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Can You Relate? Bristol-Myers Narrowed the Relatedness Requirement but Changed Little in the Specific Jurisdiction Analysis

Megan Crowe
megan.crowe@slu.edu

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**CAN YOU RELATE? *BRISTOL-MYERS* NARROWED THE
RELATEDNESS REQUIREMENT BUT CHANGED LITTLE IN THE
SPECIFIC JURISDICTION ANALYSIS**

INTRODUCTION

Today, it is a basic principal that personal jurisdiction must be properly established before a lawsuit can go forward. If a party so chooses, personal jurisdiction can be waived and the court can continue to adjudicate the claim.¹ Often, however, defendants will challenge personal jurisdiction in order to get the case dismissed from a particular forum. Despite the essentiality of personal jurisdiction, the laws guiding the concept have never been truly settled, likely because it is a product of court-made law stemming from Constitutional penumbras rather than promulgated statutory rules.²

The most recent development in the ever-evolving world of personal jurisdiction comes from the Supreme Court's ruling in *Bristol-Myers*,³ which attempts to narrow the scope of the relatedness requirement of the specific jurisdiction analysis. This article argues that the Court's fact-specific holding failed to establish a bright line test for finding a sufficient level of relatedness between a plaintiff's claim and the defendant's contact with a forum, and as such, it will not greatly alter or impact the specific jurisdiction analysis. Further, the opinion is not likely to result in a great degree of negative consequences for plaintiffs litigating in mass actions.

Part I discusses the historical background of personal jurisdiction, including relevant developments that have led to today's specific jurisdiction analysis to which the *Bristol-Myers* opinion adds. Part II discusses how two different states took opposite positions on the relatedness requirement before the Supreme Court decided the issue on appeal. Part III discusses the Supreme Court's interpretation of the relatedness requirement and examines how lower courts have subsequently applied the *Bristol-Myers* reasoning in personal jurisdiction analyses. Finally, Part IV discusses the concerns raised by the opinion about mass action litigation and attempts to dispel those concerns.

1. See Fed. R. Civ. P. 12(h)(1).

2. See *i.e.* Cal.C.C.P. § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

3. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017).

I. HISTORICAL BACKGROUND: PERSONAL JURISDICTION

A. *Beginnings: Due Process and Personal Jurisdiction*

The notion of personal jurisdiction has been developed based on the concepts of territoriality and state sovereignty.⁴ The first conception of personal jurisdiction arose in 1877, when the Supreme Court held in the case of *Pennoyer v. Neff* that a person's consent or presence in the state was required in order for him to be sued within a state.⁵ The Court's holding rested on the Due Process Clause of the Fourteenth Amendment and the policy that states should have jurisdictional sovereignty over the people and property within them.⁶

Ever since *Pennoyer* first applied constitutional limits to states' exercise of personal jurisdiction, there has been an abundance of confusion and frustration because of the lack of a coherent theory to guide predictable outcomes.⁷ To this day, courts are still continuing and struggling to develop the law of personal jurisdiction, piece by piece, but concerns of Due Process remain at the heart of the issue.⁸

B. *Minimum Contacts: International Shoe*

Decades after *Pennoyer*, *International Shoe* considered when a person's presence in a state is sufficient under the *Pennoyer* framework to establish personal jurisdiction.⁹ The Court held Due Process requires that in order to subject a defendant to personal jurisdiction, he must have certain minimum contacts with the state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.¹⁰ The Court, in dicta, considered a framework for what it considered to be sufficient minimum contacts: if systematic and continuous contacts gave rise to the suit, jurisdiction was proper; however, a single and isolated contact with the state, unconnected to the suit, is insufficient to establish minimum contacts for jurisdictional purposes.¹¹

There are also other in-between situations in which the minimum contact analysis may be met. It is from these in-between situations that the notions of

4. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1681 (2017).

5. *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877).

6. *Id.*

7. Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 263 (2014).

8. *Id.* at 264 (2014) (arguing that a state must have authority to regulate conduct intended to obtain benefits of its laws, otherwise, the essential element of sovereignty would be lost).

9. *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310 (1945).

10. *Id.* at 316.

11. *Id.* at 318-19.

general and specific jurisdiction were born.¹² General jurisdiction follows from the court's acknowledgment that there are times when continuous corporate operations within a state are so substantial and of such a nature that suit is justified in that state on causes of action arising from dealings entirely distinct from those activities.¹³ Further, specific jurisdiction follows from acknowledgment that some isolated contacts, because of their nature, quality, and the circumstances of their commission, may be sufficient to render a corporation liable to suit in that state.¹⁴

C. General Jurisdiction: Daimler and Goodyear

Goodyear and *Daimler* defined the current general jurisdiction test.¹⁵ These cases established that mere proof that a corporation does continuous and systematic business in a state is insufficient for purposes of general jurisdiction.¹⁶ Such interpretation of general jurisdiction would be exceedingly broad, and large national corporations were being subject to suit all over the country.¹⁷

The general jurisdiction inquiry is not whether a corporation's in-state contacts are merely continuous and systematic, but rather whether the corporation's affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state.¹⁸ *Daimler* has established a corporation can only be considered "at home" in the state of its incorporation and in the state where it has its principal place of business.¹⁹

D. Specific Jurisdiction

Specific jurisdiction does not have a bright line test like the "at home" test for general jurisdiction and has been developing and evolving ever since *International Shoe*. In order to better shape the concept of specific jurisdiction, the Supreme Court in *McGee* and *Denckla* elaborated on the minimum contacts test, developing the idea of deliberate contacts – a defendant must have purposefully availed himself of the privilege of exercising some business in the state.²⁰

12. Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 433 (2017).

13. *Id.*; *International Shoe*, 326 U.S. at 318.

14. *Id.*

15. *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

16. *Daimler*, 134 S. Ct. at 761.

17. *Id.* at 761-62.

18. *Id.* at 761.

19. *Id.* at 760-61.

20. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In 1980, *World-Wide Volkswagen* built on the notion of deliberate contacts and established the three-part specific personal jurisdiction test that is used today.²¹ The Court held that the exercise of personal jurisdiction is constitutional when: 1) the defendant purposefully availed himself of the forum state, or in other words, he had contacts with the state and the contacts were purposeful and deliberate; 2) the plaintiff's claim arose out of those contacts; and 3) exercising personal jurisdiction is reasonable based on a consideration of factors including the state's interest in adjudicating the dispute, the plaintiff's interest in convenient and effective relief, the interstate judicial system's interest in obtaining the most effective resolution, and the shared interest in furthering fundamental substantive social policies.²²

Since then, the Supreme Court has further analyzed each of these three factors. The Court has examined the element of purposeful availment many times.²³ There is little dispute as to what constitutes a corporation purposefully availing itself of a particular forum state, notwithstanding a lingering dispute regarding whether placing goods in the stream of commerce satisfies purposeful availment.²⁴ When in doubt whether purposeful availment is satisfied, facts demonstrating reasonableness will influence the satisfaction of this element.²⁵

Until recently, the Supreme Court had neglected to further interpret the second element of the *World-Wide Volkswagen* test – whether the plaintiff's claim arises out of the defendant's purposeful availment or contacts with the forum state, otherwise known as the “relatedness requirement.”²⁶ Several state supreme courts delivered opinions on this issue, coming to opposite conclusions.²⁷ The Supreme Court of the United States then granted certiorari on one of those cases and attempted to shed light on whether this requirement is met when the defendant is a nationwide company whose minimum contacts reach every state, and a nonresident plaintiff is harmed in some way by the defendant.²⁸

21. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

22. *Id.*

23. *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985); *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112 (1987).

24. *Asahi*, 480 U.S. 1987 at 112.

25. *Id.*

26. *Bristol-Myers Squibb Company v. Superior Court*, 377 P.3d 874, 907 (Cal. 2016).

27. *Id.*; *State ex rel. Norfolk Southern Railway Company v. Dolan*, 512 S.W.3d 41, 48 (Mo. 2017).

28. *Bristol-Myers*, 137 S. Ct. at 1778 (2017).

II. DISAGREEMENT OVER THE SCOPE OF THE RELATEDNESS REQUIREMENT

Recently, two state supreme courts opined on the relatedness requirement, reaching opposite interpretations of its scope.²⁹ The Supreme Court of California held that the requirement was satisfied when nonresident plaintiffs were harmed by the same type of harmful conduct in which the defendant was engaged in the forum state.³⁰ In Missouri, the supreme court held that though the same type of conduct occurred in the forum state, the plaintiff's claims were not sufficiently related to the forum contacts.³¹ The reasoning from these cases and their dissents influenced the Supreme Court's opinion on the issue.

A. *Broad Interpretation: California Supreme Court*

1. Factual Background

In March 2012, eight complaints were filed in California state court on behalf of 678 individuals against Bristol-Myers Squibb.³² All of the individuals named as plaintiffs in the suits had been prescribed and had taken Plavix, a drug made by the defendant, and as a result suffered adverse consequences such as bleeding, ulcers, heart attacks, stroke, and even death.³³ The complaints all alleged causes of action sounding in California state law, but Bristol-Myers Squibb argued that the court had no personal jurisdiction over it with regard to the plaintiffs who were not California residents.³⁴

Of the 678 plaintiffs, only eighty-six were residents of California, while the rest resided in thirty-three other states.³⁵ Bristol-Myers Squibb was incorporated in Delaware, had its headquarters in New York, and had its most substantial operations in New Jersey where it employed nearly 6,500 people.³⁶ In comparison, Bristol-Myers Squibb only employed about 250 sales representatives in California.³⁷ Although the company sold millions of Plavix pills to distributors in California, the California sales of Plavix constituted just over one percent of the company's overall sales revenue.³⁸ Bristol-Myers Squibb had a few research facilities and laboratories in California; however, there was no evidence that these facilities did work on Plavix.³⁹

29. See generally *Bristol-Myers*, 377 P.3d 887; *Norfolk Southern*, 512 S.W.3d 48.

30. See *Bristol-Myers*, 377 P.3d at 890-91.

31. See *Norfolk Southern*, 512 S.W.3d at 49.

32. *Bristol-Myers*, 377 P.3d at 877, 878.

33. *Id.* at 878.

34. *Id.*

35. *Id.*

36. *Id.* at 879.

37. *Bristol-Myers*, 377 P.3d at 879.

38. *Id.*

39. *Id.*

2. Broad Application of the Relatedness Requirement

The California Supreme Court considered whether Bristol-Myers Squibb's contacts with California were sufficient to establish specific jurisdiction in regards to the nonresident plaintiffs' claims.⁴⁰ There was no question that Bristol-Myers Squibb purposefully availed itself of California by marketing and advertising there, employing sales representatives there, contracting with distributors there, and operating facilities there.⁴¹ Further, the court held that the assertion of specific jurisdiction was not unreasonable.⁴² Thus, the heart of the dispute was whether the relatedness requirement was met.

The court ultimately concluded that the nonresident plaintiffs' claims arose out of or were connected to the defendant's forum contacts and as such, personal jurisdiction was proper.⁴³ The court employed a broad interpretation of the relatedness requirement by using a "substantial connection" test, which instructs that there must be a substantial nexus or connection between the defendant's activities in the forum and the plaintiff's claim.⁴⁴ The court further explained that a claim need not arise directly from, or be proximately caused by the defendant's contacts for jurisdiction to be proper; only when the operative facts are not related to the defendant's contacts can the cause of action be said to not arise from the contact.⁴⁵

Applying this reasoning to the facts, the court held that the plaintiffs' claims did in fact arise out of the defendant's California conduct. The company engaged in a nationwide Plavix marketing and distribution campaign that reached California and all other states alike, and this nationwide campaign created a substantial nexus to the plaintiffs' claims that dealt with said marketing and distribution, including fraudulent advertising, design, manufacture, and nondisclosure of material information about Plavix.⁴⁶ Further, Bristol-Myers Squibb had several research and laboratory facilities located in California, and the activities that took place in these facilities created an additional nexus to the plaintiffs' claims of negligent research, development, and design of the drug itself.⁴⁷

The court rejected the idea that the nonresident plaintiffs' claims were merely parallel to the resident plaintiffs' claims. Rather, the claims were all based on a single, coordinated nationwide course of conduct directed from its

40. *Id.* at 894.

41. *Id.* at 886-87.

42. *Bristol-Myers*, 377 P.3d at 891-94.

43. *Id.* at 890-91.

44. *Id.* at 885, 887.

45. *Id.* at 885.

46. *Id.* at 888.

47. *Bristol-Myers*, 377 P.3d at 888.

headquarters and implemented across the country.⁴⁸ Thus, the nationwide marketing and distribution in effect gave rise to all of the plaintiffs' claims.

B. Narrow Interpretation: Missouri Supreme Court

1. Factual Background

In February of 2017, the Supreme Court of Missouri addressed the relatedness requirement in a single-plaintiff personal injury case.⁴⁹ The plaintiff, an Indiana resident, filed a personal injury action against Norfolk Southern Railway for cumulative trauma sustained during his employment with the company in Indiana.⁵⁰ The plaintiff filed suit in Missouri, and Norfolk Southern argued that Missouri could not properly exercise personal jurisdiction over it.⁵¹

Although Norfolk Southern did systematic and continuous business in Missouri, those activities were insufficient for general jurisdiction for all causes of action unrelated to that state.⁵² Norfolk Southern, a Virginia company, had railroad tracks running through Missouri as well as twenty-two other states.⁵³ It had about 600 employees in Missouri, yet employed more than 600 people in thirteen other states.⁵⁴ The company generated substantial revenue in Missouri, but that revenue only comprised about two percent of the corporation's overall revenue.⁵⁵ Thus, the plaintiff was required to rely on specific jurisdiction.⁵⁶

Because the plaintiff did not plead any facts alleging that his injury arose from the company's Missouri activities, his claim for specific jurisdiction rested on the argument that his injuries arose in Indiana from the same type of activities that the defendant conducts in Missouri. He argued that because Norfolk Southern engaged in railroad business in Missouri, and his injuries arose out of railroad business in Indiana, the claims were sufficiently related to the company's contacts in Missouri.⁵⁷

2. Narrow Application of the Relatedness Requirement

The Missouri Supreme Court rejected this argument and held there was no specific jurisdiction over the plaintiff's claims.⁵⁸ Though Norfolk Southern undoubtedly purposefully availed itself in Missouri, the suit could not be brought

48. *Id.* at 889-90.

49. *Dolan*, 512 S.W.3d at 44.

50. *Id.* at 44-45.

51. *Id.* at 45.

52. *Id.* at 48.

53. *Id.* at 45.

54. *Norfolk Southern*, 512 S.W.3d at 47.

55. *Id.*

56. *Id.* at 48.

57. *Id.* at 49.

58. *Id.*

in Missouri because the claims were not sufficiently related to the company's Missouri contacts.⁵⁹ No level of but-for causation connected the individual's personal injury allegations to the company's presence in Missouri, and as such, the claims did not arise out of the defendant's purposeful availing of the forum.⁶⁰

The court noted that the plaintiff's argument employed a "pre-*Daimler* approach."⁶¹ If a company did the same type of business all over the country, it would become subject to specific jurisdiction in all states, thereby defeating the distinction between specific and general jurisdiction.⁶²

Although *Norfolk Southern* differs in many ways from *Bristol-Myers*, in both cases, plaintiffs argued that specific jurisdiction was proper when the plaintiffs' injuries arose from the same "type" of activities that the defendant conducted in the forum state. California held that these sorts of parallel claims constituted a substantial connection as to meet the relatedness element.⁶³ Missouri held otherwise.⁶⁴ The Supreme Court of the United States granted certiorari of the *Bristol-Myers Squibb* case to decide the issue.⁶⁵

III. CURRENT INTERPRETATION OF THE RELATEDNESS REQUIREMENT

In a June 19, 2017 opinion, the Supreme Court reversed the California Supreme Court by way of reasoning similar to that employed by the Missouri Supreme Court.⁶⁶ The holding effectively narrowed the scope of the relatedness requirement, yet courts are still left much discretion in deciding what level of causation or relatedness is sufficient for specific jurisdiction based on the facts of each case.

A. *Narrowing the Scope: The Bristol-Myers Decision*

1. Due Process is the Ultimate Consideration

The Court's opinion was predicated on the underlying two-fold policy rationale for personal jurisdiction restrictions. The first concern is the burden placed on the defendant – courts must assess any practical problems that would result from requiring a defendant to litigate in a given forum.⁶⁷ Personal

59. *Norfolk Southern*, 512 S.W.3d at 49.

60. *Id.*

61. *Id.*

62. *Id.* at 50.

63. *See Bristol-Myers*, 377 P.3d at 878.

64. *See Norfolk Southern*, 512 S.W.3d at 44.

65. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 827, 827 (2017).

66. *Bristol-Myers*, 137 S. Ct. at 1777.

67. *Id.* at 1780.

jurisdiction restrictions thus act as a guarantee of immunity from burdensome, inconvenient, or distant litigation.⁶⁸

The second concern is protection of federalism and the legitimate interests of the states in adjudicating cases.⁶⁹ Personal jurisdiction restrictions ensure certain territorial limitations and protect the sovereignty of the states.⁷⁰ The Court suggested that this second concern overrides the first – even though *Bristol-Myers Squibb* would suffer no inconvenience from litigating in California, the Due Process Clause, acting as an instrument of interstate federalism, nevertheless divests the state from adjudicating the controversy.⁷¹

2. Reversing the California Supreme Court

The Court ultimately reversed the California Supreme Court and held that *Bristol-Myers Squibb* was not subject to specific jurisdiction in California with regard to the nonresident plaintiffs' claims.⁷² It held that the plaintiffs' claims, arising merely from the same type of activities the defendant conducted in the forum, were not sufficiently related to *Bristol-Myers Squibb's* California contacts.⁷³

In so holding, the Court relied on several important facts. First, the defendant did not develop, manufacture, label, package, or create a marketing strategy for *Plavix* in California.⁷⁴ Additionally, though the defendant contracted with California distributors, the nonresident plaintiffs did not allege they obtained *Plavix* through California sources, nor did they claim they were injured or treated for injuries in California.⁷⁵ Finally, there was no evidence that *Plavix* itself was designed or developed in any of the company's California research or laboratory facilities.⁷⁶

Considering the foregoing facts, the conduct that gave rise to the nonresident plaintiffs' claims occurred entirely outside of California.⁷⁷ Specific jurisdiction is confined to adjudication of issues deriving from or connected with the very controversy that establishes jurisdiction, and the court noted it could not be said that the nonresident plaintiffs' claims were derived from or connected to *Bristol-Myers Squibb's* conduct in California.⁷⁸

68. *Id.*

69. *Id.*

70. *Id.*

71. *Bristol-Myers*, 137 S. Ct. at 1780-81.

72. *Id.* at 1782.

73. *Id.* at 1781.

74. *Id.* at 1778.

75. *Id.*

76. *Bristol-Myers*, 137 S. Ct. at 1779.

77. *Id.* at 1782.

78. *Id.* at 1780, 1782.

3. Narrowing the Relatedness Requirement

The Court's holding demonstrated an attempt to narrow the scope of the relatedness requirement. The Court stated that "the mere fact that some plaintiffs were prescribed, obtained, and ingested Plavix in California" and sustained injuries similar to those of the nonresident plaintiffs, does not necessarily allow California to convey jurisdiction over the nonresident plaintiffs' claims.⁷⁹ Bristol-Myers Squibb's relationship with third parties – here, the California plaintiffs – was an insufficient basis for extension of jurisdiction to nonresidents, even when the third parties brought similar claims.⁸⁰ The Court's reasoning was in line with the Missouri Supreme Court – rejecting the notion that out-of-state claims arising from the same "type" of activity conducted by a defendant in the forum state constitute a sufficient level of relatedness so as to say that the plaintiffs' claims arose out of the defendant's contacts in the forum.

B. Questions Remaining After Bristol-Myers

Two questions remained to be answered in light of the Supreme Court's decision.⁸¹ The first question, whether the *Bristol-Myers* holding applies to mass actions only or class actions alike, arises from Justice Sotomayor's dissent where she queries whether the opinion would also apply to a class action in which the plaintiff injured in the forum state seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.⁸² The second question, whether the opinion is limited to only state courts or extends to federal courts, arises out of the last sentence in the *Bristol-Myers* opinion, in which the Court leaves open the question of whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.⁸³

1. *Bristol-Myers* Does Not Apply to Class Actions

The holding in *Bristol-Myers* applies only to mass actions and not class actions.⁸⁴ This is first evidenced by the majority's assertion that its holding was consistent with *Shutts*.⁸⁵ In *Shutts*, the Court held it was consistent with Due Process to exercise personal jurisdiction over the claims of nonresident class

79. *Id.* at 1781.

80. *Id.*

81. See *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-CV-00564 NC, 2017 WL 4224723 at *6 (N.D. Cal. Sept. 22, 2017).

82. *Id.* at *8; *Bristol-Myers*, 137 S. Ct. at 1789 n.4.

83. *Fitzhenry-Russell*, 2017 WL 4224723 at *7; *Bristol-Myers*, 137 S. Ct. at 1784.

84. See Robert S. Peck, *Constricting Personal Jurisdiction*, 53 TRIAL 26, 30 ("Defendants have already begun to argue that *Bristol-Myers* precludes class actions that involve out-of-state class members. The discussion of class actions in the decision, though, gives little credence to that claim.").

85. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

members despite them having no minimum contacts with the forum state.⁸⁶ A state's authority to resolve the claims of nonresident plaintiff class members, however, is entirely distinct from its authority to exercise jurisdiction over an out-of-state defendant.⁸⁷

Further, *Bristol-Myers* applies only to mass actions because the citizenship of unnamed plaintiffs in class actions is not taken into account for personal jurisdiction purposes; the class action device expressly extends personal jurisdiction over unnamed class members.⁸⁸ This is so because the term "party" indicates the applicability of certain procedural rules such as establishing proper personal jurisdiction,⁸⁹ but in class actions, unnamed class members are not named on the complaint as parties in interest, and as such, do not need to establish proper personal jurisdiction.⁹⁰ On the other hand, in mass actions such as in *Bristol-Myers*, each plaintiff is named as a party in interest and must establish proper personal jurisdiction.⁹¹

2. *Bristol-Myers* Applies to Federal Courts Sitting in Diversity

The holding in *Bristol-Myers* applies to federal courts whose subject-matter jurisdiction arises solely out of diversity jurisdiction. First, the Court's statement was not an expression of a holding that its decision would not apply to a federal court; it was merely a refusal to opine on a question not before it since the facts did not involve a federal court.⁹² Additionally, federal courts routinely apply specific jurisdiction analyses to defendants that are before them solely on the basis of diversity jurisdiction, as the claims in such cases sound in state law.⁹³ When this happens, the concerns of Due Process and state sovereignty, as well as the burden on the defendant, remain prevalent.⁹⁴

When a federal court entertains only questions of federal law, however, a categorical extension of the *Bristol-Myers* opinion to federal courts is not warranted.⁹⁵ The *Bristol-Myers* opinion centered on due process and the question of state sovereignty, but when a case is pending in federal court on the basis of federal question subject-matter jurisdiction, no such concerns are raised.⁹⁶ This is because federal courts all represent the same federal sovereign,

86. *Bristol-Myers*, 137 S. Ct. at 1782-83.

87. *Id.*

88. Peck, *supra* note 84, at 26, 30.

89. *Devlin v. Scardelliti*, 536 U.S. 1, 9-10 (2002).

90. *Fitzhenry-Russell*, 2017 WL 4224723 at *5.

91. *Id.*

92. *Id.* at *4.

93. *Id.*

94. *Id.*

95. *Monteville Sloan v. General Motors LLC*, 16-CV-07244-EMC, 2018 WL 784049, at *6 (N.D. Cal. Feb. 7, 2018).

96. *Id.* at *7.

not the sovereignty of a foreign state government.⁹⁷ Thus, the decisive factor in a state court's analysis, as recognized and applied by *Bristol-Myers*, becomes irrelevant for the federal court.⁹⁸

C. *Relatedness Requirement After Bristol-Myers*

1. The Scope of the Relatedness Requirement Remains Unclear

The Court's opinion makes certain that parallel conduct inside the forum or a defendant's similar contacts with third parties in the forum do not establish a sufficient connection for a nonresident's claims to meet the requisite relatedness requirement. However, despite the Court's attempt to narrow the scope of the relatedness element, it left no bright line rule for determining exactly what level of connection would be sufficient to prove a plaintiff's claim arises out of a defendant's contact with a forum state. The Court neglected to adopt an express test such as "substantial connection" or "but-for causation" leaving courts very little substantial guidance.⁹⁹

The strictest reading of the opinion would lead to the conclusion that a defendant's contacts in the forum state must be the proximate cause of a plaintiff's claim. However, recent applications of *Bristol-Myers* suggest that the connection need not be that stringent.¹⁰⁰ Rather, some lower level of but-for causation is sufficient – as long as the defendant's conduct was in the causal chain leading to the plaintiff's suit, the contact was sufficiently related and specific jurisdiction was met.¹⁰¹

For example, in *Feller*, a plaintiff sued for breach of contract due to an increase in price of an insurance policy.¹⁰² The policy was originally priced by the defendant company in California, but the increase ultimately came to fruition when the company was located in its new headquarters in Iowa.¹⁰³ The allegation of breach was premised upon the original pricing of the policy and subsequent increase of that price; therefore, the original pricing of the policies was a link in the causal chain leading to the breach of contract injury, and specific jurisdiction in California was proper.¹⁰⁴ Though the outcome in *Feller*

97. *Id.*

98. *Id.*

99. See Rhodes & Robinson, *supra* note 7 (explaining that "arises out of" implies that nearly all of the events giving rise to the suit took place in the forum, whereas "related to" and "connected to" are weaker terms implying that the conduct may be part of the chain of events leading to a claim, but perhaps not the basis for liability itself).

100. See *Feller v. Transamerica Life Ins. Co.*, No. 216CV01378CASAJWX, 2017 WL 6453262 (C.D. Cal. Dec. 11, 2017).

101. *Id.* at *4.

102. *Id.* at *1.

103. *Id.* at *6.

104. *Id.*

was in line with *Bristol-Myers*, *Bristol-Myers* did not mandate a standard of but-for causation for the relatedness test; rather, the *Feller* court adopted this reasoning at its own discretion.

2. The Relatedness Requirement is Fact-Intensive

One certainty following *Bristol-Myers* is that the relatedness requirement analysis will continue to be fact-intensive. In establishing whether specific jurisdiction is proper, courts must examine very specific facts linking the defendant's forum behavior to a plaintiff's claim. For example, in *Cortina*, the court used the *Bristol-Myers* analysis and found specific jurisdiction based on findings of fact that nearly every clinical trial involved in studying the drug Plavix occurred in California.¹⁰⁵ Because the basis for plaintiffs' claim was the inadequacy of the clinical trials performed on Plavix, the court held the California activities were sufficient to create a direct connection between the defendant's forum conduct and the plaintiffs' claim.¹⁰⁶

3. Jurisdictional Discovery Becomes Critical

The fact-intensiveness of the relatedness inquiry will result in an increase of crucial jurisdictional discovery, since before there was little reason to explore the affiliation between the defendant and the underlying cause of action to establish jurisdiction.¹⁰⁷ This notion was acknowledged in *In Re Nexus*, where plaintiffs experiencing defects with their smartphones sued the two companies who developed the phones, Huawei and Google, in California.¹⁰⁸ Huawei moved to dismiss for lack of personal jurisdiction, and the question was how much evidence would be sufficient to establish the plaintiffs' claims arose out of Huawei's conduct in California.¹⁰⁹

Unlike in *Bristol-Myers*, where there was no proof that the research done in California was related to Plavix itself, here there were some facts that showed Huawei's research and development efforts in California focused on Android interoperability – software used by Google.¹¹⁰ This left open the possibility that Huawei did perform relevant development of the product in California and the plaintiffs' claims arose directly out of this conduct.¹¹¹ As a result, the court held that limited jurisdictional discovery should take place regarding how much of Huawei's research and development of the relevant smartphone took place in

105. *Cortina v. Bristol-Myers Squibb Co.*, No. 17-CV-00247-JST, 2017 WL 2793808, at *4 (N.D. Cal. June 27, 2017).

106. *Id.*

107. Peck, *supra* note 84, at 29-30.

108. *In re Nexus 6P Products Liability Litigation*, No. 17-CV-02185-BLF, 2018 WL 827958, at *1-2 (N.D. Cal. Feb. 12, 2018)

109. *Id.* at *1-2, *5.

110. *Id.* at *5.

111. *Id.*

California.¹¹² Following the *Bristol-Myers* opinion, more courts are sure to follow these footsteps in allowing more jurisdictional discovery.

IV. FUTURE IMPLICATIONS ON MASS LITIGATION

The decision in *Bristol-Myers* was largely agreed upon by the Supreme Court, as eight justices supported the majority, while only Justice Sotomayor dissented.¹¹³ Her dissent raised concerns that may be shared by many plaintiffs' attorneys handling nationwide mass actions.¹¹⁴ However, because the *Bristol-Myers* decision has not greatly impacted the specific jurisdiction analysis, the concerns raised are not likely to come to fruition, negatively impacting plaintiffs in mass actions. Further, while the concerns are valid, judicial vehicles such as savings statutes, multidistrict litigation, and class actions act to counter the potential negative effects of the decision.

A. *The Dissent's Concerns of Unfairness*

Justice Sotomayor disagreed with the majority that the nonresident plaintiffs' claims were not sufficiently related to the defendant's contacts in California. She argued that just because those plaintiffs were injured in other states did not mean their claims did not relate to the advertising and distribution efforts of *Bristol-Myers Squibb* in California.¹¹⁵ Her argument suggests that the relatedness requirement should be decided using a substantial connection or similar test rather than a more stringent test of proximate or but-for causation.¹¹⁶

Justice Sotomayor's dissent is steeped in concerns that a narrow interpretation of the relatedness element will result in considerable unfairness, eliminating plaintiffs' ability to hold corporations fully accountable for nationwide conduct and giving corporations a tool to prevent aggregation of claims.¹¹⁷ First, she asserts that going forward, it will be profoundly difficult to aggregate the claims of plaintiffs injured across the country to sue a defendant in a single, isolated action.¹¹⁸ Likewise, she claims it may become impossible to bring certain nationwide mass actions at all against defendants at home in different states or force plaintiffs to sue in far-flung jurisdictions.¹¹⁹ Finally, she claims that the majority's decision will result in unnecessary piecemeal legislation and bifurcation of claims.¹²⁰ Though valid, Justice Sotomayor's concerns hold little weight when scrutinized.

112. *Id.* at *5-6.

113. *Bristol-Myers*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

114. Peck, *supra* note 84, at 28.

115. *Bristol-Myers*, 137 S. Ct. at 1786 (Sotomayor, J., dissenting).

116. *Id.*

117. *Id.* at 1784, 1789.

118. *Id.* at 1789.

119. *Id.*

120. *Bristol-Myers*, 137 S. Ct. at 1784.

B. *Bristol-Myers Does Not Greatly Diminish the Plaintiffs' Forum Options*

The *Bristol-Myers* decision has not altered much, if any, of the personal jurisdiction analysis—plaintiffs' options for proper forums are not any narrower than before.¹²¹ After *Tyrell*, plaintiffs feared that representation of injured railroad workers would become difficult, as proper jurisdiction would be limited to where the plaintiff was injured, where the railroad is incorporated, and where it has its principal place of business.¹²² Plaintiffs also feared it would become difficult to sue corporations in state court for out-of-state injuries or resort to traveling to the defendant's home state to sue no matter how far this would require the plaintiff to travel.¹²³ Justice Sotomayor's concerns directly mirror these sentiments, but *Bristol-Myers* did not create any restriction on personal jurisdiction narrower than those which *Tyrell* had already established—jurisdiction is proper where the plaintiff was injured, or where general jurisdiction is proper.

Considering *Bristol-Myers* did not alter the holding presented *Tyrell*, it will not become “profoundly difficult”¹²⁴ for plaintiffs across the nation to aggregate their claims and sue a defendant in a single, isolated action. First, plaintiffs have the option of joining together and filing mass actions in their home state where specific jurisdiction is proper.¹²⁵ Second, plaintiffs may still bring nationwide mass actions in any state where the defendant is subject to general jurisdiction.¹²⁶ In *Bristol-Myers*, the plaintiffs could have properly sued in Delaware, New York, or possibly even New Jersey.¹²⁷

Bringing suit in a forum of general jurisdiction would not have resulted in any increased inconvenience to the plaintiffs—no particular state was home to a majority of the plaintiffs in the action, so no matter where the consolidated action was brought, most plaintiffs would have been litigating in a remote forum.¹²⁸

121. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (Like in *Bristol-Myers*, the *Tyrell* court found that state courts could not exercise personal jurisdiction over a railroad merely because it did some business in the forum state. The Court relied on *Goodyear* and *Daimler* as well as due process concerns in holding that general jurisdiction was improper because the defendant was neither incorporated nor had its principle place of business in the forum state, and specific jurisdiction was appropriate with respect to only those claims related to business the defendant actually conducted in the forum state).

122. Jeffrey White, *Switching Tracks on Jurisdiction*, 54 TRIAL 56 (Feb. 2018).

123. Recent Case, *B.N.S.F. Railway Co. v. Tyrrell*, 131 HARV. L. REV. 333, 341–42 (2017).

124. *Bristol-Myers*, 137 S. Ct. at 1789.

125. *Id.* at 1783.

126. *Id.*

127. *Id.* (Although *Bristol-Myers Squibb's* headquarters was located in New York, general personal jurisdiction may be appropriate in New Jersey, where the company maintained substantial operations, under the nerve center test set forth by the Court in *Hertz Corp. v. Friend*, 559 U.S. 77, 80–81 (2010)).

128. *Id.* at 1783–84 (Ninety-two plaintiffs were from Texas, eighty-six plaintiffs were from California, and seventy-one plaintiffs were from Ohio).

Plaintiffs may desire to choose a forum other than one of general jurisdiction because of friendlier laws or courtrooms, yet this type of forum shopping has long been looked down upon.¹²⁹ The benefit of *Bristol-Myers* in reducing forum shopping outweighs any potential inconvenience to plaintiffs.

C. *Judicial Vehicles Counter the Negative Implications of Bristol-Myers*

1. Savings Statutes Protect Affected Plaintiffs' Claims

Those most affected by the *Bristol-Myers* opinion were those involved in talcum powder litigation against corporate giant Johnson & Johnson. Thousands of plaintiffs across the county sued Johnson & Johnson alleging that the talcum powder in their products caused ovarian cancer.¹³⁰ Mass actions were brought in plaintiff-friendly Missouri by plaintiffs who had never had any contact with the state, under a theory used by the plaintiffs in *Bristol-Myers*—they were harmed out-of-state by the same type of activities that Johnson & Johnson conducted in Missouri.¹³¹ If nonresident plaintiffs were not able to properly invoke joinder to keep their cases in the mass action, they felt the immediate impact of the *Bristol-Myers* decision.¹³² In some cases, Johnson & Johnson immediately removed to federal court, and in others, judges declared mistrials and ended litigation when ninety-five percent of plaintiffs were from other states.¹³³

Though some may experience inconvenience or frustration by having their case dismissed from a jurisdiction known for doling out large awards to plaintiffs, *Bristol-Myers* will not be detrimental to their claims because savings statutes ultimately allow those plaintiffs to still have their day in court.¹³⁴ Nearly every state has some version of a savings statute—a law allowing a plaintiff to re-file her claim in a state within a certain period of time after it was dismissed elsewhere for lack of jurisdiction.¹³⁵ These statutes allow plaintiffs to re-file their claims even after the statute of limitations for the claim has expired, as long

129. See *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001) (A plaintiff's choice of forum is accorded deference unless there is any indication that it is the result of forum shopping).

130. Joel Currier, *Talcum Powder Lawsuits Find a Home in St. Louis – For Now*, ST. LOUIS POST DISPATCH, (May 21, 2017), http://www.stltoday.com/news/local/crime-and-courts/talcum-powder-lawsuits-find-a-home-in-st-louis-for/article_64762c56-7046-59a5-b848-6c5c4f734344.html [<https://perma.cc/6XHJ-2CSX>].

131. *Id.*

132. *Id.*; see also Peck, *supra* note 84, at 29–30 (referencing *Swann v. Johnson & Johnson*, No. 1422CC09326-01 (E.D. Mo. June 19, 2017)).

133. Peck, *supra* note 84, at 29.

134. See generally C. T. Drechsler, Annotation, *Statute Permitting New Action After Failure of Original Action Commenced Within Period of Limitation, as Applicable in Cases Where Original Action Failed For Lack of Jurisdiction*, 6 A.L.R.3d 1043 (1966) (updated weekly).

135. *Id.*

as their original suit was filed in good faith within the proper statutory period.¹³⁶ Thus, plaintiffs whose ongoing litigation was interrupted by the decision are still able to pursue relief in a proper jurisdiction.

Because *Bristol-Myers* does not apply to class actions, plaintiffs involved in mass actions will not be disadvantaged if their claims must be separated and re-filed. If the holding were to apply to class actions, thereby eliminating jurisdiction over nonresident class members, a plaintiff might be dissuaded from re-asserting her claim because it is not worth enough to pursue individually.¹³⁷ Mass actions, however, are different in that each plaintiff pursues her own individual, often high value claim, and so her ability to recover will not be limited by re-filing in another proper jurisdiction.¹³⁸

2. Multidistrict Litigation Relieves Concerns of Future Mass Action Litigation

Although the *Bristol Myers* opinion does not hinder plaintiffs' ability to file statewide mass actions where specific jurisdiction is proper, there is concern that more statewide mass actions and fewer nationwide mass actions will result in piecemeal legislation or bifurcation of claims. This in turn may result in disuniformity in laws and a decrease in judicial economy.¹³⁹

Multidistrict litigation serves as one resolution to both of these problems for those cases that are removable to federal district courts.¹⁴⁰ Multidistrict litigation promotes efficiency by taking actions filed across many states and in many districts and keeping them in one forum, eliminating the wasteful duplicative efforts of courts.¹⁴¹ It also ameliorates discovery challenges that arise from multiple horizontal litigations.¹⁴² Multidistrict litigation further promotes uniformity in the law.¹⁴³ Courts have an interest in not having the rulings of one district judge undermine those of another, so multidistrict litigation acts to

136. *Id.*

137. Alexandra D. Lahav, *Mass Tort Class Actions - Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 999–1000, 1009–10 (2017).

138. *Id.* at 1009–10.

139. Gluck, *supra* note 4, at 1682–83 (2017); *see also* Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1024–31 (2017) (Arguments against aggregation are often framed as problems of due process including disuniformity of interests and uneven successes of remedy distribution).

140. Gluck, *supra* note 4, at 1682–83 (Multidistrict litigation is one way of combining class actions and individual claims regarding one central issue into a single forum for pre-trial proceedings).

141. *Id.*

142. *Id.* at 1683.

143. *Id.*

prevent jurisdiction wars.¹⁴⁴ By having one forum control the cases from across the country, multidistrict litigation eliminates issues of forum shopping.¹⁴⁵

3. Class Actions Can Be an Alternative

One final implication that the decision may have is an increase in class actions for nationwide aggregation.¹⁴⁶ Although traditionally, mass toxic tort cases have been considered more appropriate for mass litigation rather than class action,¹⁴⁷ there has been an increase in tort aggregation, to the point that it has become commonplace.¹⁴⁸ In both class action rules and personal jurisdiction laws alike, the concern is the legitimacy of a court's authority to bind litigants.¹⁴⁹ The class device, as part of the development of aggregate litigation, demonstrates a willingness to expand jurisdiction over nonresidents, and will serve as an adequate alternative to those affected by *Bristol-Myers*.¹⁵⁰

CONCLUSION

In conclusion, *Bristol-Myers* narrowed the scope of the relatedness requirement of specific jurisdiction in holding that when a nonresident plaintiff is injured by merely the same type of activity the defendant conducted in the forum, the plaintiff's claim is not sufficiently related to the defendant's forum contacts in order to establish specific personal jurisdiction. Despite this holding, the Court failed to adopt a bright line test for determining what level of connection between the defendant's forum contacts and the plaintiff's claim is sufficient to meet this relatedness requirement.

Because the *Bristol-Myers* holding did not significantly alter the specific jurisdiction analysis, courts are still left with freedom to determine what connections establish relatedness based on the facts of individual cases. While the decision may give rise to an increase in jurisdictional discovery, it will not result in negative consequences for mass action plaintiffs. Plaintiffs remain free to pursue aggregated actions in the places where the plaintiffs can establish that the defendant's activities gave rise to their claim, or where the defendant is subject to general jurisdiction.

144. *Id.*

145. Gluck, *supra* note 4, at 1685.

146. *See generally* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. Rev. 97 (2017) (Class actions are on the rise from a recent decline, and *Bristol-Myers* may help act as a reprieve from years of case law adverse to class action aggregation).

147. *See* Gluck, *supra* note 4, at 1684–85 (In personal injury cases, individual questions of causation, damages, and applicable law often require state by state evaluation).

148. Resnik, *supra* note 139, at 1025 (Mass torts constitute ninety percent of multidistrict litigation).

149. *Id.* at 1026.

150. *Id.*

Judicial resources like savings statutes, multidistrict litigation, and class actions act as safeguards to some of the negative implications the decision would have otherwise had. As such, the future of mass action litigation is safe in the wake of *Bristol-Myers*.

MEGAN CROWE*

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