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General Jurisdiction After *Daimler AG v. Bauman*

Registration As an End-Run Around At-Home Jurisdiction?

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The Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), announced a sweeping change to the law of personal jurisdiction. The *Daimler* Court held that a corporate defendant is subject to general personal jurisdiction — jurisdiction over suits unrelated to the defendant's contacts with the forum — only where the corporation may fairly be "regarded as at home," which is generally limited to the defendant's state of incorporation and the state where it has its principal place of business. *Id.* at 760-61 & n.19. In announcing this strict standard, the *Daimler* Court rejected the rule, long applied by many lower courts, permitting the exercise of general jurisdiction in any forum where a corporate defendant maintained an office or was otherwise "doing business." *Id.* at 761-62 & n.20.

At least initially, *Daimler* was understood by many to have signaled the end of "doing business" as a basis for general, "all-purpose" jurisdiction. But since *Daimler*, a number of courts have issued decisions that, if widely adopted, would resurrect the "doing business" standard under another name, and would reduce the Supreme Court's "at-home" requirement to a nullity. According to these courts, whenever an out-of-state corporation registers to do business with a secretary of state and appoints an agent for service of process, that defendant consents to general jurisdiction over all disputes brought in the courts of the forum state, regardless of whether the corporation is "at home" in that state. This sort of reasoning is, in our view, both foreclosed by *Daimler* and based on a theory of consent that is at odds with decades of personal-jurisdiction jurisprudence under *International Shoe Co. v. Washington*. As a result, and as explained herein, courts should reject this consent-based theory of general jurisdiction and instead apply the "at home" standard expressly adopted in *Daimler*.

General Jurisdiction Under *International Shoe*

For 70 years, it has been settled law that due process permits a state court to exercise jurisdiction over an out-of-state defendant only when that defendant has certain "minimum contacts" with the forum such that the maintenance of the suit comports with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1945)). The cases applying *International Shoe's* "minimum contacts" standard have long recognized two categories of personal jurisdiction: specific and general. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 413-415 & nn. 8-9 (1984). Specific jurisdiction is dispute-specific; it applies when the plaintiff's cause of action "aris[es] out of or relate[s] to" the defendant's forum-directed contacts. *Id.* at 414 n.8. General jurisdiction, by contrast, is dispute-blind. It arises only where the defendant's relationship to the forum is so extensive as to warrant the exercise of jurisdiction over any and all cases involving that defendant. *Id.* at 415 n.9.

In the first 65 years after *International Shoe* was decided, the Supreme Court decided just two general jurisdiction cases — *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408 (1984). Neither *Perkins* nor *Helicopteros*, however, provided any bright-line test for determining when an out-of-state corporation's contacts with a forum support general jurisdiction, and as a result lower courts were largely left "to their own devices in determining when a corporation would or would not be subject to general jurisdiction." Tanya J. Monestier, Where Is Home Depot "At Home"?: *Daimler v. Bauman* and the End of Doing Business Jurisdiction, 66 *Hastings L.J.*, 233, 241-42 (2014).

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In the absence of any clear standard, lower courts typically held that general jurisdiction was proper in any forum where an out-of-state corporation was "doing business," either by maintaining a staffed office in-state or by otherwise conducting "continuous and systematic" sales or advertising activity within the forum. *See, e.g., Thomason v. Chemical Bank*, 234 Conn. 281, 300 (1995). Under this line of cases, it was generally believed that large national manufacturers and retailers, with substantial operations all over the country, were properly subject to general jurisdiction in all 50 states. Todd David Peterson, The Timing of Minimum Contacts, 80 *Geo. Wash. L. Rev.* 202, 213-14 (2011). That understanding would begin to change, though, when the Supreme Court decided to take up the question of general jurisdiction in the first of two recent cases.

The *Goodyear* Decision and the Introduction of The 'At-Home' Standard

After more than 25 years of silence on the standard for general jurisdiction, the Supreme Court initially returned to the issue in 2011, with its decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). The defendants in *Goodyear* were European tire manufacturers — foreign subsidiaries of the Goodyear Tire and Rubber Company — that had been sued as a result of a fatal bus crash in France allegedly caused by the manufacturers' tires. Two vacationing North Carolinians were killed in the crash, and their families elected to bring suit against the foreign tire manufacturers in a North Carolina state court. The defendants' only contact with North Carolina was the fact that a small percentage of their tires had proceeded through the "stream of commerce" and had been distributed in the state by affiliates. Reversing the judgment of an intermediate North Carolina appellate court, the Supreme Court unanimously concluded that this "stream of commerce" analysis — typically used as a basis for specific jurisdiction — was insufficient to support general, "all-purpose" jurisdiction over a suit unrelated to the defendants' forum contacts. *Id.* at 2851-52, 2855.

The result in *Goodyear* was unsurprising, as the expansive "stream of commerce" theory of general jurisdiction embraced by the North Carolina court went far beyond any plausible theory of general jurisdiction. More significant than the result was the Court's reasoning. Justice Ginsburg's opinion for the unanimous Court repeatedly invoked a new formulation of the kinds of contacts that properly give rise to general jurisdiction. The Court stated, several times, that general jurisdiction lies only in a forum where the defendant's "affiliations … are so 'continuous and systematic' as to render [the defendant] *essentially at home*." *Id.* at 2851 (emphasis added). The Court explained that, under this standard, the "paradigm forum for the exercise of general jurisdiction" over an individual is "the individual's domicile." *Id.* at 2853-54 (citing *Int'l Shoe Co.*, 95 U.S. at 317). The Court also suggested that, for a corporation, the paradigm forum, such as the corporation's "place of incorporation and principal place of business," would be "an equivalent place." *Id.* (citing Brilmayer et al., A General Look at General Jurisdiction, 66 *Texas L. Rev.* 721, 728 (1988).)

'At-Home' Jurisdiction Affirmed: *Daimler*

Goodyear's formulation of the governing standard strongly suggested that general jurisdiction should not extend beyond a corporate defendant's state of incorporation, principal place of business, and (in limited circumstances) some equivalent forum where a corporation may truly be regarded as "at home." That sort of narrow standard is inherently inconsistent with a regime, long embraced by lower courts, in which a defendant's nationwide sales can result in the exercise of general jurisdiction in all 50 states. Nonetheless, the initial response to *Goodyear* from many courts and commentators was to resist this reading and to adopt a narrow interpretation of *Goodyear's* holding. *See, e.g., J.B. v. Abbott Labs., Inc.*, No. 12-385, 2013 U.S. Dist. LEXIS 15768, at *9 (N.D. Ill. 2013) (rejecting the defendant's claim that "*Goodyear* created a 'new standard'" under which "general jurisdiction exists only in a forum where the corporation is 'essentially at home'"); Meir Feder, *Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction, 63 *S.C. L. Rev.* 671, 672 (2012) (noting that it had "been suggested" in some quarters "that the Court's apparent restriction of general jurisdiction to corporations that are 'essentially at home' should be dismissed as 'loose language,' and that *Goodyear* should be limited to its 'particular facts.'").

Any doubt about the meaning of the Supreme Court's "at-home" formulation for general jurisdiction was nonetheless resolved two years later in *Daimler*. The case arose out of Argentina's "Dirty War," during which workers at a Mercedes Benz auto plant were allegedly targeted by the country's military dictatorship as "subversives." In 2004, the workers and their representatives filed suit in the Northern District of California against Daimler AG, the parent corporation of Mercedes Benz Argentina, for wrongs perpetrated against these workers in Argentina. *Daimler*, 134 S. Ct. at 751-52. The plaintiffs claimed that Daimler was properly subject to suit in California on a theory of general jurisdiction. While Daimler, a German corporation with headquarters in Stuttgart, lacked the "systematic and continuous contacts" with California needed to support general jurisdiction, its New Jersey-based subsidiary, Mercedes-Benz USA, maintained several offices in California, and distributed Daimler-manufactured automobiles throughout the state.

Daimler had conceded in the lower courts that Mercedes-Benz USA was "subject to general jurisdiction in California." *Id*. at 758. Initially, then, the key issue was whether the activities of Daimler's American subsidiary could be imputed to the German parent for jurisdictional purposes. *Id*. at 758-59. However, Justice Ginsburg's opinion for an eight-Justice majority avoided that question and assumed that Mercedes-Benz USA's activities were attributable to Daimler AG. The Court then held that, even taking into account the subsidiary's contacts with California, the exercise of general jurisdiction over Daimler did not comport with due process, because Daimler was in no sense "at home" in California. *Id*. "[O]nly a limited set of affiliations with a forum," the Supreme Court stated, "will render a defendant amenable to all-purpose jurisdiction there." *Id*. at 760. The Court explained that, for a corporation, the kinds of affiliations that give rise to general jurisdiction are limited to the defendant's "place of incorporation," "principal place of business," and perhaps, "in an exceptional case," an equivalent forum where a corporation may fairly be regarded as "at home." *Id*. at 760-61 & n.19.

In announcing and applying this standard, the Court expressly disapproved of the expansive view of general jurisdiction applied in many lower courts. A corporation "operat[ing] in many places," the Court noted, "can scarcely be deemed at home in all of them." *Id*. at 762 & n.20. As a result, a standard that would permit the exercise of general jurisdiction in every state in which a corporation "engages in a substantial, continuous, and systematic course of business" would be "unacceptably grasping." *Id*. at 761.

The *Daimler* Backlash

The decisions in *Goodyear* and *Daimler* certainly seemed to have put the final nail in the coffin of "doing business" jurisdiction. But in the aftermath of *Daimler*, a number of litigants and courts have resurrected the theory under the rubric of consent. These courts have ruled that, even if application of the Daimler test would preclude general jurisdiction, a corporation that registers to do business in a state and appoints an agent for service of process — as is typically required by state statute in order to do business within a state — thereby consents to the exercise of general personal jurisdiction by the forum state's courts.

In order to reach this result, these courts have expressly relied on precedents and principles decided under the old, pre-*International Shoe* personal-jurisdiction doctrine of *Pennoyer v. Neff*, 95 U.S. 714 (1878). Under the *Pennoyer* regime, state-court jurisdiction to render judgment was grounded in territorial power based on the presence of a person or property within the jurisdiction of a court. Courts sought to determine whether a corporate defendant was "doing business within the State in such manner and to such extent as to warrant the inference that it [was] present there." *Phila. and Reading RR v. McKibbin*, 243 U.S. 264, 265 (1917). In addition, cases under *Pennoyer* also held that jurisdiction could be founded on express or implied consent, which included compliance with a state statute requiring appointment of an agent for service of process as a condition of conducting in-state business. *See, e.g., Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95-96 (1917). Since *Daimler* was handed down, a number of courts have dredged up this old case law in order to distinguish the Supreme Court's recent "at home" precedent.

For example, in *Perrigo Co. v. Merial Ltd.*, No. 14-403, 2015 U.S. Dist. LEXIS 45214 (D. Neb. Apr. 7, 2015), a Nebraska-based plaintiff brought suit in Nebraska federal court for an alleged breach of a settlement agreement by several European-based entities. The court acknowledged that any exercise of general jurisdiction would be improper under *Daimler*, because the European defendants were not "at home" in Nebraska. *Id*. at *15-16. Nevertheless, the court, relying on Eighth Circuit precedent and pre-*International Shoe* Supreme Court jurisprudence, held that appointment of an agent for service of process constitutes binding consent to general personal jurisdiction in the forum state. *Id*. at *17-18. A number of other recent district court decisions have reached similar conclusions, holding that statutes mandating registration by out-of-state corporations and appointment of an agent for service of process warrant the exercise of general jurisdiction based on a theory of consent. *See, e.g., Acorda Therapeutics, Inc. v. Mylan Pharms. Inc.*, 78 F. Supp. 3d 572 (D. Del. 2015); *Senju Pharm. Co., Ltd. v. Metrics, Inc.*, No. 14-3962, 2015 U.S. Dist. LEXIS 41504 (D.N.J. Mar. 31, 2015); *Vera v. Republic of Cuba*, No. 12-1596, 2015 U.S. Dist. LEXIS 32846, at *25 (S.D.N.Y. Mar. 17, 2015); *Forest Labs., Inc. v. Amneal Pharms. LLC*, No. 14-508, 2015 U.S. Dist. LEXIS 23215, at *46 (D. Del. Feb. 26, 2015).

Not every post-*Daimler* decision, however, has accepted this theory of consent by registration to do business. *See Pub. Impact, LLC v. Bos. Consulting Grp., Inc.*, No. 15-464, 2015 U.S. Dist. LEXIS 101398 (M.D.N.C. Aug. 4, 2015); *Astrazeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549 (D. Del. 2014). These decisions have held that "registration to do business in [a] state" and "designation of a statutory agent for service" cannot be construed as consent to general, all-purpose jurisdiction over any and all disputes. *Public Impact*, 2015 U.S. Dist. LEXIS 101398, at *11-14. And these decisions have also recognized that any contrary rule treating "mere compliance with such statutes" as consent would be

directly "at odds with *Daimler*," as it would impose no meaningful limits on general jurisdiction and would continue to "expose companies with a national presence … to suit all over the country." *Astrazeneca*, 72 F. Supp. 3d at 554-57.

The Flaws in the General-Jurisdiction-By-Consent Regime

Appeals presenting the viability of the registration-as-consent rule are currently pending before the Court of Appeals for the Federal Circuit. *See Acordia Therapeutics Inc. v. Mylan Pharms. Inc.*, appeal docketed, No. 15-1456 (Fed. Cir. March 17, 2015); *Astrazeneca AB v. Mylan Pharms., Inc.*, appeal docketed, No. 15-1460 (Fed. Cir. March 17, 2015). Other appeals are sure to follow, and it seems likely that the issue will eventually have to be resolved by the Supreme Court. When that time comes, the Court should — and, in our view, likely will — reject the registration-as-consent rule as contrary to not just *Daimler*, but also decades of settled jurisprudence under *International Shoe*.

The principal problem with the registration-as-consent rule is that it is explicitly predicated upon outmoded pre-*International Shoe* notions of "consent" that were long ago discarded. Indeed, *International Shoe* criticized expansive caselaw on "consent" as a "legal fiction." 326 U.S. at 318-19; *see generally* Philip B. Kurland, The Supreme Court, the Due Process Clause, and the *In Personam* Jurisdiction of State Courts — from *Pennoyer* to *Denckla*: A Review, 25 U. *Chi. L. Rev.* 569 (1958). In the years since *International Shoe*, moreover, the Supreme Court has instructed that "[a]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," not the discarded regime of *Pennoyer*. *See Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). Indeed, the Court has made it clear that "to the extent that prior decisions are inconsistent" with rule of *International Shoe*, "they are overruled." *Id.* at 212 n.39. And *Daimler* itself expressly stated that case law "decided in the era dominated by *Pennoyer's* territorial thinking … should not attract heavy reliance today." *Daimler*, 134 S. Ct, at 761 n.18. These instructions cast significant doubt on any decision that would adopt a rule at odds with the result in *Daimler* based upon century-old, pre-*International Shoe* precedent.

Nor is there any real question that acceptance of a registration-as-consent rule would amount to a *de-facto* overruling of *Daimler*. Every state maintains a mandatory registration statute requiring "a corporation doing business in the state to register … and appoint an agent for service of process." *See* Tanya J. Monestier, Registration Statutes, General Jurisdiction, and the Fallacy of Consent, 36 *Cardozo L. Rev.* 1343, 1345 (2015). States have historically sought to expand their statutory application of personal jurisdiction to the farthest extent constitutionally permitted. For example, in the wake of *Daimler*, the New York State legislature has introduced a bill that would explicitly require consent to general jurisdiction for all corporations doing business in the state. *See* Lanier Saperstein, Geoffrey Sant and T. Augustine Lo, New York State Legislature Seeks to Overturn '*Daimler*,' *N.Y.L.J.*, May 20, 2015, at 4. Additional legislation may well follow in other jurisdictions.

Further, because the only way a defendant could withhold this so-called "consent" would be to refuse to do business within a forum, the submission to jurisdiction under a registration-as-consent rule is in no sense a voluntary submission to general jurisdiction. Compelled registration is not voluntary consent in any meaningful sense. *See Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 891 (S.D. Tex. 1993) ("Consent requires more than legislatively mandated compliance with state laws."). In fact, this type of forced or "extorted" consent may well be independently unconstitutional as a matter of due process or dormant Commerce Clause principles. *See, e.g.*, Monestier, 36 *Cardozo L. Rev.* at 1347 (arguing consent by registration violates the Due Process Clause); Carol Andrews, Another Look at General Personal Jurisdiction, 47 *Wake Forest L. Rev.* 999, 1073-74 (2012) (arguing that consent by registration violates the Dormant Commerce Clause); Br. of Amicus Chamber of Commerce at 18-21, *Acordia Therapeutics, Inc. v. Mylan Pharms. Inc.*, No. 15-1456 (Fed. Cir. May 26, 2015) (arguing that consent by registration violates the unconstitutional conditions doctrine). For all of these reasons, the resurrection of nationwide doing-business jurisdiction under a consent-by-registration rule is contrary to both *Daimler* and modern personal-jurisdiction case law generally. When the time comes, we think the Supreme Court should (and likely will) reject the rule and re-affirm *Daimler's* "at-home" standard.

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