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SESSION TITLE: What Have Bristol-Meyers Squibb and Mallory Meant for Class Actions?

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Zac Madonia primarily practices in the areas of class action defense and complex commercial litigation. He represents corporate clients from a diverse range of industries – including mortgage and consumer lending, pharmaceutical and medical device manufacturing, distribution, and dispensing, automotive, consumer packaged goods, and healthcare – facing class and mass actions in federal and state courts across the country. He has experience litigating a wide variety of substantive areas of law, including public nuisance, state and federal consumer protection statutes, antitrust and competition, commercial fraud, securities and shareholder derivative litigation, False Claims Act, intellectual property infringement, and breach of fiduciary duty. He regularly speaks and publishes on topics related to class action litigation.

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I. BMS *Overview*

In *Bristol-Myers Squibb* ("*BMS*"), the United States Supreme Court concluded that California state courts could not exercise personal jurisdiction over the defendant BMS as to the claims of non-resident plaintiffs who could not satisfy the well-settled test for specific jurisdiction. *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255, 137 S. Ct. 1773 (2017).

BMS was a mass action in which nearly 700 plaintiffs filed suit in California state court, alleging injuries from BMS's antiplatelet drug Plavix. Nearly 600 of the 700 plaintiffs were non-California residents, who "were not prescribed [the product] in California, did not purchase [the product] in California, did not ingest [the product] in California, and were not injured by [the product] in California." *Id.* at 1781. Nor were there allegations that the defendant developed the product, created a marketing strategy for the product, or manufactured, labeled, packaged, or worked on the regulatory approval of the product in California. *Id*. at 1778. The fact that nearly 600 of the 700 plaintiffs in *BMS* were non-California residents was indicative of forum shopping by the plaintiffs' attorneys who launched that litigation. Given the lack of any nexus to California of the claims of non-California plaintiffs, BMS, a Delaware corporation headquartered in New York, challenged the California court's jurisdiction to adjudicate the claims of those non-California residents.

After the California courts found specific personal jurisdiction to exist (based largely on the fact that BMS marketed and distributed Plavix nationwide), the United States Supreme Court, by an 8-1 vote, reversed. The Supreme Court emphasized that even in a mass action, Due Process dictated that "the suit must aris[e] out of or relat[e] to the defendant's contacts with the forum" for a court to exercise specific jurisdiction, *id*. at 1780. Because, however, there was no "connection between the forum and the" non-California plaintiffs' claims, the California courts had no personal jurisdiction over BMS as to those claims. *Id*. at 1781. The fact that BMS distributed Plavix into California was irrelevant, as the non-California plaintiffs' claims did not arise from those distribution activities. The fact that the California courts had personal jurisdiction over the claims of California plaintiffs was also irrelevant: as the Supreme Court held, that California 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" nonresidents." *Id*.

BMS, however, was a *mass* action case, not a *class* action case, and the Court notably did not explicitly address whether personal jurisdiction was required over the claims of absent class members—a fact that Justice Sotomayor specifically pointed out in her dissent.

II. Impact of *BMS* in the District Courts

In the immediate aftermath of *BMS*, class action defendants across the country hoped that *BMS* could be used as a panacea to kill the nationwide class action brought in any state but the defendant's home forum. Class action defendants raised *BMS*-based challenges to the court's personal jurisdiction over the claims of absent non-resident class members early and often: via motions to dismiss the claims of non-resident absent class members; motions to strike class allegations; and oppositions to motions for class certification. As the argument generally went,

although *BMS* was decided in the mass action, not class action, setting, its logic should nevertheless apply with equal force to class actions. After all, the personal jurisdiction requirement is a substantive right anchored in the Due Process clause of the U.S. Constitution, and the procedural rules allowing for class actions are not supposed to alter parties' substantive rights. In response, plaintiffs generally argued that in a class action, all that mattered was that the court could exercise personal jurisdiction over the named plaintiffs' claims, not absent class members, the Due Process clause be damned.

Perhaps unsurprisingly given the lack of clear guidance from the Supreme Court in *BMS*, significant divide emerged among the lower courts on the questions of whether and how *BMS* applies to class actions.

Many federal district courts concluded that *BMS* applied to class actions for the precise reason articulated above: that is, the procedural mechanisms of Rule 23 cannot supplant a defendant's substantive Due Process rights. *See, e.g.*, *Plumber's Local Union No. 690 Health Plan v. Apotex Corp.*, Civ. A. No. 16-665, 2017 WL 3129147, at *9 (E.D. Pa. July 24, 2017) (dismissing non-Pennsylvania claims for certain defendants); *Spratley v. FCA US LLC*, No. 3:17-CV-0062, 2017 WL 4023348, at *7–8 (N.D.N.Y. Sept. 12, 2017) (dismissing claims of out-of-state plaintiffs who had "shown no connection between their claims and Chrysler's contacts with New York"); *In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696 (BMC)(GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 2017) ("The constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case."); *Maclin v. Reliable Reports of Texas, Inc.*, No. 1:17-CV-2612, 2018 WL 1468821 (N.D. Ohio Mar. 26, 2018) ("[T]he Court cannot envisage that the Fifth Amendment Due Process Clause would have any more or less effect on the outcome respecting FLSA claims than the Fourteenth Amendment Due Process Clause, and this district court will not limit the holding in *BMS* to mass tort claims or state courts."); *Roy v. FedEx Ground Package Sys., Inc.*, No. 3:17-CV-30116-KAR, 2018 WL 2324092, at *9 (D. Mass. May 22, 2018) (rejecting argument that *BMS* should be limited to cases originally filed in state court but finding the exercise of jurisdiction appropriate on the facts of the case); *In re Nexus 6P Prods. Litig.*, No. 17-cv-02185-BLF, 2018 WL 827958 at *5–6 (N.D. Cal. Feb. 12, 2018) (requiring plaintiffs to re-plead complaint to attempt to allege jurisdiction in a manner consistent with *BMS*); *McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 WL 4864910 at *4–5 (N.D. Ill. Oct. 26, 2017) (dismissing claims "brought on behalf of non-Illinois residents or for violations of Florida, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington law without prejudice"); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165-PHX-DLR, 2017 WL 4357916 at *4 n.4 (D. Ariz. Oct. 2, 2017) ("The Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class."); *Leppertv. Champion PetfoodsUSA Inc.*, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019; *Chavez v. Church & Dwight Co,*2018 WL 2238191 (N.D. Ill. May 16, 2018) (due process concerns "suggest that it seeks to bar nationwide class actions in forums where the defendant is not subject to general jurisdiction").

Other courts, however, reached the opposite result, cabining *BMS* to mass actions, and distinguishing mass actions, where each plaintiff is named as an individual party and, therefore, is a real party in interest, from class actions, where only the lead plaintiffs arguably are real parties in interest. *See, e.g.*, *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-CV-00564 NC,

2017 WL 4224723 (N.D. Cal. Sept. 22, 2017) ("Yet the Supreme Court did not extend its reasoning to bar the nonresident plaintiffs' claims here, and *Bristol-Myers* is meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff"); *Sloan v. General Motors LLC*, 287 F. Supp.3d 840 (N.D. Cal. Feb. 7, 2018); *In re Morning Song Bird Foot Litig.*, No. 12-CV-01592 JAH-AGS, 2018 WL 1382746 (S.D. Cal. Mar. 19, 2018); *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360 (N.D. Ga. 2018); *Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods., Inc.*, No. 17-2161 2018 WL 1377608 (E.D. La. March 19, 2018); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 5971622 (E.D. La. Nov. 30, 2017).

Meanwhile, still other courts punted on the issue, denying pre-certification *BMS* personal jurisdiction challenges, but reserving the question until class certification. For example, in *Chernus v. Logitech, Inc.*, No.: 17-673(FLW), 2018 WL 1981481 (D.N.J. April 27, 2018), the court recognized division in district court opinions regarding *BMS*, found the balance weighing against applying it in the class context, then stated "no class has been certified, and therefore, to determine whether this Court has specific jurisdiction over Defendant with respect to the claims of the unnamed class members prior to class certification would put the proverbial cart before the horse."

III. Appellate Decisions Discussing *BMS*

The first Court of Appeals to consider *BMS*'s application to class actions was the Seventh Circuit in *Mussat v. IQVIA, Inc*., 953 F.3d 441 (7th Cir. 2020). After the Northern District of Illinois struck the plaintiff's nationwide class allegations from the pleadings for lack of personal jurisdiction, a unanimous Seventh Circuit panel that included Justice Barrett reversed. The court reasoned that class actions were fundamentally different than mass actions, and that "[n]onnamed class members . . . may be parties for some purposes and not for others." Accordingly, the court held that "the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so." The Supreme Court denied cert in *Mussat*, perhaps unsurprisingly, given the lack of any circuit split.

The next year, the Sixth Circuit also declined to apply *BMS* to class actions in *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021), borrowing heavily from *Mussat*. In a notable dissent, however, Judge Thapar opined that courts must have "personal jurisdiction over all parties for each claim—including the claims of absent class members ." Judge Thapar reasoned that, because courts can bind both named and absent class members to its judgment, class actions are similar to the mass action considered in BMS and should be treated similarly.

The only other Courts of Appeal confronted with the question of whether *BMS* applies to nationwide class actions have sidestepped the issue. Specifically, the D.C, Fifth, and Ninth Circuits were all confronted with pre-certification challenges to the trial courts' personal jurisdiction over the claims of absent class members; each held that the question of whether the court needed personal jurisdiction over the claims of absent class members was not ripe until the class certification stage. *See, e.g.*, *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299 (D.C. Cir. 2020); *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021) (reversing district court ruling that defendant had waived *BMS* personal jurisdiction challenge to claims of absent class members by failing to raise it in motion to dismiss).

IV. Best Practices for Raising *BMS*

In the wake of *Mussat* and *Lyngaas*, the general perception is that class action defendants are having less success in convincing district courts to apply *BMS* to class actions. Nevertheless, given the real possibility that there one day could be a circuit split—and subsequent Supreme Court review—class action defendants should continue to consider raising *BMS* at every possible turn: in a motion to dismiss the complaint; in a motion to strike nationwide class allegations; in an answer; and in opposition to class certification. While the Ninth Circuit's reasoning in *Moser* that a defendant's "personal jurisdiction" defense to the claims of absent class members is not available before the class certification stage seems logically sound, there is always a risk that a court could disagree, and find that the failure to raise the personal jurisdiction defense on the first possible occasion constitutes a waiver.

V. *Mallory* Overview

In *Mallory*, the U.S. Supreme Court upheld Pennsylvania's "registration statute," that allows plaintiffs to sue any corporation registered to do business in the state, even if the corporation is not headquartered in the state and the suit did not arise in the state. *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2034-2039, and 2047-2049 (2023) (Gorsuch, J.'s majority 5-4 opinion, in which Alito, J. joined). The Supreme Court held that Pennsylvania's statute requiring a foreign business to consent to general jurisdiction in order to do business in the state did not violate the Due Process clause. *Id*. Given the potential to sue defendants in foreign jurisdictions pursuant to such "registration statutes," this decision seemingly broadened options for available jurisdictions for filing suit. As detailed below, though, this has largely not been borne out—in the class action context or otherwise—given the limited states with such statues that have been so interpreted to confer general jurisdiction over registrants.

For background, in *Mallory*, plaintiff Robert Mallory sued his former employer, Norfolk Southern Railway Co. ("Norfolk") for cancer allegedly attributed to his work on the railway. *Id.* at 2032. Although Mallory was a Virginia resident and the alleged carcinogen exposure occurred in Ohio and Virginia, and Norfolk is headquartered and incorporated in Virginia, Plaintiff filed suit in Pennsylvania. *Id.* at 2032-33. Mallory claimed that jurisdiction in Pennsylvania was proper based on the fact that Norfolk's extensive business conducted in Pennsylvania, and because Pennsylvania requires out-of-state companies that register to do business in the state to agree to appear in its courts on "any cause of action" against them. *Id.* at 2033, citing 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b) (2019). In response, Mallory challenged the exercise of jurisdiction in Pennsylvania for this claim—premised on Pennsylvania's consent by registration statute—as a violation of the Fourteenth Amendment's Due Process Clause. *Id.* at 2033.

The Supreme Court determined that the Pennsylvania statute at issue requiring an out-of-state corporation to consent to personal jurisdiction to do business there does not violate the Due Process Clause, and that such consent broadly confers jurisdiction over registrants in Pennsylvania for plaintiffs who seek redress against non-resident corporations for conduct that occurred elsewhere. *Id.* at 2044-45. In doing so, the Supreme Court reached its conclusion in what felt like a departure from the recent contacts-based general and specific jurisdiction analyses that have predominated in this area since *International Shoe* and its progeny, and relied on a separate consent-based test

emanating from *Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) holding that consent-based jurisdiction does not violate due process considerations. *Id.* at 2037, 2044-45.

While consent to personal jurisdiction has long been the rule, *Mallory* has been viewed as significant in endorsing a theory that statutes requiring out-of-state corporations to consent to jurisdiction before doing business there are constitutional, and create a valid basis for jurisdiction—prompting concerns over expanding the potential reach of such personal jurisdiction.

While *Mallory* does not address class actions specifically, the potential impact for forum shopping in such large-scale, national litigations seems obvious. However, as outlined below, its impact has to date been fairly limited, largely due to the fact that Pennsylvania is the sole state with such a business registration statutes that explicitly includes a consent to general jurisdiction provision, and there are only a minority of states with statutes with implicit provisions that have been interpreted to confer general jurisdiction. As such, litigants should stay on top of state-specific developments particularly in these jurisdictions, and in others that may seek to revise their business registration statutes to confer general jurisdiction.

VI. Impacts of Mallory in Other Jurisdictions

Case law in many jurisdictions has addressed whether the individual state's statutes require a foreign business to submit to general jurisdiction within it. *See* Updating Our 50-State Survey on General Jurisdiction by Consent, Drug & Device Law, Nov. 5, 2018 (last visited on January 30, 2024) (https://www.druganddevicelawblog.com/2018/11/updating-our-post-bauman-50-state-survey-on-general-jurisdiction-by-consent.html#). As noted, the vast majority of states have held that they do not, and only a minority have interpreted their statutes as implicitly conferring general jurisdiction.

A. *A Minority of States Hold Their Statutes Require A Foreign Business to Consent to General Personal Jurisdiction*.

Prior to *Mallory*, a small minority of states held that their consent-by-registration statutes would not violate Due Process, including: 1) Georgia, 2) Kansas, 3) Minnesota, and, arguably, 4) Iowa. *Allstate Ins. Co. v Klein*, 422 S.E.2d 863, 865 (Ga. 1992); *Merriman v. Crompton Corp*., 146 P.3d 162, 177 (Kan. 2006): *Rykoff-Sexton, Inc. v. Am. Appraisal Assocs., Inc*., 469 N.W.2d 88, 91 (Minn. 1991); and *Spanier v. American Pop Corn Co.*, 2016 WL 1465400 (N.D. IA, April 14, 2016) (Iowa's registration statute is similar to Minnesota's statute, subjecting a foreign business to general jurisdiction would not violate Due Process), *cf*. IA ST § 617.3 ("if a foreign corporation commits a tort in whole or in part *in Iowa against a resident of Iowa*, such acts shall be deemed to constitute the appointment of the secretary of state..whom may be served…[process, notice, or proceedings] *arising from or growing out of such contract or tort*")(emphasis added). Under *Mallory*, these decisions would likely be upheld against a current Due Process assertion.

Subsequent to *Mallory,* a federal court in Georgia similarly upheld the exercise of general jurisdiction against a foreign defendant. *Sloan v. Burist*, 2023 WL 7309476 (S.D. Ga. Nov. 6, 2023). There, *Sloan* consolidated several actions that arose out of a tractor trailer accident that

occurred in Camden County, GA. The plaintiff sued several entities, including Mayflower, a "foreign, for-profit entity organized and existing under the laws of Missouri," and which had its principal place of business and registered agent based in also in Missouri. *Id* at 1. Mayflower had registered to do business in Georgia pursuant to Georgia's registration statute. *Id.* at 4. The Court determined that the exercise of general jurisdiction over Mayflower was proper, based on prior Georgia Supreme Court decisions relying on *Pennsylvania Fire.* Since *Mallory* in turn relied on *Pennsylvania Fire*, the Georgia federal court in *Sloan* determined that Georgia's prior case law remained good law for the conclusion that general jurisdiction exists via Georgia's business registration statute. *Id.* at 4.

B. *Majority of States Have Held That Their Statutes Do Not Require A Foreign Business to Consent to General Jurisdiction*

A majority of states have concluded that their business registration statutes do not require a foreign corporation to submit to general personal jurisdiction.

Missouri and Illinois have both held that their business registration statutes do not confer general jurisdiction over foreign corporations. In *Dolan*, the plaintiff was an Indiana resident, and sued Norfolk Southern, a Virginia corporation, in Missouri claiming workplace injuries pursuant to the Federal Employer's Liability Act. *State ex. rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41 (Mo. banc 2017). The Supreme Court of Missouri rejected the argument that a foreign business consents to general jurisdiction merely by complying with Missouri's business registration statute, based on the text of that statute. *Id*. at 52. Specifically, none of the statutes at issue referenced personal jurisdiction, and the Court also found them insufficient to implicitly confer general jurisdiction. *Id*. As such, unlike Pennsylvania's statute, there was no independent basis for general jurisdiction under Missouri's business registration statute. *Id*.

Illinois similarly declined to interpret its registration statutes to confer general jurisdiction over a foreign corporation. *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 2017 IL 121281, 90 N.E.3d 440 (2017). *Aspen* involved a subrogation claim filed in Illinois on behalf of the plaintiff's insured, a New Jersey based corporation, for a loss allegedly incurred in Michigan. *Id*. at 3 – 4. The defendant is an Indiana corporation with its principal place of business in Indiana. *Id*. at 7. While the defendant operated a warehouse in Illinois and had been registered to do business there, the Court rejected the argument that Illinois' business registration statutes require foreign corporations to consent to general jurisdiction to conduct business in Illinois. *Id*. at 8, 24. This decision largely rested on the fact that none of the statutes governing foreign corporations conducting business in the state reference a consent to general jurisdiction. *Id.* at 24.

VII. Mallory's Potential Impacts on Class Actions Mirror These Outcomes

There have been limited cases addressing *Mallory* in the class action context, and where those cases arise, they generally track the underlying case law in the pertinent jurisdiction. In other words, class actions defendants have generally been held to be subject to general jurisdiction in those limited jurisdictions that interpret their business registration statutes to confer general jurisdiction over foreign registrants and, conversely, general jurisdiction has not been found to exist in those jurisdictions where the state's business registration statute is not so interpreted.

For instance, in *In re: Hair Relaxer Marketing Sales Practices and Prods. Liab. Litig.*, plaintiffs brought a putative class action against manufacturers of various hair relaxer products claiming the products contained harmful chemicals that caused injury. *See In re: Hair Relaxer Marketing Sales Practices Prods. Liab. Litig.*, MDL No. 3060, 2023 WL 7531230 (N.D. Ill. Nov. 13, 2023). Two of the defendants sought to be dismissed for lack of personal jurisdiction. *Id.* at *9. One defendant, Dabur International, submitted an affidavit that it was incorporated in principally located in Dubai, UAE, and its sole United States office is in New Jersey. *Id.* at *10. The Court rejected the plaintiffs' citation for *Mallory* as a basis for conferring general jurisdiction in this circumstance, stating that *Mallory* "addressed ***Pennsylvania's*** requirement that an out-of-state corporation consent to personal jurisdiction to do business there." *Id.* In contrast, Illinois' long-arm statute requires "continuous and systematic business contacts with the forum" and does not similarly confer general jurisdiction. *Id.*

Similarly, in *Rosenwald v. Kimberly Clark Corp.*, various plaintiffs from different states (California, Wyomimg, Washington, Colorado, Florida, Pennsylvania, and New Jersey) filed a putative class action alleging that the defendant's marketing of Kleenex Wet Wipes Germ Removal falsely suggests that the product is a "germicide," in violation of their respective states' consumer protection laws. *Rosenwald v. Kimberly Clark Corp.*, No. 3:22-cv-04993-LB, 2023 WL 5211625 (N.D. Cal. Aug. 14, 2023). The defendant corporation is incorporated in Delaware and headquartered in Texas. *Id.* at *1. As to maintaining suit in California, it was alleged that the defendant had three California locations, and some employees in California. *Id.* at *6. However, the Court reasoned that those "modest contacts [were] not 'so continuous and systematic as to render [the defendant] essentially at home in the Forum State." *Id.* at *6, citing Daimler, 571 U.S. at 127. The Court also acknowledged that *Mallory* held that "if a state statute provides that a corporation registering to do business in the state consents to general jurisdiction in that state, then the corporation is subject to general jurisdiction." *Id.*, citing *Mallory*, 143 S. Ct. at 2037-38. However, the Court determined this latest pronouncement from the Supreme Court was "not relevant to courts in California, because 'California does not require corporations to consent to general personal jurisdiction in [the] state when they designate an agent for service of process or register to do business.'" *Id.*, citing *AM Tr. V. UBS AG*, 681 F. App'x 587, 588-89 (9th Cir. 2017). As such, the non-California plaintiffs failed to establish general jurisdiction and the Court dismissed those plaintiffs' claims.

VIII. Potential Revision of State Statutes Post-Mallory.

While current impacts on litigation, including class actions, have been relatively limited, that does not foreclose the potential for further change in the future. Now that *Mallory* has endorsed the validity of consent-based registration statutes at least insofar as due process challenges are concerned, states my seek to rework their statutes. This has not yet been borne out in legislative efforts due to competing interests in this area, but the option is certainly there for future attempts to be made. As such, litigants should keep an eye on developments to determine the potential impact on potentially expanding forums for mass tort litigation where a defendant may be sued on any issue.