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LITIGATION

In this BNA Insight, attorney Paul Ragusa examines the impact of a recent U.S. Supreme Court decision on litigation involving foreign corporations and abbreviated new drug applications. He says it may become more challenging to assert general jurisdiction over foreign and out-of-state corporations in states that are not the corporation's principal place of business or state of incorporation.

Establishing Personal Jurisdiction Over Foreign Corporations in ANDA Cases



BY PAUL RAGUSA

When can personal jurisdiction be properly asserted against a foreign corporation based on the general local activities of its subsidiary in the forum state? In an opinion authored by Justice Ginsberg, the Supreme Court recently considered this and other questions in *Daimler AG v. Bauman*,¹ and overturned a lower court's decision that held a parent cor-

¹ 134 S. Ct. 746 (2014).

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poration subject to general jurisdiction in a state based on the in-state contacts of its subsidiary.

Fundamentals of General Personal Jurisdiction: Perkins, Helicopteros & Goodyear

In two often cited decisions, *Perkins v. Benguet Consolidated Mining Co.*² and *Helicopteros Nacionales de Columbia v. Hall*³, the Supreme Court delineated the scope of general jurisdiction and its applicability to corporations. In *Perkins*, the Court held that a court could exercise general personal jurisdiction over a corporation on the basis of that company's "continuous and systematic" contacts with the forum state. The Court further stated that a foreign corporation's temporary re-

² 342 U.S. 437 (1952).

³ 466 U.S. 408 (1984) (survivors of U.S. citizens who died in a helicopter crash in Peru instituted wrongful-death actions in a Texas state court against the owner and operator of the helicopter, a Colombian corporation).

location of operations to a state can be considered “continuous and systematic” to subject that corporation to proceedings in that state.⁴ Accordingly, it was proper to exercise general jurisdiction over a Philippine corporation in Ohio, the state where the company’s operations were temporarily managed during World War II.

Helicopteros involved a Colombian corporation that purchased helicopters and obtained some pilot training from a Texas manufacturer, and entered into a contract with a Texas joint venture to provide helicopter transportation services. When one of its helicopters crashed in Peru, *Helicopteros* and the Texas manufacturer were sued by the estates of its former American employees. In *Helicopteros*, the Court distinguished *Perkins* and determined that the repeated purchasing of products from a state and sending employees to the state for business and training “cannot be described or regarded as a contact of a ‘continuous and systematic’ nature” to warrant general personal jurisdiction over the corporation in that state.⁵ *Helicopteros*, according to the Court, did not have the level of general business contacts that the Court found in *Perkins*.⁶

The “continuous and systematic” standard set forth in *Perkins* and *Helicopteros* has been frequently invoked by lower courts but has led to inconsistent interpretations of what type of contacts satisfy this standard, particularly when corporate affiliates are involved. In *Goodyear Dunlop Tires Operations, S. A. v. Brown*, the Supreme Court had occasion to clarify the legal standard of general personal jurisdiction.⁷ In *Goodyear*, the families of two children that were killed in a bus crash in France brought suit in North Carolina, alleging that the accident was due to faulty tires manufactured and distributed by foreign subsidiaries of Goodyear USA. In response, Goodyear USA’s foreign subsidiaries maintained that North Carolina lacked adjudicatory authority over them and moved to dismiss. The North Carolina Court of Appeals, however, exercised general jurisdiction over the foreign corporation on the basis that the defective tire, which was manufactured and sold abroad, “had reached North Carolina through ‘the stream of commerce.’”⁸

The Supreme Court, in a unanimous decision, overturned the lower court’s ruling, stated that such a limited “connection [] between the forum and the foreign corporation [] is an inadequate basis for the exercise of general jurisdiction.”⁹ The Court held that Goodyear USA’s foreign subsidiaries’ “attenuated connections to the state [] fall far short of the ‘the continuous and systematic general business contacts’ necessary to empower North Carolina to” warrant general personal jurisdiction.¹⁰ The Court emphasized that for proper exercise of general jurisdiction, the defendant connections to the state must be “so ‘continuous and systematic’ as to render them essentially *at home* in the forum state,” where the relevant state for a corporation

should be “equivalent” to the state of domicile for an individual.¹¹

Daimler AG v. Bauman

Daimler involved claims regarding acts allegedly committed by Daimler’s Argentinian subsidiary, Mercedes-Benz Argentina (“MB Argentina”).¹² Plaintiffs named DaimlerChrysler Aktiengesellschaft (Daimler), the German parent corporation of MB Argentina, as well as Daimler’s U.S. subsidiary, Mercedes-Benz USA LLC (“MB USA”) as defendants in a case filed in the District Court for the Northern District of California.

The plaintiffs argued that Daimler was subject to personal jurisdiction in California based on the California contacts of MB USA. MB USA, which is incorporated in Delaware and has its principal place of business in New Jersey, imports Daimler-manufactured vehicles from Germany and distributes the vehicles among independently-owned dealerships located throughout the US, including California. The Ninth Circuit, reversing the decision of the District Court, held that Daimler was subject to personal jurisdiction in California because MB USA was Daimler’s “agent” for jurisdictional purposes and attributed MB USA’s California contacts to Daimler.¹³ The Ninth Circuit primarily relied on its conclusion that the “MB USA’s services were ‘important’ to Daimler, as gauged by Daimler’s hypothetical readiness to perform those services itself if MB USA did not exist.”¹⁴

The Supreme Court overturned the Ninth Circuit’s decision, finding that Daimler was not subject to general personal jurisdiction. Although the Court did not expressly overrule the use of an agency test for determining general jurisdiction, it specifically held that the Ninth Circuit’s formulation of the “agency” test did not satisfy the requirements of due process.¹⁵ In particular, an inquiry into the “importance” of a subsidiary is not a valid test, as it “will always yield a pro-jurisdiction answer,” and will incorrectly subject “foreign corporations to general jurisdiction whenever they have an in-state subsidiary [], an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’” that the Court previously rejected in its decision in *Goodyear*.¹⁶

The Court reiterated the holding of *Goodyear*, stating that general jurisdiction is warranted if “that corpora-

¹¹ *Id.* at 2853-2854 (quoting Brilmayer et al., A General Look at General Jurisdiction, 66 TEXAS L.REV. 721, 782 (1988))(emphasis added).

¹² *Daimler AG v. Bauman*, 134 S. Ct. 746, 748 (2014).

¹³ *Bauman v. Daimler-Chrysler Corp.*, 644 F.3d 909 (9th Cir. 2011). Under the Ninth Circuit “agency” test, a court could exercise general personal jurisdiction over a foreign parent corporation for activities that occurred entirely outside of the U.S. if: (1) it would perform the tasks of the subsidiary if the subsidiary did not exist and (2) it had the “right to control” the subsidiary. *Id.* at 920. The “agency” test as applied by the Ninth Circuit “is satisfied by a showing that the subsidiary functions as the parent corporation’s representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services.” *Id.*

¹⁴ *Daimler*, 134 S. Ct. at 749 (2014).

¹⁵ *Id.*

¹⁶ *Id.* at 759.

⁴ *Perkins*, 342 U.S. 437, 438 (1952).

⁵ *Helicopteros*, 466 U.S. at 416 (1984).

⁶ *Id.*

⁷ 131 S. Ct. 2846 (2011).

⁸ *Brown v. Meter*, 199 N.C.App. 50, 67-68 (2009).

⁹ *Goodyear*, 131 S. Ct. at 2851 (2011).

¹⁰ *Id.* at 2857 (quoting *Helicopteros*, 466 U.S. at 416 (1984)).

tion's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.'"¹⁷ According to the Court, "home" should be defined in relation to the "corporation's activities in their entirety, nationwide and worldwide" and should not rely "on the magnitude of a defendant's in-state activities . . . [o]therwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States."¹⁸

A corporation's principal place of business and state of incorporation are considered the "[p]aradigm bases for the exercise of general jurisdiction."¹⁹ The identification of such states will assure potential plaintiffs that they will "have recourse [in] at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."²⁰ However, the Court did not foreclose "the possibility that in an exceptional case, see, e.g., *Perkins*, . . . a corporation'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."²¹

Under the facts of the case, even assuming that MB USA's contacts could be imputed to its parent, *Daimler* was not "at home" in California for purposes of general jurisdiction. As neither *Daimler* nor MB USA were incorporated or have a principal place in California, the Court held that there is no basis to subject *Daimler* to general jurisdiction in California. The Supreme Court concluded by stating that concerns about international comity, in particular, the potential effects a broad definition of general jurisdiction may have on international agreements and judgments supported its determination that foreign corporations are not subject to general jurisdiction in all states merely because their subsidiaries have sizeable sales.²²

Establishing General Personal Jurisdiction in ANDA Cases

Under the Hatch-Waxman Act,²³ it is considered a "theoretical" act of infringement to file an abbreviated new drug application (ANDA) seeking Food and Drug Administration approval to market a patented drug before the relevant patent expires, "because the allegedly infringing product has not yet been marketed."²⁴ In

ANDA cases, plaintiffs often rely on general personal jurisdiction to bring a case into a forum of their choosing, asserting that general jurisdiction is warranted because the defendants are licensed to distribute pharmaceuticals and/or are in the business of making and selling pharmaceutical products the forum state.²⁵

However, following *Daimler*, such activities, even if "continuous and systematic," may not be sufficient to warrant general personal jurisdiction; the corporation must be found to be "at home." As a result, it may become more challenging to assert general jurisdiction over foreign and out-of-state corporations in states that are not the corporation's principal place of business or state of incorporation.

Daimler does leave room for ANDA plaintiffs to argue an appropriate agency test to assert general jurisdiction over a foreign parent corporation based on local activities of a subsidiary, although it left open what that test should look like. It also leaves room for ANDA plaintiffs to assert an "exceptional case" type of general jurisdiction, when a defendant's corporate operations are substantial enough to render the corporation at home in a forum other than its place of incorporation or principal place of business.

Most ANDA cases have historically been filed in New Jersey or Delaware.²⁶ A potential consequence of the *Daimler* decision is that more ANDA cases may be filed in less frequently visited courts where the defendants are "at home,"²⁷ or where specific personal jurisdiction can be found.²⁸

²⁵ See, for example, *Sandoz v. Pfizer*, 2010 WL 502727 (noting that Sandoz, a Colorado corporation with a principal place of business in New Jersey, has sufficient contacts in Delaware to be subjected to personal jurisdiction. Such contacts include being licensed to distribute pharmaceuticals in the state of Delaware, and being in the business of making and selling generic pharmaceutical products for sale throughout the United States, including Delaware). See, also, *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litigation*, 693 F. Supp.2d 409 (Del. 2010) (holding that Anchen Pharmaceuticals, a California corporation with a principal place of business in California, was subject to general jurisdiction in Delaware because Anchen derives "substantial revenue" from Delaware drug sales).

²⁶ See PWC 2013 - Patent litigation study, available at http://www.pwc.com/en_us/us/forensic-services/publications/assets/2013-patent-litigation-study.pdf.

²⁷ For example, a number of generic pharmaceutical companies are incorporated and headquartered in Pennsylvania (e.g., Mylan Pharmaceuticals), where, based on the holding in *Daimler*, they will be considered "at home" for general jurisdiction purposes.

²⁸ Specific jurisdiction applies when a forum state exercises jurisdiction over a defendant because the defendant's activities in that state gave rise to the claim. See, for example, *Pfizer Inc. v. Synthon Holding, B.V.*, 386 F. Supp.2d 666 (M.D.N.C. 2005) (held that specific jurisdiction is proper in the state where the defendant and an affiliate extensively prepared and submitted the ANDA at issue).

¹⁷ *Id.* at 761 (emphasis added).

¹⁸ *Id.* at n. 20.

¹⁹ *Id.* at 749. The Court clarified that the holding in *Good-year* did not limit a corporation to general jurisdiction where it is incorporated or has its principal place of business but were only given as "paradigm examples." *Id.* at n. 19.

²⁰ *Id.* at 760.

²¹ *Id.* at 761 n 19.

²² *Id.* at 763.

²³ Drug Price Competition and Patent Term Restoration Act of 1984, Codified at 21 U.S.C. §§ 301-399.

²⁴ 35 U.S.C. § 271(e)(2)(A). See, also, *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1365 (Fed. Cir. 2003).