

# Limiting Personal Jurisdiction: Defeating Plaintiffs' Attempts To Avoid *Daimler*

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# **The Significance Of Personal Jurisdiction To Corporations Doing Business Worldwide**

# Quick Personal Jurisdiction Primer

- Personal jurisdiction establishes a court's authority over the defendant
- Due process limits a state's power to assert personal jurisdiction
  - Federalism concerns also relevant
- General jurisdiction vs. specific jurisdiction
  - General: Court may exercise personal jurisdiction with respect to claims unrelated to the forum state
    - “corporation's continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities” (*Daimler*)

# Quick Personal Jurisdiction Primer (2)

- Specific: Personal jurisdiction over claim because it is related to the forum state
  - “the suit arises out of or relates to the defendant’s contacts with the forum” (*Daimler*)
- Supreme Court’s decision in *Daimler* (2014) significantly limited availability of general jurisdiction
  - Many lower courts had held general jurisdiction available as long as defendant corporation had “continuous and systematic” contacts with the forum state
    - Generally held satisfied in large states such as California
  - Supreme Court held that contacts must be so “continuous and systematic” as to render it “essentially at home in the forum state,” which—absent unusual circumstances—restricts general jurisdiction to a corporation’s state of incorporation and state of principal place of business

# Why Should Defendants Care?

- Consequences of *Daimler*
  - Plaintiffs must meet test for specific jurisdiction when suing outside a corporation’s “home” states
  - More focus on standards for establishing specific jurisdiction
- New tools for defendants to avoid plaintiff-friendly “magnet” jurisdictions
  - Force claims into corporate defendants’ “home” states
  - Prevent aggregation by requiring claims to be brought in states in which individual plaintiffs live
- Plaintiffs fight back:
  - Attempts to reintroduce general jurisdiction: “registration” theory; aggregation theory
  - Attempts to broaden specific jurisdiction: Rely on defendants’ contacts unrelated to lawsuit; broad “stream of commerce” approach

# Overcoming The “Registered Agent/Consent” Theory

# The Theory

- What the theory is:
  - A corporation consents to general jurisdiction by registering to conduct business in a state and designating an agent for service of process
- State law vs. federal law aspects
  - What the state statute says and how it has been interpreted
  - Federal due process limitations

# Arguments Plaintiffs Make

- Supreme Court approved this theory in its 1917 decision in *Pennsylvania Fire*
- Some post-*International Shoe*, pre-*Daimler* lower-court decisions approved the theory too
- *Daimler* had nothing to do with jurisdiction by consent and thus didn't disapprove the theory



# Arguments Defendants Can Make

- Plaintiff must prevail under both state law (by showing that registration equals consent under the state statute) and federal law (by showing that that is consistent with due process)
- The arguments
  - Inconsistent with *Daimler* on multiple levels
    - If doing business isn't enough, registering to do business necessarily isn't enough
    - Under *Daimler* there's general jurisdiction in at most two states; under this theory, there's general jurisdiction in all 50
    - If theory were correct, *Daimler* would be “robbed of meaning by a backdoor thief”

# Arguments Defendants Can Make (cont'd)

- The arguments (cont'd)
  - Not what consent means in this context
    - *Insurance Company of Ireland*
    - Unconstitutional conditions
    - Ultimately an attempt to circumvent *Daimler* by substituting words “consents to jurisdiction” for “is subject to jurisdiction”
  - *Pennsylvania Fire* no longer good law

# Notable Post-*Daimler* Appellate Decisions

- *Brown v. Lockheed Martin* (2d Cir. Feb. 2016)
- *Acorda Therapeutics v. Mylan Pharmaceuticals* (Fed. Cir. Mar. 2016)
- *Genuine Parts v. Cepec* (Del. Sup. Ct. Apr. 2016)

# Supreme Court Review?

- Likelihood of review
- Likelihood of success

# ***Daimler's* Implications For Mass Actions And Class Actions**

# Plaintiffs' Tactics



- Use mass actions or class actions to assert “specific” personal jurisdiction in a plaintiff-friendly forum
  - Tactic: Join plaintiffs who can legitimately obtain specific jurisdiction over the defendant
  - Tactic: Claim “specific” jurisdiction based on nationwide conduct in forum state

# Three Responses To Plaintiffs' Tactics



- Argue that a defendant's nationwide practices cannot be used to create specific jurisdiction in each state
- Argue that personal jurisdiction must be separately established as to *each claim* asserted by *each plaintiff*
- Fight joinder

# Argue That A Defendant's Nationwide Practices Cannot Be Used To Create Specific Jurisdiction In Each State

- Plaintiffs' theory would eviscerate *Daimler*
  - Would effectively subject national corporations to general jurisdiction in each state, not just states of incorporation and principal place of business
  - *Daimler* held that “continuous and systematic” contacts with forum state insufficient to establish general jurisdiction
- Basing specific jurisdiction on nationwide practices that did not cause a particular plaintiff to be injured in the forum state is contrary to *International Shoe, Helicopteros, Goodyear* and *Walden*
- Pending cert. petition: *Bristol-Myers Squibb*



# Argue That Personal Jurisdiction Must Be Separately Established As To *Each Claim* Asserted by *Each Plaintiff*

- There is no such thing as a supplemental specific personal jurisdiction
  - Specific personal jurisdiction is claim-specific
  - Specific personal jurisdiction is plaintiff-specific
- A class-action defendant does not lose any defenses that would otherwise be available to it

# Fight Joinder

- Fight joinder as improper
- Move to sever and dismiss claims asserted by non-resident plaintiffs on *forum non conveniens* grounds

# **What Contacts Are Relevant For Establishing Specific Jurisdiction?**

# Eligible Universe: Defendant's Contacts With Forum State



- *Walden*: “defendant’s suit-related conduct must create a substantial connection with the forum State”
  - Contact with plaintiff is not sufficient – even if plaintiff is a forum state resident; must be with *forum state*

# Defendants' Contacts With Forum Must Be Suit-Related

- Supreme Court has said so:
  - Specific jurisdiction is available only where the defendant's in-state activities "g[i]ve rise to the liabilities sued on," or where the suit "relat[es] to that in-state activity" (*Daimler*)
  - "'single or occasional acts' in a State [that are] sufficient to render [it] answerable in that State with respect to those acts, **though not with respect to matters unrelated to the forum connections**" (*Goodyear*)
- Specific jurisdiction rests on—and is limited by—state's regulatory authority:
  - "[t]he obligation which is here sued upon arose out of **those very activities**," making it "reasonable and just \* \* \* to permit the state to enforce **the obligations which [the defendant] ha[d] incurred there**" (*International Shoe*)
  - "depends on an affiliation between the forum and the underlying controversy, principally, **activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation**" (*Goodyear*)

# Efforts To Expand Specific Jurisdiction By Circumventing The “Suit-Related” Requirement

- *BMS* case is an example of this phenomenon
  - Court relied on sales of product in state even though claims did not arise out of those sales
- Other courts have pointed to unrelated in-state activity
  - Efforts to promote product/service even though claims did not arise out of those promotion activities
- Increased reliance on “stream of commerce” theory
  - Supreme Court in *Asahi* (1987) upheld personal jurisdiction over a product manufacturer that placed product into stream of commerce with awareness that it might or would reach the forum state
  - Four Justices held that such awareness was sufficient
  - Four Justices held that more is required: The defendant also must have “purposefully directed” its conduct “toward the forum State,” by, for example, “designing the product for the market in the forum State [or] advertising in the forum State”
  - Court declined to resolve issue in *J. McIntyre* (2011)

# Other Issues

# Practical Considerations

- Need to preserve argument by acting early in case
- Jurisdictional discovery



# Preservation Of Personal Jurisdiction Arguments – Overview

- Ordinarily, a challenge to personal jurisdiction must be raised at the outset of a case; but federal court rules may differ from state court rules, and rules vary from state to state, as to precisely when, and how, the issue must be raised
  - In most jurisdictions, it is no longer necessary to file a “special appearance” to contest personal jurisdiction
  - Under Fed. R. Civ. P. 12, lack of personal jurisdiction may be raised in an answer or by motion to dismiss; but if a defendant files a motion to dismiss before filing an answer, it must object to personal jurisdiction the motion to dismiss to preserve the issue

# Preservation Of Personal Jurisdiction Arguments – Overview (cont'd)

- Some states permit the defendant to raise the issue in its answer as an affirmative defense, while others require the defendant to raise the issue in a pre-answer motion to dismiss
- In some states, filing a pro forma motion to dismiss may suffice to preserve the issue even if the defendant does not file a supporting memorandum or take any action to notice the motion for decision; but in other states, the defendant's failure to present the motion for decision may constitute waiver of the issue
- The bottom line is that it is necessary to act quickly when complaints are served to decide whether, and if so how, to raise the personal jurisdiction issue
- It is imperative to check local rules regarding preservation to ensure that a viable defense of lack of personal jurisdiction is not waived inadvertently

# Personal Jurisdiction – Waiver By Participation In Litigation

- In some states, if the personal jurisdiction issue is raised in an answer or timely-filed motion to dismiss, the defendant may participate in the litigation, *e.g.*, by participating in merits discovery, without waiving the objection
- But in other states, even if the issue is preserved initially in a motion to dismiss or answer, a defendant could be deemed to waive the issue by subsequently taking affirmative actions in the litigation that arguably are inconsistent with the objection to personal jurisdiction
  - For example:
    - Serving affirmative discovery going to the merits
    - Responding to discovery going to the merits
    - Seeking affirmative relief from the court

# Personal Jurisdiction – Waiver By Participation In Litigation (cont'd)

- The prevailing view appears to be that a defendant does not waive an objection to personal jurisdiction by removing a case from state to federal court
- Ordinarily, a defendant may raise lack of personal jurisdiction in a motion to dismiss and, in the same motion, alternatively seek dismissal on other grounds
- Again, the critical point to keep in mind is that the preservation rules may vary; therefore, it is critical to check the local rules quickly and before taking any other action in the case

# Jurisdictional Discovery – Overview



- One potential downside of filing personal jurisdiction motions is that plaintiffs may respond by serving burdensome discovery requests seeking information concerning all of the defendant's present and past connections to the forum state
- Some courts, particularly in plaintiff-friendly jurisdictions, may be inclined to allow plaintiffs considerable latitude in pursuing at least some putative jurisdictional discovery
- But other courts may require a plaintiff to plead at least a prima facie basis for personal jurisdiction before permitting any discovery, or at least be open to objections that would significantly limit the scope of any putative personal jurisdiction discovery

# Jurisdictional Discovery – Objections

- The starting point for objections to jurisdictional discovery, particularly where plaintiff is relying on general jurisdiction, is *Daimler*
- In *Daimler*, the Court noted that the personal jurisdiction issue “should be resolved expeditiously at the outset of litigation” and that any discovery concerning general jurisdiction should be limited because “it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home.” (134 S. Ct. at 762 n.20)
- Plaintiffs should have to show that the discovery sought could lead to information that would satisfy the rigorous “at home” standard for general jurisdiction under *Daimler*

# Jurisdictional Discovery – Objections (cont'd)

- Another important objection is that under *Daimler*, the issue is whether the defendant may be deemed “at home” in the forum *at the time suit is filed* (*Young v. Daimler AG*, 228 Cal.App.4th 855, 864 n.6 (2014)), or, at most, for “a period that is reasonable under the circumstances—up to and including the date the suit was filed.” See *Brown v. Martin Lockheed Corp.*, 814 F.3d 619, 628 n.8 (2d Cir. 2016)
  - Accordingly, where general jurisdiction is at issue, the defendant will have a strong argument that the courts should reject any attempt by plaintiffs to embark on a discovery fishing expedition concerning its business activities in the forum state in years gone by
- And where specific jurisdiction is at issue, a defendant may still be able to object to particular discovery requests on overbreadth or burdensomeness grounds where plaintiff cannot show that his/her claim “arises out of or relates to” the defendant’s business activity in the forum

# **The Current State Of Play In The Supreme Court**



# Pending Certiorari Petitions Covering Multiple Issues

- Scope of the Court's ruling in *Daimler*
  - *BNSF Railway Co. v. Tyrrell*, No. 16-405: Lower court held that *Daimler* is limited to suits against non-US corporations
- Distinction between general and specific jurisdiction
  - *Bristol-Myers Squibb Co. v. Superior Court of Cal., Cnty. of S.F.*, No. 16-466
- Contacts relevant for specific jurisdiction
  - *TV Azteca, S.A.B. de C.V. v. Ruiz*, No. 16-481: Lower court held that general efforts to promote business in the forum state are sufficient to permit specific jurisdiction
- Standard governing the “stream of commerce” theory
  - *Koninklijke Philips N.V. v. Washington*, No. 16-559: Is placing goods into the stream of commerce with knowledge they will reach the forum state sufficient, or must there also be purposeful conduct directed toward the forum state required?

# Questions?

- Please submit questions using the chat feature on the right panel of the WebEx portal
- Please email [prucker@mayerbrown.com](mailto:prucker@mayerbrown.com) with any additional questions, or reach out to us directly:



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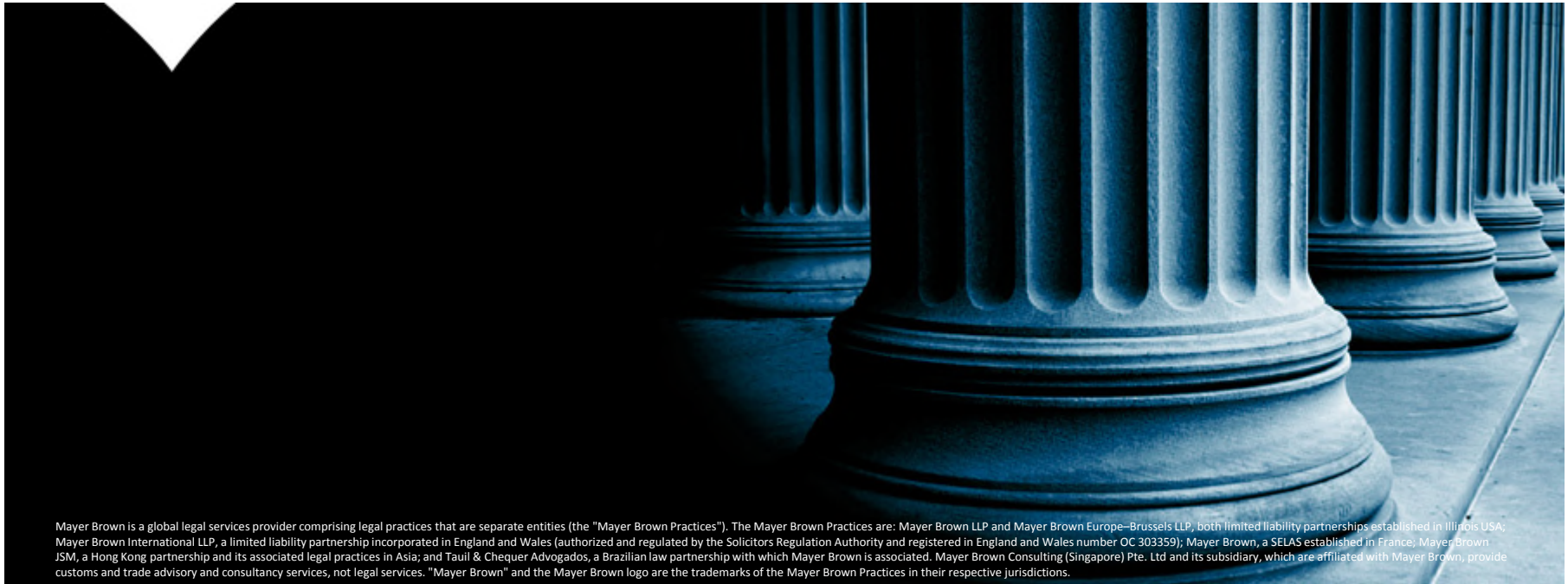


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