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DUE PROCESS LIMITS ON NATIONWIDE CLASS ACTIONS POST-*BMS v. SUPERIOR COURT*

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DUE PROCESS LIMITS ON NATIONWIDE CLASS ACTIONS POST-*BMS V. SUPERIOR COURT*

PROLOGUE

Not quite four years ago, shortly after *Daimler AG v. Bauman*,[1] was decided, this writer predicted that the jurisdictional principles being enunciated by the U.S. Supreme Court had implications for the maintenance of nationwide class actions under state law:

> In most nationwide class actions, the claims of most class members will not arise in the forum state. Procedural rules allowing class actions cannot expand substantive law, including the law of personal jurisdiction. Thus, most of the claims in a nationwide class action, unless brought in a jurisdiction where all corporate defendants are 'at home,' should be subject to dismissal on jurisdictional grounds after *Bauman*—unless the claims are brought under some federal statute that relaxes jurisdictional requirements (such as by aggregating nationwide contacts).[2]

Little precedent existed at the time; the 2014 LEGAL BACKGROUNDER cited only *Bates v. Bankers Life & Casualty Co.*,[3] which held that *Bauman* precluded the exercise

[1] 134 S. Ct. 746 (2014) (hereafter, "*Bauman*").

[2] James M. Beck and Michelle Lyu Cheng, *The Other Shoe Drops on General Jurisdiction: Making the Most of Supreme Court's* Bauman *&* Goodyear *Rulings*" WLF LEGAL BACKGROUNDER, June 20, 2014, at 4 (footnote omitted), http://www.wlf.org/upload/legalstudies/legalbackgrounder/062014LB_Beck.pdf.

[3] 993 F. Supp. 2d 1318, 1333 (D. Or. 2014).

of general personal jurisdiction in an action brought by plaintiffs alleging injury in the forum.

I. PRECURSOR: *BAUMAN*-BASED NATIONWIDE CLASS ACTION PERSONAL JURISDICTION

A number of post-*Bauman* decisions then held, in the class action context, that no jurisdiction existed over non-forum activities by non-resident corporations.[4] Most notably, in *Demaria v. Nissan N.A., Inc.*,[5] the court held that "case-linked" jurisdiction[6] failed as to every would-be class representative except one resident of the forum state:[7]

> Under the circumstances of this case, where each plaintiff's claim is predicated on the law of the particular state where he or she purchased a car and the claims of the other plaintiffs as alleged remain unrelated to anything that transpired in [the forum state], imposing personal jurisdiction for all of the claims because specific jurisdiction may lie as to

[4] *Bauer v. Nortek Global HVAC LLC*, 2016 WL 5724232, at *6 (M.D. Tenn. Sept. 30, 2016) (product "units [that] were purchased and installed in [the class representatives'] respective ... Home States" could not possibly "arise out of or relate to" any actions by the defendant in the forum state; non-resident plaintiffs "and the classes they represent" dismissed); *Kincaid v. Synchrony Financial*, 2016 WL 4245533, at *2-3 (N.D. Ill. Aug. 11, 2016) (no jurisdiction based on forum contacts; "putative class members" in forum state could not count as "suit-related contacts"); *Matus v. Premium Nutraceuticals, LLC*, 2016 WL 3078745, at *3-4 (C.D. Cal. May 31, 2016) (no case-linked jurisdiction over non-forum aspects of consumer fraud class action brought by in-state resident; "purchas[ing the product] through an unnamed reseller" insufficient); *Henderson v. United Student Aid Funds, Inc.*, 2015 WL 12658485, at *4 (S.D. Cal. April 8, 2015) (resident class representative failed to establish case-related jurisdiction over a non-resident corporation concerning telephone calls not made in the forum).

[5] 2016 WL 374145 (N.D. Ill. Feb. 1, 2016).

[6] The Supreme Court has referred to personal jurisdiction predicated on a defendant's case-specific conduct in the forum as "case-linked." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). This WORKING PAPER does the same.

[7] *Demaria*, 2016 WL 374145, at *7.

> this one plaintiff's claims would run afoul of the traditional notions of fair play and substantial justice.[8]

Similarly, *Famular v. Whirlpool Corp.*[9]—decided less than two weeks before *BMS*—dismissed all claims by non-resident class representatives against non-resident corporate defendants for lack of personal jurisdiction. "[T]he Court must determine whether there is general personal jurisdiction over each defendant" individually.[10] Relying in part on *Demaria*, *Famular* recognized that case-linked personal jurisdiction cannot allow [a court] to hear plaintiffs' claims against the foreign defendant based on defendant's actions occurring solely outside the forum state.[11] Another decision occurring between *Bauman* and *BMS* rejected case-linked jurisdiction based on assertions that absent class members resided in the state.[12]

II. PRIME TIME: *BMS* DRIVES ANOTHER NAIL INTO THE CLASS ACTION COFFIN

More significant change occurred in *Bristol-Myers Squibb Co. v. Superior Court*,[13] where the Supreme Court held that case-linked jurisdiction was both plaintiff-

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[8] *Id.* at *8.

[9] 2017 WL 2470844 (S.D.N.Y. June 7, 2017).

[10] *Id.* at *3.

[11] *Id.* at *7.

[12] *AM Trust v. UBS AG*, 78 F. Supp. 3d 977, 986 (N.D. Cal. 2015) (rejecting jurisdiction "based on the theory that the claims that will be asserted by the proposed class members once the class is certified" because "claims of unnamed class members are irrelevant"), *aff'd on other grounds*, 681 F. Appx. 587 (9th Cir. 2017).

[13] 137 S. Ct. 1773 (2017) (hereafter, "*BMS*").

and defendant-specific so that purported jurisdictional contacts of other plaintiffs and other defendants do not count in case-linked personal jurisdiction.[14] This reiteration and reapplication of the principle that personal jurisdiction is litigant-specific may well sound the death-knell for nationwide class actions under state law, unless brought where a corporate defendant is "at home" under *Bauman*. Otherwise, *BMS* calls case-linked personal jurisdiction into question any time a non-resident plaintiff asserts a state-law[15] claim against a non-resident defendant.

Non-forum class action allegations involving sales made by independent intermediate sellers were dismissed under *Bauman* and *BMS* in *In re Dental Supplies Antitrust Litigation*.[16] Since none of the non-resident, would-be class representatives purchased any of the defendant's products in the forum state, *BMS* precluded assertion of case-linked personal jurisdiction.[17] The *Dental Supplies* court refused to loosen due process personal-jurisdiction requirements in the class action context. "A

[14] *Id.* at 1781 ("The mere fact that other plaintiffs were prescribed, obtained, and ingested [the product] in [the forum]—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."); *id* at 1783 ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction") (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

[15] A caveat in *BMS* leaves open the possibility that case-linked jurisdiction could differ in some unspecified manner in federal question cases governed by the Due Process Clause of the Fifth, as opposed to the Fourteenth, Amendment. 137 S. Ct. at 1784. Diversity-based claims are not subject to this caveat. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 398 (5th Cir. 2009); *LDGP, LLC v. Cynosure, Inc.*, 2018 WL 439122, at *2 n.2 (N.D. Ill. Jan. 16, 2018).

[16] 2017 WL 4217115 (S.D.N.Y. Sept. 20, 2017). No distinction between Fifth and Fourteenth Amendment Due Process was asserted or addressed in *Dental Supplies*.

[17] *Id.* at *6, 9.

putative class representative seeking to hale a defendant into court to answer to the class must have personal jurisdiction over that defendant just like any individual litigant must."[18] The court added:

> Plaintiffs attempt to side-step the due process holdings in [*BMS*] by arguing that the case has no effect on the law in class actions because the case before the Supreme Court was not a class action. This argument is flawed. *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.[19]

Since *BMS*, courts in the Northern District of Illinois have extensively addressed the questionable validity of nationwide class actions against non-resident defendants. In *DeBernardis v. NBTY, Inc.*,[20] a putative nationwide class action under consumer protection statutes was pared down to only claims involving resident plaintiffs. The court agreed that it did "not have jurisdiction to hear the case involving non-resident class of plaintiffs" under *BMS*.[21] Due process jurisdictional limits applied equally to class actions, and *BMS* precluded non-resident class action plaintiffs from asserting claims against non-resident corporate defendants:

> The Court believes that it is more likely than not based on the Supreme Court's comments about federalism that the courts will apply *BMS* to outlaw nationwide class actions in a form, such as in this case, where there is no general jurisdiction over the Defendants. There is also the

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[18] *Id.* at *6 (quoting Rubenstein, 2 NEWBERG ON CLASS ACTIONS § 6:25 (5th ed. 2011)).

[19] *Id.* at *9 (citation omitted) (emphasis added).

[20] 2018 WL 461228 (N.D. Ill. Jan. 18, 2018).

[21] *Id.* at *1.

> issue of forum shopping ..., but possible forum shopping is just as present in multi-state class actions.[22]

Consequently, those portions of the class action that sought to represent "out-of-state plaintiff classes" were dismissed.[23]

DeBernardis found *McDonnell v. Nature's Way Products, LLC*[24] to be the most persuasive precedent, as *McDonnell* was "a remarkably similar case to the one at bar."[25] *McDonnel* dismissed all non-forum claims in a class action under "seven states' consumer fraud laws" against a non-resident defendant.[26] Due process limits reiterated in *Bauman* and *BMS* precluded claims by non-resident class representatives and class members against a non-resident corporate defendant:

> [A]ny injury [that non-resident plaintiffs] suffered occurred in the state where they purchased the products. Because the only connection to [the forum] is that provided by [resident plaintiff's] purchase ..., which cannot provide a basis for the Court to exercise personal jurisdiction over the claims of nonresidents where [defendant] has no other connection to this forum, the Court dismisses all claims ... brought on behalf of non-[forum] residents or for violations of [other states' consumer protection] law without prejudice.[27]

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[22] *Id.* at *2 (citation omitted).

[23] *Ibid.*

[24] 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017).

[25] *DeBernardis*, 2018 WL 461228, at *2.

[26] *McDonnell*, 2017 WL 4864910, at *1.

[27] *Id.* at *4.

Several other Northern District of Illinois decisions have reached similar results. After *BMS* was decided, *Greene v. Mizuho Bank, Ltd.*[28] reconsidered a prior order adding a non-resident class plaintiff. Rejecting any distinction between class actions and "mass actions" of the sort at issue in *BMS*, *Greene* found "no meaningful difference between [*BMS*] and this case."[29] "Nothing in [*BMS*] suggests that it does not apply to named plaintiffs in a putative class action; rather, the Court announced a general principle [of] due process ... [that] applies with equal force whether or not the plaintiff is a putative class representative."[30] *Greene* also rejected an attempt to assert "pendent jurisdiction" over the claims of absent, non-resident class members, holding that due process, as applied in *BMS*, prevented supplemental jurisdiction, which applied only to one party's different claims, to be expanded to allow entirely different parties to sue.[31]

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[28] 2017 WL 7410565 (N.D. Ill. Dec. 11, 2017).

[29] *Id.* at *4.

[30] *Id.* (citing, *inter alia*, NEWBERG ON CLASS ACTIONS § 6:25).

[31] 2017 WL 7410565, at *4-5. Other courts rejecting plaintiff-adding pendent jurisdiction arguments post-*Bauman* are: *Lexington Insurance Co. v. Zurich Insurance (Taiwan) Ltd.*, 2017 WL 6550480, at *3 (W.D. Wis. Dec. 21, 2017); *Spratley v. FCA US LLC*, 2017 WL 4023348, at *7 (N.D.N.Y. Sept. 12, 2017); *Famular v. Whirlpool Corp.*, 2017 WL 2470844, at *6 (S.D.N.Y. June 7, 2017); *MG Design Associates, Corp. v. Costar Realty Information, Inc.*, 224 F. Supp. 3d 621, 629 (N.D. Ill. 2016), *partially reconsidered on other grounds*, 267 F. Supp. 3d 1000 (N.D. Ill. 2017); *In re Testosterone Replacement Therapy Products Liability Litig.*, 164 F. Supp. 3d 1040, 1048-49 (N.D. Ill. 2016); *In re: Bard IVC*, 2016 WL 6393596, at *4 n.4 (D. Ariz. Oct. 28, 2016); *In re: Zofran (Ondansetron) Products Liability Litig.*, 2016 WL 2349105, at *5 n.5 (D. Mass. May 4, 2016); *Demaria v. Nissan, Inc.*, 2016 WL 374145, at *7-8 (N.D. Ill. Feb. 1, 2016); *Tulsa Cancer Institute, PLLC v. Genentech Inc.*, 2016 WL 141859, at *4 (N.D. Okla. Jan. 12, 2016); *Hill v. Eli Lilly & Co.*, 2015 WL 5714647, at *7 (S.D. Ind. Sept. 29, 2015); *In re Plavix Related Cases*, 2014 WL 3928240, at *9 (Ill. Cir. Aug. 11, 2014).

LDGP, LLC v. Cynosure, Inc.[32] likewise rejected an attempt to join additional non-resident class plaintiffs, purportedly to serve as representatives of non-resident classes.[33] Plaintiffs' argument, "that because the claims of at least one plaintiff ... arose out of events taking place in [the forum], defendant is also subject to personal jurisdiction for similar claims brought by other plaintiffs that have no other connection to [the forum]," was directly contrary to *BMS*:

> Plaintiffs' arguments are unconvincing. Though the nonresidents' claims are similar to those of resident plaintiffs, the difference that plaintiffs point out is fundamental: the events that lead to the nonresidents' claims took place outside of [the forum]. The number of would-be nonresident plaintiffs has no bearing on whether those plaintiffs' claims arise from or relate to the defendant's activity in the forum. [quotations from *BMS* omitted] Consequently, this court does not have personal jurisdiction over defendant with regard to the claims brought against it by the nonresident plaintiffs.[34]

Another would-be Illinois multi-state class action failed in *Demedicis v. CVS Health Corp.*[35] The forum plaintiff unsuccessfully attempted to assert "purely class-based claim[s] on behalf of others for violations of similar state consumer fraud statutes in other states."

> Because specific personal jurisdiction is based on claims arising out of a defendant's conduct within the forum state, this Court has no jurisdiction over claims based on out-of-state consumer fraud laws. ... As Defendants argue, "[p]ersonal jurisdiction over the defendant must

[32] 2018 WL 439122 (N.D. Ill. Jan. 16, 2018).

[33] *Id.* at *1 n.1.

[34] *Id.* at 3.

[35] 2017 WL 569157 (N.D. Ill. Feb. 13, 2017).

> be established as to each claim asserted." Here, Plaintiff has not established personal jurisdiction over the out-of-state claims as he is the sole connection between Defendants and Illinois.[36]

Elsewhere, a class action alleging "violations of the consumer protection laws of forty-eight additional [to the forum] states and two territories" was trimmed to just the forum state in *Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.*[37] All claims asserted under the laws of the 50 non-forum jurisdictions were dismissed.

> Only [plaintiffs'] Pennsylvania Claims arise out of or relate to Selling Defendants' sales of generic drugs in Pennsylvania. ... [T]he Non-Pennsylvania Claims do not arise out of or relate to any of Selling Defendants' conduct within the forum state. Accordingly, the Court cannot exercise specific jurisdiction over the Non-Pennsylvania Claims brought against Jurisdiction Defendants.[38]

Another multi-state (four non-forum jurisdictions) consumer class action was trimmed to just forum residents in *Spratley v. FCA US LLC*.[39] *BMS* precluded adjudication of claims asserted by the non-resident classes. "[T]he out-of-state Plaintiffs have shown no connection between their claims and [defendant's] contacts with the forum state. Therefore, the Court lacks specific jurisdiction over the out-of-state Plaintiffs' claims."[40]

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[36] *Id.* at 4-5 (citations omitted).

[37] 2017 WL 3129147, at *1 (E.D. Pa. July 24, 2017).

[38] *Id.* at *9 (following *Demaria* and *Demedicis*).

[39] 2017 WL 4023348, at *1 (N.D.N.Y. Sept. 12, 2017).

[40] *Id.* at *7.

III. THE EMPIRE STRIKES BACK: DECISIONS REFUSING TO APPLY *BMS* TO CLASS ACTIONS

Two decisions are to the contrary, and seek to exempt class actions from the due-process-based personal jurisdiction requirements of *Bauman* and *BMS* that otherwise apply to all litigation.

A. *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc*.

In *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*,[41] the Northern District of California held that because "citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes," it was permissible for a California court to adjudicate claims by non-resident class members—some 88% of the class—against a non-resident corporation.[42] This holding turned the rationale of the two cases cited[43] upside down, since both decisions had *refused* to expand jurisdiction based on the residence of absent class members—as opposed to *Fitzhenry-Russell*'s employment of the same proposition to *expand* personal jurisdiction to absent class members' claims nationwide.[44]

Fitzhenry-Russell refused to recognize an "extension of [*BMS*] to class actions," stating that "this may be one of the those contexts" in which "[n]onnamed class

[41] 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017).

[42] *Id.* at *5.

[43] *AM Trust*, 78 F. Supp. 3d at 986, *see supra*, n.13; *Senne v. Kansas City Royals Baseball Corp.*, 105 F. Supp. 3d 981, 1022 (N.D. Cal. 2015).

[44] Further, the only support *AM Trust* cited for the proposition, *Ambriz v. Coca Cola Co.*, 2014 WL 296159 at *46 (N.D. Cal. Jan. 27, 2014), involved venue, not jurisdiction.

members ... may be parties for some purposes and not for others" to jurisdiction.[45] Based on that "may be," *Fitzhenry-Russell* refused to apply to class actions an otherwise directly on-point and recently decided 8-1 Supreme Court "straightforward application ... of settled principles of personal jurisdiction."[46] *Fitzhenry-Russell* pronounced *Plumbers' Local. 690* "unpersuasive" because it supposedly contained "no analysis" of *BMS*.[47] *Fitzhenry-Russell* discussed none of the other precedent that imposes the Due Process limits of *BMS* and *Bauman* on class actions.

B. *In re Chinese-Manufactured Drywall Products Liability Litigation*

In re Chinese-Manufactured Drywall Products Liability Litigation[48] embarked on a more comprehensive assault on Due Process as applied in *BMS* and *Bauman*. While earlier in the protracted *Chinese Drywall* litigation—before *Bauman*—Judge Fallon had avoided a similar personal jurisdiction pitfall by severing out non-resident class member claims in identical situation,[49] by late 2017, however, the defendants being targeted with a nationwide class action were no longer sympathetic. Rather, they had defaulted and were essentially daring the plaintiffs to try to come after them in

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[45] 2017 WL 4224723, at *5 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002)). *Devlin* dealt not with personal jurisdiction, but rather permissive intervention.

[46] *BMS*, 137 S. Ct. at 1783.

[47] 2017 WL 4224723, at *5 n.4. In actuality *Plumbers' Local. 690* devoted four full paragraphs to the issue, although discussing *Demaria* and *Demedicis* rather than *BMS* directly. 2017 WL 3129147, at *9.

[48] 2017 WL 5971622 (E.D. La. Nov. 30, 2017).

[49] *See In re Chinese Manufactured Drywall Products Liability Litig.*, 894 F. Supp. 2d 819, 858 (E.D. La. 2012), *aff'd*, 742 F.3d 576 & 753 F.3d 521 (5th Cir. 2014).

China.[50] Plaintiffs sought the heaviest cudgel possible—a money judgment on behalf of a nationwide class action—and only weeks before *BMS* was decided, Judge Fallon certified such a class.[51] Having built his considerable reputation managing massive conglomerations of litigation,[52] Judge Fallon was unlikely to read *BMS* as reducing such aggregations—and was certainly not inclined to rule in favor of *Chinese Drywall* defendants that had thumbed their collective noses at the court. He thus held:

> *BMS* would not affect the jurisdictional holding in the present case. *BMS* was not a class action; it was a 'mass tort action' in state court. This factor materially distinguishes this action from [*BMS*] because in class actions, the citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes.[53]

Chinese Drywall relied upon the same questionable set of cases as had *Fitzhenry-Russell*.[54] Thus, neither *Chinese Drywall* nor *Fitzhenry-Russell* find support in any precedent actually holding that personal jurisdiction could be based on ignoring the "citizenship of the unnamed plaintiffs" for whom judgment would ultimately be entered.

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[50] *Chinese Drywall*, 2017 WL 5971622, at *4.

[51] *Id.* at *5.

[52] *E.g.*, "Taking on MDLs with Technology: Judge Eldon E. Fallon on How to Move Mountains," https://multijurisdictionlitigation.files.wordpress.com/2012/11/fsx-fallon-e-service-and-mdls.pdf; "How Judge Fallon Works His MDL Magic," https://www.bna.com/judge-fallon-works-n57982070383/.

[53] 2017 WL 5971622, at *12 (citations and quotation marks omitted).

[54] *See* Discussion, *supra*, of *AM Trust*, *Senne*, and *Ambriz* decisions.

Judge Fallon was "cognizant" of what he described as "superficial similarities between mass tort actions (like in *BMS*) and a class action."[55] Thus, *Chinese Drywall* sought to buttress its thin precedential basis in several ways.[56] However, none of these arguments, upon examination, are persuasive.

1. Due Process rights of defendants, not absent class members, at stake

Chinese Drywall asserted that class actions and mass torts are different, chiefly because "a class action has different Due Process safeguards" arising from Federal Rule of Civil Procedure 23.[57] Rule 23's requirements, however, exist almost solely to protect the absent plaintiffs' Due Process rights in representative litigation. Personal jurisdiction is quite the opposite—"the primary concern is the burden on the defendant."[58] Denigrating the Due Process rights of class action defendants by citing Due Process protections intended to protect plaintiffs is a *non sequitur*.

2. Due Process as an instrument of interstate federalism

Chinese Drywall viewed "fairness" as "the fundamental purpose of due process."[59] That is not the case; limits on personal jurisdiction are inherent in our constitutional system. Once again, *BMS* answers this question:

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[55] *Chinese Drywall*, 2017 WL 5971622, at *14.

[56] *Id.* at *14-21.

[57] *Id.* at *14 (citing "numerosity, commonality, typicality, adequacy of representation, predominance and superiority").

[58] *BMS*, 137 S. Ct. at 1780.

[59] *Chinese Drywall*, 2017 WL 5971622, at *15.

> [R]estrictions 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. ... The sovereignty of each State implies a limitation on the sovereignty of all its sister States. ... [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.[60]

"Due process limits on [a court's] adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties."[61] Regardless of subjective considerations of "fairness," Due Process restrictions on personal jurisdiction exist because the Constitution created a federal system of government. *Chinese Drywall* involved plaintiffs from three states—Louisiana, Florida, and Virginia[62]—and defendants from China. Under *BMS*, Due Process provides no basis for adjudicating claims involving harm to persons in California, Texas, or New York.

3. *Shutts* has no bearing on *Chinese Drywall*

Like the plaintiffs in *BMS*, *Chinese Drywall*[63] invoked *Phillips Petroleum Co. v.*

[60] 137 S. Ct. 1780-81 (numerous citations and quotation marks omitted).

[61] *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

[62] 2017 WL 5971622, at *9-11.

[63] 2017 WL 5971622, at *15-16.

Shutts.[64] Once again, *BMS* supplies the answer. " Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here." … "[T]he [*Shutts*] Court stated specifically that its 'discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a defendant class.'"[65]

4. Neither Rule 23 nor Rule 4 empower nationwide class actions

Chinese Drywall asserted that Congress, in creating Rule 23 (and secondarily Rule 4), permitted nationwide class actions.[66] While it is possible that Congress could constitutionally do so, it simply has not. Neither Rule 23 nor Rule 4 are substantive statutes, but merely rules of civil procedure created under the Rules Enabling Act (REA), which prohibits any rule from "abridg[ing], enlarg[ing] or modify[ing] any substantive right."[67] Jurisdiction is, if anything, even more REA "substantive" than the "defenses" that the Supreme Court held could not be abridged by operation of Rule 23.[68]

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[64] 472 U.S. 797 (1985).

[65] 137 S. Ct. at 1783 (emphasis in original) (quoting *Shutts*, 472 U.S. at 812 n.3). *See also Greene*, 2017 U.S. Dist. Lexis 202802, at *12-13 (rejecting contention that *Shutts* precluded application of *BMS* to class actions).

[66] 2017 WL 5971622, at *17, *18.

[67] 28 U.S.C. § 2072(b).

[68] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims.").

The mass creation on a nationwide scale of personal jurisdiction that would otherwise be unconstitutional under the Due Process Clause can only be substantive. The federal rules cannot even impose pre- or post-judgment interest, because such "interest in a diversity action is ... a substantive matter governed by state law."[69] If the federal rules cannot even add interest to a judgment, they certainly cannot create the personal jurisdiction necessary to enter the judgment itself.

5. The Multidistrict Litigation Act did not create personal jurisdiction

Chinese Drywall cited the Multidistrict Litigation Act[70] as "another example" of the "principle" that Congress can create personal jurisdiction.[71] Again, Congress did not do so. Section 1407 does expressly address personal jurisdiction, but only for one specific purpose: providing that an MDL judge "may exercise the powers of a district judge in any district *for the purpose of conducting pretrial depositions* in such coordinated or consolidated pretrial proceedings."[72] Thus the only jurisdictional expansion that Congress chose to confer on MDL judges is explicitly limited to facilitating depositions. *Expressio unius est exclusio alterius* should preclude this

[69] *In re Exxon Valdez*, 484 F.3d 1098, 1101 (9th Cir. 2007).

[70] 28 U.S.C. § 1407.

[71] 2017 WL 5971622, at *17.

[72] *Id.* § 1407(b) (emphasis added).

argument, because "[w]here Congress explicitly enumerates certain exceptions ..., additional exceptions are not to be implied."[73]

The express terms of the MDL Act thus refute the jurisdiction asserted in *Chinese Drywall*. The MDL act nowhere confers on an MDL judge "the same pre-trial jurisdiction as the transferor courts where the cases were initially filed."[74] That statute "speaks not in terms of imbuing transferred [MDL] actions with some new and distinctive venue character."[75]

6. CAFA does not confer personal jurisdiction

Chinese Drywall also invoked the Class Action Fairness Act (CAFA).[76] CAFA expanded the scope of federal diversity jurisdiction—subject matter jurisdiction. CAFA has nothing to do with personal jurisdiction, and certainly does not purport to create nationwide personal jurisdiction over persons sued by classes subject to its provisions. Courts routinely dismiss for lack of personal jurisdiction under *Bauman* and *BMS* cases over which CAFA provides subject matter jurisdiction.[77] Again, perhaps

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[73] *TRW, Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) (citation and quotation marks omitted).

[74] 2017 WL 5971622, at *20.

[75] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998); *cf. Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 904 (2015) (removing "venue" limitation from *Lexecon* quotation).

[76] 2017 WL 5971622, at *18.

[77] *E.g.*, *Burgess v. Religious Technology Center, Inc.*, 600 Fed. Appx. 657, 660-61 (11th Cir. 2015); *Spratley*, 2017 WL 4023348, at *6-8; *Plumbers' Local 690,* 2017 WL 3129147, at *9; *Ferrari v. Mercedes Benz USA, LLC*, 2017 WL 3115198, at *2-3 (N.D. Cal. July 21, 2017); *AM Trust*, 78 F. Supp. 3d at 985-86; *In re LIBOR-Based Financial Instruments Antitrust Litig.*, 2015 WL 6243526, at *19 (S.D.N.Y. Oct. 20, 2015).

Congress could constitutionally have expanded personal jurisdiction in CAFA, but it did not.

7. Existence of national settlement classes irrelevant

Chinese Drywall states, accurately, that "courts have often approved national classes in mass tort cases in the settlement context."[78] However, settlement is consensual, and personal jurisdiction is waivable. If a non-resident defendant is agreeable to a nationwide settlement, encompassing non-resident plaintiffs, personal jurisdiction is not a stumbling block, not even after *BMS*.

8. Jurisdiction over some does not mean jurisdiction over all

Relying primarily on the dissent in *BMS*, *Chinese Drywall* denies that federalism concerns exist in class actions.[79] This final proposition puts the rabbit in the hat. Yes, defendants in *Chinese Drywall* had sufficient jurisdictional contacts with the three "forum states" because resident class representatives, claiming damages suffered in those states, had brought suit. But if *BMS* means anything, it means that the existence of personal jurisdiction over claims by other resident plaintiffs (three MDL transferred plaintiffs from three states) does not support personal jurisdiction over similar claims by *non-residents* (everybody from other states):

[78] 2017 WL 5971622, at *18.

[79] 2017 WL 5971622, at *19-20 (citing *BMS*, 137 S. Ct. at 1781, 1788 (Sotomayor, J., dissenting)).

> The mere fact that other plaintiffs were prescribed, obtained, and ingested [the product] in [the forum state]—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims.[80]

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While all the available personal jurisdictional mud (and then some) was thrown against *Chinese Drywall*, ultimately nothing sticks. Fittingly, the opinion's most important holding—that "an MDL transferee court ... has personal jurisdiction over nonresident class members and has the power to ... approve a nationwide class,"[81] has no citation at all. In any event, the steady drumbeat of precedent described above means that the impact of *BMS* on nationwide class actions brought under state law is surely headed for the appellate courts, and the first decisions should occur by the end of 2018. Judicial trends to date warrant cautious optimism.

MOVING FORWARD

Thus, whenever faced with a state-law class action structured so that a non-resident (not "at home" under *Bauman*) business defendant would be facing claims brought by non-resident class members (whether named or unnamed), such defendant(s) should strongly consider moving to dismiss all non-resident plaintiffs' claims for lack of personal jurisdiction.

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[80] *BMS*, 137 S. Ct. at 1781.

[81] 2017 WL 5971622, at *14.