New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 102
MONDAY, NOVEMBER 28, 2016

OUTSIDE COUNSEL

Expert Analysis

'Consent by Registration' Theory Of Jurisdiction: Are Its Days Numbered?

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For many lawyers, one of the most indelible lessons of first-year civil procedure class was that a corporation that engages in substantial business in a state is subject to general personal jurisdiction there—that is, it can be sued there on any claim, even if unconnected to the state.

But in 2014, the Supreme Court held in *Daimler v. Bauman*, 134 S. Ct. 746 (2014) that finding general jurisdiction anywhere the defendant did business would be "unacceptably grasping." Thus, the court held that, as a matter of due process, outside of an "exceptional case," a corporation can only be subject to general jurisdiction in its state of incorporation or where it has its principal place of business. Id. at 760–61, n.19

Daimler seemed to spell the end of general jurisdiction based on "doing business," promising corporations a measure of certainty as to where they could be sued. But that certainty may prove to have been short lived. As a result of the tectonic shift announced in *Daimler*, plaintiffs seeking to sue out-of-state corporations have dusted off a relic of a legal theory: a corporation "consents" to general jurisdiction by registering to do business in a state and appointing an agent for service there, and therefore can be sued in that state on any cause of action. This article explains why the "registration" theory is no longer viable under modern precedent and principles of due process, and further explores how courts have grappled with the issue.

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Return of the Theory

The "registration" theory of general jurisdiction is embodied in the 1917 case of *Pennsylvania Fire*, in which the U.S. Supreme Court held that an insurance company incorporated in Arizona could be sued in Missouri regarding business having nothing to do with that state, because the corporation registered to do business in Missouri, which in turn required it to appoint an in-state agent for service of process. Justice Oliver Wendell Holmes, writing for the court, held that those acts constituted valid "consent" to be sued. *Pa. Fire Ins. Co. of Phila. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93 (1917).

In an attempt to circumvent *Daimler*, plaintiffs have had ample opportunities to raise this theory of jurisdiction, because every state requires "foreign" corporations (those incorporated outside the state) to register in order to do business there and to appoint an in-state agent for service of process; in at least eight states, including New York, registering and appointing an agent for service are also deemed to constitute "consent" to general personal jurisdiction. See Kevin D. Benish, Note, "Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After 'Daimler AG v. Bauman,'" 90 N.Y.U. L. REV. 1609 (2015).

Not Squaring With 'Daimler'

At first, plaintiffs invoking the "registration" theory of jurisdiction

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found some degree of success, notwithstanding the seemingly contradictory holding of *Daimler*. In 2015, for instance, federal courts in the District of Nebraska, New Jersey, and Delaware, among others, held that the theory remained viable even after *Daimler*. See *Perrigo Co. v. Merial Ltd.*, 2015 WL 1538088, (D. Neb. April 7, 2015); *Otsuka Pharm. Co. v. Mylan Inc.,* 106 F.Supp.3d 456 (D.N.J. 2015); *Novartis Pharm. Corp. v. Mylan Inc.*, 2015 WL 1246285 (D. Del. March 16, 2015).

However, several courts have recently recognized—correctly, in our view—that the "registration" theory of jurisdiction is an outdated and unconstitutional fiction that would create a giant loophole in *Daimler*, and is incompatible with due process.

Although it has twice ducked definitively deciding the issue, earlier this year, the U.S. Court of Appeals for the Second Circuit expressed grave doubt about the constitutionality of the "registration" theory. In *Brown v. Lockheed Martin*, 814 F.3d 619 (2d Cir. 2016), the plaintiff claimed that Lockheed Martin was subject to general jurisdiction in Connecticut because it had registered to do business there. The Second Circuit faced the threshold question of whether Connecticut's registration statute had been construed by that state's courts as conferring consent to general jurisdiction—because, unlike in New York, there was not definitive case law on the question.

Ultimately, the Second Circuit avoided formally deciding whether the "registration" theory was constitutional, finding that Connecticut's registration statute had not been interpreted to confer general jurisdiction. But judges Barrington Parker, Gerard Lynch, and Susan Carney made clear their views on the constitutional question, writing that interpreting the registration statute to confer general jurisdiction would mean that "Daimler's ruling would be robbed of meaning by a back-door thief" and thus, "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 jurisdiction by the state. Id. at 637, 640.

Indeed, the "registration" theory encompasses a more aggressive view of general jurisdiction than the Supreme Court found unconstitutional in *Daimler*. *Daimler* held that even "substantial" and "systematic" business in a state should not subject a corporation to all suits there. *Daimler*, 134 S. Ct. at 761. The "registration" theory would ironically permit courts to exercise general jurisdiction over out-of-state corporations so long as they do any business in the state at all, which requires them to be registered.

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Likewise, *Daimler* held that subjecting a corporation to general jurisdiction wherever it did business would constitute an "exorbitant exercise[] of all-purpose jurisdiction [that] would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id.* 134 S. Ct. at 761-62. But instead of limiting general jurisdiction to a corporation's "unique" and "easily ascertainable" home bases, the "registration" theory would allow multiple states to claim general jurisdiction, making it impossible for a corporation to know in advance where it could be sued.

Nevertheless, the Second Circuit has continued to avoid resolving this issue. Several months ago, that court again had an opportunity to address the question, in a case in which the authors of this article were counsel to the defendant, Costco Wholesale Corporation. There, plaintiffs appealed from the dismissal of the case on jurisdictional grounds by Judge Vernon Broderick of the Southern District of New York, who, applying *Daimler*, rejected the plaintiffs' argument that Costco was subject to suit in New York based on its New York business operations.

On appeal, plaintiffs argued that Costco consented to general jurisdiction in New York when it registered to do business. The Second Circuit found it unnecessary to address the issue, however, agreeing with Costco's threshold argument that plaintiffs waived the "registration" argument by failing to raise it in the district court. See *Ritchie Capital Mgmt. v. Costco Wholesale Corp.,* 2016 WL 3583225 (2d Cir. July 1, 2016).

'Pennsylvania Fire'

Notwithstanding *Daimler*, some courts have found that the "registration" theory remains constitutional. For example, in *Acorda Therapeutics v. Mylan Pharms*., the U.S. Court of Appeals for the Federal Circuit found that there was specific jurisdiction over the defendant, Mylan Pharmaceuticals, in Delaware (meaning

the defendant could be sued there based on the specific facts of the lawsuit). Nevertheless, Judge Kathleen O'Malley issued a concurrence stating that she would have found Mylan subject to general jurisdiction in Delaware based on its registration to do business. O'Malley reasoned that the Supreme Court had never expressly stated that *Pennsylvania Fire* was overruled, and that it was not the prerogative of a federal circuit court to overrule the Supreme Court. See *Acorda Therapeutics v. Mylan Pharm.*, 817 F.3d 755 (Fed. Cir. 2016).

But the Supreme Court warned in *Daimler* that cases "decided in the era dominated by Pennoyer's territorial thinking…should not attract heavy reliance today." *Daimler*, 134 S. Ct. at 761 n.18. In *Lockheed*, the Second Circuit sensibly interpreted the Supreme Court's "warning" to include *Pennsylvania Fire*, which was decided in an era when courts could exercise jurisdiction only over defendants that were deemed to be "present" in the forum state and a corporation was found to be "present" only in its state of incorporation. Thus, courts in that era invented "fictions" for jurisdiction over foreign corporations, which came to include the notion that a corporation "consents" to general jurisdiction when it registers to do business and appoints an agent for service, as embraced by Justice Holmes. *Lockheed*, 814 F.3d at 639.

That old jurisdictional framework fell by the wayside in 1945, when the Supreme Court announced a more modern framework of personal jurisdiction analysis in the seminal case of *International Shoe v. Washington*, 326 U.S. 310 (1945). Not surprisingly, many post-*International Shoe* Supreme Court cases make clear that the outdated "fictions" that arose during the time of *Pennoyer* are no longer valid bases for jurisdiction today. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977).

In another sign that courts are recognizing that *Pennsylvania Fire* has no continuing viability, one month after O'Malley issued her concurrence in *Acorda*, the Supreme Court of Delaware held in *Genuine Parts v. Cepec* that, in light of the constitutional problems with the "registration" theory, Delaware courts could no longer read the state's business registration statute as conferring consent to general personal jurisdiction. The court held that continuing the decades-old practice of reading the registration statute as a "consent" to jurisdiction would "collide[] directly" with *Daimler*. The court further held that cases like *Pennsylvania Fire* no longer had force given the Supreme Court's explicit warning in *Daimler* against reliance on outdated jurisdiction cases, as well as prior Supreme Court holdings to that effect. *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016).

Other highest state courts have come to similar conclusions. In September 2016, after examining the requirements of *Daimler*, the Colorado Supreme Court held that Ford Motor Company's appointment of a registered agent did not convert it to a state resident subject to any and all suits as a matter of state law. *Magill v. Ford Motor Co.*, 379 P.3d 1033 (Oct. 3, 2016).

The judicial debate continues, however. For instance, in June 2016, a federal district court in St. Louis, citing O'Malley's opinion in *Acorda*, held that a corporation registered to do business in Missouri could constitutionally be subject to general jurisdiction on the theory that the Supreme Court had "no occasion to consider the consent issue in *Daimler*." The court further noted that the Daimler case was brought in California, a state that, unlike Missouri, had not interpreted compliance with its registration statute to confer consent to personal jurisdiction. *Regal Beloit Am. v. Broad Ocean Motor*, 2016 WL 3549624 (E.D. Mo. June 30, 2016).

Future of the Theory

The "registration" theory of general jurisdiction will continue to be tested, as the issue is pending in many cases winding their way through lower state and federal courts. Regardless of the forum in which this question is ultimately decided—which may perhaps one day be the U.S. Supreme Court—the time has come to retire the anachronistic theory of general personal jurisdiction based upon business registration. The fact that a national corporation has significant business operations in a state does not mean that the corporation should be sued there for actions wholly unconnected to the forum. The Supreme Court said as much in *Daimler*. It seems absurd to think the Supreme Court meant to leave a gaping hole in its analysis through the routine and common requirement in all states that foreign corporations register to do business.