Legal Backgrounder

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Personal Jurisdiction over Corporate Defendants: Debunking Plaintiffs' Post-*Daimler* Dodges

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After decades in which it was a non-issue, personal jurisdiction is suddenly a hot topic. Absent intervening guidance from the US Supreme Court, lower courts had adopted expansive views of general jurisdiction, holding that corporations were subject to general jurisdiction in any state in which they were "doing business." But a pair of recent decisions—*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014)—affirmed the narrow scope of general jurisdiction, and thereby made it harder for plaintiffs to bring suit in plaintiff-friendly states that have no connection to the conduct at issue. Now, aside from "exceptional" circumstances, a corporate defendant is subject to general jurisdiction only in the state where it is incorporated and the state in which it has its principal place of business.

In response, plaintiffs' lawyers have pursued various strategies to once again expand the scope of personal jurisdiction over corporate defendants. This Legal Backgrounder identifies those strategies, discusses available counter arguments, and previews two cases currently pending in the Supreme Court that will likely affect personal jurisdiction going forward.

Is Registering to Do Business Consent to Jurisdiction?

Is it constitutionally permissible for a court to exercise general jurisdiction over a non-resident corporation based solely on the fact that it is *registered* to do business in the forum state? Prior to *Daimler* and even more so afterwards, plaintiffs' lawyers have argued that registration to do business in a state constitutes "consent" by the out-of-state corporation to general jurisdiction there. Several points argue against the theory that registration amounts to consent to general jurisdiction.

First, there is a state-law argument. Most registration statutes say that an out-of-state corporation wishing to do business in the state must register and appoint an agent to accept service of process if the company is sued there. These requirements have nothing to do with personal jurisdiction, a subject that is distinct from service of process and covered by other provisions of state law, so compliance with them should not be read to confer general jurisdiction, particularly given the constitutional problems that would result from such a reading. Since *Daimler*, the only federal circuit court and all state courts of last resort to decide the question have uniformly ruled against plaintiffs—in each case avoiding the constitutional issues by interpreting state law as not making "consent" to general jurisdiction a consequence of registering to do business.[1]

[1] *See Figueroa v. BNSF Ry.*, 361 Or. 142 (2017); *State ex rel. Norfolk S. Ry. v. Dolan*, 2017 WL 770977, at *7-8 (Mo. Feb. 28, 2017); *Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874, 884 (Cal. 2016), *cert. granted on other grounds*, 2017 WL 215687 (U.S. 2017); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 137-48 (Del. 2016); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 630-41 (2d Cir. 2016) (interpreting Conn. law); *see also AM Trust v. UBS AG*, 2017 WL 836080, at *1 (9th Cir. Mar. 3, 2017) (applying *Bristol-Myers Squibb*).

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There also are constitutional arguments, which provide both a reason to interpret state law as *not* making consent to general jurisdiction a consequence of registration (under the principle of "constitutional avoidance") and grounds for a direct challenge to state law if it is interpreted otherwise. These arguments fall into three categories.

1. Due process. The most straightforward, compelling, and commonsense response to the registration theory is that, if it were correct, *Daimler* would be a futile gesture. In particular:

- Since *registering* to do businesses is a lesser contact with a state than actually *doing* business there, and since doing business is not a constitutionally permissible basis for general jurisdiction under *Daimler*, registration cannot be a permissible basis for jurisdiction either.

- It makes no difference that the registration theory is purportedly based on "consent." *Daimler* would certainly trump a state statute providing that a corporation that *conducts* substantial business in a state "is subject to" general jurisdiction there. The same should be true, *a fortiori*, of a statute providing that a corporation that merely *registers* to do business "is subject to" general jurisdiction in that state. It cannot be that a state legislature or court may circumvent *Daimler* simply by substituting the words "consents to" for "is subject to."

- Under *Daimler*, there can ordinarily be general jurisdiction over a corporation in at most two states—where it is incorporated and where it is headquartered. Under the registration theory, potentially there could be general jurisdiction in all 50 states.

2. Unconstitutional conditions. Under the doctrine of "unconstitutional conditions," the government may not deny a benefit to a person because of the exercise of a constitutional right. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-97 (2013). The registration theory runs afoul of that doctrine, because it conditions a corporation's ability to transact business within a state in which it is not "at home" on a waiver of its due-process right—recognized in *Daimler*—not to be subject to general jurisdiction there.

3. Commerce Clause. A statute violates the Commerce Clause if it is interpreted to make consent to general jurisdiction a consequence of registering to do business for three reasons. First, such a statute may facially discriminate against out-of-state businesses by requiring only those businesses to register and/or appoint an agent for service of process. Second, such a statute discriminates against out-of-state businesses in its practical effect by subjecting national companies to unanticipated litigation in inconvenient locations that have no relation to the underlying conduct. Third, the burden imposed on interstate commerce by such a statute exceeds any local interest that the state might advance. At least one court has endorsed a Commerce Clause argument in rejecting plaintiffs' registration theory. *In re Syngenta AG MIR 162 Corn Litig.*, 2016 WL 2866166, at *4-6 (D. Kan. May 17, 2016).

The registration issue is unlikely to reach the Supreme Court in the near future unless and until at least one federal court of appeals or state court of last resort holds that the registration theory is valid under both state law and the Due Process Clause. If the issue does reach the Court, however, it is hard to imagine that it will allow *Daimler* to be "robbed of meaning by [this] backdoor thief." *Brown*, 814 F.3d at 640.

Daimler's Implications for Mass Actions and Class Actions

No longer able to obtain *general* jurisdiction after *Daimler* over corporate defendants in states other than those in which they are incorporated or have their principal place of business, plaintiffs seeking to sue nationally active corporations in plaintiff-friendly jurisdictions have tried to expand the scope of *specific* personal jurisdiction significantly.

Jurisdiction by joinder is one of plaintiffs' tactics to evade *Daimler*. Suit is filed in the desired state on behalf of multiple plaintiffs, at least one of whom can legitimately assert specific jurisdiction over the defendant because the conduct giving rise to that individual's claim occurred in the forum state. Plaintiffs then argue (i) that all of the plaintiffs are properly joined because the conduct giving rise to their claims was—at a high level of abstraction—the same; and (ii) that because one plaintiff indisputably can obtain personal jurisdiction over the defendant, and the other plaintiffs are properly joined, all plaintiffs can obtain personal jurisdiction.

The other tactic, often used in conjunction with mass or class actions, is to bring suit in the desired state based on the defendant's nationwide conduct. Plaintiffs assert that there is specific personal jurisdiction over the plaintiffs' claims, even if none of them has a connection to the forum state, because the conduct giving rise to the claims was nationwide conduct that occurred in (every state including) the forum state.

Although these tactics have succeeded in some jurisdictions, there are strong arguments why courts should reject them. Jurisdiction by joinder is contrary to well-established law, according to which personal jurisdiction must be separately established as to *each claim* asserted by *each plaintiff*. Specific jurisdiction is claim-specific. "There is no such thing as supplemental specific personal jurisdiction; if separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim." *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 n.6 (5th Cir. 2006) (citation omitted). Specific jurisdiction is also plaintiff-specific, which means that a court "may not exercise personal jurisdiction over some Plaintiffs solely because it has personal jurisdiction over others in the same case." *Family Wireless #1, LLC v. Automotive Technologies, Inc.*, 2015 WL 5142350, at *4 n.2 (E.D. Mich. Sept. 1, 2015). In federal court at least, plaintiffs cannot evade these principles by filing a class action, because, under the Rules Enabling Act, the rules of civil procedure—including those permitting class actions—cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016).

Daimler's limitation on general personal jurisdiction would be eviscerated if a defendant's nationwide practices—for example, its marketing or employment practices—were sufficient to establish specific jurisdiction over the defendant in each state. Were that the case, every nationally active corporation would be subject to personal jurisdiction in every state. That, however, is contrary to *Daimler*, which held that corporations are typically subject to general jurisdiction only in their state of incorporation and the state in which they have their principal place of business. Basing specific jurisdiction on nationwide practices when a plaintiff's injury was not caused by those practices being carried out in the forum state is, moreover, contrary to longstanding Supreme Court jurisprudence, according to which specific jurisdiction exists only when a claim arises out of or relates to a defendant's activity in the forum state.

As discussed below, the Supreme Court will address specific jurisdiction based on joinder and a defendant's nationwide practices in *Bristol-Myers Squibb Co. v. Superior Court of California*, No. 16-466.

Limits on Specific Personal Jurisdiction

Mass and class actions aside, there are, of course, important due-process constraints on specific jurisdiction. First, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Goodyear*, 564 U.S. at 924 (citation omitted) (alteration original). "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation," and that "relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1118, 1121-22 (2014) (internal quotation omitted) (emphasis original). "[M]ere injury to a forum resident is not a sufficient connection to the forum." *Id.* at 1125.

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Second, although even "'single or occasional acts' occurring or having their impact within the forum State" may be enough to show "purposeful" contacts with the forum, *Goodyear*, 564 U.S. at 923, the plaintiff must *also* show that "the suit 'arise[s] out of or relate[s] to the defendant's contacts with the forum.'" *Daimler*, 134 S. Ct. at 754 (alteration original). Or as the Court put it in *Walden*, "[f]or a State to exercise [specific] jurisdiction consistent with due process, the defendant's *suit-related* conduct must create a substantial connection with the forum State." 134 S. Ct. at 1121 (emphasis added).

But when exactly does a claim "arise out of or relate to" contacts in the forum state? In *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 415 n.10 (1984), the Court "decline[d] to reach" the question, and in the decades since, courts have given very different answers: some have held that the defendant's contacts must be a but-for cause of the plaintiff's claims; others have held—without agreeing on a precise standard—that something more than but-for causation is required; at least one federal court of appeals has said that proximate cause is required; and a few other courts—like the California Supreme Court in *Bristol-Myers Squibb*—have held that no causal connection between the defendant's forum contacts and a plaintiff's claims is required at all. Fortunately, the question that *Helicopteros* left open is likely to be resolved shortly.

Pending Supreme Court Cases

On April 25, the Supreme Court will hear argument in both *Bristol-Myers Squibb* and another case implicating the scope of personal jurisdiction over corporate defendants—*BNSF Railway v. Tyrrell* (No. 16-405).

Bristol-Myers Squibb involves jurisdiction by joinder. Suit was brought by hundreds of individuals in California state court for injuries allegedly caused by a drug that was sold throughout the country. The drug was not developed, manufactured, or labeled in California; nor was the marketing campaign for the drug conceived there. And although some plaintiffs ingested the drug in California, the vast majority did not. The California Supreme Court held that the state's courts could exercise specific jurisdiction over the claims asserted by the out-of-state plaintiffs because even though they did not ingest the drug in California their claims were "based on the same allegedly defective product" and the same "nationwide marketing" as those of the in-state plaintiffs with whom they were joined. *Bristol-Myers Squibb*, 377 P.3d at 888. The US Supreme Court will decide "[w]hether a plaintiff's claims arise out of or relate to a defendant's forum activities," *i.e.*, whether there is specific jurisdiction, "when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts." *Bristol-Myers Squibb Co. v. Superior Court of California*, No. 16-466, *Petition for Cert.* at i.

Tyrrell implicates *Daimler* directly. The plaintiff filed suit in Montana even though he was not injured in the state and the defendant neither was incorporated in Montana nor had its principal place of business there. Explicitly "declin[ing]" to apply *Daimler*, the Montana Supreme Court concluded that Montana courts could exercise general jurisdiction over the plaintiff's claim. *Tyrrell v. BNSF Ry.*, 373 P.3d 1, 7 (Mont. 2016). It held that *Daimler* was limited to its facts and therefore does not govern suits between American parties involving injuries allegedly sustained in the United States, and that the Due Process Clause, on which *Daimler* is based, was trumped by a venue provision in the statute under which the plaintiff sued. The US Supreme Court will decide whether either of those propositions is correct.

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