

**TOTALLY CLASS-LESS?:  
EXAMINING *BRISTOL-MYERS*'S  
APPLICABILITY TO CLASS ACTIONS**

*Justin A. Stone\**

*In June 2017, the U.S. Supreme Court tightened the specific jurisdiction doctrine when it dismissed several plaintiffs' claims in a mass tort action against pharmaceutical company Bristol-Myers Squibb (BMS) for lack of personal jurisdiction. The action was brought in a California state court and involved several hundred plaintiffs alleging that they were injured by Plavix, a drug BMS manufactures. The Supreme Court held that California could not constitutionally exercise personal jurisdiction over BMS as to the nonresident plaintiffs, who did not have an independent connection to California. While the nonresident plaintiffs argued that California had specific jurisdiction because their claims were identical to the California residents' claims (with the only difference being that their experience with Plavix occurred in other states), the Court held that these claims did not arise out of BMS's contacts with California, but rather out of BMS's contacts with the particular states in which these plaintiffs were injured. In so holding, the Court emphasized that enabling California to exercise jurisdiction in this context would infringe on the sovereignty of other states—more specifically, the states who housed the nonresident plaintiffs involved in the action. This Note explores whether class actions should be bound by this decision. The fundamental question, then, is whether class actions are meaningfully distinguishable from mass tort actions such that they avoid Bristol-Myers's reach.*

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\* J.D. Candidate, 2019, Fordham University School of Law; B.A., 2016, University of Florida. I would like to thank Professors Benjamin Zipursky and Howard Erichson for their expert guidance, the University of Florida for equipping me with the tools for success, the *Fordham Law Review* editors for their incredible assistance, and my family and girlfriend for their endless support.

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#### INTRODUCTION

Corporate defendants recently obtained a huge win in the U.S. Supreme Court, but the scope of the victory remains unclear. On June 19, 2017, in an 8–1 decision, the Court held that the state of California lacked jurisdiction over the nonresident plaintiffs involved in a mass tort lawsuit.<sup>1</sup> Brought in a California state court against the pharmaceutical behemoth Bristol-Myers Squibb (BMS), the case involved hundreds of plaintiffs alleging that the BMS drug Plavix had damaged their health.<sup>2</sup> BMS filed a motion to dismiss the claims for lack of personal jurisdiction as to the plaintiffs who had no connection to California. Reversing the Supreme Court of California, the U.S. Supreme Court, in an opinion authored by Justice Alito, ruled in favor of BMS. The Court held that—although the nonresident plaintiffs brought identical claims to those plaintiffs who were prescribed the drug in California, ingested the drug in California, and were injured by the drug in California—California could not constitutionally exercise territorial jurisdiction over them.<sup>3</sup> In so holding, the Court left open the question at the center of this Note: whether, in class action lawsuits, personal jurisdiction exists for members of the class that have no connection to the forum state in which the action is brought.

Part I of this Note first describes the landscape of personal jurisdiction and, more specifically, the landscape as it relates to corporations. It then examines more closely the *Bristol-Myers* opinion itself by scrutinizing the purported reasoning behind the Court's decision, explaining how the decision alters the personal jurisdiction landscape, and surveying the law concerning the relationship between personal jurisdiction and class actions prior to the decision. Finally, it briefly defines the different types of class actions and compares them to the *mass* actions of the sort involved in *Bristol-Myers*.

Part II examines eight recent decisions that analyze the applicability of *Bristol-Myers* to class actions. This Part exemplifies the disparate approaches courts have used in applying *Bristol-Myers* to the class action context. Part III concludes that *Bristol-Myers* should not be extended to class actions as they are meaningfully distinguishable from the type of action brought in *Bristol-Myers*.

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1. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017).

2. *Id.*

3. *Id.* at 1781.

## I. BACKGROUND

A. *Personal Jurisdiction Before and After Bristol-Myers*

Personal jurisdiction is guided by the Due Process Clause found in the Fourteenth Amendment of the U.S. Constitution, which prohibits a state from exercising jurisdiction over a defendant if such an exercise would inappropriately exceed the reach of that state's sovereignty.<sup>4</sup> There are two types of power through which a state can exercise personal jurisdiction over an individual: general jurisdiction and specific jurisdiction.<sup>5</sup> If a state has general jurisdiction over an individual, that individual can be sued in that state regardless of the specific claim at hand.<sup>6</sup> If a state has only specific jurisdiction over an individual, that individual can be sued in that state only if her contacts with the state give rise to the individual's specific claim at hand.<sup>7</sup> Personal jurisdiction, unlike subject matter jurisdiction, can be waived by consent.<sup>8</sup> Plaintiffs consent to personal jurisdiction when they sue.<sup>9</sup> Defendants can consent either through an affirmative statement of consent or by proceeding with the actions against them without objecting to jurisdiction.<sup>10</sup>

As every first-year law student at some point discovers, the current state of the personal jurisdiction doctrine was first established in the Supreme Court's seminal decision, *International Shoe Co. v. Washington*.<sup>11</sup> In response to the increasing corporate population, the Court provided the following oft-quoted guideline:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>12</sup>

*International Shoe* also drew a distinction between two types of personal jurisdiction—a dichotomy that laid the foundation for the doctrines of general and specific jurisdiction.<sup>13</sup> In a more eloquent diction, the Court explicitly acknowledged that a defendant may be subject to suit in a particular forum either because (1) the defendant had such substantial contacts with the forum that the defendant could be sued there, regardless of whether the plaintiff's claim relates to those contacts; or (2) the defendant's contacts with

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4. See generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 310 (1945).

5. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014).

6. See *id.*

7. See *id.*

8. See FED. R. CIV. P. 12(h)(1)(B); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

9. See, e.g., *Ins. Corp. of Ir.*, 456 U.S. at 703 (stating that "an individual may submit to the jurisdiction of the court by appearance").

10. See FED. R. CIV. P. 12(h)(1)(B).

11. 326 U.S. 310 (1945).

12. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

13. *Id.* at 318.

the forum state, irrespective of substantiality, gave rise to the plaintiff's claim.<sup>14</sup>

Following *International Shoe*, the extent to which plaintiffs could forum shop by arguing that a corporate defendant is subject to general jurisdiction in every state in which it conducts substantial business operations remained unclear.<sup>15</sup> Over the last few years, however, the Court has narrowed the doctrine of general jurisdiction tremendously, at least insofar as it relates to corporate defendants.<sup>16</sup> In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>17</sup> the Court made clear that a state may not assert general jurisdiction over the foreign subsidiaries of a corporation simply by virtue of the latter being subject to such jurisdiction.<sup>18</sup> In *Daimler AG v. Bauman*,<sup>19</sup> the Court narrowed the doctrine further when it indicated that a state may exercise general jurisdiction over a corporation only if the corporation (1) is incorporated in the state attempting to exercise general jurisdiction, or (2) has established its principal place of business in the state attempting to exercise general jurisdiction.<sup>20</sup> The Court did not completely limit the exercise of general jurisdiction to these two options and acknowledged that there may be extraordinary circumstances in which a state could assert general jurisdiction over a corporation that is neither incorporated nor headquartered there.<sup>21</sup> However, since *Daimler*, no such circumstance has arisen, and no state has successfully exercised general jurisdiction over a corporation unless one of those two conditions was satisfied.

Accordingly, *Bristol-Myers* analyzed the California court's exercise of specific personal jurisdiction over BMS since, after *Daimler*, California had no claim to general jurisdiction despite BMS's substantial contacts with the

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14. *Id.*

15. See Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. REV. 1313, 1356–57 (2005) (noting that, in 2005, “[l]ower courts and scholars have not reached a consensus as to the number and type of contacts necessary to establish general jurisdiction over unrelated claims”). Compare *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418–19 (1984) (holding that Texas could not assert general jurisdiction over the defendant despite the defendant's substantial business contacts with the state), with *Rush v. Savchuck*, 444 U.S. 320, 330 (1980) (stating, in dicta, that Minnesota and every other state could assert general jurisdiction over the defendant by virtue of the defendant having conducted business in all fifty states).

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

17. 564 U.S. 915.

18. See *id.* at 919–20.

19. 134 S. Ct. 746.

20. *Id.* at 760. The “principal place of business” is a corporation's headquarters. See *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010).

21. *Daimler*, 134 S. Ct. at 760. The Court said this with *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) in mind. In *Perkins*, the Court held that Ohio could properly assert general jurisdiction over the defendant-corporation, which was neither headquartered nor incorporated in Ohio, because the defendant had, due to World War II, temporarily moved all of its business operations to Ohio. See *Perkins*, 342 U.S. at 448.

state.<sup>22</sup> To assert specific jurisdiction, as the doctrine stands today, a plaintiff must satisfy three prongs by showing that (1) the defendant has purposefully availed itself of the forum state; (2) the plaintiff's claim or claims arise out of or relate to such contacts with the state (i.e., arise out of such purposeful availment); and (3) it would be reasonable for the forum state to exercise jurisdiction in the case at hand.<sup>23</sup>

In *Bristol-Myers*, neither the Court nor BMS contested that BMS had purposefully availed itself of the California market.<sup>24</sup> Not only did BMS have a laboratory in California, it marketed Plavix to the California population and generated over \$900 million from California sales of Plavix at the time of the case.<sup>25</sup> Further, neither the Court nor BMS contested jurisdiction as to the California plaintiffs.<sup>26</sup> However, the Court did dismiss the claims of the nonresident plaintiffs for lack of personal jurisdiction.<sup>27</sup>

The *Bristol-Myers* action was brought by 678 plaintiffs, 592 of whom were not residents of California.<sup>28</sup> The Court reasoned that the non-Californians' claims neither related to nor arose out of BMS's contacts with California because, unlike the California plaintiffs, these plaintiffs were never prescribed Plavix in California; never ingested Plavix in California; and were never injured by Plavix in California. Nor did BMS conduct research on, or develop, the drug in California.<sup>29</sup> The plaintiffs' assertion that their claims did relate to BMS's contacts with California was centered on the fact that their claims were identical to those brought by the California plaintiffs—the only difference, of course, being that their experience with Plavix occurred in states other than California.<sup>30</sup> Thus, the Court answered a question it had never before answered concretely and determined that, when assessing whether a court has territorial jurisdiction in a mass tort action, the court must examine each plaintiff's claim individually. Consequently, just three years after tightening the requirements for general jurisdiction, the Court doubled down with a more stringent analysis of specific jurisdiction. The extent to which the specific jurisdiction doctrine has been narrowed for class actions, however, is yet to be determined. As Justice Sotomayor, the lone dissenter

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22. Interestingly, the California Court of Appeal initially upheld jurisdiction under a theory of general jurisdiction, but subsequently amended its position to a theory of specific jurisdiction. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017).

23. *Id.* at 1785–86 (“Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant.”).

24. *Id.* at 1786.

25. *Id.* at 1778.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1781.

30. *Id.* The plaintiffs also argued that California could exercise specific jurisdiction because BMS had a contract with a California distributor to distribute Plavix nationwide. The Court rejected this argument. *Id.* at 1783. While illustrative of the Court's narrow approach to specific jurisdiction, that argument is not relevant for the purposes of this Note.

in *Bristol-Myers*, emphasized, whether the Court's holding extends to class actions remains to be seen.<sup>31</sup>

Interestingly, while the Court's clear recognition of the plaintiffs' failure to satisfy the second prong appeared sufficient to overturn the California court, the Court continued with what appeared to be a reasonableness (or third prong) analysis.<sup>32</sup> The Court understood that in terms of efficiency and convenience—factors often considered in a reasonableness inquiry—dismissing these claims would be counterproductive since it would spawn several lawsuits around the country as opposed to resolving the claims with a single lawsuit.<sup>33</sup> However, the Court focused on what it believed was a more pressing concern:

Assessing [the] burden on [the defendant in litigating in a certain forum] obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction “are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.”<sup>34</sup>

“The sovereignty of each State,” the Court continued, “imply[s] a limitation on the sovereignty of all its sister States.’ And at times, this federalism interest may be decisive.”<sup>35</sup> The Court concluded that this “federalism interest” cannot be overcome by the forum state's interest in asserting its power over the particular defendant, or by the convenience or efficiency that would result if such jurisdiction was allowed—lest the Due Process Clause be violated.<sup>36</sup>

### B. Class Actions

In arguing that the Court should exercise jurisdiction over BMS, California pointed to the Court's decision in *Phillips Petroleum Co. v. Shutts*,<sup>37</sup> which proceeded through a money-damage class action.<sup>38</sup> *Shutts* is an important case because it represents the only time the Supreme Court focused on this relationship between personal jurisdiction and class actions. In that case, the defendant, Phillips Petroleum (“Phillips”), argued that the Court lacked personal jurisdiction over the nonresident class members who had no

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

32. Actually, the Court did not explicitly separate its analysis into three prongs, but its analysis does follow the typical trajectory of this multipronged approach. Justice Sotomayor did break her analysis down into the three prongs in her dissent. *Id.* at 1785–86.

33. See *id.* at 1780 (majority opinion).

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

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

36. See *id.*

37. 472 U.S. 797 (1985).

38. See *id.* at 801.

connection to Kansas, the forum state.<sup>39</sup> Although initiating an action constitutes consenting to personal jurisdiction, Phillips argued that the nonresident, unnamed class members could not be said to have consented since they had a minimal role in bringing the suit.<sup>40</sup> Indeed, many members of the class probably did not even realize they were part of an action against Phillips, as they were only given an opportunity to opt out rather than an opportunity to affirmatively opt into the action.<sup>41</sup> In dismissing Phillips's objection, the Court explained that the traditional personal jurisdiction due process analysis that applies to defendants does not apply to plaintiffs.<sup>42</sup> However, the Court made clear that in money-damage class actions such as this one, to avoid due process issues the unnamed class members must receive notice of the suit, an opportunity to be heard, and an opportunity to affirmatively opt out of the class.<sup>43</sup>

The *Bristol-Myers* Court, though, rejected California's reliance on *Shutts*, emphasizing that *Shutts* involved a decision regarding the "due process rights of *plaintiffs*."<sup>44</sup> The case in front of it, on the other hand, implicated the traditional "minimum contacts" analysis used to consider territorial jurisdiction over *defendants*.

A class action is "a form of representative litigation" in which "[o]ne or more class representatives litigate on behalf of many absent class members, and those class members are bound by the outcome of the representative's litigation."<sup>45</sup> As such, class actions are the exception to the due process notion that an individual cannot be bound by a decision to which she is not a named party.<sup>46</sup> Federal Rule of Civil Procedure 23 governs the class action certification process in federal court.<sup>47</sup> Rule 23(a) dictates the following prerequisites that need to be satisfied to obtain certification:

- (1) the class [must be] so numerous that joinder of all members is impracticable;
- (2) there [must be] questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class; and
- (4) the representative parties [must] fairly and adequately protect the interests of the class.<sup>48</sup>

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39. *Id.* at 802–04.

40. *Id.* at 806.

41. *Id.* at 801.

42. *Id.* at 808.

43. *Id.* at 811–12.

44. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783 (2017).

45. 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 1:1 (5th ed. 2011).

46. *See id.*

47. FED. R. CIV. P. 23. For purposes of this Note, I will use Rule 23 to give the background of class actions. The Class Action Fairness Act dramatically relaxed 28 U.S.C. § 1332(a)'s diversity requirement vis-à-vis class actions and enabled defendants to remove any state class action to federal court as long as "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A) (2012). However, it should be noted that, although many states do not distinguish between different class action categories, the following analysis can likely be applied to many state court class actions as well.

48. FED. R. CIV. P. 23(a).

Rule 23 recognizes four types of class actions—a crucial delineation for purposes of this Note.<sup>49</sup> There are two types contemplated in 23(b)(1), one in 23(b)(2), and one in 23(b)(3).<sup>50</sup> The first type of class action is governed by 23(b)(1)(A) and is used when prosecution of “separate actions by or against individual members of the class would create a risk of incompatible standards of conduct for the adverse party due to inconsistent or varying adjudications with respect to individual members of the class.”<sup>51</sup> This category is rarely used and generally does not cover class action suits that seek money damages.<sup>52</sup> Rather, it is for those situations in which contradictory adjudicatory outcomes in individual cases would leave the defendant unsure of how to act.<sup>53</sup> For example, if the holders of a bond sued to have the bond deemed invalid, and some won and some lost, the defendant would not know the status of his obligations.<sup>54</sup> This category of class action is sensibly referred to as an “incompatible-standards” class action.<sup>55</sup>

The next type of class action is governed by 23(b)(1)(B), which states that

a class action may be maintained . . . if: prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.<sup>56</sup>

The paradigmatic example of this category occurs when numerous people are likely to sue a defendant individually, but the defendant’s funds are likely insufficient to satisfy all judgments against it.<sup>57</sup> A class action under this category ensures fairness by awarding each member of the class a pro rata share of the defendant’s available funds.<sup>58</sup> This type of class action is appropriately termed the “limited-fund” class action.<sup>59</sup>

Rule 23(b)(2), which dictates the third type of class action, permits a class action if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>60</sup> Money damages are generally not available in this category.<sup>61</sup> This is typically used when a group of people is seeking structural injunctive

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49. *Id.* r. 23(b).

50. *Id.*

51. *Id.* r. 23(b)(1)(A); *see also* 2 RUBENSTEIN, *supra* note 45, § 4:1.

52. 2 RUBENSTEIN, *supra* note 45, § 4:1.

53. *See id.*

54. *Id.*

55. *Id.*

56. FED. R. CIV. P. 23(b)(1)(B).

57. *See* 2 RUBENSTEIN, *supra* note 45, § 4:1.

58. *Id.*

59. *Id.*

60. FED. R. CIV. P. 23(b)(2).

61. 2 RUBENSTEIN, *supra* note 45, § 4:1; *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 365–67 (2011).

relief, or some other form of relief that is not monetary.<sup>62</sup> This category of class action is commonly referred to as an “injunctive” class action. It is frequently employed in the field of civil rights and, accordingly, is also often referred to as a “civil rights” class action.<sup>63</sup>

The final class action category is found in 23(b)(3), which permits a class action if “the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy.”<sup>64</sup> To sufficiently satisfy the predominance requirement needed to get a 23(b)(3) class certified, the class must demonstrate that individualized issues of law or fact will not predominate at trial.<sup>65</sup> To satisfy the superiority requirement, the class must show that representative litigation presents a superior form of litigation than potential alternatives—such as proceeding through several individual actions or proceeding through the joinder mechanism (where all parties are named in the lawsuit).<sup>66</sup> This category is often referred to as the “money-damage” class action.<sup>67</sup> It is thus labeled because it is the class action most frequently employed when seeking money damages.<sup>68</sup> Naturally, the money-damage class action is a category for which certification is frequently sought.

As for opt-out and notice rights in class actions, they are only mandatory in money-damage class actions.<sup>69</sup> Providing notice to unnamed class members in 23(b)(1) and 23(b)(2) class actions is discretionary because, as explained later, constitutional due process concerns are not as prevalent in these class action types.<sup>70</sup> In addition, class members in 23(b)(1) and 23(b)(2) actions often do not have the option to opt out of the class, as is also explained more thoroughly below.<sup>71</sup>

There are four central objectives of the class action.<sup>72</sup> They can be described in terms of compensation, deterrence, efficiency, and legitimacy.<sup>73</sup> Class actions are effectively the only way individuals with claims for small amounts of money can seek redress in court.<sup>74</sup> People with such claims will not find pursuing individual actions worth their time, as the legal fees would almost assuredly exceed the amount that could be recovered in court.<sup>75</sup>

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62. See 2 RUBENSTEIN, *supra* note 45, § 4:1.

63. See *id.*

64. FED. R. CIV. P. 23(b)(3) (emphasis added).

65. See, e.g., *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 635 (5th Cir. 2016) (“The narrow issue in this case is whether the Plaintiffs may prove RICO causation through common proof such that individualized issues will not predominate at trial. The import of this inquiry is whether class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3).”).

66. 2 RUBENSTEIN, *supra* note 45, § 4:64.

67. *Id.* § 4:1.

68. *Id.*

69. See FED. R. CIV. P. 23(c)(2)(B); *id.* r. 23(c)(2)(B)(v).

70. See FED. R. CIV. P. 23(c)(2)(A); see also *infra* Part III.

71. See 2 RUBENSTEIN, *supra* note 45, §§ 4:2, 4:26; see also *infra* Part III.

72. 1 RUBENSTEIN, *supra* note 45, §§ 1:7–:10.

73. *Id.*

74. See *id.* § 1:7.

75. See *id.*

Indeed, an attorney faced with such a client would be hesitant to even take the case.<sup>76</sup> However, the unique procedural mechanics of a class action allow small-claim plaintiffs to obtain compensation by allowing a group of people with the same claim to consolidate their claims into a single action.<sup>77</sup> Moreover, the aggregation of plaintiffs into one lawsuit actually increases compensation by reducing the fees and costs associated with initiating and proceeding with a lawsuit individually.<sup>78</sup>

In the same vein, class actions also serve a deterrent effect.<sup>79</sup> As just discussed, when the harm of a defendant's conduct is dispersed such that each harmed individual only has a claim for a small sum of money, no individual suit is likely to arise.<sup>80</sup> Accordingly, the defendant is free to continue engaging in tortious activity since it does not have to pay for it.<sup>81</sup> The defendant is externalizing costs that should be internalized.<sup>82</sup> Class actions provide for such internalization, as they hold defendants accountable for their conduct.<sup>83</sup> With the threat of a class action always looming, defendants will be more likely to absorb the costs that are associated with conforming their conduct to the law.<sup>84</sup>

Class actions also provide a deterrent effect by enabling a greater amount of nonmonetary litigation.<sup>85</sup> An individual plaintiff who seeks injunctive relief often sees her case mooted and, therefore, dismissed.<sup>86</sup> Consequently, the next similarly situated plaintiff is left without a remedy. Acknowledging this problem, the Supreme Court has held that a certified class may possess Article III standing whether or not the named plaintiff's claim has been mooted, as long as at least one member of the class still possesses a justiciable claim.<sup>87</sup> By enabling such suits, private legal enforcement is expanded and wrongdoing further deterred.<sup>88</sup>

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76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* § 1:8.

80. *See supra* notes 74–75 and accompanying text.

81. *See* 1 RUBENSTEIN, *supra* note 45, § 1:8.

82. *See id.*

83. *See id.*

84. *See id.* (“The Supreme Court has long recognized that public agencies cannot themselves detect and deter all wrongdoing. Private suits are an important complement to public enforcement.”). For example, the Court once noted that “[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.” *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968) (per curiam).

85. *See* 1 RUBENSTEIN, *supra* note 45, § 1:8.

86. This proposition is applicable to mooted class action cases that are not already subject to the mootness exception, that is, those cases that are “capable of repetition yet evading review.” *See id.* (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 514–15 (1911)).

87. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (holding that a named plaintiff's claim may proceed regardless of whether her claim has been mooted, so long as some class member's claim is still justiciable).

88. 1 RUBENSTEIN, *supra* note 45, § 1:8.

Class actions also promote efficiency.<sup>89</sup> They do so by consolidating actions and enabling representative litigation.<sup>90</sup> It requires less time and is less expensive to proceed through one lawsuit than through several.<sup>91</sup> As the Supreme Court put it, “[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”<sup>92</sup> Thus, class actions preserve both judicial resources and litigants’ resources.<sup>93</sup> Class actions are especially economical when the class members individually have large claims against a defendant, such that each member would pursue the action individually, that is, with or without the class action option.<sup>94</sup> In these situations, courts would be faced with a number of repetitive actions if a class action was not permitted.<sup>95</sup> Conversely, as just explained, small-claim individuals might not litigate at all without the advantages of a class action.<sup>96</sup> Thus, it could be argued that, in these situations, class actions are inefficient, as they create the expenditure of time and resources that would otherwise not occur.<sup>97</sup> However, even in these situations, class actions, as also outlined above, provide a deterrent effect that forces would-be defendants to act more socially efficient by internalizing costs that should belong to them and not imposing them on others.<sup>98</sup> This internalization inducement prevents both public and private lawsuits from occurring in the first place, thereby not only preserving judicial resources, but also preserving resources consumed by public enforcement.<sup>99</sup>

Finally, class actions enhance the legitimacy of the judiciary by helping prevent inconsistent results and thus promoting uniformity in the law.<sup>100</sup> Class actions accomplish this objective by either preventing incompatible standards or ensuring that claims predominated by the same issues of law and fact are resolved the same way.<sup>101</sup> Naturally, when two individual lawsuits that share predominantly the same issues of law and fact are resolved disparately, the legitimacy of the common law is threatened.<sup>102</sup>

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89. *Id.* § 1:9.

90. *Id.*

91. *Id.*

92. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).

93. *See id.*

94. *See id.*

95. *See id.*

96. *See supra* notes 74–77 and accompanying text.

97. 1 RUBENSTEIN, *supra* note 45, § 1:9.

98. *Id.*

99. *Id.*

100. *See id.* § 1:10.

101. *See id.*

102. *See id.*

### C. Distinguishing Mass Actions

The plaintiffs in the *Bristol-Myers* litigation proceeded through a mass action<sup>103</sup> and, more specifically, a mass tort action.<sup>104</sup> Mass actions, like class actions, present a type of group litigation in which several plaintiffs with similar claims consolidate their claims into one action.<sup>105</sup> In *Bristol-Myers*, for example, a nationwide group of individuals consolidated their allegations of injury by Plavix into one action in a California court.<sup>106</sup>

Unlike class actions, however, in mass actions every plaintiff is a named plaintiff to the lawsuit. Otherwise stated, a mass action is not a form of representative litigation.<sup>107</sup> Moreover, as distinguished from class actions, mass actions often present situations in which issues of fact or law are more particularized among the group of plaintiffs.<sup>108</sup> For example, in a mass tort action like *Bristol-Myers*, the individual plaintiffs might have suffered varying degrees of harm. More significantly, a defendant like BMS might be able to prove lack of causation for some individuals (say, because of a certain individual's medical history, unhealthy lifestyle, or recent activity) but not for others. Consequently, while the Supreme Court has not categorically denied the ability of a group of people who have been injured by a defendant's widespread tortious conduct to form a class, it has indicated that such certification will rarely occur.<sup>109</sup> In *Amchem Products, Inc. v. Windsor*,<sup>110</sup> the Court stated:

[M]ass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways." And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. But the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's have been certifying such cases in increasing number. The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great.<sup>111</sup>

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103. The term "mass action" is used in this Note to refer to aggregate litigation that is not of the representational variety—or, in other words, aggregate litigation in which every claimant is a named plaintiff.

104. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1777 (2017).

105. 28 U.S.C. § 1332(d)(11)(B)(i) (2012).

106. *Bristol-Myers Squibb*, 137 S. Ct. at 1777.

107. See 28 U.S.C. § 1332(d)(11)(B)(i) ("[T]he term 'mass action' means any civil action (except a [class action]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . .").

108. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

109. *Id.*

110. 521 U.S. 591.

111. *Id.* (alteration in original) (citations omitted) (quoting FED. R. CIV. P. 23 advisory committee's note to 1966 amendment).

*Amchem* involved a group of plaintiffs attempting to certify a 23(b)(3) class on the basis of asbestos-induced injuries.<sup>112</sup> The Court denied certification on the grounds that, inter alia, the individuals suffered varying degrees of harm and “were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods.”<sup>113</sup> Two years later, the Court again denied 23(b)(3) certification in an asbestos case,<sup>114</sup> thereby cementing its reluctant approach to certifying money-damage class actions involving personal injury in a mass tort context.<sup>115</sup> That said, the *Amchem* Court suggested that “mass accident” cases (i.e., cases that have “a single common event at their core”) might satisfy the predominance requirement and therefore present situations appropriate for 23(b)(3) class certification.<sup>116</sup> An example of a “mass accident” case is the class action lawsuit that arose after a Hyatt hotel’s skywalk collapsed and injured several people.<sup>117</sup> In that case, every class member was injured by the same, single occurrence. Therefore, class certification was deemed appropriate.<sup>118</sup>

In summary, a lawsuit might proceed through a mass action rather than a class action because the harmed parties in a mass action are unable to demonstrate either the prerequisites of a class action governed by 23(a) (or their state equivalent) or, if such prerequisites can be satisfied, the requirements demanded by the particular class action category sought by the proposed class. There is no separate rule for mass actions like there is for class actions. Rather, mass actions are governed by the permissive joinder rules found in Rule 20 of the Federal Rules of Civil Procedure.<sup>119</sup>

## II. RECENT CASE LAW EXAMINING *BRISTOL-MYERS* IN THE CLASS ACTION CONTEXT

Despite the fact that *Bristol-Myers* was decided only in June 2017, several courts had already applied it in the class action context within that calendar year. A federal court in the Eastern District of Pennsylvania recently provided defendants with an encouraging answer. In *Plumbers’ Local Union No. 690 Health Plan v. Apotex Corp.*,<sup>120</sup> the court declined to exercise personal jurisdiction over the claims of out-of-state class members.<sup>121</sup> The court decided this case fewer than five weeks after *Bristol-Myers*.<sup>122</sup> This case involved a class action in which the representative plaintiff was a

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112. *Id.* at 597.

113. *Id.* at 624.

114. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 829–30 (1999).

115. *See* 2 RUBENSTEIN, *supra* note 45, § 4:62.

116. *See id.*; *Amchem*, 521 U.S. at 625.

117. *See In re Fed. Skywalk Cases*, 680 F.2d 1175, 1177 (8th Cir. 1982).

118. *Id.* at 1189.

119. FED. R. CIV. P. 20.

120. No. 16-665, 2017 WL 3129147 (E.D. Pa. July 24, 2017).

121. *See id.* at \*6.

122. *Compare id.* at \*1, with *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1773 (2017).

plumbers' union, headquartered in Pennsylvania, the forum state, which provided a health insurance plan to its members, who individually span the nation.<sup>123</sup> The union alleged that the defendants, all pharmaceutical companies, intentionally misrepresented the price of the drugs they sold to prescription drug providers.<sup>124</sup> The providers, in turn, distributed these drugs to the union's members and allegedly billed the union at an improperly inflated price.<sup>125</sup> The court declined to exercise jurisdiction over the defendants as to the non-Pennsylvania claims.<sup>126</sup> The court explained: "Only Plumbers' Pennsylvania Claims arise out of or relate to . . . Defendants' sales of generic drugs in Pennsylvania . . . . Accordingly, the Court cannot exercise specific jurisdiction over the Non-Pennsylvania Claims . . . ." <sup>127</sup>

However, while the court cited *Bristol-Myers* once in the decision to support its definition of specific jurisdiction,<sup>128</sup> it did not distinguish between the mass action brought in *Bristol-Myers* and the class action before it. In fact, the court seemingly did not rely on *Bristol-Myers* at all. Instead, it relied on two Northern District of Illinois cases to reach its conclusion regarding jurisdiction over the defendants vis-à-vis the non-Pennsylvania plaintiffs.<sup>129</sup> The two Illinois cases did involve class actions and thus presented more similar fact patterns.<sup>130</sup> Still, it is odd that the court did not rely on *Bristol-Myers* at all, especially considering that it cited it earlier in the opinion.<sup>131</sup> The significance here is: (1) the court did not explicitly extend *Bristol-Myers* to class actions since it did not rely on it, and (2) at least one court, the Northern District of Illinois, has been applying *Bristol-Myers*-like analysis to class action lawsuits that predate *Bristol-Myers*.

In a case that was decided several weeks later, the U.S. District Court for the Northern District of New York more explicitly extended *Bristol-Myers* to the class action context. In *Spratley v. FCA US LLC*,<sup>132</sup> the court, relying on *Bristol-Myers*, granted the defendant's 12(b)(2) motion as to the plaintiffs whose claims were unrelated to the defendant's contacts with New York, the

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123. See *Apotex Corp.*, 2017 WL 3129147, at \*8.

124. See *id.* at \*3.

125. See *id.*

126. See *id.* at \*9.

127. See *id.*

128. See *id.* at \*6.

129. See *id.* at \*9 (citing *Demedicis v. CVS Health Corp.*, No. 16-CV-5973, 2017 WL 569157 (N.D. Ill. Feb. 13, 2017) and *Demaria v. Nissan N. Am., Inc.*, No. 15c3321, 2016 WL 374145 (N.D. Ill. Feb. 1, 2016)).

130. See *id.*

131. Once *Bristol-Myers* was issued, the defendants did file a notice of supplemental authority to alert the court that the decision supported their 12(b)(2) motion. See Defendants' Notice of Supplemental Authority at 1, *Apotex Corp.*, 2017 WL 3129147, ECF No. 302. The plaintiffs' only argument in response was that the defendants had consented to jurisdiction by registering to do business in Pennsylvania. See Plaintiff's Supplemental Memorandum of Law in Opposition to Certain Defendants' Motion to Dismiss at 2–3, *Apotex Corp.*, 2017 WL 3129147, ECF No. 312.

132. No. 3:17-CV-0062, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017).

forum state.<sup>133</sup> The case involved eight named plaintiffs who alleged that Chrysler, the defendant, knowingly concealed a safety defect that was present in several of its models.<sup>134</sup> All but two of the named plaintiffs, however, had no connection to New York.<sup>135</sup> They purchased and repaired their defective vehicles in other states.<sup>136</sup>

The *Spratley* court did not even address the argument that *Bristol-Myers* is distinguishable in that it involved a mass action as opposed to a class action. Rather, the court analyzed the jurisdictional aspect of the case as though it were no different from *Bristol-Myers*. The court wrote:

Plaintiffs argue that the out-of-state Plaintiffs' claims need not arise from Chrysler's New York activities because the out-of-state Plaintiffs' claims are the same as the New York Plaintiffs' claims and arise out of Chrysler's nationwide activity. However, the Supreme Court recently rejected this very theory of personal jurisdiction.

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In *Bristol-Myers Squibb*, the Court found specific jurisdiction lacking because there was no connection between BMS's California contacts and the nonresidents' claims. Similarly, in this case, the out-of-state [named] Plaintiffs have shown no connection between their claims and Chrysler's contacts with New York.<sup>137</sup>

It is true that the plaintiffs never advanced the argument that *Bristol-Myers* does not extend to class actions because *Bristol-Myers* involved a mass action.<sup>138</sup> However, that should not have been significant, as the *Spratley* court was aware of this argument via Justice Sotomayor's dissent.<sup>139</sup> What is significant, however, is this court's treatment of these facts as indistinguishable from those of *Bristol-Myers*. In this case, the plaintiffs, like those in *Bristol-Myers*, were imperiled by a defective product.<sup>140</sup> However, in this case, the plaintiffs proceeded procedurally through a class action rather than a mass action.<sup>141</sup> That said, no plaintiff in this case was physically injured. Still, it is reasonable to think that the court here saw the arbitrariness that might result from upholding or denying jurisdiction simply predicated on the procedural mechanism the plaintiffs elected to employ. While this case does not directly shed light on the extremely important question of whether the reasoning in *Bristol-Myers* should be extended to *unnamed* class action plaintiffs with no connection to the forum state, it does highlight this arbitrariness consideration, which ostensibly weighs in favor of such

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133. *See id.* at \*9.

134. *See id.* at \*1.

135. *See id.*

136. *See id.*

137. *Id.* at \*6–7 (citation omitted).

138. *See* Plaintiffs' Response to FCA US LLC's Notice of Supplemental Authority in Support of Its Motion to Dismiss for Lack of Personal Jurisdiction, *Spratley*, 2017 WL 4023348, ECF No. 65.

139. This is confirmed by the court's invocation of *Bristol-Myers* earlier in the opinion. *See supra* note 137 and accompanying text.

140. *Spratley*, 2017 WL 4023348, at \*1.

141. *See id.*

extension, at least as to the named plaintiffs in a class action seeking money damages.<sup>142</sup>

Eight days later, an Eastern District of New York decision suggested that *Bristol-Myers* should extend to class actions, while more directly focusing on the distinction between mass actions and class actions.<sup>143</sup> The court stated:

Plaintiffs attempt to side-step the due process holdings in *Bristol-Myers* by arguing that the case has no effect on the law in class actions because the case before the Supreme Court was not a class action. This argument is flawed. The constitutional requirements of due process does [sic] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case.<sup>144</sup>

This case involved a group of dentists alleging that a group of distributors acted in violation of antitrust laws and artificially raised the price of dental supplies. The court dismissed one of the *defendants* from the lawsuit on the grounds that the court could not exercise jurisdiction over that defendant, who had practically no contacts with New York, the forum state. However, because all the *plaintiffs* involved in the case resided in New York, the lawsuit proceeded against the other defendants. Accordingly, the exact issue in *Bristol-Myers* was not implicated. Still, the court's strong language here suggests that it would extend the *Bristol-Myers* holding to the class action context.

Two days later, a district court in the Northern District of California refused to extend *Bristol-Myers*. In *Fitzhenry-Russell v. Dr. Pepper Snapple Group*,<sup>145</sup> two named plaintiffs, both California residents, sued Dr. Pepper on behalf of a nationwide class, alleging that Dr. Pepper intentionally employed deceptive advertising practices by inducing people to believe its ginger ale contained real ginger.<sup>146</sup> Dr. Pepper, relying on *Bristol-Myers*, moved to dismiss for lack of personal jurisdiction as to the non-California class members, who independently had no connection to California as it related to Dr. Pepper's contacts with the state.<sup>147</sup> The plaintiffs argued that *Bristol-Myers* does not apply to class actions, but only to mass actions.<sup>148</sup>

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142. The plaintiffs' complaint alleges that issues of law and fact predominate over the class members' claims, which indicates that the class here attempted to obtain 23(b)(3) certification.

143. See *In re Dental Supplies Antitrust Litig.*, No. 16 C.V. 696, 2017 WL 4217115, at \*1, \*9 (E.D.N.Y. Sept. 20, 2017).

144. *Id.* at \*9.

145. No. 17-CV-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017).

146. See *id.* at \*1.

147. See *id.* at \*3.

148. See *id.* at \*5. The plaintiffs also argued that *Bristol-Myers* did not apply because they were in federal court and *Bristol-Myers* involved a state court action, a scenario the majority in *Bristol-Myers* explicitly chose not to rule on. See *id.* at \*4. The Supreme Court in *Bristol-Myers* stated that "since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restriction on the exercise of personal jurisdiction by a federal court." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783–84 (2017). However, the *Dr. Pepper*

The court agreed with the plaintiffs and denied Dr. Pepper's 12(b)(2) motion on the grounds that

[i]n a mass tort action . . . each plaintiff [is] a real party in interest to the complaints, meaning that they [are] named as plaintiffs in the complaint. In a putative class action, like the one before the Court, one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the "named plaintiffs" are the only plaintiffs actually named in the complaint.<sup>149</sup>

All the named plaintiffs in this action, the court noted, were California residents.<sup>150</sup> As such, the court, despite recognizing that the named plaintiffs were chosen precisely to circumvent *Bristol-Myers*,<sup>151</sup> concluded that *Bristol-Myers* did not extend so far.<sup>152</sup>

In so holding, the court relied in part on a separate Supreme Court case, *Devlin v. Scardelletti*,<sup>153</sup> in which the Court stated 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*."<sup>154</sup> The court continued: "The Supreme Court in *Devlin* specified some of these procedural rules, and all dealt with promoting expediency in class action litigation."<sup>155</sup> The court ultimately decided that unnamed class members are not parties when such status relates to personal jurisdiction.

However, the court proceeded further by noting that "[p]erhaps this may be one of those contexts in which an unnamed class member should be considered as [a] part[y]" because of the language the Supreme Court elected to use in *Bristol-Myers*.<sup>156</sup> Nonetheless, the court concluded that the facts in front of it were "meaningfully distinguishable" from those in *Bristol-Myers*, as each plaintiff in *Bristol-Myers* was a named party to the lawsuit.<sup>157</sup>

Two features of *Dr. Pepper* stand out: (1) the court's recognition that *Bristol-Myers* pushed substantially in the direction of granting the defendant's motion to dismiss; and (2) its literal approach to distinguishing between class and mass actions. The latter establishes that, had any of the named plaintiffs been one of the non-California class members, the court would have granted Dr. Pepper's 12(b)(2) motion as to those plaintiffs. Thus, this case seems consistent with *Spratley*, in which the court granted the defendant's 12(b)(2) motion on the grounds that several of the named

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court rejected that argument and held that *Bristol-Myers* is equally applicable to federal actions. See *Dr. Pepper*, 2017 WL 4224723, at \*4.

149. *Id.* at \*5.

150. *Id.*

151. Eighty-eight percent of the class consisted of non-California residents. *Id.*

152. See *id.*

153. 536 U.S. 1 (2002).

154. See *Dr. Pepper*, 2017 WL 4224723, at \*5 (alteration in original) (quoting *Devlin*, 536 U.S. at 9–10).

155. *Id.*

156. *Id.*

157. *Id.*

plaintiffs failed to satisfy the standard articulated in *Bristol-Myers*. Such an implication, of course, serves as merely a hiccup for plaintiffs' lawyers, as they could simply select their class representatives carefully, a technique employed by the plaintiffs' counsel in *Dr. Pepper*.<sup>158</sup> Still, such a limitation certainly would make the class certification process at least a little more difficult.

The implications illustrated by the former point—that is, that the court paid homage to the Supreme Court's diction—are potentially much larger. The language to which the court refers, although not specified, is likely the federalism language excerpted in Part I.A.<sup>159</sup> The *Bristol-Myers* Court made sure to emphasize the federalism concerns that would arise from enabling a California court to exercise jurisdiction over the non-California plaintiffs.<sup>160</sup> While it premised its decision on a “straightforward application” of specific jurisdiction jurisprudence,<sup>161</sup> the Court drove its constitutional due process point home by warning that enabling jurisdiction would infringe upon the sovereignty of other states.<sup>162</sup> Perhaps the court in *Dr. Pepper* was acknowledging that mass actions and class actions are indistinguishable in this federalism context, while choosing nonetheless to cling to the literal differences between the two. Or, maybe the court did perceive a palpable distinction stemming from the fact that class actions involve unnamed plaintiffs and mass actions do not. Whatever its motivation, the court here did provide an extremely useful question: In light of the language used by the *Bristol-Myers* Court, are class actions distinguishable from mass actions? In other words, do the differences between class actions and mass actions provide a basis on which to argue that exercising jurisdiction over unnamed class members with no connection to the forum state does not infringe on the sovereignty of other states?

The court in *Dr. Pepper* also cited the Supreme Court's *Devlin* decision as support for its holding. That case articulated that unnamed class members may be considered parties to the litigation “for some purposes and not for others.”<sup>163</sup> The *Devlin* Court indicated that the main criterion when deciding between inclusion and exclusion should be efficiency.<sup>164</sup> Accordingly, *Devlin* highlighted the efficiency objective realized by proceeding through a class action. *Devlin*, then, may not be an obstacle to extending *Bristol-Myers* to unnamed class members, as the *Bristol-Myers* Court emphatically dismissed California's efficiency argument and pointed instead to the sovereignty issues that would result from allowing such an exercise of jurisdiction.<sup>165</sup> However, the *Devlin* Court was not driven by the same federalism concern that drove the *Bristol-Myers* Court, since the *Devlin*

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158. *Id.*

159. *See supra* notes 35–36 and accompanying text.

160. *See supra* notes 35–36 and accompanying text.

161. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783 (2017).

162. *See supra* notes 35–36 and accompanying text.

163. *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002).

164. *See id.*

165. *See supra* notes 34–36 and accompanying text.

decision had nothing to do with personal jurisdiction, but rather with the proper status of unnamed class members. As such, it is hard to rely too heavily on *Devlin* for answers.

*Dr. Pepper*'s analysis was recently followed by the Eastern District of Kentucky in *Day v. Air Methods Corp.*<sup>166</sup> *Day* involved a class of plaintiffs who alleged that their employer failed to adequately compensate them for the overtime hours they worked.<sup>167</sup> The district court judge in *Day* held that, at least as to unnamed class members, extension of *Bristol-Myers* is not justified.<sup>168</sup> The court invoked both *Dr. Pepper* and *Devlin* to support its conclusion.<sup>169</sup>

A more recent case that has examined the issue, however, seems indistinguishable from *Dr. Pepper*, yet comes to a different conclusion. In *McDonnell v. Nature's Way Products, LLC*,<sup>170</sup> the Northern District of Illinois held that the jurisdictional analysis in *Bristol-Myers* does extend to unnamed class members who have no independent connection to the defendant's contacts with the forum state.<sup>171</sup> In so holding, the court explicitly relied on *Bristol-Myers*,<sup>172</sup> while also acknowledging that the *Dr. Pepper* court came to the opposite conclusion on similar facts.<sup>173</sup> *McDonnell* involved a class of individuals alleging a pecuniary injury inflicted by the defendant's deceptive advertising of its product.<sup>174</sup> In declining to exercise personal jurisdiction, the court explained that "[p]urchasers of [the defendant's] products . . . who live in Florida, Michigan, Minnesota, Missouri, New Jersey, New York, or Washington have no injury arising from [the defendant's] forum-related activities in Illinois."<sup>175</sup> The court's conclusion here is unsurprising though, as *Plumbers' Local Union No. 690 Health Plan* evidenced that the Northern District of Illinois had already been applying *Bristol-Myers*-like analysis to the class action context.<sup>176</sup>

Yet, an even more recent decision also confronted the issue directly and held, in line with *Dr. Pepper*, that *Bristol-Myers* should not extend to class actions. In *In re Chinese-Manufactured Drywall Products Liability Litigation*,<sup>177</sup> homeowners spanning several states brought individual actions alleging that their Chinese-manufactured drywall emitted gasses that caused injury.<sup>178</sup> All of the federal actions were consolidated for pretrial

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166. No. 5:17-183-DCR, 2017 WL 4781863 (E.D. Ky. Oct. 23, 2017).

167. *See id.* at \*1.

168. *See id.* at \*2.

169. *See id.* at \*2 n.1.

170. No. 16C5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017).

171. *See id.* at \*3-4.

172. *See id.* at \*4.

173. *See id.* at \*4 n.7.

174. *See id.* at \*1.

175. *Id.* at \*4.

176. *See supra* notes 129-31 and accompanying text.

177. No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017).

178. *Id.* at \*14. Mass tort cases are not typically susceptible to class action treatment. *See supra* note 111 and accompanying text. However, in this case, the defendants fled the jurisdiction of the court and thus were subjected to default judgments. *In re Chinese-*

proceedings in a multidistrict litigation in the Eastern District of Louisiana in 2009.<sup>179</sup> In 2014, the court certified a 23(b)(3) class.<sup>180</sup> Following the issuance of *Bristol-Myers*, the defendants filed a motion to dismiss for lack of personal jurisdiction<sup>181</sup> as to the nonresident class members involved in each forum's class action proceeding.<sup>182</sup> In denying the motion, the court cited *Dr. Pepper* for the proposition that class actions are meaningfully distinguishable from mass tort actions and thus escape the grasp of *Bristol-Myers*.<sup>183</sup> The court proceeded to distinguish the two types of actions by noting the "different due process safeguards" that apply only to class actions.<sup>184</sup> The court further distinguished the two procedural devices by emphasizing the stringent requirements that need to be satisfied in order to obtain class certification, including the predominance and superiority requirements that apply only to 23(b)(3) actions.<sup>185</sup> The court used these requirements to illustrate that there are bona fide differences between a certified class and an aggregation of individuals proceeding through joinder rules.<sup>186</sup> Interestingly, this court implicitly went even further than the *Dr. Pepper* court because all the plaintiffs involved in this case were named parties to the lawsuit.<sup>187</sup>

The foregoing decisions illustrate that, at least shortly after *Bristol-Myers*, courts are wildly divided on this issue. They also shed light on the fundamental question at hand. If the *Dr. Pepper* and *Chinese-Manufactured Drywall* courts' position that there are meaningful distinctions between a mass action group and a class action group is to be credited, *Bristol-Myers* ought to be deemed inapplicable to the class action context. However, if mass action groups are more properly perceived as indistinguishable from class action groups with regard to personal jurisdiction and state sovereignty concerns, as other courts have indicated, then extension of *Bristol-Myers* is unavoidable.

### III. ANSWERING WHETHER (AND WHERE) EXTENSION OF *BRISTOL-MYERS* IS WARRANTED

Whether class actions are meaningfully distinguishable from mass actions with respect to personal jurisdiction depends on the features of the class action in question. Each class action type is defined by characteristics that differentiate them. These distinctions, in turn, are important for determining

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*Manufactured Drywall*, 2017 WL 5971622, at \*14. Accordingly, liability was easily established as to all claimants. *Id.*

179. *See id.* at \*5.

180. *See id.* at \*4.

181. *See id.* at \*5.

182. Those forums included federal courts in Louisiana, Florida, and Virginia. *See id.* at \*13.

183. *See id.* at \*12.

184. *See id.* at \*14.

185. *See id.*

186. *See id.*

187. *See id.*

which class action types, if any, should be limited by *Bristol-Myers*. At its core, the issue of extending *Bristol-Myers* centers on whether the classes involved in each class action type are more properly perceived as individual entities or, instead, as aggregations of individuals.

If a class of plaintiffs is properly viewed as an individual entity, like a public corporation, then *Bristol-Myers* should not be deemed applicable. When one corporation sues another corporation for the latter's nationwide tortious conduct, the former is able to sue in any jurisdiction in which that conduct occurred. This is true even if some of the plaintiff-corporation's shareholders were injured by the defendant-corporation's conduct in a state other than the forum state. This result is driven by the perception of a corporation as an individual unit. Accordingly, if a class of plaintiffs is similarly (and properly) regarded as an individual entity, extension does not seem warranted.

This view is arguably consistent with the Supreme Court's *Keeton v. Hustler Magazine, Inc.*<sup>188</sup> opinion, in which the Court granted jurisdiction over the defendant, Hustler Magazine, despite the fact that only part of the plaintiff's claim arose in New Hampshire, the forum state.<sup>189</sup> In that case, the plaintiff, a New York resident, sued Hustler for libel that arose from its publication of stories involving the plaintiff.<sup>190</sup> Hustler is neither incorporated nor headquartered in New Hampshire.<sup>191</sup> The plaintiff sued in New Hampshire because that was the only forum in which her claim was not time-barred,<sup>192</sup> and the publication at issue was distributed nationally.<sup>193</sup> Consequently, the Court stated that the "cause of action arises out of the very activity being conducted, *in part*, in New Hampshire."<sup>194</sup> Similarly, if a class is seen as an individual entity, the cause of action will arise, in part, in the forum state, presuming that at least one member's injury is connected to that state. That said, *Keeton* is distinguishable in that the plaintiff was, arguably, injured in New Hampshire, since she was, arguably, injured in every state in which the alleged lies were spread. Further, the federalism limitation presented by *Bristol-Myers* is not as implicated in *Keeton* since New Hampshire has an interest in preventing the dissemination of lies about within its borders. Again, however, the same is true of a class of plaintiffs when the class is viewed as an individual entity, since at least a part of that entity is harmed wherever the defendant's injurious conduct occurs. Still,

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188. 465 U.S. 770 (1984).

189. *See id.* at 780–81. In *Bristol-Myers*, California also argued that *Keeton* supports the exercise of jurisdiction over the nonresident plaintiff. The Court rejected this assertion on the grounds that, in *Keeton*, at least some of the harm to the plaintiff arose out of the defendant's contact with New Hampshire, the forum state. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1782 (2017).

190. *See Keeton*, 465 U.S. at 772.

191. *See id.*

192. *See id.* at 773.

193. *See id.* at 770.

194. *Id.* at 780 (emphasis added).

*Keeton* provides the most liberal limits of the Court's approach to personal jurisdiction.<sup>195</sup>

Alternately, a class of plaintiffs can be viewed as an aggregation of individuals, each of whom possess individual, substantive rights. Seen in this light, Rule 23 and state equivalents merely exist as useful procedural devices that can help individuals vindicate their rights efficiently. Class actions allow representative litigation, but preserve the individuality of each member's substantive claims. Thus, if a motion to dismiss for lack of personal jurisdiction was granted as to the unconnected plaintiffs in a mass action, that same group should not be able to proceed through a class action.

Judge (then Professor) Diane Wood commented on the issue of personal jurisdiction in class actions twenty years ago.<sup>196</sup> In doing so, she recognized the importance of determining whether a class is perceived as an individual unit or instead as an aggregation of individuals.<sup>197</sup> She also understood (perhaps prophetically) that this distinction is crucial in light of state sovereignty concerns.<sup>198</sup> She asserted that "a court's adjudicatory jurisdiction over the different kinds of parties in class actions—named representatives, in-state absentees, and absentees with no links to the adjudicating forum—is a function of the cohesiveness of the class before the court and of the representational nature of the particular class action."<sup>199</sup> She believes that the more cohesive the class the more "assured we are that any particular member who comes before the court seeking to be a class representative will in fact be capable of satisfactorily standing in for the absentees."<sup>200</sup> If a class is sufficiently cohesive, "[t]he adjudicatory jurisdiction of the forum court to affect the right of absentees is a function of the court's power to affect the representative before it."<sup>201</sup> Conversely, Wood believes that if a class contains important differences among the represented individuals, the class is more properly regarded as an aggregation of individuals and therefore personal jurisdiction must be evaluated as to each class member.<sup>202</sup> Thus, Wood would reject a one-size-fits-all approach and instead take a nuanced approach to the question of whether *Bristol-Myers* should extend to the class action context. Indeed, such an approach seems appropriate in light of the significant distinctions among the different class types.

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195. See Andrews, *supra* note 15, at 1369 ("A policy analysis of *Keeton* shows that its holding already stretched the justifications for jurisdiction . . .").

196. See generally Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597 (1987).

197. See *id.* at 598–99.

198. See *id.* at 604.

199. *Id.* at 598–99.

200. *Id.* at 601.

201. *Id.* at 605.

202. See *id.* at 601–05.

A. Bristol-Myers's *Applicability to 23(b)(1) and 23(b)(2) Actions*

Rule 23(b)(1) governs “incompatible-standards” and “limited-fund” class actions, which involve individual claims that “are so intertwined that class adjudication is *essential*.”<sup>203</sup> For example, using the “incompatible standards” bond example, imagine if one court declared a municipal bond void in one individual action and another court declared the same bond valid in a separate individual action.<sup>204</sup> The municipality is left having no clue how to act.<sup>205</sup> These incompatible judgments make the class action device not only seem preferable but necessary for effective resolution.<sup>206</sup> In effect, then, a 23(b)(1)(A) class cannot be disaggregated. Accordingly, it is no surprise that in 23(b)(1)(A) class actions there is generally neither a notice requirement nor an opportunity for an unnamed class member to opt out.<sup>207</sup>

The same is true of 23(b)(1)(B) class actions. In a limited-fund case, proceeding individually will create a “race to the courthouse,” as the defendant would only have the ability to compensate a limited number of individuals.<sup>208</sup> However, under 23(b)(1)(B), every harmed individual in the class can be compensated according to her pro rata share. As such, allowing class members to opt out of such an action would undermine the purpose of having this category in the first place, namely, to ensure that claimants get their fair share.<sup>209</sup> The formation of a class in limited-fund situations, then, also provides the only means by which a group of individuals is able to vindicate its substantive rights.<sup>210</sup>

After considering the characteristics of 23(b)(1) class actions, it seems necessary to conclude that a class certified under this category is more properly perceived as an individual entity. In fact, it makes little sense to view these class actions differently. The precise reason these types of class actions exist is to avoid individuals contradicting (in incompatible-standards actions) or usurping (in limited-fund actions) other individuals' rights. In these class actions, the members' claims are “so intertwined” that it is *essential* for their claims to become one. To use Judge Wood's words, these classes are sufficiently cohesive to assure “that any particular member who comes before the court seeking to be a class representative will in fact be capable of satisfactorily standing in for the absentees.”<sup>211</sup>

Indeed, the Supreme Court has indicated its agreement with this perception through its decision to make notice and opt-out rights discretionary and, as

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203. 2 RUBENSTEIN, *supra* note 45, § 4:2 (emphasis added).

204. *See supra* note 54 and accompanying text.

205. *See supra* note 54 and accompanying text.

206. *See* 2 RUBENSTEIN, *supra* note 45, § 4:2.

207. *See id.*

208. *See id.*

209. *See id.* § 4:16.

210. *See id.*

211. Wood, *supra* note 196, at 601; *see also supra* note 200 and accompanying text.

to opt-out rights, often forbidden in 23(b)(1) proceedings.<sup>212</sup> While 23(b)(3) money-damage class actions mandate provision of such rights to comport with due process, the same due process concern does not manifest itself in 23(b)(1) class actions.<sup>213</sup> The reason for this is clear: individuals' due process rights are not threatened by 23(b)(1) proceedings because 23(b)(1) proceedings involve situations in which the class mechanism is the only way to reasonably take action. The only way to achieve satisfactory resolution of a 23(b)(1) issue is for a class to form and proceed together as one. The class members' claims are inextricably linked. No class member is foregoing an alternative to proceed individually because the claims can only successfully exist together. Thus, this constitutional due process concern is not implicated. Nor is the *Bristol-Myers* Court's federalism concern because, under the "entity" characterization, the class is injured in any state in which one of its members is injured. In other words, the class's claim arises in any state in which the defendant's contacts injured any portion of the class.

However, 23(b)(1) class actions are the least utilized type.<sup>214</sup> One explanation for this grounds itself in the Rule's due process approach.<sup>215</sup> As mentioned, the Supreme Court has held that class actions involving money damages require notice and opt-out rights for unnamed class members.<sup>216</sup> Consequently, 23(b)(1) class actions that are not of the limited-fund variety are generally limited to actions seeking injunctive relief, since notice and opt-out rights are inconsistent with the nature of 23(b)(1) classes.<sup>217</sup> Injunctive relief class actions, however, typically take the form of 23(b)(2) class actions.<sup>218</sup>

Rule 23(b)(2) class actions, or "injunctive" class actions, however, are defined by similarly unitary characteristics. As the Supreme Court itself noted, 23(b)(2) classes are defined by their "indivisible nature" and

"the notion that the [defendant's] conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."

In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each member would be entitled to an individualized award of money damages.<sup>219</sup>

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212. See FED. R. CIV. P. 23(c)(2)(A); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011) (labeling 23(b)(1) and 23(b)(2) "mandatory" classes and noting that "the Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out").

213. See *Dukes*, 564 U.S. at 363.

214. See 2 RUBENSTEIN, *supra* note 45, § 4:2.

215. See *id.*

216. See *id.*; *supra* note 212 and accompanying text.

217. See 2 RUBENSTEIN, *supra* note 45, § 4:2.

218. See *id.*

219. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011) (citation omitted) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Class certification is only appropriate in 23(b)(2) actions when a decision to enjoin or permit the defendant's allegedly harmful conduct as to an individual would necessarily affect the class as a whole.<sup>220</sup> Accordingly, here, as in 23(b)(1) class actions, "unitary adjudication is not only preferable, but it is also essential."<sup>221</sup> Unsurprisingly, in 23(b)(2) class actions, as in 23(b)(1) class actions, notice need not be provided, and the opportunity to opt out is generally not afforded.<sup>222</sup> Again, the law acknowledges the entity-like feel of 23(b)(2) classes and, accordingly, understands that the due process concerns implicated by the class action device are not as present in these "injunctive" classes.

As indicated earlier, this type of class action is commonly employed in civil and constitutional rights cases.<sup>223</sup> However, since only injunctive relief is sought in these actions, the following question might sometimes arise: Why would a plaintiff bother going through the class certification process if she is just seeking to enjoin a certain defendant's conduct?<sup>224</sup> If she wins an individual suit, while the outcome would certainly affect individuals not involved in the action (making certification appropriate), the court nonetheless would enjoin the defendant's wrongful conduct, so why endure the extra hurdles presented by the class certification process?<sup>225</sup>

The answer to these questions manifests itself in the mootness point made earlier when class action objectives were discussed.<sup>226</sup> Take the famous civil rights class action case, *Brown v. Board of Education*.<sup>227</sup> In that case, if the named plaintiff, Linda Brown, proceeded individually, she would likely have graduated school well before resolution of her case, thereby causing her claim to be moot.<sup>228</sup> However, because the mootness doctrine does not apply to class action lawsuits as long as someone in the class has a justiciable claim,<sup>229</sup> an injunctive class action allowed Linda Brown to vindicate her rights.<sup>230</sup> This mootness rule magnifies the 23(b)(2) class's "entity" status. On one hand, this mootness rule can be viewed as yet another constitutional exception applicable to class action lawsuits.<sup>231</sup> This exception would read something like: class actions are an exception to Article III's "case-or-controversy" requirement. Or, this mootness rule can be viewed not as a

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220. See FED. R. CIV. P. 23(b)(2); 2 RUBENSTEIN, *supra* note 45, § 4:26.

221. 2 RUBENSTEIN, *supra* note 45, § 4:26; see also *Dukes*, 564 U.S. at 361–62 ("Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class.").

222. See *supra* note 212.

223. See *supra* note 63 and accompanying text.

224. See 2 RUBENSTEIN, *supra* note 45, § 4:26.

225. See *id.*

226. See *id.*; *supra* notes 86–87 and accompanying text.

227. 347 U.S. 483 (1954).

228. See 2 RUBENSTEIN, *supra* note 45, § 4:26.

229. See 1 *id.* § 1:8.

230. See 2 *id.* § 4:26. See generally *Brown*, 347 U.S. 483.

231. Class actions provide an exception to the due-process-driven rule that all people bound by the resolution of a lawsuit must be named parties to that suit. See *supra* note 46 and accompanying text.

constitutional exception but as consistent both with the Constitution and with the view that 23(b)(2) classes are individual units, comprised of many individual parts, but capable of legal action only as a whole. In this light, the class's claim is justiciable, as the class still has many controversies in need of a remedy. Thus, the mootness "exception" is not exceptional at all.

Additionally, a plaintiff like Linda Brown might seek class certification because the scope of relief expands as more people join a 23(b)(2) action.<sup>232</sup> If Linda Brown had won an individual action, it is possible that only her school would have been desegregated.<sup>233</sup> However, by representing all of the black students in her community, Linda Brown desegregated an entire school district.<sup>234</sup> This relationship between class size and remedy size again elucidates the unified persona that defines 23(b)(2) actions. The larger a 23(b)(2) class grows, the greater the remedial impact an injunction will have. This effect is a product of the inseparability of each member's claim. As the unified claim grows in magnitude, so, too, does the impact of the court's resolution.

Moreover, 23(b)(1) and 23(b)(2) classes fully embody the representative litigation that Rule 23 was created to establish. Using Judge Wood's approach, these class action types are both sufficiently cohesive and truly representational.<sup>235</sup> The necessity of employing these class types in certain situations ensures that the named plaintiff or plaintiffs in these actions genuinely are standing in for the absentees. Any class member could serve as the named plaintiff without altering the substance or structure of the lawsuit. Referring back to the corporation analogy, shareholders may sell their shares to new owners, but the company's operations remain the same.

The foregoing reasons illustrate why *Bristol-Myers* should not extend to 23(b)(1) or 23(b)(2) class actions (or to analogous state class actions) that seek to avoid incompatible results, involve limited-fund defendants, or seek injunctive relief. These classes are more properly regarded as individual entities. Accordingly, when any part of that unit is harmed by the defendant's contacts with a particular state, that state presents a constitutionally sound forum.

#### B. *Bristol-Myers's Applicability to 23(b)(3) Actions*

Finally, there is the 23(b)(3), or "money-damage" class action. While the 23(b)(1) and 23(b)(2) class actions present situations in which the individual class members are inextricably linked, the members in a money-damage class "typically are not so intertwined."<sup>236</sup> Rather, money-damage class actions serve to promote efficiency by consolidating the claims of several similarly situated individuals.<sup>237</sup> Unlike the other types of class actions, then, the

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232. See 2 RUBENSTEIN, *supra* note 45, § 4:26.

233. See *id.*

234. See *id.*

235. See *supra* notes 199–201 and accompanying text.

236. 2 RUBENSTEIN, *supra* note 45, § 4:47.

237. See *supra* notes 89–91 and accompanying text.

formation of a 23(b)(3) class is not *essential* for effective resolution. In money-damage class actions, each individual could initiate her own claim individually and be entitled to the same remedy as that which she could obtain through a class action.<sup>238</sup> Furthermore, the individual class members in money-damage class actions are often entitled to varying amounts of compensation upon a favorable resolution.<sup>239</sup> There is, accordingly, not as strong a feeling of interconnectedness among the members in 23(b)(3) proceedings. Indeed, the Advisory Committee to the Federal Rules of Civil Procedure acknowledged as much when it wrote that “class-action treatment is not as clearly called for” in 23(b)(3) class actions.<sup>240</sup> As such, it is harder to argue for the “entity” perception when evaluating 23(b)(3) class actions.

However, as earlier explained, one of the central objectives of class actions is to enable people to obtain compensation for small claims that would be inefficient to pursue as individual actions.<sup>241</sup> This objective is attained through the use of 23(b)(3) money-damage classes.<sup>242</sup> Not only does proceeding through a 23(b)(3) class action ensure compensation for a group of individuals who would not otherwise be made whole, but, as also noted earlier, it has the effect of deterring the wrongdoer’s harmful conduct.<sup>243</sup> Thus, in these small-claim 23(b)(3) class actions, as in 23(b)(1) and 23(b)(2) actions, the class mechanism can be seen as essential for the attainment of a remedy. The same cannot be said of mass tort actions, like the one in *Bristol-Myers*, in which many of the claimants sought damages that would also be worth seeking in an individual action.<sup>244</sup>

Still, the reality is that small-claim money-damage class actions feasibly *could* be brought as several individual claims; it would just be incredibly inefficient for any individual plaintiff to do so. Consequently, even these 23(b)(3) class actions are grounded in efficiency concerns. Thus, the question of *Bristol-Myers*’s extension to 23(b)(3) class actions does not warrant as clear of an answer. And while it is true that small-claim 23(b)(3) cases accomplish beneficial deterrent and compensatory objectives, such benefits would not be eliminated by the extension of *Bristol-Myers*. Rather, these benefits would simply be limited to realization in either the defendant’s home state, or in a forum in which the defendant’s contacts with the state give rise to each member’s claim.

There is, however, something to be said about undermining 23(b)(3)’s efficiency objective. Extending *Bristol-Myers* to 23(b)(3) actions would make it hard for plaintiffs to form voluminous classes. In situations where a defendant’s wrongdoing injures a class of people nationwide, the only forum

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238. See 2 RUBENSTEIN, *supra* note 45, § 4:49.

239. See *id.* § 4:54.

240. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

241. See *supra* notes 74–77 and accompanying text.

242. See 2 RUBENSTEIN, *supra* note 45, § 4:47.

243. See *supra* notes 79–88 and accompanying text.

244. This proposition is supported by the fact that the underlying case in *Bristol-Myers* proceeded as a mass tort action which, unlike a class action, does not serve to enable small-claim plaintiffs to obtain compensation.

in which a nationwide class action could likely proceed is a state in which the defendant is subject to general jurisdiction. Such a severe obstacle will make it difficult for these classes to form and will increase the likelihood of creating a series of lawsuits as opposed to a single class action. Consequently, the objective of achieving “economies of time, effort, and expense”<sup>245</sup> (i.e., the efficiency objective) would be greatly mitigated. One could argue that mass actions are similarly available to promote efficiency.<sup>246</sup> This argument, as it relates to the *Bristol-Myers* holding, would proceed by noting that the efficiency benefits of mass actions were explicitly subjugated by the Court in favor of federalism concerns. As such, the argument would conclude, the same reasoning should apply to money-damage class actions.

Yet, the efficiency accomplishments of mass actions are not as substantial as those of class actions.<sup>247</sup> The extent to which efficiency is more substantially achieved in 23(b)(3) class actions than mass actions is highlighted by the predominance requirement. Because “questions of law or fact . . . [must] *predominate* over any questions affecting only individual members,”<sup>248</sup> the 23(b)(3) class action guarantees an efficient result. Mass actions, on the other hand, while always involving some common issues of law and fact, often involve plaintiffs whose individual cases differ significantly from one another.<sup>249</sup> These differences, in turn, require additional and particularized litigation, thereby mitigating the mass action’s economical objective.<sup>250</sup>

Still, it is hard to avoid that *Bristol-Myers* explicitly dismissed efficiency concerns by highlighting federalism concerns. After all, extension of *Bristol-Myers* still permits class actions in defendants’ home states. Moreover, since only the named plaintiffs are required to litigate in class actions, the burden of litigating in the defendant’s home state is much lighter than would be in a mass action, in which all the plaintiffs are named. Thus, the argument for not extending *Bristol-Myers* can only be won by illustrating that 23(b)(3) class actions do not encounter the same federalism obstacle as mass tort actions. Arguing that class actions achieve greater efficiency than mass actions and, therefore, that *Bristol-Myers* should be stopped in its tracks, does just the opposite.

Furthermore, 23(b)(3) class actions do not always involve an aggregation of individuals with de minimis claims. Sometimes they involve an aggregation of claimants who each individually are seeking a substantial monetary award from a defendant.<sup>251</sup> In these cases, procedural efficiency does seem to be the driving rationale behind proceeding through a class action.<sup>252</sup> Accordingly, it is harder to distinguish these class action types

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245. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

246. *See supra* note 105 and accompanying text.

247. *See supra* notes 108–14 and accompanying text.

248. FED. R. CIV. P. 23(b)(3) (emphasis added).

249. *See supra* notes 108–14 and accompanying text.

250. *See supra* notes 108–10 and accompanying text.

251. *See supra* notes 94 and accompanying text.

252. *See supra* notes 94–95 and accompanying text.

from the *Bristol-Myers*-like mass actions, which also ground themselves in an efficiency rationale.

However, the 23(b)(3) predominance requirement does not only further efficiency aims, it also promotes uniformity in the law, the other central purpose of a 23(b)(3) action.<sup>253</sup> The predominance requirement presents a high threshold that needs to be met in order to get a money-damage class action certified. Requiring “questions of law or fact common to class members [to] predominate over any questions affecting only individual members”<sup>254</sup> ensures that members of a 23(b)(3) class are similarly situated to a high degree, which, in turn, promotes consistency in the law by resolving the similarly situated claims the same way. If each member of a 23(b)(3) class were to proceed individually, there is a significant chance that the similarly situated cases would be resolved by contradictory judgments. One court might set precedent X while another court sets precedent Y on substantially identical claims. Indeed, the predominance requirement is “meant to assess whether the class’s interests are sufficiently cohesive to warrant adjudication by representation.”<sup>255</sup> The same sense of cohesion is not as sought-after in mass actions. The risk of having inconsistency in the law by disassembling a mass action is not nearly as great, as different outcomes are often justifiable because claimants often present key factual differences among their respective cases.<sup>256</sup> On the other hand, forcing a 23(b)(3) class to disassemble and litigate separately does risk inconsistency in the law, as the initial formation of the class required each individual’s claim to be governed by predominantly the same legal and factual disputes. Whether the *Bristol-Myers* Court’s federalism concern trumps this legal inconsistency problem is a closer question.

Naturally, the contention arises that, in *Bristol-Myers*, California premised its specific jurisdiction argument on the fact that the claims of the nonresident plaintiffs were identical to those of the California plaintiffs: the nonresident plaintiffs, like the California plaintiffs, ingested and were subsequently injured by Plavix.<sup>257</sup> The Court, of course, rejected this argument.<sup>258</sup> Therefore, it can be argued that extension to 23(b)(3) class actions is warranted even in the face of 23(b)(3)’s predominance requirement.

Yet, California could not argue that inconsistency in the law might flow from the Court’s decision to deny personal jurisdiction, as the plaintiffs’ cases likely involved significant distinctions, including different Plavix-inflicted injuries and varying levels of causation evidence.<sup>259</sup> This makes sense in light of the fact that a key distinguishing factor between mass actions

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253. See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

254. FED. R. CIV. P. 23(b)(3).

255. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

256. See *supra* notes 108–14 and accompanying text.

257. See *supra* note 3 and accompanying text.

258. See *supra* note 3 and accompanying text.

259. The underlying action in *Bristol-Myers* involved nearly 700 individuals, each of whom were likely prescribed varying doses, had distinct medical histories, and were injured to varying degrees.

and 23(b)(3) class actions is the latter's predominance requirement, which, again, serves to promote uniformity in the law.

However, the *Spratley* court seemingly was not affected by the distinguishing effect of the predominance requirement. Although that court did not explicitly address *Bristol-Myers*'s extension to class actions, it did invoke *Bristol-Myers* to grant the defendant's 12(b)(2) motion to dismiss.<sup>260</sup> Above, it was conjectured that such dismissal might have been predicated on an arbitrariness concern—namely, that upholding jurisdiction would allow plaintiffs like these to proceed through a class action when a mass action would be barred by *Bristol-Myers*. Accordingly, proceeding through a class action would have the effect of providing these plaintiffs with a procedural loophole.

Yet, the fact that plaintiffs may sometimes choose between proceeding through a mass action or class action does not provide a procedural loophole as much as it speaks to the selectiveness of a 23(b)(3) class action. The predominance requirement decides which groups of people can proceed through a class action. Often, the members of a 23(b)(3) class could have proceeded through a mass action, but not vice versa. It is more appropriate to form a 23(b)(3) class when the same issues of law and fact predominate over each individual claim. The reverse is not true—most mass actions do not meet the requirements needed to proceed through a class action. Thus, there is no arbitrariness in not extending *Bristol-Myers* to money-damage class actions because the predominance requirement serves to meaningfully distinguish a class-action-qualified group from a mass-action-qualified one. The ability to qualify for class certification speaks to the nature of a particular group of individuals—one that is inherently more cohesive than a group unable to obtain such certification. Conversely, a group that is too dominated by particularized facts cannot be properly regarded as a class.

Another telling distinction is that class actions are rarely appropriate in the personal injury context.<sup>261</sup> The only instance in which class certification is sometimes warranted is when the injuries arise from a single occurrence, such as the collapse of the Hyatt skywalk.<sup>262</sup> Again, this illustrates the natural distinction between class action and mass action groups. When several injuries occur as the result of an isolated occurrence, the issues of law and fact will generally predominate over each individual's claim, as there are no major discrepancies as to the manner in which the individuals were harmed. Using the skywalk example, each individual was injured at the exact same time, in the exact same place, by the exact same accident. That can easily be contrasted with the injuries associated with *Bristol-Myers*. There, important differences like dosage and medical and personal history served to individualize each person's claim. This distinction between these two types of personal injury cases exemplifies the predominance requirement as an

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260. See *supra* notes 133, 137 and accompanying text.

261. See *supra* notes 111–15 and accompanying text.

262. See *supra* notes 116–18 and accompanying text.

effective mechanism used to only qualify groups that are sufficiently cohesive.

Still, as the *Dr. Pepper* and *Day* courts explicitly addressed, and as the *Spratley* court implicitly acknowledged, there seems to be a difference between extending the *Bristol-Myers* holding to class actions in which unnamed class members cannot establish specific (or general) jurisdiction and extending *Bristol-Myers* in class actions in which some of the named plaintiffs cannot establish personal jurisdiction. In the former situation, *Dr. Pepper* and *Day* do not view extension as warranted or proper.<sup>263</sup> In the latter situation, all three courts seem to think extension is appropriate.<sup>264</sup> After all, every plaintiff in a mass action is named and the *Bristol-Myers* Court clearly denied jurisdiction to the plaintiffs with claims unrelated to the forum state. However, to distinguish on these grounds is to diminish the more meaningful distinction between money-damage class actions and mass actions—namely, the greater cohesion among those involved in the former as well as the former’s more substantial promotion of legal consistency. Distinguishing between named and unnamed class members undermines the essence of the 23(b)(3) class because it suggests that the primary way to distinguish class actions from mass actions is by acknowledging that the former involves representatives, while the latter does not. While this is still a meaningful distinction, it does not as sensibly warrant paralyzing *Bristol-Myers* in light of the Court’s federalism language. However, the named-unnamed distinction is the more palpable one, as it allows courts to grab onto a concrete difference between the two forms of litigation.

However, relying on the differences between what lies at the core of mass actions and class actions might be viewed as an exercise in abstraction. Judges are asked to make law according to established legal principles; the more concrete distinction allows them to do so here. However, to really illustrate how 23(b)(3) class actions do not implicate the federalism concern focused on by the *Bristol-Myers* Court, the named-unnamed distinction might be better seen as a product of the differences in nature between mass and class actions. In other words, the greater sense of cohesion in the former enables a unique type of litigation—representative litigation—that concretely projects the differences between the two types of lawsuits through the unnamed-named distinction. Still, as Judge Wood noted, a forum state’s ability to exercise jurisdiction over the unnamed members of a sufficiently cohesive class “is a function of the court’s power to affect the representative before it.”<sup>265</sup> Thus, as indicated by the judges in *Spratley* and *Dr. Pepper*, class representatives—that is, named parties in a class action—must satisfy the jurisdictional requirements mandated by *Bristol-Myers*.

Still, the due process constraints that limit only 23(b)(3) actions seemingly weigh in favor of extension of *Bristol-Myers* to both named and unnamed class members. To remain consistent with the Due Process Clause, provision

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263. See *supra* notes 150–52, 168 and accompanying text.

264. See *supra* notes 137, 149–52, 168 and accompanying text.

265. Wood, *supra* note 196, at 605.

of notice and opt-out rights to all class members in a money-damage class action is mandatory.<sup>266</sup> This requirement serves to highlight the constitutional due process concerns that arise in 23(b)(3) actions as compared to the other class action types, which do not mandate provision of notice or opt-out rights.<sup>267</sup> As the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*<sup>268</sup> stated:

[Rule 23(b)(2)] does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.<sup>269</sup>

Due to the fact that 23(b)(3) classes, unlike the other class types, are not essential to afford claimants proper relief, “an individual litigant can pursue her own money damage action without affecting other similarly situated parties.”<sup>270</sup> As such, the members of 23(b)(3) classes need to be given minimal due process rights, namely, notice of the lawsuit and an opportunity to opt out.<sup>271</sup> In 23(b)(1) and 23(b)(2) class actions, conversely, these requirements are absent because of the classes’ individualized nature.<sup>272</sup> Since the only way to obtain an effective remedy in these class action types is through the formation of a class, notice and opt-out rights are not seen as necessary.<sup>273</sup> Thus, the Due Process Clause here serves to distinguish 23(b)(3) class actions with more of an aggregate feel than an “entity” class action.

Furthermore, as Professor Carol Rice Andrews noted years before *Bristol-Myers* tightened the specific jurisdiction doctrine, the Constitution (and the Court’s interpretation of it) conceivably does limit jurisdiction in nationwide class actions in which certain class members have no connection to the forum state—or, what Andrews terms the “problem class action.”<sup>274</sup> In illustrating her point, Andrews relies on *Shutts*.<sup>275</sup> Specifically, she highlights the Court’s choice-of-law analysis, an area that is also governed by the Due Process Clause but is less constitutionally stringent because it does not require the defendant to have purposely availed itself of the forum state.<sup>276</sup> Instead, for a state’s choice-of-law rules to be applied, “that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally

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266. See *supra* notes 43, 69 and accompanying text.

267. See *supra* notes 70–71 and accompanying text.

268. 564 U.S. 338 (2011).

269. *Id.* at 363.

270. 2 RUBENSTEIN, *supra* note 45, § 4:49.

271. See *supra* note 69 and accompanying text.

272. See *supra* Parts III.A–B.

273. See *supra* Parts III.A–B.

274. See Andrews, *supra* note 15, at 1349.

275. See *id.* at 1370–74.

276. See *id.* at 1373.

unfair.”<sup>277</sup> In *Shutts*, the Court held that Kansas, the forum state, could not apply its choice-of-law rules to the claims of the class members whose cases did not arise out of the defendant’s contacts with Kansas.<sup>278</sup> Here, then, the formation of a class did not except the members with claims unrelated to the forum state from the constitutional limitations of the Due Process Clause. Andrews argued:

The same conclusion can apply to personal jurisdiction. If the relationship between the claims of the unnamed class members and the forum were insufficient to meet the test for choice of law, then it seemingly would be insufficient to meet the more demanding due process test for personal jurisdiction over the defendant.<sup>279</sup>

However, the choice-of-law inquiry is often explored after personal jurisdiction has been established.<sup>280</sup> Indeed, the choice-of-law limitation serves as a constitutional safeguard for situations in which personal jurisdiction has been established in the forum state, but the forum state does not serve as the optimal state for choice of law, as was the case in *Shutts* itself.<sup>281</sup> Accordingly, choice-of-law due process concerns actually help to mitigate the federalism concern of failing to extend *Bristol-Myers* to class actions.

Yet, Judge Wood indicated that specific jurisdiction ought to only be asserted over a defendant opposing a class if: (1) specific jurisdiction can properly be exercised as to each class member individually, or (2) the class is of the “purely representational variety.”<sup>282</sup> Judge Wood argued that 23(b)(3) classes that involve too many differences among the individual members—such as differences in “interest, stake, or motivation”<sup>283</sup>—conform more squarely to the joinder model, that is, the model in which several individuals use Rule 20 (or a state equivalent) to aggregate their claims, as was the case in *Bristol-Myers*.<sup>284</sup> However, classes that involve these differences should not, with the proper scrutiny, be able to obtain class certification in the first place. Nevertheless, if they do obtain certification, due to a lack of scrutiny or difficulty in ascertaining predominance at the filing stage, there are ex post measures to remedy the error.<sup>285</sup>

Either way, the case remains that a group of individuals with a mass tort claim against a particular defendant cannot simply circumvent the personal jurisdiction obstacle created by *Bristol-Myers* by proceeding as a class. To

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277. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

278. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

279. Andrews, *supra* note 15, at 1373.

280. Personal jurisdiction is a threshold inquiry, since the defendant is seen to have consented if she does not immediately object. *See supra* note 10 and accompanying text.

281. *See Shutts*, 472 U.S. at 821 (“[W]hile a State may, for reasons we have previously stated, assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law.”).

282. *See Wood*, *supra* note 196, at 617–18.

283. *See id.* at 603.

284. *See id.* at 623–24.

285. *See id.* at 601.

do so would require the group to satisfy the predominance requirement.<sup>286</sup> And, as already explained, the plaintiffs in *Bristol-Myers*-like actions are not able to do so.<sup>287</sup> Indeed, “the predominance requirement . . . precludes certification in most mass tort personal injury cases.”<sup>288</sup> Thus, the predominance requirement has the effect of distinguishing the actual nature of money-damage mass actions and money-damage class actions. Failing to extend *Bristol-Myers*, then, facilitates realization of 23(b)(3)’s objective: to enable a certain *type* of group to proceed through representative litigation—more specifically, a group that is defined by predominantly the same issues of law and fact.

Finally, class actions, unlike mass actions, are governed by a rule that was created to establish an equitable exception to the constitutional limitation of individuals being bound only by actions to which they are a party in the traditional sense (i.e., a named party).<sup>289</sup> Mass actions, conversely, comport with this constitutional limitation.<sup>290</sup> The very core of a class action, then, is constitutionally exceptional. Thus, to except class actions from the federalism language of *Bristol-Myers* seems justifiable.

In *Amchem*, which involved a putative 23(b)(3) class action, the Court noted that Rule 23(b)’s “dominant concern” is ensuring that “the proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.”<sup>291</sup> If a court certifies a class, then, it inherently acknowledges the group’s unique level of cohesiveness. Seen another way, similar to the mootness exception, this due process exception is not genuinely exceptional, but rather consistent with the notion that classes are properly perceived as individual units and, thus, the absent class members are fully present through their representatives. An injury to any individual in the class represents an injury to a portion of the class itself. Accordingly, if the class representative satisfies the jurisdictional requirements, so do the absent class members.

Yet the Court has made clear that in 23(b)(3) actions this due process concern is significant.<sup>292</sup> However, this concern is addressed through 23(b)(3)’s provision of a middle ground: rather than require individuals to affirmatively opt *into* the action (as due process would mandate in any other type of nonclass action), absent class members must be given the opportunity to affirmatively opt *out*.<sup>293</sup> This middle ground can only be regarded as constitutionally appropriate if 23(b)(3) classes are sufficiently cohesive and representational; if they are, a court’s jurisdictional reach over the absentees

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286. See FED. R. CIV. P. 23(b)(3).

287. See *supra* notes 108–14 and accompanying text.

288. 2 RUBENSTEIN, *supra* note 45, § 4:54.

289. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); *supra* note 45 and accompanying text.

290. As stated earlier, every party in a mass action is named. See *supra* notes 102, 106 and accompanying text.

291. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

292. See *supra* notes 266–70 and accompanying text.

293. See *supra* notes 43, 69 and accompanying text.

will be a function of its reach over the representative before it. The predominance requirement achieves this aim. In sum, while the predominance requirement might not rise to the level of awarding 23(b)(3) classes with the same “entity” status as the other types of class action, it does enough to protect it from *Bristol-Myers*.

#### CONCLUSION

The *Bristol-Myers* Court was clear about the contours of the personal jurisdiction doctrine and how it applied to the facts at hand. The non-Californian plaintiffs could not survive a motion to dismiss for lack of personal jurisdiction because general jurisdiction could not be asserted over BMS, and the non-Californian plaintiffs’ claims did not arise out of BMS’s contacts with California. To hold otherwise, the Court emphasized, would infringe upon the sovereignty of the states that did represent an appropriate forum for the non-California residents. The Court, as Justice Sotomayor crossly noted, left open the question of whether its decision would extend to class actions. Thus, this Note principally examined whether class actions are sufficiently distinguishable from mass actions so that the Court’s federalism concern is not implicated. For 23(b)(1) and 23(b)(2) actions, the answer came more easily: the unified and essential nature of these actions precluded extension of *Bristol-Myers*. Rule 23(b)(3) actions, on the other hand, presented a closer question. However, the requirements that are needed to form 23(b)(3) classes, namely, the predominance and superiority requirements, elevate 23(b)(3) classes above *Bristol-Myers*’s reach. Without them, 23(b)(3) actions would be too similar to mass actions to survive *Bristol-Myers*. Similar to how they permit a middle ground to satisfy due process concerns, these unifying requirements do enough to evade *Bristol-Myers* concerns as well. Perhaps a middle ground in this context as well is imminent. For now, though, the class action should remain unscathed.