



Early Detection and Argument Is Key

By Chris Jorgensen
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In 2011, the Supreme Court began rolling back the expansion of personal jurisdiction, and the trend seems to have continued in 2017.

The Evolution of *Daimler's* General Jurisdiction Standard

No corporation likes to be sued. Lawsuits devour time and money and serve as a distraction to corporate operations. These difficulties are magnified when the lawsuits are filed in far-flung jurisdictions, distant from corporate leadership

and in unfamiliar courts. Until recently, the gradual creep of personal jurisdiction by state courts over corporations led to cases being heard far from corporate headquarters, justified by slim threads of corporate contact or activity.

Starting in 2011, the Supreme Court began rolling back the expansion of personal jurisdiction through two seminal decisions, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), both written by Justice Ginsburg.

This article will briefly describe the changes that have occurred in general personal jurisdiction over the past few years, leading to a more restrictive view of when a court has jurisdiction over a corporation. It will also describe efforts to reverse that restrictive view. By being aware of plaintiffs' tactics, defense attorneys can better fend off attempts to subject their clients to

suits in places where the clients are clearly not "at home."

Jurisdiction Defined

Many people might find it odd for a court in Florida to be deciding a dispute involving a Washington-based business. Similarly, a New Hampshire corporation would probably find it curious to receive a court order from New Mexico that imposed restrictions on its activities. A court's ruling is only effective if it has the power and the authority over the parties that it seeks to govern. This jurisdictional power is created through statutes enacted by state legislatures (and sometimes Congress for federal causes of action), and the power must comply with the constitutional limits of due process. A court in Indiana can't issue a ruling that binds a party in Idaho unless the court has jurisdiction over that party.



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The principles of due process, fundamental fairness, and hopefully, common sense, should oversee the establishment and the exercise of personal jurisdiction. Personal jurisdiction must be limited to those instances that comport with due process, and “[d]ue process requires the defendant have at least ‘minimum contacts’ with the forum state so that ‘maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” *Brady v. Sw. Airlines Co.*, No. 2:14-CV-2139 JCM NJK, 2015 WL 4074112, at *1 (D. Nev. July 6, 2015) (quoting *Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)). The Supreme Court has determined that “the defendant’s conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there.” *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Potential defendants should be able “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

General Versus Specific Jurisdiction

As for the foundation, “[t]he basis of a court’s personal jurisdiction over a corporation can be general—that is, all-purpose jurisdiction—or it can be specific—that is, conduct-linked jurisdiction.” *State ex rel. Norfolk S. Ry. Co. v. Dolan*, No. SC 95514, ___ S.W.3d ___, 2017 WL 770977, at *2 (Mo. Feb. 28, 2017). For specific jurisdiction to exist, a plaintiff’s claim must arise out of a defendant’s forum-related activities. *See, e.g., Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004). Thus, even though a corporation may sell many products in New Jersey, if a plaintiff’s claim arises out of employment discrimination at a plant in Maine, there is no specific jurisdiction in New Jersey because the plaintiff’s claim does not “arise out of” or have anything to do with the company’s New Jersey contacts.

This article will focus primarily on general jurisdiction, which imposes “an exacting standard, as it should... because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.” *Schwarzenegger*,

374 F.3d at 801. However, it is important to note that the Supreme Court significantly limited the reach of specific jurisdiction in *Walden* (decided the same year as *Daimler*) when it rejected the argument that a defendant’s actions targeting a forum resident, or contacts with that resident, not the forum itself, are sufficient to subject the defendant to specific jurisdiction. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (“[O]ur ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.”); *id.* at 1122 (“[T]he plaintiff cannot be the only link between the defendant and the forum.”); *id.* at 1125 (“The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.”); *id.* at 1126 (“[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.”); *id.* at 1126 (“[T]he mere fact that [the defendant’s] conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction.”).

Plaintiffs often argue that a court in a particular forum has both specific and general jurisdiction over a defendant and try to confuse the court about the relevant inquiry, but the analyses are distinct. The question relevant to general jurisdiction is whether the particular defendant is “at home” in the forum. The question addressed by specific jurisdiction is whether the particular plaintiff’s cause of action arises out of, and is sufficiently related to, the defendant’s forum contacts, which must be extensive enough that the exercise of jurisdiction comports “with fair play and substantial justice, *i.e.*, it must be reasonable.” *Schwarzenegger*, 374 F.3d at 801 (quotation and citation omitted).

The Supreme Court seems to be increasingly concerned about preserving and separating the two types of distinct jurisdiction. On April 25, 2017, the Court heard oral arguments for two cases involving personal jurisdiction: *Bristol-Myers Squibb v. Superior Ct. of California*, Supreme Court Docket No. 16-466 (involving specific jurisdiction), and *BSNF Railway Co. v. Tyrrell*, Supreme Court Docket No. 16-405 (concerning general jurisdiction). The Court seemed eager to use this opportunity to

further define the differences between specific and general jurisdiction.

In the *Bristol-Myers Squibb* case, the California Supreme Court had allowed non-residents in a mass tort case to sue a pharmaceutical manufacturer in California even though the non-resident plaintiffs had allegedly been injured by a certain drug outside of California. *See Bristol-Myers*

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Squibb Co. v. Superior Court, 377 P.3d 874, 887–91 (Cal. 2016), *cert. granted sub nom. Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 827 (2017). (The defendant pharmaceutical company did not contest that there would be specific jurisdiction over the claims of California residents who were injured in California; the question was whether non-residents could “tack on” their claims to the California plaintiffs’ claims.)

During the April 25, 2017, argument, the Supreme Court justices vigorously questioned both sides, but they specifically inquired why the California court would take upon itself the responsibility for adjudicating the claims of the non-resident plaintiffs. *Bristol-Myers Squibb v. Superior Ct. of California*, Supreme Court Docket No. 16-466, Tr. 34:6–11, 55:18–56:9, Apr. 25, 2017. The justices expressed concern that allowing such jurisdiction would effectively “reintroduce general jurisdiction, which was lost in *Daimler*, by the backdoor.” *Id.* at 54:9–25.

In an opinion issued June 19, 2017, the High Court ruled that California courts could not exercise personal jurisdiction over the defendant based on the non-resident plaintiffs’ claims. The Court emphasized that there are territorial limitations on the power of the various states and that “[e]ven if the defendant would suffer minimal or no inconvenience from

being forced to litigate before the tribunals of another State... [and] even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, No. 16-466, 582 U.S. ___, 2017 WL 2621322, at *7 (June 19, 2017) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)).

The Court rejected the California Supreme Court’s “sliding scale approach,” under which “the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims.” *Id.*, 2017 WL 2621322, at *8. As the Court explained, “Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction.” *Id.* “What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.” *Id.*

The Supreme Court’s recent decisions indicate that the Supreme Court has significant interest in limiting the notion of “national” general jurisdiction and forcing plaintiffs to file their lawsuits in the correct jurisdictions. Defense counsel can use these new cases to argue against the practice of bringing suit against corporate defendants in “hell hole” jurisdictions.

General jurisdiction has historically been asserted when (1) there is no specific or direct act by the defendant toward the plaintiff within the jurisdiction, but (2) the defendant has such continuous and systematic contacts within the jurisdiction that a court finds that the jurisdiction’s courts can assert adjudication authority over the defendant, even for cases not arising from the company’s activities within the state. General jurisdiction is intended to confer authority when the contacts are numerically considerable and qualitatively important: “General personal jurisdiction exists in ‘instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit... on causes of action arising from dealings entirely distinct from those activities.’” *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 57 N.E.3d 656, 665 (Ill.

App. Ct. 2016) (quoting *Daimler*, 134 S. Ct. at 761).

General Jurisdiction Constrained

Before *Goodyear* and *Daimler*, general jurisdiction had become a catch-all rationalization for courts to assert jurisdiction over a defendant corporation, regardless of where it was based and regardless of how minimal its forum contacts were.

The Supreme Court decisions in *Goodyear* and *Daimler* narrowed the ability of state courts to assert personal jurisdiction based on corporate activity within the state boundaries. In *Goodyear*, the Supreme Court rejected what it called “the sprawling view of general jurisdiction... embraced by the North Carolina Court of Appeals,” under which “any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.” 564 U.S. at 929. The Supreme Court focused on the idea that a corporation should be subject to general jurisdiction only where it is “at home” and gave the example of a corporation’s state of incorporation or principal place of business. *See id.* at 924. Therefore, a company incorporated in Delaware, with its corporate headquarters in Missouri, could not normally be sued in Arizona under the doctrine of general jurisdiction. On the other hand, the decision “did not rule that state of incorporation and principal place of business are the exclusive bases for the exercise of general jurisdiction and left open the question of whether a corporation may be viewed as ‘at home’ in another state where it had substantial business activities.” Edward D. Cavanagh, *General Jurisdiction 2.0: The Updating and Uprooting of the Corporate Presence Doctrine*, 68 Me. L. Rev. 287, 304 (2016).

In *Daimler*, Justice Ginsburg went into greater detail, and explained:

Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.... With respect to a corporation, the place of incorporation and principal place of business are “paradig[m]... bases for general jurisdiction.” Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.

Daimler, 134 S. Ct. at 760 (citations omitted) (quoting *Lea Brilmayer et al., A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 735 (1988)).

The Supreme Court clarified that a company could not be “at home” in all the jurisdictions where it did business: “A corporation that operates in many places can scarcely be deemed to be at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before [the concept of] specific jurisdiction evolved in the United States.” *Daimler*, 134 S. Ct. at 762 n.20. It then follows that “when ‘a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how systematic and continuous, are extraordinarily unlikely to add up to an exceptional case.’” *State ex rel. Norfolk S. Ry. Co.*, 2017 WL 770977, at *4 (quoting *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016)). To elaborate, “to be such ‘an exceptional case,’ the forum state must be a ‘surrogate for place of incorporation or home office’ such that the corporation is ‘essentially at home’ in that state.” *Id.* (quoting *Daimler*, 134 S. Ct. at 756 n.8, 761 n.19).

The added guidance in *Daimler* relating to the “at home” standard described in *Goodyear* means that companies should not be forced to defend themselves in jurisdictions where they have only a passive presence, or even where they do significant amounts of business, yet are not “at home.” *See, e.g., Daimler*, 134 S. Ct. at 752, 760–62 (2014) (holding that even if *Daimler* had MBUSA’s contacts attributed to it, it still would not be “at home in California” for purposes of general jurisdiction, even though “MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.... [and] is the largest supplier of luxury vehicles to the California market”); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (concluding that there was no general jurisdiction in Texas over a foreign corporation where it had no place of business in Texas, even though it had sent “its chief executive officer to Houston for a contract-negotiation session; accept[ed] into its New York bank account checks drawn on a Houston bank; purchas[ed] helicopters, equipment, and

training services from [a Texas enterprise] for substantial sums; and sen[t] personnel to [Texas] for training”); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984) (“[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action.”).

Justice Ginsburg rejected the jurisdictional creep that was occurring, stating, “Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state-defendant ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’” *Daimler*, 134 S. Ct. at 761–62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

The take-away lesson for attorneys representing corporations is to define early where “at home” is for their corporate clients, and then argue vigorously that a lawsuit filed in any other jurisdiction is misplaced. The result of such vigilance hopefully would limit the general jurisdiction of courts over a corporation to a small handful of locations.

The U.S. Supreme Court’s apparent focus on reducing the number of places where a corporation can be sued resurfaced during the recent oral argument and decision in the *BNSF Railway Co. v. Tyrrell* case. The *Tyrrell* case concerned whether railroad employees could sue their employer in Montana for injuries that occurred outside of Montana when the employees were not residents of Montana, and the railroad company was incorporated in Delaware and had its principal place of business in Texas. Indeed, the Court noted that there was no connection whatsoever between Montana and the employees’ claims or the railroad other than that the railroad did business in Montana and there seemed to be a large number of similar suits that had previously been filed and decided in Montana. *BNSF Railway Co. v. Tyrrell*, Supreme Court Docket No. 16-405, Tr. 11:7–12:8, 22:16–24:5, 25:16–22, 26:7–15, Apr. 25, 2017. The Montana Supreme Court had asserted jurisdiction, distinguishing the *Daimler* rule as limited to the facts of that specific case, which involved foreign plaintiffs, and also finding that 45 U.S.C. §56 of the Federal Employers Liability Act (FELA)

allowed a plaintiff to bring suit wherever the defendant railroad was doing business, which the Montana Supreme Court viewed as establishing personal jurisdiction. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 5–9 (Mont. 2016), *cert. granted*, 137 S. Ct. 810 (2017).

In an opinion issued on May 30, 2017, the Supreme Court held that Section 56 of the FELA did not confer personal jurisdiction over railroads, but rather addressed venue and subject matter jurisdiction. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1553 (2017). Apart from Justice Sotomayor, who dissented, the Supreme Court justices also unanimously held that Montana could not exercise general jurisdiction over the railroad merely because it did business in Montana. *See id.*, 137 S. Ct. at 1558–59. First, the Supreme Court rejected the Montana Supreme Court’s efforts to distinguish *Daimler* as not involving a FELA claim or a railroad defendant. As the High Court explained, the “Fourteenth Amendment due process constraint described in *Daimler*... applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued.” *Id.* Next, the Supreme Court reiterated that despite the fact that the railroad “has over 2,000 miles of railroad track and more than 2,000 employees in Montana... [a] corporation that operates in many places can scarcely be deemed at home in all of them.” *Id.* at 1159 (quoting *Daimler*, 134 S. Ct. at 762 n.20). The Supreme Court again emphasized that “in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims... that are unrelated to any activity occurring in” the forum. *Id.*

Justice Sotomayor complained in her dissent that under the majority’s reasoning, “it is virtually inconceivable that [multistate or multinational] corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation.” *Id.* at 1560 (Sotomayor, J., dissenting). That is precisely what the Supreme Court has been indicating—and what large corporations should want.

As the Arizona Court of Appeals recently explained, “a size-based approach would be both standardless and malleable.” *Wal-Mart Stores, Inc. v. LeMaire*, No. 1 CA-SA 17-0003, ___ P.3d ___, 2017 WL 1954809,

at *1, 5 (Ariz. Ct. App. May 11, 2017) (holding “that the magnitude of a corporation’s business activities in Arizona is not sufficient to create general jurisdiction when that corporation is neither incorporated nor has its principal place of business in Arizona”). In *LeMaire*, the Arizona Court of Appeals rejected the plaintiff’s argument that Wal-Mart should be “subject to gen-

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eral jurisdiction based on its exceptionally substantial business activities in Arizona.” *Id.* at *5. Despite the fact that “Wal-Mart was the largest employer in Arizona in 2014 and... [i]n 2015, it employed more Arizonans than the next two largest employers combined,” the court held that there was nothing “exceptional” about Wal-Mart’s activities “to give rise to general jurisdiction.” *Id.* As the court explained:

There is no constitutional doctrine establishing a threshold level of commercial activity sufficient to create general jurisdiction. And if mere size were sufficient, the fluctuating levels of each foreign corporation’s economic activity would have to be relitigated in every case before jurisdiction could be determined. We view such an approach as constitutionally untenable.

Id.

Challenging the Restriction

Naturally, the *Goodyear* and *Daimler* decisions were not well received by attorneys seeking to forum shop and ambitious courts seeking to extend their influence.

They sought ways to outmaneuver the new *Goodyear* and *Daimler* standards. One strategy asserts that a corporation's act of registering to do business in a state, or appointing a corporate agent for service of process, constitutes consent to be sued. Savvy plaintiffs' counsel have also convinced courts that lengthy and invasive jurisdictional discovery is needed before

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Neither tactic to outmaneuver the *Goodyear/Daimler* general jurisdictional standard should be successful. Thoughtful defense counsel should solidify their arguments against these propositions early and assert them in any initial pleading.

Jurisdictional Discovery

One concerning trend in the evolution of general jurisdiction post-*Daimler* is courts' increasing use of jurisdictional discovery. Such discovery seems designed to help a plaintiff find reasons why a court should assert jurisdiction and does little to help a defendant's assertion that jurisdiction is not proper. Indeed, the Supreme Court has specifically warned that "significant expenses" can be "incurred just on the preliminary issue of jurisdiction" and that "[j]urisdictional rules should avoid these costs whenever possible." *J. McIntyre Mach., Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2790 (2011) (Kennedy, J.) (three justices concurring and two justices concurring in judgment).

The Federal Rules of Civil Procedure do not explicitly address jurisdictional discovery, but several courts routinely allow such discovery. Jurisdictional discovery is time-consuming and expensive because a plaintiff will not want to stop searching until something justifying jurisdiction is found. Jurisdictional discovery has the tendency to go astray because it is simply too tempting for a plaintiff to conduct general discovery, pre-litigation, under the guise of seeking jurisdictional facts. There is little case law in the area of jurisdictional discovery, and courts are not trained to provide appropriate standards governing the scope of jurisdictional discovery, resulting in vague and uncertain parameters.

Further, court orders requiring jurisdictional discovery post-*Daimler* seem to miss the point. While plaintiffs send out voluminous discovery requests, seeking to find every possible forum contact that a defendant may have, no matter how random, fortuitous, or irrelevant, the point is that these contacts do not render a non-resident defendant "at home" in the jurisdiction. Courts should not hesitate to disallow or to shut down jurisdictional discovery when "[i]t is apparent that nothing plaintiffs could discover about [a defendant's] contacts with [the forum] would make [the defendant] 'essentially at home' in [the forum]." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (citing *Daimler*, 134 S. Ct. at 760-62) ("[A] refusal [to grant discovery] is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." (quoting *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977))); see also *Anhing Corp. v. Viet Phu, Inc.*, No. 14-56664, 2016 WL 6561499, at *2 (9th Cir. Nov. 4, 2016).

On this point, a court in the U.S. District Court for the Northern District of California found, post-*Daimler*:

[J]urisdictional discovery is unnecessary and inappropriate, as it would not reveal facts sufficient to constitute a basis for jurisdiction. Indeed, *Daimler* directly addressed the impact of its decision on the need for jurisdictional discovery, stating that "it is hard to see why much in the way of discovery would be needed to determine whether a corporation is at home."

AM Trust v. UBS AG, 78 F. Supp. 3d 977, 986 (N.D. Cal. 2015) (quoting *Daimler*, 134 S. Ct. at 762 n.20), *aff'd*, No. 15-15343, 2017 WL 836080 (9th Cir. Mar. 3, 2017).

As an example of the futility of jurisdictional discovery, consider the following scenario.

A small, family-owned manufacturer of metal clips was surprised and confused when it was served with a personal injury, product liability lawsuit, which was filed in Las Vegas, Nevada. Apparently, the company's clips had been used to fasten airplane seatbelts to the passenger seats in a Southwest plane. The plaintiff alleged that she had been injured when a flight originating in Las Vegas had experienced turbulence. The clip had slipped off the seat anchor, thereby releasing the seatbelt, and the plaintiff had come out of her seat and hit her head on the overhead luggage bin.

The manufacturer did not understand how it could be sued in Las Vegas. It was a New York business. It did not sell its products to individuals. It had never employed any officers, employees, agents, or representatives in Nevada. It did not maintain an office facility, a mailing address, or a telephone listing in Nevada. It had no subsidiaries or affiliates in Nevada, and it had no agent for service of process in Nevada. The company had no Nevada-specific marketing materials, had never shipped products into Nevada, and had never sold any merchandise to a Nevada resident.

However, the specific clip, and many identical clips that the company may have manufactured, had probably been in Nevada on hundreds of occasions because airplanes using such clips regularly travel through Las Vegas. The plaintiff sought jurisdictional discovery to determine the following:

- Which of the company's customers conducted business in Nevada using the company's parts;
- What portion of the company's sales comprised sales to its customers conducting business in Nevada;
- What percentage of aircraft used parts manufactured by the company;
- What percentage of aircraft transporting passengers into Nevada used parts manufactured by the company;
- What portion of the company's sales were to airlines that flew into Nevada;

- What written agreements existed for company parts that were transported into Nevada; and
- Communications between the company and Southwest regarding Nevada.

In the post-*Daimler* world, none of those discovery topics were relevant because none of those topics concerned whether the company was “at home” in Nevada, and they would not establish a direct relationship between the manufacturer and the forum for purposes of specific jurisdiction; they would only establish a relationship between the manufacturer and the airlines that did business in Nevada. See *Brady v. Sw. Airlines Co.*, No. 2:14-CV-2139 JCM NJK, 2015 WL 4074112, at *4 (D. Nev. July 6, 2015) (“The answers to these questions are irrelevant to the jurisdictional inquiry and thus are insufficient to allow jurisdictional discovery.”). What this means is that when “a plaintiff’s claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery.” *Id.* (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006)).

Extraterritorial Activities to Determine Jurisdiction

In the course of allowing jurisdictional discovery, courts have sometimes allowed a plaintiff to examine a company’s entire business structure to determine all of the various places where a company does business, not just whether the company is “at home” in the subject jurisdiction. This extensive discovery seems to have stemmed from Justice Sotomayor’s *Daimler* concurrence, which criticized the majority decision as reasoning that it “is not that *Daimler*’s contacts with California are too few, but that its contacts with other forums are too many.” *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring). According to Justice Sotomayor’s characterization of the majority decision, the forum contacts “must be viewed in the context of” the corporation’s “nationwide and worldwide” operations.” *Id.* (quoting majority opinion, 134 S. Ct. at 762 n.20). Courts have seized on this concept to allow jurisdictional discovery not only to determine the forum contacts that a company may have but also to create a proportionality test that mea-

sures a company’s in-state contacts against the company’s out-of-state contacts. As explained elsewhere, under this view,

Although the Court noted that its decision would not change the scope of discovery, it is impossible to imagine how *Daimler* would not result in increased jurisdictional discovery at the district court level. Now, lower courts will need to identify the scope of a company’s contacts in other forums in addition to its in-state contacts.

Kaitlin Hanigan, *A Blunder of Supreme Proportions: General Jurisdiction After Daimler Ag v. Bauman*, 48 Loy. L.A. L. Rev. 291, 301 (2014) (footnotes omitted).

Defendants may need to provide at least statistical information showing that a company’s forum contacts are a small part of its overall operations. See, e.g., *Brown*, 814 F.3d at 629 (ruling that there was no general jurisdiction where corporation’s “business in [the forum], while not insubstantial, constitutes only a very small part of its portfolio. For example, ... its Connecticut-based employees represented less than 0.05 percent of [company’s] full workforce” and the \$160 million in gross revenue derived from forum-based operations over five years “never exceeded 0.107 percent of the company’s total annual revenue”); see also *BNSF Ry. Co.*, 137 S. Ct. at 1554 (noting that railroad “has 2,061 miles of railroad track in Montana (about 6 percent of its total track mileage of 32,500), employs some 2,100 workers there (less than 5 percent of its total work force of 43,000), generates less than 10 percent of its total revenue in the State, and maintains only one of its 24 automotive facilities in Montana (4 percent)”).

Jurisdictional discovery may also be expanded to consider the forum contacts of a corporation’s subsidiaries. The *Daimler* Court rejected a broad agency test that the Ninth Circuit had adopted, which effectively attributed all subsidiary forum contacts to a parent corporation, but noted that “several Courts of Appeals have held[] that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.” 134 S. Ct. at 759. A typical alter ego test is that a plaintiff must show “(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and

(2) that failure to disregard [their separate identities] would result in fraud or injustice.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015) (internal quotation marks and citation omitted).

In *Ranza*, the Ninth Circuit ruled that while “the alter ego test has traditionally been used to bring a controlling parent into a controlled subsidiary’s home forum,”

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there was no persuasive reason why the test could not be used “to bring a controlled subsidiary into the controlling parent’s home forum.” *Id.* at 1071–73. Thus, “the alter ego test may be used to extend personal jurisdiction to a foreign parent or subsidiary when, in actuality, the foreign entity is not really separate from its domestic affiliate.” *Id.* at 1073 (considering whether Nike’s Oregon contacts could be attributed to its wholly owned Dutch subsidiary).

By alleging personal jurisdiction based on an alter ego theory, plaintiffs’ counsel may be able to obtain far-reaching discovery regarding a company’s parent or subsidiary operations, or both. See, e.g., *Williams v. Yamaha Motor Co.*, No. 15-55924, ___ F.3d ___, 2017 WL 1101095, at *3–4 (9th Cir. Mar. 24, 2017) (considering evidence that the parent corporation “has 109 consolidated subsidiaries located in at least 26 different countries and spanning five continents” and that net sales in North America “accounted for approximately 17 percent of [the parent corporation’s] total net sales,” but ultimately ruling that the parent corporation was not subject to general jurisdiction in California notwithstanding its subsidiary’s California contacts).

The additional time and cost imposed by jurisdictional discovery could have a



chilling effect on corporations, which will think twice about the substantial effort and the corresponding disclosure of corporation information needed to establish a defense based on lack of personal jurisdiction. The result could lead corporations to forgo the benefits provided by the *Goodyear* and *Daimler* decisions.

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Registering to Do Business in a State Should Not Constitute Consent to General Jurisdiction

Another increasingly common tactic to defeat a jurisdictional motion to dismiss is for plaintiffs' counsel to argue that a corporate defendant "consented" to jurisdiction when it registered to do business in the jurisdiction, or when it appointed a resident agent to accept service. This "consent" argument tries to avoid any analysis at all whether a corporation is "at home" in the jurisdiction.

The argument against "consent" jurisdiction should be made in an early motion to dismiss, before a plaintiff's counsel even gets a chance to sow that seed of doubt in a court's mind. A defense counsel should argue that since nearly every state requires registration by corporations seeking to do business in the state, and since nearly every state requires a company to appoint an agent for service of process, "a broad inference of consent based on registration would allow national corporations to be sued in every state, rendering *Daimler* pointless." *State ex rel. Norfolk S. Ry. Co.*, 2017 WL 770977, at *8 (citing *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016)). Indeed, "in the light of today's global economy, to say that registering to do business is conditioned on implied consent to be sued for unrelated matters likely violates

'the unconstitutional conditions doctrine,' which 'forbids [states from] burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.'" *Id.* at *8 n.9 (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013)).

Yet there is still a split of opinion among states whether such corporate registration requirements operate to confer general jurisdiction. The key to understanding, and advocating against, consent jurisdiction is found in examining the specific language used in each state's particular statute requiring corporate registration.

In *Aclin v. PD-RX Pharm. Inc.*, 189 F. Supp. 3d 1294, 1305 (W.D. Okla. 2016), the court found that a company did not consent to general jurisdiction in Oklahoma when it registered to do business there. The Oklahoma court reviewed "consent to jurisdiction" findings going back to the Supreme Court's decision in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917), which "upheld a decision of the Missouri Supreme Court that appointment of a registered agent constituted consent to general jurisdiction in Missouri." *Aclin*, 189 F. Supp. 3d at 1305. The *Aclin* court explained "that such decisions are guided by state law" and found the Oklahoma registration statute "silent on the issue of whether registration constitutes consent to jurisdiction." *Id.* Therefore, the registration statute could not confer general jurisdiction over a registered company.

Another court opined, *Pennsylvania Fire* is now simply too much at odds with the approach to general jurisdiction adopted in *Daimler* to govern as categorically as [the plaintiff] suggests; in our view, the Supreme Court's analysis in recent decades, and in particular in *Daimler* and *Goodyear*, forecloses such an easy use of *Pennsylvania Fire* to establish general jurisdiction over a corporation based solely on the corporation's registration to do business and appointment of an agent under a state statute lacking explicit reference to any jurisdictional implications.

Brown, 814 F.3d at 638–40 (again pointing out that "[i]f mere registration and the accompanying appointment of an in-state agent... sufficed to confer general jurisdiction by implicit consent, every corporation

would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief").

According to the Supreme Court of California,

"[T]he purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the State." Accordingly, 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 its California transactions.

Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 884 (Cal. 2016) (quoting *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929)), cert. granted sub nom. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 827 (2017).

Several courts have declined to hold that consent to general jurisdiction was implied based on registration statutes that were silent about how registration affected general jurisdiction. For example, the Arizona Court of Appeals recently explained,

Had the Legislature intended to endow Arizona courts with the ability to hear all cases (including those in which Arizona has no interest) against all registered foreign corporations, it would have said so. We think it is unlikely that the Legislature intended to give Arizona courts the constitutionally dubious authority to hear any case against any registered foreign corporation when such cases need not involve any Arizonans.

LeMaire, 2017 WL 1954809, at *2. Rejecting the argument that it would be unfair to Arizonans to disallow them to sue for causes of action arising in other states, the court pointed out that "the convenience to the plaintiff has no bearing on whether a defendant's due process rights are violated by subjecting it to general jurisdiction." *Id.*

However, general jurisdiction has been upheld based on statutes expressly conditioning registration to do business on consent to general jurisdiction. For example, a judge for the U.S. District Court for the Eastern District of Pennsylvania considered a Pennsylvania statute providing that "the

following relationships between a person and this Commonwealth shall constitute a sufficient basis... to enable the tribunals of this Commonwealth to exercise *general personal jurisdiction* over such person (i) Incorporation under or *qualification as a foreign corporation* under the laws of this Commonwealth.” *Bors v. Johnson & Johnson*, No. CV 16-2866, ___ F. Supp. 3d ___, 2016 WL 5172816, at *2 (E.D. Pa. Sept. 20, 2016) (quoting 42 Pa. Stat. §5301). The court ruled that it could properly exercise general jurisdiction based on consent, explaining,

The Supreme Court in *Daimler* referenced jurisdiction by consent when discussing general jurisdiction to distinguish between “consensual” jurisdiction and “non-consensual bases for jurisdiction,” not to “doubt the validity of consent-based jurisdiction.”

Consent remains a valid form of establishing personal jurisdiction under the Pennsylvania registration statute after *Daimler*. The Supreme Court did not eliminate consent. Parties can agree to waive challenges to personal jurisdiction by agreements in forum selection clauses or, as here, by registering to do business under a statute which specifically advises the registrant of its consent by registration.

Id., 2016 WL 5172816, at *3–5 (footnote omitted).

Some jurisdictions are grappling with competing and contradictory interpretations of their state registration-to-do-business statute. For example, in March 2015, two U.S. District of New Jersey decisions upheld the exercise of personal jurisdiction based on a consent theory. See *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 437–40 (D.N.J. 2015) (exercising jurisdiction over a company where it “accepted service of process through its registered agent in the state” and concluding that *Daimler* “did not disturb the consent-by-in-state service rule”); *Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 469–71 (D.N.J. 2015) (exercising general jurisdiction over companies that registered to do business in New Jersey, appointed an agent for service, and engaged in a substantial amount business in the state, explaining that “designation of an in-state agent for service of process in accordance with a state registration statute may con-

stitute consent to personal jurisdiction, if supported by the breadth of the statute’s text or interpretation”).

However, a little over a year later, the same court found that “New Jersey’s registration and service statutes do not constitute consent to general jurisdiction because they do not contain express reference to any such terms.” *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 179 (D.N.J. 2016) (further holding “that consent to jurisdiction cannot be found by looking to the amount of business a registered foreign corporation conducts in the state”). The court criticized the *Otsuka* ruling and rejected case law that “would permit the Court to exercise general jurisdiction over any corporation that completes the required registration and appointment procedures, regardless of whether the statute expressly discusses general jurisdiction.” *Id.* at 178. If that were permitted, “*Daimler*’s limitation on the exercise of general jurisdiction to those situations where ‘the corporation is essential at home’ would be replaced by a single sweeping rule: registration equals general jurisdiction. That cannot be the law.” *Id.*

Similarly, decisions in the U.S. District of Delaware had split until the Delaware Supreme Court clarified that “we read our state’s registration statutes as providing a means for service of process and not as conferring general jurisdiction.” *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016); see also *Pfizer Inc. v. Mylan Inc.*, 201 F. Supp. 3d 483, 487 n.1 (D. Del. 2016) (“In light of the Delaware Supreme Court’s decision in *Genuine Parts Co. v. Cepec*, 137A.3d 123 (Del.2016), plaintiffs have conceded that consent can no longer be a basis for personal jurisdiction when premised solely on Delaware’s registration statute.”).

Many of the circuits have not yet ruled on consent jurisdiction in the post-*Daimler* world. However, pre-*Daimler*, several circuits upheld general jurisdiction based on a registration-to-do-business consent theory. See, e.g., *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990); *Budde v. Kentron Hawaii, Ltd.*, 565 F.2d 1145, 1149 (10th Cir. 1977).

The above cross section of conflicting opinions demonstrates the importance of knowing what a state statute specifically says, and whether a statute expressly

equates registration to do business with consent to be sued. Court decisions that look backward, relying on pre-*Goodyear* and pre-*Daimler* precedents, more readily find jurisdiction based on consent. However, it is difficult to square such holdings with *Daimler*’s rejection of “general jurisdiction in every State in which a corporation ‘engages in a substantial, continu-

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ous, and systematic course of business” as “unacceptably grasping.” 134 S. Ct. at 761, 762 n.20 (reiterating that “[a] corporation that operates in many places can scarcely be deemed at home in all of them”).

Corporate defendants that plan to challenge jurisdiction must do the research in advance and understand the language that the business registration statutes contain. The second step is to determine how those statutes have been applied and craft the argument explaining why registering for business in a state should not confer jurisdiction in advance.

Using *Daimler* to Your Advantage

Early detection and argument is the key to avoiding jurisdictional disputes. Corporate counsel must identify early where a corporation is at home and develop strong *Daimler* and *Goodyear* arguments to persuade an errant court from asserting jurisdiction. Corporate counsel must also provide a court with the tools for denying time-consuming jurisdictional discovery requests.

When the potential for litigation is identified, counsel must organize the information that could be used to assert, or to deny, jurisdiction and define the proper jurisdiction before the opposing party strikes first. The *Goodyear* and *Daimler* decisions can benefit corporate defendants. It is crucial to implement those decisions before a claimant can create confusion and doubt over where particular litigation should occur. 