



When Can Personal Jurisdiction Over a Non-US Company Be Based on Actions Taken By Its US Subsidiary?

Plaintiffs routinely try to impute the activities of US subsidiary companies to their non-US parents in an effort to obtain jurisdiction over the parents in American courts. While there is broad agreement as to the general principles of law to be applied in addressing the question of parental responsibility, judicial rulings are very fact-specific, and not at all consistent with one another. Notably, some decisions turn on a review of the facts giving rise to the claim, while in others the courts focus on the general operation of the parent-subsidiary relationship at issue. In both cases, a familiarity with the rules that courts are likely to apply can allow for advance planning, and help minimize the chances that a court will find that jurisdiction exists.

This special issue of *The World in US Courts* is devoted exclusively to the parent-subsidiary relationship, and discusses the circumstances under which US courts will and will not impute a subsidiary's actions to its parent for purposes of determining whether the parent must remain in a case.¹ An Executive Summary appears below, describing the principal points that we draw from the cases. A more detailed summary with discussions of specific cases follows for those readers wishing to study the issue in further detail and to consider its application in the context of their situations.

Executive Summary

Personal jurisdiction describes the power of a US court (state or federal) to require a party to participate in a judicial proceeding, and to issue enforceable orders applicable to that party. Even if a court has jurisdiction to hear a particular dispute, it may only act against parties over which it has personal jurisdiction. The result is that some parties may win dismissal of a claim on personal jurisdiction grounds even if the case proceeds against other defendants.

The Due Process Clause of the US Constitution imposes requirements as to the minimum contacts that a defendant must have with a forum before personal jurisdiction may be asserted. Many plaintiffs seek to evade these requirements in the case of suits against a non-US company by arguing that the conduct of the company's US subsidiaries should be imputed to the parent for purposes of determining whether the parent had adequate contacts with the state where the litigation has been filed to support the assertion of personal jurisdiction.

US courts consider two types of personal jurisdiction, and the role of the parent-subsidiary relationship is different in each. First, "general personal jurisdiction" allows a court to hear any claim against a particular defendant no matter whether the claim relates to the defendant's contacts with the forum State where the court sits. "Specific personal jurisdiction," meanwhile, is narrower, only allowing a court to hear claims arising out of the defendant's contacts with the forum. The difference can have dramatic practical consequences: Subject to the assertion of additional defenses that would have to be litigated, a defendant that is sued in a State where it is subject to general personal jurisdiction may be required to answer for its conduct anywhere in the US or even the world.

¹ This report describes principles of law and specific court cases, but their application to specific factual settings depends on many factors. Nothing in this report should be considered the provision of legal or other professional advice or opinions as to any subject to any reader.

General personal jurisdiction is broad in scope but difficult to obtain. The 2014 decision of the US Supreme Court in *Daimler AG v. Bauman* held that general personal jurisdiction could only be asserted over a corporation in a State where the corporation could be said to be “at home.” The Supreme Court described a corporation as being “at home” in a State where it is incorporated or has its principal place of business. For non-US corporations, there may be no US State where that is true. The *Daimler* case speculated that there may be an “exceptional” case where an alternative basis for general jurisdiction might be found, but courts have been reluctant to apply this exception broadly, choosing instead to conclude in the vast majority of cases that the State of incorporation/principal place of business test is dispositive.

Plaintiffs used two theories to try to assert general personal jurisdiction against a non-US company based on the activities of its US subsidiaries. First, they have argued that, under the facts of specific cases, the subsidiary’s corporate form should be disregarded and the parent and the subsidiary should be deemed to be one entity—“alter egos” of one another. The *Daimler* case reduced the significance of this argument by noting that, even if the subsidiary were found to be part of the parent, general personal jurisdiction would still attach only if the *combined* company were incorporated, or had its principal place of business in, the US State where litigation was brought. Regardless, efforts to “pierce the corporate veil” are often attempted but are rarely successful. Corporations largely exist in order to shield their owners from the corporation’s own actions, and courts will generally respect the corporate form if the subsidiary appears not to be a sham. Factors often cited by courts in refusing to pierce the corporate veil are whether the subsidiary is adequately capitalized, appears to make certain decisions on its own (even though there may be overlap in the management and boards between a subsidiary and its parent), and corporate formalities are observed. Notably, this risk can be minimized by careful advance planning.

Plaintiffs also try to impute the conduct of a subsidiary to its parent on a theory that the subsidiary is merely an “agent” of the parent. The *Daimler* opinion rejected two specific agency arguments and cast doubt on the viability of this theory as a general matter, and it appears unlikely that, at least as to general personal jurisdiction, agency claims will be successful in the future.

The parent-subsidiary relationship plays a different role in analyzing whether specific personal jurisdiction exists, because the focus is on specific conduct. Under the Due Process Clause, specific jurisdiction exists where (i) a defendant has itself “purposefully availed” itself of the privilege of doing business in a forum State, of a magnitude and type that it could reasonably anticipate being required to defend itself in the State’s courts, (ii) the claims at issue arose out of those contacts, and not actions unrelated to the forum, and (iii) the assertion of jurisdiction would be consistent with “fundamental fairness and substantial justice.”

Defendants often litigate whether the Due Process requirements for the assertion of specific personal jurisdiction have been satisfied. For present purposes, the question is whether a plaintiff may refer to actions taken by a non-US parent’s US subsidiary in seeking to satisfy the test. The same two theories—that the parent and the subsidiary are alter egos of one another, and that the subsidiary has acted as the parent’s agent—are used by plaintiffs in the context of specific personal jurisdiction, but the relevance of the parent-subsidiary relationship is different.

The showing necessary to pierce the corporate veil in the context of special jurisdiction is the same as it is with respect to general jurisdiction—meaning, that it is just as difficult. If successful, however, a plaintiff could utilize the US company’s contacts with the forum State in order to argue that the *non-US parent* had “purposefully availed” itself of the privilege of doing business in a State, that the claim arose from the subsidiary’s conduct, and that asserting jurisdiction was fair. Under the facts of a given case, this showing might not be difficult to satisfy. Again, the basis for such an argument is one that largely depends on the manner in which a parent has conducted and maintained its relationship with its subsidiaries, and thoughtful advance planning can reduce risks considerably.

Arguments that a subsidiary is merely the agent of its parent are also more dangerous in the context of specific jurisdiction than in that of general jurisdiction. While the standards for showing that an agency relationship exists are the same, the focus of special jurisdiction on the specific acts that give rise to a claim makes those acts—and the role the parent may have played in them—more relevant. The skepticism expressed in *Daimler* about the viability of agency theories in the context of general jurisdiction simply does not exist with respect to special jurisdiction, and so agency remains a potentially dangerous theory for non-US defendants. Even so, thoughtful advance planning can minimize the risk that an agency relationship may be found in connection with any transaction.

Discussion

1. *General Principles of Personal Jurisdiction*

Personal jurisdiction describes the power of a US court (state or federal) to require a party to participate in a judicial proceeding, and to issue enforceable orders applicable to that party. The plaintiff bears the burden of alleging facts from which personal jurisdiction may be inferred, although the court may conduct hearings and other fact-finding activities in order to determine whether applicable standards have been met. Arguments that a court cannot assert personal jurisdiction over a defendant must be presented at the very outset of a case, before substantive filings are made, or they will be waived.²

All states have legislation and court rules that describe the circumstances in which personal jurisdiction may be asserted. In all cases, those rules are also limited by the Due Process Clause of the US Constitution. In federal courts, the scope of personal jurisdiction is principally established by affirmative legislation and court rules of the state in which the court is located, and is similarly limited by the Due Process Clause. Most states seek to apply their laws to the fullest extent constitutionally permitted, and so this report will focus on those constitutional limitations.

Cases analyzing when personal jurisdiction attaches to a defendant have interpreted the US Constitution to require that a plaintiff allege that a defendant has “purposefully established minimum contacts with the forum State” and that asserting jurisdiction “would comport with fair play and substantial justice.”³ Ordinarily, the service of a complaint on a defendant within a state’s boundaries will satisfy these requirements and be sufficient to confer personal jurisdiction. But where a defendant cannot be found in the forum state—because it can be found only in other states or outside the US entirely—difficult questions can arise as to what “minimum contacts” are required. In this regard, the cases distinguish between two different forms of personal jurisdiction. “General” jurisdiction is broad, and allows a court to require the participation of a defendant in connection with any dispute the court may properly hear. In contrast, “specific” jurisdiction is more limited, and allows a court only to require a defendant’s participation as to claims that “aris[e] out of or relate[] to the defendant’s contacts with the forum.”⁴

General jurisdiction is broad in scope but difficult to obtain. In the *Daimler* case, the US Supreme Court limited general jurisdiction to instances in which the defendant could be said to be “at home” in a forum.⁵ In the case of an individual, the “paradigm” situation will be the state where he or she is domiciled. With respect to a corporation, the Court found that the inquiry should center on “an appraisal of a corporation’s activities in their entirety, nationwide and worldwide,” and concluded that a corporation’s “place of incorporation and principal place of business are ‘paradigm[] . . . bases for general jurisdiction’”⁶ For non-US corporations, it is likely that neither paradigm situation will apply, and general personal jurisdiction may simply be unavailable. By using the term “paradigm,” however, the Supreme Court reserved

² See Fed. R. Civ. P. 12(b)(2).

³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quotation marks and citation omitted).

⁴ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (citation omitted).

⁵ *Daimler*, 134 S. Ct. at 751.

⁶ *Daimler*, 134 S. Ct. at 762 n.20, 760.

the possibility that “exceptional” cases may exist in which alternative grounds for general jurisdiction would satisfy constitutional requirements.⁷ But the Court gave no examples of such situations.

Specific personal jurisdiction focuses on “the relationship among the defendant, the forum, and the litigation,” and requires the application of different standards.⁸ Courts have developed a three-part test to determine whether special jurisdiction exists. First, the defendant must have “purposefully availed” itself of the benefits and protection of a forum state’s laws. In tort cases (and in statutory claims that resemble torts), this requirement has been understood to require that a defendant’s conduct be “focus” on the forum state, and that the effect of that conduct be felt in the forum state.⁹

Second, the claims made against the defendant must “arise out of” the contacts with the forum.¹⁰ While sharing many characteristics, the rules for applying this test that have been formulated by the different US courts of appeals are not the same, and different outcomes could follow depending on where a case has been filed.

Finally, asserting jurisdiction must not “offend ‘traditional notions of fair play and substantial justice.’”¹¹ Courts have stated that a defendant seeking to prevail on this third test where jurisdiction has survived the first two tests must make a “compelling case,”¹² and in practice very few defendants have been able to do so.

2. General Personal Jurisdiction in a Post-Daimler America

As a practical matter, *Daimler* has made it extremely difficult for general personal jurisdiction over a non-US parent company to be based on acts of its US subsidiary—even where the subsidiary is located in the forum state, and is itself subject to general personal jurisdiction. The stark facts of the case make the point. In *Daimler*, a group of Argentine plaintiffs filed suit against Daimler Aktiengesellschaft (“Daimler AG”), a German corporation, in the Northern District of California, alleging that Daimler AG’s Argentinian subsidiary collaborated with Argentine state security forces to “kidnap, detain, torture, and kill certain [Mercedes-Benz] Argentina workers” during Argentina’s “Dirty War” of 1976-1983.¹³ The conduct on which the claims were based took place exclusively in Argentina. The plaintiffs named only one defendant in the complaint—Daimler AG, the German corporation—and sought to hold it vicariously liable for the subsidiary’s actions.¹⁴

The US Supreme Court granted review to decide whether the Due Process Clause permitted the assertion of personal jurisdiction over Daimler AG on these facts. The plaintiffs argued that jurisdiction in California was proper because Mercedes-Benz USA, a Delaware corporation with its principal place of business in New Jersey and an indirect subsidiary of Daimler AG, maintained multiple California-based facilities and realized substantial revenues from California sales.¹⁵ For the purposes of that decision only, the Court assumed that Mercedes-Benz USA was “at home” in California (meaning, that general jurisdiction over the company existed).¹⁶ The Supreme Court ultimately held that, even in such case and assuming that Mercedes-Benz USA’s actions could be imputed to Daimler, “there would still be no basis to subject Daimler [AG] to general jurisdiction in California, for Daimler [AG]’s slim contacts with the State hardly render it at home there.”¹⁷ The Court rejected the plaintiffs’ request to “approve the exercise of general

⁷ *Id.* at 761 n. 19. The “exceptional” case was described as one where, other than because of its place of incorporation or principal place of business, a corporation’s “operations . . . may be so substantial and of such a nature as to render the corporation at home in that State.”

⁸ See *Shaffer v. Heitner*, 433 U. S. 186, 204 (1977).

⁹ *Walden v. Fiore*, 134 S. Ct. 115, 1124 (2014).

¹⁰ *Helicopteros Nacionales de Colombia, s. A. v. Hall*, 466 U.S. 408, 414 n.9 (1984).

¹¹ *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 113 (1987) (quoting *Int’l Shoe*, 326 U.S. at 316).

¹² *Burger King*, 471 U.S. at 477.

¹³ *Daimler*, 134 S. Ct. at 751-52.

¹⁴ *Id.* at 752.

¹⁵ *Id.* at 753.

¹⁶ *Id.* at 758.

¹⁷ *Id.* at 760.

jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business’ as “unacceptably grasping.”¹⁸

Daimler makes abundantly clear that a non-US corporation itself—not its managing agent, subsidiary, or affiliate—must be “at home” in the forum state for a court to exercise general personal jurisdiction.¹⁹ That said, the Supreme Court’s opinion left open a few questions, applicable to the limited situation where a non-US corporation’s operations are centered in the US. First, it did not change the general law that a corporate subsidiary could be deemed to be part of the parent if the subsidiary’s relationship to the parent is so close that the two formally separate corporations could be deemed “alter-egos” of one another—in corporate parlance, this is referred to as “piercing the corporate veil.” That concept arises with respect to general jurisdiction but is addressed more frequently in connection with specific personal jurisdiction, and thus is discussed below. Second, while rejecting two theories under which a subsidiary’s conduct could be imputed to its parent under an “agency” theory for purposes of general personal jurisdiction, the Court declined to declare categorically that an agency theory could never have a place in the analysis of general personal jurisdiction.²⁰ The fundamental point, however, is *Daimler*’s holding that neither of the “alter-ego” or “agency” theories matters if, even when considering of the subsidiary’s activities in the US, the non-US parent still is not “at home” in the forum state.

Daimler has been treated as a watershed case in the world of civil procedure and personal jurisdiction. In the majority of cases post-*Daimler*, courts have disposed of the general personal jurisdiction inquiry in a very cursory and conclusory manner, concluding that general personal jurisdiction has not been established merely because the defendant was not organized under the laws of, or have its principal place of business in, the forum state.²¹ Even in the cases that engage in a more detailed analysis, there is little if any discussion about alternative facts that might have led to a different result.²² This is unsurprising given the categorical test established by *Daimler*; in all but the most difficult cases, it will be plain that a corporate defendant outside its state of incorporation or principal place of business is not “at home” there.

The “exceptional case” postulated by *Daimler* as providing an alternative basis for general jurisdiction has generated some speculation, but few examples. Only two courts to date have found general personal jurisdiction based upon an “exceptional case,” and neither provided significant guidance for other cases. In *Sokolow v. Palestine Liberation*,²³ the US District Court for the Southern District of New York held that general personal jurisdiction could be asserted over two defendants, the Palestine Liberation Organization and the Palestine Authority, neither of which was incorporated in or had a principal place of business in New York. Although the defendants argued that their contacts with the US were minimal, especially when compared to their contacts with other countries, the court held that general personal jurisdiction over both organizations could be based on their alleged continuous and systematic business and commercial contacts within the United States. The court in *Sokolow* failed to elaborate upon its general personal jurisdiction holding or seek to place it within the *Daimler* framework, limiting the precedential value of the court’s decision.

¹⁸ *Id.* at 761.

¹⁹ *Id.*

²⁰ The Court rejected claims that a sufficient agency relationship could be established where a subsidiary performed services “important” to the parent, or where contractual arrangements gave the parent the right to “oversee” certain of the subsidiary’s obligations. *Id.* at 759-760. The Court specifically noted, in contrast, the applicability of agency theories to specific personal jurisdiction. *Id.* at 759 n.13.

²¹ See, e.g., *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224-26 (2d Cir. 2014); *Associated Energy Grp., LLC v. Air Cargo Ger. GmbH*, 24 F. Supp. 3d 602, 607 (S.D. Tex. 2014); *Google Inc. v. Rockstar Consortium US LP*, No. C 13-5933 CW, 2014 U.S. Dist. LEXIS 53757, at 5 (N.D. Cal. Apr. 17, 2014); *Air Tropiques, Sprl v. N. & W. Ins. Co. Ltd.*, No. H-13-1438, 2014 U.S. Dist. LEXIS 44255, at 10-11 (S.D. Tex. Mar. 31, 2014); *Beach v. Citigroup Alt. Invs. LLC*, No. 12 Civ. 7717(PKC), 2014 U.S. Dist. LEXIS 30032, at 6-7 (S.D.N.Y. Mar. 7, 2014); *Meyer v. Bd. of Regents of Univ. of Okla.*, No. 13 Civ. 3128(CM), 2014 U.S. Dist. LEXIS 68510, at 3-4 (S.D.N.Y. May 14, 2014);.

²² See, e.g., *Cutcher v. Midland Funding, LLC*, No. ELH-13-3733, 2014 U.S. Dist. LEXIS 68768, at 6-8 (D. Md. May 19, 2014); *Meyer v. Bd. of Regents of Univ. of Okla.*, No. 13 Civ. 3128(CM), 2014 U.S. Dist. LEXIS 68510, at 3-4 (S.D.N.Y. May 14, 2014); *Simon v. Republic of Hung.*, 37 F. Supp. 3d 381, 403 (D.D.C. May 9, 2014).

²³ *Sokolow*, No. 04 Civ. 397 (GBD), 2014 U.S. Dist. LEXIS 168114 (S.D.N.Y. Dec. 1, 2014).

Similarly, in *Hosking v. Hellas Telcoms. (Lux.) III SCA*, the US Bankruptcy Court for the Southern District of New York held that it had general personal jurisdiction over the defendant Deutsche Bank, even though Deutsche Bank was neither incorporated in New York nor maintained its principal place of business in New York.²⁴ Although the court's opinion provides limited guidance in reconciling its conclusion with that in *Daimler*, the court's focus was on the sheer scale of Deutsche Bank's New York operations, including "a principal location in New York, where it has \$5 billion in assets and operates out of a massive 1.6 million square foot Regional Head Office at 60 Wall Street that employs some 1,600 personnel, including 1,000 executives."²⁵ The court held that Deutsche Bank is "at home" in the US, is represented by counsel in the US, and the US has a significant interest in adjudicating the proceeding.²⁶ These "substantial contacts," the court held, warranted subjecting Deutsche Bank to general personal jurisdiction.²⁷ *Hosking* and *Sokolow*, so far, seem to be outlier cases in extending general personal jurisdiction. Both, notably, involve cases of specific public interest.

In other recent cases applying *Daimler* to personal jurisdiction issues, courts have consistently failed to find an "exceptional case" to allow the application of general personal jurisdiction to defendants who fail to meet the "two paradigms."²⁸ Some of these cases, such as *Bulwer v. Mass. College of Pharm. & Health Scis.*, demonstrate how difficult it is to generalize from the *Hosking* decision.²⁹ The plaintiff in *Bulwer* brought suit against the Massachusetts College of Pharmacy and Health Sciences ("the College") for copyright infringement and other related claims. The defendant is a nonprofit college incorporated in Massachusetts, operating three campuses: two located in Massachusetts and a smaller one located in New Hampshire. Not even in this circumstance, in which a college maintained an entire campus, with staff, faculty and students in the neighboring state of New Hampshire, did the court extend general personal jurisdiction to the College. The court, in quoting *Daimler*, held that this is not a case with "instances in which the continuous corporate operations are so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities."³⁰

In other cases, courts finding that they did not have general personal jurisdiction over the defendants at hand have been more willing to explain why cases have not been "extraordinary." In *Brown v. CBS Corp.*, for example, the explained that the defendant, Lockheed Martin, maintained even less substantial contact with the forum, Connecticut, than *Daimler* did with California.³¹ The court noted that "Lockheed Martin currently has 28 employees working in four separate cities, it leases property in [Connecticut] with its name on the building and a telephone listing, it has derived about \$160 million in revenue from Connecticut since 2008, and it pays corporate income tax in Connecticut."³² The court looked to the proportion of Lockheed's business in the forum state compared to the US overall, the proportion of its revenue derived from the forum, the percentage of Lockheed's employees working in the forum, the extent of its assets and real estate in the forum, and even the fact that Lockheed's operations in Connecticut were primarily directed toward contracts with the US government and not toward Connecticut businesses and residents.³³ In *Brown*,

²⁴ *Hosking*, 524 B.R. 488 (Bankr. S.D.N.Y. 2015).

²⁵ *Id.* at 508.

²⁶ *Id.* at 513.

²⁷ *Id.*

²⁸ *7 W. 57th St. Realty Co. LLC v. CitiGroup Inc.*, No. 13 Civ. 981 (PGG), 2015 U.S. Dist. LEXIS 44031 (S.D.N.Y. Mar. 31, 2015); *Air Tropiques, SPRL v. Northern & Western Ins. Co.*, No. H-13-1438, 2014 U.S. Dist. LEXIS 44255 (S.D. Tex. Mar. 31, 2014); *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221 (2d Cir. 2014) (Per Curium); *In re MN MSC Flaminia*, No. 12-cv-8892 (SAS), 2015 U.S. Dist. LEXIS 52977 (S.D.N.Y. Apr. 22, 2015); *Associated Energy Group, LLC v. Air Cargo Germany GMBH*, 24 F. Supp. 3d 602 (S.D. Tex. June 4, 2014); *Hewlett-Packard Co. v. Toshiba Corp.* (*In re Optical Disk Drive Antitrust Litig.*), No. 10-md-02143-RS, 2015 U.S. Dist. LEXIS 57035 (N.D. Cal. Apr. 28, 2015); *McCann v. Sandals Resorts Int'l, Ltd.*, No. 14-2208, 2015 U.S. Dist. LEXIS 16962 (E.D. Pa. Feb. 11, 2015); *Meyer v. Bd. of Regents*, No. 13 Civ. 3128 (CM), 2014 U.S. Dist. LEXIS 68510 (S.D.N.Y., May 14, 2014); *Otsuka Pharm Co. v. Mylan Inc.*, No. 14-4508 (JBS/KMW), 2015 U.S. Dist. LEXIS 35679 (Dist. N.J. Mar. 23, 2015).

²⁹ *Bulwer v. Mass. College of Pharm. & Health Scis.*, No. 1:13-cv-521-LM, 2014 U.S. Dist. LEXIS 106365 (D. N.H. Aug. 4, 2014). *Bulwer* (and certain other cases discussed below) involve a defendant that was incorporated and had a principal place of business in a different State, not outside the US, but the Due Process standards for the assertion of general personal jurisdiction are the same.

³⁰ *Id.* (citation omitted).

³¹ *Brown v. CBS Corp.*, 19 F. Supp. 3d 390 (D. Conn. May 14, 2014).

³² *Id.* at 398.

³³ *Id.* at 398-99.

these factors all were cited in support of the conclusion that Lockheed could not be classified as an exceptional case, and was therefore not subject to general personal jurisdiction in Connecticut.³⁴

Similarly, no “exceptional case” was found in *Senju Pharm. Co., Ltd. v. Metrics, Inc.*³⁵ The court in that case noted that the defendant owned no facilities or offices in the forum state (New Jersey), did not sell products or services in New Jersey, was not registered to do business in New Jersey, did not have an agent appointed to accept service of process in New Jersey, the fact that the plaintiff made no allegations that the defendant had any employees, agents, or bank accounts in New Jersey, and that there were no allegations that the defendant was soliciting business or advertising in New Jersey.³⁶ While the court did note that the defendant formerly had an office in the forum and had litigated 11 patent cases in 14 years in New Jersey, it held that a defendant’s past activity could not serve to establish general personal jurisdiction in this case when the defendant did not have any current business activity in New Jersey. Given all of these factors that demonstrated the defendant’s insignificant contacts with New Jersey, the court held that it was not subject to general personal jurisdiction in the state.³⁷

3. *The New Battleground: Specific Personal Jurisdiction*

Following *Daimler*, general jurisdiction is now only appropriate where a corporation is “at home” in the forum state, limiting the circumstances in which a non-US corporation may be sued in a state for conduct occurring in a different state, or elsewhere in the world. But *Daimler* did not change the rules applicable to the assertion of special personal jurisdiction, and so non-US entities remain at risk to suit in the US arising out of their contacts with different US states. Indeed, *Daimler* made questions of specific personal jurisdiction all the more important.

A non-US corporation (or individual) can act directly in the US (*i.e.*, not through a US subsidiary) so as to satisfy Due Process requirements and invoke a court’s specific personal jurisdiction.³⁸ Indeed, the US Supreme Court recently confirmed that “it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its [specific personal] jurisdiction over him.”³⁹ For purposes of this paper, the critical question is when a subsidiary’s contacts with a forum can be imputed to its non-US parent so as to satisfy this standard. Plaintiffs generally pursue two related theories in support of imputation: Alter-ego and agency.

Corporations exist largely for the purpose of shielding their owners from direct responsibility for the corporation’s actions, and so while many efforts are made to “pierce the corporate veil,” relatively few are successful.⁴⁰ In general, the analysis focuses on the relationship between the parent and the subsidiary, with the ultimate question being whether the corporate separation is real and not a pure fiction.⁴¹ (Some jurisdictions may also require the plaintiff to prove that the parent used the corporate form to perpetrate a fraud on the plaintiff before allowing an alter-ego theory

³⁴ *Id.* at 400.

³⁵ *Senju Pharm. Co., Ltd. v. Metrics, Inc.*, No. 14-3962 (JBS/KMW), 2015 U.S. Dist. LEXIS 41504 (S.D. N.J. Mar. 31, 2015).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Again, as a reminder, jurisdiction must affirmatively be authorized under the specific jurisdictional statutes and rules of the State in which a federal court sits. Due Process limitations often define the scope of this authorization, but must generally be understood as a limitation.

³⁹ *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

⁴⁰ See Phillip I. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations*, 6.01 at 106 (1987) (writing that courts only pierce corporate veils in “exceptional” cases).

⁴¹ See, e.g., *Noah Technologies, Inc. v. Rice*, No. 2:14-cv-325-FtM-29DNF, 2014 U.S. Dist. LEXIS 161548 (M.D. Fla. Nov. 18, 2014) (holding that “[t]o establish jurisdiction under the alter ego theory, the plaintiff’s pleading must set forth sufficient jurisdictional allegations to pierce the corporate veil of the resident corporation. The corporate veil cannot be pierced unless the plaintiff can establish *both* that the corporation is a ‘mere instrumentality’ or alter ego of the defendant, *and* that the defendant engaged in ‘improper conduct’ in the formation or use of the corporation.” (quotation marks omitted)); see also *Eaves v. Pirelli Tire, LLC*, No. 13-1271-SAC, 2014 U.S. Dist. LEXIS 64866 (D. Kan. May 12, 2014) (holding that there was no personal jurisdiction over the foreign manufacturing parent companies because plaintiffs failed to establish sufficient contacts by an alter-ego or agency theory with the tire distributor); See, e.g., *Luv N Care, Ltd. v. Angel Juvenile Prods.*, No. 3:11-1878, 2015 U.S. Dist. LEXIS 74688 (W.D. La. June 9, 2015) (holding that “[t]he legal fiction of distinct corporate entities may be disregarded when a corporation is so organized and controlled as to make it merely an instrumentality or adjunct of another corporation. If one corporation is wholly under control of another, the fact that it is a separate entity does not relieve the latter from liability, but in such cases the former corporation is merely an alter ego or business conduit of the latter, and the court is free to disregard their separate corporate entity.”).

to proceed).⁴² Determining whether a parent and its subsidiary are alter-egos of one another is situation-specific, and no single factor or set of factors is dispositive. Generally, though, courts consider the following questions, with a Yes answer pointing in the direction of respecting the separation between the subsidiary's conduct and the parent:

- Is the subsidiary adequately capitalized?
- Has the subsidiary observed corporate formalities?
- Is there a meaningful difference between the subsidiary's corporate officers and directors with officers and directors of its parent?
- Does the subsidiary make significant decisions on its own?
- Does the subsidiary pay the salaries of its employees directly?
- Does the subsidiary pay formal dividends as opposed to merely transferring money to its parent on an ad-hoc basis?
- Does the parent respect the subsidiary's property as opposed to using the subsidiary's property as if it belonged to the parent?

These questions are notable for addressing questions of practice and structure independent of the conduct that may have given rise to a suit. As such, they can be anticipated and steps may be taken in advance to minimize the risk that a court will "pierce the corporate veil."

Plaintiffs contending that a subsidiary's conduct should be imputed to its parent based on an agency theory, by contrast, tend to focus more on the specific actions on which a claim is based. Indeed, in the *Daimler* case itself, the Supreme Court recognized that "a corporation can purposefully avail itself of a forum [thus satisfying the first test for specific jurisdiction] by directing its agents or distributors to take action there," and observed that an agency relationship may come in different forms, and be limited to certain purposes. In order to make an agency argument successfully, plaintiffs generally must demonstrate that: (1) the parent intended for the subsidiary to act for the parent, (2) the subsidiary agreed to act as the parent's agent, (3) and that the parent exercised total control over the subsidiary.⁴³ Again, the inquiry is fact-specific.

Two recent cases illustrate the analyses engaged in by courts in considering claims that an out-of-state (or non-US) corporation should be responsible for its subsidiary's contacts with the forum. In *Bui v. Golden Biotechnology Corp.*,⁴⁴ the US District Court for the Northern District of California declined to extend personal jurisdiction over Taiwanese parent company GBC Taiwan based on either of the two theories presented: (1) that GBC New Jersey, which did not challenge personal jurisdiction, was an alter ego or agent of GBC Taiwan whose contacts could be attributed to its parent, or (2) that specific jurisdiction existed because GBC Taiwan purposefully availed itself of the forum. In *Bui*, the plaintiff, a physician residing in California, entered an employment agreement with defendant GBC New Jersey, a New Jersey subsidiary of Taiwanese defendant GBC Taiwan. When Bui's employment was terminated, she filed a complaint for breach of contract against both GBC New Jersey and GBC Taiwan. GBC Taiwan moved to dismiss for lack of personal jurisdiction.⁴⁵

⁴² See, e.g., *id.*

⁴³ See, e.g., *Alpha Capital Anstalt v. New Generation Biofuels, Inc.*, No. 13-CV-5586, 2014 U.S. Dist. LEXIS 161472 (S.D.N.Y. Nov. 18, 2014) (holding that individual inventor was subject to specific personal jurisdiction because he was aware of and in charge of specific conduct that his company performed that gave rise to the action).

⁴⁴ *Bui v. Golden Biotechnology Corp.*, 2014 U.S. Dist. LEXIS 113272 (N.D. Cal. Aug. 14, 2014)

⁴⁵ *Id.* at *5-6.

The court observed that a parent corporation is only chargeable with the contacts of its US subsidiary if the relationship between the two companies is so close that the subsidiary could be characterized as an alter ego or agent of the parent. It first held that Bui did not demonstrate the necessary unity of interest and ownership sufficient to make the required showing under an alter-ego theory. Specifically, she presented no evidence that GBC Taiwan dictated the daily operations of GBC New Jersey, nor did she provide support for her assertion that GBC New Jersey was undercapitalized. Bui also failed to show that GBC New Jersey was an agent of GBC Taiwan, as she offered only conclusory allegations that “but for” the existence of GBC New Jersey, GBC Taiwan itself would have performed the activities GBC New Jersey performed.

Finally, the court found that there was no specific jurisdiction over GBC Taiwan itself, as GBC Taiwan had not “purposefully availed” itself of the California forum. GBC New Jersey, not GBC Taiwan, sought out and entered into the contract with the Bui, and even if GBC Taiwan had been a party to that contract, entering a contract with a state’s resident does not constitute establish minimum contacts in that state.

In another recent case, *Nykcool A.B. v. Pac Int’l Servs.*, the US District Court for the Southern District of New York found specific personal jurisdiction over an Ecuadorean national under the alter-ego theory based on the court’s jurisdiction over US companies that he owned.⁴⁶ The plaintiff alleged that the owner “owns and controls the defendant companies, that money was, and is, routinely funneled throughout all of the defendant companies at [the owner’s] whim, and that the defendant companies are not entitled to be treated as legal entities separate from” their owner.⁴⁷ The court found that these allegations satisfied the requirement that it plead that the US companies were “shells” for the owner’s own activities that should be treated as “shams” and his alter-egos.⁴⁸ The court rejected the defendant’s argument that the *Daimler* case had precluded the use of an alter-ego argument to support the assertion of specific personal jurisdiction.⁴⁹

Conclusion

No issue is litigated more often in US courts against parents of US subsidiaries than whether the parent is responsible for the subsidiary’s conduct, and therefore itself subject to jurisdiction. Case law has established numerous defenses to such claims of jurisdiction, but they must be raised immediately, and whether they apply will turn on a close analysis of the parent-subsidary relationship as well as the facts giving rise to the dispute. In both cases, advance planning can minimize the chances that jurisdiction over the non-US parent will be found, thus allowing the parent to enjoy the benefits of the subsidiary’s corporate form that the law intended.

⁴⁶ *Nykcool A.B. v. Pac. Int’l Servs.*, 66 F. Supp. 3d 385 (2014).

⁴⁷ *Id.* at 390.

⁴⁸ *Id.* .

⁴⁹ *Id.*