
NOTE

KEEPING CORPORATIONS IN THE
COURTS: A FRAMEWORK FOR
ADDRESSING JURISDICTION OVER
CORPORATE DEFENDANTS IN CLASS
ACTION LITIGATION

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I. INTRODUCTION

In a series of recent cases, the Supreme Court has made it significantly more difficult for plaintiffs to seek legal redress against corporations by limiting the power of courts to exercise personal jurisdiction over corporate defendants. Beginning in 2011, the Supreme Court limited the inquiry around where a corporation might be subject to general, all-purpose jurisdiction for claims against it.¹ Then, in 2017, in *Bristol-Myers Squibb v. Superior Court of California* (“*BMS*”), the Court constrained the ability of plaintiffs to join together to sue a corporation when those plaintiffs were harmed by the

¹ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929–30 (2011).

corporation in different states.² Importantly, these decisions left open whether these jurisdictional constraints apply to class actions.

This Note argues that because of the important role that class actions play in corporate accountability, it is essential that these limitations not be extended to the class action form. In summary, if the Rule 23 class action certification criteria are met and if the court has jurisdiction over the defendant with respect to class *representatives*' claims under current personal jurisdiction doctrine, then the court should impute jurisdiction over that defendant with respect to the claims of class *members*. Part II of the Note details the scope of the aforementioned string of cases and discusses the scholarly, judicial, and popular responses to the potential applicability of *BMS* to class actions. Part III identifies the problems with applying *BMS* to class actions, focusing on the importance of private enforcement in maintaining corporate accountability and the essential role that the class action form plays in that process. Finally, Part IV considers the legal, policy, and normative considerations associated with limiting the scope of *BMS* and proposes solutions for how to limit *BMS* in the class action context.

II. *BMS* AND THE NARROWING OF PERSONAL JURISDICTION

Over the past twelve years, the Supreme Court has limited personal jurisdiction in two doctrinal contexts. First, it narrowed courts' ability to exercise personal jurisdiction over defendants under a theory of general jurisdiction.³ Second, the Court limited the ability for courts to exercise jurisdiction

² *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 588 U.S. 255, 265 (2017).

³ General jurisdiction, or all-purpose jurisdiction, allows a court to exercise jurisdiction over a defendant for any claim against that defendant, whether or not directly related to the defendant's contacts with the forum, by virtue of the defendant's significant presence there. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–37 (1966).

under the other theory of jurisdiction, specific jurisdiction.⁴ These jurisdictional limitations culminated in *Bristol-Myers Squibb v. Superior Court of California*, which significantly constrained the ability of plaintiffs to join together in a mass action against a corporate defendant.⁵

BMS left open whether its jurisdictional constraints would apply to class actions,⁶ but soon after the opinion was issued, the legal commentariat began contemplating the likelihood that it would. District courts are far from uniform in their application of *BMS* to class actions, and only a minority of Courts of Appeals has addressed the issue. As the Supreme Court has not yet taken up the issue directly, the extent to which *BMS* applies to class actions remains doctrinally unsettled.

A. The Narrowing of Personal Jurisdiction

The Court's limitation on general jurisdiction began in 2011. Until then, when analyzing whether a defendant was subject to general jurisdiction, a court would assess whether a defendant's contacts with the forum were "continuous and systematic."⁷ However, in 2011, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court limited the "continuous and systematic" inquiry by holding that general

⁴ Specific jurisdiction allows courts to exercise jurisdiction over claims against a defendant that are related to that defendant's contacts with the state, even if those contacts themselves do not rise to a sufficient level to meet a general-jurisdiction standard. See *generally* *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁵ See *Bristol-Myers Squibb Co.*, 588 U.S. at 265.

⁶ *Id.* at 278 n.4.

⁷ See Daniel Wilf-Townsend, *Class Action Boundaries*, 90 FORDHAM L. REV. 1611, 1619 ("For the first sixty-plus years after *International Shoe*, courts throughout the country had interpreted that case's 'continuous and systematic' standard for general jurisdiction to mean that such jurisdiction was available over a defendant in any state where it had substantial long-term operations."); Maggie Gardner, Pamela K. Bookman, Andrew Bradt, Zachary Clopton & D. Theodore Rave, *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 457 (2022) ("Before 2011, plaintiffs could rely on general 'doing business' jurisdiction to establish personal jurisdiction over corporations that target their conducts towards every state.").

jurisdiction can be found only where a corporation can be deemed to be “essentially at home.”⁸ Three years later, in *Daimler AG v. Bauman*, the Court affirmed that, for a corporate defendant, this language refers almost exclusively to the corporation’s place of incorporation or its principal place of business.⁹ The result of these two cases is that, in determining whether it has general personal jurisdiction over a corporate defendant, a federal court must now limit its inquiry to whether the forum in question is that corporation’s place of incorporation or principal place of business, and not whether the corporation’s significant business presence in the forum meets the “continuous and systematic” standard.¹⁰

This limitation on general jurisdiction increased plaintiffs’ reliance on specific jurisdiction as the sole way to bring claims against a defendant in any forum that did not fall into the newly limited conception of where the defendant was “at home.”¹¹ However, soon after *Goodyear* and *Daimler*, the Court proceeded to limit the ability for courts to exercise specific personal jurisdiction over corporate defendants. Three years after *Daimler*, in *Bristol-Myers Squibb Co. v. Superior Court of California*, nearly 700 plaintiffs joined together to sue Bristol-Myers Squibb in a California state court for injuries resulting from a single drug.¹² However, of these nearly 700

⁸ *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 916, 919 (2011).

⁹ *Daimler AG v. Bauman*, 571 U.S. 117, 137–39 (2014). In fact, the Court describes the possibility of exercising general jurisdiction in a forum that is not the corporation’s place of incorporation nor its principal place of business as “an exceptional case.” *Id.* at 139 n.19.

¹⁰ See Kevin D. Benish, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1610 (2015) (“*Daimler* limited general jurisdiction under the Due Process Clause to a defendant corporation’s principal place of business or place of incorporation. In doing so, longstanding bases of personal jurisdiction in the United States have been eliminated[.]”).

¹¹ Harv. L. Rev., *Personal Jurisdiction—General Jurisdiction—Daimler A.G. v. Bauman*, 128 HARV. L. REV. 311, 318 (2014).

¹² See *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 259 (2017). It is worth noting that, prior to *Goodyear* and *Daimler*, a case like *BMS* almost certainly would have not come about because nobody would have thought to question Bristol-Myers Squibb’s susceptibility to

plaintiffs, close to 600 purchased the drug and suffered their injuries outside of California.¹³ Despite the defendant's extensive contacts with state, the Court refused to find jurisdiction over the claims of the plaintiffs who purchased and consumed the drug outside of the forum state.¹⁴ Now, as a result of *BMS*'s limitation on specific jurisdiction, plaintiffs asserting factually identical claims cannot join together in one state to litigate their claims efficiently if some of those plaintiffs' claims do not relate to the defendant's contacts with the desired forum state.

B. *BMS*'s Applicability to Class Actions

BMS was a mass action, not a formal class action under Rule 23 of the Federal Rules of Civil Procedure. In its opinion, the Supreme Court left open the holding's applicability to class actions. Justice Sotomayor, in dissent, expressed concern that the majority's limitations on specific jurisdiction might "also apply to a class action in which a plaintiff injured in the forum States seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."¹⁵

Soon after the Court issued the opinion, commentators, seeing the opinion's potential applicability to class actions, began contemplating the decision's consequences. The ramifications of applying *BMS* to class actions seemed so severe and so relevant that articles about that possibility started gracing mainstream periodicals.¹⁶ One products liability litigator even

general personal jurisdiction in California. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1275 (2017). In fact, the California state court itself originally held that it had general jurisdiction over Bristol-Myers Squibb before the case went up to the Supreme Court. Order Den. Def. Bristol-Myers Squibb Company's Mot. To Quash Service of Summons for Lack of Personal Jurisdiction 2:13-17, Sept. 23, 2013.

¹³ See *Bristol-Myers Squibb*, 582 U.S. at 259, 258-59.

¹⁴ *Id.* at 265.

¹⁵ *Id.* at 278 n.4 (Sotomayor, J., dissenting).

¹⁶ See, e.g., Richard Levick, *The Game Changes: Is Bristol-Myers Squibb the End of an Era?*, FORBES (June 11, 2017, 2:21 PM),

lamented that *BMS*'s "reiteration and reapplication of the principle that personal jurisdiction is litigant-specific may well sound the death-knell for nationwide class actions under state law, unless brought where a corporate defendant is 'at home' under [*Daimler*]." ¹⁷

Furthermore, after the opinion was issued, some legal scholars and judges began affirmatively arguing that *BMS* should apply to class actions. Judge Laurence Silberman, touted by some as "the most influential judge never to have sat on the Supreme Court," ¹⁸ penned a lengthy dissent considering whether the Supreme Court's logic in *BMS* should be extended to class actions. ¹⁹ Ultimately concluding that "logic dictates" that it should, Judge Silberman argued that, "like the mass action in *Bristol-Myers*, a class action is just a species of joinder, which 'merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate

<https://www.forbes.com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/?sh=2c05bfc2e831>

[<https://perma.cc/D85Y-L6WV>] ("Trump's travel ban may be the focus of current media interest but no recent Supreme Court decision has a potentially greater impact than *Bristol-Myers Squibb v. Superior Court of California.*"); Robert Channick & Becky Yerak, *Supreme Court Ruling Could Make it Harder to File Class-Action Lawsuits Against Companies*, CHI. TRIB. (Nov. 6, 2022), <https://www.chicagotribune.com/business/ct-supreme-court-ruling-mass-actions-illinois-0625-biz-20170622-story.html>

[<https://perma.cc/83CQ-FRTV>] ("[T]he Supreme Court opinion [will], on the whole, likely deter lawsuits against corporations. . . . [T]he new restrictions on jurisdiction may lead to a different kind of forum shopping: corporations seeking to move to states offering the protection of more favorable laws.")

¹⁷ James M. Beck, Reed Smith LLP, *Due Process Limits on Nationwide Class Actions Post-BMS v. Superior Court*, at 4 (Wash. Legal Found., Critical Legal Issues Working Paper Series No. 207, 2018), <https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/03-18BeckWP.pdf> [<https://perma.cc/7PH5-PW43>].

¹⁸ The Editorial Board, *A Judge for First Principles*, WALL ST. J. (Oct. 24, 2021), <https://www.wsj.com/articles/a-judge-for-first-principles-laurence-silberman-award-thomas-11635109580> [<https://perma.cc/P6K3-ZJ8Y>].

¹⁹ *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 305 (D.C. Cir. 2020) (Silberman, J., dissenting).

suits.”²⁰ He continued to reason that “since the requirements of personal jurisdiction must be satisfied independently for ‘the specific claims at issue,’ . . . personal jurisdiction over claims asserted on behalf of absent class members must be analyzed on a claim-by-claim basis.”²¹

Invoking similar structural arguments about class actions as a species of joinder, Professor A. Benjamin Spencer, a member of the Civil Rules Advisory Committee of the Judicial Conference of the United States, argued that “there must be personal jurisdiction over a defendant with respect to the claims of absent class members”²² because “a court must have jurisdiction over a defendant . . . to render a binding judgment against it”²³ and that, with respect “to the claims of absent, unnamed class members, . . . to the extent that such claims are unconnected with the defendant’s forum state contacts, contemporary understandings of . . . constraints on state power prevent that forum from rendering a binding, in personam judgment against the defendant on those claims.”²⁴

Federal district courts confronting this issue in the wake of *BMS* have ruled both ways on the opinion’s applicability to Rule 23 class actions. However, an empirical study taken two-and-a-half years after the opinion came down found that approximately three-quarters of district court opinions declined to extend *BMS* to class actions.²⁵ Furthermore, the only circuit courts to consider the question have ruled that *BMS* does not apply to class actions.²⁶

²⁰ *Id.* at 306 (quoting *Shady Grove Orthopedic Assocs. P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion)).

²¹ *Id.* (quoting *Bristol-Myers Squibb*, 582 U.S. at 256).

²² A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 REV. LITIG. 32, 47 (2019).

²³ *Id.* at 39.

²⁴ *Id.* at 48.

²⁵ Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action*, 129 YALE L.J. FORUM 205, 208 (2019).

²⁶ See *Fisher v. Fed. Express Corp.*, 42 F.4th 366 (3d Cir. 2022); *Lyn-gaas v. Ag*, 992 F.3d 412 (6th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020).

Most of the courts that have limited *BMS* to mass actions have invoked *Devlin v. Scardelletti*.²⁷ In that case, the Supreme Court held that “[n]onnamed class members . . . may be parties for some purposes and not for others. The label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.”²⁸ Using this framework, lower courts typically have analyzed the procedural and structural differences between mass actions and class actions, often distinguishing the two by highlighting that “each plaintiff is a real party in interest” in a mass action, whereas unnamed class members litigate through “representatives” in a class action.²⁹ Focusing on these structural differences, these courts have concluded that non-named class members should not be considered “parties” in class actions.³⁰

Notwithstanding this apparent early preference in the lower courts for limiting *BMS* to mass actions, the Supreme Court and a majority of Courts of Appeals have not yet taken up the question. But in its recent string of personal jurisdiction cases, the Supreme Court has not hesitated to circumscribe courts’ jurisdictional power, all the while purportedly applying “settled principles.”³¹ As the applicability of *BMS* to Rule 23 class actions has not been conclusively decided,³² guidance is still needed on the legal, policy, and normative considerations involved in the issue.

²⁷ *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

²⁸ *Id.* at 9–10.

²⁹ *See, e.g.*, *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018). *See also* *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126–27 (D.D.C. 2018) (synthesizing case law that limited *BMS* to mass actions), *aff’d*, 952 F.3d 293 (D.C. Cir. 2020).

³⁰ *See, e.g.*, *Mussat v. Iqvia, Inc.*, 953 F.3d at 441, 447 (7th Cir. 2020).

³¹ *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255 at 264 (2017).

³² *See* 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 6:30 (6th ed. 2022) (“The ultimate impact of *Bristol-Myers Squibb* on nationwide class actions remains unsettled and will likely be so until the Supreme Court weighs in further.”).

III. THE IMPLICATIONS OF APPLYING *BMS* TO CLASS ACTIONS

Extending *BMS* to class actions would severely compromise the ability of private plaintiffs to use litigation as a tool to effectuate United States regulatory policy. Understanding the extent of these ramifications requires a consideration of two factors: first, the importance that private litigation, and class actions in particular, plays in corporate accountability; and second, the inadequacy of the resultant state of litigation should *BMS*'s limitations on specific jurisdiction be extended to the class action form.

A. The Importance of Class Actions in Corporate Accountability

It is essential that *BMS*'s limitations on aggregate litigation not be extended to class actions. Extending *BMS* to class actions would limit the size of class actions brought in states where the defendant is not subject to general jurisdiction by restricting the size of the class to just those individuals whose injuries arose out of the defendant's contacts with that one state. The size of class actions, and their resultant high-stakes nature, makes them a powerful deterrent to corporate misconduct. As a result, extending *BMS* to apply to class actions would directly undermine the primary element of class actions that makes them so effective at holding corporations accountable.

1. The Importance of Private Litigation in Corporate Regulation

Lawsuits brought by private plaintiffs serve an essential regulatory function in the United States. In fact, litigation is often called "*de facto* regulation."³³ There are two distinct features of the American regulatory system that foster the need

³³ MandA.TV, *Bill Savitt – Wachtell, Lipton, Rosen & Katz*, YOUTUBE (Feb. 19, 2016) (interview with William Savitt), <https://www.youtube.com/watch?v=csiySHar2RI> [<https://perma.cc/75M5-H3P6>].

for private litigation to enforce regulatory aims. First, the American system of regulatory enforcement, unlike the European system, relies on *ex post* penalties for violations of regulatory provisions. Instead of regulating “consequences,” most other developed countries regulate “entry.”³⁴ In other words, these countries generally require advanced administrative approval from a centralized, government bureaucracy, both when opening new businesses and when introducing new products into the market.³⁵ Second, the American *ex post* regulatory approach differs from the European approach in that the American system relies on a diffuse set of regulators, both public and private, in order to enforce regulatory objectives.³⁶ Importantly, this reliance on private litigation is frequently a deliberate legislative decision made in statutory implementation.³⁷

As a result of these two features, in the United States, the “[r]egulation of wrongdoing by private parties is not merely . . . [a] supplement to public enforcement by regulators,” but is in an “institutional feature of our public law.”³⁸ In fact, one empirical study found that “where public and private litigation enforcement mechanisms are coupled, private enforcers bring over ninety-five percent of enforcement actions.”³⁹ Due to the essential role that private lawsuits play in regulatory enforcement, robust and powerful mechanisms for bringing private causes of action are needed to maintain accountability

³⁴ Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007).

³⁵ *Id.* at 375. Even in the United States, though, there are certain exceptions to the *ex-post* default approach. For example, the Food and Drug Administration requires pharmaceutical companies to ask permission and receive approval before putting a drug on the market. See 21 C.F.R. § 314.107 (2016).

³⁶ J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1140 (2012).

³⁷ Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Intuitive Approach*, 162 U. PENN. L. REV. 1543, 1547 (2014).

³⁸ Glover, *supra* note 36, at 1141.

³⁹ Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 U. VA. L. REV. 1483, 1494 (2022) (citing SEAN FAHRANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 10 (2010)).

over corporate defendants subject to these regulatory schemes.

2. The Class Action Form and Corporate Accountability

Class-action litigation is a particularly effective form of regulation over corporations. Some scholars even argue that the fact that class actions effectively deputize “private attorneys general” to bring suits against corporations makes “[c]lass action lawsuits . . . the most effective way to hold corporations accountable.”⁴⁰

The history of the class action is directly tied into its importance. The modern class action “developed in response to the inability of centralized government institutions to comprehensively address a number of widespread wrongs.”⁴¹ In the words of Chief Justice Burger, “[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”⁴² Today, class actions are the “central mechanism of enforcement for a broad range of laws, including those governing products liability, securities fraud, consumer fraud, and antitrust violations.”⁴³

Furthermore, class actions may constitute the *only* viable form of regulatory litigation in certain areas. Because litigation is very expensive, often it is unlikely that a sufficient number of plaintiffs will bring individual claims against a given corporation to constitute a legitimate threat to that corporation’s financial or reputational wellbeing. This idea is frequently referred to as the existence of a “negative value suit.”⁴⁴ The concept of the “negative value suit” refers to the idea that when an individual is harmed to a small enough extent that the damage award for his or her injury alone would

⁴⁰ BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 3 (2019).

⁴¹ Glover, *supra* note 36, at 1163.

⁴² *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980).

⁴³ Glover, *supra* note 36, at 1163.

⁴⁴ *Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).

not make it worth it to undergo the expense necessary hire a lawyer and bring a lawsuit, the individual suit will likely never be brought in the first place.⁴⁵ The economic reality of negative value suits means that individuals may not be afforded the opportunity to vindicate their legal rights at all without the availability of the class action form.⁴⁶ As Judge Posner once remarked in an opinion affirming class certification for a class of 17 million low-value claims, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”⁴⁷

The aggregative function of class action litigation can also help balance the financial investment in a suit between individual plaintiffs and large, corporate defendants, even if the individual suit might be profitable on its own.⁴⁸ If a plaintiff sues a pharmaceutical company because its drug allegedly caused \$200,000 of harm to the plaintiff, the plaintiff’s lawyer who is working on a 30% contingency fee will invest up to \$60,000 in the suit. The pharmaceutical company, however, stands to lose \$200,000, so, it will invest up to \$200,000 just to defend against the individual plaintiff. But if the company knows that thousands of individuals have consumed the drug and potentially have been injured by it, it will invest significantly more than \$200,000, because once causation and liability are established in the first suit, it will be far easier for a plaintiff to establish these elements in later suits.⁴⁹ However, if a class action attorney with a 20% contingency fee

⁴⁵ FITZPATRICK, *supra* note 40, at 5.

⁴⁶ See Gardner et al., *supra* note 7, at 465 (“Denying plaintiffs a forum in which they can sue collectively can, in some cases, be equivalent to denying them any forum at all.”); see also *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 246 (2013) (Kagan, J., dissenting) (observing that preventing plaintiffs from proceeding collectively can make the “effective vindication” of their statutory rights “prohibitively expensive”).

⁴⁷ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁴⁸ The following example approximates one used in FITZPATRICK, *supra* note 40, at 64–66.

⁴⁹ In fact, the pharmaceutical company may be collaterally estopped from relitigating the issue of causation at all, depending on the exact facts of the case. See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 332 (1979).

represents a class of 500 plaintiffs, each with \$200,000 of damages, the attorney will be willing to invest up to \$20,000,000 in the suit. In this way, the economies of scale facilitated by the aggregative function of class actions allow potentially profitable suits to be “brought and handled in a manner commensurate with its magnitude.”⁵⁰

An additional, non-economic benefit of class actions is that they allow individuals who are aware of corporate misdeeds to vindicate the rights of individuals who may have suffered identical harms but are unaware of it. When individuals suffer the kinds of small harms that might be present in a negative value suit, those victims may not even realize that they were harmed at all.⁵¹ But because the class action form allows for representative litigation, individuals who do become aware of harm (say, in a consumer fraud or mislabeling case) can represent those who are unaware of the harm.⁵² For example, in 2021, Zoom Video Communication, Inc. settled a class action lawsuit against it after plaintiffs alleged that Zoom was sharing users’ privacy data without authorization.⁵³ It stands to reason that many of the users who had a Zoom subscription between 2016 and 2021 (the definition of the class represented) were unaware that their private information was used without authorization. But because the class action form allows for representative litigation, the named plaintiffs (or perhaps, their lawyers) who were aware of the breach were able to effectuate relief for those who were not.⁵⁴

⁵⁰ Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Action Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

⁵¹ FITZPATRICK, *supra* note 40, at 60.

⁵² *Id.* at 61.

⁵³ Jonathan Stempel, *Zoom Reaches \$85 Million Settlement Over User Privacy, “Zoombombing,”* REUTERS (Aug. 2, 2021, 4:05 PM), <https://www.reuters.com/technology/zoom-reaches-85-mln-settlement-lawsuit-over-user-privacy-zoombombing-2021-08-01/> [https://perma.cc/E3EP-VSTR].

⁵⁴ As a part of the settlement, any individual who had a Zoom subscription between March 30, 2016 and July 30, 2021 could file a claim online for \$25. Jay Peters, *Zoom Might Pay You \$25 as Part of a Class-Action Settlement*, THE VERGE (Dec. 2, 2021, 5:56 PM),

These economic and representative features of class actions make them necessary for enforcing and deterring corporate wrongdoing.⁵⁵ Class actions “deter by making defendants pay for, and thus internalize, the costs of their actions. But for cost internalization and deterrence to occur, a class action must be a reality.”⁵⁶ Furthermore, “[a]lthough consumer class actions generally address small individual claims, they are nevertheless significant protective and preventive mechanisms in a world where interactions with economically and politically powerful corporations are such a pervasive aspect of people’s daily life.”⁵⁷ Without the unique aggregative feature of the class action form, there is a “real risk . . . that serious wrongdoing at the corporate level will go unchecked for want of a champion to respond to a common problem.”⁵⁸

B. The Insufficiency of General Jurisdiction

Were *BMS* extended to class actions, a nation-wide class could only bring suit in a state where the defendant was subject to general jurisdiction. General jurisdiction provides an inadequate substitute for the ability to base a class action suit on specific jurisdiction. Reliance on general jurisdiction is problematic for two reasons: first, there may be no forum where the suit could be heard at all; and second, it would incentivize jurisdictions to adopt defendant-friendly choice-of-law rules and substantive law.

<https://www.theverge.com/2021/12/2/22814758/zoom-class-action-lawsuit-zoombombing-encryption-settled/> [<https://perma.cc/TB8L-4GKR>].

⁵⁵ See *infra* Section III.C for a discussion of why MDL does not solve these issues.

⁵⁶ 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 1.6 (6th ed. 2022).

⁵⁷ Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 100–01 (2004).

⁵⁸ Richard A. Epstein, *Class Actions: The Need for a Hard Second Look*, 4 CIV. JUST. REP. 5 (Mar. 2002), https://media4.manhattan-institute.org/pdf/cjr_04.pdf [<https://perma.cc/CF95-QFDP>].

1. Potential Lack of a Forum at All

Limiting the fora available for multi-state class actions to only those states that have general jurisdiction over the defendant could result in a situation where there is no forum in the United States that could adjudicate the dispute. The non-existence of a forum with general jurisdiction to adjudicate a given dispute that might otherwise be amenable to specific jurisdiction could occur for three reasons.

First, for a foreign corporation, there may be no forum in the United States where the corporation is subject to general jurisdiction, even if the corporation has significant contacts with the United States.⁵⁹ For example, in *Douglass v. Nippon Yusen Kabushiki Kaisha*, the Fifth Circuit held that a global shipping company, which was headquartered in Japan, had extensive contacts with the United States, and had litigated in United States courts over 30 times, could not be sued in any district court in the United States for deaths it caused to United States soldiers overseas.⁶⁰ Specific jurisdiction was unavailable because the claims against the corporation did not arise out of any of its United States contacts. And because the corporation was headquartered and incorporated in Japan, and thus not “at home” anywhere in the United States, there was no forum that could exercise general jurisdiction over the defendant.⁶¹

Second, for a suit against two defendants who together caused harm, there may be no forum where both defendants would be subject to general jurisdiction, even though there may be one or more fora where both would be subject to specific jurisdiction.⁶² Consider a hypothetical in which there is a second *BMS* defendant: a pharmaceutical distribution company incorporated in Texas and headquartered in Oklahoma that distributed the harmful drug to California. Under today’s law, both *Bristol-Myers Squibb* and this hypothetical

⁵⁹ Gardner et al., *supra* note 7, at 461.

⁶⁰ See *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 229 (5th Cir. 2022).

⁶¹ *Id.* at 234–35.

⁶² Gardner et al., *supra* note 7, at 462.

company would be subject to specific jurisdiction in California for the injuries caused to California plaintiffs. However, there is no state in the country where both companies would be subject to general jurisdiction.⁶³ Thus, a lawsuit against both defendants, whether a class action or not, could only proceed jointly against both defendants under a theory of specific jurisdiction.

Finally, there may be no forum that can hear a dispute not only because of the doctrine of personal jurisdiction, but because of the doctrine of *forum non conveniens*. Each state has its own law of *forum non conveniens*, and many state courts apply it to dismiss cases against at-home defendants when the court determines that the dispute would be more properly heard elsewhere.⁶⁴ This practice is particularly prevalent in prominent “at-home” jurisdiction states like Delaware and New York, and is used not just in states of incorporation, but also in states where corporations maintain their principal places of business.⁶⁵ As a result, even if a multi-state class action were to bring suit in a state where the defendant was subject to general jurisdiction, it is possible that that forum would choose not to hear the dispute in question.

2. Incentives to Create Defendant-Friendly Jurisdictions

Second, and more broadly, limiting personal jurisdiction in class actions to defendants’ home states most likely will lead to the development of defendant-friendly law in two ways.⁶⁶

First, overreliance on general jurisdiction would incentivize jurisdictions to adopt forum-law-friendly choice-of-law rules.⁶⁷ States would effectuate this by changing their choice-

⁶³ In this example, Bristol-Myers Squibb could be subject to general jurisdiction in New York or Delaware, and the hypothetical company could be subject to general jurisdiction in Texas and Oklahoma.

⁶⁴ Gardner et al., *supra* note 7, at 464. Presumably, the forum that the court determines would be more proper for the dispute would be one that could exercise specific jurisdiction over the defendant.

⁶⁵ *Id.*

⁶⁶ *Id.* at 458.

⁶⁷ *Id.* at 467.

of-law rules to favor a presumption of *lex fori* (law of the forum), rather than *lex loci* (law of the place of injury).⁶⁸ Such a change actually occurred in Michigan, just as one example.⁶⁹ As a result, in cases against Michigan automotive manufacturers involving car accidents that occurred in other states, Michigan courts have found that “those states’ interests in having their law applied to claims brought by their residents for in-state accidents [do] not overcome Michigan’s interest in applying Michigan law to Michigan car manufacturers.”⁷⁰

With choice-of-law rules in place that favor the law of the forum, putative forum states are incentivized to develop defendant-friendly substantive law. The development of the law in this direction is not only possible, but probable, because “[w]hen states’ courts are filled with cases brought by out-of-state plaintiffs against local corporate defendants,” states will naturally “adopt laws protective of those interests.”⁷¹ For example, Michigan also developed very defendant-friendly products-liability law,⁷² which its state courts then applied to cases involving resident automobile manufacturer defendants.⁷³

⁶⁸ It is also worth noting that such a change would apply in federal court as well, as federal courts sitting in diversity must apply the choice-of-law doctrine of the forum state. See *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941).

⁶⁹ Gardner et al., *supra* note 7, at 470.

⁷⁰ *Id.* It is worth noting that there are due process limits on applying *lex fori* to controversies that have very little connection with the forum in question. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985). That being said, presumably applying the law of the forum to a controversy involving a *resident* defendant would meet the requisite “state interest[]” required to comport with Due Process. *Id.* at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

⁷¹ *Id.* at 469.

⁷² *Id.* at 470–71.

⁷³ *Id.* at 472 (“Once choice-of-law rules point in the direction of the forum state’s law . . . , then all of the other locally friendly substantive laws—like limitation on punitive damages, strict liability, or respondeat superior—come in as well. Indeed, even if a state court finds that another state’s substantive law applies, it may nevertheless apply its local law on issues like damages limitations.”).

This defendant- and corporation-friendly shift in the law creates a “bias favoring defendants” that is particularly problematic when plaintiffs are seeking recourse against corporate defendants.⁷⁴ These developments not only disadvantage out-of-state plaintiffs who are forced to sue a corporate defendant in its home jurisdiction, but they might discourage plaintiffs from suing at all.⁷⁵

C. The Insufficiency of MDL as an Alternative Solution

Due to the aggregative features of multidistrict litigation (“MDL”) and its increasing importance in the federal docket in areas like products liability and mass torts, MDLs might seem like a tempting alternative to class actions. This is especially so because MDLs face far fewer restrictions with respect to personal jurisdiction than do class actions and mass actions.⁷⁶ However, despite the many positive features of MDLs, they have several shortcomings and are different enough from class actions that they should not be considered a viable substitute.

1. MDL’s Built-In Limitations

There are two primary structural limitations with MDL. First, MDLs can only consolidate cases in federal court, and not cases in state court.⁷⁷ Thus, its ability to cure piecemeal litigation is significantly limited, especially in state-law-dominated areas like products liability. While it is true that a case that is removed to federal court can then be transferred into an MDL, MDLs would be severely impaired as a class-action consolidation tool if *BMS* were extended to class actions. Such an extension would force class actions to proceed on a state-

⁷⁴ Mehren & Trautman, *supra* note 3, at 1147.

⁷⁵ Gardner et al., *supra* note 7, at 472.

⁷⁶ See *infra* Section III.C.2 for a discussion of personal jurisdiction in MDL.

⁷⁷ See 28 U.S.C. § 1407(a) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”).

by-state basis, and it is quite possible that these smaller class actions—limited only to those plaintiffs harmed in a single state—would not meet the requirements for federal subject matter jurisdiction under the Class Action Fairness Act (CAFA),⁷⁸ thus making the actions unremovable to federal court, and therefore unable to be consolidated into an MDL.

Second, MDL only applies to “pretrial proceedings,”⁷⁹ and thus cannot extend to a trial on the merits. As a result, a suit that might benefit from a jury trial (for example, one involving a corporation accused of systemic gender discrimination⁸⁰) could not benefit from an aggregated jury trial via MDL, whereas it could through the class action form.

2. Resulting Problems with MDL

While, in theory, MDL only applies to “pretrial proceedings,” “it is the worst-kept secret in civil procedure that the MDL is really a *dispositive*, not pretrial, action.”⁸¹ This is because the MDL court retains the power to dismiss suits and authorize settlement. Most MDLs are either dismissed or settled, and fewer than three percent of suits transferred into MDLs are ever remanded.⁸²

The dispositive nature of MDLs, in conjunction with the personal jurisdiction rules that apply to them, may result in due process issues. The current law of personal jurisdiction in MDLs is that the transferring court must have personal jurisdiction over the defendant, but the transferee court does not.⁸³ Thus, many suits that go into MDLs proceed to final

⁷⁸ See 28 U.S.C. § 1332(d)(2) (requiring a minimum amount in controversy of \$5 million for class actions to qualify for federal subject matter jurisdiction).

⁷⁹ 28 U.S.C. § 1407(a). See also *infra* Section II.C.2 for a discussion qualifying MDL’s limitation to “pretrial proceedings.”

⁸⁰ See, e.g., *Wal-Mart v. Dukes*, 564 U.S. 338 (2011).

⁸¹ Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017).

⁸² Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1169 (2018).

⁸³ *Id.* at 1169–70 (2018).

judgments in front of courts that have no personal jurisdiction to hear those suits in the first place. Any legal change that would encourage a push of more suits into MDLs—such as a limitation on the use of class actions—would exacerbate these due process issues.

Another, perhaps bigger, issue is that plaintiffs lack agency in MDLs. Once suits are transferred into an MDL, “the plaintiff exercises functionally very little control over the litigation.”⁸⁴ Furthermore, the fact that these suits can be transferred to any district court in the country means that plaintiffs may be forced to defend themselves in foreign and unrelated fora, a problem that the doctrine of personal jurisdiction attempts to combat.⁸⁵ Illustrating these problems, one district judge observed, “something is lost when Mrs. Smith, who is injured by ingesting a drug in Columbus, Georgia, does not have the opportunity to tell her story here at home but must be relegated to ‘Plaintiff number X’ in some settlement grid in a faraway courthouse by a faceless judge.”⁸⁶

Finally, for plaintiffs and the litigation system as a whole, MDL does not solve the problems associated with the negative value suit.⁸⁷ Because MDLs consist of consolidated individual lawsuits that were already brought in court, a lawyer would have to be willing to bring that initial, *individual* suit in the first place before that suit got transferred into an MDL. By contrast, the class action form allows plaintiffs and lawyers to consider the economics of bringing suit on behalf of a group of plaintiffs *ab initio*.

For these reasons and for the structural reasons discussed above, corporate defendants tend to prefer MDL to class

⁸⁴ *Id.* at 1224. While this may be true in class actions as well, plaintiffs have the opportunity to opt out of class actions for money damages. Fed. R. Civ. P. 23(c)(2)(B). On the other hand, plaintiffs who bring individual suits may have their actions transferred into an MDL without their consent.

⁸⁵ See *infra* Section IV.A.1 for a discussion of the goals and values of the doctrine of personal jurisdiction.

⁸⁶ Letter from Judge Clay D. Land, U.S. Dist. Ct. J. for the Middle Dist. of Ga., to Professor Francis E. McGovern, Duke Law Sch. (Oct. 29, 2010), quoted in Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 57 (2021).

⁸⁷ See *supra* Section III.A.2.

actions.⁸⁸ This is because “MDL allows defendants to avoid the costs of duplicative litigation without the risk that a single classwide verdict will impose firm-threatening liability—a prospect that defendants often argue forces them to settle even questionable claims once a class is certified.”⁸⁹ Thus, any doctrinal changes that reduce the amount of suits that are brought as class actions and that increase the amount of suits that end up in MDL are changes that would both benefit corporate defendants and undermine the power of private litigation in upholding corporate accountability.

IV. PROPOSED SOLUTION

Whether *BMS* applies to class actions remains an open question, and the lower courts are in disagreement about the case’s application.⁹⁰ Doctrinal clarity is needed about the limits of the specific-jurisdiction inquiry involving absent class members. That clarity could be achieved through a form of jurisdictional imputation, whereby if the court has personal jurisdiction over the defendant with respect to the claims of the class representatives, the court imputes personal jurisdiction over that defendant with respect to the claims of absent class members. The legal basis for imputation could be an amendment to the Federal Rule of Civil Procedure or a judicial opinion. However, before considering these solutions, it is worth considering why imputation does not offend the values and principles that underly the doctrine of personal jurisdiction as it has developed to this day.

A. Why Impute?

A consideration of the values and goals that animate the doctrine of personal jurisdiction, together with the requirements of valid class certification, demonstrates that the imputation of personal jurisdiction over the claims of absent class members when the claims of their representatives are

⁸⁸ Bradt, *supra* note 12, at 1267.

⁸⁹ *Id.*

⁹⁰ *See supra* Section II.B.

properly before the court is consistent with values that animate the doctrine of personal jurisdiction.

1. The Justifications for Personal Jurisdiction

The Supreme Court has grounded the doctrine of personal jurisdiction, and its resulting limitations on a court's power to adjudicate a dispute, on two justifications: due process and federalism.⁹¹ Over the past 40-or-so years, as opposed to analyzing these two separately and independently of each other, the Supreme Court has offered a useful multi-factor framework for "reasonableness" that successfully weaves together both of these considerations.⁹² In particular, these factors adequately take into account the federalism concerns of personal jurisdiction in a way that the minimum contacts inquiry—the actual doctrinal standard for establishing personal jurisdiction—alone does not.⁹³

While many of these factors were rooted in earlier cases, they are most explicitly stated in *World-Wide Volkswagen Corp. v. Woodson*.⁹⁴ The factors to be considered are (i) the burden on the defendant, (ii) the forum state's interest in adjudicating the dispute, (iii), the plaintiff's interest in obtaining convenient and effective relief, (iv) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (v) the shared interest of the several states in furthering fundamental substantive social policies.⁹⁵ A consideration of how jurisdictional imputation would implicate each of these factors in the context of a properly certified class

⁹¹ See *Ford Motor Co. v. Montana Eighth Judicial District*, 141 S.Ct. 1017, 1025 (2021).

⁹² Gardner et al., *supra* note 7, at 478.

⁹³ *Id.* at 475–79 (explaining how the fairness factors adequately address the fairness considerations associated with due process while also considering balance of interests among different states in a way that a single-state-focused, minimum contacts inquiry does not).

⁹⁴ 444 U.S. 286 (1980).

⁹⁵ *Id.* at 292. See *infra* Section IV.A.3 for a more thorough discussion of these factors.

affirms that imputation is consistent with the values that underlie due process.⁹⁶

2. The Requirements of Class Certification

Before discussing why jurisdictional imputation for a properly certified class does not offend due process or federalism justifications of personal jurisdiction, it is worth briefly going over what is required to properly certify a class. Class certification, detailed in Rule 23 of the Federal Rules of Civil Procedure, has four requirements that apply to any type of class action and two additional requirements for a class seeking a damages award from, rather than an injunction against, a defendant.⁹⁷

In order to certify any class, the class must meet the following requirements⁹⁸: (i) *numerosity*, such that “joinder of all members is impracticable”; (ii) *commonality*, which exists when “there are questions of law or fact common to the class”; (iii) *typicality*, meaning the claims of the class representatives are “typical of the claims . . . of the class”; and (iv) *adequacy of representation*, meaning that the class representatives will “fairly and adequately protect the interests of the class.”⁹⁹

Furthermore, a class seeking monetary damages has two additional requirements: (i) *predominance*, meaning that “the questions of law or fact common to class members predominate over any questions affecting only individual class members”; and (ii) *superiority*, meaning that the class action form “is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹⁰⁰

3. The Merits of Imputation

The imputation of jurisdiction over absent class members in a properly certified Rule 23 class action implicates each of

⁹⁶ See *infra* Section III.A.3.

⁹⁷ See Fed. R. Civ. P. 23(a).

⁹⁸ A commonly used short-hand is offered for each requirement for ease of reference.

⁹⁹ Fed. R. Civ. P. 23(a).

¹⁰⁰ Fed. R. Civ. P. 23(b)(3).

the “reasonableness factors” above in a way that is consistent with the values that animate the doctrine of personal jurisdiction.¹⁰¹

i. The Burden on the Defendant

The burden on the defendant is the primary concern animating the due process justification for personal jurisdiction.¹⁰² It is also the factor that most clearly supports imputing jurisdiction over absent class members. In a properly certified class action, the defendant would already be in court, defending itself against the claims on which the class was certified. Because of the *commonality* and *typicality* requirements, any absent class members’ claims would necessarily have to bear sufficient factual similarity¹⁰³ to the representatives’ claims to avoid being meaningfully additionally burdensome to defend against those added claims. Furthermore, in a suit for damages, these factually parallel claims would have to *predominate* over any other claims, further minimizing any additional burden.

It is true that by allowing class certification, the defendant has to litigate against a potentially higher damages award. However, this factor is not focused on that kind of burden; instead, it is focused on “protect[ing] the defendant against the burdens of litigating in a *distant or inconvenient forum*.”¹⁰⁴ In this context, a defendant would already be litigating in the forum in question, and thus adding the claims of class members who were harmed in other states would not further burden the defendant within the meaning of how this factor is considered by the courts.

¹⁰¹ The analysis acknowledges that, doctrinally, satisfaction of the fairness factor is not sufficient to establish jurisdiction; instead, it is using these factors as a way to demonstrate how jurisdictional imputation would be consistent with the underlying values that animate the doctrine of personal jurisdiction. *See generally, supra* Section IV.A.1.

¹⁰² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

¹⁰³ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011).

¹⁰⁴ *World-Wide Volkswagen*, 444 U.S. at 292 (emphasis added).

ii. The Forum State's Interest in Adjudicating the Dispute

The forum state's interest in adjudicating a dispute does not clearly cut in favor of jurisdictional imputation, but it does not clearly cut against it either. This factor asks whether the forum state has an interest in adjudicating the dispute to protect its own citizens or to vindicate its own laws.¹⁰⁵ One might argue that the forum state has proportionally less interest in adjudicating a dispute as more out-of-state class members are added, but this is not necessarily the case. While it is true that the forum would be providing relief to class members, the claims that are being adjudicated are those of the class representatives, which are required to be *typical* of the class as a whole. Thus, the forum state is primarily adjudicating the claims of the class representatives. Furthermore, if the class representatives' claims were subject to specific jurisdiction in the forum, then presumably the forum would have an interest in adjudicating their claims. It is not clear how adding additional claims belonging to absent class members would lessen the forum state's initial interest in adjudicating claims of its citizens.¹⁰⁶

iii. The Plaintiff's Interest in Obtaining Convenient and Effective Relief

A consideration of the plaintiff's interest in convenient and effective relief strongly counsels towards allowing jurisdictional imputation. This factor must be analyzed through the

¹⁰⁵ See *McGee v. International Life Ins. Co.*, 335 U.S. 220, 223 (1957); *Asahi Metal Industry Co., Ltd. v. Superior Ct. of Cal.*, 480 U.S. 102, 114–15 (1987).

¹⁰⁶ It is true that imputation might undermine the interest of other potential forum states in adjudicating disputes involving their citizens. However, the case that originated this factor, *McGee v. International Life Ins. Co.*, made clear that this inquiry really just concerns the legitimacy of the forum in question to hear the dispute and is not a balancing test among potential fora. See *McGee*, 335 U.S. 220, 223 (1957) (only considering California's potential interest in hearing a dispute involving its citizen, and not considering Texas's potential countervailing interest in hearing the dispute despite the defendant's residency in Texas).

proper lens, using the absent class members as the plaintiffs in question, because it is their claims over which a court will impute jurisdiction. Class actions frequently are the most effective way to bring suits against corporate defendants, and in certain areas of the law, they may be the only effective way to bring suit against a corporate defendant.¹⁰⁷ And class actions offer an extremely convenient way for courts to afford relief to plaintiffs: in most class actions, if class members do not affirmatively opt out, they can partake in the relief.¹⁰⁸ In other words, the class representatives, who are required to be able to *adequately represent* the members, are able to do all the work while the class members can simply wait for the judgment or settlement.

But when viewing the absent class members jointly as a group, the “convenience” conferred by a class action becomes even more critical. If a court does not impute jurisdiction over these class members, they have two options for bringing their claims. The first is to bring multiple class actions, each only containing plaintiffs who were injured in the forum state. Bringing multiple class actions, as opposed to one single class action, in order to vindicate the rights of the same group of plaintiffs clearly points against convenience. The other option is to bring the class action in a state where the defendant is subject to general jurisdiction (assuming such a state exists at all¹⁰⁹). Unless a plurality of class members already resides in this state, then being forced to bring the class action in this state is less convenient.

iv. The Interstate Judicial System’s Interest in Obtaining the Most Efficient Resolution of Controversies

As a general statement, authorizing class actions to adjudicate the claims of more individuals contributes to the efficiency of the interstate judicial system in the resolution of

¹⁰⁷ See *supra* Section III.A.2.

¹⁰⁸ They may have to file a claim to receive this relief, but in modern times, this can usually be done fairly easily on the internet.

¹⁰⁹ See *supra* Section III.B.1.

controversies. When the claims certified are common to the class, and especially when those common claims predominate over individual claims, any separation of the litigation based purely on jurisdictional grounds would necessarily result in piecemeal and duplicative litigation.¹¹⁰ This is exacerbated by the fact that class members have to be so *numerous* as to make joinder impracticable, meaning that not certifying the class would not only result in duplicative litigation, but lots of it. It is also worth noting that due to the aforementioned shortcomings of MDL,¹¹¹ MDL should not be considered a cure-all for piecemeal litigation.

This factor is also sometimes interpreted to consider procedural issues such as the location of witnesses and evidence. It is true that for individuals who were harmed out of state as a result of out-of-state contacts, witnesses and evidence for those individuals will likely not be located in the forum state. However, if their claims satisfy *commonality*, and if the representatives' claims are *typical*, then the in-state witnesses and evidence that authorized reasonable specific jurisdiction in the first place should be sufficient to resolve the claim of the out-of-state class members.

v. The Shared Interest of the Several States in Furthering Fundamental Substantive Social Policies

This factor considers the “common interest of all sovereigns in promoting substantive social policies.”¹¹² Specifically, this factor considers which forum, among many, is most appropriate for the states' *common interest* in the furthering of substantive social policies,¹¹³ as opposed to which state is

¹¹⁰ Gardner et al., *supra* note 7, at 463.

¹¹¹ See *supra* Section III.C.

¹¹² Harlow v. Children's Hosp., 432 F.3d 50, 68 (1st Cir. 2005) (quoting United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F.2d 1080, 1088 (1st Cir. 1992)).

¹¹³ *Id.* See also Kulko v. Superior Court of California, 436 U.S. 84, 98 (1978).

more interested in vindicating its *own* substantive law.¹¹⁴ At the very least, if the class's claims satisfy *commonality*, and the class representative's claims satisfy *typicality*, then in choosing among different fora where the suit could be brought, it is not apparent why broader class certification would counsel against this factor.

However, there is also an argument that broader class certification actually is necessary for the interstate judicial system as a whole to vindicate substantive social policies. Considering the aforementioned discussion of the effectiveness of class action litigation in effectuating regulatory policy against corporate defendants,¹¹⁵ a jurisdictional rule that limits the size of classes, and perhaps limits their ability to be brought at all in certain cases, would undermine the shared interest of states in vindicating substantive social policies.¹¹⁶

B. Possible Methods of Imputation

Most courts that have limited *BMS* have done so by distinguishing between “parties” and “nonparties” and concluding that absent class members are nonparties for the purpose of personal jurisdiction.¹¹⁷ However, more clarity and doctrinal stability would result from an affirmative imputation of jurisdiction over the claims of absent class members.¹¹⁸ There are two ways to establish a legal basis for imputation: through an amendment to the Federal Rules of Civil Procedure or through judge-made law in judicial opinions.

¹¹⁴ This latter consideration falls more properly under the “forum state’s interest” factor. *See supra* Section IV.A.3.b. It also stands to reason that in areas that are frequently the subject of class actions, like products liability or consumer safety, there is more commonality than divergence among various states’ substantive social policies.

¹¹⁵ *See supra* Section III.A.2.

¹¹⁶ *See supra* Section III.A for a discussion of the importance of class actions in effectuating regulatory policy.

¹¹⁷ *See supra* notes 27–28 and accompanying text.

¹¹⁸ *See supra* Section IV.A.

1. Rule 23

Perhaps the most obvious and clear solution to the issue of personal jurisdiction over absent class members is to amend Rule 23 itself, which governs class actions. Rule 23 already provides for special procedures for class actions separate and apart from the class certification rules.¹¹⁹

One problem with such an amendment is that the Federal Rules theoretically are not allowed to prescribe the contours of personal jurisdiction, because personal jurisdiction is a constitutional right, and therefore substantive. This argument has its roots in the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure cannot “abridge, enlarge, or modify any substantive right.”¹²⁰ There are several ways the Advisory Committee¹²¹ could refute this argument.

First, other rules in the Federal Rules of Civil Procedure already prescribe the jurisdictional reaches of courts. Some especially glaring examples come within Rule 4. Rule 4(k), in particular, is “undoubtedly a rule of jurisdiction—rather than a rule of procedure—as it identifies circumstances in which service of process ‘establishes personal jurisdiction over a defendant.’”¹²² One obvious provision that does this is Rule 4(k)(1)(A), which, despite its seemingly unassuming wording, affirmatively establishes the jurisdictional reach of federal courts.¹²³ However, perhaps more blatantly, Rule 4(k)(1)(B) extends personal jurisdiction in federal court over those

¹¹⁹ See, e.g., Fed. R. Civ. P. 23(f) (detailing special procedures for class action appeals).

¹²⁰ 28 U.S.C. § 2072(b).

¹²¹ The Advisory Committee is the body that evaluates proposals for amendments to the Federal Rules of Civil Procedure. 28 U.S.C. § 2077.

¹²² A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 983–84 (2019) (quoting Fed. R. Civ. P. 4(k)).

¹²³ See *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (“[A] federal district court’s authority to assert personal jurisdiction in most cases is linked to service of process on a defendant ‘who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.’”) (quoting Fed. R. Civ. P. 4(k)(1)(A)).

parties who could not otherwise be subject to jurisdiction,¹²⁴ and thus, quite literally, “enlarge[s]” and “modif[ies]” a substantive right, if the parameters of personal jurisdiction in court are to be determined as such. Rule 4(n)(2) is also a rule of jurisdiction in that it prescribes a specialized procedure which allows a court to obtain personal jurisdiction over property.¹²⁵

Second, the Advisory Committee might argue that a jurisdictional provision would not be an instance of a Rule conflicting with the constitutional scope of due process, but instead is merely an instance of “defining due process exceptions that are afforded to class actions,” or, in other words, “defining the scope of a litigant’s due process rights in the *specific context* of group representative litigation.”¹²⁶ This would be in line with a long history of the Supreme Court cases affirming due process exceptions and carveouts in the context of class actions and representative litigation in cases like *Hansberry v. Lee*¹²⁷ and *Phillips Petroleum Co. v. Shutts*.^{128,129} There are other constitutionally rooted procedural rules that have carveouts for class actions with respect to absent class members. For example, most circuits do not separately address the standing of absent class members in an Article III standing inquiry because the absent class members’ interests are “sufficiently similar to the named party’s interests” to ensure that their interests are part of a “live case or controversy.”¹³⁰ The logic

¹²⁴ See Fed. R. Civ. P. 4(k)(1)(B) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is a party under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued[.]”).

¹²⁵ See Spencer, *supra* note 122, at 984 (describing Fed. R. Civ. P. 4(n)).

¹²⁶ Wilf-Townsend, *supra* note 7, at 1626 (emphasis added).

¹²⁷ 311 U.S. 32 (1940).

¹²⁸ 472 U.S. 797 (1985).

¹²⁹ See generally, Wilf-Townsend, *supra* note 7, 1626–28 (tracing the history of due process exceptions in the context of class actions). One salient difference worth acknowledging is that in this case law, the Supreme Court was determining the contours of these due process carveouts, rather than the Rules themselves mandating such carveouts.

¹³⁰ *Id.* at 1636.

of these carveouts is consistent with the proposal that the due process protections inherent in a properly certified class action would permit jurisdictional imputation over the claims of class members.

A final refutation could be that if jurisdiction is mainly based on 4(k)(1)(A),¹³¹ which requires serving a summons on the defendant, and historical practice and procedure never require absent class members to serve the defendant, then their claims should not be required to be subject to a jurisdictional analysis. In this way, the proposed modification to Rule 23 would not be “abridg[ing], enlarg[ing], or modify[ing]” the personal jurisdiction of courts, but is instead merely clarifying what the Rules already prescribe in other contexts.

There are two additional but minor impediments to amending the Federal Rules to permit this kind of imputation. First, the Supreme Court is the body responsible for the promulgation of the Federal Rules of Civil Procedure,¹³² and the current Supreme Court is the doctrinal source of the jurisdictional limitations that have caused these problems in the first place. It may be unlikely that the Court would promulgate a Rule that would expand specific jurisdiction in the context of class actions. That said, the proposal does not directly conflict with any Supreme Court opinion, so it is still a possibility. Second, this proposed amendment would only apply in federal court because it is an amendment to the Federal Rules of Civil Procedure. While many states’ rules of procedure mirror the Federal Rules closely, it is possible that states would not necessarily adopt such a modification. In that case, this amendment would not be completely successful in rectifying the issue with respect to suits brought in state court.¹³³

Finally, there is an alternative amendment to the Federal Rules: modifying Rule 4 to authorize nationwide service of

¹³¹ See *supra* note 123 and accompanying text.

¹³² 28 U.S.C. § 2071.

¹³³ Though if such an amendment would permit more expansive jurisdiction in federal court, including plaintiffs from multiple states, then it might be more likely that plaintiffs would file multi-state class actions with federal subject matter jurisdiction under CAFA.

process in all multistate class actions in federal court.¹³⁴ This amendment is consistent with the Federal Rules and statutes that provide broad grants of jurisdiction associated with nationwide service of process.¹³⁵ However, one obvious limitation to this approach is that, while it may be the simplest to effectuate, it would only impact jurisdiction in federal court, while many class actions, particularly in areas like products liability, are brought in state court.¹³⁶

2. Judicial Opinions

Doctrinally, there are numerous routes a court could take to decline extending *BMS*'s jurisdictional limitations to class actions. Courts that have addressed this issue generally focus on limiting the jurisdictional inquiry only to class members instead of imputing jurisdiction over the representative plaintiffs' claims to claims of class members.¹³⁷ Two other potential doctrinal avenues that that courts have not explored use logic more in line with jurisdictional imputation, and provide more clarity in the context of the jurisdictional inquiry around class actions, even absent any modifications to the Federal Rules of Civil Procedure.

i. Pendent Personal Jurisdiction

One solution could be for courts to exercise a form of pendent personal jurisdiction over the claims of absent class members when the claims of the representatives are properly before that court. Pendent personal jurisdiction "is a judge-made doctrine grounded in the accommodation of

¹³⁴ 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 6:30 (6th ed. 2022).

¹³⁵ See, e.g., Fed. R. Civ. P. 4(k)(2); 15 U.S.C. § 77v (providing for nationwide service of process for any violations of the Securities Act of 1933).

¹³⁶ Of course, Rule 23 of the Federal Rules of Civil Procedure applies only to federal courts as well, but many states model their class action certification criteria on Rule 23. By contrast, the concept of nationwide service of process is applicable only to federal courts.

¹³⁷ See *supra* Section II.B.

aggregation,”¹³⁸ that “permits a court to hear additional claims against a defendant over whom the court has personal jurisdiction based on other related claims.”¹³⁹ The doctrine primarily is based on efficiency concerns, including “judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties[.]”¹⁴⁰ Courts hold that the doctrine does not offend due process because “[o]nce a defendant is before the court, it matters little, from the point of view of procedural due process, that he has become subject to the court’s ultimate judgment as a result of territorial or extraterritorial process.”¹⁴¹ In other words, “pendent personal jurisdiction imposes no practical burden on a defendant already properly before the forum court on a related claim.”¹⁴² When such a defendant already must appear in a forum to defend against such a claim, it is “reasonable to compel that defendant to answer other claims in the same suit arising out of a common nucleus of operative facts.”¹⁴³

The requirements of *typicality*, *commonality*, and, for a damages suit, *superiority*, would ensure that the members’ claims are “related” enough to the representatives claims to make a *per se* application of pendent personal jurisdiction in the context of class actions consistent with the doctrine’s contours. Moreover, such a *per se* application would further the doctrine’s goals of efficiency by allowing a greater number of claims to be adjudicated in a single class action by one judge

¹³⁸ Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 22 (2018).

¹³⁹ Spencer, *supra* note 122, at 1004. For example, if a federal court has personal jurisdiction over a defendant for antitrust claims, authorized by a nationwide-service-of-process provision, that court, following the doctrine of pendent personal jurisdiction, could choose to exercise jurisdiction over state law claims sharing a “common nucleus of operative fact” with the antitrust claims, even if those state law claims might not have sufficient connection to the forum in question to uphold jurisdiction on their own. *See, e.g., Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174 (9th Cir. 2004).

¹⁴⁰ *Action Embroidery Corp.*, 368 F.3d at 1181.

¹⁴¹ *Robinson v. Penn Central Co.*, 484 F.2d 553, 555 (3d Cir. 1973).

¹⁴² Dodson, *supra* note 138, at 22.

¹⁴³ *Action Embroidery Corp.*, 368 F.3d. at 1181.

and one jury and by avoiding piecemeal litigation by obviating the requirement to divide class actions along state lines.

The doctrine, as it exists now, is not perfectly suited to jurisdictional imputation, however. Different courts vary on the exact contours and limitations of the doctrine of pendent personal jurisdiction. But most federal courts only allow pendent *claim* jurisdiction on state claims that share a common nucleus of operative fact with a federal claim that has original jurisdiction in federal court. Further, most courts do not allow pendent *party* jurisdiction at all.¹⁴⁴ Both of these limitations would proscribe a *per se* application of the doctrine in the context proposed. Many class actions, even those validly in federal court under CAFA, are based purely on state law. And crucially, this proposed form of pendent personal jurisdiction is purely a pendent *party* personal jurisdiction.

One way to get around these issues—albeit a way that takes the doctrine outside of judge-made law—is for Congress to codify pendent personal jurisdiction in a statute, just as it codified pendent subject matter jurisdiction in the case of the supplemental jurisdiction statute.¹⁴⁵ Just like in the case of the supplemental jurisdiction statute, Congress would have to preserve some elements of the common-law doctrine (in this case, the ability of courts to hear “related” claims), but overturn other elements of it (in this case, the limitations on pendent party jurisdiction and the qualifications on what kinds of claims count as original jurisdiction onto which the related claims can be appended). With such a statutory clarification in place, judges could clearly and validly apply the doctrine to the claims of class members when the claims of class representatives have proper original jurisdiction.

ii. *Ford*’s “Relate To”

BMS’s limitations of specific jurisdiction are based on the case’s interpretation of the “arise out of or relate to”

¹⁴⁴ See generally, Louis J. Capozzi III, *Relationship Problems: Pendent Personal Jurisdiction After Bristol-Myers Squibb*, 11 DREXEL L. REV. 215, 224–239 (2018).

¹⁴⁵ See 28 U.S.C. § 1367.

requirement for specific jurisdiction¹⁴⁶ that originated in *International Shoe*.¹⁴⁷ The Supreme Court's subsequent, and most recent, personal jurisdiction opinion, *Ford Motor Co. v. Montana*, reinvigorated the interest in bifurcating the requirements of "arise out of" and "relate to."¹⁴⁸ Permitting jurisdiction over claims that merely "relate to" the defendant's contacts with the forum state—as opposed to requiring that these claims strictly "arise out of" those contacts—loosens the required nexus between the defendant's contact with the forum and claims that may be validly heard by a court.¹⁴⁹

As applied to class actions, the proposed judicial reasoning would be that *BMS*, when read together with *Ford*, would not restrict class actions based on the claims of absent class members because satisfying the requirements of Rule 23 necessarily would ensure that the absent class members' claims "relate to" the defendant's conduct in the forum that gave rise to jurisdiction over the class representatives' claims. In other

¹⁴⁶ *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 262 (2017).

¹⁴⁷ *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 319 (1945) ("But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue[.]") (emphasis added).

¹⁴⁸ *Ford Motor Co. v. Montana Eighth Judicial District*, 141 S.Ct. 1017, 1026 (2021). The idea of bifurcating "arise out of" and "relate to" originated in Justice Brennan's dissent in *Helicopteros Nacionales de Colombia, S.A. v. Hall*. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 420, 425–27 (1984) (Brennan, J., dissenting).

¹⁴⁹ See *Ford*, 141 S.Ct. at 1026 ("The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing."). For example, in *Ford* itself, the Court upheld personal jurisdiction over Ford for products liability claims associated with vehicles that were not purchased in the forum states in question—thus lacking strict causality—on the grounds that the automobile accidents were sufficiently related to Ford serving a market in those states. *Id.* at 1028–30.

words, the “affiliation” or “relationship” that *Ford* requires¹⁵⁰ to uphold “relate to” in this context would be provided by the relationship that Rule 23 requires between the claims of the class representatives and the absent class members. Like with pendent personal jurisdiction, the requirements of *typicality* and *commonality* would do most of the work in ensuring the adequate relatedness.¹⁵¹

This line of reasoning is consistent with *Ford*’s repeated admonition that specific jurisdiction does not require a “strict causal relationship.”¹⁵² This reasoning is also consistent with *Ford*’s view that jurisdiction is reasonable when a corporate defendant can “structure its primary conduct”¹⁵³ to exploit a state’s business. Finally, such a reading would not be in tension with *BMS* itself, in that here, Rule 23 is assuring that “relatedness” is satisfied, whereas in a mass action, no such built-in protection exists.

One could argue that this reasoning is just a limitation on the jurisdiction inquiry as opposed to a form of jurisdictional imputation: if Rule 23 is satisfied, the court does not have to look to the claims of absent class members at all. But the argument actually is that satisfying the Rule 23 class certification requirements creates an adequate nexus between the defendant’s contacts and the absent class members’ claims. Thus, the court is not declining to analyze jurisdiction over the absent class claims—an approach that in and of itself might be questionable in light of *BMS*. Instead, the court is affirmatively concluding that there *is* necessarily jurisdiction over those claims.

¹⁵⁰ *Id.* at 1024, 1025.

¹⁵¹ It is worth noting that for states that have significantly more lenient requirements for class certification—particularly with respect to *commonality*, *typicality*, and *predominance*—then a class certified under one of those states’ rules may not necessarily satisfy this “relatedness” requirement.

¹⁵² *Ford*, 141 S.Ct. at 1026.

¹⁵³ *Id.* at 1030 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

C. Just Corporations or All Defendants?

One final consideration is whether this jurisdictional imputation should apply to just corporations, or to all defendants in general. There are numerous examples of purely procedural rules that treat corporations and persons differently. These examples exist in statutorily created procedural rules. For example, the venue statute¹⁵⁴ provides different definitions of “residency” for natural persons and corporations.¹⁵⁵ These rules also exist in common-law procedural doctrines, such as the concept of “domicile,” for which federal courts use different tests as applied to persons and corporations.¹⁵⁶

However, creating a carveout in the context of aggregate litigation might cause some logistical problems. For example, if a suit were brought against a corporation for products liability, and then the plaintiffs wanted to join one of the directors or officers of the company using Rule 20,¹⁵⁷ they may be unable to if these proposed jurisdictional guidelines regarding class actions only applied to corporate defendants. Such a carveout may also be largely unnecessary given that corporations are almost always the defendants in class actions, and, from a normative perspective, there is a strong argument that if an individual were to have harmed enough people that a class could be certified against him, and if he purposefully availed himself of a state where he did not reside to the extent that specific jurisdiction could be exercised over him,¹⁵⁸ then it would be reasonable to require him to defend against a class in that forum. That being said, even extending this jurisdiction imputation to all defendants would likely only make a difference for corporate defendants in all but the most unusual cases.

¹⁵⁴ 28 U.S.C. § 1391.

¹⁵⁵ See 28 U.S.C. § 1391(c).

¹⁵⁶ Compare *Sheehan v. Gustafson*, 967 F.2d 1214 (8th Cir. 1992), with *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

¹⁵⁷ Fed. R. Civ. P. 20.

¹⁵⁸ This consideration is relevant because none of the proposed methods of jurisdiction imputation would matter if the suit were brought in the defendant’s home state.