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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Shrinking Grounds for General Jurisdiction After 'Daimler'

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In most instances, a federal court assessing whether it has personal jurisdiction over a defendant applies the forum state's personal jurisdiction statute—in New York, CPLR 301 for general jurisdiction, and CPLR 302 for long-arm or specific jurisdiction. If the exercise of jurisdiction is permissible under New York law, the court then assesses whether it also comports with due process under the Fourteenth Amendment. New York's long-arm statute does not confer jurisdiction in every case where it is constitutionally permissible.[1] Accordingly, where a defendant is subject to jurisdiction under CPLR 302, the exercise of jurisdiction will likely also pass constitutional muster.

But the Supreme Court's recent decision in *Daimler v. Bauman*,[2] coupled with its 2011 decision in *Goodyear Dunlop Tires Operations v. Brown*,[3] call into question whether certain long-held assumptions about the reach of CPLR 301—New York's general jurisdiction statute—are consistent with due process. *Daimler's* impact is already evident in decisions from the U.S. District Court for the Southern District of New York. We discuss below several of those recent decisions, which raise important questions about the scope of general jurisdiction in New York.

'Daimler v. Bauman'

The plaintiffs in *Daimler*, Argentinian victims (or their relatives) of atrocities committed during Argentina's "Dirty War" from 1976-1983, brought suit in California against Daimler, alleging that its Argentine subsidiary had collaborated with Argentina's security forces and was liable to them for human rights violations under federal, state and Argentine law. The plaintiffs asserted that Daimler, a German entity, was vicariously liable for the acts of its Argentine subsidiary, and asserted personal jurisdiction over Daimler based on the California contacts of its U.S. indirect subsidiary, Mercedes-Benz USA (MBUSA)—a theory ultimately accepted by the U.S. Court of Appeals for the Ninth Circuit, en banc, but rejected by the Supreme Court as inconsistent with due process and with its 2011 decision in *Goodyear*.

MBUSA, the exclusive distributor of Mercedes-Benz automobiles in the United States, is incorporated in Delaware with its principal place of business in New Jersey. It nevertheless has substantial operations in California, and is the largest supplier of luxury vehicles in that state. Plaintiffs relied on MBUSA's continuous and systematic course of business in California as the basis for jurisdiction over Daimler, its parent—a formulation the Daimler court rejected as "unacceptably grasping."

After noting that general jurisdiction has "come to occupy a less dominant place" than specific jurisdiction in a "contemporary scheme" that focuses on the relationship between the defendant, the forum and the litigation,[4] the Daimler court observed that general jurisdiction remains quite limited. The court reiterated its holding in *Goodyear* that the inquiry is not whether a defendant has continuous and systematic contacts with the forum state, but whether its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'" *Goodyear* found that for corporations, the place of incorporation and the principal place of business are "paradigm" bases for

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general jurisdiction.

In *Daimler*, the court noted that these are not the only touchstones for finding a corporation "at home," but that "[a] corporation that operates in many places can scarcely be deemed at home in all of them."[5] Under this approach, notwithstanding MBUSA's substantial activities in California, the court concluded that neither MBUSA nor Daimler was "at home" there, stressing that neither entity was incorporated nor had its principal place of business in California.

'Doing Business' as a Basis

Does "doing business in New York" remain a sufficient basis for general jurisdiction? Courts applying New York law have traditionally equated "doing business" in New York with being present in the state for purposes of general jurisdiction[6]—so much so, in fact, that jurisdiction under CPLR 301 is commonly referred to as "doing business" jurisdiction. Courts routinely look to factors such as the existence of an office in New York, solicitation of business in New York, the presence of bank accounts or other property in New York, and the presence of employees or agents in New York, in assessing whether a corporation is subject to general jurisdiction in the state.[7]

However, as Southern District Judge Colleen McMahon points out in her recent opinion in *Meyer v. Board of Regents of the University of Oklahoma*,[8] "the 'at home in' formulation of *Daimler* calls into question the notion that 'doing business in' New York—the traditional formulation of the CPLR 301 test—is constitutionally compliant." Similarly, Southern District Judge Andrew L. Carter Jr. noted in *Rates Technology v. Cequel Communications*,[9] that even if the plaintiffs' allegations in that case were sufficient to support general jurisdiction under New York law, they would not satisfy due process after *Daimler*.

In *Meyer*, the plaintiff sued, among other defendants, the University of Oklahoma, alleging that the university was in possession of a painting that had been stolen from her family by the Nazis. The jurisdictional question in *Rates Technology* was whether a provider of Voice over Internet Protocol (VoIP) services with no New York presence, was amenable to suit in New York based on its leases of transmission equipment that allowed its signal to pass through New York—an arrangement the plaintiffs characterized as "permanent and constant." In both cases, the courts performed the traditional "doing business" analysis, finding insufficient contacts under that formulation of the test. Their caveats about the impact of *Daimler*, however, suggest that the "doing business" test may be reaching the end of its useful life.

'Daimler' and 'Goodyear' call into question whether certain long-held assumptions about the reach of New York's general jurisdiction statute are consistent with due process.

Agency as a Basis

One aspect of *Daimler* of which a number of courts have taken note, is that even though the court assumed for the sake of argument that MBUSA's contacts with California could be imputed to *Daimler* under an agency theory of jurisdiction, it questioned the constitutional validity of that theory. Specifically, the Ninth Circuit had upheld jurisdiction over Daimler on an agency theory focused on whether MBUSA performs services for Daimler of such importance that Daimler would do them itself if MBUSA did not.

This test was nearly identical to the longstanding Second Circuit test announced in *Wiwa v. Royal Dutch Petroleum Co.*,[10] permitting the assertion of jurisdiction based on an agent's contacts with New York. Without expressly holding that agency-based jurisdiction under such a test was improper, the court observed that a test formulated on the "importance" of an agent's services "stacks the deck, for it will always yield a pro-jurisdiction answer," because anything a corporation does through an intermediary is presumably something it would do by other means if the intermediary did not exist.[11]

The Second Circuit as well as several Southern District judges have already noted that this language calls into question whether *Wiwa* and the long line of cases that follow it, are still good law.[12] But these recent decisions all stress an important distinction between the agency theory criticized in *Daimler*, which focuses on the importance of the agent to the defendant's operations, and an approach that would impute jurisdiction based on the dominance of one entity over the other, such as under an alter ego theory.

Thus, in *Sonera Holding v. Cukurova Holding*,[13] the Second Circuit observed that *Daimler* cast doubt on the usefulness of *Wiwa's* importance-based agency analysis. It emphasized the contrast between *Wiwa's* approach and one that examines whether the agent or affiliate "is so dominated by the defendant as to be its alter ego."[14] Amplifying this distinction, Southern District Judge Lewis A. Kaplan rejected the defendant's argument in *NYKCool v. Pacific International Servs*,[15] that jurisdiction based on an alter ego theory was no longer permissible after *Daimler*.

In that case, the plaintiff had been trying in vain for years to collect a judgment of almost $7 million from companies controlled by the defendant. Each time a judgment was awarded against a new company, it would transfer its assets and render itself judgment proof. In seeking to collect directly against the individual defendant, plaintiff alleged that the defendant controlled the judgment debtor companies as sham and alter ego companies, making specific allegations about the defendant's ownership and control of the companies and that money was funneled throughout the companies at defendant's "whim."

Judge Kaplan found that whatever doubts *Daimler* had expressed regarding the mere department or agency theory of jurisdiction, "[t]he Court did not express any doubt as to the soundness of an alter ego theory of jurisdiction, which is present only in the rather different circumstance in which one person or entity truly dominates another so that the two are indistinguishable for practical purposes."[16]

Although Kaplan assumed that *Daimler's* concerns about the agency theory of jurisdiction extend also to the "mere department" theory—another long-standing basis for the assertion of general jurisdiction under Section 301—*Daimler* did not expressly mention the mere department theory. Southern District Judge William H. Pauley III, in his decision in *Newlead Holdings v. Ironridge Global IV,*[17] proceeds on the assumption that the mere department theory is distinct from the agency theory discussed and discredited in *Daimler*, and remains a valid basis for the assertion of general jurisdiction.

Newlead involved a suit by a shipping and mining company against an investor it accused of engaging in "death spiral" financing, short selling and other improper conduct. The defendant was a British Virgin Islands (BVI) company with two BVI directors, had no offices, employees or property in the United States, and was not registered to do business in New York. Observing that the defendant was "not as foreign as it seems," Pauley noted that it was the subsidiary of a Delaware company with its principal place of business in California, one of whose directors had a New York office and who conducted all negotiations with the plaintiff on behalf of the defendant.

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Pauley noted that plaintiff's reliance on *Wiwa* to support jurisdiction through an agency theory was undercut by *Daimler*. He went on, however, to find that "[a]side from an agency theory, 'where a parent corporation is present in New York, its foreign subsidiary may be subject to New York jurisdiction if the subsidiary is a 'mere department' of the parent.'"[18] Under that test, courts look to common ownership; the extent to which the subsidiary is financially dependent on the parent; and the degree to which the parent interferes with or controls the selection and assignment of executives, marketing and operational policies of the subsidiary.[19] In *Newlead*, apart from common ownership, Judge Pauley found no evidence of the remaining factors that would support exercise of jurisdiction under a mere department theory.

Conclusion

None of the post-*Daimler* cases discussed above reached a different result than they would have before *Daimler*, but the analysis in each case was clearly affected by *Daimler*, which is likely to narrow the reach of New York's general jurisdiction statute and to alter significantly the settled approach taken to assessing jurisdiction under that statute. As a result, plaintiffs seeking to venue an action in New York are likely to focus increasingly on the dispute's nexus to New York in order to support jurisdiction under the long-arm statute.

1. *Ehrenfeld v. Mahfouz*, 9 N.Y.3d 501, 512 (2007).
2. ____ U.S. ____, 134 S. Ct. 746 (2014).
3. 564 U.S. ____, 131 S. Ct. 2846 (2011).
4. 134 S. Ct. at 758 (internal citations omitted).
5. Id. at 762 n.20.
6. See, e.g., *Hoffritz for Cutlery v. Amajac*, 763 F.2d 55, 58 (2d Cir. 1985); *CIMC Raffles Offshore (Singapore) PTE v. Baerfield Drilling*, 2013 WL 5434685 (S.D.N.Y. Sept. 26, 2013) (Rakoff, J.); *Moore v. Publicis Group*, 2012 WL 6082454 (S.D.N.Y. Dec. 3, 2012) (Carter, J.); *Avila v. Lease Finance Group*, 2012 WL 3165408 (S.D.N.Y. July 31, 2012) (Forrest, J.).
7. See, e.g., *Landoil Res. Corp. v. Alexander & Alexander Servs*., 918 F.2d 1039 (2d Cir. 1990).
8. 2014 WL 2039654 (S.D.N.Y. May 14, 2014).
9. 2014 WL 1494337 (S.D.N.Y. March 25, 2014).
10. 226 F.3d 88 (2d Cir. 2000).
11. 134 S. Ct. at 758 (internal citations omitted).
12. See, e.g., *Sonera Holding v. Cukurova Holding*, 750 F.3d 221, 225 (2d Cir. 2014); *NYKCool v. Pacific International Servs*, 2014 WL 3605632 (S.D.N.Y. July 15, 2014) (Kaplan, J.); *Newlead Holdings v. Ironridge Global IV*, 2014 WL 2619588 (S.D.N.Y. June 11, 2014) (Pauley, J.).
13. 750 F.3d 221.
14. 750 F.3d at 225 (quoting *Daimler*, 134 S. Ct. at 759).
15. 2014 WL 3605632.
16. Id., at *5-6. Judge Kaplan's rejection of the defendant's jurisdictional challenge is technically dicta, inasmuch as he found that the plaintiff's attempt to serve the defendant by email was insufficient. He ordered that the plaintiff could serve the summons and complaint upon the defendant's attorneys, and, observing that such service "readily is achievable," went on to address the general jurisdiction argument in anticipation of proper service.
17. 2014 WL 2619588.
18. Id., at *4 (quoting *Dorfman v. Marriott Int'l Motels*, 2002 WL 14363 (S.D.N.Y 2002) (Haight, J.)).
19. Id. (citing *Jazini v. Nissan Motor*, 148 F.3d 181 (2d Cir. 1998) (internal quotations omitted).