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Why Bristol-Myers Applies To Absent Class Members: Part 1

By **Brian Troyer**
(August 6, 2018, 2:46 PM EDT)


Brian Troyer

While the split among courts over the application of Bristol-Myers Squibb v. Superior Court of California[1] in class actions is growing, the battle of reasoning has become one-sided.[2] This three-part article examines the reasoning of courts that have declined to apply BMS to absent class members. They have given a dizzying array of reasons for their decisions, the sheer number and inconsistency of which reflect their collective and individual weakness. I conclude that these courts have produced internally contradictory and legally problematic results.

This is a predictable and unavoidable consequence of the flawed reasoning behind these decisions, which treat a nonresident's claim as within a court's jurisdiction if the claimant is an absent class member, but not if the claimant is a named plaintiff. A range of anomalous, irreconcilable results flows from that flawed premise that jurisdiction depends on the mode of joinder. In contrast, consistently applying BMS to absent class members resolves these contradictions.

Specific Jurisdiction Is Claimant-Specific and Nontransferable

In BMS, the U.S. Supreme Court rejected a "sliding scale" for specific jurisdiction, in which more activity of a defendant in a forum state would offset a lack of connection between it and a plaintiff's claim. In doing so, the court made clear that specific jurisdiction over a defendant is truly claim- and claimant-specific, concluding that jurisdiction must be established separately for each plaintiff's claim. In fact, the Supreme Court used the shorthand language "specific jurisdiction over a claim" to describe this requirement.[3]

A critical corollary of this holding is that specific jurisdiction does not transfer or extend from one plaintiff's claim to another's.[4] There is no jurisdictional umbrella or "one-touch" rule that subjects a defendant to jurisdiction for all similar claims if there is at least one resident plaintiff to provide a jurisdictional anchor.

This is true even though it might be efficient for a defendant to defend all similar claims in one court. BMS emphasized that efficiency and low incremental burden do not overcome territorial limitations on jurisdiction and a defendant's right under the Due Process Clause not to be required to defend claims with no connection to the forum state.[5]

Absent Class Members Are "Parties" for Purposes of Specific Jurisdiction

Several courts have explicitly or implicitly distinguished this holding of BMS on the ground that specific jurisdiction in a class action is based solely on a named plaintiff's claims.[6] According to these courts, the analysis is complete once jurisdiction over a named plaintiff's claim is established. Absent class members are not considered and need no independent jurisdictional basis for their claims, because they are not named plaintiffs.[7]

But this reasoning begs the question. To say only named plaintiffs are considered for purposes of specific jurisdiction is to state a conclusion, not to justify it. The Supreme Court disapproved this formulaic approach in Devlin v. Scardelletti,[8] holding that absent class members should be treated as parties for some purposes but not for others. As Justice Sandra Day O'Connor explained, to say a class member is or isn't a party is a conclusion that depends on purpose and context.[9]

Under Devlin, the treatment of absent class members is determined through substantive and functional analysis of their relationship to the issue at hand. In two examples cited in Devlin, absent class members are treated as parties for purposes of tolling, but as nonparties for purposes of the complete diversity rule.[10] In both cases, the result is based on the efficiency goals of class actions.[11] In Devlin itself, however, the question was whether an absent class member had the right to appeal the approval of a settlement.[12] The majority held that he did, even though it would be more efficient to disallow class member appeals, with Justice O'Connor reasoning:

What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing.[13]

Thus, when due process rights are at issue, efficiency gives way, and class members are treated as parties.

The lesson for in personam jurisdiction over defendants seems clear. A class judgment, whether favorable or unfavorable, constitutes a judgment on each class member's claim.[14] Because a court must have valid jurisdiction to render a judgment binding on a defendant, there is little room for doubt that absent class members should be treated as parties for this purpose.

Class actions cannot be distinguished from mass actions for this purpose on grounds that it is less inconvenient for a defendant to defend a class action in another forum. Even if it is less inconvenient, that difference is not relevant. BMS itself holds that in personam jurisdiction is not a matter of mere convenience or burden, but of states' limited territorial power and a defendant's right to due process.[15]

Moreover, Devlin itself establishes that efficiency and burden considerations are secondary and not determinative of how class members should be treated when due process rights are at issue. Absent class members, therefore, should be treated no differently than named plaintiffs under BMS.

The second part of this article will discuss absent class members' status as real parties in interest, the

limits of Rule 23's procedural safeguards and the fact that proper choice of law does not remedy lack of jurisdiction. The third part will consider Congress' failure to grant federal courts nationwide in personam jurisdiction, and examine how failing to apply BMS produces contradictory results.

Brian A. Troyer is a partner at Thompson Hine LLP.

[1] Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017).

[2] Many courts have also applied BMS to class members. See Practice Management Support Services v. Cirque Du Soleil Inc., No. 14 C 2032, 2018 U.S. Dist. LEXIS 39754 (N.D. Ill. March 12, 2018); Anderson v. Logitech Inc., No. 17 C 6104, 2018 U.S. Dist. LEXIS 36785, at *3 (N.D. Ill. March 7, 2018) (striking nationwide class allegations); DeBernadis v. NBTY Inc., No. 17 CV 6125, 2018 U.S. Dist. LEXIS 7947 (N.D. Ill. Jan. 18, 2018); McDonnell v. Nature's Way Products, No. 16 C 5011, 2017 U.S. Dist. LEXIS 177892, at *10 N.D. Ill. Oct. 26, 2017; Wenokur v. AXA Equitable Life, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017); Spratley v. FCA US LLC, 2017 U.S. Dist. LEXIS 147492 (N.D.N.Y. Sept. 12, 2017); Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., 2017 U.S. Dist. LEXIS 114733 (E.D. Pa. July 24, 2017).

[3] BMS at 1780 ("In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation' between the forum and the underlying controversy").

[4] See id. at 1781 (holding that assertion of jurisdiction over nonresident claims is impermissible "even when third parties (here, plaintiffs residing in California) can bring claims similar to those brought by the nonresidents").

[5] See id. at 1780-81.

[6] See Casso's Wellness Store & Gym LLC v. Spectrum Lab. Prods., 2018 U.S. Dist. LEXIS 43974, *14 (E.D. La. March 19, 2018) ("Unlike Bristol-Myers … the plaintiff seeking to represent the class is the only plaintiff named in the complaint, and his claims — not the unnamed non-resident members — are relevant to the personal jurisdiction inquiry."); Sanchez v. Launch Tech. Workforce Sols. LLC, 2018 U.S. Dist. LEXIS 28907, *14 (N.D. Ga. Jan. 26, 2018) ("Launch does not acknowledge authority holding that members of a plaintiff class will not detract from a named plaintiff's ability to establish specific jurisdiction over the defendant on behalf of the class ...."); Day v. Air Methods Corp., 2017 U.S. Dist. LEXIS 174693, *6 (E.D. Ky. Oct. 23, 2017) ("This argument is misplaced because the inquiry for personal jurisdiction lies with the named parties of the suit … not the unnamed proposed class members."). Another court concluded that the jurisdiction question was premature before a class was certified, at which point class members would be parties. Chernus v. Logitech Inc., 2018 U.S. Dist. LEXIS 70784, *21-22 (D. N.J. April 27, 2018) ("In other words, because the class members are not yet parties in this case — and they may not be — absent class certification, I need not analyze specific jurisdiction with respect to their claims"). This approach has some appeal as a matter of technical procedure, since there is no claim of a putative class member to "dismiss," but a court could decide the question on a motion to strike nationwide class allegations prior to certification and could treat a motion to dismiss as a motion to strike. Putting the question off until certification serves little purpose but to prolong and complicate the litigation.

[7] See Sanchez, 2018 U.S. Dist. LEXIS 28907, 17 ("Launch has shown no reason that this Court may not continue to exercise jurisdiction over a nationwide class claim on the strength of its specific personal jurisdiction over the defendant as to the named plaintiff's claim"); Day, 2017 U.S. Dist. LEXIS 174693, *6 ("AMC does not contend that personal jurisdiction would be improper over the claims brought by the named plaintiffs. As a result, the Court will deny AMC's motion to dismiss [nonresident class members' claims] for lack of personal jurisdiction"). These courts have cited some cases predating BMS for this proposition. The problem with those cases is, of course, that they predated BMS's clarification that personal jurisdiction over a defendant is claim- and claimant-specific.

[8] Devlin v. Scardelletti, 536 U.S. 1 (2002).

[9] See Devlin, 536 U.S. at 10 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context"). Several courts that have declined to apply BMS to class members cite Devlin for this principle, but with little or no explanation for their conclusion that absent class members are not parties in this context. Day, 2017 U.S. Dist. LEXIS 174693, *6 n. 1; Sanchez, 2018 U.S. Dist. LEXIS 28907, *15.

[10] The Class Action Fairness Act abolished the complete diversity requirement in favor of minimal diversity for class actions. Even setting that aside, the treatment of absent class members under the old complete diversity rule is not a persuasive analogy here, because it did not infringe defendants' rights under the Due Process Clause.

[11] See Devlin, 536 U.S. at 10.

[12] The class member had preserved the objection by objecting in the trial court.

[13] Devlin, 536 U.S. at 10.

[14] See Rule 23(g) (requiring judgments to include those whom the court finds to be class members).

[15] BMS, 137 S. Ct. 1780-81 (holding that, notwithstanding the lack of inconvenience, "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") (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

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Why Bristol-Myers Applies To Absent Class Members: Part 2

By **Brian Troyer** (August 7, 2018, 2:53 PM EDT)

Brian Troyer

The split among courts over the application of Bristol-Myers Squibb v. Superior Court of California[1] in class actions is growing. This three-part article examines the reasoning of courts that have declined to apply BMS to absent class members. I conclude that these courts have produced internally contradictory and legally problematic results.

The first installment reviewed a couple of key principles: first, that specific jurisdiction does not transfer or extend from one plaintiff's claim to another's, and second, that absent class members are "parties" for purposes of specific jurisdiction. This installment will discuss absent class members' status as real parties in interest, the limits of Rule 23's procedural safeguards and the fact that proper choice of law does not remedy lack of jurisdiction.

Absent Class Members Are Real Parties in Interest

Several courts have distinguished BMS on the ground that mass-tort plaintiffs are real parties in interest, while absent class members are not. For example, one court reasoned:

> In a mass tort action, like the one in Bristol-Myers Squibb, each plaintiff was a real party in interest to the complaints, meaning that they were named as plaintiffs in the complaints. … In a putative class action … one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the 'named plaintiffs' are the only plaintiffs actually named in the complaint.[2]

At one level, this reasoning seems to be merely a restatement of the tautology that absent class members are not named plaintiffs, which, as shown above, resolves nothing about jurisdiction over their claims. But it is also a category error, conflating named plaintiffs with real parties in interest.[3]

A real party in interest is the person with the substantive right to be vindicated, who may or may not be the person named as plaintiff. Indeed, the very purpose of Rule 17(a) is to ensure that the plaintiff named in the complaint is the real party in interest.[4] In point of fact, class members are real parties in interest, and Rule 23 only provides an exception to the normal mode of litigation requiring them to be individually named, instead allowing their claims to be adjudicated on a representative basis, because individual joinder is impractical.

This is not a difference between mass and class actions. In both cases, all the allegedly injured persons are real parties in interest; only the manner of their joinder differs, and BMS should be applied equally to both.

Rule 23's Procedural Safeguards Do Not Create Personal Jurisdiction Over Defendants

Another rationale that has gained traction with courts declining to apply BMS is that Rule 23 provides "due process safeguards" to defendants that distinguish class actions from mass tort actions. The leading case is In re Chinese-Manufactured Drywall Prods. Liab. Litig.,[5] where the court explained this way why BMS does not apply to class actions:

> Class actions, nonetheless, are different from mass torts. In particular, for a case to qualify for class action treatment, it needs to meet the additional due process standards for class certification under Rule 23 — numerosity, commonality, typicality, adequacy of representation, predominance and superiority. Fed. R. Civ. P. 23(a)&(b).

The court in Molock followed suit, quoting this language and adding, "[t]hese additional elements of a class action supply due process safeguards not applicable in the mass tort context."[6]

The problem here is that Rule 23's requirements are designed to address very different due process issues than the jurisdictional issue addressed in BMS. Rule 23's requirements are designed to protect against the potential procedural and evidentiary unfairness of representative adjudication, not to remedy a court's territorial overreach in violation of the Fourteenth Amendment.

Rule 23 theoretically protects defendants against prejudice arising from the adjudication of claims based on representative proof, without the benefit of individual discovery, cross-examination and evidence submission. At bottom, Rule 23 is supposed to ensure that the proof at trial is the same proof that would be presented for and against each class member's claim, which is the only way a class action avoids enlarging or abridging substantive rights.[7]

Those concerns are unrelated to the jurisdictional problem in BMS, which was that nonresident plaintiffs' claims were beyond the territorial power of the state of California to adjudicate. Indeed, there is palpable irony in the argument that Rule 23 closes the jurisdictional gap in BMS. There was no potential prejudice from representative adjudication in BMS, because all the claimants were named plaintiffs. Nevertheless, the California courts lacked jurisdiction to hear the nonresidents' claims. The conclusion is inescapable that Rule 23's protections cannot render the exercise of jurisdiction over nonresidents' claims valid. If jurisdiction was lacking over named plaintiffs' claims in BMS, where representation was not even an issue, then a fortiori it is lacking over claims of absent class member claims, Rule 23 notwithstanding.

It can be argued that the U.S. Supreme Court recognized in Phillips Petroleum Co. v. Shutts[8] that Rule 23's protections can render the exercise of extraterritorial jurisdiction constitutional. But Shutts concerned jurisdiction over the nonresident class members, not the defendant. The Supreme Court's approval of the exercise of jurisdiction over them was conditioned upon the existence of protections including notice and the right to opt out, which are not available to a defendant.

The Supreme Court explained in Shutts and again, emphatically, in BMS that the question of jurisdiction over nonresident class members is entirely different from that of jurisdiction over a nonresident defendant:

> [T]he Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. … Since Shutts concerned the due process rights of plaintiffs, it has no bearing on the question presented here.[9]

In short, Rule 23's safeguards simply do not fill the jurisdictional gap, because they address completely different concern, and none of the courts citing Rule 23 has come to grips with this problem with the argument. The argument from Rule 23 instead seems to be a recapitulation of the argument that absent class members are not really parties to the case.

In Sanchez, for example, the court said class actions are different because they present a "unitary, coherent claim," while the mass action in BMS "may — and likely would — present significant variations in the plaintiffs' claims."[10] Again, this difference — to the extent it is a real one — has nothing to do with the jurisdictional question in these cases. Jurisdiction was not lacking in BMS because of differences in plaintiffs' claims but because of territorial overreach. Whether nonresidents' claims are tried individually or on a representative basis leading to a classwide judgment, a court still lacks jurisdiction over the defendant to hear those claims.

Proper Choice of Law Does Not Remedy Lack of Jurisdiction

In In re Chinese-Manufactured Drywall, Judge Eldon Fallon offered a number of other reasons for refusing to apply BMS, one of which was that any unfairness to the defendant can be remedied by applying proper choice-of-law principles.[11] Indeed, the court largely treated the issue as one of choice of law, and it distinguished BMS on the ground that the nonresidents there sought to sue under California law.[12] That is only partly true, if at all, but, in any event, it is not part of the Supreme Court's analysis in BMS, which never mentions choice of law.

This is no surprise, since personal jurisdiction and choice of law are separate issues. Indeed, Judge Fallon's argument, taken seriously, proves too much. If it were true that applying the correct law remedied any defect in jurisdiction, then courts would have universal nationwide jurisdiction, and California would have had jurisdiction in BMS so long as it applied proper choice of law principles. Plainly, that is not the case.

The third and final installment of this article will consider Congress' failure to grant federal courts nationwide in personam jurisdiction, and examine how failing to apply BMS produces contradictory results.

Brian A. Troyer is a partner at Thompson Hine LLP.

[1] Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017).

[2] Fitzhenry-Russell v. Dr. Pepper Snapple Grp., 2017 U.S. Dist. LEXIS 155654, at *5 (N.D. Cal. Sept. 22, 2017). See also Tickling Keys Inc. v. Transamerica Fin. Advisors Inc., 2018 U.S. Dist. LEXIS 79578, *14-15

(M.D. Fla. April 3, 2018) (quoting Fitzhenry-Russell); Sanchez v. Launch Tech. Workforce Sols. LLC, 2018 U.S. Dist. LEXIS 28907, *8-9 (N.D. Ga. Jan. 26, 2018) (distinguishing BMS from a class action on ground that absent class members are not real parties in interest); Molock v. Whole Foods Mkt. Inc., 2018 U.S. Dist. LEXIS 42582, *20-21 (D.D.C. March 15, 2018) (quoting Fitzhenry-Russell).

[3] The confusion in Fitzhenry-Russell appears to have arisen from the fact that jurisdiction was litigated in California's appellate courts through a petition for a writ of mandate against the Superior Court, with the nonresident plaintiffs listed in the petition as real parties in interest. See Fitzhenry-Russell, 2017 U.S. Dist. LEXIS 155654, *133-14, citing BMS Co. v. Superior Court, 228 Cal. App. 4th 605, 175 Cal. Rptr. 3d 412 (2014) (noting that nonresident plaintiffs were listed as real parties in interest to petition for a writ of mandate), rev'd by Bristol-Myers Squibb, supra. These issues are completely unrelated. The nonresident plaintiffs' status as real parties in interest to the mandamus petition was irrelevant to the question of personal jurisdiction over the defendant with respect to their claims.

[4] See Fed. R. Civ. P. 17(a) (requiring that an action be "brought in the name of the real party in interest").

[5] In re Chinese-Manufactured Drywall Prods. Liab. Litig., 2017 U.S. Dist. LEXIS 197612, *37 (E.D. La. Nov. 28, 2017).

[6] Molock, 2018 U.S. Dist. LEXIS 42582, *21. See also Feldman v. BRP United States Inc., 2018 U.S. Dist. LEXIS 53298, *14-16 (S.D. Fla. March 28, 2018) (finding that the due process safeguards of Rule 23 distinguish class actions from mass torts and permit exercise of jurisdiction notwithstanding BMS); Casso's Wellness Store & Gym LLC v. Spectrum Lab. Prods., 2018 U.S. Dist. LEXIS 43974, *14 (E.D. La. March 19, 2018) (same); Sanchez v. Launch Tech. Workforce Solutions, LLC, 2018 U.S. Dist. LEXIS 28907, *10 (N.D. Ga. Jan. 26, 2018) ("Launch fails to recognize … that Rule 23 … also sets forth certification procedures that protect the defendant's due process rights").

[7] See Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (holding that member claims must be based on a "common contention" that "is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."). Courts that have distinguished BMS have recognized this difference without recognizing its significance. See Sanchez, 2018 U.S. Dist. LEXIS 28907, *11 (explaining that Rule 23 ensures a "unitary, coherent claim" based on representative proof); In re Chinese-Manufactured Drywall, 2017 U.S. Dist. LEXIS 197612, *52 (quoting The Role of Choice of Law in National Class Actions, 156 U. Pa. L. Rev. 2001, 2002 (2008) ("The reason for the class device is that a coherence of rights and claims already exists among potential class members, and it is the existence of those elements that makes the representative suit appropriate")).

[8] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[9] Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017) at 1783.

[10] Sanchez v. Launch Tech. Workforce Sols. LLC, 2018 U.S. Dist. LEXIS 28907, *11.

[11] 2017 U.S. Dist. LEXIS 197612, *40-44.

[12] Id. *43.

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Why Bristol-Myers Applies To Absent Class Members: Part 3

By **Brian Troyer**
(August 8, 2018, 2:35 PM EDT)


Brian Troyer

The split among courts over the application of Bristol-Myers Squibb v. Superior Court of California[1] in class actions is growing. This three-part article examines the reasoning of courts that have declined to apply BMS to absent class members. I conclude that these courts have produced internally contradictory and legally problematic results.

The first installment of this article reviewed a couple of key principles: first, that specific jurisdiction does not transfer or extend from one plaintiff's claim to another's, and second, that absent class members are "parties" for purposes of specific jurisdiction. The second installment discussed absent class members' status as real parties in interest, the limits of Rule 23's procedural safeguards and the fact that proper choice of law does not remedy lack of jurisdiction.

This final installment will consider Congress' failure to grant federal courts nationwide in personam jurisdiction, and examine how failing to apply BMS produces contradictory results.

Congress Has Not Granted Federal Courts Nationwide In Personam Jurisdiction

Judge Eldon Fallon's opinion in In re Chinese-Manufactured Drywall Prods. Liab. Litig.[2] includes an extended argument that federal courts need no long-arm jurisdiction over nonresidents' claims, because "Congress has constitutional authority to shape federal court's [sic] jurisdiction beyond state lines to encompass nonresident parties," and "has repeatedly done so — with Rule 4, MDLs, and class actions [Rule 23]."[3] These arguments, however, fail collectively and individually, because Congress in fact has not given federal courts such nationwide jurisdiction in class actions. Whether it could do so is beside the point.

Rule 4

It is true, as Judge Fallon notes, that Rule 4 authorizes service of process and exercise of jurisdiction by district courts within 100 miles of where the summons is issued, even if outside the state boundaries — but no farther. Otherwise, service of process establishes jurisdiction only over a person subject to the jurisdiction of the state courts.[4] Thus, Rule 4 plainly does not grant nationwide jurisdiction to federal courts.

The MDL Statute

It is also true that Congress authorized transfer of cases for pretrial coordination in the MDL statute.[5] But it did no more than that. An MDL court has only derivative (from a transferor court) pretrial (not trial) jurisdiction over parties who otherwise might not be within its jurisdiction. Nothing about this very specific, limited grant of authority creates nationwide class action jurisdiction.

CAFA

Judge Fallon argues that the mass tort section of the Class Action Fairness Act of 2005, or CAFA,[6] "illustrates that personal jurisdiction is permissible even when there are nonresident plaintiffs or class members whose claims arise from conduct outside of the forum state."[7] But, as his discussion acknowledges, CAFA only grants subject matter jurisdiction based on minimal diversity, and it does not purport to grant in personam jurisdiction over claims of nonresident plaintiffs against nonresident defendants. It does not concern in personam jurisdiction at all.

Thus, CAFA cannot be read as a preexisting exception to BMS. Indeed, Congress would be without power to extend personal jurisdiction beyond the limits of the Fourteenth Amendment as demarcated in BMS.

Rule 23

Finally, Judge Fallon cites Rule 23 itself in support of nationwide classes unlimited by jurisdictional concerns.[8] Of course, Rule 23 confers no jurisdiction at all. Recognizing this, Judge Fallon proffers several indirect arguments for the effect of Rule 23, beginning by quoting the U.S. Supreme Court's instruction that Rule 23 "categorically … entitles" a plaintiff to represent a class if the requirements are met.[9] But this language says nothing about the geographic or jurisdictional scope of any class a plaintiff is entitled to represent.

Setting that aside, this argument is tantamount to saying that Rule 23 trumps the constitutional limits on jurisdiction recognized in BMS. The Rules Enabling Act, or REA, precludes such a construction with its now-familiar provision that the rules may not "abridge, enlarge, [or] modify the substantive rights of any litigants."[10] Judge Fallon answers this objection with what can best be called a deflection, quoting a law review article to the effect that because Rule 23 was not intended to change substantive rights, no application of it can change substantive rights.

This again begs the question. Abundant precedent confirms that applications of Rule 23 that alter substantive rights violate the REA. The question of whether using Rule 23 to claim nationwide jurisdiction violates the REA can't be avoided by saying the rule was not intended to violate it.

In sum, these arguments in In re Chinese-Manufactured Drywall simply do not advance the case for why BMS does not apply to class actions. Rule 23 is a procedural rule with no jurisdictional force. Its use to extend jurisdiction to claims that would be outside a court's reach under BMS if the claimants were named as plaintiffs violates the REA.

BMS Applies in Federal Courts

Judge Fallon lastly argues that BMS does not apply in federal courts, because the federalism concerns the Supreme Court considered do not apply to federal courts.[11] While his argument is somewhat lengthy and discursive, the answer to it is short and clear: Apart from the few instances where Congress

has authorized nationwide service of process for suits under specific federal statutes, the federal courts' jurisdiction is tied to that of the states where they sit, and is subject to the same minimum contacts-based limitations under the Fourteenth Amendment's Due Process Clause.[12] No exception exists for class actions.

Like Judge Fallon's Rule 23 argument, his federalism argument is probably easiest understood within the unusual context of the case before him, although it is incorrect even there. In that case, jurisdiction had already been argued and resolved, default judgment had been entered against the defendant before BMS was decided, and the defendant sought to reopen the issue of jurisdiction. In any event, there can be little doubt that BMS does apply in federal courts as well as state courts. Even the court in Fitzhenry-Russell conceded this truth.[13]

Failing to Apply BMS Produces Contradictory Results

Courts that have not applied BMS to absent class members have produced contradictory and irrational results. This was highly predictable, because the failure to apply BMS leaves a nonresident named plaintiff in a multistate or nationwide class action subject to conflicting rules. BMS says the nonresident plaintiff's claims must be dismissed for lack of jurisdiction, yet the same plaintiff is a member of a class these courts hold is within their jurisdiction. The confusion that flows from this conflict was easy to foresee, and it is already occurring.

In Feldman v. BRP United States Inc.,[14] for example, one plaintiff from Florida and one from New York sued in Florida on behalf of a nationwide class and Florida and New York subclasses. They pleaded counts under the Magnuson Moss Warranty Act, common law and New York and Florida consumer statutes. The common law counts and the Magnuson Moss count were pleaded on behalf of the nationwide class or, alternatively, the subclasses. The New York and Florida statutory counts were pleaded on behalf of the subclasses.

The court held that BMS required dismissal of the New York plaintiff's claims and the New York "subclass claims" but not nationwide class members' claims.[15] This raises numerous paradoxes and conflicts:

- What are the New York "subclass claims" that are dismissed? Do they include New York common law claims in addition to the statutory claim? If so, why can't those claims remain, given that the common law claims of residents of 48 other states survive despite the absence of any named plaintiffs from their states to represent them?

- If only the New York statutory claim is dismissed, hasn't the court split the New York residents' claims? Indeed, hasn't it done so either way, given that their Magnuson Moss claims appear to survive as part of the nationwide class?

- Why can the remaining Florida plaintiff pursue common law claims on behalf of residents of other states, but not New York? Just because there was a New York named plaintiff who was dismissed?

- The dismissal of New York subclass claims implies that claims under a non-forum state's law cannot be part of the case without a named plaintiff resident in the state. Why isn't the same thing true of all other states?

- Is the dismissed New York plaintiff still a member of the nationwide class? Seemingly, he could not be, since his claims were dismissed; yet he would fit the definition, so he must be. How can the court lack jurisdiction to adjudicate his claim as a named plaintiff but have jurisdiction to adjudicate his claim as a class member?

- How can it be more proper for nonresidents to be members of a class without representatives from their own states than it is to be class members with such representatives?

Similar conflicts are evident in Molock v. Whole Foods Mkt. Inc.,[16] where six plaintiffs from six states sought to represent a nationwide class and six state subclasses, pleading claims under common law and state wage laws. Two of the named plaintiffs, Bowen and Strickland, residents of Maryland and Oklahoma, alleged no activity in the forum (D.C.) giving rise to their claims. The court held that BMS required it to dismiss their claims but not those of absent class members outside D.C.[17]

The same kinds of paradoxes thus arise. Are Bowen and Strickland still members of the nationwide putative class? Are there still Oklahoma and Maryland subclasses? Are they now represented only by the remaining named plaintiffs, none of whom are from Oklahoma or Maryland? Do their claims still include Oklahoma and Maryland statutory claims? Does the dismissal order result in claim splitting?

From a defendant's perspective, these conflicting results reflect clear violations of the REA. The defendants' due process rights are being altered by the application of Rule 23 to allow them to be sued on nonresidents' claims in a foreign jurisdiction, even though BMS establishes that the same claims could not be brought within a court's jurisdiction by being joined under permissive joinder rules. Thus, the means of joinder is being used to determine whether jurisdiction can be asserted over a defendant.

Ironically, courts following this approach have acknowledged that class certification is a form of joinder like traditional joinder, even while arguing that they do not need independent jurisdiction over class members' claims.[18] The nonresident defendant has a due process right not to be sued by nonresident plaintiff claimants in a distant forum. These are substantive rights, not mere matters of procedure.

No provision of the rules can be applied to change that result without violating the REA, yet that is how these courts have applied Rule 23. The irrational results speak for themselves. The consistent application of BMS to absent class members and named plaintiffs alike resolves these issues, and is faithful to the Supreme Court's holding.

Brian A. Troyer is a partner at Thompson Hine LLP.

[1] Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017).

[2] In re Chinese-Manufactured Drywall Prods. Liab. Litig., 2017 U.S. Dist. LEXIS 197612, *37 (E.D. La. Nov. 28, 2017).

[3] Id. *52-53.

[4] Fed. R. Civ. P. 4(k)(1)(B).

[5] See 28 U.S.C. §1407; In re Chinese-Manufactured Drywall, 2017 U.S. Dist. LEXIS 197612, *47.

[6] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

[7] In re Chinese-Manufactured Drywall, 2017 U.S. Dist. LEXIS 197612, *48.

[8] Id. at 49-54.

[9] In re Chinese-Manufactured Drywall, 2017 U.S. Dist. LEXIS 197612, *49 (quoting Shady Grove Orthopedic Associates v. Allstate Insurance Co. 130 S.Ct. 1431, 1437 (2010)).

[10] 28 U.S.C. §2072.

[11] In re Chinese-Manufactured Drywall, 2017 U.S. Dist. LEXIS 197612, *53-58.

[12] See, e.g., Practice Mgmt. Support Servs. v. Cirque Du Soleil Inc., 2018 U.S. Dist. LEXIS 39754, *49 (N.D. Ill. March 12, 2018).

[13] 2017 U.S. Dist. 155654, *10-13.

[14] Feldman v. BRP United States Inc., 2018 U.S. Dist. LEXIS 53298.

[15] Id. *14 (“And because Mr. Dickerson is the only Plaintiff seeking to represent the New York subclass, those subclass claims must be dismissed as well”).

[16] Molock v. Whole Foods Mkt. Inc., 2018 U.S. Dist. LEXIS 42582.

[17] Id. *16-21.

[18] See In re Chinese-Manufactured Drywall, 2017 U.S. Dist. LEXIS 197612, *49-50 (“A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of separate suits”).