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All Is Not Lost: Personal Jurisdiction in a Post-BMS World

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IN A TYPICAL ANTITRUST CLASS ACTION, plaintiff purchasers sue multiple sellers on behalf of a class of similarly situated purchasers nationwide. The purchasers often allege that the sellers conspired to raise prices on some good or service.[1] Nationwide classes are key to class actions of all types—but are especially important to these antitrust cases—because they allow plaintiffs to bring cases that may not be economical to pursue on a state-by-state basis and enable all cases to be resolved more efficiently.

The Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California* ("*BMS*"),[2] which introduced new requirements for plaintiffs attempting to sue companies using specific personal jurisdiction, sent shock waves throughout the antitrust class action bar. Importantly, *BMS* was a coordinated mass action, not a class action, but if courts applied *BMS*'s restrictions to class actions, plaintiffs would find it significantly harder to certify nationwide classes.

Six years in, *BMS*'s application to class actions has been limited and uneven. While a handful of courts have taken the dramatic step of applying *BMS*'s rules to class actions, most courts have declined to do so or have dodged the issue on procedural grounds. The nationwide class action therefore remains largely intact, and *BMS* has not disturbed any major antitrust cases. Litigants, however, risk running afoul of *BMS*'s requirements if they remain unaware of the issues it presents—especially with regard to limitations on named class plaintiffs.

This article offers practical guidance to class action practitioners—particularly in the antitrust context—who may be unfamiliar with personal jurisdiction issues generally and with *BMS* specifically. Though *BMS*'s logic is not often applied to unnamed class members in class actions—and the Third, Sixth, and Seventh Circuits have expressly declined to do so—litigants filing cases outside of those circuits face some risk of *BMS* being used to dismiss their class claims. Further, *BMS* has highlighted existing law requiring that courts have personal jurisdiction as to the claims of all named class plaintiffs. This article addresses the arguments practitioners may want to consider when they make and respond to personal jurisdiction challenges arising from *BMS* and its application to class actions.

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Personal Jurisdiction

BMS is a case about the constitutional limits of personal jurisdiction. Under the doctrine of personal jurisdiction, a defendant cannot be sued in a forum—that is, a court—unless it has enough contacts with the forum state to comply with the Constitution's Due Process Clause.[3] Under Supreme Court precedent, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State."[4]

Minimum contacts can be established via either specific jurisdiction or general jurisdiction. A forum may assert specific jurisdiction over a defendant when the litigation "aris[es] out of or relate[s] to the defendant's contacts with the forum."[5] For example, a defendant has minimum contacts in New York where the company offers a product to customers in New York, often ships products to customers in New York, and ships the product to New York that is the subject of the litigation.[6] In antitrust law in particular, Section 12 of the Clayton Act allows for the exercise of personal jurisdiction over corporations nationwide, meaning that any court in the United States can exercise personal jurisdiction so long as the corporation has minimum contacts with the United States as a whole.[7]

A forum may assert general jurisdiction over a defendant—that is, jurisdiction regardless of how the suit originated—"when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[8] In practice, it may be difficult to establish general jurisdiction outside of a corporation's place of incorporation or headquarters (often termed "principal place of business").[9]

Finally, a defendant can also consent to personal jurisdiction, regardless of whether personal jurisdiction is proper.[10] A defendant can consent either explicitly, such as in a stipulation, or implicitly, such as by filing an answer to the complaint or failing to raise the defense in a pre-answer motion.[11]

BMS's Limitations on Specific Personal Jurisdiction

BMS considered a mass tort suit against the maker of blood-thinning drug Plavix for product liability and misrepresentation.[12] The plaintiffs, a group of over 600 Plavix users from 34 states, did not seek class treatment but instead sued in state court in California, under California tort law as part of a coordinated mass suit. Defendant BMS was incorporated in Delaware and headquartered in New York, so California courts could not assert general jurisdiction under recent Supreme Court precedent. BMS did sell Plavix extensively in California, although its California sales were not especially high compared to other states.[13]

BMS contested California courts' exercise of personal jurisdiction over the claims brought by non-California

residents in the mass suit. The California Supreme Court applied a "sliding scale approach to specific jurisdiction," finding that because BMS had "extensive contacts with California," courts could exercise specific jurisdiction even for claims with a "less direct connection" to the state.[14] The California Supreme Court allowed for specific jurisdiction because, applying this sliding scale approach, "the claims of the nonresidents were similar in several ways to the claims of the California residents."[15]

The U.S. Supreme Court rejected California's approach. Instead, Justice Alito, writing for the Court, held that without an "'affiliation between the forum and the underlying controversy,' specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."[16] Because BMS lacked that affiliation for the claims of non-California residents, there could be no specific jurisdiction.[17]

Though the Court's opinion did not consider any impacts on class actions, Justice Sotomayor noted the ambiguity raised by the decision in a spirited dissent and remarked that the opinion "hands one more tool to corporate defendants determined to prevent the aggregation of individual claims."[18] In response, the majority noted that the plaintiffs could nonetheless "join[] together in a consolidated action in the States that have general jurisdiction over BMS," such as New York or Delaware.[19] Further, the majority noted that the decision "leave[s] open the question whether" its restrictions on specific jurisdiction apply in federal courts—or only in state courts, as considered there.[20]

Post-*BMS* Lower-Court Decisions: Absent Plaintiffs

Since *BMS*—and with no further guidance from the Supreme Court—lower courts have wrestled with Justice Sotomayor's implied question of how to apply *BMS* to class actions where defendants challenge the court's specific jurisdiction over them for the claims of unnamed, out-of-state plaintiffs. Class actions differ from mass actions in that one or more named plaintiffs sue on behalf of similarly situated, unnamed class members (also known as "absent" class members), who are nevertheless bound by the judgment in the case unless they opt out.[21] Class actions are governed by Federal Rule of Civil Procedure 23, which requires courts to "certify" that a class and its representatives meet certain requirements, as a check to ensure that absent class members' interests are being adequately and efficiently represented.[22]

Courts have taken three main approaches toward *BMS*'s application to non-resident, absent class members: most courts have declined to apply *BMS* in class actions and allowed the exercise of specific jurisdiction; some have sidestepped the issue based on timing reasons; and a handful have applied *BMS* to prevent the exercise of specific jurisdiction over non-resident class members. This section will discuss those approaches in turn.

***Courts declining to apply* BMS.** Most courts considering *BMS* in the context of class actions—including the two Courts of Appeals to directly consider the issue—have held that *BMS* does not apply to class actions and consequently denied any objections to the exercise of personal jurisdiction.[23]

The first Court of Appeals to consider *BMS*'s application to class actions was the Seventh Circuit in *Mussat v. IQVIA, Inc.*[24] *Mussat* involved a putative nationwide class action brought in the U.S. District Court for the Northern District of Illinois by an Illinois plaintiff against a defendant incorporated in Delaware and headquartered in Pennsylvania for violations of the Telephone Consumer Protection Act. The district court had applied *BMS* and ordered the nationwide class to be struck from the pleadings based on lack of personal jurisdiction.

Chief Judge Wood, writing for a unanimous panel that included future Supreme Court Justice Amy Coney Barrett, reversed the district court and held that *BMS* should not apply to class actions. Declaring that "[p]rocedural formalities matter," the panel called attention to the differences between class actions and coordinated mass actions, including that a class action must undergo class certification procedures to bind absent class members.[25] The court further reasoned that "[n]onnamed class members . . . may be parties for some purposes and not for others" and are not considered parties when assessing subject matter jurisdiction or venue.[26] Accordingly, "the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so."[27]

The court offered two final observations. First, applying *BMS* to class actions would prevent nationwide class actions, a disfavored outcome because neither Supreme Court precedent nor Rule 23 "frowns on class actions."[28] Second, *BMS* "expressly reserved the question whether its holding extended to the federal courts at all" as further support for not applying *BMS* to class actions—although the court did not explore the federal–state court issue further.[29]

Borrowing heavily from *Mussat*, the Sixth Circuit also declined to apply *BMS* to class actions in *Lyngaas v. Curaden AG*.[30] There, a divided panel of the Sixth Circuit rejected the defendants' personal jurisdiction challenge and "follow[ed] the[] lead [of *Mussat*] in holding that *Bristol-Myers Squibb* does not extend to federal class actions." The court called attention to "the certification procedures set forth in Rule 23" for class actions, reasoning that "[t]he different procedures underlying a mass-tort action and a class action demand diverging specific personal jurisdiction analyses."[31]

Dissenting as to this jurisdictional issue, Judge Thapar opined that courts must have "personal jurisdiction over all parties for each claim—including the claims of absent class members."[32] Judge Thapar reasoned that, because courts can bind both named and absent class members to its judgment, class actions are similar to the mass action considered in *BMS* and should be treated similarly.

In dicta, the Third Circuit also endorsed the *Mussat* and *Lyngaas* approach. In *Fischer v. Federal Express Corp.*, a unanimous panel held that *BMS* requirements *did* apply to Federal

Labor Standards Act collective actions but "did not change the personal jurisdiction question with respect to class actions."[33]

None of the district courts considering *BMS* in the context of antitrust class actions has applied its restrictions to absent class members. For example, in *Hospital Authority of Metropolitan Government of Nashville v. Momenta Pharmaceuticals, Inc.* ("*MGH*"), the U.S. District Court for the Middle District of Tennessee considered a putative class action brought by a city-run hospital in Tennessee and a health benefit plan based in New York against two out-of-state drugmakers.[34] The plaintiffs alleged that the drugmakers conspired to fix prices and monopolize the market for a drug used to treat heart attacks, in violation of the Sherman Act and various state antitrust and consumer protection laws.[35]

On a motion to dismiss, the drugmakers argued that the court lacked specific jurisdiction under *BMS* because the plaintiffs "assert[ed] putative class action claims as non-Tennessee residents, on behalf of non-Tennessee residents, and under non-Tennessee laws, based on enoxaparin purchases made outside Tennessee."[36] That court, which considered the issue before *Mussat*, *Lyngaas*, or *Fischer*, rejected the drugmakers' argument, holding that *BMS* does not apply to class actions.[37] The court reasoned—similarly to *Mussat* and *Lyngaas*—that class actions were procedurally different from mass actions because "the named plaintiffs are the only plaintiffs actually named in the complaint" and class certification "suppl[ies] due process safeguards not applicable in the mass tort context."[38] The class was later certified and the parties eventually settled.[39]

These cases reflect the view of the majority of district courts across the country, which have held that *BMS* does not apply to class actions—including all courts considering the issue in antitrust cases.[40] A 2019 review of the case law—before any circuit-level decisions on the issue—found that 48% of district court decisions in which the argument was raised declined to apply *BMS* to class actions, whereas only 13% of district court decisions applied *BMS* (38% of decisions did not reach the issue).[41] The vast majority of courts addressing the issue since the review have declined to apply *BMS* and allowed for courts to exercise personal jurisdiction over the claims of absent class members so long as the named plaintiffs satisfied personal jurisdiction requirements.[42]

Courts sidestepping jurisdictional holdings. Instead of ruling on the ultimate issue of *BMS*'s application to absent class members, some courts have found challenges to personal jurisdiction under *BMS* to be premature and therefore deferred any determinations on the merits. Under this rationale, *BMS* has placed litigants in a catch-22 of sorts when applied to class actions, because litigants can only object to personal jurisdiction relating to absent class members after their arguments are already waived.

Under longstanding practice and precedent, defendants must object to the exercise of personal jurisdiction in their initial pleading or motion to dismiss; otherwise, they waive their personal jurisdiction objections.[43] But when a party files a putative class complaint, the class has not yet been certified, so absent class members' claims are not yet before the court.[44] Accordingly, some courts have held that objecting to personal jurisdiction in a motion to dismiss filed in advance of class certification may be premature, while objecting after class certification may risk waiver.[45]

Three Courts of Appeals have considered this timing issue. All have found that defendants do not waive personal jurisdiction objections over absent class members' claims by failing to include them in a motion to dismiss; instead, objections regarding absent class members are premature prior to class certification.[46] For example, in *Moser v. Benefytt, Inc.*, a California resident filed a putative nationwide class action in the U.S. District Court for the Southern District of California against a telemarketing company incorporated in Delaware and headquartered in Florida.[47] The defendant did not object to the exercise of personal jurisdiction in its motion to dismiss; instead, it raised objections as part of its opposition to class certification. The district court denied the defendant's objection, holding these personal jurisdiction-related objections waived under Fed. R. Civ. P. 12(h).

On appeal, a divided Ninth Circuit panel reversed, holding that the defendant's personal jurisdiction defense was not "available" at the motion to dismiss stage, so it could not be waived.[48] Though the plaintiff requested that the panel decide the merits of the *BMS* issue, the panel demurred, remanding to the district court for a ruling on the merits.[49]

Federal district courts in the Northern District of California, Southern and Eastern Districts of New York, Northern and Southern Districts of Illinois, District of Maryland, District of Massachusetts, District of New Jersey, Eastern District of Pennsylvania, and Southern District of Indiana have all declined to issue *BMS* merits rulings and instead deferred consideration of personal jurisdiction to class certification.[50]

Courts applying* BMS *and declining to exercise specific jurisdiction. Although some courts have broken with the general trend and applied *BMS* to class actions (though none have done so in antitrust cases), their numbers have dwindled since *Mussat* and *Lyngaas*. *Mussat* abrogated several Illinois district court decisions that had applied *BMS* to absent class members, leaving only two decisions from across the country that have not been abrogated: *Stacker v. Intellisource, LLC*[51] and *Carpenter v. PetSmart, Inc.*[52]

Stacker considered a putative nationwide class action alleging violations of the Fair Credit Reporting Act filed in the U.S. District Court for the District of Kansas. The plaintiff was a Kansas resident; the defendant was an LLC headquartered in Colorado.[53] On the personal jurisdiction issue, the court acknowledged that "the majority of district courts and two circuit courts" declined to apply *BMS*; nevertheless, it applied *BMS* and held that the claims of non-Kansan class members "would be subject to dismissal due to lack of personal jurisdiction."[54] The court acknowledged that its holding conflicted with *Mussat* and the *Lyngaas* majority but reasoned that those cases were "not persuasive" for the reasons expressed

in Judge Thapar's dissent in *Lyngaas*. The court reasoned that "[a] defendant should not be required to litigate claims that have no connection to this state solely because the claims are those of unnamed class members."[55] Accordingly, the court struck the plaintiff's class allegations from the complaint.[56]

Carpenter, which was decided before *Lyngaas* or *Mussat*, similarly struck the plaintiff's allegations seeking certification of a putative nationwide class of hamster habitat purchasers in the U.S. District Court for the Southern District of California, where the defendant was incorporated in Delaware and headquartered in Arizona.[57] The court reasoned that different procedures in class actions (like Rule 23 class certification) compared to mass actions were simply "a distinction without a difference" and did not merit any differences in personal jurisdiction analysis between class actions and mass actions.[58]

The discussion above shows that most courts have been reluctant to apply *BMS* to the claims of absent class members. First, courts have distinguished class actions from mass actions based on the procedural protections (like class certification requirements) present in class actions that were not present in the *BMS* mass action. Second, courts have worried that applying *BMS* would disrupt nationwide class actions writ large, in ways not contemplated by the Supreme Court or Rule 23. Any momentum for applying *BMS* to class actions appears to have been stalled by the Sixth and Seventh Circuits' decisions declining to apply *BMS* to absent class members (and the Third Circuit's dicta suggesting the same). Still, courts are unlikely to hold that defendants have waived objections to the exercise of personal jurisdiction if they fail to raise them in the original pleadings or motions to dismiss.

Post-*BMS* Lower-Court Decisions: Named Plaintiffs

In addition to requiring courts to show that personal jurisdiction can be exercised over the claims of all mass action plaintiffs, *BMS* also reminded courts that they must be able to exercise jurisdiction over the claims of all *named* plaintiffs in the case—including all the named plaintiffs in a class action. Therefore, where some of the *named* class plaintiffs were non-residents and failed to show that they had a connection to the forum state, courts have emphasized post-*BMS* that the court must have personal jurisdiction as applied to named plaintiffs and dismissed these non-resident plaintiffs' claims.[59]

For example, in *Lugones v. Pete & Gerry's Organic, LLC*, a putative class of free-range egg consumers sued the maker of Nellie's Free Range Eggs for misleading labeling in the U.S. District Court for the Southern District of New York ("SDNY"). The named plaintiffs included consumers from both New York and other states who did not claim to have any connections to buying eggs in New York. The egg maker was based in New Hampshire. The court declined to apply *BMS* to unnamed class members, but it dismissed the claims of the named plaintiffs who did not reside in New York, holding that the "weight of authority" showed that *BMS*'s personal jurisdiction restrictions apply to named class plaintiffs.[60]

Multidistrict litigation (MDL), however, has been a different story, with the majority of courts declining to apply *BMS* to even named plaintiffs. In *In re Delta Dental Antitrust Litigation*, the Judicial Panel on Multidistrict Litigation (JPML) considered an objection to personal jurisdiction by the plaintiffs in an SDNY case that was transferred to the Northern District of Illinois as part of an MDL.[61] The MDL case was a putative nationwide class action brought by several named plaintiff dentists—who together were residents of ten states—against an Illinois-based nationwide association of dental insurance companies and over 30 state-based affiliates of the association.[62] The MDL dentist plaintiffs alleged that the association abused its monopsony power to restrict competition, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[63] They further alleged that the court had specific jurisdiction over both the national and state-based defendants through each defendant's contacts and business in Illinois, as well as each defendant's conspiring with the Illinois-based members of the association.

The SDNY case alleged the same course of events, but the named plaintiffs were all New York dentists and the only defendant was a New York Delta Dental insurance affiliate.[64] Further, the SDNY plaintiffs alleged both Sherman Act violations and New York state law violations.[65]

After the JPML conditionally transferred the SDNY case to the MDL in the Northern District of Illinois, the New York dentists opposed transfer on the basis that the Northern District of Illinois could not exercise specific jurisdiction over either party in the SDNY case.[66] The New York dentists argued that the JPML should apply *BMS*'s personal jurisdiction requirements, which would prevent jurisdiction because neither party had any contacts in Illinois.

The JPML rejected that argument, holding that "the transferee court can exercise personal jurisdiction to the same extent that the transferor court could,"[67] and that *BMS* did not "necessitate[] unraveling more than forty years of MDL jurisprudence."[68]

Courts have largely affirmed the holding of *In re Delta Dental* in MDL cases,[69] but the decisions have not been unanimous. In *In re Dicamba Herbicides Litigation*, a putative nationwide class of farmers sued seed makers Monsanto and BASF for harmful effects of several herbicides and herbicide-resistant seeds.[70] The case was transferred from across five districts to the U.S. District Court for the Eastern District of Missouri.[71] The named plaintiffs were residents of eight states, including Missouri; Monsanto was headquartered in Missouri, and BASF, a German corporation, had U.S. headquarters in either North Carolina or New Jersey.[72] The court applied *BMS* and dismissed the nationwide class claims against BASF, citing to a string of Northern District of Illinois cases applying *BMS* (which have since been overruled by *Mussat*).[73]

In sum, *BMS* has emphasized the limitations under which named plaintiffs can bring a class action, requiring a showing of jurisdiction in class actions that include non-resident named plaintiffs. Other than *Dicamba Herbicides*, however,

courts have not used *BMS* to limit class actions where named non-resident plaintiffs' claims have been transferred to the court via an MDL, as doing so would prevent MDL courts from exercising jurisdiction in many cases.

Accounting for *BMS* in Your Litigation

The analysis above shows that the drastic changes that class action lawyers feared (or hoped for) after *BMS* have not materialized. Though Justice Alito's opinion left open the question of whether courts would need to show they can exercise personal jurisdiction as to the claims of absent class members, in practice, courts have rarely applied *BMS* to class actions. Applying *BMS* to class actions has become rarer still post-*Mussat* and *Lyngaas*, which provided sound reasoning for distinguishing *BMS* from class actions. Further, the Supreme Court may not have much appetite to overrule *Mussat* and *Lyngaas*, both because there has yet to be a circuit split on the issue, and because Justice Amy Coney Barrett already declined to apply *BMS* to class actions in *Mussat*. Therefore, the risk of *BMS* being used to invalidate a nationwide class action is relatively low.

Plaintiff's lawyers, however, can take steps to mitigate that risk. First, plaintiff's lawyers should consider where to bring suit, and if possible, file in the defendant's "home" jurisdiction, so that the court could exercise general jurisdiction over the defendant and avoid any *BMS* issues altogether. If doing so is impractical—or if there are multiple defendants in multiple states—filing in the Third, Sixth, or Seventh Circuits where reasonable grounds exist to do so would provide the least risk of any *BMS* application.

Second, plaintiff's lawyers should focus on the substance of why it is incorrect to apply *BMS* to class actions, rather than potential waiver issues. *Mussat*, *Lyngaas*, and—for an antitrust context, *MGH*—provide strong rationales for distinguishing class actions from the mass tort action considered in *BMS*. These rationales include courts' consideration of only named plaintiffs in decisions on subject-matter jurisdiction and venue, absent class members' lack of participation in the lawsuit, and simply the fact that most courts have declined to apply *BMS* to class actions. Courts in all circuits (except for the Federal Circuit) have declined to apply *BMS* to class actions, so plaintiff's lawyers can apply the rationale of a court in their circuit—if not the same court considering the case.[74]

Finally, *BMS* has emphasized the need for plaintiff's lawyers to ensure that *named* plaintiffs can meet personal jurisdiction requirements. Despite courts' reluctance to apply *BMS* to claims of *absent* class members, courts have been less willing to excuse deficiencies in showing that the court can exercise jurisdiction over the claims of named plaintiffs. Not all plaintiffs need reside in the same state as the forum, but all plaintiffs must be able to show that their claim is connected to that state unless the plaintiffs can invoke Clayton Act Section 12's nationwide jurisdiction against corporations.[75]

If moving to dismiss a class action, defense lawyers should take note of the timing issues that *BMS* presents. Moving to dismiss absent class members' claims before the class is certified is generally premature, and failing to raise the defense will not constitute waiver. But it may help to flag the issue for the court in a footnote or otherwise.

Defense lawyers can look to Judge Thapar's dissent in *Lyngaas*, which emphasized the fact that class actions can bind both named and absent class members. Defense lawyers should be aware, however, that these arguments are unlikely to succeed—and are foreclosed in the Sixth and Seventh Circuits.

Antitrust lawyers know that antitrust class actions are among the most complex procedural cases in the federal courts, and personal jurisdiction is but one of many issues that may arise in the course of litigation. *BMS* has perhaps made it more likely that these personal jurisdiction issues will arise in your litigation. But *BMS*'s impact remains limited in class actions. As before, lawyers should take care to show that the court can exercise personal jurisdiction as to the claims of their named class plaintiffs, but making the showing as to unnamed class members is unnecessary. The nationwide class action, always thought to be on the brink of demise, lives to fight another day. ■

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[1] *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., 1:06-md-1775 (E.D.N.Y.) (nationwide plaintiff classes of air cargo purchasers sue more than three dozen air cargo providers for conspiracy to raise prices).

[2] 582 U.S. 255 (2017).

[3] Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945); Rush v. Savchuk, 444 U.S. 320, 327 (1980); *see generally* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (4th ed. updated 2023). The forum state must also allow for personal jurisdiction by statute; however, a majority of states have enacted personal jurisdiction statutes to extend the reach of personal jurisdiction to the maximum allowed under constitutional due process. 4A Federal Practice and Procedure, *supra*, § 1069.

[4] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (quoting *Int'l Shoe*, 326 U.S. at 316); *see generally* 4 Federal Practice and Procedure, *supra* note 3, § 1067.1.

[5] Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (alterations in original) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).

[6] Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 166–67 (2d Cir. 2010); *see also, e.g.*, *In re* Chinese Manufactured Drywall Prod. Liab. Litig., 742 F.3d 576, 589 (5th Cir. 2014); Logan Prods., Inc. v. Optibase, Inc., 103 F.3d 49, 53 (7th Cir. 1996); *see generally* 2 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 6:30 (6th ed. updated 2023).

[7] 15 U.S.C. § 22; Phillip E. Areeda (late) & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 271c2 (5th ed. 2023); *see, e.g.*, *In re* Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 207 (2d Cir. 2003) ("The ensuing minimum contacts analysis looks to a corporation's contacts with the United States as a whole to determine if the federal court's exercise of personal jurisdiction comports with due process."); Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 449 (6th Cir. 2012).

[8] *Daimler AG*, 571 U.S. at 127 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

[9] BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 413 (2017). The recent decision, *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023), discussed an alternative way to find general jurisdiction against companies outside of their place of incorporation and principal place of business based on a corporation's consent to appear in state court as a condition of registering

to do business within that state. It remains unclear, however, exactly how much *Mallory* will impact the general-jurisdiction jurisprudence.

[10] *Burger King*, 471 U.S. at 472 & n.14; *see also* 5B Federal Practice and Procedure, *supra* note 3, § 1351.

[11] Fed. R. Civ. P. 12(h)(1); 5B Federal Practice and Procedure, *supra* note 3, 1351; *see also, e.g.*, Am. Fid. Assur. Co. v. Bank of N.Y. Mellon, 810 F.3d 1234, 1241 (10th Cir. 2016); Coleman v. Kaye, 87 F.3d 1491, 1498 (3d Cir. 1996).

[12] Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 259 (2017).

[13] *Id.* at 259.

[14] *Id.* at 260.

[15] *Id.*

[16] *Id.* at 264.

[17] *Id.* at 265.

[18] *Id.* at 278 (Sotomayor, J., dissenting); *see also id.* at 278 n.4 ("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.").

[19] *Id*. at 268.

[20] *Id.* at 269. After the Class Action Fairness Act of 2005, most class actions are litigated in federal court. *See, e.g.,* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623, 660 (2012). Thus, if the *BMS* decision were limited to state courts, it would effectively not apply to class actions.

[21] 1 Newberg and Rubenstein on Class Actions, *supra* note 6, § 1:5.

[22] Fed. R. Civ. P. 23; 1 Newberg and Rubenstein on Class Actions, *supra* note 6, § 1:5.

[23] 4 Federal Practice and Procedure, *supra* note 3, § 1067.2; Daniel Wilf-Townsend, Essay, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 Yale L.J. Forum 205, 226 (2019).

[24] 953 F.3d 441 (7th Cir. 2020).

[25] *Id.* at 446–47.

[26] *Id.* at 447 (alteration in original) (quoting Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002)).

[27] *Id.*

[28] *Id.* at 448.

[29] *Id.*

[30] 992 F.3d 412 (6th Cir. 2021).

[31] *Id.* at 435.

[32] *Lyngaas*, 992 F.3d at 440 (Thapar, J., concurring in part and dissenting in part).

[33] 42 F.4th 366, 375 (3d Cir. 2022).

[34] 353 F. Supp. 3d 678, 684 (M.D. Tenn. 2018); Amended Complaint, ¶¶ 13–15, *MGH*, No. 3:15-cv-1100 (M.D. Tenn. Dec. 21, 2017), ECF No. 191.

[35] *MGH*, 353 F. Supp. 3d at 684–85.

[36] *Id.* at 690.

[37] *Id.* at 692.

[38] *Id.* (quoting Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126 (D.D.C. 2018), *aff'd on other grounds sub nom.* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020)).

[39] Order of Preliminary Approval of Settlement, *MGH*, No. 3:15-cv-1100 (M.D. Tenn. Jan. 3, 2020), ECF No. 488.

[40] *See also* Kadow v. First Fed. Bank, No. 8:19-CV-566-PWG, 2020 WL 5230560, at *11 (D. Md. Sept. 2, 2020) (denying *BMS*-based objection in antitrust class action). Though *In re Dental Supplies Antitrust Litigation* dismissed a defendant based on lack of specific jurisdiction, that defendant had no contacts with the forum state as to *any* plaintiff, so *BMS* issues did not arise. No. 16-CV-696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).

[41] Wilf-Townsend, *supra* note 23, at 228. Percentages may not add up to 100% due to rounding.

[42] 4 Federal Practice and Procedure, *supra* note 3, § 1067.2 (counting over 30 courts since 2019 that declined to apply *BMS*, compared to six that have applied *BMS* to absent class members).

[43] Moser v. Benefytt, Inc., 8 F.4th 872, 877 (9th Cir. 2021); Fed. R. Civ. P. 12; 5B Federal Practice and Procedure, *supra* note 3, § 1351.

[44] *Moser*, 8 F.4th at 877.

[45] *See id.*; *Molock*, 952 F.3d at 300.

[46] *Moser*, 8 F.4th at 877 (finding objections not waived); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240, 251 (5th Cir. 2020) (same); *Molock*, 952 F.3d at 299.

[47] 8 F.4th at 874.

[48] *Id.* at 877. In a dissenting opinion, Judge Cardone disagreed with the panel's conclusion that the personal jurisdiction question was properly before the court under rule 23(f). *Id.* at 879 (Cardone, J., dissenting).

[49] *Id.* at 877. The case settled before the court issued any rulings. Moser v. Health Ins. Innovations, Inc., 17-cv-1127 (N.D. Cal. Sept. 7, 2022), ECF No. 206.

[50] See 4 Federal Practice and Procedure, *supra* note 3, § 1067.2 (collecting cases).

[51] No. 20-2581-JWB, 2021 WL 2646444 (D. Kan. June 28, 2021).

[52] 441 F. Supp. 3d 1028, 1037 (S.D. Cal. 2020); *see also* 4 Federal Practice and Procedure, *supra* note 3, § 1067.2.

[53] 2021 WL 2646444, at *1.

[54] *Id.* at *11.

[55] *Id.* at *10–11.

[56] *Id*. at *11.

[57] 441 F. Supp. 3d at 1033.

[58] *Id*. at 1037.

[59] *See, e.g.*, Lugones v. Pete & Gerry's Organic, LLC, 440 F. Supp. 3d 226, 236 (S.D.N.Y. 2020); Wiggins v. Bank of Am., N. Am., 488 F. Supp. 3d 611, 622–23 (S.D. Ohio 2020) (citing cases); Sloan v. Gen. Motors LLC, No. 16-CV-07244-EMC, 2019 WL 6612221, at *9 (N.D. Cal. Dec. 5, 2019) ("The overwhelming majority of federal courts have held that *Bristol-Myers* applies to claims brought by named plaintiffs in class actions.").

[60] *Lugones*, 440 F. Supp. 3d at 235.

[61] 509 F. Supp. 3d 1377, 1378 (J.P.M.L. 2020).

[62] *Id.* at 1378 n.1; Consolidated Complaint, ¶¶ 9–21, *In re* Delta Dental Antitrust Litig., 1:19-cv-06734 (N.D. Ill. Nov. 26, 2019), ECF No. 96.

[63] Consolidated Complaint, ¶ 156, *In re Delta Dental*, 1:19-cv-06734, ECF No. 96.

[64] Complaint, ¶¶ 22–25, Ben Zvi v. Delta Dental of N.Y., Inc., 1:20-cv-05628 (S.D.N.Y. July 21, 2020), ECF No. 1.

[65] *Id.*, ¶¶ 195, 200 (citing the Donnelly Act, N.Y. Gen. Bus. Law § 340 (McKinney 2023)).

[66] *In re Delta Dental*, 509 F. Supp. 3d at 1379.

[67] *Id.* (quoting *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 297 n.11 (3d Cir. 2004)).

[68] *Id.* at 1380.

[69] *See, e.g., In re* ZF-TRW Airbag Control Units Prod. Liab. Litig., 601 F. Supp. 3d 625, 695 (C.D. Cal. 2022), *opinion clarified sub nom. In re* ZF-TRW Airbag Control Units Prod., No. LA-ML-19-02905, 2022 WL 19425927 (C.D. Cal. Mar. 2, 2022); *In re* McKinsey & Co., Inc., Nat'l Prescription Opiate Consultant Litig., 543 F. Supp. 3d 1377, 1379 n.6 (J.P.M.L. 2021).

[70] 359 F. Supp. 3d 711, 718 (E.D. Mo. 2019).

[71] *In re* Dicamba Herbicides Litig., 289 F. Supp. 3d 1345, 1347 (J.P.M.L. 2018).

[72] *Dicamba Herbicides*, 359 F. Supp. 3d at 723.

[73] *Id.* at 724.

[74] 4 Federal Practice and Procedure, *supra* note 3, § 1067.2.

[75] *See, e.g.*, *MHG*, 353 F. Supp. 3d at 692 (finding personal jurisdiction as applied to claims of non-Tennessee health plan, which nevertheless purchased the relevant drug for Tennessee residents).