

2018

# Hybrid Removal

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## Recommended Citation

Jordan, Samuel P., Hybrid Removal (March 29, 2018). Iowa Law Review.

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# HYBRID REMOVAL

SAMUEL P. JORDAN\*

## ABSTRACT

*In the wake of the Supreme Court's recent activity in the domain of personal jurisdiction, defendants have greater leverage to challenge the forum choices made by plaintiffs when initiating litigation. This Article uncovers an unexpected way that defendants are deploying that leverage: by filing hybrid removals in federal court. Hybrid removals are filed in cases that lack facial diversity of citizenship and involve no federal question. Ordinarily, these characteristics would trigger a quick remand. To avoid that result, defendants have sought to make personal jurisdiction part of the removal analysis. This crossing of jurisdictional lines has the potential to facilitate expediency, but it may also undermine the relationship between federal and state courts. For that reason, the Article concludes that hybrid removal should be embraced with due care, and offers some guidelines for its implementation.*

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## INTRODUCTION

In 1945, the United States Supreme Court revolutionized personal jurisdiction with its decision in *International Shoe Co. v. Washington*.<sup>1</sup> Dispensing with the rigid constraints that had governed for roughly 70 years,<sup>2</sup> the Court embraced a new vision of the adjudicatory authority of states rooted in the now-familiar concept of “minimum contacts.”<sup>3</sup> Now, roughly 70 years after *International Shoe*, a second personal jurisdiction revolution is underway. This current revolution is softer than

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<sup>1</sup> 326 U.S. 310 (1945).

<sup>2</sup> See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

<sup>3</sup> *Int’l Shoe*, 326 U.S. at 316.

the first – no longstanding precedent has been overturned, and the Court has instead strained to frame its decisions as mere extensions of established principles.<sup>4</sup> But revolutions take many forms, and as Part I of this Article explains, there can be little doubt that the Court's recent cases have articulated narrowing principles that mark a substantial shift in both doctrine and tone.<sup>5</sup>

For confirmation of this, one need only look to the trial courts. Both plaintiffs and defendants have been making adjustments in litigation strategy in response to the Court's activity, and trial judges have been faced with an influx of personal jurisdiction-related motions. The remainder of this Article is focused on these adjustments and these motions in the context of aggregate litigation. There is certainly much to be said about current developments in other forms of litigation,<sup>6</sup> but the basic case structure under consideration here involves claims – most often product liability claims – by multiple plaintiffs against one or more defendants.

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<sup>4</sup> See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773, 1781 (“Our settled principles regarding specific jurisdiction control this case.”); *id.* at 1783 (“Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up.”).

<sup>5</sup> See *infra* Part I.

<sup>6</sup> As discussed *infra* at notes 20-21, a particular area for concern is the impact of

Plaintiffs have long had substantial leeway in their selection of a forum for the litigation of these sorts of disputes. They have used that leeway to achieve both horizontal and vertical objectives. Horizontally, plaintiffs seek to identify states that may be hospitable to the claims being brought; vertically, plaintiffs often seek to secure a state court within that hospitable state by structuring the parties to the suit in a way that shields the case from removal.<sup>7</sup>

The nascent personal jurisdiction revolution gives defendants powerful tools that can be employed to disrupt the ability of plaintiffs to achieve their objectives. Part II explains what those tools are, and how they are being used on the ground. In many cases, the forum selected by plaintiffs is insufficiently connected to at least some of the claims being asserted, and that permits defendants to force those claims to be litigated elsewhere. When the plaintiffs are from multiple states, this connectedness problem may extend only to those claims brought by non-resident plaintiffs, and the victory for defendants is in that sense impartial. But because the unconnected – and therefore jurisdictionally suspect – claims are often included in

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<sup>7</sup> See *infra* notes 69-72.

the suit precisely to destroy diversity of citizenship among the parties, their elimination renders the remaining claims removable to federal court. In this way, the personal jurisdiction revolution frustrates the plaintiffs' vertical preferences and creates echoes in the domain of subject matter jurisdiction. Whether these echoes were intended or anticipated is not clear, but they are nevertheless an understandable outgrowth of the new jurisdictional landscape.

What is less understandable is the procedural route by which the defendants are seeking to achieve these results. Rather than raise their personal jurisdiction arguments in state court, many defendants are opting instead to remove directly to federal court, notwithstanding a facial lack of diversity that would ordinarily provoke a remand. To avoid that outcome, defendants are asking the federal court to consider questions of personal jurisdiction first prior to assessing the viability of removal. This Article labels this procedural strategy "hybrid removal" because it hinges on a consideration of personal jurisdiction arguments as part of the subject matter jurisdiction determination. Hybrid removal deviates from the traditional federal analysis of removability, and its use is traceable directly to the personal

jurisdiction revolution. Part II tells the story of its introduction, early failures, and eventual success in the wake of *Bristol-Myers Squibb*. Part III then offers a critical analysis of whether and when hybrid removal should be permitted. Although there is no reason to impose a categorical bar, federal judges ought to approach the doctrine with care. Personal jurisdiction determinations based on questions of federal law and limited to the pleadings are good candidates for hybrid removal; determinations requiring the development and assessment of jurisdictional facts or interpretations of state law are not.

## I. THE EVOLVING PERSONAL JURISDICTION LANDSCAPE

Almost since the day the modern approach to personal jurisdiction was ushered in by the Supreme Court's opinion in *International Shoe*, courts have distinguished between jurisdiction based on contacts related to the suit and jurisdiction based on aggregate contacts.<sup>8</sup> The first category, now shorthanded as

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<sup>8</sup> In addition to jurisdiction based on the "minimum contacts" formulation introduced in *International Shoe*, courts continue to recognize jurisdiction based on "traditional" grounds such as presence, consent, and domicile.

specific jurisdiction, supports jurisdiction only for particular claims and has been the subject of fairly sustained attention by the Supreme Court.<sup>9</sup> Although litigated less frequently, the second category — general jurisdiction — remained a viable if less visible form of adjudicatory authority.<sup>10</sup> In particular, general jurisdiction proved useful in cases where a foreign defendant conducted substantial business activities within a state (or states). In such circumstances, a foreign defendant could be haled before an American court based on those activities, even when they bore no relation to the particular claims in the suit.

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*See* *Burnham v. Superior Court*, 495 U.S. 604 (1990) (physical presence in a state at the time they are served is consistent with traditional notions of fair play and substantial justice); *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (forum-selection clauses forcing individuals to consent to jurisdiction are enforceable); *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (individuals are subject to jurisdiction wherever they are domiciled).

<sup>9</sup> *See, e.g.,* *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (mailing a reinsurance certificate established substantial connection enough for specific jurisdiction); *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (connection created by the unilateral activity of plaintiffs insufficient to make the exercise of jurisdiction reasonable); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) (contractual relationship, including forum selection clause, constituted purposeful availment sufficient to comport with notions of fair play and substantial justice).

<sup>10</sup> This form of jurisdiction was less visible in part because it did not seem to occur to defendants to mount a challenge. For example, even in *Daimler*, Mercedes Benz USA did not challenge the jurisdiction of the California court. *Daimler AG v. Bauman*, 134 S.Ct. 746, 757 (2014); *see infra* note 28. Perhaps that is because they were content to defend there, but more likely they concluded that any such challenge would be futile. *See* Judy M. Cornett & Michael H. Hoffheimer, *Goodbye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 111 (2015).

Those days are over. In a pair of recent cases, the Supreme Court has now placed substantial limitations on the scope of general jurisdiction.<sup>11</sup> Both of those cases arose in the transnational context just discussed. The first, *Goodyear*, involved a claim against a foreign subsidiary of Goodyear Tire and Rubber based on an accident that occurred in France.<sup>12</sup> The injured parties were citizens of North Carolina and brought suit there.<sup>13</sup> There was no serious effort to articulate a specific jurisdiction theory, and the plaintiffs instead relied on an assertion that the subsidiary's regular sales of products within the state provided authority for the exercise of general jurisdiction.<sup>14</sup> That effort was rebuffed by a unanimous Court, which found that general jurisdiction was only appropriate where a defendant could be considered "at home," and that the sort of business activity at issue did not meet

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<sup>11</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

<sup>12</sup> *Goodyear*, 564 U.S. at 918.

<sup>13</sup> *Id.*

<sup>14</sup> The *Goodyear* subsidiary did not directly sell tires in North Carolina, but tires did regularly make their way to the state through the "stream of commerce." *Id.* at 926.

that high standard.<sup>15</sup> The Court followed that opinion with a very similar one in *Daimler* only three years later.<sup>16</sup> At issue in *Daimler* were claims filed against a German corporation based on actions taken in Argentina that allegedly violated the human rights of foreign plaintiffs.<sup>17</sup> The only connection between the suit and the California forum were the substantial sales of cars manufactured by the foreign defendant in that state.<sup>18</sup> Again, the Court found that that kind of business activity, even if continuous and substantial, is insufficient to trigger the availability of general jurisdiction, and so the plaintiff's unrelated claims were beyond the reach of the California courts.<sup>19</sup>

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<sup>15</sup> *Id.* at 927.

<sup>16</sup> *Daimler*, 134 S.Ct. at 746. One difference between the two cases was that *Daimler* presented a question about whether the contacts of a subsidiary could be assigned to the principal for personal jurisdiction purposes. The Court declined to provide a definitive answer to that question. See *infra* notes 26-28.

<sup>17</sup> *Id.* at 751.

<sup>18</sup> The Court mentions the underlying issue of whether a foreign corporation maybe be subject to general jurisdiction in the US based on the activities of its subsidiary, but declines to pass judgment. *Id.* at 759.

<sup>19</sup> *Id.* at 760.

Unsurprisingly, the decisions in *Goodyear* and *Daimler* were immediately understood to have implications in the context of transnational litigation.<sup>20</sup> Commentators predicted that it would be difficult to bring claims against foreign defendants in American courts unless the claims at issue arise out of (or at least relate to) activities taken in or producing effects in the United States.<sup>21</sup> But the decisions also raised alarm bells for a second category of cases, namely those brought by multiple plaintiffs against a defendant or defendants based on a pattern

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<sup>20</sup> Justice Ginsburg's opinion in *Daimler* explicitly emphasizes the transnational context of the case. *Id.* at 762-63. See also Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643 (2015); Gwynne L. Skinner, *Expanding General Personal Jurisdiction Over Transnational Corporations for Federal Causes of Action*, 121 PENN. ST. L. REV. 617 (2017); Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, \_\_ VA. J. INT'L. L. \_\_ (forthcoming).

<sup>21</sup> See, e.g., 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, 415 n. 6 (2017) (complaining that the "retraction of corporate general jurisdiction" . . . "leave[s] many plaintiffs without any U.S. forum, even when foreign defendants injure plaintiffs in the United States and in so doing reap the benefits of the U.S. market"); Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 786-88 (2017) (explaining that the inquiry as to what drives the Roberts Court's approach to personal jurisdiction points to a reluctance to draw foreign disputes into United States courts and an overall commitment to formalistic notions of sovereignty dependent upon territorial boundaries). *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting) (predicting that the majority's opinion will eliminate the ability to bring a mass action against a defendant not headquartered or incorporated in the U.S. since they are not "at home" in any state). In response to these transnational litigation concerns, some have proposed expanding personal jurisdiction in the federal courts by shifting from Fourteenth Amendment due process to Fifth Amendment due process. See Borchers, *supra*; Jonathan R. Nash, *National Personal Jurisdiction* (SSRN draft); Simowitz, *supra* note 20.

of conduct occurring in several states.<sup>22</sup> Flexible joinder rules often permit such claims to be brought together as a procedural matter, and jurisdiction in such cases largely went unchallenged when based on substantial business activities directed at the state.<sup>23</sup> But the restrictions on the use of such activities to support general jurisdiction raises questions about whether personal jurisdiction would undermine the goals of flexible joinder by requiring claims to be split, or alternatively, brought together in a forum inconvenient (and perhaps undesirable) to plaintiffs.<sup>24</sup>

Since *Daimler*, plaintiffs have developed a variety of strategies to avoid its potentially harsh jurisdictional consequences.<sup>25</sup> One such strategy is suggested by *Daimler* itself. There, the plaintiffs attempted to reach Daimler, a foreign corporation,

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<sup>22</sup> Bristol-Myers Squibb, 137 S.Ct. at 1789 (Sotomayor, J., dissenting) (concluding the majority's opinion will make it difficult for plaintiffs in multiple states injured by a defendant's nationwide conduct to sue in a single action); 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, 348 (2013).

<sup>23</sup> See, e.g., Fed. R. Civ. P. 20; Cornett and Hoffheimer, *supra* note 10, at 111.

<sup>24</sup> Bristol-Myers Squibb, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) ("the majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone," resulting in piecemeal litigation and bifurcation of claims). But see Alani Golanski, *Why Daimler Accommodates Personal Jurisdiction in Mass Tort Litigations*, 80 Alb. L. Rev. 311 (2017) (arguing pre-*Bristol-Myers Squibb* that *Daimler* "correlates with an expansive view of specific jurisdiction capable of accommodating the multiparty, multi-jurisdictional mass tort scenario").

<sup>25</sup> See Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 228-29 (2014).

through the contacts of its subsidiary, Mercedes Benz USA.<sup>26</sup> The Ninth Circuit explicitly embraced a theory of agency to support its conclusion that jurisdiction was proper, but the Supreme Court demurred.<sup>27</sup> According to Justice Ginsburg, the subsidiary's contacts with California were insufficient to support general jurisdiction even if they were imputed to the parent corporation, and that finding made it unnecessary for the Court to articulate the circumstances under which jurisdictional agency might be permitted.<sup>28</sup> Technically, then, the issue of agency was left unresolved, but only because it was made irrelevant in most cases. The issue may reappear if a plaintiff attempts to reach a foreign defendant by suing in a subsidiary's home state, but rather than demonstrating an exception, such a case will reflect the impact of *Daimler's* rule.

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<sup>26</sup> *Daimler*, 134 S. Ct. at 746.

<sup>27</sup> *Id.* at 759.

<sup>28</sup> This result was muddled by the fact that Mercedes Benz USA did not challenge jurisdiction, a litigation decision that almost certainly reflects the prevailing understanding that doing substantial business in the state was sufficient to expose a corporate defendant to jurisdiction. See *supra* note 10. That concession led Justice Ginsburg to conclude, "for purposes of this decision only, that MBUSA qualifies as at home in California." *Daimler*, 134 S. Ct. at 759. Even so, she then determined that those same contacts were not enough to render *Daimler* itself at home in California. *Id.* Future subsidiaries are not likely to make the same concession.

A second strategy has been to abandon the newly limited theory of general jurisdiction in favor of an expanded vision of specific jurisdiction. This approach is a poor fit for many transnational cases,<sup>29</sup> but it has substantial promise in the domain of aggregate litigation. Or more accurately it had promise, until the Supreme Court decided *Bristol Myers Squibb*.<sup>30</sup> *BMS* involved a classic aggregate litigation fact pattern. Multiple plaintiffs joined together to sue the manufacturer of the drug Plavix.<sup>31</sup> All of the claims involved harms that arose from the use of Plavix, but in only some of the claims did the allegedly harmful use occur in the forum state of California.<sup>32</sup> For the California claims, no one disputed that there was a clear basis for the exercise of specific jurisdiction.<sup>33</sup> *BMS* targeted California consumers with advertising in the state, distributed and sold the drug to patients within the state,

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<sup>29</sup> For example, this approach would have failed in *Daimler* itself because there were no forum-linked activities by the defendant that were in any way related to the claims being brought. Thus it was not possible to attempt an argument that the claims were “related to” forum activities, even absent a causal link. In other words, the unrelated business activities were the only conceivable basis for jurisdiction, and the contraction of general jurisdiction was therefore decisive.

<sup>30</sup> *Bristol-Myers Squibb*, 137 S. Ct. 1773 (holding that due process does not permit exercise of specific personal jurisdiction in California over claims by nonresident consumers).

<sup>31</sup> *Id.* at 1777.

<sup>32</sup> *Id.* at 1778.

<sup>33</sup> *Id.*

and the California claims arose directly from that purposeful activity.<sup>34</sup> The difficulty in the case involved personal jurisdiction over BMS for the joined claims that were brought by non-California users of Plavix.<sup>35</sup> One option would have been to use the continuous and systematic sales of the drug as a hook for general jurisdiction, but of course that was precisely the move targeted by *Daimler*.<sup>36</sup> With general jurisdiction off the table, the plaintiffs embraced a specific jurisdiction theory that hinged on the assertion that the non-California claims were nevertheless related to BMS's activities within the state.<sup>37</sup> In other words, the non-resident plaintiffs relied

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<sup>34</sup> The California Supreme Court emphasized that BMS maintained a physical presence in California, employed well over 400 individuals in the state, and actively and purposefully sought to promote sales of Plavix to California residents, resulting in California sales of nearly \$1 billion over six years. *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 886 (2016), *rev'd by Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty.*, 137 S. Ct. 1773 (2017).

<sup>35</sup> The group of plaintiffs consisted of eighty-six California residents and 592 residents from thirty-three other states who filed eight separate complaints in California Superior Court. *Bristol-Myers Squibb*, 137 S. Ct. at 1778. Although the complaints asserted thirteen claims arising solely under California law, the nonresident plaintiffs did not allege that they obtained the drug through any California sources, that they were injured by the drug in California, or that they were treated for their drug-related injuries in California. *Id.*

<sup>36</sup> Justice Ginsburg described use of the continuous and systematic formulation for general jurisdiction as "unacceptably grasping." *Daimler*, 134 S. Ct. at 760–61.

<sup>37</sup> Brief for Respondent at 17-38 *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S.Ct. 1773 (2017), 2017 WL 1207530; *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d at 888 (stating the claims were based not on "similar" conduct, but instead on a single, coordinated, nationwide course of conduct directed out of BMS's New York headquarters and New Jersey operations center and implemented by distributors and salespersons across the country).

on the same purposeful conduct at issue in the California claims, and then linked that conduct to their own claims through a flexible view of the connection necessary to support specific jurisdiction. That flexible view was good enough for the California Supreme Court,<sup>38</sup> but was squarely rejected by an eight justice majority of the United States Supreme Court.<sup>39</sup> According to the latter court, what is required is “a connection between the forum and the specific claims at issue,” and that connection cannot be provided by claims brought by others.<sup>40</sup>

In the wake of *Bristol Myers Squibb*, plaintiffs in aggregate products liability litigation have scrambled to comply with the requirement of a direct link between a defendant’s forum-state activity and each claim in the action. Where the plaintiffs themselves live in different states, such that the sale, use, and harm allegedly caused by the product in question did not all occur in the forum state, plaintiffs have instead sought to find some other activity within the state that can be said to

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<sup>38</sup> *Id.*

<sup>39</sup> *Bristol-Myers Squibb*, 137 S. Ct. at 1776 (stating that the California Supreme Court found specific jurisdiction without identifying any adequate link between California and the nonresidents’ claims).

<sup>40</sup> *Id.*

contribute in some way to each claim. This strategy first emerged in *Bristol Myers Squibb* itself, when the lawyers for the plaintiffs floated an alternative argument to support jurisdiction that relied on contractual activity between BMS and McKesson, a California corporation who contracted with BMS to distribute the drug nationally.<sup>41</sup> The Supreme Court dismissed that theory as a “last ditch contention,”<sup>42</sup> but it has been picked up and fleshed out in subsequent cases, with mixed success. Plaintiffs seeking to protect a major verdict in Missouri were unsuccessful in getting the court to permit additional “jurisdictional discovery” to develop evidence of forum activity common to all claims.<sup>43</sup> But other plaintiffs have successfully brought claims by plaintiffs from multiple states in a consolidated action based on “clinical trials” or “field tests” that were conducted in the forum state.<sup>44</sup>

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<sup>41</sup> *Id.* at 1783.

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

<sup>43</sup> *Fox v. Johnson & Johnson*, 2017 WL 4629383 at \*3 (Mo. Ct. App. Oct. 17, 2017) (vacating a \$72 million jury verdict, and declining to remand for additional jurisdictional discovery). In a related case, a trial court judge in Missouri declared a mistrial in the immediate aftermath of *Bristol-Myers Squibb*. <https://www.law.com/nationallawjournal/almID/1202790568692/SCOTUS-Ruling-Instantly-Touches-Off-Mistrial-in-Missouri-Talc-Cas/>.

<sup>44</sup> The same Missouri trial judge who declared a mistrial after the *Bristol-Myers Squibb* decision later upheld a \$110.5 million verdict based on a finding that personal jurisdiction was supported based on allegations that the

A third strategy has been to search for federal statutory language that might be read to expand the scope of personal jurisdiction for certain claims. For a time, certain provisions within the Federal Employers' Liability Act (FELA) looked promising. Section 56 of FELA provides that an action "may be brought" in the district "in which the defendant shall be doing business at the time of commencing [an] action."<sup>45</sup> Based on this language, plaintiffs argued that FELA claims could be brought in any federal district where a defendant was doing business, even if the

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defendant enlisted a Missouri company to "manufacture, mislabel, and package" the product in question. *Slemp v. Johnson & Johnson*, Nov. 29, 2017 Order at 7, No. 1422-CC09326-02 (Mo. Nov. 29, 2017). *See also* M.M. ex rel. Meyers v. GlaxoSmithKline LLC, 61 N.E.3d 1026 (Ill. Ct. App. 2016) (finding specific jurisdiction based on defendant's contracts with doctors within the state to conduct clinical trials on the drug in question). *Meyers* was decided and the appeal to the Illinois Supreme Court was denied before the United States Supreme Court decided *Bristol Myers Squibb*, but the United States Supreme Court denied certiorari in the case after *Bristol Myers Squibb*. *GlaxoSmithKline LLC v. M.M. ex rel. Meyers*, 138 S.Ct. 64 (October 2, 2017) (denying the petition for writ of certiorari). *See also* *In re Syngenta Mass Tort Actions*, No 3:16-cv-00255, 2017 WL 2117728 (S.D. Ill. May 15, 2017) (finding specific jurisdiction based on "field tests" conducted in Illinois). A similar argument was used in a single plaintiff case to support jurisdiction in a state that was the home of neither party. *Dubose v. Bristol-Myers Squibb*, No. 17-cv-00244, 2017 WL 2775034 (N.D. Cal. June 27, 2017) ("clinical trials conducted [in California] were part of the unbroken chain of events leading to Plaintiff's alleged injury"). But after finding a valid basis for the exercise of personal jurisdiction, the court granted a motion to transfer the case to the plaintiff's home state. *Id.*

<sup>45</sup> 45 U.S.C. § 56 (2016). That same section also describes other districts where the action may be maintained. *Id.* Due to Supreme Court precedent, plaintiffs' reliance on this section to approve personal jurisdiction over defendants seemed promising. As Judge Learned Hand explained in *Kilpatrick v. Tex. and Pac. Ry.*, in both *Baltimore & Ohio R. Co. v. Kepner* and *Miles v. Illinois Central R. Co.*, the Supreme Court held that once a railroad did business in any jurisdiction, Sec. 6 subjected it to personal service regardless of how much inconvenience or expense was involved in trying the action far away from the scene of the accident and the residence of all the defendant's witnesses; accordingly, a plaintiff might select a jurisdiction which promised "the richest harvest, and the railroad must meet him on his chosen ground." 166 F.2d 788 (2d Cir. 1948).

particular claim arose from business activity elsewhere.<sup>46</sup> Moreover, the same section further declares that for FELA claims the jurisdiction of the federal courts “shall be concurrent with that of the courts of the several states.”<sup>47</sup> According to plaintiffs, that meant that any FELA claim could also be brought in any state court within a federal district where the defendant was doing business.<sup>48</sup> As with the other strategies already discussed, success here was limited and short-lived. Plaintiffs succeeded in convincing the Supreme Court of Montana to adopt their reading of FELA,<sup>49</sup> but the United States Supreme Court stepped in once again to reject that effort.<sup>50</sup> According to the Court, the provisions relied on by the plaintiffs were

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<sup>46</sup> See Brief for Respondent at 24, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (No. 16-405), 2017 WL 1192088, at \*24 (arguing that some statutes or cases using “concurrent” jurisdiction to refer only to subject-matter jurisdiction hardly establishes that “concurrent” jurisdiction is susceptible to only one meaning because a term “may mean one thing for one purpose and something different for another”) (quoting *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933)).

<sup>47</sup> 45 U.S.C. § 56 (2016).

<sup>48</sup> Additionally, this was even argued in jurisdictions where the defendant conducted only a small portion of business. See, e.g., Brief for Respondent at 67, *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017) (No. SC 95514), 2016 WL 3944143 (Mo.), at \*67 (arguing that *Daimler* did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may sue under FELA wherever the railroad is doing business).

<sup>49</sup> *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1 (Mont. 2016).

<sup>50</sup> *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549 (2017); see generally *Civil Procedure – Personal Jurisdiction – BNSF Railway Co. v. Tyrrell*, 131 HARV. L. REV. 333 (2017). Even before the United States Supreme Court answered the

directed at venue and subject matter jurisdiction, but had nothing to do with personal jurisdiction.<sup>51</sup> Personal jurisdiction for FELA claims therefore must be based on standard due process principles, meaning that a connection between business activities and the claim must be present unless the defendant is sued “at home.”<sup>52</sup>

Finally, plaintiffs have argued that corporate defendants have consented to the exercise of jurisdiction through their compliance with state business registration requirements. This effort resuscitates a strategy used a century ago to resist narrow jurisdictional rules,<sup>53</sup> but it has met with limited success.<sup>54</sup> To be successful, plaintiffs

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question definitively, other state supreme courts rejected the effort to read FELA to confer authority to exercise personal jurisdiction. *See, e.g.,* *Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017); *Barrett v. Union Pac. R.R. Co.*, 390 P.3d 1031, 1038 (Ore. 2017) (explaining instead that the first sentence of section 56 provides for expanded venue “if there is jurisdiction”).

<sup>51</sup> *Tyrrell*, 137 S.Ct. at 1555.

<sup>52</sup> And of course after *Bristol Myers Squibb* that connection requires more than that the activities are of the same kind that the defendant conducts within the state. *See supra* note 40.

<sup>53</sup> *See Hess v. Pawloski*, 274 U.S. 352 (1927) (finding no substantial due process difference between requiring formal designation of local official for service of process and providing that use of highway is tantamount to such an appointment); *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917) (finding consent to personal jurisdiction where an agent was appointed to accept service of process within forum state).

<sup>54</sup> *E.g., Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016) (“[T]he holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general ‘consent’ has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and

must first convince the court that the applicable business registration statute was intended to trigger broad consent to jurisdiction, and then convince the court that such broad consent would be consistent with due process constraints.<sup>55</sup> A few courts have concluded that both of these hurdles have been cleared, thereby permitting the exercise of jurisdiction over claims unrelated to activities within the state against corporations not at home in the state.<sup>56</sup> But a greater number of courts that have considered the issue recently have stopped short of that

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the [Supreme] Court's 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.”).

<sup>55</sup> Unlike subject matter jurisdiction, a party may consent to personal jurisdiction and thus waive protection of the Due Process Clause. *Ins. Corp. of Ire., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (explaining that personal jurisdiction is waivable because it flows from the Due Process Clause and protects an *individual* liberty interest). But there may be limits on the scope of consent that a state can extract in exchange for registration to do business. Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436 (2012) (considering this question); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1364-65 (2015) .

<sup>56</sup> Specifically, courts in the Third and Fourth Circuits have declined to interpret *Daimler* as creating a sea change regarding personal jurisdiction by consent. *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648 (E.D. Pa. 2016) (holding that a foreign corporation registered to do business in Pennsylvania thereby consented to exercise of personal jurisdiction over it in Pennsylvania in a products liability action); *Hegna v. Smitty's Supply, Inc.*, No. 16-3613, 2017 WL 2563231, at \*4 (E.D. Pa. June 13, 2017) (concluding that by registering to do business under § 5301, the corporation consented to general personal jurisdiction in Pennsylvania and that its consent is still valid under *Goodyear* and *Daimler*); *Kulich v. Electrolux Home Prod., Inc.*, No. ELH-16-3412, 2017 WL 345856, at \*6 (D. Md. Jan. 24, 2017) (finding the foreign corporation consented to general jurisdiction in the state by registration).

conclusion.<sup>57</sup> In part this is attributable to the different language contained in the registration statutes being interpreted. That said, many courts have openly worried that expansive interpretations of registration requirements would chart an end run around the limitations imposed by *Daimler*,<sup>58</sup> and for that reason have favored narrower constructions that avoid due process concerns.<sup>59</sup> Ultimately the Supreme

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<sup>57</sup> Since *Daimler* did not fully address the issue of jurisdiction through consent, many courts subsequently followed the foundation laid by *Brown v. Lockheed Martin Corp.* 814 F.3d 619 (2d Cir. 2016) (concluding that the Connecticut business registration statute does not constitute a corporation's consent to submit to the general personal jurisdiction of Connecticut courts). *See, e.g., Perez v. Air & Liquid Sys. Corp.*, No. 3:16-CV-00842-NJR-DGW, 2016 WL 7049153, at \*9 (S.D. Ill. Dec. 2, 2016) (finding that the corporation did not consent to jurisdiction by registering to do business and appointing an agent for service of process, as required by Illinois law to do business in the state); *Leibovitch v. Islamic Republic of Iran*, 188 F. Supp. 3d 734, 748-50 (N.D. Ill. 2016) (rejecting plaintiffs' argument that the court should exercise general personal jurisdiction because banks consented to jurisdiction by registering to do business in Illinois); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2016 WL 2866166, at \*5 (D. Kan. May 17, 2016) (holding that jurisdiction-via-registration violates the Dormant Commerce Clause); *Genuine Parts Co. v. Cepec* 137 A.3d 123 (Del. 2016) (holding that a foreign corporation's compliance with statutory requirements for registration of a foreign corporation to do business within a state does not constitute implied consent to general jurisdiction over corporation within that state); *State ex rel. Norfolk S. Ry. Co. v. Dolan* 512 S.W.3d 41 (Mo. 2017) (holding that statutes governing registration of foreign corporations and service thereon do not provide an independent basis for exercising jurisdiction over foreign corporations for suits unrelated to the corporation's activities in the state). Many courts that have considered the issue have concluded that the statutes in question were directed at ensuring the availability of service rather than expanding the scope of the state's jurisdictional authority.

<sup>58</sup> *See, e.g., Brown*, 814 F.3d at 639 (“[W]ere we to accept Brown’s interpretation of Connecticut’s business registration statute, we would risk unravelling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely.”); *Cepec*, 137 A.3d at 140-48.

<sup>59</sup> *See Brown*, 814 F.3d at 639; *Genuine Parts Co. v. Cepec* 137 A.3d at 139 (explaining that the decision aligned with current federal rules on jurisdiction by giving the statute “a narrower and constitutionally unproblematic reading”).

Court will likely have to resolve the limits (if any) on a consent-based theory rooted in a state's business registration statute.<sup>60</sup> Given the Court's reaction to other efforts to avoid the impact of *Daimler*, there is reason to believe that the success enjoyed by plaintiffs here may not only be limited but also short-lived.

## II. LITIGATION TRENDS

There may yet prove to be a route that plaintiffs can forge to avoid or at least mitigate the impact of the Supreme Court's recent activity in the domain of personal jurisdiction. Until then, it appears that these decisions provide a powerful tool to defendants involved in aggregate litigation. This article now turns to the ways that defendants are using that tool. Specifically, the discussion here explores the specific procedural mechanisms by which the newly recognized jurisdictional restrictions are being introduced into litigation in the federal and state courts. Although attention is paid to a variety of litigation trends that have emerged in recent years, the focus

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<sup>60</sup> Rhodes, *supra* note 55, at 436 (noting that registration-based jurisdiction is "ripe for invalidation by the Supreme Court"); Monestier, *supra* note 55, at 1398-1400.

of this section – and indeed the remainder of the Article – will turn to one trend in particular: hybrid removal.

### *A. Cases Filed in Federal Court*

If a case is filed in federal court, as a general matter the due process constraints on personal jurisdiction articulated by the *Daimler* series of cases will be applicable thanks to the command of the federal procedural rules.<sup>61</sup> As a result, defendants served with a federal summons today can respond with a motion to dismiss under Rule 12(b)(2) if their only contact with the state where the federal court sits is unrelated business activity.<sup>62</sup> Depending on the circumstances, this motion may be targeted at the entire suit or at certain claims within it.

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<sup>61</sup> Fed. R. Civ. P. 4(k)(1)(A). Two exceptions to this are found in Rule 4(k). In cases involving joinder under Rule 14 or 19, service “not more than 100 miles from where the summons was issued” is sufficient to establish personal jurisdiction. Fed. R. Civ. P. 4(k)(1)(B). For federal claims, jurisdiction can be supported based on nationwide contacts, so long as the defendant would not be subject to personal jurisdiction in any individual state and “exercising jurisdiction is consistent with the United States Constitution and laws.” Fed. R. Civ. P. 4(k)(2).

<sup>62</sup> This is true notwithstanding the fact that state long arm statutes may purport to reach the defendant. *See, e.g.*, DE ST TI 10 § 3104(c)(4)(permitting exercise of jurisdiction over defendants who cause tortious injury out of the state if the person does regular business in the state or engages in other persistent course of conduct); MS ST § 13-3-57 (2003)(allowing state to exercise personal jurisdiction over defendants who do any business in the state); NE ST § 25-536 (2003)(1)(d) (stating the court can exercise personal jurisdiction over defendants if they

If the defendant is foreign and the claim arises from activities outside the United States, a full dismissal may be granted and the practical result will be to force the litigation to relocate outside of the American system.<sup>63</sup> If the defendant is not foreign or if the claim arose from activities that occurred elsewhere within the United States, then a full dismissal would have the effect of forcing the litigation to relocate within the American system, either where the defendant is at home or in a state where specific jurisdiction over all claims can be supported.<sup>64</sup> The federal court

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cause injury in the state by acts outside of the state if they regularly do business or engage in other persistent conduct within the state); NC ST § 1-75.4 (2002)(d) (authorizing exercise of personal jurisdiction over defendants whether the claim arises in the state or without the state if defendants are engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise); ORCP 4 (2002)(d) (granting exercise of personal jurisdiction over defendants whether the claim arises within the state or without this state if the defendant is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise); WI ST § 801.05 (2003) (granting exercise of personal jurisdiction over defendants whether the claim arises within the state or without this state if the defendant s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise).

<sup>63</sup> Daimler did not lead to full dismissal because Mercedes Benz USA consented to jurisdiction. Daimler, 134 S.Ct. at 746. If only Daimler had been sued, then there would have been no American jurisdiction where the case could have been sustained. See Bristol-Myers Squibb, 137 S. Ct. at 1789 (2017) (Sotomayor, J., dissenting)(arguing the majority's opinion will make it impossible for plaintiffs to bring nationwide actions against foreign corporations who are not "at home" in any state, curtailing and even eliminating their ability to hold corporations accountable).

<sup>64</sup> See discussion *supra* notes 21-24.

may achieve this result more efficiently by granting a transfer of the case rather than ordering a dismissal.<sup>65</sup>

In many cases, *Daimler* threatens only a subset of the claims within a case, and so a motion to dismiss will not achieve complete dismissal for the defendant. This was true of *Daimler* itself, thanks to the fact that one of the defendants consented to jurisdiction.<sup>66</sup> It is also true of many aggregate litigation cases with a structure similar to *Bristol-Myers Squibb*. The claims that arise from in-state activity are jurisdictionally secure, but other claims may be targeted by a motion to dismiss even if they are sufficiently related for joinder purposes and arise from activity identical to that used to support the in-state claims.<sup>67</sup> Should a defendant decide to deploy the jurisdictional defense supplied by the *Daimler* line of cases, the result will

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<sup>65</sup> See, e.g., *Dubose v. Bristol-Myers Squibb Co.*, 2017 WL 2775034, \*5 (N.D. Cal. June 27, 2017)(finding personal jurisdiction based on defendant conduct in the state but transferring to the plaintiff's home state). And of course it is well established that a federal court may transfer even if it concludes that it lacks personal jurisdiction. *Goldlawr, Inc. v. Heiman*, 82 S.Ct 913, 916 (1962).

<sup>66</sup> *Daimler*, 134 S.Ct. at 746.

<sup>67</sup> *Bristol-Myers Squibb*, 137 S. Ct. at 1783 (Sotomayor, J., dissenting).

be to force the plaintiff to choose between pursuing a single case in the defendant's home state or pursuing a fractured case in multiple states.

### *B. Cases Filed in State Court*

The impact of *Daimler* is more complex in cases filed in state court. At a superficial level, the state court location of the suit makes no difference, at least in cases that would fall within the scope of federal rule 4(k)(1)(A). In those cases, the procedural device used to raise a jurisdictional challenge may vary based on state practice, but the availability of a jurisdictional defense would be identical in either court system. So again, defendants in state court today may use *Daimler* to seek dismissal either of the entire case or of some subset of claims within a case.<sup>68</sup>

The complexity arises because the resolution of the personal jurisdiction issues may have implications for federal subject matter jurisdiction. It is no secret

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<sup>68</sup> *Daimler*, 134 S.Ct 746, and *Bristol-Myers Squibb*, 137 S.Ct. 1773, are examples of partial dismissals. For an example of a complete dismissal, see *Swann, et al. v. Johnson & Johnson, et al.*, No. 1422-CC09326-01 (Mo. June 21, 2017). Almost immediately after *Bristol-Myers Squibb* was decided, a state court judge in St. Louis declared a mistrial in an ongoing trial involving an alleged link between talcum powder and ovarian cancer.

that many plaintiffs bringing tort actions prefer to litigate in state court.<sup>69</sup> Indeed, when structuring cases, plaintiffs often strive to secure that preferred forum by shielding the suit from removal. Sometimes this is done by foregoing federal claims that might otherwise be brought.<sup>70</sup> In many other cases, it is done by destroying complete diversity through the strategic inclusion of plaintiffs who are citizens of the defendant's home state.<sup>71</sup> Defendants have long resisted this strategy, with limited success.<sup>72</sup> That track record should change under the new regime. In many cases,

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<sup>69</sup> See, e.g., Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 786 (2017) (discussing how forum shopping is based on the premise that justice may vary on the vagaries of geography unrelated to the merits of the claim at hand); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (finding that, after controlling for other variables such as case selection, removal to federal court decreased plaintiffs' odds of winning by roughly one-fifth); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts To Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 57 (2009) ("Forum selection is often the most important strategic decision a party makes in a lawsuit.").

<sup>70</sup> See, e.g., *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1986) (noting that a plaintiff is "the master of the claim" and may choose to avoid removal by omitting federal claims from the initial complaint).

<sup>71</sup> A recent article, which characterizes this strategic case structuring as "fraudulent aggregation," provides many recent examples. Jeff Lingwall and Chris Wray, *Fraudulent Aggregation: The Effect of Daimler and Walden on Mass Litigation*, 69 FLA. L. REV. 599, 600 n. 4 (2017). Because this destroys diversity, the action is not removable under 28 U.S.C. §1441(a).

<sup>72</sup> The Class Action Fairness Act of 2005, which was designed to facilitate the relocation of some class actions to a federal forum, is an example of substantial success on a systemic level. But CAFA has had unintended consequences that have mitigated much of its forum effects. Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 REV. LITIG. 591, 593 (2013) ("CAFA has inspired some of the most creative lawyering in recent decades, as plaintiffs' attorneys seek to evade CAFA class and mass action

defendants should now have the tools necessary to target the claims by non-diverse plaintiffs, and then remove the remaining claims to federal court. In other words, the Supreme Court's recent activity should be expected to have both horizontal and vertical effects. It will lead to relocation of suits from one state to another, but it will also lead to relocation of suits from state court to federal court.<sup>73</sup>

To see how this may play out, consider a slight simplification of *Bristol Myers Squibb*.<sup>74</sup> Ten years ago, if some California users of Plavix decided to sue Bristol Myers Squibb, and had a strong preference to do so in a state court in California, then they would likely consider joining forces with some other Plavix users from either New York (where BMS's headquarters are located) or Delaware (where BMS is

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provisions and to retain aggregate litigation in state court forums."). At the individual case level, defendants have been forced to resort to arguments like fraudulent joinder, which are rarely successful. *See infra* Part III.A. This limited success in the courts has triggered efforts to forge a legislative solution, which have thus far led nowhere. *See, e.g.,* Arthur D. Hellman, *The "Fraudulent Joinder Prevention Act of 2016": A New Standard and a New Rationale for an Old Doctrine*, 17 *THE FEDERALIST SOCIETY REVIEW* 34 (2016).

<sup>73</sup> Lingwall & Wray, *supra* note 71, at 602-03.

<sup>74</sup> This hypothetical leaves out the "last ditch contention" from that the decision by the defendant to contract with a forum-based company to distribute the drug nationally created a sufficient link to support specific jurisdiction. *Bristol-Myers Squibb*, 137 S.Ct. at 1783; *see supra* notes 43-44.

incorporated).<sup>75</sup> California's joinder rules would permit the claims to proceed together as a matter of procedure, and personal jurisdiction would be supported by BMS's substantial business activity (and sales of Plavix) within the state of California.<sup>76</sup> The array of parties would also prevent removal, at least if the plaintiffs limited their complaint to state law causes of action,<sup>77</sup> and thus the plaintiffs could rather easily structure their complaint to achieve their objectives. Today, that effort would fail. *Daimler* and *BMS* in combination make it clear that the California court could not exercise jurisdiction over the out of state defendants, and once those parties are dismissed, the remaining parties satisfy the federal subject matter

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<sup>75</sup> Under 28 U.S.C. 1332(c)(1), a corporate party is deemed a citizen of "every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." The "principal place of business" language has been interpreted to refer to the corporation's "nerve center," which usually coincides with the location of its headquarters. *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

<sup>76</sup> See Brief for Respondent at 11, *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466), 2016 WL 7156384 at \*11 (explaining that California had routinely exercised jurisdiction based on business activity within the state).

<sup>77</sup> The presence of federal claims would raise the possibility that the case would fall within the scope of federal subject matter jurisdiction through some combination of original jurisdiction under 28 U.S.C. §1331 and supplemental jurisdiction under 28 U.S.C. §1367.

jurisdiction requirement of complete diversity. As a result, the surviving portion of the case may be heard in a federal court.<sup>78</sup>

As a procedural matter, how should a defendant go about achieving this result? The most straightforward answer is that a defendant should proceed in two steps. First, the defendant should file a motion to dismiss based on personal jurisdiction in the state court where the plaintiffs filed the action. When that motion is resolved, and the claims by the out of state (and non-diverse) plaintiffs are dismissed, what remains is a removable case. The second step, therefore, is to take advantage of the 30-day statutory window to file a notice of removal when changes to a case render it removable.<sup>79</sup> Consider again the California plaintiffs who join

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<sup>78</sup> The prospect of removal will affect how plaintiffs respond to the sub-optimal choices provided them under the new regime. Think again about the modified BMS case. Today, the plaintiffs will have two choices from the standpoint of personal jurisdiction: bring the claims together in the defendant's home state using a general jurisdiction theory, or split the claims and rely on specific jurisdiction to bring the claims in multiple states. One way to view this choice is as a trade-off between the inconvenience of litigating on the defendant's home turf and the inefficiency of piecemeal litigation. But that misses the vertical implications of the *Daimler* line of cases. If the plaintiffs split the claims, the result will not just be inefficiency, but a shift to a federal venue for many (though not all) of the claims. That result can be avoided if the plaintiffs choose instead to accept the inconvenience of litigating in the defendant's home state. Put differently, if we observe plaintiffs traveling together post-*Daimler* to sue defendants at home, that could reflect either a desire to maximize litigation efficiency or the strength of the plaintiffs' preference for litigation in state court.

<sup>79</sup> 28 U.S.C. § 1446(b)(3) ("Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or

forces with a New Yorker to sue Bristol-Myers Squibb in a California state court. The defendant's strategy would be to file a motion to dismiss the claim by the New York plaintiff, and after *Daimler* and *Bristol-Myers Squibb* there is little doubt that such a motion would be granted. When the case is thus reduced to claims by California plaintiffs against a corporation headquartered in New York and incorporated in Delaware, BMS can relocate the case to federal court with an uncomplicated notice of removal.

Interestingly, many defendants navigating the post-*Daimler* terrain have opted not to chart this straightforward path. Instead, they have skipped the step of presenting a personal jurisdiction challenge to the state court in favor of filing an immediate notice of removal in federal court.<sup>80</sup> When the plaintiffs respond to the removal with a motion to remand, the defendants urge the federal court to dismiss certain claims based on personal jurisdiction, and then uphold the removal of the claims that remain. This approach asks the federal court to assess personal

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otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.")

<sup>80</sup> See, e.g., cases discussed *infra* at notes 88-100.

jurisdiction as part of its consideration of subject matter jurisdiction, and because it blends those two doctrines it will be referred to here as “hybrid removal.” On a superficial level, hybrid removal appears to be a more expedient manner of proceeding as it involves one step rather than two. But in fact this approach introduces greater complexity because it raises questions about the sequencing of jurisdictional decisions and about judicial federalism that are avoided by the two-step approach.

When deciding whether a case has been properly removed, the default position for federal judges is to consider the case as it has been presented to them through the attached state court materials.<sup>81</sup> This default position is problematic for defendants pursuing hybrid removal. Absent a favorable resolution of such a personal jurisdiction challenge in state court, the materials presented to the federal court show a case that does not meet the requirements for removal, and the ordinary result is a remand to state court. To avoid this outcome, defendants need

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<sup>81</sup> 14B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3723 n. 12; *Pullman Co. v. Jenkins*, 305 U.S. 534, 537-38 (1939) (right to remove should be “determined according to the plaintiffs’ pleading at the time of the petition for removal”).

an argument to nudge federal judges away from the default position, and they have found an attractive candidate in *Ruhrgas v. Marathon Oil*.<sup>82</sup> In *Ruhrgas*, the Supreme Court considered whether a federal court could dismiss a removed case on personal jurisdiction grounds without first establishing a basis for subject matter jurisdiction.

A unanimous Court answered in the affirmative, at least where the personal jurisdiction issue is “straightforward” and “presents no complex question of state law.”<sup>83</sup> Defendants have seized on *Ruhrgas* to argue that because the personal jurisdiction issues presented post-*Daimler* are indeed straightforward, federal courts need not consider the viability of removal based on the case as presented to them. Instead, the court should dismiss certain claims from the action based on personal jurisdiction before assessing whether the requirements for removal are satisfied.<sup>84</sup>

Thus, defendants achieve their goals — dismissal of some claims and relocation of the others to federal court — in one fell swoop.

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<sup>82</sup> *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). As discussed *infra* Part III.A, some defendants have relied on the doctrine of procedural misjoinder to achieve a similar result.

<sup>83</sup> *Ruhrgas*, 526 U.S. at 588 (1999). *See also id.* at 578 (there is no “unyielding jurisdictional hierarchy”).

<sup>84</sup> *See, e.g.*, Brief for Appellant at 37, *Robinson v. Pfizer, Inc.*, 855 F.3d 893 (8th Cir. 2017) (No. 16-2524), 2016 WL 7228481, at \*37.

Notwithstanding the appeal of this approach, it is not without its difficulties. Primary among them is that even if *Ruhrgas* does apply, it operates as a source of discretion rather than as a command. That means that defendants need to convince federal judges not only that they can consider personal jurisdiction before assessing removal, but also that they should. This initially proved challenging, even after *Daimler*. As a pragmatic matter, the jurisdictional sequencing approved by *Ruhrgas* is enticing to federal judges because it promotes the expedient resolution of cases. Rather than engage in a complex analysis of whether the case must be dismissed for lack of subject matter jurisdiction, the court can reach the same result by recognizing a straightforward defect in personal jurisdiction. But the invocation of *Ruhrgas* in a hybrid removal scenario does not simplify matters in the same way. In part this is because the alternative that is being avoided is itself straightforward. If the court takes up subject matter jurisdiction first, it looks at the removal materials and sees a case that lacks complete diversity on its face. True, the court may have to consider an argument sounding in something like fraudulent joinder along the way,

but even so the path to remand is fairly smooth.<sup>85</sup> So a decision to consider personal jurisdiction first does not help the court avoid complexity, particularly since the personal jurisdiction issues might require the court to consider issues of first impression. Just as important, a decision to consider personal jurisdiction first does not provide the court with an alternative path to dismissal. Quite to the contrary, defendants are pressing hybrid removals precisely because they are trying to steer the court to a different result, one that would add a complex case (or part of one) to the docket.

Despite the hurdles associated with the hybrid removal strategy, defendants began to pursue it in the aftermath of the Supreme Court's decision in *Daimler*. This was no accident, but was instead the result of a concerted effort by defendants to leverage the Supreme Court's personal jurisdiction jurisprudence to manipulate venue in their favor.<sup>86</sup> At first, the overwhelming reaction of federal judges faced

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<sup>85</sup> See, e.g., *Dotson v. Bayer Corp.*, 2017 WL 35706 (E.D. Mo. Jan. 4, 2017) (considering and rejecting fraudulent misjoinder and fraudulent joinder before remanding). Many of the cases cited *supra* note 89 are very similar in their reasoning and result.

<sup>86</sup> Richard A. Dean and Jennifer L. Mesko, *How to Remove Multi-Plaintiff Cases Involving Personal Jurisdiction Challenges and Avoid Subject Matter Remand*, RX for the Defense, Vol. 23 Issue 2 (Defense Research Institute

with hybrid removals was to dispatch the cases quickly back to state court.<sup>87</sup>

Notwithstanding these early failures, defendants continued to press hybrid removal, and indeed continued doing so even after receiving clear instructions to stop.<sup>88</sup> As

but one example, consider the experience of Bayer in the Eastern District of Missouri. Bayer and a number of its subsidiaries have been subject to multiple

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Mar. 26, 2015) (“It is well known that *Daimler* provides a powerful tool for defendants to attack claims of personal jurisdiction. But the novel combination of the *Daimler* personal-jurisdiction argument with the *Ruhrgas* approach to the ‘hierarchy of jurisdiction’ question provides an even more powerful removal option for multi-plaintiff cases filed in state court.”); see also Sherri S. Rich, *The Yielding Jurisdictional Hierarchy*, 51 Federal Lawyer 34 (Aug. 2004).

<sup>87</sup> See, e.g., cases cited *infra* note 89. The only exception to this early trend of remands is *Addelson v. Sanofi S.A.*, 2016 WL 6216124 (E.D. Mo. Oct. 25, 2016) (approving hybrid removal and issuing stay pending transfer to multidistrict litigation).

<sup>88</sup> As an interesting illustration, consider *Robinson v. Pfizer, Inc.*, 2016 WL 1721143, at \*4 (E.D. Mo. Apr. 29, 2016). Sixty-four plaintiffs from twenty-nine states joined together to file a complaint against Pfizer in the Circuit Court for the City of St. Louis, Missouri. Notwithstanding the fact that six plaintiffs shared New York citizenship with the defendant, Pfizer filed a notice of removal. In the district court, the defendants raised the issue of hybrid removal, but the district court’s opinion relied primarily instead on arguments sounding in fraudulent joinder and procedural misjoinder. On the basis of those arguments, the district judge not only issued a remand order, but also entertained and granted a request by plaintiffs for attorneys’ fees and costs under 28 U.S.C. 1447(c). In doing so, the district judge noted the numerous efforts by defendants to seek removal in similar cases, and concluded that those efforts were no longer “objectively reasonable.” That cost order triggered something relatively uncommon in this area: appellate review. A remand by a district judge is a non-appealable order, 28 U.S.C. 1447(d), but the order imposing costs was subject to appeal. Because the costs order should not have been imposed if the removal was objectively reasonable, the appeal in *Robinson* opened the window to present the issue of hybrid removal to the Eighth Circuit. See Brief for Appellant at 37-39, *Robinson v. Pfizer*, 855 F.3d 893 (8th Cir. 2017) (No. 16-2524), 2016 WL 4728015 at \*37-39. In response, the plaintiffs disclaimed the costs awarded and argued that the appeal was therefore moot. Brief for Appellees at 12-16, *Robinson v. Pfizer*, 855 F.3d 893 (8th Cir. 2017) (No. 16-2524), 2016 WL 6679969 at \*12-16. The Eighth Circuit accepted the mootness argument, and therefore made no statement regarding the propriety of hybrid removal. *Robinson v. Pfizer*, 855 F.3d 893 (8th Cir. 2017).

lawsuits surrounding the Essure birth control device, and many of those lawsuits have been filed in the state courts of Missouri. In most of those cases, the claims brought by some of the plaintiffs were unrelated to any activity undertaken by Bayer within the state. In turn, some of the plaintiffs asserting these unrelated claims shared citizenship with at least one of the defendants, thereby destroying complete diversity. At least since *Daimler* was decided, Bayer has consistently responded to these lawsuits by filing a notice of removal, invoking *Ruhrgas* in an effort to get the federal court to consider personal jurisdiction first, and arguing that dismissal of the unrelated claims creates a valid basis for removal. The first fifteen times it did so, a variety of federal judges rebuffed Bayer's efforts and instead issued quick and unreviewable remands back to state court.<sup>89</sup>

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<sup>89</sup> *McPeters v. Bayer, Corp.*, No. 4:16-CV- 1680-SPM, 2017 WL 57250 (E.D. Mo. Jan. 5, 2017); *Mounce v. Bayer, Corp.*, No. 4:16CV1478 RLW, 2017 WL 7235707 (E.D. Mo. Dec. 13, 2016); *Hines v. Bayer Corp.*, No. 4:17-CV-01395-JAR, 2017 WL 2535709 (E.D. Mo. June 12, 2017); *Dotson v. Bayer Corp.*, No. 4:16cv01593PL, 2017 WL 35706 (E.D. Mo. Jan. 4, 2017); *Langston v. Bayer Corp.*, No. 4:17-CV-00888 JAR, 2017 WL 1873285 (E.D. Mo. May 9, 2017); *Jordan v. Bayer Corp.*, No. 4:17-CV-01330-JAR, 2017 WL 1909059 (E.D. Mo. May 10, 2017); *Hall v. Bayer Corp.*, No. 4:16-CV-1523 (CEJ), 2017 WL 86011 (E.D. Mo. Jan. 10, 2017); *Dorman v. Bayer Corp.*, 4:16CV601 HEA, 2017 WL 7033765 (E.D. Mo. Dec. 12, 2016); *Robb v. Bayer Corp.*, No. 4:16-CV-1727-RLW, 2017 WL 7235708 (E.D. Mo. Dec. 13, 2016); *Tenny v. Bayer Healthcare, LLC.*, No. 4:16-CV-1189-RLW, 2017 WL 7235705 (E.D. Mo. Dec. 13, 2016); *Jones v. Bayer Corp.*, No. 4:16CV1192 JCH, 2017 WL 7230433 (E.D. Mo. Dec. 14, 2016); *Whitlock v. Bayer Corp.*, No. 4:16-CV-1913-SPM, 2017 WL 564489 (E.D. Mo. Feb. 13, 2017).

Eventually, though, Bayer's persistence paid off. On July, 14, 2017, the sixteenth time proved the charm and Bayer achieved precisely the result it sought.<sup>90</sup> Other defendants litigating in the Eastern District of Missouri have similarly seen their luck change. Hybrid removals have now been accepted in numerous cases, by multiple judges in the district.<sup>91</sup> So what changed? As previously discussed, the decision whether to engage in jurisdictional resequencing is influenced by pragmatic considerations, and those considerations have been shifting in favor of permitting hybrid removal. When the Supreme Court decided *Goodyear* and then *Daimler*, it marked a clear shift in the doctrine of general jurisdiction. Even so, as detailed in Part II, many doctrinal ambiguities remained, particularly around the potential for an

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<sup>90</sup> *Jordan v. Bayer*, 2017 WL 3006993 (invoking *Ruhrgas*, dismissing unrelated claims based on lack of personal jurisdiction, and denying the motion to remand as to the remaining claims). For further discussion of this case, see *infra* notes 136-153. Notably, Bayer's victory was delivered by the district judge who had previously rebuffed hybrid removal efforts and had even awarded costs against another repeat defendant based on a finding that the filing of a hybrid removal was not "objectively reasonable." See discussion of *Robinson v. Pfizer*, *supra* note 88.

<sup>91</sup> *Jordan v. Bayer Corp.*, No. 4:17-CV-865 (CEJ), 2017 WL 3006993 (E.D. Mo. July 14, 2017); *Ingham v. Johnson & Johnson*, No. 4:17-CV-1857 SNLJ, 2017 WL 3034696 (E.D. Mo. July 18, 2017); *Livaudais v. Johnson & Johnson*, No. 4:17-CV-1851 SNLJ, 2017 WL 3034701 (E.D. Mo. July 18, 2017); *Reppell v. Johnson & Johnson*, No. 4:17-CV-1858 SNLJ, 2017 WL 3034707 (E.D. Mo. July 18, 2017); *Swann v. Johnson & Johnson*, No. 4:17-CV-1845 SNLJ, 2017 WL 3034711 (E.D. Mo. July 18, 2017); *Siegfried v. Boehringer Ingelheim Pharmaceuticals, Inc.*, No. 4:16 CV 1942 CDP, 2017 WL 2778107 (E.D. Mo. June 27, 2017).

expanded use of specific jurisdiction as an alternative source of adjudicatory authority. Subsequent actions by the Court — most notably the decision in *Bristol-Myers Squibb* — have resolved much of that ambiguity, and federal judges therefore perceive it as much more straightforward to conclude that there is no basis for personal jurisdiction over plaintiffs bringing claims against out-of-state defendants based on out-of-state contacts. The timing of Bayer's first hybrid removal victory in the Eastern District of Missouri is therefore not coincidental. The fifteen losses came before the *Bristol-Myers Squibb* decision; the first victory came less than a month after.

Indeed, the influence of *Bristol-Myers Squibb* can be seen even more acutely in a series of five cases involving Bayer affiliates filed across the Mississippi River in the Southern District of Illinois.<sup>92</sup> All five cases are essentially identical in their

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<sup>92</sup> As explained here, each case resulted in two relevant opinions: (1) *Pirtle v. Janssen Research & Development, LLC*, 2017 WL 2492663 (S.D. Ill. June 9, 2017), and *Pirtle v. Janssen Research & Development, LLC*, 2017 WL 4224036 (S.D. Ill. Sept. 22, 2017); (2) *Bandy v. Janssen Research & Development, LLC*, 2017 WL 2492660 (S.D. Ill. June 9, 2017), and *Bandy v. Janssen Research & Development, LLC*, 2017 WL 4224035 (S.D. Ill. Sept. 22, 2017); (3) *Woodall v. Janssen Research & Development, LLC*, 2017 WL 2495410 (S.D. Ill. June 9, 2017), and *Woodall v. Janssen Research & Development, LLC*, 2017 WL 4237924 (S.D. Ill. Sept. 22, 2017); (4) *Braun v. Janssen Research & Development, LLC*, 2017 WL 2492662 (S.D. Ill. June 9, 2017), and *Braun v. Janssen Research & Development, LLC*, 2017 WL 4224034 (S.D. Ill. Sept. 22, 2017), and (5) *Douthit v. Janssen Research & Development, LLC*, 2017

procedural history; *Pirtle v. Janssen Research* is illustrative.<sup>93</sup> The complaint was filed in Illinois state court on March 16, 2017 by an Illinois plaintiff and a New Jersey plaintiff against numerous defendants with multiple citizenships that included New Jersey but not Illinois.<sup>94</sup> On April 28, 2017, the defendants filed a notice of removal in the Southern District of Illinois.<sup>95</sup> Defendants cited *Ruhrgas* and asked the federal court to first conclude that personal jurisdiction for the New Jersey plaintiff's claim was lacking, and then to uphold the removal as to the remaining claim by the Illinois plaintiff.<sup>96</sup> The court declined, and instead remanded the case back to state court on June 9, 2017 based on the lack of diversity on the face of the state court materials.<sup>97</sup> *Bristol Myers Squibb* was decided a few weeks later, and the defendants

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WL 2492661 (S.D. Ill. June 9, 2017), and *Douthit v. Janssen Research & Development, LLC*, 2017 WL 4224031 (S.D. Ill. Sept. 22, 2017).

<sup>93</sup> *Pirtle*, 2017 WL 2492663 at \*1.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Plaintiffs' Memorandum in Support of their Motion to Remand at 6-10, *Pirtle v. Janssen Research & Development, LLC*, 2017 WL 6996738 (S.D. Ill. June 9, 2017) (No. 3:17-cv-442-DRH).

<sup>97</sup> *Pirtle*, 2017 WL 2492663 at \*3.

responded to the decision by filing a second notice of removal on July 19, 2017.<sup>98</sup>

To justify the “re-removal,” the defendants characterized the *BMS* decision as an “order” or “other paper” for purposes of 28 U.S.C. 1446(b)(3), meaning that its issuance triggered a new 30-day removal window.<sup>99</sup> The district court accepted that statutory argument, invoked *Ruhrgas* to resequence jurisdictional decisions and dismiss the New Jersey claim, and denied the motion to remand as to the Illinois claim.<sup>100</sup>

As these cases demonstrate, *Bristol Myers Squibb* is having a direct impact on the availability of hybrid removals in the federal district courts. To be clear, that result is not required. Even though it may now be simple to resolve hybrid removals by considering personal jurisdiction first, it remains equally simple (or at least nearly as simple) to resolve them by considering subject matter jurisdiction first. *Ruhrgas* permits federal judges to begin with personal jurisdiction when doing so would

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<sup>98</sup> Second Notice of Removal, *Pirtle v. Janssen Research & Development, LLC*, No. 3:17-cv-00442-DRH (S.D. Ill. June 9, 2017).

<sup>99</sup> *Id.* at \*3.

<sup>100</sup> *Pirtle*, 2017 WL 4224036 at \*3-6.

avoid a difficult subject matter jurisdiction analysis. But when neither issue is difficult, judges are presented with an easy path to either a full remand or hybrid removal. We might expect incentives related to caseload management to nudge federal courts toward returning cases to state court.<sup>101</sup> Federal courts who are instead using their *Ruhrgas* discretion are doing so at least in part because they perceive that a remand will not actually result in any workload reduction.<sup>102</sup> That is, if it is clear that the only impact of a remand will be the lengthen the amount of time it takes for a narrowed version of the case to make its way to federal court, then it hardly seems controversial to pursue the expedient result of achieving the same result immediately.<sup>103</sup> Even so, as the next Part explains, further attention is warranted.

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<sup>101</sup> Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 306 (2011) (“given the reasonable assumption that judges tend to act in their self-interest, judges may too heavily weigh the first factor of minimizing workload”).

<sup>102</sup> See, e.g., Siegfried, 2017 WL 2778107 at \*2 (“Remanding this case for lack of complete diversity, only to have the case removed again later once the non-Missouri plaintiffs are dismissed, would be a waste of judicial resources.”)

<sup>103</sup> *Id.* The expediency being pursued here is not simply the result that produces the least federal effort, but is instead rooted in considerations of intersystemic efficiency.

### III. ASSESSING HYBRID REMOVAL

Hybrid removal is an intentional strategy being deployed by defendants in complex cases, particularly those with multiple plaintiffs. The judicial reception to this strategy has evolved with the jurisdictional doctrine, and especially since the decision in *Bristol-Myers Squibb*, the trend has moved strongly in the direction of acceptance of hybrid removal as a doctrine of expediency. This part undertakes a critical analysis of the doctrine. It concludes that there is no categorical argument against hybrid removal, and that it is a sensible and defensible procedural device in some circumstances. Indeed, it is a superior procedural device to some others that have developed in response to persistent agitation by defendants, and it should be viewed going forward as the preferred vehicle for assessing whether removals should be sanctioned despite their facial nonconformity with the diversity statute. That said, there are limits to expediency, and hybrid removal should be resisted when concerns about judicial federalism are particularly acute.

#### *A. Expediency and Doctrinal Fit*

One complication with hybrid removal is that it overlaps with other doctrines that have developed over the years within the rubric of subject matter jurisdiction. The inclusion of stray plaintiffs or defendants who happen to destroy complete diversity is a time-honored practice used by plaintiffs who would prefer to litigate in state court. Efforts by defendants to counter that practice are equally time-honored, and have given rise to two related but distinct doctrines.

The first, fraudulent joinder, enjoys wide acceptance but limited applicability.<sup>104</sup> Defendants initially pressed this doctrine by pointing out the somewhat obvious nature of the litigation strategy being deployed by plaintiffs, and asked federal courts to intervene and permit removal when it was clear that the intent behind the structure of the suit was to secure a state court forum. No federal court has been willing to go this far; to the contrary, all have concluded that questionable intent standing alone is insufficient to trigger the availability of removal.<sup>105</sup> That said, defendants have been able to convince federal courts to

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<sup>104</sup> See generally 14B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3723 n. 93-114.

<sup>105</sup> Wright & Miller, *supra* note 104, at § 3723 n. 94.

disregard non-diverse parties and permit removal in two situations: (1) when the claim brought by or against the non-diverse party is clearly not colorable;<sup>106</sup> and (2) when the jurisdictional facts pled by plaintiff reflect outright fraud.<sup>107</sup> The burden is placed on the defendant to demonstrate the existence of one of these conditions by clear and convincing evidence,<sup>108</sup> and it is met only rarely.<sup>109</sup>

The second doctrine, procedural misjoinder,<sup>110</sup> is an extension of the same theme. The basic argument here is that the combination of the claims in a single action is deficient under the procedural joinder rules, notwithstanding the possibility

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<sup>106</sup> Wright & Miller, *supra* note 104, at § 3723 n. 96 & 100; *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392 (5th Cir. 2013) (finding claim against non-diverse party was insufficient based on the pleadings, and denying remand as a result); *Welk v. GMAC Mortg., LLC*, 720 F.3d 736 (8th Cir. 2013) (same); *see also* *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004) (finding no fraudulent joinder when non-colorable nature of claim applies to both non-diverse and diverse parties).

<sup>107</sup> Wright & Miller, *supra* note 104, at § 3723 n. 103.

<sup>108</sup> Wright & Miller, *supra* note 104, at § 3723 n. 105; *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329 (11th Cir. 2011)(applying a “clear and convincing evidence” standard).

<sup>109</sup> In part because of the difficulties meeting the high burden associated with fraudulent joinder doctrine as developed by the courts, legislative solutions that effectively lower the burden have been proposed from time to time. *See* Hellman, *supra* note 72.

<sup>110</sup> There is some terminological inconsistency associated with this doctrine. Some courts have referred to it as fraudulent misjoinder to indicate its connection with the fraudulent joinder doctrine. *See, e.g.*, *In re c Products Liability Litigation*, 591 F.3d 613, 620 (8th Cir. 2010). But since the doctrine is not always based on any inquiry into motive or intent, the “fraudulent” label is misleading. I will instead refer to the doctrine here as procedural misjoinder. For a general discussion of the

that the claims being asserted are both colorable and devoid of outright fraud.<sup>111</sup>

Most often, the procedural joinder issue relates to party joinder requirements that joined claims must share a transactional relationship and at least one common question of law or fact.<sup>112</sup> If the claim brought by or against the non-diverse party are sufficiently unconnected, they may be disregarded for purposes of assessing the removal to federal court. Some courts simply require a finding of misjoinder, while others require a showing that the misjoinder is egregious.<sup>113</sup>

Procedural misjoinder in particular shares an affinity with hybrid removal. Both are ways of asserting that non-diverse parties are insufficiently connected with the rest of the suit, and that a facially non-removable case should be permitted to remain in federal court as a result. In procedural misjoinder, the relevant lack of

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<sup>111</sup> *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006) (“If these requirements are not met, joinder is improper even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants.”).

<sup>112</sup> See, e.g., Fed. R. Civ. P. 20(a) (requiring joined party claims to share a transactional relationship and a common question of law or fact); E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 215-16 n. 105 (2005). It is not obvious that federal joinder rules should provide the procedural requirements when assessing procedural misjoinder. See *infra* notes 124-127.

<sup>113</sup> See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 819-21 (2006) (collecting cases, and criticizing the egregiousness requirement).

connection is between the non-diverse claims and the other claims. In hybrid removal, the relevant lack of connection is between the non-diverse claims and the forum state. To be sure, the overlap between these doctrines is not complete.<sup>114</sup> But in the run of cases, these are two separate doctrines being invoked for the same reason and to achieve the same result.

If procedural misjoinder is capable of addressing these cases, then what explains the rise of hybrid removal in the wake of *Daimler* and *Bristol Myers Squibb*? The answer to that lies in the sporadic embrace of procedural misjoinder in the federal courts. The doctrine has been met with approval in some appellate circuits,<sup>115</sup> but has been rejected or ignored in others. In those districts where procedural misjoinder is unavailable or viewed with skepticism, hybrid removal is an exceedingly attractive alternative. This helps to explain the persistence of its

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<sup>114</sup> For example, if the plaintiffs sued where the defendant is “at home,” then personal jurisdiction for all claims would be unproblematic, and defendants would not be able to use hybrid removal as a strategy to move some claims to federal court. But defendants might still argue that the claims brought by plaintiffs who share forum citizenship are insufficiently connected to the remaining claims as a matter of joinder.

<sup>115</sup> The seminal procedural misjoinder case is *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds by* *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). *See also* *Crockett*, 436 F.3d at 533 (approving removal based on a finding of improper joinder); *In re Prempro Products Liability Litigation*, 591 F.3d 613 (8th Cir. 2010).

invocation in the Eastern District of Missouri and the Southern District of Illinois. The Eighth Circuit has not formally rejected fraudulent misjoinder, but its discussion of the doctrine has led district judges in the Eastern District of Missouri to interpret the doctrine extremely narrowly.<sup>116</sup> The Seventh Circuit has said even less about the doctrine, leaving the district judges in the Southern District of Illinois free to reject it altogether.<sup>117</sup> Conversely, in districts where procedural misjoinder is recognized, there is less need to press federal judges to embrace a new doctrine. The Northern District of Texas provides an illustration. The Fifth Circuit discussed the doctrine of procedural misjoinder approvingly as far back as 2002,<sup>118</sup> and since then district

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<sup>116</sup> See, e.g., *Dickerson v. GlaxoSmithKline, LLC*, 2010 WL 2757339 (E.D. Mo. July 12, 2010)(remanding because misjoinder was not egregious); *Hines v. Bayer Corp.*, 2017 WL 2535709 (E.D. Mo. June 12, 2017)(same). These results flow from the Eighth Circuit's opinion in *In re Prempro*, 591 F.3d 613, which suggested that the fraudulent misjoinder doctrine would require "a level of misjoinder that was not only improper, but grossly improper." *Id.* at 624; see also *id.* (fraudulent misjoinder not relevant "absent evidence that plaintiffs' misjoinder borders on a 'sham'").

<sup>117</sup> See, e.g., *Rutherford v. Merck & Co.*, 428 F.Supp.2d 842, 851 (S.D. Ill. 2006) (characterizing fraudulent misjoinder as an "improper expansion of the scope of federal diversity jurisdiction by the federal courts"); *Abel v. SmithKline Beecham Corp.*, 2013 WL 5835404 (S.D. Ill. Oct. 30, 2013) (noting the rejection of the fraudulent misjoinder doctrine by numerous judges in the district). The hostility toward procedural misjoinder informs a hybrid removal analysis because it makes the subject matter jurisdiction inquiry even more straightforward.

<sup>118</sup> *In re Benjamin Moore & Co.*, 318 F.3d 626 (5th Cir. 2002). In *Benjamin Moore*, the Fifth Circuit concluded that it lacked jurisdiction to review the district court's remand order, but its opinion contained language indicating support for the concept of procedural misjoinder. This followed an earlier opinion in the same case in which the court denied a writ of mandamus, but noted that "it might be concluded that misjoinder of

courts in the Northern District of Texas have entertained arguments that removal should be upheld on that basis. That was true before the Supreme Court's recent personal jurisdiction activity, and tellingly it remains true even after.

The result of all of this is doctrinal confusion. Both doctrines can support a defendant's goal of achieving a partial removal to federal court in a single step. But in some districts, procedural misjoinder is entrenched and hybrid removal is unnecessary, while in others, procedural misjoinder is disfavored and hybrid removal has emerged as an attractive new argument. This confusion should be resolved by permitting the doctrine of hybrid removal to displace procedural misjoinder.<sup>119</sup> The primary reason for this relates to the fit between the actual argument being made by defendants and the doctrine being employed. When defendants resist the filing of a multi-plaintiff against them in a disfavored forum, the basis for their resistance has more to do with the location of the suit rather than its structure. Personal

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plaintiffs should not be allowed to defeat diversity jurisdiction." *In re Benjamin Moore & Co.*, 309 F.3d 296 (5th Cir. 2002). *See also* *Crockett*, 436 F.3d 529.

<sup>119</sup> This is based on an acknowledgement - but not necessarily an endorsement - of those developments. For better or worse, the Supreme Court is unlikely to rethink its current approach to personal jurisdiction anytime soon. *See* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 *Nw. U. L. Rev.* 1301, 1305 (2014).

jurisdiction, of course, relates to location, and so it more closely tracks the concern being raised. Hybrid removal also avoids difficult questions about intent. Courts applying procedural misjoinder have struggled to define what must be shown in order to trigger severance and partial removal, and many have required that defendants demonstrate that the misjoinder at issue is "egregious" or "a sham."<sup>120</sup> Part of the reason for this confusion is the perceived relationship between procedural misjoinder and fraudulent joinder.<sup>121</sup> Hybrid removal carries no such doctrinal baggage, and requires no attempt to discern the motivation of the litigants.

A final reason relates to choice of law. There is a complicated but under-appreciated choice of law question embedded in the procedural misjoinder doctrine. When assessing whether parties have been properly joined to the suit (and therefore whether they should be considered for removal purposes), should the court apply the federal joinder rules or the joinder rules of the state where the case was filed?

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<sup>120</sup> See *supra* note 113.

<sup>121</sup> Hines & Gensler, *supra* note 113, at 819 (tracing the undue influence of fraudulent joinder on procedural misjoinder analysis).

Courts who have applied the doctrine have not answered this question uniformly,<sup>122</sup> and most courts have not really addressed the issue directly.<sup>123</sup> Scholarly attention to the matter has been limited. Gensler and Hines have suggested that federal courts ought to favor the application of federal joinder rules, not as a matter of a Rules Enabling Act command, but to better serve the policy goal of policing strategic behavior on the part of plaintiffs.<sup>124</sup> It is not obvious why the removal statute, which is explicitly rooted in subject matter jurisdiction, should be read to deprive plaintiffs of the availability of state procedural rules related to joinder.<sup>125</sup> The removal statute is without question designed to vindicate policy goals, some of which relate to the protection of defendants, but even so its application has traditionally been tempered by the traditional deference to a plaintiff's choice of forum, which is partially embodied in the maxim that the statute should be

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<sup>122</sup> Compare *Coleman v. Conseco, Inc.*, 238 F.Supp.2d 804, 815-16 (S.D. Miss. 2002) (applying federal joinder rules) with *Conk v. Richards & O'Neil, LLP*, 77 F.Supp.2d 956, 971 (S.D. Ind. 1999) (applying state joinder rules).

<sup>123</sup> See Hines & Gensler, *supra* note 113, at 812 (2006) (noting that some of the foundational decisions on procedural misjoinder said little or nothing on the choice of law question).

<sup>124</sup> *Id.* at 817.

<sup>125</sup> *Id.* at 815 ("Whether the state thinks the party structure is acceptable is wholly beside the point.").

interpreted narrowly.<sup>126</sup> A full discussion of this issue is beyond the scope of this Article. The relevant point is that the doctrine of hybrid removal avoids these complications. Thanks to the command of the Federal Rules of Civil Procedure, there is no question that a federal court must analyze personal jurisdiction using the same analysis that the state court would use.<sup>127</sup> Hybrid removal thus does not represent any expansion in the scope of removability; rather, it merely facilitates expeditious consideration of personal jurisdiction and subject matter jurisdiction in a single inquiry.

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<sup>126</sup> See, e.g., *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281-82 (5th Cir. 2007) (invoking federalism to support the proposition that “[t]he removal statute is therefore to be strictly construed, and any doubt about the propriety of removal must be resolved in favor of remand”); *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (“the removal statute should be strictly construed and all doubts should be resolved in favor of remand”) (citing 14 Wright & Miller, *Federal Practice and Procedure* § 3642).

<sup>127</sup> There are a few slight exceptions to this general approach to personal jurisdiction in the federal courts. First, in cases involving parties joined under Rule 14 or 19, Fed. R. Civ. P. 4(k)(1)(B) extends the scope of personal jurisdiction 100 miles from the federal courthouse, regardless of state borders. Second, Fed. R. Civ. P. 4(k)(1)(C) allows the exercise of personal jurisdiction when authorized by a federal statute, and Congress has passed statutes permitting nationwide service of process in limited contexts. See, e.g., 28 U.S.C. §§ 1335, 2361 (interpleader); 28 U.S.C. §§ 1369(a), 1697 (mass torts); Jonathan R. Nash, *National Personal Jurisdiction* (SSRN draft) at 14-15 (discussing these and others). The other current extension of personal jurisdiction in federal courts, Fed. R. Civ. P. 4(k)(2), is not relevant to this discussion because it applies only to federal question cases. In response to the recent changes in personal jurisdiction doctrine, however, some commentators have proposed modifications to this rule to expand the scope of federal personal jurisdiction in diversity cases. See *id.*; Borchers, *supra* note 21; Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, \_\_ VA. J. INT’L. L. \_\_ (forthcoming).

### *B. Federalism and Restraint*

Even though it has some advantages over existing doctrines, and even though it may promote judicial efficiency, hybrid removal should be not available as a procedural mechanism in every case. Instead, principles of judicial federalism will often caution in favor of restraint. This section explains the reasons why restraint is warranted, and the next section develops an account of how that restraint should operate in practice. Concerns about judicial federalism led some federal appellate courts to adopt the firm rules regarding the primacy of subject matter jurisdiction that were at issue in *Ruhrgas*.<sup>128</sup> It must of course be noted that the United States Supreme Court concluded that such inflexible rules were unwarranted. In reaching that conclusion, however, the Court cautioned that “a State’s dignitary interest bears consideration when a district court exercises discretion in a case of this order.”<sup>129</sup> In other words, the power to resequence jurisdictional decisions is not absolute, and

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<sup>128</sup> *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998) (en banc), *rev’d*, 526 U.S. 574 (1999).

<sup>129</sup> *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999).

should be informed not just by the interests of the federal courts, but also by the countervailing interests of the state courts.

Much of the discussion of *Ruhrgas* has revolved around how far its resequencing power extends, or about how and where to draw the line between *Ruhrgas* and the constraint imposed by the predecessor case *Steel Co v. Citizens for a Better Environment*.<sup>130</sup> These discussions have not produced a uniform understanding, but central to the defense of some form of resequencing has been the recognition that it operates as a limitation on the exercise of federal judicial power. The federal court may be deciding “threshold” or “non-merits” issues in a manner that carries some preclusive effect,<sup>131</sup> but it is doing so in the service of declining adjudicative power over the merits of the claim. As a result, the power

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<sup>130</sup> 523 U.S. 83 (1998)(holding that a federal court could not reach the merits of a claim without first establishing subject matter jurisdiction). For discussions of the scope and contours of *Ruhrgas*, see Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001); Michael J. Edney, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals after Ruhrgas*, 68 U. CHI. L. REV. 193 (2001); Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301 (2011); Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099 (2013).

<sup>131</sup> For discussions of the preclusive effects of federal decisions on threshold issues made pursuant to *Ruhrgas*, see Edney, *supra* note 130; Clermont, *supra* note 130; Trammell, *supra* note 130

recognized by *Ruhrgas* has generally been characterized as a power to dismiss,<sup>132</sup> and the use of that power has been viewed as consistent with principles of judicial restraint and judicial federalism.<sup>133</sup>

Like *Ruhrgas*, hybrid removal involves the interaction between subject matter jurisdiction and personal jurisdiction, and it is in that sense unremarkable. That said, hybrid removal is remarkable in the sense that it does not culminate in the dismissal of the case before the federal court. Rather, certain claims are dismissed, but the court then asserts power to decide remaining claims on the merits. Hybrid removal thus presents a significantly different context for the application of *Ruhrgas*: resequencing to support the assertion of adjudicative power rather than mere

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<sup>132</sup> See, e.g., Trammell, *supra* note 130, at 1101 (describing the doctrine as “the ability to dismiss a case on easier grounds before taking up harder jurisdictional questions”); Clermont, *supra* note 130, at 309 (*Ruhrgas* “allows courts to avoid decision on subject-matter jurisdiction by hypothesizing its existence in order to dismiss on other threshold grounds with a binding effect”). That framing is supported, if perhaps not required, by Justice Ginsburg’s opinion in *Ruhrgas*, which speaks most often in terms of flexibility to choose among different pre-merits paths to dismissal. 526 U.S. at 1570 (“It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.”). It is also consistent with the petition for certiorari, which described the issue as “[w]hether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction.” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (quoting petition for certiorari).

<sup>133</sup> Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725 (2009); Trammell, *supra* note 130, at 1143 (“Dismissals on the basis of an allocative rule do not arrogate new powers to the federal courts.”).

dismissal. When a federal court assumes power to declare law<sup>134</sup> (or, in Alan Trammell's phrasing, to create conduct rules<sup>135</sup>), the potential for intrusion on the dignitary interests of the states is significant. Reliance on expediency alone is therefore insufficient; instead, special attention must be paid to ensure that hybrid removal does not encroach on the domain of the state courts.

### *C. Striking the Balance*

The argument thus far suggests that hybrid removal presents an appealing doctrinal fit for the concerns being pressed by defendants in many removal cases, but that restraint is warranted. This part elaborates on how that restraint might operate. Federal judges should entertain hybrid removals only when they are convinced that doing so is consistent with both pragmatism and federalism. In practice, this is most likely to be the case when the jurisdictional facts pled by the plaintiff are flatly inconsistent with the constitutional exercise of personal jurisdiction

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<sup>134</sup> Ruhrgas, 526 U.S. at 584-85 ("a court that dismisses on . . . non-merits grounds [. . .] makes no assumption of law-declaring power") (citing *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)).

<sup>135</sup> Trammell, *supra* note 130, at 1137-38.

over some claims in the suit. On the other hand, when the analysis of jurisdiction would require the federal court to pierce the pleadings or grapple with issues of state law, remand is warranted.

One of the first successful hybrid removals in the Eastern District of Missouri helps to illustrate both sides of this standard. In *Jordan v. Bayer*, the plaintiffs filed a complaint that contained claims by 94 plaintiffs against Bayer and four affiliated entities.<sup>136</sup> Only eight plaintiffs pled facts connecting their claims to the forum state of Missouri.<sup>137</sup> The remaining 86 plaintiffs were from an assortment of other states,<sup>138</sup> and all of the specific allegations relating to those plaintiffs occurred outside of the forum state.<sup>139</sup> Thus, the only forum connection for those claims was the general business activity of the defendant in the state.<sup>140</sup> After *Daimler* and

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<sup>136</sup> *Jordan v. Bayer*, 2017 WL 3006993 at \*1 (E.D. Mo. July 14, 2017). This case is one of a number of cases filed against Bayer in Missouri arising from injuries allegedly caused by the Essure medical device. See *supra* notes 89-91.

<sup>137</sup> *Id.* Seven plaintiffs were Missouri residents who had the Essure device implanted in Missouri and suffered injuries there; another was an Illinois resident who had the Essure device implanted in Missouri.

<sup>138</sup> *Id.* These other states overlapped with the corporate citizenship of the defendants, which rendered the case non-removable on its face.

<sup>139</sup> *Id.* at \*4.

<sup>140</sup> Including of course the activity of selling the device to the seven Missouri plaintiffs.

*Bristol Myers Squibb*, there can be no question that such activity is insufficient to support the constitutional exercise of personal jurisdiction, and so the plaintiff's own allegations revealed a fundamental and inescapable defect.<sup>141</sup> This is a paradigm case for hybrid removal, and the district court's decision to permit it was perfectly sensible.<sup>142</sup>

The plaintiffs in *Jordan* filed an amended complaint, and then sought reconsideration of the hybrid removal order.<sup>143</sup> To support their reconsideration request, plaintiffs relied on new factual allegations that the defendant had targeted the forum state as "ground zero" for its development of the medical device in question. These factual allegations include details about clinical trials conducted by

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<sup>141</sup> The strength of this conclusion was bolstered by a Missouri Supreme Court opinion, decided prior to *Bristol-Myers Squibb*, that held that specific jurisdiction could not be based on allegations that the defendant engaged in the same "type" of activity that gave rise to the plaintiff's claim. *State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41, 49 (Mo. 2017). *Dolan* also decided that the Missouri business registration statute did not confer consent to jurisdiction. *Id.* at 51-52.

<sup>142</sup> *But see* *Hamby v. Bayer, Corp.*, 2017 WL 3327593 (S.D. Ill. Aug. 8, 2017) (denying hybrid removal and remanding in a similar case); *Rios v. Bayer Healthcare Pharmaceuticals*, 2017 WL 3600374 (S.D. Ill. Aug. 22, 2017) (same).

<sup>143</sup> For procedural history of the case, *see* *Jordan v. Bayer Corp.*, 2018 WL 339305 at \*1 (E.D. Mo. Jan. 8, 2018)(denying reconsideration and granting leave to file amended complaint); *Jordan v. Bayer Corp.*, 2018 WL 837700 (E.D. Mo. Feb. 13, 2018) at \*1-2 (denying motion to remand based on amended complaint). In between the filing of the original complaint and the consideration of the amended complaint, the case was also transferred to a new judge due to the retirement of the judge who entered the original hybrid removal order.

doctors and at hospitals within the state,<sup>144</sup> and the central role of the St. Louis area in the overall marketing of the device.<sup>145</sup> Taken together, the plaintiffs argued that these intentional connections with the state created a sufficient link to create specific jurisdiction with respect to all claims arising from the eventual use of the device.<sup>146</sup> The district court initially denied reconsideration on technical grounds — the new allegations appeared in an amended complaint that was filed without leave — but the plaintiffs were permitted to file the amended complaint and pursue remand.<sup>147</sup>

Even after *Bristol-Myers Squibb*, the amended complaint presents a more uncertain jurisdictional case than the original complaint at issue in *Jordan*. The new facts pled in *Jordan* were explicitly designed to respond directly to *Bristol-Myers Squibb*, which noted that that the defendants did not develop the drug at issue in

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<sup>144</sup> Amended Petition for Damages at ¶ 170 C-H, *Jordan v. Bayer Corp.*, 2018 WL 339305 (E.D. Mo. Jan. 8, 2018) (No. 4:17-cv-00865), 2017 WL 5563904 (detailing clinical trials).

<sup>145</sup> *Id.* at ¶ 170 I-J (detailing marketing plan).

<sup>146</sup> *Id.* at ¶ 169 (“There is ‘specific’ jurisdiction, because Defendants used St. Louis, Missouri, to develop, create a marketing strategy for, label, or work on the regulatory approval, for Essure, and all of the Plaintiffs’ claims arise out of or relate to the Defendants’ contacts with Missouri.”).

<sup>147</sup> *Jordan*, 2018 WL 339305 at \*2.

California or create a marketing strategy there.<sup>148</sup> According to the plaintiffs, those concerns provide a “blueprint” for how to properly establish specific jurisdiction in these types of cases.<sup>149</sup> One way of resolving this uncertainty is to conclude that this understanding of *Bristol-Myers Squibb* is misguided, and that these sorts of allegations are legally insufficient. This resolution requires more than simply applying the core holding of *Bristol-Myers Squibb*. Instead, it requires a decision about how far that core holding extends, and courts facing similar decisions have produced results that are far from uniform.<sup>150</sup> Even so, the question at issue rests entirely on federal law and can be decided on the face of the complaint. Permitting a hybrid removal on this basis does not present any serious intrusion upon the domain of the state courts.<sup>151</sup> Alternatively, the source of uncertainty may derive not just from legal ambiguity as to what sort of connection is necessary to support

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<sup>148</sup> *Bristol-Myers Squibb*, 137 S.Ct. at 1778.

<sup>149</sup> *Jordan*, 2018 WL 837700 at \*4.

<sup>150</sup> *See* cases discussed *supra* notes 43-44.

<sup>151</sup> On February 13, 2017, the district judge in *Jordan* decided the renewed motion by deciding that the new allegations in the amended complaint remain “too attenuated to serve as a basis for specific jurisdiction over Bayer.” *Jordan*, 2018 WL 837700 at \*4. On that basis, the non-Missouri plaintiffs were dismissed from the suit, and the removal as to the remaining parties was then upheld based on complete diversity.

jurisdiction, but also from factual ambiguity about the actual connection that existed between the defendant and the forum state. If the jurisdictional inquiry is contested and factually-bound, the federal court should hesitate to wade too far into the consideration of a hybrid removal request. To do so is to take on a complex inquiry unnecessarily, one that might easily bleed into a consideration of issues that run to the merits.<sup>152</sup> Meanwhile, the analysis of subject matter jurisdiction remains straightforward, and indeed is even more so if procedural misjoinder arguments are no longer considered.<sup>153</sup> In this situation, then, remand is the expedient outcome. It is also an outcome that respects the domain of state courts while preserving the availability of a federal forum should the facts ultimately show an insufficient connection to sustain jurisdiction.

The approach suggested by these two cases mirrors the development of fraudulent joinder doctrine in the federal courts. Despite requests to peek through

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<sup>152</sup> For a discussion of how the resolution of personal jurisdictional issues may inevitably affect the merits of the underlying claims, see Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. Davis L. Rev. 1301 (2012).

<sup>153</sup> See discussion *supra* notes 119-127.

the pleadings and assess the underlying motivations behind a particular case structure, the federal courts have generally confined their analysis to the face of the pleadings and have dismissed claims (and thereby disregarded non-diverse parties) only when the allegations as pled reveal no possibility of relief.<sup>154</sup> Similarly, when a hybrid removal is presented, federal courts should only dismiss claims (and thereby disregard non-diverse parties) when the allegations as pled reveal no possibility of proper jurisdiction. Such an approach has the benefit of creating a symmetry between the two doctrines, but more importantly it strikes a fair balance between considerations of expediency and federalism.

As discussed in Part II, plaintiffs developed several nascent strategies to combat the impact of *Goodyear* and *Daimler* and protect their preferred forum and case structure.<sup>155</sup> Today, there are two primary survivors: pleading jurisdictional facts that link the development of the product in question to the state, and using a state's business registration statute as grounds for consent to jurisdiction. Both of

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<sup>154</sup> See *supra* notes 105-106.

<sup>155</sup> See *supra* Part II.

these push against the broad use of hybrid removal. In terms of the first, plaintiffs are searching for in-state activity by the defendant that can be used to provide a jurisdictional hook for claims brought by out-of-state plaintiffs. After *Daimler*, of course, general sales of products in the state are insufficient; instead, plaintiffs must articulate an argument that the claims asserted “arise out of” the identified activities. The amended complaint in *Jordan* reflects this trend in the pleading of complex cases,<sup>156</sup> and complaints following this trend are not good candidates for hybrid removal, at least insofar as they require development of jurisdictional facts. The same can be said for complaints pursuing the second jurisdictional strategy just described. Plaintiffs pursuing a consent strategy must rely on the state’s business registration statute, and the jurisdictional question will therefore often involve a consequential interpretation of state law.<sup>157</sup> Initially, at least, federal courts should

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<sup>156</sup> See *supra* notes 143-153.

<sup>157</sup> See discussion *supra* notes 53-60.

permit state court judges to make those interpretations, and remand provides an excellent vehicle for that kind of intersystemic judicial deference.<sup>158</sup>

#### *D. Distrust*

What will happen if plaintiffs adapt to the new jurisdictional reality and begin pleading in accordance with the strategies just discussed? Remands should become more frequent, leaving plaintiffs and defendants to determine the structure of the suit — and ultimately its location — by litigating jurisdictional facts in state court. Formally, this is a neutral result that merely affects the sequencing and location of jurisdictional decisions. And yet it is unlikely to be a result that defendants will embrace. The reason for that reveals a troubling source of the jurisdictional gamesmanship underlying these cases: defendants are interested not just in where they will litigate the ultimate merits of the claims lodged against them, but also in where they will litigate the jurisdictional issues associated with those claims. This is

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<sup>158</sup> I say “initially” here because once the statute has been given a definitive interpretation by the state, the need for deference may diminish. *See, e.g.,* State ex rel. Norfolk Southern Railway Co. v. Dolan, 512 S.W.3d 41 (Mo. 2017) (concluding that a state business registration does not establish consent to jurisdiction); Genuine Parts Co. v. Cepec 137 A.3d 123 (Del. 2016) (same). Similarly, if a federal court were to conclude that business registration statutes cannot be interpreted consistent with federal due process to extract broad consent to jurisdiction, then the question becomes one of federal law and hybrid removal again becomes appropriate.

true despite the fact that the jurisdictional standards to be applied are generally insensitive to location.<sup>159</sup> Put differently, defendants' concern with location is not about what standards will apply, but who will apply them.

Although defendants may frame their requests for hybrid removal in terms of expediency, the real underlying motivation is often a judgment that federal courts are more likely to be receptive to their personal jurisdiction arguments. This may be attributable to a general sense that state judges are more inclined to favor the exercise of adjudicative authority relative to federal courts. Empirical data on this question is relatively sparse, but lends some modest support for the proposition that federal judges may be more likely to enter personal jurisdiction dismissals.<sup>160</sup> A related explanation is a more specific concern that state judges may be resistant to enter personal jurisdiction dismissals in these types of cases. The federal districts that have seen a pattern of hybrid removals tend to overlap with state court

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<sup>159</sup> See *supra* note 127.

<sup>160</sup> Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 51-53 (1998).

jurisdictions considered by defendants as “judicial hellholes.”<sup>161</sup> That is relevant for two reasons. First, the reputations earned by these districts is presumably attributable to the behavior of both juries and judges, and so the particular judges involved may be perceived to be systematically pro-plaintiff. More controversially, the fact that these jurisdictions have positioned themselves as hospitable forums for the litigation of nationwide products liability cases has created a lot of legal business. Many lawyers — and many judges — are supported by the steady filing of cases, and the restriction of the scope of personal jurisdiction therefore constitutes a significant threat to the status quo. To the extent that the judges themselves are motivated to preserve that status quo, they may seek to undermine that threat through narrow interpretation or outright defiance. In short, what underlies much of the hybrid removal activity that has been observed recently may be a lack of trust in the willingness of state court judges to fully implement the Supreme Court’s recent personal jurisdiction decisions.

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<sup>161</sup> <http://www.judicialhellholes.org/2017-2018/executive-summary/> (identifying St. Louis, Missouri and Madison County, Illinois as “judicial hellholes”).

Distrust is a provocative hypothesis to explain the rise of hybrid removals, but it is also a vexing one. To begin, it is difficult to prove. Lawyers involved in these cases may speak casually about their motivations and strategies, but are not eager to do so formally. There are hints – prior to *Bristol-Myers Squibb*, why would Bayer continue to file hybrid removals given their paltry record of success? – but little that rises beyond conjecture. Moreover, even if proof for the hypothesis existed, it is not clear that it should have any implications for the doctrinal analysis explored here. To be sure, there are recognized doctrines that make federal courts available based on concerns about the ability of state courts to provide a neutral forum for the adjudication of particular disputes. And it should be noted that the removal statute itself may be viewed as one of those doctrines. Even so, those doctrines are responsive to systemic concerns rather than individualized suspicions. For that reason, distrust as an underlying motivation should play no role in the case-by-case determination of whether a hybrid removal should be granted.

#### CONCLUSION

The jurisdictional landscape has shifted in recent years, and litigation strategy is shifting in response. Defendants now have tools that can be leveraged to frustrate the plaintiff's choice of forum and preferred party structure. This Article has described those tools, but has also focused on a particular way that those tools are being deployed. Hybrid removal is a direct if unintended consequence of our ongoing jurisdictional revolution. In limited circumstances, it may have a useful role in promoting intersystemic expediency, but it should properly be viewed as an exception to the general approach to removability.