CIVIL PROCEDURE: CASES, QUESTIONS, AND MATERIALS

Seventh Edition

2019 UPDATE MEMORANDUM

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www.cap-press.com

Rich Freer and Wendy Perdue are delighted to have Robin Effron join them on the casebook. She will be co-author on the eighth edition, to be published in due course. In the meantime, she has joined Rich and Wendy in preparing this 2019 Memorandum Update for professors and students using the seventh edition of the casebook. Page numbers in this Memorandum are to that edition.

The only new principal case, as with last year's supplement, is *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). Though it is a specific jurisdiction case, we recommend that it be covered after general jurisdiction and *Daimler* [Casebook p. 90], because the new case is helpfully considered as one state court's reaction to the recent constriction of general jurisdiction. The Court rebuffs jurisdiction, as it did another effort in *BNSF Ry. Co. v. Tyrell*, 137 S.Ct. 1549 (2017), which is treated in Note 5 following *Bristol-Myers Squibb*.

As is our practice, we start with an overview of proposed amendments to the Federal Rules. This year there are no amendments that would become law effective December 1, 2019. However, we have included a proposal to Rule 30(b)(6) that is under continued consideration by the Advisory Committee.

One random note regarding plausibility pleading under *Twiqbal*. We are grateful to Professor Tom Metzloff at Duke for calling our attention to a district court order in a case against President Trump. In the order, the court finds that tort claims arising from candidate Trump's declaration "get them outta here" – regarding protestors – plausibly supported a tort claim. We have that order in a PDF. If anyone would like to use it in class, please contact either of us.

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2019 Amendments to the Federal Rules of Civil Procedure

On April 25, 2019, the Supreme Court announced that there are no updates to the Federal Rules of Civil Procedure for this year. However, the Advisory Committee has released a draft of a pending amendment to Rule 30(b)(6) which, if approved by the Supreme Court, would become effective on December 1, 2020 absent congressional action. Since this proposal has already garnered some attention, we reproduce the proposed amendment and comment here:

Rule 30(b)(6) ***Notice or Subpoena Directed to an Organization***.
In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must ~~then~~ designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Draft Committee Note

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served, and to continue conferring as necessary, regarding the number and description of matters for examination and the identity of persons who will testify. At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition the documents it intends to use during the deposition, thereby facilitating deposition preparation. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate one or more witnesses to testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. Discussion of the number and description of topics may avoid unnecessary burdens. Although the named organization ultimately has the right to select its designees, discussion about the identity of persons to be designated to testify may avoid later disputes. It may be productive also to discuss "process" issues, such as the timing and location of the deposition.

The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination,

which may then be refined as the parties confer. The rule recognizes that the process of conferring will often be iterative, and that a single conference may not suffice. For example, the organization may be in a position to discuss the identity of the person or persons to testify only after the matters for examination have been delineated. The obligation is to confer in good faith, consistent with Rule 1, and the amendment does not require the parties to reach agreement. The duty to confer continues if needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

Chapter 2: Personal Jurisdiction

B. Constitutional Limits on Personal Jurisdiction

4. General Jurisdiction

At page 111, following Note 9, add:

Bristol-Myers Squibb Co. v. Superior Court of California
137 S. Ct. 1773 (2017)

JUSTICE ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. 1 Cal. 5th 783, 790, 377 P.3d 874, 879 (2016). Over 50 percent of BMS's work force in the United States is employed in those two States.

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located there. *Ibid.* BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento.

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. BMS instead engaged in all of these activities in either New York or New Jersey. But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales. This amounts to a little over one percent of the company's nationwide sales revenue.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other

California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

[BMS objected to personal jurisdiction regarding all claims by nonresidents of California. That court, addressing the matter before the decision in *Daimler*, held that it had general personal jurisdiction. The California Court of Appeal ultimately held that general jurisdiction was not possible under *Daimler*, but that California had specific jurisdiction. The California Supreme Court affirmed on the basis of a "sliding scale approach to specific jurisdiction."]

Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." And while acknowledging that "there is no claim that Plavix itself was designed and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State.

* * *

We granted certiorari to decide whether the California courts' exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment.[1]

II

A

* * *

Since our seminal decision in I*nternational Shoe*, our decisions have recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction. * * * But "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that State.

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, "the suit" must "aris[e] out of or relat[e] to the defendant's contacts with the forum." In other words, 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 and is therefore subject to the State's regulation." For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."

[1] California law provides that its courts may exercise jurisdiction "on any basis not inconsistent with the Constitution . . . of the United States," Cal. Civ. Proc. Code Ann. §410.10 (West 2004).

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff 's forum of choice." *Kulko v. Superior Court* [Casebook p. 61, Note 10 (1978)]; * * *. But the "primary concern" is "the burden on the defendant." Assessing this burden 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." *Hanson v. Denckla*, [Casebook pp. 46-49 (1958)]. "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen*, [Casebook p. 49 (1984)]. And at times, this federalism interest may be decisive. As we explained in *WorldWide Volkswagen*, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."

III

A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, 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." *Goodyear*, [Casebook p. 99 (2011)]. When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. * * *

For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'"

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested

Plavix in California— and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, [Casebook p. 65 (2014)] * * *. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden*, supra, illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada." Because the "relevant conduct occurred entirely in Georgi[a] . . . the mere fact that [this] conduct affected plaintiffs with connections to the forum State d[id] not suffice to authorize jurisdiction."

In today's case, the connection between the nonresidents' claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden*, all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World Wide Volkswagen* (finding no personal jurisdiction in Oklahoma because the defendant "carr[ied] on no activity whatsoever in Oklahoma" and dismissing "the fortuitous circumstance that a single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma" as an "isolated occurrence").

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

* * *

The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff 's request for damages suffered outside the State, but that holding concerned jurisdiction to determine the scope of a claim involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no instate injury and no injury to residents of the forum State. *Keeton* [(Casebook p. 64 (1984)] held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff 's claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law.

[The Court explained that *Phillips Petroleum Corp. v. Shutts* [Casebook pp. 797-99 (1985)] was also irrelevant. It expressly dealt with personal jurisdiction over members of a plaintiff class action, and not over defendants. The fact that the defendant assumed it was subject to general

personal jurisdiction in that case was irrelevant to whether there could be general jurisdiction after *Daimler*.]

C

In a last ditch contention, respondents contend that BMS's "decision to contract with a California company [McKesson] to distribute [Plavix] nationally" provides a sufficient basis for personal jurisdiction. But as we have explained, "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U. S. 320, 332 (1980); see *Walden* ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction"). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." 1 Cal. 5th, at 815 (Werdegar, J., dissenting). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up. See Brief for Respondents 38–47. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio— could probably sue together in their home States. In addition, 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 restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U. S. 97, 102, n. 5 (1987).

* * *

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*, 571 U. S. ___ (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol-Myers Squibb is a Fortune 500 pharmaceutical company incorporated in Delaware and headquartered in New York. It employs approximately 25,000 people worldwide and earns annual revenues of over $15 billion. In the late 1990's, Bristol-Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity, Plavix was a blockbuster, earning Bristol-Myers billions of dollars in annual revenues.

Bristol-Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol-Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol-Myers' revenue worldwide.

* * *

II

Viewed through this framework [of *International Shoe* and progeny], the California courts appropriately exercised specific jurisdiction over respondents' claims.

First, there is no dispute that Bristol-Myers "purposefully avail[ed] itself" of California and its substantial pharmaceutical market. Bristol-Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly $1 billion during the period relevant to this suit.

Second, respondents' claims "relate to" Bristol-Myers' instate conduct. A claim "relates to" a defendant's forum conduct if it has a "connect[ion] with" that conduct. *International Shoe*, 326 U.S., at 319. So respondents could not, for instance, hale Bristol-Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no

connection to acts Bristol-Myers took in California. But respondents' claims against Bristol Myers look nothing like such a claim. Respondents' claims against Bristol-Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not "relate to" the advertising and distribution efforts that Bristol-Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because Bristol-Myers already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents' claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs' "interest in obtaining convenient and effective relief," *Burger King*, 471 U. S., at 477, is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. * * *

Nothing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents.

III

Bristol-Myers does not dispute that it has purposefully availed itself of California's markets, nor—remarkably— did it argue below that it would be "unreasonable" for a California court to hear respondents' claims. Instead, Bristol-Myers contends that respondents' claims do not "arise out of or relate to" its California conduct. The majority agrees, explaining that no "adequate link" exists "between the State and the nonresidents' claims" —a result that it says follows from "settled principles [of] specific jurisdiction." But our precedents do not require this result, and common sense says that it cannot be correct.

A

The majority casts its decision today as compelled by precedent. *Ibid*. But our cases point in the other direction.

The majority argues at length that the exercise of specific jurisdiction in this case would conflict with our decision in *Walden v. Fiore*. That is plainly not true. *Walden* concerned the requirement that a defendant "purposefully avail" himself of a forum State or "purposefully direc[t]" his conduct toward that State, not the separate requirement that a plaintiff 's claim "arise out of or relate to" a defendant's forum contacts. The lower court understood the case that way. The parties understood the case that way. * * * And courts and commentators have understood the case that way. * * * *Walden* teaches only that a defendant must have purposefully availed itself of

the forum, and that a plaintiff cannot rely solely on a defendant's contacts with a forum resident to establish the necessary relationship. ("[T]he plaintiff cannot be the only link between the defendant and the forum"). But that holding has nothing to do with the dispute between the parties: Bristol-Myers has purposefully availed itself of California—to the tune of millions of dollars in annual revenue. Only if its language is taken out of context, can Walden be made to seem relevant to the case at hand.

By contrast, our decision in *Keeton v. Hustler Magazine, Inc.*, suggests that there should be no such barrier to the exercise of jurisdiction here. In *Keeton*, a New York resident brought suit against an Ohio corporation, a magazine, in New Hampshire for libel. She alleged that the magazine's nationwide course of conduct—its publication of defamatory statements—had injured her in every State, including New Hampshire. This Court unanimously rejected the defendant's argument that it should not be subject to "nationwide damages" when only a small portion of those damages arose in the forum State; exposure to such liability, the Court explained, was the consequence of having "continuously and deliberately exploited the New Hampshire market," * * *. The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff 's claim arising out of its nationwide course of conduct, whereas Bristol-Myers faces many more plaintiffs' claims. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.

The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do— trump even concerns about fairness to the parties. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which "'the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation'" but personal jurisdiction still will not lie. *Ante*, at 7 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 294 (1980)). But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share? I would measure jurisdiction first and foremost by the yardstick set out in *International Shoe*—"fair play and substantial justice," 326 U.S., at 316 (internal quotation marks omitted). The majority's opinion casts that settled principle aside.

B

I fear the consequences of the majority's decision today will be substantial. Even absent a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff 's claim,[3] the

[3] *Bristol-Myers* urges such a rule upon us, but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff injured in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297 (1980). See Brief for Civil Procedure Professors as Amici Curiae 14–18; see also *J. McIntyre Machinery*,

upshot of today's opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol-Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open . . . question"). *Ante*, at 12. Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is "'essentially at home.'"[4]. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

[Second, Justice Sotomayor noted that in light of *Daimler's* limits on general jurisdiction and the holding in the present case, plaintiffs will find it impossible to bring a nationwide case against two defendants if those defendants are not incorporated in the same state or do not maintain their principal places of business in the same state. No state will have general jurisdiction over both defendants.]

It "does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe*, 326 U. S., at 316, to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

NOTES AND QUESTIONS

1. In other cases in which the Supreme Court rejected specific jurisdiction – including *Walden, J. McIntyre, World-Wide Volkswagen,* and *Hanson* – it held that there was no *International Shoe* type "contact" between the defendant and the forum. But that is not the problem in *Bristol-Myers Squibb*. In this case, the defendant forged plenty of purposeful ties with California. So what was the problem? Why does the Court reject jurisdiction?

Ltd. v. Nicastro, 564 U. S. 873, 906–907 (2011) (GINSBURG, J., dissenting). That question, and others like it, appears to await another case.

[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. Cf. *Devlin v. Scardelletti*, 536 U. S. 1, 9–10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others"); see also Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L. J. 597, 616–617 (1987).

2. In *Helicopteros*, the Court rejected general jurisdiction. The majority opinion did not consider specific jurisdiction because the par ties stipulated that the case involved only general jurisdiction. In his dissent, Justice Brennan urged that specific jurisdiction should not require that the plaintiff's claims "arise out of" the defendant's contact with the forum. Rather, it should require only that the claims "relate to" those contacts. Linguistically, he noted, "relate to" would permit a broader exercise of specific jurisdiction than a requirement that the claim "arise out of" the contact. *Helicopteros*, 444 U.S. at 425 (Brennan, J., dissenting). Did the majority in *Bristol-Myers Squibb* make such a distinction? What test does it employ? Did Justice Sotomayor make such a distinction?

3. Is the holding in *Bristol-Myers Squibb* consistent with the holding in *Walden v. Fiore* [Casebook p. 65]?

4. Does the holding in *Bristol-Myers Squibb*, which was a mass tort action, extend to personal jurisdiction in class action cases? In a class action, [discussed in Chapter 13.C of the Casebook], the lawsuit is brought by one or more named representatives on behalf of unnamed and absent class members. Lower courts have split over this issue. Some courts have declined to apply the holding to class actions because of the "significant distinctions between a class action and a mass tort action." Cabrera v. Bayer Healthcare, LLC, at 2019 WL 1146828, at *7 (C.D. Cal. Mar. 6, 2019. In Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc. 2017 WL 4224723 (N.D. Cal. Sept. 17, 2017), the court noted that in a mass tort action like *Bristol-Myers*, each plaintiff sues in her own name, making each plaintiff the "real party in interest." This is not true in a representative suit like a class action which is designed for "promoting expediency in class actions." Id. at *5. Other courts have extended the *Bristol-Myers Squibb* holding to class actions. In Greene v. Mizuho Bank, Ltd., 289 F. Supp. 3d 870 (N.D. Ill. 2017) the court held that "[n]othing in *Bristol–Myers* suggests that it does not apply to named plaintiffs in a putative class action; rather, the Court announced a general principle—that due process requires a 'connection between the forum and the specific claims at issue.'" Id. at 874. See also In re Dental Supplies Antitrust Litigation, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017); DeBernardis v. NBTY, Inc., 2018 WL 439122, at *2 (N.D. Ill. Jan. 16, 2018).

5. *Bristol Myers-Squibb* was a state law case brought in California state court. Justice Alito specifically left open the question of whether the Court's holding in *Bristol-Myers Squibb* applies to cases brought in federal court. Why would the Court explicitly reserve this question? Do you think that the Supreme Court will eventually extend *Bristol-Myers Squibb* to federal actions? One federal court in California held that *Bristol-Myers Squibb* applied to a federal action "because the Court's authority to hear this case under Federal Rule of Civil Procedure 4(k)(1)(A) is derivative of California's long-arm statute." In re Samsung Galaxy Smartphone Marketing and Sales Practices Litigation, 2018 WL 1576457 at *2 (N.D. Cal. Mar. 30, 2018). But, another federal court in the same California district held that "*Bristol-Myers* was animated by unique federalism concerns" and was thus unpersuaded that a "categorical extension [of *Bristol-Myers* to federal actions] is warranted." Sloan v. General Motors LLC, 287 F. Supp. 3d 840, 858 (N.D. Cal. 2018).

6. Note 7 following the *Daimler* case referred to Justice Brennan's dissent in *Helicopteros*. In that dissent, Justice Brennan called for a broader interpretation of the relationship required for specific

jurisdiction. Instead of requiring that the plaintiff's claim "arise out of" the defendant's contact with the forum, he argued, it should be enough that the claim merely be "related to" the conduct. Does the majority opinion in *Bristol-Myers Squibb* address Justice Brennan's concern?

7. Is the majority's emphasis on sovereignty in section II.B. of its opinion consistent with *Insurance Corp. v. Compagnie des Bauxites* [Casebook p. 60, Note 8]? In light of Justice Ginsburg's dissent in *J. McIntyre* (particularly part II, Casebook pp. 93-94), which Justice Kagan joined, are you surprised that those two Justices signed the majority opinion in *Bristol-Myers Squibb*?

8. *Bristol-Myers Squibb* shows one state court's reaction to the "new era" of restricted general jurisdiction, ushered in by *Goodyear* and *Daimler*. Because general jurisdiction was not available, the California Supreme Court stretched specific jurisdiction – and got reversed.

Another example is *BNSF Railway Co. v. Tyrell*, 137 S. Ct. 1549 (2017). There, the plaintiffs sued a railroad in Montana under the Federal Employer Liability Act (FELA), which permits railroad employees to sue their employers for injuries suffered on the job. The plaintiffs' claims arose entirely in states other than Montana.

The Montana Supreme Court upheld general jurisdiction, and noted that the railroad had over 2,000 miles of track and 2,100 employees in the state. First, it held that 45 U.S.C. § 56 conferred general jurisdiction. The Court rejected this contention unanimously because the statute addresses venue and has nothing to do with personal jurisdiction. *Id.* at 1555-57.

Second, the Montana court refused to follow *Goodyear* and *Daimler* because neither of those cases involved claims under FELA. The Court rejected this contention, held that *Goodyear/Daimler* applied, and that under those cases Montana did not have general jurisdiction. The railroad was not incorporated there. It did not have its principal place of business there. And the level of activity there was comparable to that in several other states, so there could not be general jurisdiction based upon activities. It reiterated its phrase from *Daimler*: when a corporation operates in several states, it "can scarcely be deemed at home in all of them." 137 S.Ct. at 1559.

Justice Sotomayor dissented on the second basis of the Court's holding, and lamented that now "it is virtually inconceivable that [inter state] corporations will ever be subject to general jurisdiction in any location other than their principal places of business or incorporation." 137 S.Ct. at 1560 (Sotomayor, J., dissenting in part).

Chapter 3: Notice and Opportunity to be Heard

B. Notice

2. Statutory Requirements

At pages 164-65, Note 15, add at end of Note:

Article 10(a) of the Hague Convention provides for "the freedom to send judicial documents, by postal channels, directly to persons abroad." In *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017), the Texas Court of Appeals held that this provision did not permit service of process by mail. According to that court, the quoted language applied to documents other than service of process. The Supreme Court reversed. "In short, the traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail." *Id.* at 1513. The Court emphasized that the holding does not mean that Article 10(a) authorizes service by mail; it simply means that, so long as the receiving state does not object, the Convention does not interfere with the freedom to serve by mail. *Id.* Justice Alito wrote for the Court, which was unanimous (except for Justice Gorsuch, who did not participate).

Chapter 5: Venue

D. Venue in Federal Court

"The Basic Rules"

At page 252, note:

In the last paragraph on the page, we note some of the specialized federal venue statutes. One such statute that has received recent press attention is the specialized venue statute for patent infringement cases, 28 U.S.C. § 1400(b). That statute permits venue where the defendant "resides." In 1957, the Court (in *Fourco*) held that "resides," for purposes of this statute, means where a domestic corporation is incorporated. Notwithstanding *Fourco*, some lower courts concluded that the definition of "resides" found in the general venue statute, 28 U.S.C. § 1391(c)(1), applied to the patent venue statute and, therefore, that venue was proper in every district in which the defendant was subject to personal jurisdiction. This interpretation was popular with so-called patent trolls, who had identified some particularly friendly district courts in which to sue.

In *TC Heartland v. Kraft Foods Group Brands*, 137 S. Ct. 1415 (2017), a unanimous Supreme Court reaffirmed *Fourco* and held that "resides" in the patent statute is limited to the district in which the corporation is incorporated.

At page 255, Question 6(c), note:

The reference to "Doug" in this hypothetical should be deleted. (Doug was subject to various facts in Question 5. The points we wanted to make with regard to individuals were made in those scenarios, and need not be replicated in Question 6(c).)

E. Change of Venue

2. Transfer of Civil Actions in Federal Court

e. The Effect of a Forum Selection Clause

At p. 265, final paragraph, note:

In the second sentence, references to "transferor" and "transferee" are transposed. The sentence should read: ". . . the transferee court applies the same law that the transferor would have applied."

Chapter 7: Pleadings and Judgments Based on Pleadings

D. Defendant's Options in Response

2. The Answer

b. Affirmative Defenses

At pages 344-45, Note 3, add at end of Note:

Professor Janssen demonstrated that the clear majority of lower federal courts have held that the Twiqbal plausibility standard does not apply to the pleading of affirmative defenses. William M. Janssen, The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses, 70 Wash. & Lee L. Rev. 1573, 1606 (2013).

E. Veracity in Pleading: Rule 11 and Other Devices

2. Other Sanctions

At page 369, penultimate paragraph, add at end:

In *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017), the Court unanimously held that any award of attorney's fees under the court's inherent power must be compensatory and not punitive. Thus, the party seeking the award must show a "causal link – between the litigant's misbehavior and legal fees paid by the opposing party." *Id.* at 1186. The causal link is established by a showing of "but for" causation, so the award is limited to those fees which the moving party would not have paid but for the litigation misconduct.

Chapter 8: Discovery

D. Scope of Discovery

2. Issued Concerning Discovery of ESI

At page 399, Note 6, add at end:

Rule 26(b)(2)(B) concerns ESI that can be recovered only undue burden or cost and effectively codifies *Zubulake*. In contrast, Rule 37(e) deals with ESI that is truly lost and cannot be recovered.

E. Sanctions

At pages 442-43, Notes 6 and 7:

These notes should be deleted. They refer to the old version of Rule 37(e), which was replaced in 2015. The earlier parts of the chapter addressing Rule 37(e) are correctly related to the new version.

Chapter 9: Adjudication With and Without a Trial or a Jury

C. Summary Judgment – Adjudication Without Trial

At page 491, penultimate paragraph, add:

Professor Nash has written about the surprisingly nuanced issue of the trial judge's discretion to deny summary judgment in cases in which the standard is satisfied. Though judges have such discretion, the authority is not as well established as one might think. Jonathan Remy Nash, Unearthing Summary Judgment's Concealed Standard of Review, 50 U.C. Davis L. Rev. 87 (2016).

D. Controlling and Second-Guessing Juries

3. Other Techniques for Controlling Juries

e. Juror Misconduct

At page 538, pages 538-39, after paragraph spanning those pages, add:

In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), some members of a criminal jury that returned a conviction reported that another juror claimed to decide the case, and attempted to influence others to decide, based upon racial animus toward the defendant and one of the defendant's witnesses. The Court held that the general rule against considering juror testimony must yield to the constitutional right of a criminal defendant to a fair trial. The decision was based upon the Sixth Amendment, and thus does not apply to civil cases. *Id.* at 869. It seems clear, however, that the Seventh Amendment right to a fair trial should command the same answer. Justice Kennedy wrote the majority opinion. Justice Alito filed a dissent, joined by Chief Justice Roberts and Justice Thomas. Justice Gorsuch did not participate, so the decision was five-to-three.

Chapter 11: The Preclusion Doctrines

A. Introduction and Integration

At page 622, after the first paragraph, add:

The Second Circuit has invoked a doctrine it calls "defense preclusion" to preclude a defendant from raising a defense that it could have raised, but did not, in a previous case between the same parties. The court recognized that claim preclusion did not apply because the defendant had not been a claimant in the first case. Issue preclusion did not apply because the defense was not litigated and determined in the first case. Lucky Brand Dungarees v. Marcel Fashions Group, 898 F.3d 232, 238 (2d Cir. 2018). The Supreme Court granted certiorari on June 28, 2019 on this issue: "Whether, when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties."

B. Claim Preclusion

1. Scope of a Claim

a. In general

At page 630, after Note 12, add:

13. It is possible that new facts, arising after entry of judgment, will create a new claim. The Court gave an example:

> Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners' treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent. *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2305 (2016).

D. Issue Preclusion

5. By Whom Can Issue Preclusion Be Asserted?

a. Mutuality and Exceptions

At page 656, at the end of the footnote (*), add:

Professor Koppel addresses this topic in Glenn S. Koppel, The Case for Nonmutual Privity in Vicarious Liability Relationships: Pushing the Frontiers of the Law of Claim Preclusion, 39 Campbell L. Rev. 1 (2017). He demonstrates that while the historical approach is the one outlined in our text, there is a significant trend toward expanding the notion of privity to include the relationship of indemnitor and indemnitee. The issue was raised on the civil procedure professors' listserv two years ago, when professors disagreed with the proposed answer to a sample multistate bar exam question. Professor Koppel recounts the question and the ensuing debate as an entertaining prelude to his convincing analysis.

Chapter 12: Scope of Litigation – Joinder and Supplemental Jurisdiction

D. Permissive Party Joinder by Plaintiffs

1. Procedural Aspects

At page 693, at the end of Note 6, insert:

In *Hall v. Hall*, 138 S. Ct. 1118, 1128-32 (May 23, 2018), the Court unanimously held that consolidated cases retain their separate identities, so that judgment is one is immediately appealable as a final judgment.

F. Overriding Plaintiff's Party Structure

2. Compulsory Joinder (Necessary and Indispensable Parties)

b. Jurisdictional Aspects

At page 725, after the first full paragraph, add:

In *Artis v. District of Columbia*, 138 S. Ct. 594, 601-05 (2018), the Court held that § 1367(d) is a true tolling provision. Thus, it suspends the applicable statute from running, and does not merely provide a 30-day grace period after dismissal in which to file suit. The plaintiff filed her case in the District of Columbia Superior Court 59 days after her federal case was dismissed. Because the pendency of her suit in federal court tolled the applicable statute of limitations, her claim was timely.

3. Intervention

a. Procedural Aspects

At page 739, after Note 8, add:

9. In *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), the Court held: "[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing. That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names." The Court unanimously remanded so the lower court could reconcile the confusion over whether the intervenor indeed sought different relief from that sought by the original plaintiff and, if so, to assess whether the intervenor had standing under Article III. *Id.* at 1652.

Chapter 13: Special Multiparty Litigation: Interpleader and the Class Action

C. The Class Action

4. Practice Under Rule 23

c. Requirements for Certification Under Rule 23

i. Prerequisites of Rule 23(a)

At page 774, after Note 7, add:

8. The Third Circuit requires a party seeking class certification to show "ascertainability," which is not mentioned in Rule 23. By this that court means not simply a definition with objective criteria, but that "there is a reliable and administratively feasible mechanism for determining whether class members fall within the class definition." *Carrera v. Bayer Corp*., 727 F.3d 300, 305 (3d Cir. 2013). The criterion is an issue only in Rule 23(b)(3) classes, where the court will be required to distribute monetary relief to class members if the class prevails. To date, no other court of appeals has adopted this form of "ascertainability." See, e.g., *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.3 (9th Cir. 2017).

Some Third Circuit judges have second thoughts about their court's position on the issue. See, e.g., *Byrd v. Aarons, Inc.*, 784 F.3d 154, 177 (3d Cir. 2015)(Rendell, J., concurring)(urging that the ascertainability requirement be jettisoned). See generally Note, Class Ascertainability, 124 Yale L.J. 2354 (2015).

In early 2017, the House of Representatives passed the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act." Among other things, it would impose an ascertainability requirement. Under the bill, in every federal class action seeking monetary recovery, the representative must "demonstrate[] a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members." As of this writing, this legislation has not been enacted by the Senate.

ii. Types of Class Actions Under Rule 23(b)

At page 780, following Note 2, add:

The Court upheld a classwide demonstration of damages, however, in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). In that case, employees sued to recover compensation for time spent donning and doffing protective gear (they worked in a meat processing plant). The defendant had failed to keep relevant records, so the class representative relied upon expert testimony, which was based upon averages for various types of workers. The Court distinguished *Wal-Mart*: "While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy." *Id.* at 1048. Because an individual employee in *Tyson Foods*, suing individually, would be permitted to rely on the expert opinion, so may the class.

5. Subject Matter Jurisdiction

At page 797, following *Note on Jurisdiction Under CAFA*, add:

A third party defendant, meaning a party who is joined in the lawsuit by the original defendant and is defending counterclaim brought by the original defendant, may not remove the

class action to federal court under either CAFA or the general removal statute, 28 U.S.C. § 1441(a). Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019).

Chapter 14: Appellate Review

B. Appellate Jurisdiction in the Federal Courts

1. Section 1291

At page 804, before section 2, add:

In *Hall v. Hall*, 138 S. Ct. 1118, 1128-32 (May 23, 2018), the Court unanimously held that consolidated cases retain their separate identities, so that judgment is one is immediately appealable as a final judgment.

2. Collateral Order Doctrine

At page 812, at the end of section (d), add:

The Court rejected an effort to rekindle the "death knell" doctrine in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). There, after the district court granted a motion to strike class allegations, the plaintiffs stipulated to voluntary dismissal of the case with prejudice. On appeal from that dismissal, the plaintiffs attempted to raise the issue of class certification. The effort failed: "Plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice . . . ." *Id.* at 1715. Justice Ginsburg wrote for five Justices. Justice Thomas concurred, in which Chief Justice Roberts and Justice Alito concurred. Justice Gorsuch did not participate.

Chapter 15: Alternative Models of Dispute Resolution

C. Models of Non-Judicial Resolution

3. Expansion of Contractual Arbitration

At page 854, second line of text, add:

The Court's broad interpretation of the FAA to preempt state law continued in *Kindred Nursing Centers, Ltd. v. Clark*, 137 S. Ct. 1421 (2017). In that case, Kentucky law required that a power of attorney expressly state that the person designated has the power to enter an arbitration provision. Such a clause violated the FAA by singling out arbitration provisions for special treatment. Thus, the arbitration clause was enforceable, and required that a wrongful death claim against a nursing center be arbitrated. *Id.* at 1426-29. Justice Kagan wrote the opinion for seven Justices. Justice Thomas dissented. Justice Gorsuch did not participate.

In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621-24 (2018), a five-to-four decision, the majority enforced a class action waiver and required individual arbitration of claims under the Fair Labor Standards Act. In an opinion by Justice Gorsuch, the majority concluded that that the National Labor Relations Act, in protecting workers' rights to "concerted activities for the purpose of collective bargaining or other mutual aid or protection," did not refer to litigation activities. Thus, the FAA applied and required enforcement of the clause requiring individual arbitration.

In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), in a unanimous decision, the Court held that a court may not compel class-wide arbitration when an arbitration clause is silent on the matter because "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." Id. at 1419.