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# Fragmenting Justice: How a Circuit Split is Breaking FLSA Collectives and Undermining Employee Protections Post-*Bristol-Myers Squibb*

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## I. INTRODUCTION

Decision after decision, federal circuits are eroding employees' right to unite against their employer in the courtroom. For decades, courts interpreted the Fair Labor Standards Act ("FLSA") to allow employees to file suit against employers through nationwide collectives, allowing employees across the country to vindicate their rights by pooling their resources together. Today, federal circuits are splintering employee collectives.

In *Bristol-Myers Squibb*, the Supreme Court held that, in view of the Fourteenth Amendment's Due Process Clause, state courts could not exercise specific jurisdiction over the claims of nonresident litigants.[1] A steadily growing four-to-one circuit split has extended this holding to apply to federal courts.[2] As a result, federal courts are limited in their ability to claim personal jurisdiction over out-of-state plaintiffs. The Ninth Circuit is next to decide the issue in *Harrington v. Cracker Barrel*.[3]

In the fight to recoup stolen wages, employees must now proceed divided. The FLSA's collective action mechanism must be preserved or federal courts risk inconsistent judgments in

[1] *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco County*, 582 U.S. 255, 264-66 (2017).
[2] Fischer v. Fed. Express. Corp., 42 F.4th 355, 370 (3d. Cir. 2022); Canaday v. Anthem Co., Inc., 9 F.4th 392, 397 (6th Cir. 2021); Vanegas v. Signet Builders, Inc., 113 F.4th 718, 731 (7th Cir. 2024); Vallone v. CJS Solutions Grp., LLC, 9 F.4th 861, 865-66 (8th Cir. 2021); Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 92 (1d. Cir. 2022).
[3] Gillespie v. Cracker Barrel Old Country Store Inc., No. CV-21-00940-PHX-DJH, 2023 WL 2734459 (D. Ariz. 2023), *appeal docketed*, No. 23-15650 (9th Cir. May 2, 2023).

different courts around the same issues, clogging courts with duplicative litigation, and trampling on the FLSA's expressed intent of supporting employees in the fight to vindicate their rights.

**THE FLSA**

In the 1930's, the FLSA revolutionized the workplace by ushering in employee protections such as minimum wage and overtime laws.[4] Shortly after enactment, the Supreme Court recognized that Congress enacted the statute "to aid the unprotected, unorganized, and lowest paid of the nation's population."[5] The statute was a recognition that employees needed greater protections in the employer-employee relationship.[6]

Since then, the FLSA has stood as a bulwark protecting employees against employers committing "wage theft"—the failure to pay employees wages to which they are legally entitled.[7] Nearly one hundred years after the FLSA's enactment, wage theft is still widespread as 2.4 million workers continue to lose $8 billion annually to minimum wage violations.[8]

Congress devised a mechanism to empower employees against these unequal power dynamics. The FLSA allows employees to file suit against employers on behalf of himself and other employees "similarly situated."[9] For years, courts recognized this language to permit "collective actions."[10] Through a collective action, similarly situated employees may "opt-in" as parties to the original action.[11] *Chin v. Tile Shop* helps illustrate the collective action process.

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[4] *See* Act of June 25, 1938, Pub. L. No. 718, 52 Stat. 1063
[5] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 at n.18 (1945).
[6] *Id.* at 706.
[7] Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 98 (2018).
[8] DAVID COOPER & TERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS 9, ECON. POL'Y INST. (2018).
[9] 29 U.S.C. § 216(b).
[10] *See* Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165 (1989); Campbell v. City of Los Angeles, 903 F.3d 1090, 1101 (9th Cir. 2018) (stating that collective actions are a "creature[ ] of distinct text" originating from 29 U.S.C. § 216(b)).
[11] *Campbell*, 903 F.3d at 1101.

In *Chin*, a court found that sales associates across the country were subject to similar FLSA wage violations.[12] Therefore, the court allowed the case to proceed to the next stage.[13] In this next stage, as in most FLSA collective cases, the court set a time period during which sales associates across the country could be notified of the case and had the opportunity to opt-in to the collective.[14] Once opted-in, the sales associates could proceed as individual—but united—parties to the collective litigation against the employer.

As this case demonstrates, the FLSA gives employees two rights: "the right to bring the collective litigation and the right to join it."[15] Given the FLSA's purpose is to protect employees, the Supreme Court recognized that, at the heart of it, proceeding collectively gives employees the advantage of "lower[ing] individual costs to vindicate rights by the pooling of resources."[16] The FLSA brought forth the collective action mechanism to empower employees against employers.

Since the FLSA's enactment, federal courts have allowed nationwide service of process illustrated by *Chin*. Similarly situated employees across the country could proceed collectively in one federal court to confront an employer's unlawful, nationwide practices.[17] But in 2017, the Supreme Court's *Bristol-Myers Squibb* ("*BMS*") decision signaled a potential end to nationwide FLSA collectives.

## II. BMS AND THE FEDERAL CIRCUIT SPLIT THAT FOLLOWED

In *BMS*, the Supreme Court held that, in view of the Fourteenth Amendment's Due Process Clause, a state court could not exercise specific jurisdiction over the claims of nonresident litigants.[18]

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[12] 57 F.Supp.3d 1075, 1092 (D. Minn. 2014).
[13] *Id.* at 1095.
[14] *Id.* at 1095.
[15] *Id.* at 1100.
[16] *Hoffman La-Roche*, 493 U.S. at 170.
[17] *See* Swamy v. Title Source, Inc., No. C 17-01175 WHA, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017).
[18] *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco County*, 582 U.S. 255, 264-66 (2017).

*BMS* involved a civil action in California state court filed by a group of plaintiffs consisting of 86 California residents and 592 residents from 33 other states.[19] Plaintiffs alleged that they suffered injuries after ingesting a pharmaceutical drug produced by the drug manufacturer.[20] The manufacturing, labelling, packaging, and marketing for this drug all occurred outside of California.[21] The drug, however, was sold in California and the drug manufacturer employed approximately 250 sales representatives throughout California.[22] The drug manufacturer tried to dismiss service of summons on the nonresidents' claims on the grounds that the California state court lacked personal jurisdiction.[23]

The district court found that California courts had general jurisdiction over the Defendant "[b]ecause [it] engage[d] in extensive activities in California."[24] Similarly, the California Supreme Court eventually held that the California court had specific jurisdiction due to the similarity between the nonresident and resident claims.[25] The issue eventually reached the Supreme Court which reversed and remanded the state court's judgment.[26] There are two points to emphasize about the *BMS* decision.

(1) This was an issue about jurisdiction in *state* courts. Specifically, the Court analyzed the issue based on the Fourteenth Amendment's limit on personal jurisdiction as to state courts.[27] Accordingly, the Fourteenth Amendment limited a state's ability to render judgment against a nonresident defendant.[28] On this, the court emphasized that "[i]n order for a state court to

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[19] *Id.* at 259.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Bristol-Myers Squibb*, 582 U.S. at 259.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 269.
[27] *Id.* at 261-62.
[28] *Bristol-Myers Squibb*, 582 U.S. at 261-62.

exercise specific jurisdiction, 'the *suit*' must 'arise[e] out of or relate[e] to the defendant's contacts with the *forum*.'"[29] Put differently, there must be a connection between the state forum and the conduct that places the claims in the forum's jurisdiction.[30] In BMS, the Supreme Court did not find such a connection on the fact that the relevant plaintiffs were not California residents and did not claim to have suffered harm in California.[31]

Just as important, (2) the Court expressly reserved the issue of whether this same analysis applies under the Fifth Amendment as to an exercise of personal jurisdiction in federal court under similar facts.[32] In the years since, employers have attempted to extend BMS to the FLSA arguing that out-of-state plaintiffs cannot join the resident plaintiff's claim against the employer when the harm occurred elsewhere. The majority of federal circuits, so far, agree.

The Third, Sixth, Seventh, and Eight Circuits have extended BMS to apply to FLSA collectives.[33] Although each circuit decision maintains its own wrinkles and legal analysis, the decisions are united on at least one major front. Specifically, jurisdiction for each plaintiff's claim must be analyzed claim-by-claim because an FLSA collective requires each plaintiff to hold individual party status and permits individualized claims and defenses.[34] As the Seventh

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[29] *Id.* at 262.
[30] *Id.* at 265.
[31] *Id.* ("The mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. . . . What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.").
[32] *Id.* at 268-69 ("In addition, 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.").
[33] Fischer v. Fed. Express. Corp., 42 F.4th 355, 370 (3d. Cir. 2022); Canaday v. Anthem Co., Inc., 9 F.4th 392, 397 (6th Cir. 2021); Vanegas v. Signet Builders, Inc., 113 F.4th 718, 731 (7th Cir. 2024); Vallone v. CJS Solutions Grp., LLC, 9 F.4th 861, 865-66 (8th Cir. 2021).
[34] *Vanegas*, 113 F.4th at 725–26 ("In short: FLSA collective actions are unlike class actions. Just like the mass action in *BMS*, a collective action is no more than a 'consolidation of individual cases, brought by individual plaintiffs.'" ) (citation omitted); *Vallone*, 9 F.4th at 865 ("Each failure to pay wages, however, is a separate violation that gives rise to a distinct claim. Personal jurisdiction must be determined on a claim-by-claim basis.") (citation omitted); *Canaday*, 9 F.4th at 402 (reasoning that Congress intended to end representational litigation in order to serve the "purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative action.") (citation omitted); *Fischer*, 42 F.4th at 377 ("'...each

Circuit summarized, "[e]ach failure to pay wages…is a separate violation that gives rise to a distinct claim. Personal jurisdiction must be determined on a claim-by-claim basis."[35]

The First Circuit is the only circuit on the other side of the split. The First Circuit rejected BMS' application, partly on the simple fact that BMS mainly concerned the 14th Amendment's limits on state courts, but the constitutional limits of Due Process in federal courts are limited by the 5th Amendment.[36] BMS, a case concerning state law and a state court's reach, had no binding precedent on the federal issue: "If there is any anomaly, it is the approach suggested by the Sixth Circuit—applying the Fourteenth Amendment to federal-law claims that are governed only by the Fifth Amendment."[37]

Currently, the issue is up for decision in the Ninth Circuit.[38] In that case, the district court declined to extend BMS to the FLSA on the ground that doing so would be contrary to congressional intent.[39]

## III. THE CONSEQUENCES OF SPLINTERING NATIONWIDE FLSA COLLECTIVES

An early and influential district court decision on the matter warned that applying BMS to FLSA collective actions will inevitably "splinter most nationwide collective actions, trespass on the expressed intent of Congress, and greatly diminish the efficacy of FLSA collective actions as a means to vindicate employees' rights."[40]

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FLSA claimant has the right to be present in court to advance his or her own claim.' And defendants in an FLSA collective action retain the ability to assert 'highly individualized' defenses with respect to each of the opt-in plaintiffs.").

[35] *Vallone*, 9 F.4th at 865.

[36] Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 92 (1d. Cir. 2022). The court also rejected the argument bolstered by the 6th Circuit *Canaday* decision, namely, that Rule 4(k) of the Federal Rules of Civil Procedure, which incorporates the Fourteenth Amendment, limited the jurisdiction of federal district courts. *Id.* at 93–100.

[37] *Id.* at 99.

[38] Harrington v. Cracker Barrel Old Country Store, Inc., No. 23-15650 (filed May 2, 2023).

[39] Gillespie v. Cracker Barrel Old Country Store, Inc., No. CV-21-00940-PHX-DJH, 2023 WL 2734459, at *12–13 (D. Ariz. Mar. 31, 2023).

[40] *Swamy*, 2017 WL 5196780, at *2.

Such warnings were realized after the Sixth Circuit applied BMS to FLSA collectives. After the circuit decision, plaintiff-employees across the country had to file suit in separate courts. Rather than proceeding in one collective, employees proceeded in six separate cases concerning the same general wage theft allegations.[41]

The Ninth Circuit recognized this danger. At oral argument, Ninth Circuit Judge Michael Daly Hawkins asked whether employees would have to file "separate suits in 45 states."[42] The employer's response: "That would be one option[.]"[43]

The Supreme Court once stated that the "broad remedial goal of the [FLSA] should be enforced to the full extent of its terms."[44] Congress enacted the FLSA to vindicate employees asserting their rights by allowing them to pool resources together on a united front. Applying *BMS* to the FLSA presents the risk of employees in one state finding justice and recouping wages, while employees in another state—subject to the same wage theft policies—losing those wages. Federal courts seeking to maintain an efficient docket will be bogged down with duplicative litigation in which the same evidence could have been used in one case rather than multiple cases. Employees must be able to proceed efficiently in a united collective. Anything less "is not what the FLSA contemplated."[45]

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[41] Kneppar v. Elevance Health Co. Inc., No. MJM-23-863, 2024 WL 1156406 (D. Md. Mar. 18, 2024); Baker v. Anthem Co., Inc., No. 1:21-CV-04866-WMR (N.D. Ga. Feb. 6, 2023); Lazaar v. Anthem Co., Inc., 678 F.Supp.3d 434 (S.D.N.Y. June 22, 2023); Landis v. The Elevance Health Co., Inc., 4:23-CV-00005 (E.D.N.C.); Learning v. Anthem Co., Inc., No. 21-2283 (JWB/DJF), 2024 WL 1232284 (D. Minn. Mar. 22, 2024); Midkiff v. Anthem Co., Inc., 640 F.Supp.3d 486 (E.D. Va. Nov. 10, 2022).

[42] Jennifer Bennett, *Wage Suit Jurisdiction Split Rears Head in Cracker Barrel Appeal*, BLOOMBERG L. (Feb. 7, 2025), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X2U41OT4000000?bna_news_filter=daily-labor-report#jcite.

[43] *Id.* (also suggesting, as an alternative, that Plaintiffs could sue in Tennessee court).

[44] *Hoffman-La Roche*, 493 U.S. at 173.

[45] *Zimmerman*, 23 F.4th at 97 ("Holding that a district court lacks jurisdiction over the non-resident opt-in claims would 'force[ ] those plaintiffs to file separate lawsuits in separate jurisdictions against the same employer based on the same or similar alleged violations of the FLSA. . . . That is not what the FLSA contemplated.") (citation omitted).