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The Shorter Arm of Long-Arm Jurisdiction

*Post-*Daimler, *the framework is the same but the analysis has shifted*

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Picture this: you are the general counsel of the New York subsidiary of a foreign parent corporation. You have just received a New York federal complaint naming your company and its parent corporation as defendants in a lawsuit alleging events in which the parent had no involvement in New York. The parent corporation's CEO calls to ask if it has any jurisdictional defenses. What do you tell her?

Because of the Supreme Court's 2014 landmark decision in *Daimler AG v. Bauman*,[1] the answer is quite different than it was a few years ago, as *Daimler* significantly changed the general jurisdiction principles applicable to foreign parent corporations. While the overarching framework of the jurisdictional analysis remains the same – a two-part inquiry involving the long-arm statute of the forum state and due process concerns pursuant to the Fourteenth Amendment of the Constitution – the due process component of the analysis has narrowed considerably.

Daimler involved a defendant German vehicle manufacturer that was sued in California federal court based on events taking place outside of the United States. Jurisdiction was based on the California activities of the defendant's indirect subsidiary, an importer and distributor of the defendant's vehicles. Applying agency principles, the Ninth Circuit held that the subsidiary's California activities could be attributed to, and were sufficient to support general jurisdiction over, the defendant.

The Supreme Court rejected the Ninth Circuit's conclusion that foreign corporations should be subject to general jurisdiction wherever they have an in-state subsidiary or agent, deeming such a broad exercise of jurisdiction "exorbitant" and cautioning that it would violate due process, as it "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurances as to where that conduct will and will not render them liable to suit.'"[2] Instead, the *Daimler* court found that due process concerns require that in all but the most "exceptional" situations, unless a corporation is formally incorporated or maintains its principal place of business within the forum state, it is not "at home" such that general jurisdiction exists – even for a parent corporation that has a subsidiary engaging in a substantial, continuous, and systematic course of business in a particular forum.[3]

An in-state subsidiary is no longer automatic.

Daimler is a departure from long-standing precedent in jurisdictions like the Second Circuit, which had previously found that New York courts could assert jurisdiction over a foreign corporation if it was affiliated with a New York representative entity rendering important services on the foreign corporation's behalf.[4] Even after *Daimler*, New York federal courts have articulated an alter-ego theory under which general jurisdiction can exist over a foreign corporation if its in-state domestic affiliate "is so dominated by the defendant as to be its alter ego"; for example, if "the parent's control is so complete that the subsidiary is a 'mere department' of the parent." [5]

Accordingly, post-*Daimler*, if the applicable state long-arm statute has been satisfied (typically involving an inquiry as to the company's business transactions, acts and real property holdings in the state),[6] federal courts in New York require at least one of the following to support general jurisdiction over a corporate defendant: formal incorporation in the forum state;

- principal place of business in the forum state;
- an in-state affiliate operating as the defendant's alter ego; or
- "exceptional" circumstances such that, even absent incorporation, a principal place of business, or an alter ego in the forum state, the defendant's in-state actions are sufficiently continuous and systematic to render it "at home" in that state.

By definition, a foreign parent corporation would not be incorporated in the forum state, and the location of its principal place of business is a simple and straightforward inquiry. Nor is the alter-ego analysis particularly complicated. Rather, New York federal courts evaluate whether there is common ownership of the parent corporation and its subsidiary; the financial dependency of the subsidiary on the parent corporation; the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executives and fails to observe corporate formalities; and the degree of control exercised by the parent over the subsidiary's marketing and operational policies.[7]

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As for "exceptional" circumstances warranting general jurisdiction, however, the case law on this issue is surprisingly sparse. Indeed, *Daimler* and nearly all of its progeny cite to the same case as a prime example of exceptional circumstances: the Supreme Court's 1952 decision in *Perkins v. Benguet Consol. Mining Co.*[8]

In *Perkins*, a Philippine mining corporation's president moved to Ohio during World War II, during which time all company operations in the Philippines were halted due to wartime issues. Instead, the president kept an office in Ohio at which he maintained the company's files, carried on correspondence relating to the business of the company and its employees, drew and distributed company salary checks using Ohio-based bank accounts carrying substantial balances of company funds, and held directors' meetings. Under these facts, the Supreme Court found that because "Ohio was the corporation's principal, if temporary, place of business," the exercise of general jurisdiction would not violate due process.[9]

In contrast to the unusual facts and outcome of *Perkins*, the post-*Daimler* federal courts in New York have declined to find "exceptional" circumstances for purposes of general jurisdiction in the following situations:

- a foreign employer who hired a New York employee and had a client in New York did not have "exceptional" contacts with New York of the kind that would render the employer at home in New York;[10]
- a Turkish corporation with its operations, properties and assets predominantly located in Turkey was not "at home" in New York even though its affiliates negotiated with companies in New York, contracted with American companies and had offices in New York;[11]
- no New York general jurisdiction existed over a Tennessee joint venture comprised of Missouri and California companies, as its activities in New York did not "exist to such a degree in comparison to the corporation's overall national and international presence" that they would rise to an "exceptional" level and render the corporation "at home" there;[12] and
- a Delaware corporation with its principal place of business in Missouri that leased a New York "pass-through" to furnish the corporation with nationwide non-New York customers in the event of a system failure was "simply not enough" to support jurisdiction. [13]

But what does all of this mean for the CEO, who has been patiently waiting on the phone while you read this article? To determine whether general jurisdiction exists over the foreign parent corporation under *Daimler* or alter-ego principles, ask the following questions:

- Does the parent corporation maintain a principal place of business in New York?
- Is there common ownership of the parent corporation and the subsidiary?
- Is the subsidiary financially dependent on the parent corporation?
- Does the parent corporation interfere with the selection and assignment of the subsidiary's executives and otherwise fail to observe corporate formalities, and if so, to what degree?
- Does the parent exercise control over the subsidiary's marketing and operational policies?
- Is the parent corporation currently conducting all of its business affairs in New York, such that New York is effectively its temporary principal place of business?
- Do other "exceptional" circumstances exist apart from occasional contacts with New York that you believe could render the parent corporation "at home" there?

If you answered "yes" to any of these questions, the foreign parent corporation may be subject to general jurisdiction in New York. If you answered "no," the foreign parent corporation most likely has a strong defense against general jurisdiction.

A final cautionary note: proposed legislation presently pending before the New York State Legislature seeks to override *Daimler* by providing that a foreign corporation's application for authority to do business in New York State constitutes consent to general jurisdiction in New York.[14] Should this legislation pass, registering to do business in New York would be an additional factor in a general jurisdiction analysis.

One thing is certain post-*Daimler:* the parent corporation is not automatically subject to jurisdiction in New York simply because it has an in-state subsidiary.

[1] Daimler AG v. Bauman, 134 S. Ct. 746 (2014). Daimler applies to general jurisdiction only. This article does not address specific jurisdiction, wherein the suit at issue arises out of or relates to the defendant's contacts with the forum.

[2] Id. at 761-762 (citations omitted).

[3] Id. at 761 n. 19.

[4] See, e.g., Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000) (recognizing "well-established" law providing that "a court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available.")

[5] Int'l Diamond Importers, Inc. v. Oriental Gemco (.N.Y.), Inc., No. 14-CV-3506 SAS, 2014 WL 6682622, at *11-12 (S.D.N.Y. Nov. 24, 2014) (citing Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221 (2d Cir.) cert. denied, 134 S. Ct. 2888, 189 L. Ed. 2d 837 (2014); ESI, Inc. v. Coastal Corp., 61 F.Supp.2d 35, 51 (S.D.N.Y.1999)).

[6] See, e.g., N.Y. C.P.L.R. § 302(a).

[7]NewLead Holdings Ltd. v. Ironridge Global IV Ltd., No. 14CV3945, 2014 WL 2619588, at *4 (S.D.N.Y. June 11, 2014).

[8] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[9] Id. at 448.

[10] Williams v. Preeminent Protective Servs., Inc., No. 14-CV-5333 ILG MDG, 2015 WL 365926, at *3 (E.D.N.Y. Jan. 29, 2015)

[11] Sonera Holding B.V, supra.

[12] Chatwal Hotels & Resorts LLC v. Dollywood Co., No. 14-CV-8679 CM, 2015 WL 539460 (S.D.N.Y. Feb. 6, 2015).

[13] Rates Tech. Inc. v. Cequel Commc'ns, LLC, 15 F. Supp. 3d 409, 417 (S.D.N.Y. 2014).

[14] See New York State Senate Bill S4846-2015; New York State Assembly Bill A6714-2015.