Rethinking *Daimler*

Examining the Ways That Plaintiffs Seek to Narrow *Daimler v. Bauman*

By Jesse G. Ainlay and Elizabeth S. Dillon

Many attorneys initially predicted that courts would increasingly dismiss cases against corporate defendants for lack of general jurisdiction. Plaintiffs, however, have found a number of ways to persuade courts to find jurisdiction over out-of-state corporations, seemingly circumventing the Supreme Court's decision in *Daimler*.

In January 2014, the Supreme Court of the United States issued its opinion in *Daimler AG v. Baumen, et al.*, holding that a court may only assert general jurisdiction over out-of-state corporations when "their affiliations with the [forum] State are so 'continuous and systematic' as to render them essentially at home." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Initially, commentators speculated that the Court's decision in *Daimler* would "change the game" in the mass tort context because corporations are often sued in plaintiff friendly jurisdictions for alleged actions that took place outside those jurisdictions. Often, these plaintiff friendly jurisdictions are neither the defendant's state of incorporation nor its principle place of business. Many attorneys predicted that courts would, based on *Daimler*, increasingly dismiss cases against corporate defendants for lack of general jurisdiction. *See* Christopher Renzulli & Peter Malfa, *Personal Jurisdiction and Forum Selection: Choice of Law Provisions*, 56 DRI For Def., June 2014, at 30 ("following *Daimler*, courts will be more hesitant to find sufficient affiliations with a state to establish personal jurisdiction"). In the nearly three years since *Daimler*, however, we have seen a number of different ways that plaintiffs have persuaded courts to find jurisdiction over out-of-state corporations, seemingly circumventing the Supreme Court's decision in *Daimler*. This article discusses those efforts by surveying key cases in which plaintiffs have successfully defeated defendants' attempts to dismiss cases for lack of personal jurisdiction. The ultimate goal of this article is to highlight the considerations that corporate defendants must take into account to thwart

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plaintiffs' efforts to escape the geographical confines of *Daimler*, and thereby avoid litigating cases in forums in which they do not belong.

Daimler and the History of Personal Jurisdiction in the United States

The history of personal jurisdiction in the United States probably begins with a 1877 case, *Pennoyer v. Neff*, in which the Supreme Court held that a court's jurisdiction was relatively narrow and "necessarily restricted by the territorial limits of the State in which it is established." 95 U.S. 714, 720 (1877). The Supreme Court subsequently widened its view of *specific* jurisdiction in *International Shoe*, holding that a defendant may be subject to specific jurisdiction in a forum when his or her unlawful conduct occurs in the forum, *International Shoe Co. v. Office of Unemployment Compensation and Placement*, 326 U.S. 310, 317 (1945), *and* when he or she " ha[s] certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 320.

As the Court noted in *Daimler*, 134 S. Ct. at 748–49, the Supreme Court's decision in *International Shoe* "presaged the recognition of two personal jurisdiction categories." The first, general personal jurisdiction, permits the court to exercise jurisdiction when a foreign corporation's "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." *International Shoe*, 326 U.S. at 318. The second, specific personal jurisdiction, (discussed in *International Shoe*), permits a court of a forum to exercise jurisdiction when the action "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n.8 (1984).

Since *International Shoe*, the scope of specific jurisdiction has broadened significantly, having been "cut loose from *Pennoyer's* sway." *See Daimler*, 134 S. Ct. at 749. In contrast, as set forth in the three decisions discussing general jurisdiction between *International Shoe* and *Daimler* (*i.e.*, *Perkins v. Benguet Consol Mining Co., Helicopteros Nacionales de Colombia v. Hall,* and *Goodyear Tires Operations, S.A. v. Brown)*, the Supreme Court maintained the narrow scope of general jurisdiction set forth above. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales de Colombia*, 466 U.S. at 416; *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 565 U.S. 915 (2011). This trend continued with the Supreme Court decision *Daimler AG v. Bauman*. In *Daimler*, the Supreme Court held that a nonresident corporation is not subject to a forum's *general* jurisdiction based solely on its "continuous and systematic" contacts in the forum. Rather, a defendant corporation is subject to a court's general jurisdiction only when its "affiliations with the State [in which the court sits] are *so* 'continuous and systematic' as to render it *essentially at home*" there. 134 S. Ct. at 761 (*emphasis added*). Notably, the *Daimler* Court reasoned that it would be "unacceptably grasping" if a corporation were subject to general jurisdiction in "every state" in which it "engages in a substantial, continuous, and systematic course of business." *Id.* at 760–61. The Court held that a nonresident corporation would be subject to a forum's general jurisdiction only in an "exceptional case" in which the corporation's "operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that state." *Id.* at 761 n.19. While the Supreme Court's *Daimler* decision appeared to maintain the Court's narrow view of general jurisdiction, some plaintiffs have successfully distinguished their cases from *Daimler* and persuaded courts to maintain jurisdiction over foreign corporations.

Plaintiffs' Efforts to Defeat *Daimler*

While some courts have followed the Supreme Court's decision in *Daimler* and dismissed improperly filed cases against nonresident defendants, plaintiffs in certain jurisdictions have managed to successfully defeat defendants' attempts to dismiss a plaintiff's complaint for lack of general personal jurisdiction using a myriad of different arguments. Some plaintiffs have convinced the court that a corporate defendant consented to jurisdiction by registering to do business in the forum state, while others have found success arguing that a defendant forfeited or waived the defense of lack of personal jurisdiction by actively participating in a defense on the merits of a case. In yet other cases, plaintiffs have shifted the focus entirely away from general jurisdiction, focusing instead on expanding the scope of specific jurisdiction. Other plaintiffs have even convinced courts simply not to follow the decision in *Daimler,* most commonly by finding ways to distinguish the facts of their case from those of *Daimler.*

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Consent to Jurisdiction

Plaintiffs in several jurisdictions have successfully defeated defendants' attempts to dismiss a plaintiff's complaint for lack of general personal jurisdiction by convincing the court that the corporate defendant consented to jurisdiction by registering to do business in the forum state. The Supreme Court of the State of New York, County of New York, recently addressed the issue in its decision in *Bailen v. Air and Liquid System Co.* In *Bailen*, the court determined that the defendant, a Delaware corporation with its principal place of business in Nebraska, had consented to jurisdiction in New York by registering to do business in that state, despite the fact that the defendant did not maintain any office space or regularly conduct business in New York. *Bailen v. Air and Liquid System Co.*, 2014 WL 3885949 (N. Y. Sup. Aug. 5, 2014). Even though "the place of incorporation and principal place of business are paradigm… bases for general jurisdiction," *Goodyear*, 131 S. Ct. 2853–54, and it is "incredibly difficult to establish general jurisdiction in a

forum other than the place of incorporation or principal place of business," *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014), the *Bailen* court found that neither *Daimler* nor *Goodyear* "change the law with respect to personal jurisdiction based on consent." *Bailen*, 2014 WL 3885949, at *4. The court rationalized that "[a]lthough *Daimler* clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent." *Bailen*, 2014 WL 3885949, at *4.

Plaintiffs have successfully argued that defendants forfeit or waive their defense of lack of personal jurisdiction by actively participating in a defense on the merits of a case.

Similar to the court in *Bailen*, the United States District Court for the Southern District of New York noted in *Vera v. Republic of Cuba* that *Daimler* "should not be read so broadly as to eliminate the necessary regulatory oversight into foreign entities that operate within the boundaries of the United States." *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561, 570–71 (S.D. N. Y. 2015). Therefore, while lower courts have acknowledged that an "application of the consent doctrine in the context of [a] business registration statute [leads] to an odd result following *Daimler*, because it essentially permits a finding of personal jurisdiction in any state in which the company does business," *Acorda Pharmaceuticals v. Mylan Pharmaceuticals Inc.*, 817 F. 3d 775, 591 (Fed. Cir. 2006), the alternative course of reading the holding of *Daimler* as addressing all situations of general jurisdiction is simply "not recommended." *Pfizer Inc. v. Mylan, Inc.*, 2016 WL 1319700, at *9–10 (D. Del. Apr. 4, 2016).

When taken together, these cases demonstrate that some courts have limited and narrowed the scope of *Daimler* to its facts, thereby producing results that are seemingly contrary to its explicit holding. It appears that these courts draw a distinction between consensual and nonconsensual forms of personal jurisdiction, with courts finding consensual jurisdiction when a "defendant purposefully avail[s] itself of the forum" state. *Daimler*, 134 S. Ct. at 755. The underlying rationale in these cases is that since the jurisdiction asserted in *Daimler* was nonconsensual, the Supreme Court's decision does not address (or apply to) consensual jurisdiction and its merits. In the absence of Supreme Court guidance on consensual jurisdiction, in some cases the lower courts have extended and enlarged the scope of consensual jurisdiction to include registering to do business in a particular state. *Forest Laboratories, Inc. v. Amneal Pharmaceuticals LLC*, 2015 WL 880599, at *4 (D. Del. Feb. 26, 2015); *Celgard, LLC v. SK Innovation Co.*, 792 F.3d 561 (S.D. N. Y. 2015); *Otsuka Pharmaceutical Co., Ltd. v. Mylan Inc.*, 106 F. Supp. 3d 456, 467 (D. N.J. 2015). In doing so, however, these courts have essentially eroded the spirit of *Daimler* and created a precedent "that permits a finding of personal jurisdiction in any state in which the company does business."

Forfeiture or Waiver

In other jurisdictions, plaintiffs have successfully argued that defendants forfeit or waive their defense of lack of personal jurisdiction by actively participating in a defense on the merits of a case. *See Bazor v. Abex Corp.*, C.A. No. PC-10-3965 (R.I. Super. May 2, 2016); *Am. Int'l Ins. Co. v. Robert Seuffer GMBH & Co. KG*, 468 Mass. 109 (Mass. 2014); *German Am. Financial Advisors & Trust Co. v. Rigsby*, No. 15-1612, 623 F. App'x 806, 2015 WL 5579751 (7th Cir. Sept. 23, 2015).

In May 2016, the Rhode Island Superior Court held that a defendant's active participation in a case for over two years before filing a motion to dismiss for lack of personal jurisdiction constituted a forfeiture of the defense. The court reasoned that the defendant actively participated in litigating the matter by conducting depositions of the plaintiff and plaintiff's experts, filing pleadings, participating in status conferences, and filing motions. In its opinion, the court differentiated between a "waiver" of the defense of lack of personal jurisdiction compared to a "forfeiture." Specifically, the court held that the failure to raise a jurisdictional defense in a responsive pleading constitutes a waiver, but "'[w]here a litigant's action or inaction is deemed to incur the consequence of a loss or a right, or as here, a defense, the term 'forfeiture' is more appropriate.'" The court determined that although the moving party purported to assert its jurisdictional defense in its answer and throughout the more than two-year discovery period, the defendant "did not have a sufficiently meritorious reason for delaying the assertion of the defense." As such, although it seemingly acknowledged the defendant corporation's lack of contacts with the forum state, the court still found general jurisdiction over the defendant.

Similarly, the United States Court of Appeals for the Seventh Circuit, in *German American Financial Advisors & Trust Co. v. Rigsby*, ruled that a defendant had waived a personal jurisdiction defense by failing to preserve the defense in responsive pleadings. *German American Financial Advisors*, 2015 WL 5579751, at *2.

Although not involving a foreign corporation, the Seventh Circuit's decision highlights the consequences of waiving a personal jurisdiction defense through litigation on the merits. In *German American*, rather than asserting a defense of lack of personal jurisdiction due to improper service, the relevant defendant instead moved for additional time to respond to the plaintiff's summary judgment motion. In her motion for additional time, the defendant proposed substantive defenses to challenge the plaintiff's summary judgment motion if more time was not allowed. In affirming the conclusion that this defendant waived her personal jurisdiction defense, the Seventh Circuit relied on the rule that "a defendant will waive objection to the absence of personal jurisdiction by giving the plaintiff a 'reasonable expectation' that she 'will defend the suit on the merits.'" *Id.* (internal citation omitted).

The finding of forfeiture or waiver of a personal jurisdiction defense is particularly problematic in situations in which cases are expedited for trial due to a plaintiff's declining health and discovery is conducted quickly to preserve the plaintiff's testimony. Defendants must balance the need to participate in the defense of the case to protect their interests, while being mindful of working to preserve their jurisdictional objections early and assertively.

Specific Jurisdiction

Plaintiffs in a number of other jurisdictions have endeavored to limit *Daimler's* effect by shifting the focus away from general jurisdiction and instead focusing on expanding the scope of specific jurisdiction. In these cases, courts have determined that although there may be insufficient contacts to invoke general jurisdiction under *Daimler*, a court may still have specific jurisdiction over a claim against a foreign corporation for actions occurring entirely outside of the state if such actions are "sufficiently related" to conduct that takes place in the forum state. *Bristol-Myers Squibb Co. v. Superior Court of San Francisco*, No. S221038, 377 P.3d 874 (Cal. Aug. 29, 2016); *In Re LIBOR-Based Financial Instruments Antitrust Litigation*, 2015 WL 6243526, at * 27 (S.D.N.Y. Oct. 20, 2015); *In Re Capacitors Antitrust Litigation,* 2015 WL 3638551 (N.D. Ca. Jun. 11, 2015).

In *Bristol-Myers Squibb Co. v. Superior Court of San Francisco, et al.*, the Supreme Court of California considered whether a California court had jurisdiction over 592 nonresident plaintiffs who were part of a class action suit against Bristol Myers Squibb (BMS) for injuries resulting from ingestion of the medication Plavix. In its analysis, the court noted that BMS is incorporated in Delaware, it is headquartered in New York, and it has substantial operations in New Jersey. The court further acknowledged that BMS never manufactured Plavix in California, and none of the 592 nonresident plaintiffs purchased or ingested Plavix in California. Therefore, the court held that there were insufficient contacts to consider BMS "at home" in California under *Daimler,* and the court lacked general jurisdiction in the case.

Instead, the court turned to an analysis of whether California had specific jurisdiction over BMS. The court reasoned that while the actions occurred entirely outside the forum state, BMS purposely availed itself of the benefits of California by its extensive marketing and distribution of Plavix in California, by contracting with a California distributor, and by employing hundreds of California-based salespersons, resulting in substantial sales of Plavix in the forum state. Moreover, the court was persuaded by the fact that BMS had significant research and development facilities in California, which, although they were not connected directly to the development of Plavix, directly related to BMS's nationwide marketing and distribution of Plavix, as well as the plaintiffs' claims that BMS engaged in a course of conduct of negligent research and design that led to their injuries. 377 P.3d at 888. The court held that the plaintiffs' claims, therefore, either arose from or were related to BMS's California activities, and the court had specific jurisdiction over the 592 nonresident claims without offending the notion of due process.

The Supreme Court of California reconciled its decision with *Daimler* by reasoning that unlike general jurisdiction, "which permits the exercise of jurisdiction over a defendant regardless of the subject of the litigation," the invocation of specific jurisdiction in this case "is limited to specific litigation related to the defendant's state contacts." *Id*. at 888–89. The practical reality of the decision in the mass tort context, however, is that it sets a precedent for finding specific jurisdiction over any foreign corporation that sold, marketed, or distributed products nationally, even if the injuries giving rise to the claim occurred wholly outside the forum state. As the dissent in *Bristol-Myers Squibb Co.* noted, the decision essentially "sanctions [California] to regularly adjudicate disputes arising purely from conduct in other states, brought by nonresidents who suffered no injury [in California], against companies who are not home [in California] but simply do business in the state." *Id*. at 910. This appears to contradict the spirit of the Supreme Court's decision in *Daimler* directly.

Court Failure to Follow *Daimler*

Despite the binding precedent set by the Supreme Court of the United States, some state courts have seemingly refused to follow the Court's decision in *Daimler.* The failure to follow *Daimler* is often times subtle and discrete; courts have been hesitant to state explicitly their intentions to rule against the highest legal authority in the nation. For example, in *Aspen American Ins. Co. v. Interstate Warehousing Inc.*, *Aspen American Ins. Co. v. Interstate Warehousing Inc.*, 2016 WL 3569563 (IL App. App. Jun. 30, 2016), the Appellate Court of Illinois included a lengthy discussion of *Daimler*, acknowledging its central proposition that a foreign corporation is subject to general personal jurisdiction when the affiliations with the jurisdiction are "continuous and systematic as to render it essentially at home in the forum state." *Id*. at *7 (citing and quoting *Daimler*, 134 S. Ct. at 761). In finding personal general jurisdiction over the defendant, however, the court determined that the defendant had sufficient contact in Illinois because it maintained and operated a warehouse in Illinois, even though the defendant was incorporated in Indiana and the accident giving rise to the plaintiff's injuries occurred in Michigan. *Aspen*, 2016 WL 3569563, at *1. *See also Jeffs v. Anco Insulations*, No. 15-L-533 (Ill. Ct. Cl. 2015); *Strong v. American Optical*, No. 16-L-690 (Ill. Ct. Cl. 2016) (holding that a foreign corporation had continuous and systematic contact by registering to do business in Illinois, advertising, selling, and servicing vehicles through its authorized dealers, employing Illinois citizens in its plant and dealerships located in the state, and regularly litigating numerous other asbestos and personal injury cases before the Illinois courts). What is common in the cases that have failed to follow *Daimler* is that the courts most commonly rationalize the decision by distinguishing the facts of *Daimler* from the facts of their cases. In doing so, however, these courts are diminishing the importance of the Supreme Court's decision.

Courts Following *Daimler*

Of course, not every plaintiff who attempts to distinguish his or her case from *Daimler* has succeeded, and some courts have followed *Daimler* by dismissing actions improperly brought against nonresident corporate defendants whose contacts with

the forum do not render the corporation "essentially at home" in the forum.

In *Monkton Ins. Servs. Ltd. v. Ritter*, the United States Court of Appeals for the Fifth Circuit held that the defendant, a Cayman bank incorporated in the Cayman Islands with a principal place of business of George Town, Grand Cayman, was "at home" in the Cayman Islands, and not Texas, where plaintiff brought suit. *Monkton Ins.*, 768 F.3d at 432. The *Monkton* court held that the plaintiff's allegations that the defendant conducted business with the plaintiff in Texas and wired money to banks in Texas were insufficient to establish that Texas courts had general jurisdiction over the defendant. *Id.* Notably, the Fifth Circuit also upheld the district court's decision to deny jurisdictional discovery regarding, among other things, the "nature, quality and quantity" of the defendant's contacts with the forum state. *Id.* at 434.

In *Brown v. Lockheed Martin Corp.*, the Second Circuit held that a corporation's registration in Connecticut was not enough to render the corporation subject to general jurisdiction there. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 625 (2d Cir. 2016). Additionally, the court held that the following contacts with Connecticut did not subject the defendant to general jurisdiction there: (1) the defendant's physical presence in Connecticut for over 30 years; (2) the defendant's lease of four business locations in Connecticut; (3) the defendant's employment of 30–70 workers in Connecticut over a four-year period; (4) the defendant's $160 million in revenue for Connecticut-based work; and (5) the defendant's payment of Connecticut state taxes on its revenue earned in Connecticut. *Id.* at 628. Notably, however, the court did hold, in dicta, that a defendant may waive its lack of personal jurisdiction defense for failure to comply with jurisdictional discovery orders. *Id.* at 624.

In *Long v. Patton Hospitality Mgmt., LLC*, the U.S. District Court for the Eastern District of Louisiana held that it had no general jurisdiction over a limited liability company incorporated in Nevada, with its principal place of business in Nevada, and sole member domiciled outside of Louisiana. *Long v. Patton Hospitality Mgmt., LLC*, 2016 WL 760780, at *1, 5 (E.D. La. Feb. 26, 2016). Notably, the court held that the defendant was not subject to general jurisdiction, even though the defendant appointed an agent for service of process in Baton Rouge, Louisiana. *Id.* at *2. This is directly in contrast to the Delaware and New York interpretations of *Daimler* as respectively set forth in the above-referenced *Bailen* and *Vera* cases. The holding is also notable in that the court found that the following contacts with Louisiana did not render the defendant subject to general jurisdiction in the state: (1) the defendant's management of property in Louisiana; (2) the defendant's payment of state and property taxes in Louisiana; and (3) the defendant's employment of nine individuals in Louisiana. *Id.* at *4. In holding that these contacts were insufficient to establish general jurisdiction, the *Long* court specifically interpreted the *Daimler* decision as holding that "doing business" in a state does not alone "render a foreign company 'at home' in that state." *Id.* at *5 (*quoting Daimler*, 134 S. Ct. at 762, n.20).

Conclusion

Whether a court has general jurisdiction over a nonresident corporate defendant is largely based on that court's interpretation of *Daimler*. As set forth above, some courts have interpreted the precedential weight of *Daimler* in a more stringent manner than others. In the nearly three years since the Court's decision in *Daimler*, the true effect of the decision remains unclear. It is likely that jurisdictions will continue to interpret personal jurisdiction under *Daimler* in their own, seemingly inconsistent ways, unless and until the Supreme Court further clarifies the intent of their decision. What is clear is that plaintiffs will continue to look for ways to distinguish their cases from *Daimler* to defeat defendants' motions to dismiss for lack of personal jurisdiction. As a result, defendants must be aware of the ways that plaintiffs have successfully argued for jurisdiction over foreign corporations and prepare to address those arguments in their cases. FD