Has *Shoe* run its course?

How will recent Supreme Court decisions on personal jurisdiction impact the legacy of *International Shoe* and the future of complex litigation?

by DAVID W. ICHEL

In just a few years, the Supreme Court has meaningfully altered the landscape for establishing personal jurisdiction over corporations. Its quartet of unanimous and nearly unanimous decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[1] *Daimler AG v. Bauman*,[2] *BNSF Railway Co. v. Tyrrell*,[3] and *Bristol-Myers Squibb Co. v. Superior Court of California*[4] substantially recalibrated the Fourteenth Amendment due process analysis for corporate personal jurisdiction established more than 80 years ago in *International Shoe Co. v. Washington*.[5] Its more divided 4-2-3 decision in *J. McIntyre Machinery, Ltd. v. Nicastro*[6] during the same period has heightened concern about the realities of establishing jurisdiction over foreign companies in an increasingly global marketplace. These developments impact both state and corresponding federal district courts: Pursuant to Federal Rule 4(k)(1)(A) and long-standing federal precedent, federal courts ordinarily follow state law in determining the bounds of their jurisdiction for diversity, alienage, and even federal question matters for which Congress has not specifically provided for nationwide jurisdiction.

This article, which summarizes a much more extensive analysis published in the *Rutgers Law Review*,[7] examines these decisions' potential impact on class actions and other complex litigation and provides specific recommendations to protect plaintiffs' access to a reasonable forum that is also fair to the defendants.

GIVING *INTERNATIONAL SHOE* A SHINE — OR THE BOOT?

As every law student learned in first-year Civil Procedure, *International Shoe* introduced the minimum contacts-based, "fair play and substantial justice" analysis for personal jurisdiction. *International Shoe* changed the reigning analysis — from the question of whether the state has physical power over a defendant by virtue of physical presence and service of process, as articulated in *Pennoyer v. Neff*,[8] to whether the defendant's contacts with the state are of such quality and quantity that it would be fundamentally fair and reasonable to subject the defendant to jurisdiction, either for a specific claim or generally for all claims.[9]

Addressing jurisdiction over a corporation, *International Shoe* established, in substance, a *continuum*. At one end were contacts clearly evincing the proper assertion of jurisdiction — such as a corporation maintaining its "home" or "principal place of business" in the state, or having "continuous corporate operations . . . so substantial and of such a nature" as to allow jurisdiction over any lawsuit against it there (what later came to be termed "general" jurisdiction). Further along the continuum were lesser contacts that still warranted jurisdiction — such as "when the activities of the corporation . . . have not only been continuous and systematic, but also give rise to the ▸

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liabilities sued on" and even some "single or occasional acts" in the state that "because of their nature and quality and the circumstances of their commission, may be deemed to render the corporation liable to suit" (what later came to be termed "specific" jurisdiction). At the other end of the continuum were contacts that were insufficient to justify jurisdiction — such as those that were too fleeting and unrelated to the lawsuit to justify jurisdiction.[10]

Chief Justice Harlan Fiske Stone's opinion in *International Shoe* confirmed that the analysis envisioned by the Court was intended to be a flexible one, based on the continuum of a corporation's qualitative and quantitative corporate contacts with a state:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit and those which do not cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.[11]

International Shoe was followed by the enactment of long-arm jurisdiction statutes in all states and led to decades of litigation and commentary over how much "doing business" in a state should be required for the exercise of general, all-purpose jurisdiction and how much connection a state must have to the plaintiff's claims in a lawsuit for the exercise of specific, claim-related jurisdiction. In particular, the post-*International Shoe* courts commonly allowed general jurisdiction over corporations based upon the company doing "continuous and substantial business" in the state.[12]

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The Supreme Court's quartet of decisions in *Goodyear*, *Daimler*, *BNSF*, and *Bristol-Myers*, while reaffirming the decision as "canonical,"[13] substantially recast the more flexible *International Shoe* jurisdictional *continuum* into a brighter-line, stricter *dichotomy* that is both reflective of the post-*International Shoe* concepts of "general" versus "specific" jurisdiction and more protective against forum shopping. Under this new dichotomy, for a corporation to be subject to *general* (all-purpose) jurisdiction, the firm must be essentially "at home" in the state, such as being incorporated or having its principal place of business there.[14] Otherwise, only *specific* (claim-connected) jurisdiction is constitutionally permissible: Even if the defendant does very substantial, continuous business in a state in which it is not "at home," each plaintiff's claim must "arise out of or relate to" the company's contacts with the state in order to establish personal jurisdiction.[15] The Court also emphasized in the quartet of decisions that general jurisdiction should be the exception to the rule that, ordinarily, jurisdiction should be specific, based on the company's claim-connections to the state.[16]

Goodyear, *Daimler*, and *BNSF*: The "At Home" Requirement

Justice Ruth Bader Ginsburg authored the Court's 2011 unanimous decision in *Goodyear*, holding that due process would not permit North Carolina courts to subject three European Goodyear subsidiaries to general jurisdiction for a vehicle accident that took place in Europe. The case presented product liability claims brought on behalf of North Carolina citizens injured in an accident in France involving a car with Goodyear-brand tires manufactured and distributed by the three European subsidiaries. The North Carolina courts had justified jurisdiction over the subsidiaries based on their having placed the tires in the global "stream of commerce" — even though only a tiny percentage of tires manufactured by these subsidiaries came to be sold in North Carolina, the particular tires at issue were not sold into North Carolina, and the accident did not occur there.[17] *Goodyear* thus appeared to be an easy case for the Court to overturn the assertion of general jurisdiction over the foreign subsidiaries.

Yet Justice Ginsburg's opinion went further to adopt a new due process requirement that a company must be essentially "at home" for a state to assert *general* jurisdiction over it, identifying the paradigm "home" as the company's place of incorporation or principal place of business.[18] The "at home" requirement was groundbreaking because many courts had been finding general jurisdiction based on a company's continuous and substantial "doing business" in states that were not the corporation's "home."[19] Justice

Ginsburg herself later called the decision "pathmarking."[20]

Then, three years later in *Daimler*,[21] the Court unanimously reversed a Ninth Circuit ruling that a California federal district court could exercise general personal jurisdiction over the German parent company, Daimler. That suit asserted federal Alien Tort Act and state law claims on behalf of 22 Argentine plaintiffs alleging that Daimler's Argentine subsidiary had been complicit in numerous human rights violations by the former Argentine government.[22]

Although there obviously could not be specific jurisdiction in California for claims involving actions and harm in Argentina, the Ninth Circuit had upheld general jurisdiction over Daimler based on the substantial, continuous, and systematic contacts with California by Daimler and its principal U.S. subsidiary, Mercedes Benz USA. Mercedes was a Delaware corporation headquartered in New Jersey which owned and operated numerous California facilities that sold and serviced more than ten percent of Daimler's new cars nationwide.[23] Justice Ginsburg for the Court again held that general jurisdiction can be exercised only when a corporation is "essentially at home in the forum state."[24] In so holding, she specifically rejected the contention that a corporation's engaging in a multi-billion dollar "substantial, continuous and systematic course of business" in a state not its "home" can be sufficient for general jurisdiction.[25] She also emphasized that a company cannot fairly be treated as "at home" in every jurisdiction in which it has substantial operations, as that would make every large multi-national corporation subject to all-purpose jurisdiction in every state.[26]

Three years after *Daimler*, the Court in *BNSF*[27] again applied the new bright-line dichotomy to reject jurisdiction over Federal Employers' Liability Act claims brought in Montana state court. In that case, the claims against the defendant railroad company were for injuries sustained outside Montana by two nonresident employee plaintiffs. In another opinion by Justice Ginsburg, the Court held that the company's substantial contacts with the state — consisting of 2,000 miles of track and over 2,000 employees — were insufficient to satisfy due process. Neither of the nonresident plaintiffs' claims arose from the company's activities in Montana so as to allow specific jurisdiction, the Court explained, and the defendant company was neither incorporated nor had its principal place of business in the state so as to be "at home" for general jurisdiction.[28]

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Bristol-Myers: The "Arise out of or Relate to" Requirement

In *Bristol-Myers*,[29] the Supreme Court held that California lacked jurisdiction over 592 nonresident plaintiffs that had been joined with 86 California resident plaintiffs in eight coordinated "mass actions" against Bristol-Myers Squibb for injuries allegedly caused by the company's drug Plavix.[30] Justice Samuel Alito's opinion followed the same general-specific jurisdiction dichotomy set out in *Goodyear*, *Daimler*, and *BNSF*. No one disputed that Bristol-Myers Squibb maintained extensive and continuous multi-billion-dollar operations in California, including five research laboratory facilities employing approximately 160 employees and 250 sales representatives, as well as a Sacramento advocacy office, substantial advertising, and hundreds of millions of dollars in annual sales of Plavix there. Nonetheless, the Court held that the only two states where general jurisdiction could be obtained over the company would be its states of incorporation (Delaware) and headquarters (New York).[31]

More fundamentally, the Court held that the California courts lacked "specific" jurisdiction over the 592 nonresident plaintiffs because none of their claims bore any connection to any Bristol-Myers Squibb activities in California.[32] The Court reasoned that under *International Shoe*, specific jurisdiction requires that the plaintiff's suit must arise out of or relate to the defendants' contacts with the forum; that is, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State."[33] It was undisputed that the company did not manufacture, label, package, or manage the marketing or obtaining of regula- ▸

tory approval for Plavix in California. Moreover, the nonresident plaintiffs could not allege that they were injured in California or that they purchased or were prescribed their Plavix there.[34]

The quartet of decisions were either unanimous (*Goodyear*, *Daimler*) or nearly unanimous (8-1 in *BNSF* and *Bristol-Myers*), demonstrating strong agreement on the new brighter-line approach that cuts across the Court's other notable cleavages. Nevertheless, Justice Sonia Sotomayor authored strongly worded dissents in *Bristol-Myers* and *BNSF*, as well as a concurrence in *Daimler*, arguing that the Court's new, "more restrictive" approach will make it "more difficult," and in some instances "impossible," for plaintiffs to bring nationwide aggregate actions addressing nationwide corporate conduct, particularly in cases involving small claims, foreign country corporate defendants, or two or more defendants that are "at home" in different states.[35]

J. McIntyre: The "Fifty-State" Targeting Dilemma

The Court's contemporaneous decision in *J. McIntyre Machinery, Ltd. v. Nicastro* presented a significant issue: What about a corporation that targets the entire country with sales of a product that causes injury to a plaintiff in a state in which the company otherwise has no significant contacts?[36] The case divided the Court 4-2-3 in the same term as the unanimous *Goodyear* decision. A New Jersey plaintiff had been seriously injured by a metal shearing machine produced by defendant, J. McIntyre. J. McIntyre was an English company that sold its machines for resale throughout the United States to an independent Ohio distribution company, which, in turn, structured its advertising and sales efforts with J. McIntyre's guidance. J. McIntyre also attended annual industry conventions in various states (but never New Jersey) to promote its machines alongside its U.S. distributor. It also obtained U.S. patents for its machines.[37] Yet only a handful of machines ended up in New Jersey. New Jersey's highest court found personal jurisdiction over J. McIntyre on the ground that it placed its products into "the stream of commerce" and "knew or should have known that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states."[38]

The Supreme Court reversed. Justice Anthony Kennedy's plurality opinion, joined by Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas, held that New Jersey lacked specific jurisdiction because there was no showing that the company "purposefully avail[ed] itself" of the "benefits and protections" of New Jersey by "target[ing]" its sales there, and that mere "foreseeability" that the company's products will be sold in the state is insufficient. [39]

As five of the justices noted, the "purposeful" contacts requirement should take on new meaning in the new global reality, in which companies may not intend for their products to reach any *specific* state, but plainly intend for them to reach *all* states.

Justice Stephen Breyer, joined by Justice Samuel Alito, concurred in the judgment because the company's contacts with New Jersey were too isolated. But Justice Breyer also noted that the global digital market may soon call upon the Court to recognize that the idea of "targeting" of a forum state will need to adapt to an age when foreign producers can easily sell goods nationally and internationally through an intermediary such as Amazon.com.[40] Justice Ginsburg dissented in an opinion joined by Justices Elena Kagan and Sotomayor, arguing that J. McIntyre's nationwide targeting in essence subsumed targeting New Jersey.[41]

The decision is a difficult pill to swallow. As five of the justices noted, the "purposeful" contacts requirement should take on new meaning in the new global reality, in which companies may not intend for their products to reach any *specific* state, but plainly intend for them to reach *all* states. Yet Justice Breyer's concurring opinion points out that a blanket rule providing jurisdiction over any company targeting all 50 states would result in a small business in Appalachia being subject to jurisdiction in Hawaii for selling goods over the internet. Instead, he suggested an approach that also requires that the forum be "fair" in light of the defendant's contacts with that forum.[42]

WALKING THE NEW BRIGHT LINE: THE IMPACT ON LITIGATION

The movement from the *International Shoe* continuum to a brighter-line dichotomy approach for general and specific jurisdiction should not be

inherently problematic. But the danger is that this move will cause courts to abandon the *International Shoe* admonition that ". . . the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."[43] For this reason, there should be flexibility in and around the new bright lines.

Imagining "At Home" Test Flexibility

In the case of the "at home" requirement, the Supreme Court has already made clear that there may be situations that will allow for general jurisdiction beyond the paradigm scenarios.[44] In *Daimler*, the Court pointed to its 1952 decision in *Perkins v. Benguet Consol. Mining Co.* as an example of flexibility in its "essentially at home" requirement. There, the Court determined that because a Philippines corporation's president had temporarily moved management to Ohio during World War II, general jurisdiction over the company was satisfied.[45]

One can similarly imagine other scenarios in which a corporate defendant might properly be found to be "essentially at home" for purposes of general jurisdiction in states other than its paradigm places of incorporation and principal place of business: (1) a corporation has two (or three) headquarters or principal locations;[46] (2) a corporation's executive headquarters is in a different state than its principal operations center;[47] (3) a conglomerate corporation has separately managed "divisions" headquartered in different states, and the lawsuit involves one such "division" in the forum state; or (4) for large multinational corporations incorporated and headquartered in other countries, "quasi-at home" general jurisdiction might be found in the state of their U.S. headquarters (e.g., the state of incorporation or the headquarters of the company's principal U.S. subsidiary) for injuries caused to U.S. residents. Of course, in the last two posited categories, it is possible that plaintiffs may be able to obtain *specific* jurisdiction in the state if they can show that the division headquarters or U.S. headquarters at issue was responsible for managing the development, design, production, marketing, testing, or distribution of the complained-of product, service, or communication.

Imagining "Arising out of or Relating to" Test Flexibility

Correspondingly, for specific jurisdiction, the Supreme Court has not yet defined the claim-connection phrase "arise out of or relate to," which originated in *International Shoe*.[48] As a matter of pure linguistic construction, the phrase allows for two alternatives: "arising out of," which is causal in nature, or "relating to," which denotes a logical connection. Yet not just any logical connection should suffice: We know that *International Shoe* and its progeny require some *purposeful* conduct in or towards the forum bringing about the claim such that a reasonable defendant would appreciate that its conduct could subject it to jurisdiction in the forum.[49]

The sole jurisdictional due process defect overturned in *Bristol-Myers* was the inclusion in that case of 592 plaintiffs without any claim connection to the state whatsoever.[50] But the requirement for a claim connection should still allow for a range of approaches to specific jurisdiction, provided that the claims of *all* plaintiffs in the case *are* logically connected to the defendant's purposeful contacts with the state.

For example, courts could, consistent with due process, apply a broader "but for" claim-connection test, permitting jurisdiction in a state in which the plaintiff's alleged injuries would not have occurred "but for" the defendant's contacts with the state.[51] In an action alleging that significant case-related clinical-trial testing used to obtain regulatory approval for an allegedly defective drug occurred in the forum state, jurisdiction could arguably be based on the claim connection that the drug could not have been sold "but for" such testing.[52] Or plaintiffs who purchased tickets sold and advertised in their state for a tour or event in another state at which they were injured could sue the tour or event company in their state based on the claim connection that "but for" the defendant's in-state advertising and ticket sales, the injury would not have occurred.[53] In both examples, the defendant company's due process "liberty interest" in being required to respond to claims only in fora in which it could reasonably expect to be sued would be satisfied because every plaintiff's claim would be "but for" connected to the company's contacts with the forum state.[54] The state would also have an adequate "sovereign" interest to justify its exercise of judicial power over a company with such contacts.[55] Moreover, there would be no *Bristol-Myers* forum shopping problem because *all* plaintiffs would be linked by the "but for" claim connection to the forum.

Some have criticized the "but for" test as being too broad, since it could arguably encompass every contact identified along an incident's causative chain regardless of how substantially related to the injury.[56] Most courts (at least before the Supreme Court's decision quartet) have applied either a "proximate cause" or "substantial relation" test, both of which require a more rigorous claim-connection with the ▸

forum. Certainly, states are free to apply these stricter tests.[57] Yet many of the courts that applied these stricter tests for *specific* jurisdiction were also utilizing the more jurisdiction-friendly "doing business" tests for *general* jurisdiction — essentially using general jurisdiction as a corrective "safety valve" outlet to address poor outcomes from overly strict specific jurisdiction tests.[58] Now that the Supreme Court has removed this "safety valve" by substantially constraining general jurisdiction, courts should be vigilant in not blindly applying an overly restrictive claim-connection test that would deprive deserving plaintiffs of access to a reasonable forum.

Furthermore, in today's era of the internet and other similar mass marketing tools, the *J. McIntyre* 50-state targeting dilemma should be solved by treating any company's regular and systematic targeting of product sales and marketing to all 50 states as "purposeful" targeting in any state in which the plaintiff is injured. This treatment should also be subject to a "reasonableness" analysis as to the fairness to the defendant of the state exercising jurisdiction in the particular case.[59]

It should be stressed that each of the Supreme Court's quartet of cases addressed problematic forum shopping; the plaintiffs had no strong grounds to bring the dismissed claims in the forum state. In *Goodyear*, plaintiffs brought suit in North Carolina against foreign companies for an accident that occurred in a foreign country involving tires that were manufactured abroad.[60] In *Daimler*, it was Argentine plaintiffs suing a German company in California for conduct that occurred in Argentina.[61] In *BNSF*, it was nonresident plaintiffs bringing employment-related claims in Montana that did not arise there and in which BNSF was not at home or even "quasi-at home."[62] And, in *Bristol-Myers*, it was hundreds of nonresident plaintiffs whose claims were totally unconnected with California.[63] Read in this light, the decision quartet provides greater simplicity and clarity of construct for due process jurisdictional analysis, along with a strong message against forum shopping abuse. But the quartet decisions should still leave our courts with the necessary flexibility to allow for application of the "at home" and "arising out of or related to" requirements in a manner that protects jurisdictional access to our courts in accordance with our "traditional conceptions of fair play and substantial justice."[64]

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Class Actions Still Fit the New *Shoe*

In her *Bristol-Myers* dissent, Justice Sotomayor asked whether nationwide *class actions* may be at risk. Her concern was that corporate defendants would now argue that specific jurisdiction in class actions would require a claim-connection with the state for *each* of the *absent* putative class members.[65] The justice was right about the challenges to come: Corporate defendants have indeed taken this position in a number of nationwide and multistate class actions since *Bristol-Myers*. Yet, in the final analysis, there are a number of reasons why the class action vehicle should not be compromised by the Court's decision quartet.

First, in a nationwide or multistate class action, a strong argument can be made that only the named plaintiffs — not the absent class members — should be considered as the plaintiffs for purposes of determining the court's jurisdiction under *Bristol-Myers*. The Supreme Court has already held that absent class members may be deemed parties only for some purposes, and not for others.[66] To determine traditional diversity jurisdiction in a class action under 28 USC § 1332(a), for example, it is well settled that the Court will only look to the citizenship of the named plaintiffs, not to absent class members.[67] There is logic to this distinction between joined named plaintiffs and absent class members: In a *Bristol-Myers*-type mass action case, where there are hundreds of nonresident plaintiffs joined in a mass tort action, the defendant must investigate, discover, and litigate each plaintiff's claim on issues like causation, individual physician's advice, potential misuse, and damages. In a certified class action, by contrast, predominant common legal and factual issues are, by definition, mostly focused on the defendant and are presented by the named representative plaintiffs with virtually no participation by, or discovery from, absent class members.

Several post-*Bristol-Myers* federal district court decisions have confined the specific jurisdiction analysis in class actions to just the named plaintiffs on essentially these grounds.[68] However, others courts have applied *Bristol-Myers* to dismiss class action claims brought on behalf of out-of-

state absent class members, principally on the grounds that the Rules Enabling Act prohibits Federal Rule 23 from being applied to abridge a defendant's substantive due process right not to be subject to jurisdiction in a state for any nonresident's claims (even those of absent class members) that have no connection to the state.[69]

The Supreme Court's groundbreaking 1985 class action decision in *Phillips Petroleum Co. v. Shutts* (authored by Justice William Rehnquist)[70] was the first to uphold the very concept of a *state* court adjudicating a *nationwide* class action. *Shutts* also provides support for analyzing jurisdiction in class actions by reference only to the named plaintiffs, even though the Supreme Court's *Bristol-Myers* decision declined to find the case persuasive with respect to the *Bristol-Myers* plaintiffs in that mass action (not class action) case.[71]

Shutts influences how class actions are litigated to this day, holding for the first time that a *state court* can adjudicate a nationwide class action without first obtaining jurisdiction over the absent plaintiff class members. The Court reasoned that due process did not require the same "minimum contacts" protections for absent class members as for a defendant, noting that absent class members are not burdened in the litigation in the same way as a defendant: they are not haled into court; they do not need to fear damages or penalty; and they are, at least in money-damages actions, given notice and the right to opt out, along with the safeguard of a court approval requirement and an opportunity to be heard for any proposed class settlement. Moreover, absent class members are protected by the representative nature of the class action through the class certification process.[72]

Thus, *Shutts* can be read to support the proposition that, generally, only the *named* plaintiffs' claims should be considered in the jurisdictional analysis because absent plaintiff class members are not parties to the same degree, do not present defendants with the same burdens, and are being represented by the named plaintiffs through a rigorous class certification procedure.

It is proposed that, in class actions, courts should adopt a presumption in favor of specific jurisdiction based solely on the named plaintiffs' claim-connections to the forum state, but the presumption should be subject to a defendant's demonstration that the state has an insufficient connection to absent class members to satisfy the "reasonableness" requirement for the exercise of specific jurisdiction. After all, plaintiffs' class counsel should not, as a matter of "fair play and substantial justice," be able to choose a state as the forum for a nationwide class action based on only a few in-state named plaintiffs and little else to tie the defendant to the forum. Of course, in a nationwide class action, any one state generally will not have a huge percentage of class members as compared to the entire remainder of the country, but what could be shown to be unreasonable is for the state to have an insignificant number of class members beyond the named plaintiffs. Due process requires that the defendant's contacts "reasonably" support the exercise of jurisdiction, taking into account the burdens on the defendant.[73]

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More fundamentally, regardless of how the present litigation over how to apply *Bristol-Myers* to absent class members is resolved, there should be little reason for concern over the continued viability of class actions alleging nationwide corporate misconduct. Plaintiffs' class counsel can use at least three approaches in future cases to support personal jurisdiction over a nationwide plaintiff class action under even the least jurisdiction-friendly reading of *Bristol-Myers*:

1. Class plaintiffs can obtain *specific* jurisdiction for a nationwide class in a state in which the defendant company has developed, designed, produced, tested, or from which it has distributed the offending product, packaging or communication. For a consumer contract case, the forum could be the corporation's place of contracting.[74]
2. Class plaintiffs can also obtain *general* jurisdiction in the defendant's "at home" state of incorporation or principal place of business. If there is more than one defendant, the issue can become more complicated, but there should often ▸

be overlap in at least one state among the potential specific jurisdiction and general jurisdiction states that would encompass all defendants. Moreover, for multiple corporate defendants who have allegedly engaged in wrongdoing together, jurisdiction could potentially also lie in the states where they engaged together in the alleged wrongdoing.

3. For federal securities,[75] antitrust,[76] ERISA,[77] and certain other federal claims,[78] there is nationwide personal jurisdiction available in the federal district courts via nationwide service of process statutes, and, therefore, nationwide class actions are potentially available for these significant claim areas. The federal district court will also have supplemental subject matter jurisdiction over state law claims joined in the action.[79] Indeed, one unintended result of the decision quartet may be to encourage plaintiffs' counsel to search for such federal claims to provide nationwide jurisdiction.

Thus, if plaintiffs' class counsel are mindful in their forum selection process, the issue of nonresident absent class members should not present significant jurisdictional issues going forward.

Indeed, there are other protections to prevent plaintiffs' class counsel from pursuing nationwide class actions in a forum state in which absent class members' claims bear no real connection to the state. *Shutts* itself had a second holding in addition to its upholding a state court's power to adjudicate a nationwide class action. That second holding makes clear, as later reinforced by subsequent circuit decisions, that due process prevents application of the forum state's law to a multistate class action for nonresident class members whose claims are not connected to the state.[80] Plaintiffs' counsel who attempt to squeeze too many different applicable state laws into one nationwide or multistate class action risk losing the all-important class certification motion for lack of predominance of common issues.[81] If the courts and the Supreme Court do adopt the proposed personal jurisdiction analysis for class actions that presumptively looks only to the plaintiff class representatives for specific jurisdiction, this should further underscore the important gate-keeping function of the class certification motion.

Shoe Repair: Statutory or Federal Rule Fixes for the Decision Quartet and *J. McIntyre*?

It bears noting that the recent Supreme Court decision quartet and *J. McIntyre* have propelled a number of proposals from the academy to provide for nationwide federal court personal jurisdiction for diversity of citizenship or alienage (foreign defendant citizenship) cases. One proposal calls for the change to be made in Federal Rule of Civil Procedure 4(k)(2).[82] Other proposals call for congressional statutory authorization of nationwide federal district court jurisdiction in such cases, together with new venue provisions to fairly locate actions among the district courts. These statutory proposals stem largely from the concern that a simple Rule amendment impacting personal jurisdiction could violate the 28 U.S.C. § 2072(b) Rules Enabling Act's proscription against Rules that would modify or abridge a substantive right.[83] The governing assumption of all of these proposals is that the Fifth Amendment, unlike the Fourteenth Amendment governing the states, would allow for nationwide personal jurisdiction over all such claims.[84] The Advisory Committee on Civil Rules of Procedure, at its April 10, 2018, meeting, discussed the issue but opted to defer active work on such changes for future consideration.[85]

CONCLUSION: A PREMIUM ON EARLY STEPS

Following the decision quartet and *J. McIntyre*, there is a premium on plaintiffs' counsel getting personal jurisdiction right at the outset. These decisions also should propel thoughtful counsel on both sides to try to reach agreements that avoid unnecessary jurisdictional disputes. As a former longtime large-case litigator, I teach my Complex Civil Litigation students that it is often in both sides' interests from a cost-effectiveness standpoint to try to reach early agreement on personal jurisdiction issues

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— such as agreeing on just one corporate defendant in a corporate family that is clearly subject to jurisdiction, and dismissing unnecessary affiliates or parent companies. Counsel for both sides should also discuss agreements that would allow plaintiffs to refile in a more appropriate jurisdiction, for 28 U.S.C. §§ 1404(a) or 1406(a) transfers to an appropriate district, for § 1407 centralization, or simply for one appropriate federal or state jurisdiction for all plaintiffs. It may not be possible to reach agreement in every case, but it will certainly be worth the effort.

Moreover, a nationwide class action or mass action will not necessarily be the most just, speedy, efficient, and cost-effective format for the resolution of every case concerning even nationwide-impacting corporate conduct. There are important values and choice-of-law benefits in local resolution of local citizens' claims (and local defenses related to such claims). Sometimes the better choice in aggregate litigation may consist of statewide-only actions brought only on behalf of state residents. Such actions can utilize a number of effective and flexible tools to achieve nationwide or multistate coordination of such actions through effective use of federal Multidistrict Litigation ("MDL") centralization pursuant to 28 U.S.C. § 1407, together with state-federal court coordination. This approach can allow parties to benefit from both nationwide pretrial coordination and localized trials.

Courts now have at least two decades of experience with *ad hoc* coordination of similar cases that remain in both state and federal courts. State and federal judges often agree to coordinate discovery and motion schedules, hear nearly identical motions in each other's courtrooms together, and work to organize bellwether trials and other efforts toward settlement. In fact, the website for the Judicial Panel on Multidistrict Litigation has a link dedicated to "Federal and State Coordination," which is described as "[a] joint project by the National Center for State Courts and the Federal Judicial Center." There are numerous examples of successfully coordinated cases.[86]

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

2 *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

3 *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

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

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

6 *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

7 David W. Ichel, *A New Guard at the Courthouse Door: Corporate Personal Jurisdiction in Complex Litigation After the Supreme Court's Decision Quartet*, 71 Rutgers L. Rev. 1 (2019).

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

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

10 *Id.* at 317–18.

11 *Id.* at 319.

12 *See, e.g.*, *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 632–33 (N.C. 1977) (holding defendant subject to personal jurisdiction based on "actively solicit[ing] orders . . . from residents of this State on a regular basis" for 21 months); *Frummer v. Hilton Hotels Int'l Inc.*, 227 N.E.2d 851, 854 (N.Y. 1967) (holding defendant subject to personal jurisdiction due to "widespread and energetic" activities in the forum state).

13 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

14 *Id.* at 924.

15 *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017).

16 *Daimler AG v. Bauman*, 571 U.S. 117, 128–29 (2014).

17 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011).

18 *Id.* at 924.

19 *Id.* at 919.

20 *Daimler AG v. Bauman*, 571 U.S. 117, 136 n.16 (2014).

21 *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

22 *Id.* at 122.

23 *Id.* at 123–25.

24 *Id.* at 127 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

25 *Id.* at 138.

26 *Id.* at 139.

27 *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

28 *Id.* at 1553.

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

30 *Id.* at 1777–79.

31 *Id.* at 1777–78, 1783.

32 *Id.* at 1781.

33 *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

34 *Id.* at 1781–82.

35 *Id.* at 1784 (Sotomayor, J., dissenting). *See also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part) (observing individual plaintiffs would be forced to sue in distant jurisdictions); *Daimler AG v. Bauman*, 571 U.S. 117, 159 (2014) (Sotomayor, J., concurring) (arguing majority's ultimate effect was to shift risk of loss from corporate defendants to plaintiffs).

36 *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011).

37 *Id.* at 878–79.

38 *Id.* at 879.

39 *Id.* at 882–84.

40 *Id.* at 890 (Breyer, J., concurring).

41 *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 893–914 (Ginsburg, J., dissenting).

42 *Id.* at 891–92 (Breyer, J., concurring).

43 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

44 *Daimler AG v. Bauman*, 571 U.S. 117, 137–39 (2014).

45 *Id.* at 129–30.

46 Amazon has recently made public announcements of such an intention.

47 *See, e.g.*, *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) (defendant incorporated in Delaware with principal place of business in Illinois).

48 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("arise out of or connected with").

49 *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (holding jurisdiction proper when defendant "purposefully avails itself of the privilege of conducting activities within the forum state").

50 *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781–82 (2017).

51 *See, e.g.*, *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385–86 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) (observing that "but for" test is consistent with basic function of "arising out of" requirement for personal jurisdiction).

52 *See, e.g.*, *Cortina v. Bristol-Myers Squibb Co.,* 2017 U.S. Dist. LEXIS 100437 at *7 (N.D. Cal. June 27, 2017) (holding plaintiff's injuries would not have occurred but for defendant's contacts).

53 *See Nakaki v. Caesar's Entertainment Operating Co.*, 2012 U.S. Dist. LEXIS 197016 at *5–9 (C.D. Cal. Aug. 24, 2012) (citing *Shute* for the "but for" test).

54 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

55 *Id.* at 293.

56 *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1462 (1988).

57 *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 580–85 (Tex. 2007) (cataloguing tests for the claim-connection requirement adopted across the country).

58 *Daimler AG v. Bauman*, 571 U.S. 117, 132 n.9 (2014).

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

60 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 915 (2011).

61 *Daimler AG v. Bauman*, 571 U.S. 117, 120–21 (2014).

62 *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1554 (2017).

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

64 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

65 *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773, 1789, 1789 n.4 (2017) (Sotomayor, J., dissenting).

66 *See Devlin v. Scardelletti*, 536 U.S. 1, 8–11 (2002) (discussing unnamed parties' rights in class actions).

67 *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365–67 (1921).

68 *Molock v. Whole Foods Mkt. Inc.*, 297 F. Supp. 3d 114,126–27 (D.D.C. 2018); *Sanchez v. Launch Tech. Workforce Solutions LLC*, 297 F. Supp. 3d 1360, 1365–66 (N.D. Ga. 2018); *In re Morning Song Bird Food Litigation*, 2018 U.S. Dist. LEXIS 44825 (S.D. Cal. Mar. 19, 2018); *In re Chinese-Manufactured DryWall Products*, 759 F. Supp. 2d 822 (E.D. La. 2017); *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, 2017 U.S. Dist. LEXIS 155654 (N.D. Cal. Sept. 22, 2017); *Greene v. Mizhuho Bank, Ltd.*, 289 F. Supp. 3d 870 (N.D. Ill. 2017).

69 *Practice Mgmt. Support Servs. Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 861 (N.D. Ill. Mar. 12, 2018); *DeBernardis v. NBTY, Inc.*, 2018 U.S. Dist. LEXIS 7947 (N.D. Ill. Jan. 18, 2018); *McDonnell v. Nature's Way Products, LLC*, 2017 U.S. Dist. LEXIS 177892 (N.D. Ill. Oct. 26, 2017); *Wenokur v. AXA Equitable Life Ins. Co.,* 2017 U.S. Dist. LEXIS 162812 (D. Ariz. Oct. 2, 2017).

70 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Justice Rehnquist, of course, was later appointed chief justice.

71 *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

72 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808–14 (1985).

73 *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773, 1780 (2017) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

74 *Burger King Corp. v. Rudzewicz*, 472 U.S. 462 (1985) (company headquarters); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (policyholder's state).

75 15 U.S.C. §§ 77v(a), 78aa (2018).

76 15 U.S.C. § 22 (2018)

77 Employee Retirement Income Security Act, 29 U.S.C. § 1132(e)(2) (2018).

78 *See* Racketeering Influenced & Corrupt Organizations Act, 18 U.S.C. § 1965 (2018); Comprehensive Environmental Responsibility Compensation & Protection Act, 42 U.S.C. § 9613(e) (2018); Bankruptcy Act, 11 U.S.C. § 7004(d) (2018); Federal Interpleader Act, 28 U.S.C. § 2361 (2018).

79 28 U.S.C. § 1367 (2018).

80 *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815–23 (1985); *Constano v. American Tobacco Co.*, 84 F.3d 734, 741–43 (5th Cir. 1996); *In re Bridgestone/ Firestone, Inc.*, 288 F.3d 1012, 1018–19 (7th Cir. 2002).

81 *Id.*

82 *See generally* Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 Am. U. L. Rev. 413 (2017).

83 Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 Nw. U. L. Rev. 1301 (2015); *see also* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, forthcoming in 66 UCLA L. Rev. 1, 57–60 and n.301.

84 *Id.*

85 Minutes, Civil Rules Advisory Committee, April 10, 2018 at 32.

86 *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 551–52 (E.D. La. 2009); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, 2016 U.S. Dist. LEXIS 50466 (E.D. La. Apr. 4, 2016); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prods. Liab. Litig.*, 704 F. Supp. 2d 1379 (C.D. Cal. Apr. 12, 2010); *In re New York Renu with Moistureloc Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 88515 (D. S.C. May 8, 2008).