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Expert Analysis

A Smaller World, but Personal Jurisdiction Still Matters

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When the Supreme Court decided *Daimler v. Bauman*[1] two years ago, it effectively re-wrote the rules on personal jurisdiction, abandoning – as Justice Sonia Sotomayor explained in her concurring opinion—"the 'continuous and systematic' contacts inquiry that has been taught to generations of first-year law students[.]"[2] *Daimler* announced a new rule, providing that only in "an exceptional case" could a corporation's operations in a state "be so substantial and of such a nature" as to subject it to general jurisdiction other than where it is incorporated or has its principal place of business.[3]

That ruling threw into doubt New York's longstanding test providing for general jurisdiction over corporations "doing business" in New York, and the decades of jurisprudence applying and refining that rule in light of New York's place in the center of a global economy. This article discusses a number of recent decisions from district judges in the Southern District of New York that illustrate the sea change wrought by *Daimler* on New York's personal jurisdiction jurisprudence.

'Daimler'

Daimler concerned the exercise of general jurisdiction, which turns "on the defendant's general business contacts with the forum and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts."[4] In *Daimler*, Argentine plaintiffs sought to sue Daimler, a German corporation, in California, for human rights abuses that occurred in Argentina. Daimler did significant business in California through an indirect subsidiary, with $4.6 billion in annual sales, a regional headquarters, and multiple offices and facilities in the state.[5]

In deciding that California lacked general jurisdiction over Daimler despite these extensive contacts, the court expanded on its 2011 decision in *Goodyear Dunlop Tires Operations v. Brown*,[6] which held that a court may "hear any and all claims against" a corporation "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'"[7] Writing for the Daimler majority, Justice Ruth Bader Ginsburg explained that *Goodyear's* "essentially at home" standard meant that a corporation could be subject to general jurisdiction only where it is incorporated or has its principal place of business, and that it would be the "exceptional case" for a corporation's other activities in a state to "be so substantial and of such a nature as to render the corporation at home in that State."

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Under this standard, the court held that Daimler was not "essentially at home" in California, writing that "[i]f Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which [its U.S. affiliate's] sales are sizable."8 The Court thus abrogated the longstanding, then-bedrock principle of personal jurisdiction that a corporation will be subject to the general jurisdiction of any state in which it engages in a substantial, continuous, and systematic course of business.[9]

Writing separately while concurring in the judgment, Justice Sotomayor argued that the majority erred in finding general jurisdiction inappropriate on the grounds "not that Daimler's contacts with California are too few, but that its contacts with other forums are too many."[10] She observed that the majority's approach "enshrin[ed]" an overly "narrow rule of general jurisdiction as a matter of constitutional law,"[11] immunizing corporations as "too big for jurisdiction" by withdrawing from states the reciprocal power to bring into court corporations that quite obviously avail themselves of the benefits of doing business in the forum.[12]

End of Standard in New York?

In the immediate wake of *Daimler*, the Second Circuit recognized, in *Gucci America v. Weixing Li*, that *Daimler* "expressly cast doubt" on previous precedent permitting "general jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum."[13] The Gucci plaintiffs had prevailed in the district court, pre-*Daimler*, in establishing general jurisdiction over the Bank of China, based on the presence of a Bank of China branch in New York. The Second Circuit overturned the district court's finding of general jurisdiction in light of *Daimler*, remanding for further determination regarding specific jurisdiction.

Gucci's observation that *Daimler* "cast doubt" on the "doing business" standard appears to be an understatement. Recent decisions from judges in the Southern District of New York underscore the enormous, perhaps insurmountable obstacles faced by plaintiffs in light of *Daimler* and *Gucci* to establish jurisdiction over a corporation that is neither incorporated in nor has its principal place of business in New York, no matter how substantial a business presence the corporation has in the state.

In another banking case, *Giordano v. UBS*,[14] the plaintiff asserted claims relating to advice given in Switzerland by UBS AG, a Swiss company, in connection with the plaintiff's opening and maintenance of an offshore bank account located in Switzerland. The complaint alleged that both UBS AG and its parent, UBS Group AG, were continuously present doing business in New York through bank branches and other banking functions. Even in aggregating the total in-forum activities of both UBS entities, Southern District Judge Robert W. Sweet found general jurisdiction

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over the defendant to be lacking after undertaking "the relevant comparison compelled by *Daimler*, which requires that UBS AG's in-forum contacts be judged against all of its national and global activities," rather than in isolation.[15] The plaintiff, according to the court, "offer[ed] nothing to show that UBS AG's alleged New York contacts are such a substantial portion of its total global operations that it should be deemed to be 'at home' here."[16]

Similarly, in *Viropro v. Pricewaterhousecoopers Advisory Services Sdn Bhd*,[17] plaintiffs alleged that the defendant breached its fiduciary duty in its capacity as receiver for a subsidiary of one of the plaintiffs. The defendant, an affiliate of the global accounting firm PwC, was a Malaysian corporation with its principal place of business in Malaysia, and undertook the relevant conduct through a Malaysian individual acting in Malaysia. The plaintiff, Viropro, asserted that general jurisdiction over the defendant was nonetheless proper in New York because "PwC Malaysia held itself out as part of the global PricewaterhouseCoopers network," which does significant business in New York; because PwC advertises that it operates in 158 countries and can be "wherever a client needs it to be"; and because the staff of PwC Malaysia gave presentations and used email addresses suggestive of an affiliation with PwC's larger network.[18]

The court found this argument wanting in light of *Daimler*. Southern District Judge Denise L. Cote held that the asserted contacts with New York "would not come close to satisfying the 'essentially at home' test."[19] Judge Cote explained that "there is nothing in the complaint to suggest that PwC [Malaysia] had sufficiently systematic and continuous contacts in New York to render it essentially at home here[.]"[20]

Wilder v. News Corp.[21] presents another recent example of the post-Daimler constriction of general jurisdiction in New York. Plaintiffs brought a putative class action alleging that the defendants—News Corp., its wholly owned U.K. subsidiary, and four individual officers and directors—violated securities laws by withholding information about illegal news-gathering practices at News Corp. and its affiliates. The U.K. subsidiary of News Corp. and one of its employees moved to dismiss for lack of personal jurisdiction.

Whereas in *Daimler*, the theory of jurisdiction was premised on imputing the in-forum activities of Daimler's subsidiary back to Daimler (a German company), here the plaintiffs attempted to obtain general jurisdiction over the U.K. subsidiary by piercing the corporate veil and piggy-backing on the in-forum conduct of News Corp., which has its principal place of business in New York. Notwithstanding the court's jurisdiction over News Corp., Southern District Judge Paul G. Gardephe held that

> [p]laintiffs have not demonstrated that News Corp.'s exercise of control over [the UK subsidiary] goes beyond the extent of control that a corporate parent might reasonably be expected to exercise over its subsidiary. To hold that News Corp.'s contacts with New York can be imputed to [its subsidiary] would open the door to the exercise of general personal jurisdiction in the United States over many foreign subsidiaries of U.S.-based companies. Such a result would appear to run contrary to the tenor of the Supreme Court's Daimler decision.[22]

Specific Jurisdiction

Daimler's fallout may also be extending to the exercise of specific jurisdiction, which *Daimler* referred to as "the centerpiece of modern jurisdiction theory."[23] Southern District Judge Ronnie Abrams' decision last month in *Sherwin-Williams Co. v. Avisep*[24] is a case in point. Plaintiffs, an Ohio company and its Curacao subsidiary, brought suit in New York state court against Mexican-registered companies with their principal place of business in Mexico, relating to a stock purchase agreement gone awry.

The defendants removed the case to the Southern District of New York and moved to dismiss for lack of personal jurisdiction, arguing "that the limited meetings that occurred in New York as part of a long process that started in Mexico City and concluded in Cleveland and Mexico City, for the sale of a Mexican company, under Mexican law are insufficient to confer jurisdiction" under the long-arm statute.[25] Plaintiffs, by contrast, argued that jurisdiction was appropriate because some of the negotiations between the parties, including with respect to the provisions of the stock purchase agreement at issue in the lawsuit, took place in New York.

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Judge Abrams found that the contractual negotiations in New York satisfied the requirements of New York's long-arm statute, as well as the minimum contacts prong of the requisite due process analysis. She concluded, however, that the exercise of jurisdiction did not comport with due process, because the assertion of jurisdiction would be unreasonable under the Supreme Court's five-part test for reasonableness articulated in *Asahi Metal Indus. Co. v. Superior Ct. of Calif., Solano County*.[26] Specifically, she found that the exercise of personal jurisdiction would impose a significant burden on the Mexican defendants; that New York had no interest in adjudicating the case; that New York was not a more convenient or efficient forum than the alternatives; that neither evidence nor witnesses were located in New York; and that the international judicial system's interests weighed slightly against the assertion of jurisdiction because the agreements were governed by Mexican law.

In finding that "not one of [the five factors] weighs in favor of the Court's exercise of personal jurisdiction over defendants,"[27] Judge Abrams emphasized the atypicality of the fact that the plaintiffs were not New York residents, which "drastically impacts the reasonableness inquiry."[28] She described the case as presenting "the kind of exceptional situation" where the existence of minimum contacts is present but "the exercise of personal jurisdiction would be decidedly unreasonable" nevertheless.[29]

Although Judge Abrams recognized that the circumstances in *Sherwin-Williams* were "exceptional," her decision may be an early indication that in light of *Daimler's* heightened focus on due process, courts in the Southern District will engage in a more stringent analysis relating to specific jurisdiction.

1. 134 S.Ct. 746 (2014).
2. Id. at 770 (Sotomayor, J., concurring).
3. Id. at 761 n.19.
4. *Wilder v. News Corp.*, 2015 WL 5853763, at *5 (S.D.N.Y. Oct. 7, 2015) (internal citations omitted).
5. *Daimler*, 134 S.Ct. at 766-767 (Sotomayor, J., concurring).
6. 131 S.Ct. 2846 (2011).
7. *Daimler*, 134 S.Ct. at 751 (quoting *Goodyear*, 131 S.Ct. at 2851).
8. Id. at 761.
9. See *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437, 446-47 (1952) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318-19 (1945)).
10. *Daimler*, 134 S.Ct. at 764 (Sotomayor, J., concurring).
11. Id. at 771.
12. Id. at 764. Justice Sotomayor would have ruled in favor of Daimler "on the far simpler ground that, no matter how extensive Daimler's contacts with California, that State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available." Id.
13. 768 F.3d 122, 135 (2d Cir. 2014); id. at 136 ("Prior to *Daimler*, controlling precedent in this Circuit made it clear that a foreign bank with a branch in New York was properly subject to general personal jurisdiction here.") (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93–95 (2d Cir. 2000)).
14. 2015 WL 5671970 (S.D.N.Y. Sept. 25, 2015).
15. Id. at *9 (quoting *Gucci*, 768 F.3d at 135).
16. Id.
17. 2016 WL 225686 (S.D.N.Y. Jan. 19, 2016).
18. Id. at *3.
19. Id.
20. Id.
21. 2015 WL 5853763, at *5 (S.D.N.Y. Oct. 7, 2015).
22. Id. at *10.
23. *Daimler*, 134 S.Ct. at 755 (quoting *Goodyear*, 131 S.Ct. at 2854).
24. *Sherwin-Williams Co. v. Avisep, S.A. de C.V.*, 2016 WL 354898 (S.D.N.Y. Jan. 28, 2016).
25. Id. at *3 (internal quotation omitted).
26. 480 U.S. 102, 113-14 (1987).
27. *Sherwin-Williams Co*., 2016 WL 354898, at *5.
28. Id. at *6.
29. Id. at *7.