General Personal Jurisdiction

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Strategies for Resisting Plaintiffs' Efforts to Avoid the Supreme Court's *Daimler* Ruling

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One of the plaintiffs' bar's favorite maneuvers is filing lawsuits against corporate defendants in pro-plaintiff jurisdictions, often with only tenuous connections—or no connections—between the jurisdictions and the parties or material aspects of the claims. Plaintiffs often rely on the doctrine of general personal jurisdiction (also known as "all purpose" jurisdiction) to justify these lawsuits. One way for defendants to resist this forum shopping is to cite the Supreme Court's 2014 ruling that makes it significantly more difficult for plaintiffs to establish general personal jurisdiction in a given state over an out-of-state corporate defendant. *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

Since *Daimler* was decided, however, plaintiffs' attorneys have tried to circumvent the Supreme Court's limitation on general personal jurisdiction by relying on two arguments—"pendent" (or "supplemental") personal jurisdiction and personal jurisdiction by "consent." As discussed below, those arguments are erroneous, and defendants should continue to resist the plaintiffs' bar's efforts to avoid the impact of *Daimler*.

General Personal Jurisdiction After *Daimler*

Personal jurisdiction "is an essential element" of a court's jurisdiction, "without which the court is powerless to proceed to an adjudication." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quotation marks omitted). In most lawsuits, the Due Process Clause gives plaintiffs two options for establishing personal jurisdiction: (1) general jurisdiction (also known as "all-purpose" jurisdiction); and/or (2) specific jurisdiction (also known as "case-linked" jurisdiction). *See, e.g., Daimler*, 134 S. Ct. at 751, 754 n.5, 758; *In re Bard IVC Filters Prod. Liab. Litig.*, MDL No. 15-2641, 2016 WL 6393596, at *4 (Oct. 28, 2016). (Some states have long-arm statutes that do not allow courts to exercise personal jurisdiction to the fullest extent permitted by the U.S. Constitution, thereby imposing statutory requirements on plaintiffs in addition to any requirements imposed by the Due Process Clause.) Until 2014, a large corporation that did substantial business in all fifty states typically could be sued in courts throughout the country—even in lawsuits asserting claims against the defendant that did *not* arise from the defendant's activities in (or contacts with) the forum state—because the forum state's courts asserted general personal jurisdiction over the defendant, based on the defendant's continuous and systematic contacts with the forum state.

> The *Daimler* Court held that the defendant's "place of incorporation and principal place of business are paradig[m]… bases for general jurisdiction," *Daimler*, and added that, in an "exceptional case," a defendant'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."

However, in 2014, the Supreme Court issued an important Due Process Clause ruling that defined the correct, limited scope of general personal jurisdiction in cases filed against out-of-state corporations. *See Daimler*, 134 S. Ct. 746; *see also In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL Docket No. 875, 2014 WL 5394310, at *3 (E.D. Pa. Oct. 23, 2014) ("In recent years, the Supreme Court has substantially curtailed the application of general jurisdiction over corporate defendants." (citing *Daimler*, 134 S. Ct. at 758)); *Air Tropiques, Sprl v. N. & W. Ins. Co.*, No. H-13-1438, 2014 WL 1323046, at *8 (S.D. Tex. Mar. 31, 2014) (stating that *Daimler* test for general personal jurisdiction is "more stringent" than prior "continuous-and-systematic-contacts test"). The *Daimler* Court held that the defendant's "place of incorporation and principal place of business are paradig[m]… bases for general jurisdiction," *Daimler*, 134 S. Ct. at 760 (alterations in original; quotation marks omitted), and added that, in an "exceptional case," a defendant'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. The Court rejected plaintiffs' argument that it should "approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business." *Id.* at 761 (quotation marks omitted). The proper analysis is not whether a "corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [the corporation] essentially at home in the forum State.'" *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

The *Daimler* Court's general personal jurisdiction analysis requires that courts evaluate "a corporation's activities in their entirety" because a "*corporation that operates in many places can scarcely be deemed at home in all of them*." *Id.* at 762 n.20 (emphasis added). Therefore, it is now "incredibly difficult to establish general jurisdiction [over a defendant] in a forum other than the [defendant's] place of incorporation or principal place of business." *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d

429, 432 (5th Cir. 2014) (citing *Daimler*, 134 S. Ct. at 760).

In an effort to evade *Daimler*, the plaintiffs' bar has lobbed two arguments: (1) pendent or supplemental personal jurisdiction; and (2) "consent" to personal jurisdiction based on a corporation's registration to do business in a state (and accompanying appointment of a registered agent for service of process in the state). These arguments are discussed below.

"Pendent" or "Supplemental" Personal Jurisdiction

Plaintiffs' counsel may file multi-plaintiff lawsuits in a forum state, featuring some in-state plaintiffs and many out-of-state plaintiffs, against an out-of-state corporate defendant—which presents the issue of whether the court can assert general personal jurisdiction over the defendant regarding the out-of-state plaintiffs' claims. As shown by the rulings discussed below, plaintiffs' counsel argue that: (a) the court has specific personal jurisdiction over the in-state plaintiffs' claims against the defendant because the alleged negligence occurred, and the plaintiffs were injured, in the forum state; and (b) the court can exercise pendent (or supplemental) personal jurisdiction over the out-of-state plaintiffs' claims against the defendant because those claims arise from the same common nucleus of operative facts as the claims asserted by the in-state plaintiffs.

For example, plaintiffs' counsel unsuccessfully argued pendent personal jurisdiction in an Illinois product liability lawsuit involving the prescription drug Plavix. *See Plavix Related Cases Applicable to All Cook County Cases*, No. 2012L5688, 2014 WL 3928240 (Ill. Cir. Ct. Aug. 11, 2014). Approximately five hundred plaintiffs filed personal injury claims in that coordinated proceeding against pharmaceutical companies that do business throughout the country (including Illinois), but are not incorporated under Illinois law and do not have their principal places of business in Illinois. Only sixteen plaintiffs were Illinois residents. *Id.* at *1. Although the defendants conceded that they were subject to personal jurisdiction in an Illinois court with respect to claims brought by *Illinois* residents, *id.* at *9, the defendants argued that the claims asserted by the *non-Illinois* plaintiffs should be dismissed for lack of personal jurisdiction. The Illinois court held that *Daimler* prevented the court from asserting general personal jurisdiction over the defendants. *Id.* at *7–8. The court also concluded that it lacked specific personal jurisdiction over the defendants with respect to the non-Illinois plaintiffs' claims because those plaintiffs "failed to establish any causal or logical link between their claims and Defendants' Illinois operations." *Id.* at *8–9. Finally, the non-Illinois plaintiffs contended that the court should exercise pendent personal jurisdiction over the defendants because their claims arose "from the same common fact scheme as the Illinois Plaintiffs' claims," *id.* at *9, but the court rejected that argument, as well. Each plaintiff had been ordered "to file an individual complaint," so the court held that "the non-Illinois Plaintiffs' claims do not come from the Illinois Plaintiffs' lawsuit." *Id.*

> The *Daimler* Court's general personal jurisdiction analysis requires that courts evaluate "a corporation's activities in their entirety" because a "*corporation that operates in many places can scarcely be deemed at home in all of them.*"

The pendent personal jurisdiction argument also has been rejected in federal court. *See In re Testosterone Replacement Therapy Prod. Liab. Litig.*, 164 F. Supp. 3d 1040 (N.D. Ill. 2016). In that ruling, the multidistrict litigation (MDL) court addressed a complaint initially filed in Missouri state court by ten "unrelated individuals" from nine different states (including Missouri and Illinois) against two pharmaceutical companies (both incorporated in Delaware and headquartered in Illinois). *Id.* at 1042–43. Only one of the plaintiffs—a Missouri citizen—alleged injury caused by the defendants' activities in Missouri. *Id.* at 1043. The defendants removed the lawsuit to federal court in Missouri based on diversity jurisdiction, arguing that the Illinois plaintiff was fraudulently joined because a Missouri court could not assert personal jurisdiction over them with respect to the Illinois plaintiff's claims. (After the plaintiffs filed a motion to remand the case to Missouri state court, the case was transferred to the MDL court, so that court decided the personal jurisdiction issue.) The plaintiffs did not try to establish general personal jurisdiction over the defendants in Missouri, and the defendants did not dispute that a Missouri court would have specific personal jurisdiction over them with respect to a Missouri plaintiff's claims arising out of their marketing and sale of the drug in Missouri. *Id.* at 1047. Thus, the MDL court was left to decide "whether the existence of specific [personal] jurisdiction over a defendant for one plaintiff's claims allows a court to exercise jurisdiction over that same defendant as to the other, unrelated plaintiffs' claims." *Id.* The court held that "the specific personal jurisdiction inquiry must be conducted separately for the claims of each individual plaintiff," so "every plaintiff would… have to show that his claims arise from, or are related to, defendants' conduct in Missouri." *Id.* Plaintiffs argued in favor of pendent personal jurisdiction—namely, that a court can "exercise personal jurisdiction over multiple plaintiffs' claims that arise from the same transactions or occurrences and involve some common issues of law or fact as long as the court properly has specific jurisdiction over one plaintiff's claims," *id.* at 1048—but the court was not persuaded. The court held that: (a) the doctrine of pendent personal jurisdiction does not exist, *id.*; and (b) even if that doctrine does exist, "it is far from clear that plaintiffs' claims—which involve different consumers in different states suffering different injuries after receiving

prescriptions from different doctors for a drug used for varying time periods—arise from the same transaction or occurrence," *id.* at 1049. Therefore, the court dismissed the Illinois plaintiff's claims for lack of personal jurisdiction and denied the remand motion because that dismissal gave rise to federal subject matter jurisdiction based on complete diversity of citizenship between the defendants and the remaining plaintiffs.

Other federal district courts recently have rejected pendent or supplemental personal jurisdiction arguments asserted in multi-plaintiff lawsuits. *See, e.g.*, *In re Bard IVC Filters*, 2016 WL 6393596, at *4–5 & n.4 (dismissing out-of-state plaintiffs for lack of personal jurisdiction because "[t]he in-state [p]laintiffs are not suing on behalf of the out-of-state [p]laintiffs and cannot establish personal jurisdiction for them"; noting that, even if pendent personal jurisdiction doctrine "is viable, it applies to claims asserted by a single plaintiff, not claims asserted by different plaintiffs"); *Addelson v. Sanofi S.A.*, No. 4:16CV01277 ERW, 2016 WL 6216124, at *3 & n.3 (E.D. Mo. Oct. 25, 2016) (holding that "[t]he specific personal jurisdiction inquiry must be conducted separately for the claims of each individual plaintiff" and that "[s]upplemental specific personal jurisdiction does not exist" (citing *In re Testosterone Replacement Therapy*, 164 F. Supp. at 1047, 1048)); *In re Zofran (Ondansetron) Prod. Liab. Litig.*, MDL No. 1:15-md-2657-FDS, 2016 WL 2349105, at *5 & n.5 (D. Mass. May 4, 2016) (holding that "a Missouri court would not have specific personal jurisdiction over the claims brought by… [the non-Missouri] plaintiffs"; "declin[ing] to adopt the doctrine of pendent personal jurisdiction for the reasons outlined in *In re Testosterone Replacement Therapy*").

General Personal Jurisdiction Based on Defendant's Alleged "Consent"

In an attempt to avoid the impact of the Supreme Court's *Daimler* ruling, the plaintiffs' bar has tried another argument—namely, contending that an out-of-state corporation consents to general personal jurisdiction in a forum state by registering to do business in the state (and, as typically occurs, appointing an agent for service of process in the state). State statutes typically preclude out-of-state corporations from doing business in a state without first registering to do business in the state and appointing an in-state registered agent for service of process on the corporation. *See, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 631–34 (2d Cir. 2016). (The *Daimler* Court's ruling does not specifically address whether a defendant's compliance with this kind of business registration statute constitutes the defendant's "consent" to general personal jurisdiction and thereby obviates the need to determine whether the plaintiff has satisfied the due process test for general personal jurisdiction.)

> The court held that: (a) the doctrine of pendent personal jurisdiction does not exist, *id.*; and (b) even if that doctrine does exist, "it is far from clear that plaintiffs' claims—which involve different consumers in different states suffering different injuries after receiving prescriptions from different doctors for a drug used for varying time periods—arise from the same transaction or occurrence."

Corporate defendants have foiled this "consent" gambit by arguing that merely registering to do business in a state does not make an out-of-state corporation "essentially at home" in the state for purposes of the *Daimler* Court's Due Process Clause analysis; contending that asserting general personal jurisdiction over the out-of-state corporation in such circumstances would violate the Commerce Clause; and/or relying on state law arguments.

The Second Circuit's *Lockheed Martin* ruling is a significant victory for corporate defendants regarding this general personal jurisdiction by consent argument. In this asbestos personal injury lawsuit, plaintiff argued that "a corporation that registers to do business and appoints an agent to receive service in Connecticut has, as a matter of Connecticut law and by application of Supreme Court precedent in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917)…, 'consented' to the exercise of general [personal] jurisdiction over it by that state's courts." *Lockheed Martin*, 814 F.3d at 625 (citations omitted). The Second Circuit rejected that argument based on the Due Process principles addressed in *Daimler* and explained:

> [T]he analysis that now governs general [personal] jurisdiction over foreign [*i.e.*, out-of-state] corporations—the Supreme Court's analysis having moved from the 'minimum contacts' review described in *International Shoe* [*Co. v. Washington*, 326 U.S. 310 (1945),] to the more demanding 'essentially at home' test enunciated in *Goodyear* [*Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011),] and *Daimler*—suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a 'corporate' consent—perhaps unwitting—to the exercise of general [personal] jurisdiction by state courts, particularly in circumstances where the state's interests seem limited."

Lockheed Martin, 814 F.3d at 637. According to the Second Circuit, "[i]f mere registration and the accompanying appointment of an in-state agent—without an express consent to general [personal] jurisdiction—nonetheless sufficed to confer general [personal] jurisdiction by implicit consent, every cor-

poration would be subject to general [personal] jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief." *Id.* at 640; *see also id.* (accepting plaintiff's "interpretation of Connecticut's business registration statute… would risk unravelling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely").

The *Lockheed Martin* ruling also rejected the plaintiff's reliance on the Supreme Court's 1917 *Pennsylvania Fire* ruling. The court explained that "*Pennsylvania Fire* is now simply too much at odds with the approach to general [personal] jurisdiction adopted in *Daimler* to govern as categorically as [the plaintiff] suggests." *Lockheed Martin*, 814 F.3d at 638; *see also id.* at 639 ("[T]he holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general 'consent' has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the [Supreme] Court's 21st century approach to general and specific jurisdiction in light of expectations creating by the continuing expansion of interstate and global business.").

Defendants have defeated the general personal jurisdiction by consent argument in federal district courts, as well. For example, one court recently held that asserting general personal jurisdiction over an out-of-state corporation based on its alleged consent (by registering to do business in the state) would violate the Commerce Clause. *See In re Syngenta AG MIR 162 Corn Litig*, MDL No. 2591, 2016 WL 2866166, at *4–6 (D. Kan. May 17, 2016). As the court explained:

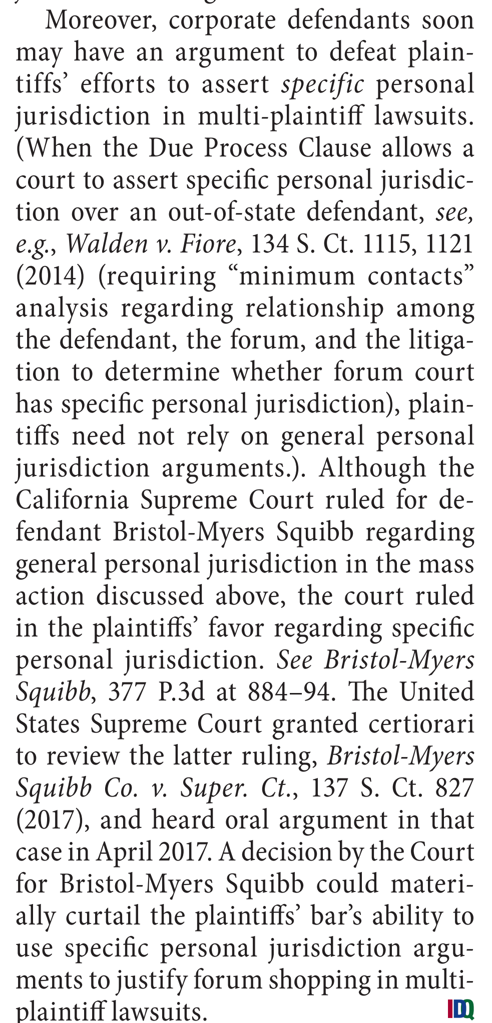
> [I]t is a matter of "common knowledge"… that if corporations are subject to general jurisdiction in every state in which they register to do business (and not only in their home states), the costs of defending suits will increase, and corporations may be deterred from registering and doing business in every state.… Thus, the Court… concludes that the Kansas registration statute, as applied in these cases to claims by the non-resident plaintiffs, discriminates against interstate commerce in practical effect, and thus is invalid under the Commerce Clause.

Id. at *5; *see also Leibovitch v. Islamic Republic of Iran*, 188 F. Supp. 3d 734, 748–50 (N.D. Ill. 2016) (granting non-party banks' motions to quash subpoenas; rejecting plaintiffs' argument that court should exercise general personal jurisdiction because banks consented to jurisdiction by registering to do business in Illinois).

State courts also have rejected the general personal jurisdiction by consent argument, sometimes based on state law grounds. *See Figueroa v. BNSF Ry. Co.*, 390 P.3d 1019, 1021 (Or. 2017) ("We hold, as a matter of state law, that the legislature did not intend that appointing a registered agent pursuant to [Oregon's foreign corporation registration statute] would constitute consent to the jurisdiction of the Oregon courts."); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 51 (Mo. 2017) (interpreting Missouri's foreign corporation registration statute to hold that it "does not provide an independent basis for broadening Missouri's personal jurisdiction to include suits unrelated to the corporation's forum activities when the usual bases for general [personal] jurisdiction are not present"); *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 884 (Cal. 2016) ("[A] corporation's appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to California transactions."); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016) ("After *Daimler*, we hold that Delaware's registration statutes must be read as a requirement that a foreign [*i.e.*, out-of-state] corporation must appoint a registered agent to accept service of process, but not as a broad consent to personal jurisdiction in any cause of action, however unrelated to the foreign corporation's activities in Delaware. Rather, any use of the service of process provision for registered foreign corporations must involve an exercise of personal jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment.").

Conclusion

Plaintiffs' attorneys likely will continue to make general personal jurisdiction arguments based on pendent (or supplemental) personal jurisdiction and/or jurisdiction by consent to try avoid the adverse impact of *Daimler* on their efforts to hale corporate defendants into court in pro-plaintiff jurisdictions without regard to whether the claims at issue arose out of the defendants' activities in, or contacts with, the forum state. The United States Supreme Court eventually may address one or both of these arguments. In the meantime, defendants should remain vigilant and present forceful arguments against these efforts to circumvent the *Daimler* general personal jurisdiction ruling.



Moreover, corporate defendants soon may have an argument to defeat plaintiffs' efforts to assert *specific* personal jurisdiction in multi-plaintiff lawsuits. (When the Due Process Clause allows a court to assert specific personal jurisdiction over an out-of-state defendant, *see, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (requiring "minimum contacts" analysis regarding relationship among the defendant, the forum, and the litigation to determine whether forum court has specific personal jurisdiction), plaintiffs need not rely on general personal jurisdiction arguments.). Although the California Supreme Court ruled for defendant Bristol-Myers Squibb regarding general personal jurisdiction in the mass action discussed above, the court ruled in the plaintiffs' favor regarding specific personal jurisdiction. *See Bristol-Myers Squibb*, 377 P.3d at 884–94. The United States Supreme Court granted certiorari to review the latter ruling, *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 827 (2017), and heard oral argument in that case in April 2017. A decision by the Court for Bristol-Myers Squibb could materially curtail the plaintiffs' bar's ability to use specific personal jurisdiction arguments to justify forum shopping in multi-plaintiff lawsuits. IDQ