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WHEN IS A DEFENDANT TOO BIG FOR GENERAL JURISDICTION?

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WHEN IS A DEFENDANT TOO BIG FOR GENERAL JURISDICTION?

Supreme Court narrows scope of general jurisdiction over foreign corporate defendants.

The U.S. Supreme Court upped the ante for plaintiffs seeking to invoke general, all-purpose personal jurisdiction over foreign corporate defendants. In *Daimler AG v. Bauman*, the Court held that a corporate defendant is subject to general jurisdiction only when the corporation's operations are so continuous and substantial to render it "at home" in that state. Absent such an "exceptional" circumstance, however, a defendant is at home at its place of incorporation or place of business.

The decision effectively limits a court's general jurisdiction, which provides authority to hear claims against a defendant based on its activities anywhere, even if there is no relationship between the claim and the forum. Plaintiffs who are unable to establish a connection between the defendant's activities in the forum state and the conduct at issue under specific, or case-limited, jurisdiction will likely be shut out of U.S. courts.

HUMAN RIGHTS PLAINTIFFS SEEK U.S. FORUM

In *Daimler*, Argentinian residents filed suit in the Northern District of California against Daimler, a German corporation. The plaintiffs alleged that Daimler's Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina), violated the Alien Tort Statute and the Torture Victim Protection Act of 1991 by conspiring with Argentinian security forces to kidnap, torture, and kill certain MB Argentina employees during Argentina's "Dirty War." The plaintiffs argued there was general jurisdiction over Daimler based on the California contacts of its American subsidiary, Mercedes-Benz USA (MBUSA). MBUSA was incorporated in Delaware and had its principal place of business in New Jersey. MBUSA also had multiple facilities in California, as well as $192

billion in sales in California in 2004, which accounted for 2.4 percent of Daimler's worldwide sales. Additionally, the general distributor agreement between Daimler and MBUSA gave Daimler the right to oversee certain of MBUSA's operations, but expressly stated that MBUSA was not a general or special agent of Daimler.

Daimler moved to dismiss. The district court granted the motion, declining to attribute MBUSA's contacts to Daimler due to an inadequate showing of an agency relationship. The court found that Daimler had insufficient contacts with California to support general jurisdiction.

THE NINTH CIRCUIT FINDS GENERAL JURISDICTION

Initially, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling on the grounds there was no agency relationship that would justify imputing MBUSA's contacts to Daimler. Upon a rehearing en banc, a divided Ninth Circuit reversed its earlier decision and held there was general jurisdiction. The majority reached its conclusion after applying a test to determine whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." The appellate court also considered whether the parent had "the right to substantially control" the subsidiary's activities. The Ninth Circuit found that MBUSA acted as Daimler's agent for jurisdictional purposes and attributed MBUSA's California contacts to Daimler.

SUPREME COURT HOLDS DAIMLER IS NOT AT HOME IN CALIFORNIA

A unanimous Supreme Court reversed the Ninth Circuit, finding such an "exorbitant" exercise of personal jurisdiction was barred by due process considerations. In an opinion written by Justice Ginsburg, the Court declined to decide whether general jurisdiction over a foreign corporation could be based on the forum contacts of its in-state subsidiary, because plaintiffs failed to argue that MBUSA served as an alter ego of Daimler, and Daimler conceded that California could exercise general jurisdiction over MBUSA. The Court assumed that MBUSA was at home in California and that its contacts were attributable to Daimler for purposes of the analysis.

The high court ruled that, absent "an exceptional case," general jurisdiction over a corporation will usually be limited to its place of incorporation and principal place of business. The appropriate inquiry in those exceptional cases is whether the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."

Observing that "[a] corporation that operates in many places can scarcely be deemed at home in all of them," however, Justice Ginsburg stated that the general jurisdiction analysis "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." The Court concluded that Daimler was not at home in California. Therefore, the state had no general jurisdiction, regardless of whether MBUSA's contacts were attributable to Daimler. The Supreme Court also observed that such an expansive view of general jurisdiction posed risks to international comity, citing impediments to negotiation of international agreements on reciprocal recognition and enforcement of judgments, as well as potential discouragement of foreign investors.

CONCURRENCE USES "UNREASONABLE" PRONG OF SPECIFIC JURISDICTION ANALYSIS

Justice Sotomayor authored a concurring opinion, arguing that the exercise of general jurisdiction should have been declined on the fact-specific grounds that it was unreasonable considering the case involved "foreign plaintiffs suing a foreign defendant based on foreign conduct." Though general jurisdiction cases have historically looked only to the

sufficiency of a defendant's contact with the forum, Justice Sotomayor would also have applied the reasonableness prong usually reserved for specific jurisdiction cases "without foreclosing future consideration of whether that prong should be limited to the specific jurisdiction context."

Justice Sotomayor disagreed with the Court's new rule requiring a comparison of the defendant's in-state contacts to its nationwide and worldwide contacts to determine whether the defendant was at home in the forum. The concurrence noted the proportionality test was a significant departure from precedent that previously focused only on the defendant's in-state contacts and that interpreted "at home" to mean that a foreign corporation's in-state contacts were "akin to those of a local enterprise." As a result, a company with sufficient forum contacts but more contacts elsewhere could be let off the hook, or be "too big for general jurisdiction."

Since the Court provided no guidance as to the ratio of a corporation's in-state contacts to its out-of-state contacts that would trigger general jurisdiction, the concurring justice warned that the Court's decision would lead to greater unpredictability and expand the scope of jurisdictional discovery. The concurrence suggested that other judicial doctrines could remedy any unfairness to corporations potentially subject to general jurisdiction in multiple states, including the reasonableness prong, the doctrine of forum non conveniens, and change of venue statutes.

Justice Sotomayor also predicted that "deep injustice" would result from the Court's ruling, as follows:

1. The states' sovereign authority to adjudicate disputes over defendants who had engaged in continuous and substantial business operations within their borders would be curtailed.
2. Small businesses would be disadvantaged, because extensive contacts outside the forum would immunize national and multinational businesses from general jurisdiction even though a larger company may do more business in a given state than a smaller one.
3. An out-of-state individual served with process while in-state would be subject to jurisdiction under the Court's ruling in *Burnham v. Superior Court of California,* but a large corporation with extensive operations in the state would not.
4. The risk of loss would be shifted from multinational corporations to injured individuals.

UNRESOLVED QUESTIONS IN THE WAKE OF *DAIMLER*

The Supreme Court declined to consider if and when a subsidiary's contacts can be imputed to a parent corporation, which was the central question on appeal. However, the Court suggested that an agency relationship, without more, is insufficient for attribution in a general jurisdiction analysis. The high court criticized the Ninth Circuit's use of an agency test as "less rigorous" than the standard used by several other circuits, which requires a determination that the subsidiary is the alter ego of the parent before imputing jurisdictional contacts. The Supreme Court stated that the Ninth Circuit's focus on the importance of the subsidiary's activities to the parent "stacks the deck" in favor of jurisdiction; the corporation could always find another means to accomplish the functions of the in-state subsidiary if it did not exist. The result would "subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate," and go beyond the traditional boundaries for all-purpose jurisdiction.

Section leaders agree that the Ninth Circuit's agency analysis was flawed. "If you just look at agency, it ignores due process considerations," says Lori B. Leskin, New York, NY, former cochair of the ABA Section of Litigation's Products Liability Committee. "Agency just has to do with the relationship between the corporations in theory. It doesn't answer the question of whether you can exercise U.S. jurisdiction over a German corporation."

A more appropriate requirement for attribution of contacts would call for analysis similar to the alter ego doctrine, according to C. Ryan Reetz, Miami, FL, vice-chair of the Section of Litigation's International Litigation Committee. "That is when agency becomes most relevant to the question of general jurisdiction, the idea of the company being truly and meaningfully present in the state," he

TREND: SUPREME COURT LIMITS U.S. SUITS AGAINST FOREIGN DEFENDANTS FOR OVERSEAS ACTIVITY

CASE	HOLDING
Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010).	Section 10(b) of the Securities and Exchange Act does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.
Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).	Foreign subsidiaries of an Ohio corporation were not at home in North Carolina for general jurisdiction purposes since only a small percentage of their products were distributed in North Carolina.
Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).	The presumption against extraterritorial application of U.S. law barred claims by Nigerian plaintiffs against foreign oil companies for violations of the Alien Tort Statute.
Daimler AG v. Bauman, No. 11-965 (U.S. Jan. 14, 2014).	A corporation is subject to general jurisdiction only when its operations are so continuous and substantial to render it at home in that state.

explains. "Otherwise, an agent is typically an agent for a limited purpose, and therefore, is not really the corporation, but merely someone who does certain things for the corporation. Unless the corporation has really lowered the corporate walls by having a general agent in the state who acts for the corporation for all purposes, it is strange to attribute the contacts of an agent to the corporation for general jurisdiction purposes," he adds.

TREND TOWARD SPECIFIC JURISDICTION

The *Daimler* Court observed that in the development of personal jurisdiction law, specific jurisdiction has "become the centerpiece of modern jurisdiction theory while general jurisdiction [has played] a reduced role." Prior to *Daimler*, the Supreme Court in 2011 held that general jurisdiction did not extend to foreign subsidiaries of a U.S. corporation in *Goodyear Dunlop Tires Operations, S.A. v. Brown*. In *Goodyear*, parents of two boys from North Carolina killed in a bus accident in France brought a wrongful death suit in North Carolina state court against Goodyear, an Ohio corporation, and three of Goodyear's foreign subsidiaries. The Supreme Court found the foreign subsidiaries were not at home in North Carolina for general jurisdiction purposes, seeing as only a small percentage of their tires were distributed in the state. Similarly, in *Kiobel v. Royal Dutch Petroleum Company*, the Court ruled in 2013 that a presumption against extraterritorial application of U.S. law barred claims by Nigerian plaintiffs against foreign oil companies for violations of the Alien Tort Statute.

"*Daimler* continues a trend of narrowly defining general jurisdiction that began in *Goodyear*. While it's true that the Supreme Court doesn't have any earlier decisions that apply general jurisdiction broadly, the lower courts have interpreted it much more broadly than the Court has in *Goodyear* and *Daimler*," says Reetz. "Here, the Supreme Court seems to be saying it's not a question of how many and how strong the defendant's ties are to the state—which is the traditional analysis—but whether those ties are the most significant ties the corporation has to all potential jurisdictions."

Human rights plaintiffs will face high barriers to U.S. courts because the Supreme Court has signaled that American courts will play a reduced role in the international arena. Recent decisions extend the presumption against extraterritorial application of law and limit the reach of the Alien Torts Statute and the Torture Victims Protection Act, observes Reetz. "It will be more difficult for plaintiffs to get general jurisdiction with the Court's notion of being 'at home,' which limits home to the place of incorporation and principal place of business unless there's an exceptional circumstance," agrees Leskin.

"The lesson is that the Court is going to require, in specific jurisdiction cases such as this one, that there be some concrete nexus between the conduct alleged in the complaint and the forum state," says Loren Kieve, San Francisco, CA, cochair of the Section's Attorney-Client Privilege Task Force and member of the Federal Practice Task Force. For human rights plaintiffs, "that is likely to be difficult to establish."

RESOURCES

- *Daimler AG v. Bauman*, No. 11-965 (U.S. Jan. 14, 2014).
- *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).
- *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).
- *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).
- *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
- Robin E. Perkins, "SCOTUS: No General Jurisdiction Based on Agency Relationships," ABA Section of Litigation Corporate Counsel Committee, News & Developments, Jan. 24, 2014, available at http://www.bit.ly/corporate-news.
- David A. Hanna, "*Kiobel* and the Exclusion of Foreign Torts," ABA Section of Litigation International Litigation Committee, News & Developments, Dec. 11, 2013, available at http://www.bit.ly/international-news.