

Personal Jurisdiction After Bristol-Myers Squibb: Unresolved Issues, Shifting Plaintiff Strategies

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**Personal Jurisdiction After
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Decisions Leading Up to *Bristol-Myers*

- *Goodyear Dunlop v. Brown* (2011)
- *J. McIntyre Mach., Ltd. v. Nicastro* (2011)
- *Daimler v. AG Bauman* (2014)
- *Walden v. Fiore* (2014)

Goodyear Dunlop v. Brown, 564 U.S. 915 (2011)

- Scope of personal jurisdiction over foreign subsidiaries of a U.S. parent corporation
- Flow of products relevant to specific jurisdiction, not general jurisdiction
- Stream-of-commerce theory not grounds for state court exercise of general jurisdiction
- Subsidiaries were not “at home” in North Carolina

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

- Whether state court had specific jurisdiction over foreign manufacturer where products sold by independent distributor
- Held that manufacturer had not purposefully availed itself of doing business in NJ or placed goods in stream of commerce with expectation they would be purchased in NJ.

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

- Whether foreign nationals could sue foreign parent corporation in CA federal district court based on events occurring outside U.S.
- Theory was general jurisdiction over U.S. subsidiary
- Parent company not subject to general jurisdiction in CA because not “at home” there; contacts not “constant and pervasive”

Walden v. Fiore, 571 U.S. 277 (2014)

- Whether defendant subject to personal jurisdiction in NV on theory that defendant knew allegedly tortious conduct in GA would affect plaintiffs who were going to NV
- Court found lack of minimum contacts with NV for specific jurisdiction – defendant’s “suit-related conduct” lacked “substantial connection” with NV
- “The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.”

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

- mass action brought by 678 plaintiffs in California Superior Court (86 of them were CA residents)
- personal injuries allegedly caused by Plavix
- drug developed and manufactured in New York and New Jersey
- sold and marketed nationwide
- Bristol-Myers (DE corp. headquartered in NY) not subject to general jurisdiction in California
- issue: whether California state courts had specific jurisdiction over non-California residents' claims

Bristol-Myers Squibb Co. v. Superior Ct.

- Bristol-Myers had 160 employees in CA
- 250 sales representatives in CA
- Small state-government advocacy office in Sacramento
- Plavix was not developed, manufactured or packaged in CA, marketing strategy not developed in CA
- From 2006-2012, Bristol-Myers sold \$900M of Plavix in CA (approx. 1% of nationwide revenue)

Bristol-Myers Squibb Co. v. Superior Ct.

- Cal. Supreme Court – Bristol-Myers’ “extensive contacts with California” allowed exercise of specific jurisdiction under Due Process Clause of Fourteenth Amendment
- U.S. Supreme Court reversed
- 8-1 opinion by Justice Alito

Bristol-Myers Squibb Co. v. Superior Ct.

- Specific jurisdiction depends on whether the claims alleged arose out of or relate to the defendant's contacts with California
- specific jurisdiction requires “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation” (quoting Goodyear)
- “When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.”

Bristol-Myers Squibb Co. v. Superior Ct.

- “What is needed – and what is missing here—is a connection between the forum and the specific claims at issue.”
- non-California residents could not demonstrate that they sustained any harm in California
- Not relevant that Bristol-Myers conducted research in CA on matters unrelated to Plavix

Bristol-Myers Squibb Co. v. Superior Ct.

- Merely because other plaintiffs were injured in California was not enough for the California court to have jurisdiction over the nonresidents' claims
- “the nonresidents' claims involve no harm in California and no harm to California residents”
- Fact that Bristol-Myers contracted with CA company to distribute Plavix nationally was not sufficient – no allegation that Bristol-Myers and distributor engaged in relevant acts in CA, or that Bristol-Myers was liable for distributor's conduct.

Bristol-Myers Squibb Co. v. Superior Ct.

- Plaintiffs seeking to bring a mass action could bring it in a state where the defendant is subject to general jurisdiction.
- Alternatively, plaintiffs could bring separate, smaller mass actions in their home states.

Bristol-Myers Squibb Co. v. Superior Ct.

- open question at Supreme Court level as to whether it is constitutional for a federal court to exercise personal jurisdiction based on contacts with the nation as a whole rather than a specific state
- Due Process Clause of the Fifth Amendment, rather than the Fourteenth Amendment, would govern this issue in the federal courts
- Federal courts, however, have long evaluated these jurisdictional issues in the same manner.

Bristol-Myers Squibb Co. v. Superior Ct.

- Justice Sotomayor was the lone dissenter.
- described majority opinion as “holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State”
- Justice Sotomayor believed it was sufficient under Supreme Court precedent that the claims of the California residents and nonresidents arose out of the essentially the same acts by the defendant.

Bristol-Myers Squibb Co. v. Superior Ct.

- “the upshot of today’s opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured”
- “The effect of the Court’s opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is ‘essentially at home.’”

Bristol-Myers Squibb Co. v. Superior Ct.

- may not be possible to bring nationwide mass action if there is more than one defendant and they are not “at home” in one state, or one of them is foreign
- footnote suggested that the Court’s opinion might not apply to a class action if absent class members were not treated as parties for purposes of personal jurisdiction

BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017)

- claims under Federal Employers' Liability Act – makes railroads liable for employee injuries
- suits brought in Montana state court
- neither employee was injured in Montana or ever worked for BNSF in Montana
- BNSF incorporated in DE with principal place of business in TX
- Montana Supreme Court found jurisdiction
- Supreme Court reversed – opinion by Justice Ginsburg for nearly-unanimous Court

BNSF Railway Co. v. Tyrrell

- Court held that Federal Employers' Liability Act only governed venue and subject matter jurisdiction, not personal jurisdiction
- Court then addressed whether personal jurisdiction in MT complied with Due Process Clause of Fourteenth Amendment
- “Because neither [plaintiff] alleges any injury from work in or related to Montana, only the propriety of general jurisdiction is at issue here”

BNSF Railway Co. v. Tyrrell

- *International Shoe v. Washington* “minimum contacts” and “traditional notions of fair play and substantial justice” test applies only to specific jurisdiction, not general jurisdiction
- General jurisdiction – *Goodyear* and *Daimler* test – “affiliations with the State are so ‘continuous and systematic’ as to render [the defendant] essentially at home in the forum State”

BNSF Railway Co. v. Tyrrell

- Corporate defendant is “at home” where it is incorporated and where it has its principal place of business
- In an “exceptional case” a corporate defendant may be “at home” in another state
- Example of that – *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) – defendant temporarily relocated from Phillipines to Ohio due to war

BNSF Railway Co. v. Tyrrell

- The *Daimler* rule “applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued”
- Need to look at “corporation’s activities in their entirety” (quoting *Daimler*)
- “[a] corporation that operates in many places can scarcely be deemed at home in all of them” (quoting *Daimler*)

BNSF Railway Co. v. Tyrrell

- BNSF had 2,061 miles of railroad track in MT (6% of total)
- 2,100 workers in MT (<5% of total)
- < 10% of total revenue from MT
- 1 of 24 automotive facilities in MT (4%)
- This would be sufficient for specific jurisdiction over claims related to business activities in MT.
- Not sufficient for general jurisdiction over claims unrelated to activities in MT.

BNSF Railway Co. v. Tyrrell

- Justice Sotomayor concurred in part and dissented in part
- She continues to disagree with *Daimler's* rule limiting general jurisdiction to states where a corporate defendant is “essentially at home”
- Views majority’s approach as departure from *International Shoe*

BNSF Railway Co. v. Tyrrell

- “The majority’s approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts with the United States.”
- Plaintiffs will “be forced to sue in distant jurisdictions with which they have no contacts or connection.”

BNSF Railway Co. v. Tyrrell

- Reads majority opinion as restricting the “exceptional case” too narrowly – majority “sends a signal to the lower courts that the exceptional-circumstances inquiry is all form, no substance”

Personal Jurisdiction After *Bristol-Myers Squibb*: Unresolved Issues,
Shifting Plaintiff Strategies

Answering the Unanswered Questions

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Daimler, BNSF, and the Lingering Question of “Where is ‘At Home’”?

- In *Daimler*, the Supreme Court clarified that the “paradigm all-purpose forums” for general jurisdiction are where the corporation is “at home”—principally, its place of incorporation and principal place of business. 571 U.S. at 137.
- But *Daimler* recognized the possibility of the “exceptional case” where “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial, and of such a nature as to render the corporation at Home in that State.” 571 U.S. at 139 n.19.

Daimler, BNSF, and the Lingering Question of “Where is ‘At Home’”?

- *BNSF Railway* confirmed that *Daimler* is the rule for *all* state-court assertions of general jurisdiction; “the constraint does not vary with the type of claim asserted or business enterprise sued.” 137 S.Ct. at 1559.
- But as Justice Sotomayor’s dissent pointed out, the majority did not answer the question reserved from *Daimler* of “the possibility of an ‘exceptional’ case in which general jurisdiction would be proper in a forum State that is neither a corporate defendant’s place of incorporation nor its principal place of business.” *Id.* at 1561-62.

Daimler, BNSF, and the Lingering Question of “Where is ‘At Home’”?

- After *Daimler*, plaintiffs routinely sought to invoke the residual category of “exceptional” cases by arguing that a corporation crosses a magical jurisdictional threshold once it locates a certain percentage of its operations in-state (anything above the 2.4% of Daimler’s worldwide sales that were located in California).
- *BNSF* arguably cuts down on the “exceptional case” category by exemplifying *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), in which World War II had forced the defendant corporation’s owner to temporarily relocate its business from the Philippines to Ohio.
- Justice Sotomayor seems to suggest that the analogy to *Perkins* means the “exceptional case” is one where a company establishes its “nerve center” in an alternate forum.

Daimler, BNSF, and the Lingering Question of “Where is ‘At Home’”?

- After *BNSF*, courts continue to use *Perkins* as the “benchmark of the ‘exceptional case.’” *Aziz v. MMR Group, Inc.*, No. H-17-3907, 2018 WL 3439637, at *3 (“[u]nlike the company in *Perkins*, Defendants did not make Texas the center of their operations by temporarily relocating to Texas.”)
- “[W]hen a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how ‘systematic and continuous,’ are extraordinarily unlikely to add up to an ‘exceptional case.’” *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 231 (Mo. 2017).
- Bottom Line: *BNSF* has effectively cabined the “exceptional case” to the facts of *Perkins* and it will take a unique example to change that (for example, a company that has more than one “nerve center” or principal place of business).

What About Foreign Corporations After *BNSF*?

- Justice Sotomayor’s dissent in *BNSF* also forecast the possibility that “[f]oreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.” 137 S.Ct. at 1560.
- Her prediction has been borne out by case law. *See Republic of Kazakhstan v. Ketebayev*, No. 17-CV-00246, 2018 WL 2763308, at *9 (N.D. Cal. June 8, 2018) (rejecting Kazakhstan’s attempt to establish general jurisdiction based on country-wide contacts pursuant to Fed. R. Civ. P. 4(k)(2)).
- *BNSF* thus arguably limits jurisdiction over foreign corporations to scenarios in which the court has specific jurisdiction.

Exploring the Scope of *Bristol-Myers Squibb* and Specific Personal Jurisdiction

- The Supreme Court’s decision and Justice Sotomayor’s dissent expressly raise two unanswered questions regarding the scope of the majority’s holding in *Bristol-Myers*:
- First, the Supreme Court provided the caveat that “since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” *Bristol-Myers*, 137 S.Ct. at 1783-84.
- Second, Justice Sotomayor noted “[t]he Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.” *Id.* at 1789 n.4.

Bristol-Myers Squibb and the Fifth Amendment

- Federal courts typically treat the limits of the Fifth and Fourteenth Amendments the same. *See Livnat v. Palestinian Authority*, 851 F.3d 45, 54 (D.C. Cir. 2017) (“No court has ever held that the Fifth Amendment permits personal jurisdiction without the same ‘minimum contacts’ with the United States as the Fourteenth Amendment requires with respect to the States. To the contrary, both the Supreme Court and this court have applied Fourteenth Amendment personal-jurisdiction standards in Fifth Amendment cases.”)
- To date, a majority of federal courts to take up this issue have found that the *Bristol-Myers Squibb* reasoning applies equally to federal court exercise of personal jurisdiction under the Fifth Amendment. *See, e.g., Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114, 125-26 (D.D.C. 2018).

Bristol-Myers Squibb and the Fifth Amendment

- Where a federal court has subject-matter jurisdiction by virtue of diversity of citizenship, *Bristol-Myers* directly applies because personal jurisdiction is a function of state service of process rules. Where a state's long-arm statute provides the basis for service, the Fourteenth Amendment governs the exercise of personal jurisdiction whether the matter is in state or federal court. *See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-00564, 2017 WL 4224723, at *4 (N.D. Cal. Sept. 22, 2017) (“[F]ederal courts routinely apply the specific jurisdiction analysis to defendants in cases that are before them solely on the basis of diversity.”)
- This is consistent with Federal Rule of Civil Procedure 4(k), which clarifies that “[s]erving a summons or filing a waiver of service established personal jurisdiction over a Defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where a district court is located” or “(C) when authorized by a federal statute.”

Bristol-Myers Squibb and the Fifth Amendment

- More than a year after *Bristol-Myers*, the majority view is that *Bristol-Myers* likewise limits federal court exercises of personal jurisdiction, even if the case arises under a federal statute.
- *See, e.g., Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, No. 14 C 2032, 2018 WL 1255021, at *16 (N.D. Ill. Mar. 12, 2018) (*Bristol-Myers* limits a federal court’s exercise of personal jurisdiction in a case involving claims under the Telephone Consumer Protection Act: “Because the TCPA does not authorize nationwide service of process, the court . . . look[s] to Illinois law for the limitation on the exercise of personal jurisdiction.”); *Horowitz v. AT&T, Inc.*, No. 3:17-cv-4827, 2018 WL 1942525, at *14-15 (D. N.J. Apr. 25, 2018) (citing *Bristol-Myers* for proposition that court lacked jurisdiction in a putative class action over the ADEA claims of named non-resident plaintiffs whose claims had no connection to the forum state).
- *But see Sloan v. General Motors LLC*, 287 F. Supp. 3d 840, 859 (N.D. Cal. 2018) (“[W]here a federal court presides over litigation involving a federal question, the due process analysis does not incorporate the interstate sovereignty concerns that animated *Bristol-Myers* and which may be ‘decisive’ in a state court’s analysis.”)

Bristol-Myers Squibb and Class Actions

- Footnote 4 to Justice Sotomayor’s dissent raises the question of whether *Bristol-Myers*’s ruling can be distinguished based on the type of case—a mass-action governed by the rules of joinder as opposed to a class action governed by Fed. R. Civ. P. 23.
- On its face, the logic motivating limits on jurisdiction in mass actions in *Bristol-Myers* could apply to class actions. In *Bristol-Myers*, the court confirmed there “must be ‘an affiliation between the forum and the underlying controversy’” and “when no such connection” exists, “specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.” *Bristol-Myers*, 137 S. Ct. at 1780-81.

Bristol-Myers Squibb and Class Actions

- The substantive requirements of the Due Process Clause should not vary based on the form of the action.
- “The Supreme Court has emphasized that ‘Rule 23’s [class action] requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the [federal court] rules of procedure ‘shall not abridge, enlarge, or modify any substantive right.’” . . . The Supreme Court held in *Bristol-Myers* that the Fourteenth Amendment’s due process clause precludes nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum resident. *Bristol-Myers*, 137 S. Ct. at 1781. Under the Rules Enabling Act, a defendant’s due process interest should be the same in the class context.” *Practice Management Support Services, Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018).

Bristol-Myers Squibb and Class Actions

- Put another way, “[t]he constitutional requirements of due process do[] 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.” *In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696 (BMC) (GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).
- *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (“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.”)
- *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) (noting that the court “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”)

Bristol-Myers Squibb and Class Actions

- Federal district courts remain split, however, with a significant minority of courts that have refused to apply *Bristol-Myers* to class actions brought in federal court.
- *Fitzhenry-Russell*, 2017 WL 4224723, at *5 (“In a mass tort action, like the one in *Bristol-Myers*, 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, like the one before the Court, 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.”).
- *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at *16 (E.D. La. Nov. 30, 2017) (citing the differences between a mass action and class actions to conclude that *Bristol-Myers* “does not speak to or alter class action jurisprudence.”).

Bristol-Myers Squibb and Class Actions

- District courts may, however, be more reluctant to apply *Bristol-Myers* in class actions that arise under federal statutes.
- *See, e.g., Becker v. HBN Media, Inc.*, 314 F. Supp. 3d 1342, 1345 (S.D. Fla. June 6, 2018) (refusing to apply *Bristol-Myers* to foreclose nationwide certification of claims brought under the Telephone Consumer Protection Act); *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360, 1366-69 (N.D. Ga. 2018) (refusing to extend *Bristol-Myers* to foreclose nationwide certification of claims brought under the Fair Credit Reporting Act).

Bristol-Myers Squibb and Class Actions

- But in some areas (consumer class actions, for example), *Bristol-Myer's* impact on multi-state class actions may be limited because it is already extremely difficult for plaintiffs to pursue multi-state class actions under the predominance requirement of Fed. R. Civ. P. 23(b)(3). Individual issues of state law that vary from state-to-state, such as reliance requirements, may often preclude certification.
- Yet, dismissal for lack of personal jurisdiction can be achieved without waiting for class certification briefing, and so offers an “early out” for defendants who may not want to incur the time and expense of class discovery. Defendants may consider strategic considerations in whether they want to procure an early dismissal without prejudice, or achieve a ruling against certification that may provide longer-lasting impact.

Personal Jurisdiction After Bristol-Myers Squibb: Unresolved Issues, Shifting Plaintiff Strategies

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***BMS* Decision: Aftermath in CA State Court**

Plaintiffs had named California distributor McKesson in the Plavix cases as an additional jurisdictional hook

After *BMS*, plaintiffs made “last ditch” effort to take discovery against McKesson, despite no such effort up to that point

On remand, California state court saw through this as attempt to end-run *BMS* and rejected it

- **“Plaintiffs’ central interest in McKesson is for purposes of personal jurisdiction Nowhere have plaintiffs argued that discovery is relevant to the merits.”**
- **“The Supreme Court held that the ‘bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.’ ... [T]his ruling resolves jurisdictional issues – it does not permit plaintiffs to conduct further jurisdictional discovery to bolster their showing.”**

A Few Post-*BMS* Battlegrounds

Jurisdictional discovery

- Plaintiffs' strategy: renew attempts to develop a factual record linking the defendant to the jurisdiction
- Defendants' response:
 - *Daimler* says jurisdiction should be easy to determine, threshold issue
 - Such discovery burdens courts, which have to actively manage it

Derivative liability

- Plaintiffs' strategy: name in-state parties such as doctors, pharmacies, or distributors
- Defendants' response:
 - Court did not say *any* ties are sufficient; jurisdiction must be met "*as to each defendant*"
 - Thus, *conduct*, not *contact*, is the key inquiry

A Few Post-*BMS* Battlegrounds

Consent by registration

- **Plaintiffs' strategy:** argue that defendants “consent” to jurisdiction by registering to do business in the state
- **Defendants' response:**
 - All 50 states have registration statutes, so equating this to consent in order to afford jurisdiction would eviscerate *Daimler*
 - Allowing state-by-state approach would undercut *Daimler's* instruction that there should be predictability to jurisdiction

Waiver

- **Plaintiffs' strategy:** argue that defendants have waived personal jurisdiction by failing to raise it in cases pre-dating *BMS*
- **Defendants' response:**
 - *BMS* iterated standard for specific jurisdiction that defendants did not have before
 - But note that clock on this argument is ticking

A Few Post-*BMS* Battlegrounds

Class actions

- **Plaintiffs' strategy:** argue that class actions differ from other mass actions so residency of unnamed class members doesn't matter
- **Defendants' response:**
 - *BMS* found that similarity of claims alone does not support jurisdiction
 - Federalism and forum-shopping concerns arise as much in this context as in other mass actions

Federal courts

- **Plaintiffs' strategy:** encourage federal courts to find *BMS* inapplicable because it rested on 14th Amendment grounds
- **Defendants' response:**
 - Practical problems of having to litigate in an inappropriate forum apply as much to federal courts as to state courts