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Fraudulent Aggregation: The Effect of Daimler and Walden on Mass Litigation

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FRAUDULENT AGGREGATION: THE EFFECT OF *DAIMLER* AND *WALDEN* ON MASS LITIGATION

*Jeff Lingwall and Chris Wray**

Abstract

This Article examines the effect of the U.S. Supreme Court’s jurisdictional tightening in *Daimler* and *Walden* on mass litigation. This Article shows how the Supreme Court’s changes to general and specific jurisdiction, considered together, end the practice of tactically allocating non-diverse plaintiffs across state lines to defeat diversity jurisdiction in nationwide litigation, a doctrine this Article terms fraudulent aggregation. This Article places the doctrine of fraudulent aggregation in the context of fraudulent joinder, the emerging doctrine of fraudulent misjoinder, and other attempts to avoid federal court jurisdiction through artful pleading. Examples from recent products liability litigation show both the application of the doctrine and the challenges facing its adoption—chiefly whether lower courts attempt to recreate general jurisdiction under the guise of expanded specific jurisdiction.

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INTRODUCTION

Academics have widely criticized the Supreme Court's jurisdictional tightening in *Daimler AG v. Bauman*¹ and *Walden v. Fiore*.² By tethering jurisdiction more closely to a defendant's conduct and home states, the argument goes, plaintiffs have lost needed flexibility in their choice of forum.³ This Article urges a different view. In the context of mass actions, the bread and butter of modern products liability litigation, the Court's adjustments to personal jurisdiction end the practice of tactically allocating non-diverse plaintiffs across state lines to defeat diversity.⁴ By

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1. 134 S. Ct. 746 (2014).

2. 134 S. Ct. 1115 (2014). As this Article went to press, the Supreme Court decided a follow-up case, *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, No. 16-466 (2017) which strengthened *Daimler* and *Walden* in the context of mass litigation. This decision reinforced the specific jurisdiction analysis in *Walden* to avoid the possibility of recreating pre-*Daimler* general jurisdiction, in line with the analysis of this Article. See *infra* note 161 for further discussion.

3. *Walden*, 134 S. Ct. at 1118; *Daimler*, 134 S. Ct. at 749–50. For academic commentary, see, for example, Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 39 (2014) (“[W]e are left with a rigid jurisdictional structure that looks remarkably like the nineteenth and early twentieth century structure that the Court claimed to have torn down to erect the minimum contacts test.”); Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 107 (2015) (“This Article argues that the Court has moved too far, too fast towards limiting the traditional power of states to require nonresident corporations to answer lawsuits in their courts. While the latest decision may achieve a level of certainty and predictability for which some commentators have longed, it has done so at the cost of restricting access to courts and through an exercise of tenuous constitutional authority that trespasses on the power of states and precludes more appropriate regulation by Congress.” (footnote omitted)); Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 108 (2015) (“The Court's restriction of general jurisdiction . . . raises real concerns.”); John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 607 (2015) (noting “the striking disparity between the protections [*Bauman*] gives to corporations and the vulnerability it creates for individuals”); Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 211 (2014) (“The two cases . . . will significantly shift the balance of power in civil litigation.”).

4. Many of the examples in this Article are drawn from recent removal contests in products liability litigation. See, e.g., *Dekalb v. C.R. Bard, Inc.*, No. CV-15-6063-R, 2015 WL 6134339, at *1–2 (C.D. Cal. Oct. 19, 2015) (aggregating ninety-three women in a filing in California state court, including three non-diverse plaintiffs to defeat diversity); *Evans v. Johnson & Johnson*, No. 2:14-cv-29700, 2015 WL 1650402, at *1 (S.D. W. Va. Apr. 14, 2015) (aggregating ninety-five plaintiffs, including one plaintiff from New Jersey, and filing in Texas state court to defeat diversity with New Jersey defendant); *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 849 (S.D. W. Va. 2015) (aggregating plaintiffs in a Texas state court filing and including one plaintiff from New Jersey to attempt to defeat diversity with New Jersey defendant).

doing so, *Daimler* and *Walden* create the doctrine this Article terms fraudulent aggregation,⁵ a plaintiff-side parallel to fraudulent joinder that reduces gamesmanship and preserves defendants' access to federal courts in mass litigation.⁶

In both fraudulent aggregation and fraudulent joinder, plaintiffs seek to defeat federal court jurisdiction through creative pleading. In the familiar case, a plaintiff attempts to defeat diversity by including a non-diverse “discardable” defendant in her complaint, against whom the plaintiff has no colorable claim.⁷ The doctrine of fraudulent joinder polices this behavior.⁸ In fraudulent aggregation, an attorney seeking to consolidate claims in mass litigation attempts to avoid federal court by tactically allocating her clients across state lines.⁹ By spreading filings for non-diverse plaintiffs across multiple states and aggregating with other diverse plaintiffs, the attorney has her cake and eats it, too—gaining the efficiency of a mass action along with a favorable state court jurisdiction.

For example, suppose an attorney develops a product liability theory against BigCorp based on personal injury. BigCorp is a New Jersey corporation, headquartered in New Jersey, which sells product nationwide through various distribution channels. BigCorp's product is widely used, so thousands of people across the country are potential plaintiffs. When considering how to initially structure the action, the attorney has two considerations: (1) her time is limited, so she does not want to manage thousands of individual cases, and (2) she prefers to litigate in state courts due to past success. Ideally, she would form a

5. As with fraudulent joinder, this Article will use the term “fraudulent aggregation” referring to both the problem and the doctrine that polices the problem, in this case the tactical allocation of plaintiffs to defeat diversity in mass litigation and the application of *Daimler* and *Walden* to those plaintiffs.

6. Fraudulent aggregation is distinct from the emerging doctrine of fraudulent misjoinder, which also concerns plaintiff-side joinder to defeat diversity. Fraudulent aggregation is based on joinder of plaintiffs over whom the court lacks jurisdiction due to *Daimler* and *Walden*. See *infra* Parts III–IV. Fraudulent misjoinder is based on the misjoinder of sham plaintiffs under Rule 20. See *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 624 (8th Cir. 2010) (discussing fraudulent misjoinder); *Woodside v. Fresenius Med. Care N. Am., Inc.*, No. 4:13-CV-2463 (CEJ), 2014 WL 169637, at *3 (E.D. Mo. Jan. 15, 2014) (examining whether “sham” plaintiffs had been improperly joined). See *generally* *Torres v. Johnson & Johnson*, No. 2:14-cv-29741, 2015 WL 4888749, at *3 (S.D. W. Va. Aug. 17, 2015) (noting that fraudulent misjoinder “may require passage upon unsettled jurisdictional grounds” but that personal jurisdiction arguments are “relatively simple”).

7. See *Filla v. Norfolk S. Ry.*, 336 F.3d 806, 809 (8th Cir. 2003).

8. E.g., *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 445 (8th Cir. 2010) (explaining the doctrine of fraudulent joinder); *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (explaining the doctrine of fraudulent joinder).

9. See *supra* note 4; *infra* Parts III–IV.

nationwide class action or a series of state-specific class actions, but class actions rarely succeed for personal injury liability theories due to the weight of individual issues.¹⁰ While checking to ensure the cases will be manageable, the attorney decides to simply group all her plaintiffs into several large state-court filings.¹¹

With this strategy in place, the attorney's only remaining challenge is to defeat removal based on diversity jurisdiction. Because BigCorp is a citizen of New Jersey, complete diversity exists between it and the citizens of each other state. If the attorney groups all her California plaintiffs into one filing, for example, BigCorp will remove to federal court.¹² But here, the attorney has an ace up her sleeve: because hundreds of potential plaintiffs live in each state, hundreds live in New Jersey. These New Jersey plaintiffs can be allocated among the filings in other state courts. By including at least one New Jersey, non-diverse plaintiff with each mass filing in other states, diversity jurisdiction is defeated and the cases remain where filed.

This Article shows how *Daimler* and *Walden*, taken together, end such nationwide sprinkling of plaintiffs to avoid federal court. *Daimler* restricts general jurisdiction to states where a defendant is essentially at home,¹³ and *Walden* limits specific jurisdiction to forums connected to the defendant's conduct towards the claims of each plaintiff.¹⁴ If a plaintiff's only connection to the forum state is through aggregation with other plaintiffs to defeat diversity, and if the defendant is not at home in that state, then *Daimler* and *Walden* require dismissing the plaintiff for lack of personal jurisdiction.¹⁵ After the non-diverse plaintiffs are dismissed, a federal court would properly exercise its jurisdiction over the remaining diverse plaintiffs with connections to the forum through

10. See, e.g., FED. R. CIV. P. 23, advisory committee's note to 1966 amendment ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried."); Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 454 (2014) ("Thus, whether resulting from the lack of class cohesion, the existence of choice-of-law complexities, or judicial discomfort with all-or-nothing trials, personal injury claims are no longer certified as litigation classes.").

11. She will likely limit these groups to less than 100 plaintiffs each to avoid BigCorp removing to federal court based on the Class Action Fairness Act (CAFA). 28 U.S.C. § 1332(d)(5)(B) (2012).

12. In personal injury claims the \$75,000 amount in controversy is usually easily satisfied. See *infra* Part IV.

13. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

14. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014).

15. See *infra* Part III.

the defendant's conduct.¹⁶ This extension of fraudulent joinder fulfills the Class Action Fairness Act (CAFA)'s extension of broad federal court jurisdiction over mass actions, by "mak[ing] it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction."¹⁷

Part I reviews the history of pleading around federal court jurisdiction, including fraudulent joinder, stipulations to the amount in controversy, and allocation of non-diverse plaintiffs across state lines. Part II discusses the Supreme Court's jurisdictional developments, and Part III applies the Court's developments to mass actions through the doctrine of fraudulent aggregation. Part IV discusses challenges to the development of the doctrine, particularly through attempts to recreate pre-*Daimler* general jurisdiction under the guise of expanded specific jurisdiction.

I. PLEADING AROUND FEDERAL COURT JURISDICTION

Plaintiffs often prefer to litigate in state courts, and some state courts in particular, perceiving them as more plaintiff-friendly than federal courts.¹⁸ Defendants usually prefer federal court,¹⁹ and so forum selection conflicts are routine in civil litigation.²⁰ Because diversity jurisdiction is

16. See 28 U.S.C. § 1441(b)(2).

17. S. REP. NO. 109-14, at 5 (2005).

18. See RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1988) ("As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security" (quoting Richard Neely, former member of the West Virginia Supreme Court of Appeals)); AM. TORT REFORM FOUND., *JUDICIAL HELLHOLES* 22–23, 32 (2015) <http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf> (discussing historically plaintiff-friendly venues such as Madison County, Illinois, and Hidalgo County, Texas); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (finding empirical evidence that plaintiff win rates decrease after removal); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 57 (2009); James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1013–14 (2006) ("To most seasoned trial lawyers, the identity of the court hearing their case is at least as important as the facts of their case. . . . This preoccupation with the identity of the decision-maker is no more profound than in the context of the choice between a state and federal court . . .").

19. This is not universally the case. For example, defendants who choose settlement might prefer a state court's procedural rules. See, e.g., Thomas Mayhew, *Choosing Federal or State Court in Consumer Class Actions*, ASS'N BUS. TRIAL LAW., Summer 2007, at 1, 5 (2007) ("[I]n some circumstances defendants will want to leave the option of a coupon-based settlement open by remaining in state court.").

20. See E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569, 571 (2006) (noting that parties "continue to fight forum selection battles with increasing intensity"); Georgene Vairo, *Foreword*, 37 LOY. L.A. L.

frequently the easiest hook for removal to federal court, plaintiffs seeking to litigate in state courts have long attempted to defeat diversity through creative pleading. For example, in *Wecker v. National Enamel & Stamping Co.*,²¹ one of the first Supreme Court recognitions of fraudulent joinder, a Missouri citizen fell into a vat of hot grease and sued his employer, a New Jersey company, for negligence.²² To avoid federal court, the plaintiff joined George Wettengel to the lawsuit, a Missouri citizen who “was not . . . a superior or superintendent, [nor] one charged with furnishing designs . . . , [nor one with] any authority to direct [plaintiff’s] work or to give him instructions as to the manner in which his duty should be performed.”²³ The Court found “the real purpose in joining Wettengel was to prevent the exercise of the right of removal by the non-resident defendant” and rejected the attempt to defeat diversity jurisdiction.²⁴

In the hundred years since *Wecker*, fraudulent joinder has become a well-established and uncontroversial jurisdictional doctrine,²⁵ protecting foreign defendants from possible in-state bias,²⁶ and offering defendants in unfriendly state courts procedural grounds to defeat sham joinders. Fraudulent joinder preserved access to federal courts in many situations, but did not cover others, particularly many class actions filed in state court. In response, Congress expanded diversity jurisdiction over mass actions in 2005. CAFA²⁷ expanded federal court jurisdiction to mass actions with 100 or more plaintiffs and \$5,000,000 or more in

REV. 1393, 1393–94 (2004) (“Year by year, the forum selection battle . . . becomes ever more fierce . . .”).

21. 204 U.S. 176 (1907).

22. *Id.* at 178–79.

23. *Id.* at 184–85.

24. *Id.* at 186; *see also* *Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146, 152–53 (1914) (fraudulent joinder cannot defeat removal); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001) (court may resolve fraudulent joinder by piercing the pleadings and considering summary judgment-type evidence); *Parks v. N.Y. Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962) (examining standards for proving fraudulent joinder). The doctrine was partially codified in 1948, at 28 U.S.C. § 1359 (1948) (“A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”). For an academic history of fraudulent joinder, *see* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 211–15 (2005).

25. *See, e.g.*, LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION 161–62 (2d ed. 2014) (discussing the doctrine of fraudulent joinder).

26. *See id.* This provides some rationale for 28 U.S.C. § 1441(b)(2)’s prohibition on removing a case against an in-state defendant under traditional diversity principles.

27. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012)).

controversy.²⁸ CAFA required only minimal diversity—that any plaintiff be from a different state than any defendant.²⁹ This vastly expanded federal court jurisdiction over mass actions, and so plaintiffs seeking to litigate in state court began avoiding CAFA through various mechanisms, such as stipulating to below \$5,000,000 in controversy,³⁰ and aggregating slightly less than 100 plaintiffs per action.³¹

However, aggregating up to even ninety-nine plaintiffs per action still required avoiding traditional diversity jurisdiction. In national-scale litigation, this could be accomplished through a mix-and-match approach. Plaintiff attorneys with national reach could retain a number of clients domiciled in the defendant's home state(s) and group filings for these plaintiffs with other diverse plaintiffs across the country. Among numerous possible examples, in litigation against Sofradim (a French corporation) and C.R. Bard (a New Jersey corporation), alleging the companies' surgical mesh products caused injury, attorneys aggregated three New Jersey plaintiffs with 90 other plaintiffs, and filed a joint suit in California state court.³² Because C.R. Bard was not diverse from the three New Jersey plaintiffs, the plaintiffs' attorneys hoped to avoid federal court. In *Kraft v. Johnson & Johnson*,³³ fifty-two plaintiffs sued Johnson & Johnson (a New Jersey corporation) in Texas state court over alleged injuries from Johnson & Johnson's transvaginal surgical mesh.³⁴ Among the fifty-two plaintiffs was a single New Jersey plaintiff to defeat diversity, and fifty-one from other states.³⁵ Similarly, in *Evans v. Johnson & Johnson*,³⁶ plaintiffs aggregated ninety-five plaintiffs together in a

28. 28 U.S.C. § 1332(d).

29. *Id.* § 1332(d)(2)(A).

30. *E.g.*, *Standard Fire Ins., v. Knowles*, 133 S. Ct. 1345, 1348 (2013) (requiring a binding stipulation to limit the amount in controversy).

31. *E.g.*, *Scimone v. Carnival Corp.*, 720 F.3d 876, 885 (11th Cir. 2013). Plaintiffs avoided jurisdiction under CAFA by splitting 104 plaintiffs into two complaints, one for plaintiffs with last names beginning A to L, and another for plaintiffs with last names beginning L to Z. *Id.*

32. *Dekalb v. C.R. Bard, Inc.*, No. CV-15-6063-R, 2015 WL 6134339, at *2 (C.D. Cal. Oct. 19, 2015).

33. 97 F. Supp. 3d 846 (S.D. W. Va. 2015).

34. *Id.* at 849. The case was removed to Texas federal court then transferred to an MDL in West Virginia.

35. *Id.*; see also *Torres v. Johnson & Johnson*, No. 2:14-cv-29741, 2015 WL 4888749, at *1 (S.D. W. Va. Aug. 17, 2015) (aggregating twenty-four plaintiffs and filing in New Mexico state court, similarly including one plaintiff from New Jersey to defeat diversity with New Jersey defendant); *Bragg v. Johnson & Johnson*, No. 2:14-cv-29743, 2015 WL 4889308, at *1 (S.D. W. Va. Aug. 17, 2015) (aggregating fifty plaintiffs and filing in Texas state court, including one plaintiff from New Jersey to defeat diversity with New Jersey defendant).

36. No. 2:14-cv-29700, 2015 WL 1650402 (S.D. W. Va. Apr. 14, 2015).

Texas state court filing, also including one non-diverse plaintiff from New Jersey to defeat diversity.³⁷

Defendants confronted with this aggregation of claims in unfriendly forums had little recourse, despite CAFA's preference for federal jurisdiction over mass actions. Fraudulent joinder applies to joinder of defendants, not plaintiffs.³⁸ Plaintiffs, as masters of their complaints, have great ability to influence the choice of forum, such as by choosing the initial forum and whether to raise potential federal claims.³⁹ So long as plaintiffs stay within bounds of the Federal Rules of Civil Procedure (the Rules), courts have not discouraged them from seeking full advantage of the ability to influence forum selection.⁴⁰ Because of this, the next Part shows how developments in jurisdictional doctrine, rather than interpretations of the Rules, extend the possibility of federal court jurisdiction to such suits.

II. FEDERAL COURT JURISDICTION AFTER *DAIMLER* AND *WALDEN*

This Part examines how recent developments in federal court jurisdictional analysis limit plaintiffs' forum-selection power.

A. *From Pennoyer and International Shoe to Goodyear*

Courts may only exercise jurisdiction consistent with the Due Process clauses of the Fifth and Fourteenth Amendments, a requirement embodied in that bane of first-year procedure students, *Pennoyer v. Neff*.⁴¹ Due process requires both subject matter jurisdiction over the

37. *Id.* at *1.

38. See Matthew C. Monahan, *De-Frauding the System: Sham Plaintiffs and the Fraudulent Joinder Doctrine*, 110 MICH. L. REV. 1341, 1345 (2012) (urging courts to extend fraudulent joinder to plaintiff-side situations, such as when a plaintiff "pleaded false jurisdictional facts or if some outside factor estopped the plaintiff from joining the suit"); Percy, *supra* note 20, at 606 ("The traditional fraudulent joinder doctrine is typically applied in cases where the . . . [plaintiff] fraudulently join[s] a non-diverse defendant.").

39. *E.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

40. See, *e.g.*, *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490 (9th Cir. 1995) (noting after district court imposed sanctions for "manipulative pleading practices" that "[w]e are not convinced that such practices were anything to be discouraged"); see also *Scimone v. Carnival Corp.*, 720 F.3d 876, 885 (11th Cir. 2013) (splitting plaintiffs into groups less than 100 based on last name when filing).

41. 95 U.S. 714, 733 (1877). Indeed, one could pen an entire article on this aspect of *Pennoyer*. See, *e.g.*, M.C. BRUCE, *SIDEBAR: A SIDEWAYS LOOK AT THE LAWYER'S LIFE 5* (2014) ("Lawyers are not funny. If you have ever tried to read a so-called humor column in any local bar association paper, you will notice that . . . [i]t is usually filled with words like *res ipsa loquitur* and citations to *Pennoyer v. Neff*"); Borchers, *supra* note 3, at 2 ("Some meanies like me make students read *Pennoyer . . .*"); Thesealocust, *Pennoyer v. Neff*, REDDIT, https://www.reddit.com/r/LawSchool/comments/3i5s8g/pennoyer_v_neff/ (last visited Nov. 14, 2016) ("*Pennoyer v. Neff* is our way of saying 'welcome to law school, tuition is non-

dispute and personal jurisdiction over the parties.⁴² Since the Supreme Court updated *Pennoyer*'s physical presence analysis in *International Shoe v. Washington*,⁴³ the personal jurisdiction due process inquiry has centered on whether a defendant has sufficient "minimum contacts" with a state to justify jurisdiction.⁴⁴ If "minimum contacts" exist sufficient to not "offend traditional notions of fair play and substantial justice," then due process is satisfied and a court's exercise of jurisdiction is reasonable. *International Shoe*'s progeny nuanced the idea of "minimum contacts," but *International Shoe* remained the standard.⁴⁵

However, for corporations, both *Pennoyer*'s requirement of physical presence and *International Shoe*'s contacts test remained remarkably fuzzy. Courts struggled to define the boundaries, and even distinguish, between these jurisdictional requirements.⁴⁶ To clarify, in 1984's *Helicopteros Nacionales de Colombia v. Hall*⁴⁷ Justice Harry Blackmun footnoted the terminology of "specific" versus "general" jurisdiction borrowed from a *Harvard Law Review* article by Professors Arthur von Mehren and Donald Trautman.⁴⁸ In 2011's *Goodyear Dunlop Tires Operations S.A. v. Brown*,⁴⁹ Justice Ruth Bader Ginsburg brought Professor von Mehren and Professor Trautman's jurisdictional theory out of the footnotes.⁵⁰

In *Goodyear*, a bus accident in France killed two boys from North Carolina.⁵¹ The boys' parents sued the companies who manufactured the tires used on the bus in North Carolina state court.⁵² Among the parties named in the suit were two foreign subsidiaries of Goodyear USA,

refundable."'). Whether these are justified (or humorous) is beyond the scope of this Article. But we digress.

42. FED. R. CIV. P. 12(b)(1)–(2).

43. 326 U.S. 310 (1945).

44. *Id.* at 316; *see also* *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) ("Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.").

45. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980) (discussing the development of the Court's jurisdictional precedent since *International Shoe*).

46. *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (noting the North Carolina Supreme Court's "[c]onfusing or blending general and specific jurisdictional inquiries").

47. 466 U.S. 408 (1984).

48. *Id.* at 414 nn.8–9 (citing Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–64 (1966)).

49. 564 U.S. 915 (2011).

50. *Id.* at 919.

51. *Id.* at 918.

52. *Id.*

organized in and operating out of Turkey, France, and Luxembourg.⁵³ After the North Carolina Court of Appeals found jurisdiction under a “stream of commerce” theory, the Supreme Court reversed, finding first that personal jurisdiction is either specific or general,⁵⁴ and that general jurisdiction arises when a non-resident defendant’s “affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”⁵⁵ The only contact the foreign subsidiaries of Goodyear USA had with North Carolina was that tires made by the subsidiaries had been sold in North Carolina.⁵⁶ The subsidiaries “have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina.”⁵⁷ As such, regardless of whether their tires were sold in North Carolina through “a highly-organized distribution process,” no general jurisdiction over the subsidiaries existed.⁵⁸

Because there was no general jurisdiction, a North Carolina court could rely only on specific jurisdiction to bring the foreign subsidiaries within its authority. In contrast to general jurisdiction, specific jurisdiction arises from a defendant’s case- and plaintiff-specific contacts with a forum.⁵⁹ In essence, specific jurisdiction requires the plaintiff’s particular claim arise out of or be related to the defendant’s forum related activities.⁶⁰ In *Goodyear*, the facts giving rise to the plaintiffs’ claims did not stem from actions by the foreign subsidiaries in North Carolina,

53. *Id.* at 919 (“Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction.”); see *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1066–67 (9th Cir. 2014) (tracing history of differentiation between general and specific jurisdiction), *cert. denied*, 135 S. Ct. 2310 (2015).

54. In contrast to the “sliding scale” between specific and personal jurisdiction that some have divined post-*International Shoe*. See Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It’s Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 580–82 (1998).

55. *Goodyear*, 564 U.S. at 919.

56. *Id.* at 920–21.

57. *Id.* at 921.

58. *Id.* at 922, 929. The Court also rejected a “single enterprise” theory of *Goodyear*, which would have held its discrete subsidiaries as parts of a whole, justifying jurisdiction against the foreign subsidiaries based on jurisdiction over *Goodyear USA* alone. *Id.* at 930–31.

59. *Specific Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

60. *E.g.*, *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (requiring that a non-resident defendant purposefully direct his activities or avail himself of the privileges of the forum, that the claim arise out of or relate to forum activities, and that the exercise of jurisdiction be consistent with fair play and substantial justice).

despite sale of their tires within the state, so no specific jurisdiction existed.⁶¹

In sum, *Goodyear* held that because specific and general jurisdiction encompass the two ways a party might have contacts with a state, and because neither existed, jurisdiction over the foreign subsidiaries was improper. Crucially for the following decisions in *Daimler* and *Walden*, the Court found the split between general and specific personal jurisdiction to be comprehensive. That is, if neither general nor specific personal jurisdiction exists, then no personal jurisdiction exists, without middle ground.⁶² After establishing that personal jurisdiction was comprised of these two dichotomous parts in *Goodyear*, the Court proceeded to tighten each part. The Court first tightened general jurisdiction in *Daimler*, and then tightened specific jurisdiction in *Walden*.

B. Daimler AG v. Bauman and General Jurisdiction

Daimler A.G. is a German corporation, headquartered in Germany.⁶³ The California plaintiffs in *Daimler* alleged that Daimler's Argentinian subsidiary worked with state security forces to torture and kill relatives of the plaintiffs during Argentina's "Dirty War" in the late 1970s and early 1980s.⁶⁴ The plaintiffs made two jurisdictional arguments. First, they attempted to show that Daimler A.G. itself had a presence in California, and second, that an agency theory applied through Mercedes-Benz USA, LLC, a U.S. subsidiary of Daimler incorporated in Delaware and operating out of New Jersey.⁶⁵ Although Mercedes-Benz USA had ample contacts with the state of California, including a regional office and billions of dollars of sales,⁶⁶ the Court summarily rejected the agency theory, noting that such a theory "appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the 'sprawling view of general jurisdiction' . . . rejected in *Goodyear*."⁶⁷ But even if the agency theory had been viable, and if Mercedes-Benz USA was at home

61. *Goodyear*, 564 U.S. at 919 ("Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy.").

62. *See id.* (noting that general and specific jurisdiction should not be "confus[ed]" or "blend[ed]"); *id.* at 927 (noting the "essential difference between case-specific and all-purpose (general) jurisdiction").

63. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

64. *Id.*

65. *Id.* at 752.

66. *Id.*

67. *Id.* at 759–60 (quoting *Goodyear*, 564 U.S. at 929).

in California, this was immaterial because Daimler A.G.'s "contacts with the State hardly render it at home there."⁶⁸

Daimler then defined where "home" is for general jurisdiction purposes.⁶⁹ The Court rejected as "unacceptably grasping" the idea that general jurisdiction existed "in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'"⁷⁰ It noted that "continuous and systematic" as used in *International Shoe* applied to specific jurisdiction, not general jurisdiction, and *International Shoe* itself distinguished between such specific-jurisdiction contacts and those "so substantial . . . as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities,"⁷¹ or in other words, "all purpose" or general jurisdiction. Thus, a corporation is not subject to general jurisdiction in every state in which it does business, but rather only where, as in *Goodyear*, it is "fairly regarded at home" by its place of incorporation or principal place of business.⁷²

The Court left open a backdoor, but only a small one. The Court noted that exceptional circumstances might exist in which "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."⁷³ Despite *Daimler A.G.*'s extensive contacts with California, the Court noted that *Daimler*'s activities "plainly do not approach that level."⁷⁴ The Court also noted that a principal place of business might temporarily reside in a certain state, citing *Perkins v. Benguet Consolidated Mining Co.*⁷⁵ In *Perkins*, the

68. *Id.* at 760; see also Stanley E. Cox, *The Missing "Why" of General Jurisdiction*, 76 U. PITT. L. REV. 153, 203 (2014) ("Extraterritorial regulatory authority—which is what general jurisdiction makes available to courts able to exercise it—must be proportional to the level of availment of benefits and protections of forum law in which the defendant has engaged. Such all-purpose availment occurs only with the defendant's true home state. That state is also therefore the only place general jurisdiction can be exercised constitutionally.").

69. This cut off other possibilities that existed post-*Goodyear*, such as being subject to general jurisdiction in any state with a bricks-and-mortar presence. See Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 681 (2015). This may have provided a more consistent parallel to the "physical presence" rule for individuals served with process. *Id.* at 682; see also *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) ("The short of the matter is that jurisdiction based on physical presence alone constitutes due process . . .").

70. *Daimler*, 134 S. Ct. at 760–61.

71. *Id.* at 761 (quoting *International Shoe v. Washington*, 326 U.S. 310, 318 (1945)).

72. *Id.* at 760; *Goodyear*, 564 U.S. at 924.

73. *Daimler*, 134 S. Ct. at 761 n.19.

74. *Id.*

75. *Id.* (citing *Perkins*, 342 U.S. 437 (1952)); see also Keri Martin, *What Remains of Vicarious Jurisdiction for Establishing General Jurisdiction Over Corporate Defendants after*

Court held that Ohio courts could exercise general jurisdiction over a Philippine corporation, although the Philippine corporation was both incorporated in and operated from the Philippines.⁷⁶ Because the company had conducted “all key business decisions” out of Ohio during the Japanese occupation in the Second World War, Ohio had become, for the time, the principal place of business.⁷⁷

C. Walden v. Fiore and Specific Jurisdiction

A month after tightening general jurisdiction in *Daimler*, the Court did the same for specific jurisdiction. In *Walden v. Fiore*,⁷⁸ the Court considered whether a Nevada court could exercise specific personal jurisdiction over a Georgia defendant whose only contacts with Nevada were through delaying the return of funds resulting from allegedly illegal activity.⁷⁹ In August 2006, TSA agents searched Gina Fiore and a companion in Puerto Rico.⁸⁰ The agents found \$97,000 in cash and questioned Fiore, suspecting involvement with illegal drugs.⁸¹ Fiore explained the cash was gambling winnings, and agents allowed her to depart for Atlanta.⁸² Upon landing, DEA agents (including Walden) seized the cash.⁸³ After Fiore’s attorney became involved and provided documentation for the earnings, the DEA returned the funds in March 2007.⁸⁴ Fiore filed a *Bivens*⁸⁵ suit in Nevada federal court, alleging

Daimler AG v. Bauman?, 12 SETON HALL CIR. REV. 1, 9–10 (2015) (discussing breadth of *Perkins*).

76. *Perkins*, 342 U.S. at 439, 448.

77. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 n.11 (1984) (discussing *Perkins*); *Daimler*, 134 S. Ct. at 756. The Court’s interpretation of *Perkins* in *Daimler* is somewhat revisionist, because as the same commentators the Court favored in *Goodyear* and *Daimler* note:

The Supreme Court voiced its approval of general jurisdiction in *Perkins* Finding that the defendant’s forum activities were “continuous and systematic,” the Court held that Ohio could assert jurisdiction over a claim unrelated to those activities and brought by a nonresident plaintiff. The phrase “continuous and systematic” thereafter became the test used by lower courts to evaluate assertions of general jurisdiction.

Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 724 (1988) (footnotes omitted); accord *Goodyear*, 564 U.S. at 919; *Daimler*, 134 S. Ct. at 760.

78. 134 S. Ct. 1115 (2014).

79. *Id.* at 1119.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1119–20.

85. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

violation of her Fourth Amendment rights.⁸⁶ The district court dismissed for lack of personal jurisdiction, and the U.S. Court of Appeals for the Ninth Circuit reversed.⁸⁷

The Supreme Court's analysis focused on the minimum contacts needed to create specific jurisdiction for a non-resident defendant.⁸⁸ It held that "[f]or a state to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State."⁸⁹ In particular, "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there" mattered.⁹⁰ Because Walden had no contacts with Nevada itself, a Nevada court could not exercise personal jurisdiction over him, despite however many contacts Walden had with Fiore.⁹¹

The best evidence that Walden had no contacts with Nevada related to Fiore's suit was the transferability of Fiore's injury. Because Fiore "would have experienced this same lack of access [to funds] in California, Mississippi, or wherever else [she] might have traveled," Walden's conduct was inherently unconnected to Nevada.⁹² In other words, because nothing but the plaintiff's residence tethered the suit to the forum state, personal jurisdiction over the defendant was improper. "[T]he mere fact that [a defendant's] conduct affected plaintiffs with connections to [a] forum State does not suffice to authorize jurisdiction."⁹³

Through this transferability lens, *Walden* mirrors *Daimler*—each rejects the idea of nationwide "traveling" personal jurisdiction. In *Daimler*, the court rejected the notion that mere sales within a forum created general jurisdiction over a defendant, as if jurisdiction travelled along with products in the stream of commerce.⁹⁴ In *Walden*, the Court rejected the similar notion that specific jurisdiction travelled along with

86. *Walden*, 134 S. Ct. at 1120.

87. *Id.*

88. *Id.* at 1121.

89. *Id.*

90. *Id.* at 1122. The Court's opinion was notably silent on its most recent personal jurisdictional opinion, *J. McIntyre Machinery, Ltd. v. Nicastro*, which generated a highly fractured opinion centered on whether a foreign corporation had targeted activities in a certain state. 564 U.S. 873, 87.

91. *Walden*, 134 S. Ct. at 1126.

92. *Id.* at 1125.

93. *Id.* at 1126. Other courts have made clear that personal jurisdiction is also *claim*-specific. *See, e.g.,* *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) ("When a plaintiff relies on specific jurisdiction, he must establish that jurisdiction is proper for 'each claim asserted against a defendant.'" (quoting *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004))); *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999) ("Questions of specific jurisdiction are always tied to the particular claims asserted.").

94. *Daimler AG v. Bauman*, 134 S. Ct. 746, 757 (2014).

a plaintiff as she moves about the country.⁹⁵ Rather than travelling, jurisdiction is tethered to the home locations of the defendant or the defendant's plaintiff-specific conduct giving rise to the case.

III. FRAUDULENT AGGREGATION: *DAIMLER* AND *WALDEN*'S ONE-TWO PUNCH

This Part discusses the Supreme Court's jurisdictional tightening in *Daimler* and *Walden* and explains how this manifests itself in mass tort litigation.

A. *Daimler* and *Walden*'s Combined Jurisdictional Tightening

When considered together, *Daimler* and *Walden* alter the litigation landscape by narrowing where plaintiffs may sue. Consider several examples. In *Barron v. Pfizer, Inc.*,⁹⁶ the plaintiffs alleged Alexander Barron suffered birth defects because of his mother's use of Pfizer's drug Zoloft while pregnant.⁹⁷ Alexander was born in Florida, which was also the state in which his mother had used Zoloft.⁹⁸ When the lawsuit was filed, both child and mother lived in Washington.⁹⁹ The only connection between either party and Missouri was Pfizer's sale and marketing of Zoloft within the state.¹⁰⁰ The court noted these "contacts do not relate to the causes of action in this suit, which arise out [of] Ms. Barron's ingestion of Zoloft in Florida and Alexander Barron's subsequent birth," and found no specific jurisdiction.¹⁰¹ It then noted Pfizer is a Delaware corporation with its principal place of business in New York, and "[m]erely establishing that a corporation regularly conducts business in a forum is not sufficient to confer general jurisdiction."¹⁰² Because no specific or general jurisdiction existed, there was no personal jurisdiction and the court dismissed the complaint under Rule 12(b)(2).¹⁰³

95. *Walden*, 134 S. Ct. at 1125.

96. No. 4:15-CV-584 CAS, 2015 U.S. Dist. LEXIS 136020 (E.D. Mo. Oct. 6, 2015).

97. *Id.* at *1.

98. *Id.* at *3.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at *4.

103. *Id.* The court noted multiple prior dismissals under the same jurisdictional theory. See *Clarke v. Pfizer, Inc.*, No. 4:15CV1072 AGF, 2015 U.S. Dist. LEXIS 118850, at *5 (E.D. Mo. Sept. 8, 2015); *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 U.S. Dist. LEXIS 85282, at *8 (E.D. Mo. June 1, 2015); *Fidler v. Pfizer Inc.*, No. 4:15 CV 582 RWS, 2015 U.S. Dist. LEXIS 176403, at *1 (E.D. Mo. June 25, 2015).

Similarly in *ADT, LLC v. Capital Connect, Inc.*,¹⁰⁴ ADT sued Security Investments, an Ohio LLC with its principal place of business in Ohio.¹⁰⁵ ADT alleged Security Investments had falsely made customers believe it was associated with ADT, violating the Lanham Act and Texas common law.¹⁰⁶ Security Investments moved to dismiss for lack of personal jurisdiction.¹⁰⁷ The court granted the motion, noting “[i]t is ‘incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.’”¹⁰⁸ In addition, the cause of action arose “out of the behavior of Security Investments in dealing with its customers in Ohio and Virginia, not in Texas,” so specific jurisdiction also lacked.¹⁰⁹

The holding in *Barron* and *ADT* extends to litigation with multiple plaintiffs. In *Tulsa Cancer Institute, PLLC v. Genentech, Inc.*,¹¹⁰ the plaintiff cancer institute sued Genentech for breach of warranty and unjust enrichment, alleging Genentech’s vials of Herceptin (a cancer medication) contained less usable medication than as labeled.¹¹¹ After some motion practice, the plaintiff filed an amended complaint seeking to join seven additional plaintiffs (with identical claims) to the litigation.¹¹² Of these seven new plaintiffs, only one had its principal place of business in Oklahoma.¹¹³ Genentech moved to dismiss the non-resident plaintiffs for lack of personal jurisdiction.¹¹⁴ As with other states, Oklahoma’s long-arm statute permits exercise of jurisdiction on any basis consistent with the Constitution,¹¹⁵ so the court proceeded to a due process analysis under *Daimler* and *Walden*.¹¹⁶ The results should be familiar. The court noted that “[e]ach plaintiff . . . must show that its claim arises out of or is related to the defendant’s contacts with the

104. No. 3:15-CV-2252-G, 2015 U.S. Dist. LEXIS 157025 (N.D. Tex. Nov. 20, 2015).

105. *Id.* at *3 (among other defendants).

106. *Id.*

107. *Id.* at *1–2.

108. *Id.* at *9 (quoting *Monkton Ins. Servs. Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014)).

109. *Id.* at *12; *see also* *Horizon Comics Prod. v. Marvel Entm’t, LLC*, No. 15-11684, 2016 U.S. Dist. LEXIS 15659, at *26 (D. Mass. Feb. 9, 2016) (finding no specific jurisdiction over Marvel Comics in copyright dispute over “Iron Man” armor despite the Iron Man films being shown in Massachusetts).

110. No. 15-CV-157-TCK-TLW, 2016 U.S. Dist. LEXIS 3512 (N.D. Okla. Jan. 12, 2016).

111. *Id.* at *2.

112. *Id.*

113. *Id.* The court referred to these as the “resident plaintiffs” (Tulsa Cancer Institute and State of Oklahoma *ex rel.* Board of Regents of the State of Oklahoma acting on behalf of the University of Oklahoma Stephenson Cancer Center). *Id.* at *6 n.4.

114. *Id.* at *1.

115. OKLA. STAT. tit. 12, § 2004(F) (2016).

116. *Genentech*, 2016 U.S. Dist. LEXIS 3512, at *5–6.

forum.”¹¹⁷ A “shared nucleus of facts between the claims of the resident Plaintiffs and non-resident Plaintiffs” was thus insufficient to establish personal jurisdiction.¹¹⁸ Because general jurisdiction also did not exist (Genentech was not an Oklahoma corporation, nor was its principal place of business in Oklahoma), the claims against the non-resident defendants were dismissed.¹¹⁹

One final example shows the effect of these jurisdictional arguments beyond forum alone. In *Jaeger v. Howmedica Osteonics Corp.*,¹²⁰ plaintiffs filed a mass action in the Southern District of Illinois regarding Howmedica’s “CerviCore” spinal device.¹²¹ Howmedica is a New Jersey corporation, so no general jurisdiction existed, and the facts relevant to Jaeger’s claim occurred in California.¹²² Howmedica therefore moved to transfer Jaeger’s case to California under 28 U.S.C. § 1404(a).¹²³ After transfer, the Northern District of California concluded that the Illinois court lacked personal jurisdiction over Howmedica, so venue had never been proper in Illinois in the first place.¹²⁴ Because of this, the court applied California rather than Illinois choice of law rules, found that California law applied, and that the case had not been brought within the California statute of limitations for personal injury claims.¹²⁵

B. Jurisdictional Tightening in Mass Litigation

To this point *Goodyear*, *Daimler*, and *Walden* accomplished three tasks: *Goodyear* established personal jurisdiction as either general or specific,¹²⁶ and *Daimler* and *Walden* tethered those jurisdictional possibilities to specific forums. *Daimler* limited general jurisdiction for defendant corporations to the state of incorporation or principal place of business,¹²⁷ and *Walden* made specific jurisdiction both claim- and plaintiff-specific (rather than existing through the sale of products within a state generally).¹²⁸ Whereas almost any contact with a state allowed

117. *Id.* at *8; see also *Urban Textile, Inc. v. A & E Stores, Inc.*, No. 2:14-cv-01554-CAS, 2014 WL 3955173, at *4 (C.D. Cal. Aug. 11, 2014) (“It is insufficient that [defendant] conducted other business with California, unrelated to plaintiff’s claims.”).

118. *Genentech*, 2016 U.S. Dist. LEXIS 3512, at *9. The court also refused to exercise jurisdiction over the non-resident plaintiffs under a theory of pendent jurisdiction. *Id.* at *10.

119. *Id.* at *12.

120. No. 15-cv-00164-HSG, 2016 U.S. Dist. LEXIS 16493 (N.D. Cal. Feb. 10, 2016).

121. *Id.* at *7.

122. *Id.* at *18.

123. *Id.* at *17.

124. *Id.* at *23.

125. *Id.* at *26–27.

126. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

127. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

128. *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014).

personal jurisdiction under *Perkins*,¹²⁹ now suit can only be brought in a state where a defendant is essentially at home or a state in which the plaintiff's claim arose out of the defendant's activities.¹³⁰ Hence the outcomes in *Barron*, *ADT*, *Genentech*, and *Jaeger*.

While these outcomes are significant, when *Goodyear*, *Daimler*, and *Walden* are considered in light of mass litigation they show an even greater change in the litigation landscape. By tethering jurisdiction to a defendant's home state or the state where the plaintiff's claim arose, the Court's jurisdictional trilogy dramatically expands access to federal courts. Again, consider the following. Plaintiffs who seek the efficiencies of a mass action but who wish to avoid federal court must defeat both jurisdiction under 28 U.S.C. § 1332(a) (traditional diversity) and 28 U.S.C. § 1332(d)(2) (CAFA). Because CAFA applies only to aggregations of 100 or more plaintiffs per 28 U.S.C. § 1332(d)(5), simply aggregating a maximum of ninety-nine plaintiffs per suit is sufficient to avoid jurisdiction under § 1332(d).¹³¹ However, the plaintiffs must still defeat traditional diversity under § 1332(a). Pre-*Daimler* and *Walden*, this was easily done. In a mass action with thousands of plaintiffs from across the country, an enterprising attorney could easily find a handful of clients domiciled in the defendant's home state(s). These non-diverse plaintiffs could then be strategically allocated in mass actions of up to ninety-nine plaintiffs in favorable jurisdictions across the country. Because the standard for general jurisdiction under *Perkins* was merely systematic contact with the forum state¹³²—usually satisfied easily in any state for a defendant with a nationally distributed product—non-diverse plaintiffs defeated diversity jurisdiction for the entire aggregation.¹³³

This piggybacking ends with *Goodyear*, *Daimler*, and *Walden*.¹³⁴ Because personal jurisdiction is now tethered to a defendant's home

129. Even under *Perkins* there were exceptions refusing to find personal jurisdiction under *International Shoe* alone. *E.g.*, *Affordable Healthcare, LLC v. Protus IP Sols., Inc.*, No. 4:08CV502 RWS, 2009 WL 749536, at *3–4 (E.D. Mo. Mar. 19, 2009) (dismissing the claims of twenty-five out-of-state plaintiffs in a ninety-seven plaintiff action).

130. *Walden*, 134 S. Ct. at 1125; *Daimler*, 134 S. Ct. at 760.

131. 28 U.S.C. § 1332(d)(5) (2012).

132. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445–46 (1952).

133. Because non-CAFA mass actions often involve personal injury claims, the jurisdictional amounts of \$75,000 per plaintiff are usually satisfied easily. *See, e.g.*, JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* 120 (2d ed. 2011) (“[M]ost serious personal injury claims will easily satisfy the threshold; even if out-of-pocket losses do not reach the threshold, the inclusion of claims for emotional or dignitary injuries, pain and suffering, and punitive damages will satisfy federal jurisdiction.”).

134. *See* *Level 3 Commc'ns, LLC v. Ill. Bell Tel. Co.*, No. 4:13-CV-1080 (CEJ), 2014 WL 50856, at *2–3 (E.D. Mo. Jan. 7, 2014) (refusing to allow a second plaintiff to essentially ‘piggyback’ onto a first plaintiff's properly established personal jurisdiction because “[i]t is well-

state(s) or the states in which the defendant's plaintiff-specific and suit-related conduct occurred, strategic sprinkling of non-diverse plaintiffs around the country to defeat 28 U.S.C. § 1332(a) fails. Non-diverse plaintiffs must now limit their suits to either the defendant's home state(s) or the states where the defendant's suit-related conduct affected them personally.¹³⁵ Without the ability of plaintiffs to strategically defeat complete diversity through inter-state allocation of non-diverse plaintiffs, mass actions previously denied federal court jurisdiction are now the domain of the federal courts.

Seen this way, the Court's jurisdictional trilogy fulfills the promise of CAFA in expanding federal court jurisdiction over mass actions. Before jurisdiction was tethered to specific forums through *Daimler* and *Walden*, CAFA created incentives to game the 100-plaintiff mark during national-level litigation. By removing this incentive, the Court put teeth into federal court jurisdiction over *all* mass actions, consistent with the intent to "make[] it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction."¹³⁶

For example, in the *Kraft* case discussed above, fifty-two plaintiffs, including one non-diverse plaintiff from New Jersey, sued Johnson & Johnson (a New Jersey corporation) in Texas state court under a products liability theory.¹³⁷ The defendant Johnson & Johnson removed to federal court based on what this Article terms fraudulent aggregation—alleging the tactical allocation of a non-diverse plaintiff with no connection to the forum to defeat diversity—and plaintiffs moved to remand.¹³⁸ The court examined existence of personal jurisdiction, and found general jurisdiction lacking because Johnson & Johnson only engaged in business in Texas.¹³⁹ The court rejected plaintiffs' attempt to "ask the court to recognize an additional basis supporting the exercise of all-purpose jurisdiction" based on large sales, training of Texas-based employees, websites directed at a Texas audience, or whether Texas employees received direct-deposit paychecks.¹⁴⁰ Because the plaintiffs did not

established that the requirement for personal jurisdiction cannot be bypassed by proving proper joinder"), *vacated in part on other grounds*, 2014 WL 1347531 (E.D. Mo. Apr. 4, 2014).

135. *Walden*, 134 S. Ct. at 1125; *Daimler*, 134 S. Ct. at 760.

136. S. REP. NO. 109-14, at 5 (2005); *see also* *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (articulating CAFA's primary objective of putting national cases of great importance in federal court).

137. *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 848–49 (S.D. W. Va. 2015).

138. *Id.* at 849.

139. *Id.* at 854.

140. *Id.* at 853, 854 (finding that "permitting the maintenance of a website accessible in all states to tip the scale in the general-jurisdiction calculus would effectively eviscerate the doctrine: the defendants here and countless other corporations, large and small, would be subject to all-purpose jurisdiction nationwide").

contest specific jurisdiction,¹⁴¹ the claims against the non-Texas, and non-diverse, plaintiffs were dismissed for lack of personal jurisdiction.¹⁴² The remaining plaintiffs were from Texas, completely diverse from Johnson & Johnson, and so the plaintiffs' motion to remand was denied.¹⁴³

In a similar case against the same defendant, *Torres v. Johnson & Johnson*,¹⁴⁴ attorneys aggregated twenty-two plaintiffs and brought suit in New Mexico state court, again including one New Jersey plaintiff with no connection to New Mexico to defeat diversity.¹⁴⁵ Johnson & Johnson removed to federal court on the basis of no personal jurisdiction over the New Jersey plaintiff.¹⁴⁶ The court agreed, finding Johnson & Johnson was not incorporated in nor operated out of New Mexico, and "the bald allegation that the defendants['] conduct substantial business in the forum is unavailing for the purposes of general jurisdiction."¹⁴⁷ The court then turned to specific jurisdiction and summarily noted that out-of-state plaintiffs in the litigation "failed to allege that the purported injuries . . . occurred in New Mexico."¹⁴⁸ After dismissing the New Jersey plaintiff, complete diversity existed and the case remained in federal court.¹⁴⁹

The facts played out similarly in *Locke v. Ethicon Inc.*¹⁵⁰ There, seventy-seven plaintiffs brought suit in Texas state court against Ethicon, a New Jersey corporation with its principal place of business in New Jersey.¹⁵¹ One of the seventy-seven plaintiffs was a New Jersey resident, included in an attempt to defeat diversity jurisdiction, and only one was a resident of Texas.¹⁵² Ethicon removed to federal court, arguing that the court lacked personal jurisdiction over the single New Jersey resident who defeated diversity, and plaintiffs moved to remand.¹⁵³ In response, Ethicon argued that the non-Texas plaintiffs "do not allege injuries in

141. *Id.* at 851 n.2.

142. *Id.* at 854.

143. *Id.* at 854–55.

144. No. 2:14-cv-29741, 2015 WL 4888749 (S.D. W. Va. Aug. 17, 2015).

145. *Id.* at *1.

146. *Id.*

147. *Id.* at *5.

148. *Id.*

149. *Id.* at *6; *see also* *Bragg v. Johnson & Johnson*, No. 2:14-cv-29743, 2015 WL 4889308, at *7 (S.D. W. Va. Aug. 17, 2015) (dismissing a similar aggregation for lack of general jurisdiction, when plaintiffs failed to argue the existence of specific jurisdiction); *Evans v. Johnson & Johnson*, No. 2:14-cv-29700, 2015 WL 1650402, at *7 (S.D. W. Va. Apr. 14, 2015).

150. 58 F. Supp. 3d 757, 759 (S.D. Tex. 2014).

151. *Id.*

152. *Id.* at 759–60 (noting that plaintiffs' claimed "complete diversity is lacking because New Jersey litigants appear on both sides of the proverbial 'v'"). The remaining plaintiffs came from fourteen different states. *Id.* at 759 & n.1.

153. *Id.* at 760.

Texas to trigger the specific jurisdiction of the Court,” and “they are not ‘at home’ in Texas within the meaning of *Daimler*.”¹⁵⁴ The court agreed, rejecting similar plaintiff-side arguments as in *Kraft*, and the case remained in federal court.¹⁵⁵

As shown in these illustrations, thus far the application of personal jurisdiction arguments in mass litigation has been limited primarily to general jurisdiction under *Daimler*, while glossing over specific jurisdiction under *Walden*. At least in part, this is because plaintiffs simply have not raised specific jurisdiction arguments as frequently.¹⁵⁶ As more courts find a lack of general jurisdiction, this is sure to change, especially with the possibility that a court might read specific jurisdiction broadly.¹⁵⁷ But as plaintiffs dodge *Daimler*, they are immediately faced with *Walden*, thus the one-two punch of *Daimler* and *Walden* together creates the doctrine of fraudulent aggregation.¹⁵⁸

IV. CHALLENGES TO THE ADOPTION OF FRAUDULENT AGGREGATION

Whether the doctrine of fraudulent aggregation becomes as established as fraudulent joinder depends on whether lower courts recreate pre-*Daimler* general jurisdiction under another name. This depends on several factors, such as the reception *Daimler* receives in lower courts, how broadly specific jurisdiction is read in wake of *Walden*, how pre-*Daimler* and *Walden* precedent regarding fraudulent misjoinder fairs, and whether Congress maintains the service of process standard currently embodied in Rule 4.

Since *Daimler* was decided, some courts have begun finding jurisdiction over corporate defendants under a consent theory.¹⁵⁹ Under

154. *Id.*

155. *Id.* at 765.

156. *E.g.*, *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 851 n.2 (S.D. W. Va. 2015) (failing to contest specific jurisdiction); *Bragg v. Johnson & Johnson*, No. 2:14-cv-29743, 2015 WL 4889308, at *7 (S.D. W. Va. Aug. 17, 2015) (failing to raise specific jurisdiction).

157. *See infra* Section IV.

158. At risk of over-extending the metaphor, *Goodyear* established that personal jurisdiction boxers have only two fists (general or specific), with no head-butts in-between. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919–20 (2011). For *Daimler* and *Walden* acting together, see *Tulsa Cancer Inst., PLLC v. Genentech Inc.*, No. 15-CV-157-TCK-TLW, 2016 U.S. Dist. LEXIS 3512, at *7–10 (N.D. Okla. Jan. 12, 2016).

159. *E.g.*, *Regal Beloit Am., Inc. v. Broad Ocean Motor LLC*, No. 4:16-cv-00111-JCH, 2016 WL 3549624, at *1 (E.D. Mo. June 30, 2016) (stating that defendant “purposefully availed itself of the privilege of conducting business with residents of Missouri, inter alia, by registering with the State of Missouri, and as such has established sufficient minimum contacts with the State of Missouri”); *McDonald AG Inc. v. Syngenta AG*, Case No. 14-md-2591-JWL, 2016 WL 2866166, at *1 (D. Kan. May 17, 2016); *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, 78 F. Supp. 3d. 572, 576 (D. Del. 2015) (“*Daimler* does not change the fact that [the defendant] consented to this Court’s exercise of personal jurisdiction when it registered to do business and appointed an agent

this theory, registering to do business in a state is sufficient to bring a corporate defendant under all-purpose jurisdiction within the state, even if clearly not “at home” under *Daimler*. Because the large corporations typically named as defendants in mass litigations are often registered across multiple (or all) states, this argument has the potential to recreate pre-*Daimler* general jurisdiction under another name. If pre-*Daimler* general jurisdiction is restored in all but name, then fraudulent aggregation of claims becomes possible again in any state in which a corporation registers an agent. While other courts disagree, such as the U.S. Court of Appeals for the Second Circuit noting, “*Daimler*’s ruling would be robbed of meaning by a back-door thief,”¹⁶⁰ if *Daimler* is undercut, so is fraudulent aggregation.

General jurisdiction may also be recreated in all but name through a broad reading of specific jurisdiction. If specific jurisdiction is extended sufficiently then it could swallow *Daimler* alongside fraudulent aggregation. For example, in *Bristol-Meyers Squibb Co. v. Superior Court*,¹⁶¹ California and non-California plaintiffs sued Bristol-Meyers

for service of process in the State of Delaware.”); *Bailen v. Air & Liquid Sys. Corp.*, No. 190318/12, 2014 WL 3885949, at *4 (N.Y. Sup. Ct. Aug. 5, 2014) (“Although *Daimler* clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent.” (footnote omitted)). See generally Kevin D. Benish, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler* AG v. Bauman, 90 N.Y.U. L. REV. 1609, 1610–14 (2015) (discussing *Daimler*’s impact on general jurisdiction under the Due Process Clause and the notion of “consent-by-registration”); Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 687–88 (2015) (discussing consent to jurisdiction and the questions *Daimler* raises about this theory).

160. *Brown v. Lockheed-Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016); see also *ADT, LLC v. Capital Connect, Inc.*, No. 3:15-CV-2252-G, 2015 U.S. Dist. LEXIS 157025, at *13 (N.D. Tex. Nov. 20, 2015) (“The act of registering to do business in Texas does not establish jurisdiction”); *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 U.S. Dist. LEXIS 85282, at *8–9 (E.D. Mo. July 1, 2015) (“If following these [registration] statutes creates jurisdiction, national companies would be subject to suit all over the country. This result is contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction.”); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) (finding that registration is “insufficient to confer general jurisdiction”). See generally Benish, *supra* note 159, at 1611–12 (describing circuit split over constitutionality of consent-by-registration).

161. 377 P.3d 874 (Cal. 2016). As mentioned in note 2, as this Article went to press the U.S. Supreme Court overturned the California Supreme Court’s decision. The Court noted:

Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the

Squibb (BMS), a Delaware corporation operating from New York.¹⁶² The plaintiffs alleged the drug Plavix, manufactured by BMS, caused injury.¹⁶³ The California Supreme Court ultimately accepted an appeal involving eight complaints on behalf of 678 individuals, only eighty-six of which lived in California.¹⁶⁴ In a 4–3 decision, the court sensibly found BMS was not subject to general jurisdiction in California, even going so far as to reject the plaintiffs’ registration theory.¹⁶⁵ Unfortunately, the court found specific jurisdiction over the claims of all plaintiffs, stating that “under this specific set of circumstances . . . for purposes of establishing the requisite minimum contacts, plaintiffs’ claims concerning the allegedly defective design and marketing of Plavix bear a substantial nexus with or connection to BMS’s extensive contacts with California.”¹⁶⁶ Specifically, the court cited the drug’s nationwide marketing, sales of drugs in the state, BMS’s relationship with a distributor in the state, the maintenance of research and development facilities in the state, and “hundreds of California employees.”¹⁶⁷

In other words, after rejecting general jurisdiction, the Supreme Court of California then immediately recreated it under the guise of specific jurisdiction, sounding remarkably like the view rejected in *Daimler*: “Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business.’ That formulation, we hold, is unacceptably grasping.”¹⁶⁸

The dissent took notice, agreeing that general jurisdiction was lacking, but sharply criticizing the holding of specific jurisdiction, stating that “the majority expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction.”¹⁶⁹ If decisions like *Bristol-Meyers* undercut the prohibition against finding general jurisdiction in every state in which a corporation

forum are not enough.

Bristol-Myers Squibb Co. v. Super. Ct. of Cal., No. 16-466, slip op. at 7 (2017) (emphasis added); see also *BNSF Ry. Co. v. Tyrrell*, No. 16-405, slip op. at 2 (2017) (affirming the general jurisdiction principles of *Daimler* in context of the Federal Employers’ Liability Act).

162. *Id.* at 878–79.

163. *Id.* at 878.

164. *Id.* at 877.

165. *Id.* at 884 (“[A] corporation’s appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions.”).

166. *Id.* at 890.

167. *Id.* at 894.

168. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–61 (2014) (citation omitted).

169. *Bristol-Myers*, 377 P.3d at 896.

does business, then non-diverse plaintiffs will again defeat diversity in any state via what can be fairly called “jurisdiction by joinder.”¹⁷⁰

Next, fraudulent aggregation depends on how lower courts treat pre-*Daimler* and *Walden* authority on joinder of plaintiffs. For example, in *Bradshaw v. Mentor Worldwide, LLC*,¹⁷¹ both resident and non-resident plaintiffs claimed they were injured by the defendant corporation’s pelvic mesh product.¹⁷² Despite no connection between the out-of-state plaintiffs and the forum state, the court applied a “common nucleus of fact” theory based on pre-*Daimler* and *Walden* authority in the U.S. Court of Appeals for the Eighth Circuit to reject the defendant’s attempt to remove to federal court.¹⁷³ By ignoring *Daimler* and *Walden*’s plaintiff-specific requirements for jurisdiction, this theory again has the potential to recreate pre-*Daimler* general jurisdiction—nationwide products liability suits generally focus on similar allegations among plaintiffs allegedly injured by the same product.¹⁷⁴

Finally, the long-term effect of *Walden* depends on whether Rule 4 is ever amended to allow nationwide service of process. Although *Walden* was decided on constitutional rather than procedural grounds, the court in *Walden* only lacked jurisdiction because Rule 4 establishes personal jurisdiction through serving a defendant “who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”¹⁷⁵ Because state court jurisdiction requires a due process analysis, *Walden* was resolved on constitutional grounds. If Congress authorized national service of process by amending Rule 4, the due process restriction on state adjudication would arguably disappear.¹⁷⁶

170. *Id.* at 905. On the same day as the Supreme Court of California’s ruling, the Illinois Court of Appeals found specific jurisdiction on similar grounds. *M.M. ex rel. Myers v. GlaxoSmithKline LLC*, 2016 WL 4506714, at *7–8 (Ill. App. Ct. Aug. 26, 2016). Plaintiffs in the Illinois case conceded the general jurisdiction point, but on specific jurisdiction, the court found “purposeful contacts” where GlaxoSmithKline conducted clinical trials in the state, had employees in the state, and maintained a registered agent there for service. *Id.*

171. No. 4:15-CV-332 SNLJ, 2015 U.S. Dist. LEXIS 72088 (E.D. Mo. June 4, 2015).

172. *Id.* at *1.

173. *Id.* at *5–6 (citing *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 622 (8th Cir. 2010) (finding that plaintiffs were not fraudulently misjoined and declining to decide whether the doctrine of fraudulent misjoinder existed)); *see also* Memorandum and Order at 3–4, *Turley v. Janssen Research & Dev. LLC*, No. 4:15cv1553 SNLJ (E.D. Mo. Dec. 23, 2015) (finding that plaintiffs were properly joined because their claims arose out of the same transactions or occurrence and included common questions).

174. *See Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 850–51 (S.D. W. Va. 2015) (discussing the difference between fraudulent misjoinder under Rule 20 and the lack of personal jurisdiction).

175. FED. R. CIV. P. 4(k)(1)(A).

176. *See Entek Corp. v. Sw. Pipe & Supply Co.*, 683 F. Supp. 1092, 1100 (N.D. Tex. 1988); Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather*

Without due process restrictions on adjudication by state courts, no limit on aggregation of claims would exist under *Walden*. With this said, while Congress has authorized national service in some contexts, such as antitrust and securities law,¹⁷⁷ there is no indication it plans to amend Rule 4 more generally.

CONCLUSION

As with the Supreme Court's summary judgment trilogy in the 1980s¹⁷⁸ and the *Twiqbal* revolution in the 2000s,¹⁷⁹ the Court's jurisdictional tightening in *Daimler* and *Walden* will have long-term consequences for civil litigation.¹⁸⁰ This Article highlights the application of *Daimler* and *Walden* in mass litigation, in which heightened jurisdictional requirements will expand defendants' access to federal courts by ending the practice of tactically allocating non-diverse plaintiffs between states to defeat diversity. While this doctrine of fraudulent aggregation faces challenges, chiefly through the potential recreation of general jurisdiction under new names, early cases show courts willing to embrace this new jurisdictional landscape. For defendants facing mass actions in historically unfriendly forums, fraudulent aggregation brings welcome relief, just as fraudulent joinder did to individual actions a hundred years prior.

Than Liberty After Walden v. Fiore, 19 LEWIS & CLARK L. REV. 769, 774–75 (2015); Daniel Klerman, *Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713, 713–16 (2015).

177. Klerman, *supra* note 176, at 716.

178. See generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (defining burden of parties at summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (establishing the “no genuine issue of material fact” standard); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–98 (1986) (approving dismissal of facially implausible claim at summary judgment stage).

179. “*Twiqbal*” is a combination of two case names: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

180. While academic commentary questions what effect the summary judgment trilogy or *Twiqbal* actually had on litigation, these cases remain among the most cited Supreme Court cases of all time. See Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2278 (2012) (finding *Twombly* and *Iqbal* increased the number of complaints failing to reach discovery); Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 562 (2012) (noting little effect of the summary judgment trilogy outside courses in civil procedure).

