Contra Plaintiffs’ Bar, Registering to Do Business Does Not Create General Jurisdiction

by Professor Mark Moller


The plaintiffs’ bar, smarting from this reduction in their forum-shopping opportunities, is scrambling to neutralize Daimler. Their weapon of choice: a hoary rule that defendants subject themselves to general jurisdiction wherever they voluntarily register to do business. Daimler, though, undercuts that rule’s viability, as the U.S. Court of Appeals for the Second Circuit has recently—and aptly—explained in Brown v. Lockheed Martin Corporation, 814 F.3d 619 (2016).

Lockheed—a toxic tort suit brought against the Maryland aerospace company in Connecticut—is a poster child for the portability of modern litigation. An Alabaman’s suit against Lockheed in his home state foundered on Alabama’s unfavorable statute of limitations. Rather than suffer the preclusive effect of a judgment for Lockheed, the plaintiff dismissed the case voluntarily and went in search of greener pastures (a state with a more favorable limitations period), eventually landing in Connecticut federal court. Id. at 623-24.

Because this second suit had little connection to Connecticut, the federal court lacked specific, or case-related, jurisdiction over Lockheed. The plaintiff pinned jurisdiction, instead, on Lockheed’s having registered to do business in Connecticut. This, he argued, rendered the company amenable to the state’s general jurisdiction. Lockheed’s registration had this effect, suggested plaintiff, because: (1) registration, along with Lockheed’s longstanding physical presence in Connecticut, amounted to a “continuous and systematic” connection, and (2) Lockheed consented to Connecticut’s general jurisdiction by registering there. Id. at 625.

Daimler, the Second Circuit recognized, clearly doomed the first argument. General jurisdiction lies, said Daimler, only when the defendant’s contacts are “so continuous and systematic” that the defendant is “essentially at home” in the forum. Daimler, 134 S. Ct. at 761 (emphasis in original). And “[e]xcept in a truly ‘exceptional case,’ a corporate defendant may be treated as ‘essentially at home’ only where it ... incorporate[s] or maintains its principal place of business.” Lockheed, 814 F.3d at 627. The defendant’s routine contacts, the court reasoned, did not qualify as “exceptional” under Daimler.

The Lockheed plaintiff’s second, consent-based argument cast back to long-ago Pennoyer v. Neff. 95 U.S. 714 (1878). States, suggested Pennoyer, can condition doing business within their borders on defendants’ advance consent to their jurisdiction, signified by appointing a local agent for service of process. Id. at 735-36.

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The Second Circuit also rejected this argument. The Connecticut registration statute, it explained, did not “plainly” advise the defendant of the sweeping jurisdictional consequences of registration. *Lockheed*, 814 F.3d at 633-34, 640. And absent such an explicit statutory jurisdictional condition, registration provides no basis for imputing a defendant’s “consent” to general jurisdiction. *Id.* at 636-37. Holding otherwise, said the Second Circuit, would fly in the face of *Daimler*’s reasoning. That decision, *Lockheed* explained, aimed at avoiding universal state jurisdiction over defendants competing in national markets—a result *Daimler* characterized as “exorbitant.” *Id.* at 639-40 (quoting *Daimler*, 134 S. Ct. at 761). Yet, said the Second Circuit, this “exorbitant” result would follow as a matter of course if plaintiff’s argument were to win the day.

“[E]very state in the Union,” after all, “has enacted a business registration statute,” and almost none of these specify registration’s jurisdictional consequences. *Lockheed*, 814 F.3d at 640 (citing Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1363-65 & nn. 109 & 11-12 (2015)). As a result, if “mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—sufficed to confer general jurisdiction,” then corporations doing business nationally would be subject to general jurisdiction in every state. “*Daimler*’s ruling,” said the Second Circuit, “would be robbed of meaning by a back-door thief.” *Id.* at 640.

What if Connecticut amended its registration statute by adding an explicit jurisdictional-consent provision? The Second Circuit didn’t feel the need to decide this hypothetical question. *Id.* at 640. But in that event, courts would come face to face with serious constitutional problems. First, it’s questionable whether defendants can meaningfully “consent” in advance to open-ended assertions of general jurisdiction. As Professor Monestier writes, when parties consent to jurisdiction in the usual way—via forum-selection clauses or by waiving objections to jurisdiction under Federal Rule of Civil Procedure 12(h)(1)—they “consent to something ( … [e.g.] jurisdiction involving a particular [party] and a particular dispute).” By contrast, under the *Lockheed* plaintiff’s theory, “a defendant, [by registering to do business,] consents to everything ( … [e.g., to] jurisdiction in any matter involving any plaintiff”). Monestier, 36 CARDOZO L. REV. at 1384. In other contexts, the law tends to view completely open-ended advance waiver of one’s rights with deep suspicion, in part out of a fear parties can’t meaningfully weigh the risks entailed by waiver in unknown future cases.¹

General jurisdiction-by-registration also poses hard questions about the limits of state sovereignty. Through such registration schemes, states with pro-liability standards can have a gravitational effect on plaintiffs around the country in suits wholly unrelated to the state, becoming de facto national standard setters in the process. Avoiding this lurking federalism problem ought to, one would think, counsel in favor of at least some outside limits on the cases states can reach via business-registration statutes.²

Although the Second Circuit did not reach these constitutional issues, it took them seriously—so seriously that it cited these sorts of concerns as a particularly important reason to construe Connecticut’s registration statute against the conferral of general jurisdiction. *Brown*, 814 F.3d at 626, 636-37, 640-41. *Lockheed* is among the best-reasoned federal opinions to date on these issues (and, so far, the only circuit-level opinion to address them post-*Daimler*).³ It may be some time until the Supreme Court returns to the law of general jurisdiction. In the interim, *Lockheed* should prove to be a crucial authority for defendants fending off end-runs around *Daimler*.

¹ *Cf. Amchem Prods. v. Windsor*, 521 U.S. 591, 628 (1997) (raising doubts about the ability of class members to waive their right to bring claims for future, unknown injuries).
³ For another comprehensive treatment of these issues that builds on *Lockheed*’s analysis and provides a nice overview of current law across jurisdictions to boot, see *Genuine Parts Co. v. Cepec*, 2016 Del. LEXIS 247 (Del. Apr. 18, 2016).