct.<sup>302</sup> Concentrating nationwide mass-tort litigation in federal MDL courts may lead to more uniformity on these sorts of federal issues than leaving the cases to be decided in multiple state courts, subject only to the Supreme Court's limited ability to correct state-court errors after final judgment and appeal.<sup>303</sup> And as a straightforward matter of

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<sup>300</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (holding that a Department of Transportation regulation preempted a stricter state rule).

<sup>301</sup> *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986); see Issacharoff & Sharkey, *supra* note 30, at 1412 (observing that state courts may disagree about interpretations of federal laws).

<sup>302</sup> Issacharoff & Sharkey, *supra* note 30, at 1426–27.

<sup>303</sup> Cf. *State Farm*, 538 U.S. at 431 (Ginsburg, J., dissenting) (arguing that with respect to policing constitutional limitations on punitive damages, “unlike federal habeas corpus review of state-court convictions under 28 U.S.C. § 2254, the Court ‘work[s] at this business [of checking state courts] alone,’ unaided by the participation of federal district courts and courts of appeals”) (alteration in original) (citation omitted). See generally Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211

justice, there is appeal in victims being treated alike regardless of where they reside or are injured.

If *Klaxon* is watered down, many would applaud the development, including Henry Hart, were he still alive. Hart loathed *Klaxon* because he thought the federal courts were generally fairer than state courts, and particularly when it came to choice of law.<sup>304</sup> In Hart's view, federal courts should develop a federal common law of choice of law, rather than hew to states' choice-of-law rules, which he believed would inevitably be parochial.<sup>305</sup> Allowing the federal courts to make choice-of-law determinations would reduce the incentive for plaintiffs to engage in interstate forum shopping.<sup>306</sup> Hart's view, in that sense, is rather in line with the Supreme Court's in *Bristol-Myers*. The Court's concern for policing plaintiff forum shopping in *Bristol-Myers* increased the likelihood that nationwide mass torts would be consolidated in a single federal forum that defendants presume will at least be less parochial than California.

The MDL statute does not overrule *Klaxon*. But for those sympathetic to Hart's position, MDL judges might be counted on to interpret states' choice-of-law rules in ways that will be less biased toward application of forum law than state judges might be. The result, paradoxically, may be that federal control promotes more respect for different states' laws than consolidation in a single state court, which may be more inclined to apply its own law to govern the whole nation. Handling nationwide disputes at the federal level would, therefore, limit the spillover effects that inevitably occur when states attempt to apply their own substantive law or procedural rules to activity that crosses state lines, even if it comes with a little smoothing out around the edges.<sup>307</sup> In the end, channeling nationwide litigation into a single federal court may be a defensible theory of allocating cases between local and national courts.

As Edward Purcell has taught us, however, the principal shortcoming in Hart's thinking was that he dismissed the problems of *intrastate* disuniformity, and the system of vertical forum shopping by defendants it fos-

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(2004) (elaborating on the idea that federal courts should decide issues of federal law and state courts should decide issues of state law).

<sup>304</sup> Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 514–15 (1954); see PURCELL, BRANDEIS, *supra* note 9, at 251–52 (describing how Hart viewed state courts when choice of law was at issue).

<sup>305</sup> PURCELL, BRANDEIS, *supra* note 9, at 252.

<sup>306</sup> Hart, *supra* note 304, at 515 (“The federal courts are in a peculiarly disinterested position to make a just determination as to which state’s laws ought to apply where this is disputed.”).

<sup>307</sup> See Issacharoff & Sharkey, *supra* note 30, at 1386–89 (arguing in support of the benefits of national uniformity as against the dangers of state laws that cater to local concerns and biases).

tered, which led to *Erie* itself.<sup>308</sup> So although there is appeal in MDL's capacity to smooth out the differences in state law in nationwide disputes, it comes with the risk that states' regulatory interests and plaintiffs' substantive rights under state law will be subverted in service of the goal of efficient resolution of cases. Each plaintiff may, of course, insist on fidelity to *Klaxon* by opting for remand to the district in which the case was filed for a trial under the law that would apply in that state. But the realities of MDL—lengthy proceedings, centralized prosecution by the steering committee, and settlements designed to discourage opting out—may make remand more of a theoretical possibility than an attractive option. If the MDL process works unfairly in defendants' favor, then there is a risk of replicating the defects that provoked *Erie*.

In sum, regardless of one's view of *Klaxon*, it is likely that the continued dominance of MDL, boosted by *Bristol-Myers*, will advance the federalization trend. Such federalization will not be complete, however, because the MDL court must follow *Klaxon* when it is pertinent. The real question in MDL will be whether its dominance will replicate the problem that undergirded Justice Brandeis's opinion in *Erie*: whether the federal courts will be overwhelmingly friendly to corporate defendants at the expense of plaintiffs. The answer to that question depends less on whether *Klaxon* is followed to the letter, and more on how MDL courts exercise the power they now have. In short, if the cases are going to be centralized before a single federal judge, and almost certainly resolved through a mass settlement, the crucial question becomes how to ensure that those settlements are fundamentally fair.

## 2. MDL's Centralization Power

Although we have portrayed federal MDL as aggregation on defendants' terms—at least when compared to a world where plaintiffs can bring nationwide litigation in the state court of their choosing—it is not only defendants who benefit. Consolidating nearly all litigation arising out of a nationwide course of conduct in a single federal forum, rather than allowing plaintiffs to maintain parallel aggregate litigation in state courts, may also work to the advantage of the judicial system, society, and even plaintiffs themselves.

Some potential benefits are obvious, like the efficiencies that can be gained by avoiding duplicative pretrial proceedings, such as discovery and

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<sup>308</sup> PURCELL, BRANDEIS, *supra* note 9, at 248 (“Hart elevated *Erie* to the rank of first principles by stripping it of political and social content and by denying the Progressive values that had inspired it.”).

motion practice, and the legal fees and judicial resources that they consume.<sup>309</sup> By making nationwide or multistate aggregations impractical or unattractive in state court, *Bristol-Myers* also mitigates a problem that has bedeviled MDL for years—how to handle parallel state court litigation.<sup>310</sup> Federal MDL judges and state judges managing parallel proceedings have, for the most part, shown a remarkable ability to work together to coordinate these matters as much as possible.<sup>311</sup> But reducing the need for such inter-system coordination would undoubtedly yield savings for all involved and avoid those instances where federal and state judges butt heads.

Beyond the savings from avoiding duplicative proceedings, complete (or near complete) aggregation may actually create value for the parties involved. Defendants are often willing to pay a peace premium for a global settlement that can resolve all of the claims in a single transaction.<sup>312</sup> Doing so allows them to avoid the risk of adverse selection—that is, overpaying to settle the weakest claims only to be left facing the strongest claims in continued litigation—as well as the negative publicity and drag on stock price that is often disproportionate to the number of remaining claims.<sup>313</sup> Simply put, defendants will often pay extra to put the whole dispute behind them, and, indeed, often insist on very high participation thresholds as a condition of any mass settlement.<sup>314</sup> Plaintiffs, therefore, stand to gain if they can bundle all of their claims together and offer the defendant something ap-

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<sup>309</sup> See, e.g., Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989).

<sup>310</sup> See DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.3 (2017); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1349 (2000); William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1531 (1995).

<sup>311</sup> *Dunlavey v. Takeda Pharm. Am., Inc.*, No. 6:12-CV-1162, 2012 WL 3715456, at \*2 (W.D. La. Aug. 23, 2012) (“Historically, coordination by and among both federal and the multiple state courts is common in MDL and mass tort litigation as is evidenced by the plethora of cases where coordination has been utilized.”); Catherine R. Borden & Emery G. Lee III, *Beyond Transfer: Coordination of Complex Litigation in State and Federal Courts in the Twenty-First Century*, 31 REV. LITIG. 997, 1000 (2012); Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1886–91 (2000).

<sup>312</sup> E.g., Rave, *Anticommons*, *supra* note 32, at 1193–98; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760–63 (1997).

<sup>313</sup> See Issacharoff & Rave, *supra* note 32 (providing an example of the peace premium in action); Rave, *Anticommons*, *supra* note 32, at 1193–98 (providing a fuller explanation of the dynamics at work).

<sup>314</sup> See Rave, *Closure Provisions*, *supra* note 295, at 2179–81 (finding walk-away thresholds in publicly available non-class MDL settlements ranging from 85% to 100%, with most falling around 95%).

proaching total peace.<sup>315</sup> Having nearly all of the claims consolidated in a federal MDL, managed by a single plaintiffs' steering committee, may make it easier for plaintiffs to bundle them up than if many claims are also pending in multiple parallel state-court proceedings.<sup>316</sup> Additionally, this centralization reduces opportunities for competing lawyers to use state-court proceedings to attempt to sabotage or hold up a global settlement reached in the MDL.

Indeed, some scholars have argued that anything short of complete aggregation in mass torts leaves plaintiffs (and society) worse off.<sup>317</sup> Although some plaintiffs may prefer to control their own claims—either because they have atypically strong claims or because they hope to strategically hold up a global settlement in exchange for a side payment—doing so may come at the expense of the group of plaintiffs as a whole and undermine the deterrent effect of mass-tort litigation.<sup>318</sup> But one need not go so far to see that there is strength in numbers, and procedures that facilitate aggregation—even over the objection of some individuals—can increase plaintiffs' collective leverage in settlement negotiations.<sup>319</sup> MDL will never go as far towards complete aggregation as the mandatory class action that these scholars advocate. Plaintiffs who reside in the defendant's home states may be stuck in state court, unable to join the federal MDL.<sup>320</sup> Other plaintiffs might decide to take their chances suing alone in their home states, perhaps

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<sup>315</sup> Rave, *Anticommons*, *supra* note 32, at 1195.

<sup>316</sup> *See id.* at 1202 (noting how consolidation in MDL can reduce transaction costs of bundling claims for sale to the defendant).

<sup>317</sup> David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 847–53 (2002) [hereinafter Rosenberg, *Only Option*]; David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 570–72 (1987).

<sup>318</sup> Rosenberg, *Only Option*, *supra* note 317, at 847–63; *see also* Sergio P. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1087 (2012) (“[L]aw enforcement in mass tort litigation is a ‘public good’ . . .”).

<sup>319</sup> *See* Rave, *Anticommons*, *supra* note 32, at 1198–1201, 1248–49.

<sup>320</sup> Nondiverse parties raising state-law claims cannot invoke the federal courts' diversity jurisdiction. A determined plaintiffs' lawyer who wanted to be in the federal MDL and not in state court in the defendant's home state may be able to structure an aggregation of plaintiffs from the defendant's home state to trigger federal jurisdiction under the minimal diversity requirements of CAFA's mass-action provision by joining a large group of out-of-state plaintiffs along with the home-state plaintiffs in a single complaint. 28 U.S.C. § 1332(d)(11) (2012). There would have to be more than one hundred total plaintiffs, more than one-third would have to be from out of state to avoid CAFA's home state exemption. *Id.* § 1332(d)(4). And the out-of-staters would have to be content with the defendant's home state's choice-of-law rules under *Klaxon*. But it is doable. A single plaintiff from the same state as the defendant suing alone for product liability, however, will be stuck in state court. U.S. CONST. art. III; 28 U.S.C. § 1332(a). And a plaintiffs' lawyer who preferred to litigate in the defendant's home state could easily keep an aggregation of claims in state court there.



hoping to free ride on the MDL. And, of course, plaintiffs in MDL are not bound by any global settlement unless they affirmatively opt into it; they can always threaten to hold out, wait for remand, and take their claims to trial. But by reducing the opportunities and incentives for rival plaintiffs' lawyers to set up competing aggregations in the state courts of their choice and forcing them to work together in MDL, *Bristol-Myers* may in some ways actually strengthen the plaintiffs' hand as a group and increase the deterrent effect of their litigation.

Still, the near total aggregation of nationwide litigation in MDL also comes with risks. Centralization of cases in MDL increases the power of both the MDL judge and the court-appointed lawyers who manage the litigation on both sides. And new risks arise any time power is concentrated.

With potentially thousands of cases consolidated in an MDL, the judge cannot simply let the plaintiffs run their own cases through their own lawyers. Out of practical necessity, control over the course of the litigation is centralized in a handful of lawyers on the court-appointed plaintiffs' steering committee.<sup>321</sup> Those lawyers make most of the important strategic decisions on what discovery to pursue, which experts to hire, which cases to push forward towards bellwether trials, and lead the negotiations toward possible global settlements. So, although each plaintiff in the MDL has hired his or her own lawyer, those lawyers typically have little input into how their clients' individual cases are litigated for as long as they remain consolidated in the MDL.<sup>322</sup> They are at the mercy of the lead lawyers until the MDL judge determines that pretrial proceedings are over or the parties reach some sort of global settlement agreement.

When so much power is consolidated in the hands of a small group of lawyers, the usual risk of any principal-agent relationship arises: the lead lawyers might sell out the plaintiffs in the MDL by cutting a deal with the defendant to settle on the cheap in exchange for generous fees.<sup>323</sup> Of course, the agency risks are not as stark as in a class action. The lead lawyers will still have to pitch the deal to the plaintiffs, who must opt in to be bound, and in an MDL, those plaintiffs will typically have their own lawyers. But even when they are separately represented, MDL plaintiffs will often lack sufficient information to evaluate the settlement offer, and their lawyers may not

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<sup>321</sup> See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004) (describing how the plaintiff's steering committee operates).

<sup>322</sup> See, e.g., Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *FORDHAM L. REV.* 1985, 1986 (2011) (demonstrating that the lead lawyers are in control for most of the MDL process).

<sup>323</sup> See Burch, *Monopolies*, *supra* note 18, at 70–72 (identifying the danger of lead lawyers selling out the plaintiffs in MDL litigation).

have the right incentives to fully explain it.<sup>324</sup> Indeed, some MDL settlements contain powerful closure provisions designed to make it difficult for plaintiffs to reject the settlement and to tie peripheral lawyers' financial incentives to their ability to deliver their entire inventories of plaintiffs.<sup>325</sup> The controversial *In re Vioxx Products Liability Litigation* settlement, for example, required participating lawyers to withdraw from representing any client who did not want to settle, essentially saying, "take the deal or find another lawyer."<sup>326</sup>

The more power that is concentrated in the hands of the lead lawyers, the greater the risk that they will structure the deal with the defendant to benefit themselves instead of the plaintiffs. And the more the lead lawyers are able to suppress competition from or co-opt rival lawyers, the greater the chance that plaintiffs with atypically strong claims might find themselves with little choice but to accept a settlement that does not account for the factors that make their claims so valuable, resulting in a sort of "damages averaging."

One of the limits on the power of lead lawyers in MDLs has been the existence of competing power centers in parallel state court litigation. Lawyers who have amassed substantial inventories of cases—inside or outside of the MDL—can serve as a potent counterweight to the lead lawyers in the MDL.<sup>327</sup> And lawyers who have assembled sizable state court aggregations—like the one the plaintiffs tried to create in *Bristol-Myers*—have an added degree of independence from the MDL lead lawyers. Although these outside lawyers often cooperate informally with the lawyers in the MDL, sharing discovery, expert reports, trial materials, and the like, they are not beholden to the MDL lead lawyers or shackled by their strategic decisions.<sup>328</sup> These state court lawyers, operating on a different timetable in front of a different judge, could often drive the litigation forward by pressing for trials in state court ahead of the MDL judge's schedule for bellweth-

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<sup>324</sup> Bradt & Rave, *supra* note 25, at 1281.

<sup>325</sup> Rave, *Closure Provisions*, *supra* note 295.

<sup>326</sup> Settlement Agreement § 1.2.8.2, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657 (E.D. La. Nov. 9, 2007). For competing takes on the *Vioxx* settlement, compare Erichson & Zipursky, *supra* note 266 (arguing that it violates several legal ethics rules), with Baker, *supra* note 34 (arguing that it is consistent with the ethics rules).

<sup>327</sup> Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 168 (2003) ("What high-value damage claimants need is not so much a 'day in court' as the prospect of a different bargaining agent whose self-interest is not tied up with the sale of [plaintiffs'] rights en masse so as to achieve maximum [closure].").

<sup>328</sup> MDL lead lawyers sometimes attempt to undercut or co-opt competing state-court lawyers through common-benefit fee and settlement design, as Professor Burch has documented. Burch, *Monopolies*, *supra* note 18, at 112–19.

er trials, which may also help inform global settlement discussions.<sup>329</sup> And lawyers who control substantial inventories of cases that they can manage independently will often be in a position to push back against MDL lead lawyers who might have gotten too cozy with the defendant or be willing to shortchange some classes of plaintiffs.

If we are correct that *Bristol-Myers* will significantly limit plaintiffs' ability to aggregate in state courts and that most plaintiffs will prefer MDL to litigating on the defendant's home turf, then *Bristol-Myers* may eliminate some of these competing power centers and consolidate more control over mass-tort litigation in the hands of MDL lead lawyers.<sup>330</sup> Lawyers who might have tried to set up a competing nationwide aggregation in state court will instead have to work through the MDL leadership structure, reducing their independence and leverage. Although increased centralization of litigation in MDL has many benefits—not the least of which is making it harder for state court lawyers to strategically hold up a deal—it may also weaken a potential competitive check on the lead lawyers in the MDL.

Discouraging parallel state-court aggregations also consolidates power in the hands of the single federal judge tasked with overseeing the MDL. This is, of course, exactly what MDL's creators intended, as Judge Becker's quip about the dangers of "letting plaintiffs run their cases" illustrates.<sup>331</sup> But there is risk any time power is consolidated in the hands of a single person. Indeed, some scholars have criticized MDL judges for acting imperiously.<sup>332</sup> Although we are generally optimistic about how MDL judges exercise their power, we must admit that the formal mechanisms for checking

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<sup>329</sup> *Id.* at 136, 150–53. See generally J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT. L. 3 (2014) (focusing on the impact of state-court lawyers on MDL litigation).

<sup>330</sup> Of course, *Bristol-Myers* will not eliminate all parallel state-court actions. Nationwide aggregation is still possible in the defendant's home state (and sometimes the only option for residents of that state who are not diverse from the defendant). And plaintiffs can still sue individually or in small groups in their home states if they can join a non-diverse party. But by limiting their scale and location, *Bristol-Myers* makes state-court aggregations less attractive to the major players who could serve as the strongest counterweight to the MDL leadership.

<sup>331</sup> Bradt, *Radical Proposal*, *supra* note 22, at 878.

<sup>332</sup> See, e.g., Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) (criticizing MDL judges for enlarging their authority at the expense of private litigants); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (arguing that the judicial process employed in MDL may violate the Due Process Clause); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 111 (2010) (arguing that MDL judges play an outsized role in choosing lead lawyers and setting their fees).

MDL judges are few and far between.<sup>333</sup> MDL judges have tremendous flexibility and discretion in how they manage pretrial proceedings; indeed, that is one of MDL's great strengths in confronting the unique problems of mass cases.<sup>334</sup> But this broad discretion, combined with the fact that most MDLs result in global settlements, without any sort of appealable final judgment, often makes appellate review unavailable or unavailing.<sup>335</sup>

And even though the MDL judge cannot try transferred cases absent the parties' consent, plaintiffs are generally stuck in an MDL until the MDL judge lets them go. The power to remand cases to the districts where they were originally filed lies with the JPML. But the Panel seldom, if ever, actually issues a remand order without the recommendation of the MDL judge.<sup>336</sup> By making large-scale aggregation in state court impracticable and decreasing the need for the MDL judge to cooperate with state-court judges—and the ability of at least a subset of plaintiffs to potentially get different rulings from them—*Bristol-Myers* concentrates even more power in an already powerful figure.

In short, the benefits of centralization to plaintiffs in terms of increased leverage and the ability to offer peace in exchange for a premium create the risks of agent disloyalty and individual plaintiffs getting short-changed. The benefits to the judicial system and society of efficiency and closer-to-optimal deterrence come with the risk of concentrating power in the hands of a single MDL judge. And the benefits to the defendant of the chance to achieve a comprehensive resolution come with the risk of plaintiffs with meritless claims coming out of the woodwork once a settlement is announced, hoping for an easy payday. Whether the benefits of increased centralization of power in MDL outweigh the risks will largely turn on how MDLs are managed and resolved. *Bristol-Myers* thus increases the need to focus on ensuring that MDL is both efficient and fair for all involved.

As MDLs have grown, a vibrant conversation has emerged about how best to manage and resolve them. Scholars—ourselves included—have offered proposals on matters as wide-ranging as how lead lawyers are chosen

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<sup>333</sup> See Bradt & Rave, *supra* note 25, at 1301–06 (arguing that we should trust MDL judges to actively review mass settlement agreements to provide signals to plaintiffs).

<sup>334</sup> See Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 774, 840–45 (2017) (explaining how exceptional cases require ad hoc standards-based responses).

<sup>335</sup> See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1706 (2017) (discussing obstacles to appellate review).

<sup>336</sup> Burch, *Remanding*, *supra* note 21, at 418 (“[A]lthough parties may make remand requests directly to the Panel, the Panel appears never to have granted a request without first receiving the transferee judge’s blessing.”) (footnote omitted).

and compensated,<sup>337</sup> how MDL judges handle choice-of-law problems,<sup>338</sup> how the litigation is financed,<sup>339</sup> how bellwether trials are chosen and managed,<sup>340</sup> and the role of the MDL judge in supervising global settlements.<sup>341</sup> And, of course, with more cases consolidated in MDL proceedings, the JPML's choice of a transferee judge becomes all the more consequential. With *Bristol-Myers* enhancing the already enormous footprint of MDL, judges should take the opportunity to experiment with these proposals to best guarantee that the power of MDL is deployed fairly.

## CONCLUSION

*Bristol-Myers* professes modesty. It claims to have broken no new ground in personal jurisdiction, but it in fact shifts the ground under one of the fastest growing portions of the federal docket. By making aggregation in state court impracticable or unattractive, *Bristol-Myers* will result, not in the dispersal of cases in state courts around the country, but rather in the widespread federalization of mass-tort litigation in MDL.

To some degree, *Bristol-Myers* is another move in the ongoing chess match between lawyers on both sides in complex litigation. When defendants successfully close off one avenue of aggregation, plaintiffs' lawyers open a new road.<sup>342</sup> So it was here. When CAFA made nationwide mass-tort class actions in state court a thing of the past, plaintiffs' lawyers structured non-class aggregations designed to avoid removal. Defendants countered with a new strategy—to break up those aggregations by attacking the state court's personal jurisdiction under the Supreme Court's new restrictive approach. This gambit was successful, and the results are likely to channel more aggregate litigation into the federal courts under the auspices of MDL.

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<sup>337</sup> E.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 75 (2015); Burch, *Monopolies*, *supra* note 18; McKenzie, *supra* note 87, at 1019–23; Silver & Miller, *supra* note 332.

<sup>338</sup> E.g., Bradt, *Shortest Distance*, *supra* note 231.

<sup>339</sup> E.g., Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1277 (2012).

<sup>340</sup> E.g., Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 568 (1993); Edward K. Cheng, *When 10 Trials Are Better Than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 957 (2012); Fallon et al., *supra* note 87, at 2323; Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 594 (2008); Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 MINN. L. REV. 1459, 1464 (2015).

<sup>341</sup> E.g., Bradt & Rave, *supra* note 25, at 1284; Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1026 (2013); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 126 (2012).

<sup>342</sup> Burbank, *Historical Context*, *supra* note 10, at 1442.

Defendants may have won this round, but there is no reason to believe that it will be the last one. With MDL now the best available playing field for mass-tort litigation, both sides will continue to attempt to contort that process to their best advantage. Indeed, as this Article and the burgeoning scholarly work in this area demonstrate, there are many ways to subtly influence the process to the benefit of one's client. From the early-stage attempts to affect the choice of the MDL judge, to the staging of dispositive motions, to the negotiation of settlement terms, opportunities abound. Indeed, those interested in wholesale changes to the MDL process might look to persuade Chief Justice Roberts to make different appointments to the JPML or persuade the Rules Committee to intervene.<sup>343</sup>

We have also begun to see attempts to transform MDL litigation on the whole, beyond the particulars of individual cases—to “play for rules.”<sup>344</sup> After many years of unsuccessfully pushing legislation to “reform” class action litigation with a bill entitled the “Fairness in Class Action Litigation Act,” that bill reemerged in the Congress in 2017 after the Republicans achieved unified control of the legislative and executive branches.<sup>345</sup> But there was something different about this bill this time around: a brand new section proposing numerous reforms to the nuts and bolts of MDL litigation, including new requirements for pleading, bellwether trials, and mandatory interlocutory appeals. The House passed the bill on a party-line vote without debating the proposals' merits in hearings of any kind. Although the legislation currently languishes in the Senate, the inclusion of the MDL provisions signals a new front in the complex litigation wars.

And if MDL evolves too far to favor one side or the other, there is always the possibility that aggrieved defendants or plaintiffs will mount a frontal attack on MDL itself, arguing that the functionally nationwide jurisdiction that MDL courts exercise in mass torts is unconstitutional for reasons similar to those that convinced the Court in *Bristol-Myers*. Although we might not be persuaded, and consider it unlikely, one could certainly imagine how a Supreme Court hell-bent on cutting back on the power of MDL could find grounds for doing so by raising the arguments against the scope of MDL's jurisdiction that have been ignored for the last fifty years.

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<sup>343</sup> Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public-Law MDLs*, 112 NW. U. L. REV. ONLINE 85, 89 (2018), [https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1253&context=nulr\\_online&preview\\_mode=1&z=1515102286](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1253&context=nulr_online&preview_mode=1&z=1515102286) [https://perma.cc/44CK-NTLQ].

<sup>344</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 100 (1974).

<sup>345</sup> Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017).

For the time being, at least, *Bristol-Myers* appears to have laid the groundwork for a stable equilibrium where the major players will view federal multidistrict litigation as the best available option for litigating and resolving mass torts. MDL has thus become the centerpiece of the civil litigation system that its architects envisioned fifty years ago. And it is, indeed, a powerful and flexible tool for resolving disputes that are nationwide in scope. But the game is not over.