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Surveying the **Application** of **'Daimler'** in the Circuits

2014 decision provided significant guidance on jurisdiction.

BY STEPHEN BALDINI, ANTHONY PIERCE AND STANLEY WOODWARD

The decision in *Daimler v. Bauman*,[1] is hailed as "arguably the most important U.S. Supreme Court ruling on general personal jurisdiction in 70 years."[2] In *Daimler*, the U.S. Supreme Court unanimously held that a corporation may be subject to general personal jurisdiction only where its contacts with a forum state are so "continuous and systematic" such that the corporation is "essentially at home in … the State."[3] Except in exceptional circumstances,[4] the court further affirmed that the "paradigm" bases for general personal jurisdiction—where a corporation may be considered "at home"—are that corporation's "place of incorporation and principal place of business."[5] This watershed decision reversed the notion that companies with substantial sales throughout the United States can be sued anywhere. While it has been nearly two years since *Daimler*'s issuance, there have been notably few challenges to the exercise of general personal jurisdiction in the U.S. federal circuit courts. Indeed, the First, Fourth, Sixth, Eighth, Tenth, D.C., and Federal Circuits have yet to substantively consider a challenge to the exercise of general personal jurisdiction. Those courts that have addressed the issue, however, highlight who the beneficiaries of *Daimler* are: non-U.S. entities, entities sued in inconvenient forums, and, potentially, entities whose websites are accessible in many jurisdictions.

General Jurisdiction

Daimler involved the potential exercise of general personal jurisdiction over German DaimlerChrysler Aktiengesellschaft (Daimler) based on the contacts of its U.S. subsidiary, Mercedes-Benz USA (MBUSA).[6] MBUSA is a Delaware limited liability corporation serving as Daimler's exclusive importer and distributor in the United States where California then claimed more than 10 percent of all sales of new vehicles and accounted for 2.4 percent of Daimler's worldwide sales.[7] In 2004, the year the action was filed, Daimler's California sales amounted to $4.6 billion. The Supreme Court acknowledged the amount was "a considerable sum by any measure."[8]

Despite such contacts, the Supreme Court held that there was "no basis to subject Daimler to general jurisdiction in California."[9] In reaching this decision, the court noted that "[i]f Daimler's California activities sufficed to allow adjudication … the same global reach would presumably be available in every other State in which MBUSA's sales are sizable."[10] As discussed in the following cases, *Daimler*'s impact should be significant. The decision has the potential to reduce litigation exposure for companies in jurisdictions other than where the purported harm occurred.

Increased Protection for Non-U.S. Entities

Arguably the preeminent beneficiaries of *Daimler* are entities incorporated and headquartered outside the United States. After *Daimler*, such companies are subject to a U.S. court's jurisdiction only when they direct conduct toward the United States and thus give rise to an action. The Second, Fifth, Ninth, and Eleventh Circuits, have all confirmed as much (and no circuit has held to the contrary). Resoundingly, these courts have rejected the exercise of general personal jurisdiction against entities in actions where the conduct giving rise to the action occurred outside the United States.

For instance, in *Gucci Am. v. Bank of China*, the Second Circuit held that the exercise of general personal jurisdiction over a foreign bank, Bank of China, in an action where the conduct at issue occurred entirely outside the United States, was improper. This was despite Bank of China's maintenance of branch offices in the forum because the court noted the bank was incorporated and headquartered elsewhere.[11] Notably, the court explicitly acknowledged that this approach departed from Second Circuit precedent dating back to 1985, but overturned by *Daimler*.[12]


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Relatedly, in *Monkton Ins. Servs. v. Ritter*, the Fifth Circuit held that the exercise of general personal jurisdiction over a Cayman Islands bank, Butterfield Bank (Cayman) Limited (Butterfield), was improper where Butterfield was incorporated and headquartered in the Cayman Islands.[13] The court was not persuaded by Butterfield's contacts with Texas through its website, its telephone conversations with the plaintiff, a Texas resident, and wire transfers to Texas banks at the request of the plaintiff.[14]

Similarly, in *Ranza v. Nike*, the Ninth Circuit held that the exercise of general personal jurisdiction over a wholly owned foreign subsidiary of Nike would be improper because the subsidiary was neither incorporated within nor maintained its principal place of business within the pertinent forum.[15] Further, the court rejected the argument that by having a nominal number of employees travel to the forum and otherwise work within the forum the subsidiary rendered itself "at home" there.[16]

And in *Carmouche v. Tambrolee Mgmt.*, the Eleventh Circuit held that the exercise of general personal jurisdiction over Tamborlee Management (Tamborlee), a corporation registered in Panama providing shore excursions for tourists in Belize, would be improper.[17] The court noted that Tamborlee had never operated a shore excursion in Florida, had never advertised to potential customers in Florida, and had never been incorporated or licensed to do business in Florida. Following *Daimler*, the court found that these factors outweighed the fact that Tamborlee had insurance contracts with Florida entities, a bank account in Florida, a membership in a Floridian trade association, at least one post-office box

STEPHEN BALDINI *is a partner at Akin Gump Strauss Hauer & Feld in New York and head of the firm's litigation practice.* ANTHONY PIERCE *is a partner and* STANLEY WOODWARD *is counsel in the firm's Washington, D.C. office.*

in Florida, and a contract with Carnival Corporation consenting to the jurisdiction of the Southern District of Florida for any and all disputes arising from the same.[18]

Protection From Inconvenient Forums

Daimler's holding similarly protects U.S. entities from being subjected to jurisdiction in an inconvenient forum with unfamiliar practices and legal precedents and that presents the risk of navigating an unqualified, inconsistent, and/or inexperienced bench and/or jury. Rather, after *Daimler*, U.S. corporations should only be sued where they are incorporated or headquartered, or where the conduct giving rise to the action was directed at the forum.

For example, in *Chavez v. Dole Food Co.*, the Third Circuit concluded the exercise of general personal jurisdiction over Chiquita Brands International (Chiquita) would be improper because Chiquita was neither incorporated nor headquartered in Delaware.[19] In dismissing the suit against Chiquita, the District Court considered, but ultimately declined to exercise jurisdiction despite Chiquita's being "generally present with continuous and systematic activity in Delaware" and the fact that Chiquita's main operating subsidiary was a Delaware corporation.[20]

Similarly, in *Kipp v. SKI Enter. Cor. of Wis.*, the Seventh Circuit held the exercise of general personal jurisdiction improper because SKI Enterprise Corporation of Wisconsin (SKI), was incorporated in and headquartered in Wisconsin, rather than Illinois where the suit was filed. The court acknowledged, that SKI attended an annual trade show in Chicago, collected email addresses of Illinois residents for marketing purposes at that show, specifically targeted Illinois residents with its advertising, successfully attracted a large number of Illinois residents to its Wisconsin resort, and published a website accessible to Illinois residents.[21] However, the court did not find these factors amounted to the necessary requirements for general personal jurisdiction.

Potential Limitation of Internet Jurisdiction

The last category of *Daimler* beneficiaries are potentially companies whose only contacts with a foreign jurisdiction are tied to their website. In *First Metro. Church of Houston v. Genesis Group*, the Fifth Circuit held that "maintaining an interactive website is not enough to establish general personal jurisdiction."[22] While the per curiam decision omitted reference to the *Zippo* "Sliding Scale" test,[23] which has been expressly adopted in the Circuit,[24] its holding potentially conflicts with the application of that test.

Practical Implications

To be sure, not all courts are following the clear guidance articulated by *Daimler*. As others have written, two recent decisions of the Southern District seemingly depart from *Daimler* and *Gucci*.[25] Mindful of the importance decisions of the numerous district courts play in the persuasion of judges, practitioners should evaluate how their own courts have applied this watershed decision in enabling companies to seek the dismissal of actions based solely on the exercise of general personal jurisdiction.

First, companies seeking to dismiss actions based solely on the exercise of general personal jurisdiction should emphasize that the burden of establishing jurisdiction rests with plaintiffs.[26] Thus it is plaintiffs who must allege, by a preponderance of the evidence, that an entity neither incorporated nor headquartered in a given forum nevertheless has the "limited set of affiliations with a forum [that] render [the entity] amenable to all-purpose jurisdiction there."[27]

Second, companies seeking to dismiss actions should disclose their contacts with the given forum through the submission of affidavits to provide a complete picture of such contacts and highlight their insignificance as compared to *Daimler*. So doing will avoid a district court's exercise of general personal jurisdiction based solely on a plaintiff's pleadings and avoid the possibility of awarding a plaintiff jurisdictional discovery. In *Daimler*, MBUSA was "the largest supplier of luxury vehicles to the California market,"[28] with approximately $4.6 billion in sales.[29] Similarly, the court acknowledged the existence of "multiple California-based facilities, including a regional office …, a vehicle Preparation Center …, and a Classic Center."[30] The court seemingly went out of its way to identify the abundance of contacts between MBUSA and the forum in question.

Third, companies should be prepared to respond to assertions that by registering to do business in a given forum, they consented to the exercise of general personal jurisdiction there. Long has there been a circuit split on whether registration alone may be considered a waiver.[31] Post-*Daimler*, however, at least one judge, from the U.S. District Court for the District of Delaware, has recognized that to conclude a company's mere registration to conduct business in a State constitutes a waiver of personal jurisdiction is tantamount to concluding "continuous and systematic contacts" alone may establish general personal jurisdiction.[32] The court concluded to so hold is clearly in contravention of *Daimler*.

To be sure, not all courts are following the clear guidance articulated by 'Daimler'. Practitioners should **evaluate how their own courts** have applied this watershed decision in enabling companies to seek the dismissal of actions based solely on the exercise of general personal jurisdiction.

Fourth, companies incorporated or headquartered within the United States should consider the possibility that a district court unable to exercise general personal jurisdiction will transfer the action to that forum where the company is incorporated or headquartered. While it can be argued that a district court lacking general personal jurisdiction over an action similarly lacks authority to transfer an action,[33] in reality numerous courts nevertheless do so.[34]

Thus, consider the hypothetical retailer with billions of sales, hundreds of stores, thousands of employees, and licensed to do business in a given forum. Prior to *Daimler*, this retailer would likely have been subject to suit in the forum for conduct occurring entirely outside the forum. Following *Daimler*, the retailer should seek to dismiss the action so as to either avoid an inconvenient forum or to avoid suit altogether (where the retailer is incorporated and headquartered outside the United States). In so doing, the retailer should acknowledge its substantial contacts with the forum and emphasize their insignificance as compared against the contacts of MBUSA considered in *Daimler*. Finally, the retailer should consider any and all benefits in challenging a motion for transfer of venue, such as dismissing an action that cannot thereafter be re-filed because the statute of limitations has lapsed.

Conclusion

Though only a limited number of decisions regarding the proper exercise of general personal jurisdiction have come from the federal circuit courts, a clear trend has emerged: Daimler serves as a powerful tool to companies doing business throughout the United States, especially those companies incorporated and headquartered overseas as well as those companies traditionally subject to a multitude of jurisdictions because of their sizeable sales throughout the nation.

1. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
2. Lanier Saperstein, Geoffrey Sant & T. Augustine Lo, "New York State Legislature Seeks to Overturn 'Daimler'," N.Y.L.J., May 20, 2015, http://www.newyorklawjournal.com/id=1202726893242/New-York-State-Legislature-Seeks-to-Overturn-Daimler.
3. *Daimler*, 134 S. Ct. at 749.
4. See Id. at 756 note 8 ("*Perkins* 'should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions on general jurisdiction'" (quoting von Mehren & Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis," 79 Harv. L. Rev. 1121, 1144 (1966)).
5. Id.
6. Id. at 751.
7. Id. at 752.
8. Id. at 767 (Sotomayor, J., concurring).
9. Id. at 760.
10. Id. at 750.
11. *Gucci Am. v. Bank of China*, 768 F. 3d 122, 135 (2d Cir. 2014).
12. Id.
13. *Monkton Ins. Servs. v. Ritter*, 768 F. 3d 429, 431 (5th Cir. 2014).
14. Id. at 431-32.
15. *Ranza v. Nike*, 793 F. 3d 1059, 1065 (9th Cir. 2015).
16. Id. at 1069.
17. *Carmouche v. Tambrolee Mgmt.*, 789 F. 3d 1201, 1202-03 (11th Cir. 2015).
18. Id. at 1202-03.
19. *Chavez v. Dole Food Co.*, 796 F.3d 261, 270 (3rd Cir. 2015), vacated by and rehearing, en banc, granted by *Chavez v. Dole Food Co.*, 2015 U.S. App. LEXIS 16789 (3rd Cir. Sept. 22, 2015).
20. *Chavez v. Dole Food Co.*, 947 F. Supp. 2d 438, 442 (D.De. 2013).
21. *Kipp v. SKI Enter. Cor. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015).
22. *First Metro. Church of Houston v. Genesis Group*, 2015 U.S. App. LEXIS 16678, at *3 (5th Cir. 2015).
23. *Zippo Manufacturing Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
24. See *Mink v. AAA Dev.*, 190 F.3d 333, 336 (5th Cir. 1999).
25. Marshall Fishman and David Livshiz, "Do Recent Southern District Decisions Undo 'Daimler'?," N.Y.L.J. (June 11, 2015) http://www.newyorklawjournal.com/id=1202728945298.
26. See, e.g., *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194 (2d Cir.), cert. denied, 498 U.S. 854 (1990).
27. *Daimler*, 134 S.Ct. at 760.
28. Id. at 752.
29. Id. at 767 (Sotomayor, J., concurring).
30. Id. at 752.
31. Compare *Ratliff v. Cooper Labs.*, 444 F.2d 745, 748 (4th Cir. 1971); *Wenche Siemer v. Learjet Acquisition*, 966 F.2d 179, 183 (5th Cir. 1992) with *Bane v. Netlink*, 925 F.2d 637, 640 (3d Cir. 1991); *Knowlton v. Allied Van Lines*, 900 F.2d 1196 (8th Cir. 1990).
32. *AstraZeneca AB v. Mylan Pharmaceuticals*, 72 F. Supp. 3d 549, 556 (D.De. 2014). But see *Acorda Therapeutics v. Mylan Pharmaceuticals*, 78 F. Supp. 3d 572, 587 (D.De. 2015).
33. 15 Wright & Miller, Fed. Prac. & Proc. §3842 (4th ed.). See also *Thackurdeen v. Duke Univ.*, No. 14-cv-6311 (AJN), 2015 U.S. Dist. LEXIS 116952, at *38 (S.D.N.Y. Sept. 2, 2015).
34. *Centerboard Sec. v. Benefuel*, No. 15-cv-00071 (PAC), 2015 U.S. Dist. LEXIS 101729, at *9 (S.D.N.Y. Aug. 3, 2015).