

# An update on personal jurisdiction

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The circumstances in which a state may exercise jurisdiction over a company can significantly influence where and with whom companies choose to do business.

Juror attitudes, historical verdict values, available legal defenses and the aggressiveness of local plaintiffs firms all inform litigation risk and can affect a company's bottom line.

Yet, as recently as six years ago, companies were hard-pressed to deduce whether transacting business with a particular entity or in a particular state would expose them to being sued for any reason in an unfavorable forum.

Murky concepts like "continuous and systematic" affiliations with a forum and "purposeful avail[ment] ... of the privilege of conducting activities within the forum" were the standard, and whatever guidance those phrases may have provided was muddled by their inconsistent interpretation in courtrooms across the country.<sup>1</sup>

In 2011 the U.S. Supreme Court began the process of restoring meaning to its personal jurisdiction jurisprudence.

Six decisions and six years later, much of the dust has cleared and the boundaries demarcating when a corporation is subject to personal jurisdiction can be readily viewed once more.

Today, a corporation is subject to personal jurisdiction for any claim only in the state or few states in which it is at home. Otherwise, a state can exercise personal jurisdiction over a corporation only if the claim arises from the company's affiliations with that state.<sup>2</sup>

The Supreme Court's overhaul of the personal jurisdiction landscape already has affected where and against whom lawsuits are being filed, and these trends are likely to continue.

However, the newly clarified rules are unlikely to cause plaintiff firms to willingly abandon their preferred venues.

This analysis summarizes the newly clarified personal jurisdiction scheme and discusses how the plaintiff mass tort bar is reacting.

## SPECIFIC JURISDICTION

"Specific jurisdiction" refers to the exercise of jurisdiction based on a company's in-state contacts. It is limited to jurisdiction over a company for claims arising from the company's conduct or activities that occurred within the state.

Following the Supreme Court's decisions in *Walden v. Fiore* and *Bristol-Myers Squibb Co. v. Superior Court of California*, the circumstances under which a state may exercise specific jurisdiction are, in most cases, fairly straightforward: The plaintiff's claim must arise from the defendant's contacts with the state.

When conducting this analysis, courts may consider only those contacts the defendant itself created with the forum; contacts linking the forum and the plaintiff or the forum and a third party are irrelevant.

If there are no suit-related contacts linking the defendant and the forum, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state."<sup>3</sup>

A recent hearing in a Missouri state court illustrates one of the ways plaintiffs may attempt to adapt to the rule articulated in *Walden* and iterated in *Bristol-Myers Squibb Co.*

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At issue was the defendant's motion for a mistrial based on a lack of personal jurisdiction.

The defendant was a foreign corporation, and the plaintiffs' claims — for injuries they purportedly incurred as a result of using the defendant's talcum powder product — were based on alleged exposure that occurred outside the state.

The plaintiffs' counsel argued that the court had specific jurisdiction over the defendant because the defendant had contracted with a company that had a plant in Missouri to package and label talc-based powder products.

Finding that the plaintiffs failed to link the products made or distributed in Missouri to the products to which the plaintiffs allegedly were exposed, the court granted the defendant's motion for mistrial.<sup>4</sup>

If the argument advanced by the plaintiffs' counsel sounds familiar, it likely is because it closely tracks one of the arguments the U.S. Supreme Court rejected in *Bristol-Myers Squibb Co.*

There, the plaintiffs asserted that the foreign defendant's contract with a California company to distribute the blood-thinning drug Plavix nationally justified California's exercise of specific jurisdiction over the defendant for any Plavix-related claim.

Although entering into a distribution contract with a California company comprised one contact between the defendant and the forum, the Supreme Court explained, it would be relevant only if the plaintiffs' claims arose from the contract.

Since the plaintiffs failed to show any connection between the defendant's contract with the California distributor and the plaintiffs' alleged use of, or harm resulting from, Plavix, the high court ruled that the plaintiffs failed to establish specific jurisdiction over the foreign defendant.

Though unsuccessful to date, the plaintiffs' mass tort bar will likely continue to press this argument going forward.

Plaintiffs in future cases will likely seek to distinguish *Bristol-Myers Squibb Co.* by arguing that they have alleged the defendant — either directly or through a resident distributor — engaged in conduct in the forum that is relevant to their claim.

Plaintiffs may also contend they demonstrated that the resident distributor distributed the specific product to which the plaintiff purportedly was exposed.

To buttress these arguments, plaintiffs may start regularly naming companies throughout the supply chain as defendants, and may pursue discovery about the extent of control foreign defendants contractually reserved or actually exerted over design, manufacture and distribution processes.

## GENERAL JURISDICTION

Sometimes referred to as "all claims" jurisdiction, general jurisdiction exists only if the company is at home in the state.

If a state has general jurisdiction over a company, it may adjudicate any claim against the company, regardless of whether the claim arises from the company's contacts with the forum.

A corporation is considered at home in the state in which it is incorporated and the state in which it maintains its principal place of business.

In addition, if a corporation's presence in a foreign state is so exceptionally substantial that the state serves as a surrogate for the corporation's home, the corporation may be subject to general jurisdiction in that state, too.<sup>5</sup>

Courts tasked with determining whether a corporation's presence in a foreign state qualifies as an exceptional case must compare the corporation's activities in the forum state with the corporation's global activity.

Systematic and continuous contacts with a state are insufficient unless they rise to the level of the contacts a domestic enterprise has with its home state.<sup>6</sup>

In mass tort litigation, the state in which a company is incorporated or maintains its formal principal place of business rarely is the plaintiff's preferred forum.

Plaintiffs typically argue, therefore, that a corporation's contacts with the forum are sufficiently substantial, continuous and systematic to trigger the "exceptional case" basis for general jurisdiction.

However, in *Daimler AG v. Bauman*, the Supreme Court made it clear that whether a defendant has "continuous and systematic" contacts with a forum is the wrong analysis for general jurisdiction.

"That formulation ... is unacceptably grasping," the *Daimler* opinion said, as it would result in finding a corporation "essentially at home" in every state in which it conducts business, destroying the distinction between specific, contacts-based jurisdiction and general jurisdiction.

Instead, a corporation may be subject to general jurisdiction only if it is incorporated in the state, maintains its principal place of business in the state, or, in the exceptional case, is otherwise "essentially at home in the forum state."

Despite the Supreme Court's admonition that general jurisdiction may not be established based solely on the number of the defendant's in-state contacts, efforts to justify general jurisdiction by cataloging a corporation's affiliations with a forum state will likely continue.

Plaintiffs will likely argue that corporations should be subject to general jurisdiction in the state that hosts most of the corporation's operations (as opposed to its headquarters) or the state from which the corporation receives most of its earnings.

Further, because the test articulated in *Daimler* and *BNSF Railway* requires an assessment of the corporate defendant's in-state contacts in the context of its nationwide and worldwide operations, plaintiffs will likely demand more, and broader, jurisdictional discovery.

## JURISDICTION BY 'CONSENT'

Limiting general jurisdiction over a corporate defendant to the few forums in which it is at home severely curtailed the number of jurisdictions in which a corporation may be sued.

Plaintiffs have responded by attempting to resurrect a century-old theory of jurisdiction: jurisdiction by registration.

Under this theory, a foreign corporation could be subject to jurisdiction in any state in which it has registered to transact business and has appointed an agent to accept service of process on its behalf.

By registering and appointing an agent, plaintiffs contend, a corporation has consented to the state's jurisdiction.

On its face, the notion that a party may consent to a state's exercise of jurisdiction over it is not controversial.

Express consent, for example, in which a corporation explicitly agrees it may be subject to a state's jurisdiction through a contract provision, has long been recognized to be valid.

Implied consent — found when a foreign corporation voluntarily appears in response to, and litigates the merits of, a lawsuit — similarly comports with the Supreme Court's due process jurisprudence.

But as the popular idiom cautions, the devil is in the details.

Express and implied consent differ significantly from jurisdiction by registration. The first two result from a corporation's voluntary, intended acts, whereas the third derives from the post hoc determination of an independent actor (the state).

Express and implied consent also authorize only limited jurisdiction over a particular claim (the case being litigated) or class of claims (disputes arising from the contract), whereas registration-based consent purports to authorize jurisdiction for any and all claims.

In today's post-*Daimler* world, the jurisdiction-by-registration theory has met with limited success.

The highest courts of California, Delaware, Missouri and Wisconsin have rejected the theory as a valid basis for exercising general jurisdiction. So have intermediate appellate courts in Arizona and New Jersey, as well as the 2nd U.S. Circuit Court of Appeals.<sup>7</sup>

A few lower courts in other states, however, have accepted the argument.<sup>8</sup>

Despite their differing conclusions, all of these courts base their holding, at least in part, on the text of the relevant registration statute.

For example, since "none of the [Wisconsin registration statute's] words — independently or taken together — suggest consent to general jurisdiction," the Wisconsin Supreme Court concluded that complying with the statute did not constitute consent to general jurisdiction.

Conversely, Pennsylvania's statutory scheme has been held to explicitly advise foreign corporations that registering to do business in the state "constitutes a sufficient basis ... to enable [Pennsylvania courts] to exercise general personal jurisdiction over such a person," leading several district courts to conclude that a corporation consents to general jurisdiction in Pennsylvania when it complies with Pennsylvania's registration statute.<sup>9</sup>

In addition to their interpretation of the relevant statute, courts in the majority diverge from those in the minority

with respect to the import they assign to the due process clause when jurisdiction is asserted based on a corporation's registration.

Courts accepting the jurisdiction-by-registration theory typically assume, with scant exposition, that the foreign corporation waived any due process objection when it registered with the state.

The courts that reject jurisdiction by registration disagree, holding that the theory is inconsistent with the modern understanding of personal jurisdiction.

Many of the courts in the majority note too that because every state has a business-registration statute, the jurisdiction-by-registration theory — if valid — effectively would abolish the entire general jurisdiction framework.

A corporation would be subject to jurisdiction in every state in which it was registered to transact business — an outcome even broader than the "doing business" test the Supreme Court abandoned in *International Shoe Co.* and warned against in *Daimler*.

The differences separating the majority and minority positions described above offer a road map for corporate defendants facing the jurisdiction-by-registration argument.

First, foreign corporations should submit that the relevant registration statute cannot be held to authorize the exercise of general jurisdiction over it.

Second, they should explain that *Daimler* made it clear that general jurisdiction over a corporation is limited to the few forums in which the corporation is at home, and registering to transact business as a foreign corporation falls well short of what the due process clause requires.

Finally, under certain circumstances, it may also be appropriate to argue that exercising general jurisdiction based solely on a corporation's registration would violate the commerce clause.<sup>10</sup>

Plaintiffs will likely counter that the Supreme Court has authorized the exercise of general jurisdiction based solely on a corporation's compliance with a registration statute, and that *Goodyear*, *Daimler* and *BNSF Railway* did not overrule this long-standing precedent because they addressed only general jurisdiction.

To an extent, that is true; the Supreme Court arguably authorized the exercise of general jurisdiction based on registration in 1917, and its recent decisions address general jurisdiction, not consent-based jurisdiction. But this argument ignores the context in which the high court decided the jurisdiction-by-registration cases.

The Supreme Court's 1917 decision in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.* was based on the then-governing territorial approach to jurisdiction articulated in *Pennoy v. Neff*.

*Pennoyer* and its attendant legal fictions have been overruled, however, and the territory-based approach to jurisdiction has been jettisoned in favor of the contacts analysis set forth in *International Shoe Co.*<sup>11</sup>

Moreover, by expanding the doctrine of personal jurisdiction to permit states to exercise specific jurisdiction over claims arising within their borders, *International Shoe Co.* vitiated the need for jurisdiction by registration.<sup>12</sup>

Thus, neither the basis for jurisdiction by registration nor its purpose remain. *Pennsylvania Fire Insurance Co.*, like other cases “decided in the era dominated by *Pennoyer*’s territorial thinking, should not attract heavy reliance today.”<sup>13</sup>

## CONCLUSION

After decades of confusion, corporations finally have clear guidance on how their choices may affect the locations in which they may be sued.

A corporation may be subject to general jurisdiction only in the state or few states in which it is at home, and is subject to specific jurisdiction only where the plaintiff’s claims arise from the corporation’s contacts with the forum.

Despite the Supreme Court’s efforts, some plaintiffs will likely continue bringing claims in their preferred forums, regardless of whether the corporate defendant is subject to general or specific jurisdiction under the relevant test.

These plaintiffs will likely argue that the foreign corporation’s contacts with the forum are so exceptional they warrant deeming the corporation “at home” in the jurisdiction, or that by complying with the state’s business-registration statute, the corporation consented to the state’s exercise of general jurisdiction over it.

For the reasons discussed above, however, in most jurisdictions these arguments should fail.

One final note: Determining whether a claim can be dismissed for lack of personal jurisdiction is only half of the analysis. Corporate defendants should also assess the potential outcomes of obtaining a dismissal.

For example, if the claim will likely be refiled in a less favorable forum, a corporation may prefer to waive its personal jurisdiction objection and litigate the claim in the forum in which it is filed.

Similarly, where the action or a number of actions will continue in the corporation’s absence and additional claims are expected to follow, a corporation may prefer to remain a party so it may participate in shaping the direction of, and precedents that may result from, that early lawsuit.

## NOTES

<sup>1</sup> *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>2</sup> *Goodyear Dunlop Tire Operations SA v. Brown*, 564 U.S. 915, 919 (2011); see also *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1558 (2017); *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-761 (2014); *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017); *Walden v. Fiore*, 134 S. Ct. 1115, 1121-1122 (2014).

<sup>3</sup> *Walden*, 134 S. Ct. at 1122; *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781 (quoting *Goodyear*, 564 U.S. at 919).

<sup>4</sup> The case is *Swann v. Johnson & Johnson*, No. 1422-CC09326-01 (Mo. Cir. Ct., St. Louis City). Despite the mistrial for a lack of personal jurisdiction, the case is not over. The court allowed the plaintiffs to conduct additional discovery to attempt to find evidence that would permit the court to exercise specific jurisdiction over the defendants. Following the court’s ruling, the defendants removed the case to federal court and asked the district court to dismiss the case for a lack of personal jurisdiction. See *Swann v. Johnson & Johnson*, No. 17-cv-1845, 2017 WL 3034711 (E.D. Mo. July 18, 2017) (Limbaugh, J.). The District Court decided that the removal was untimely and remanded the case to state court.

<sup>5</sup> *BNSF Ry. Co.*, 137 S. Ct. at 1558 (quoting *Daimler*, 134 S. Ct. at 760, 761 n. 19, 726 n. 8, 761 n. 19); *Goodyear*, 564 U.S. at 924.

<sup>6</sup> *Daimler*, 134 S. Ct. at 726 n. 8, 761 n. 19. The Supreme Court has found the facts of only one case sufficient to qualify as an “exceptional case” — *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). There, the high court found that Ohio could exercise general jurisdiction over a company incorporated and principally located in the Philippine Islands where the company’s Philippine operations had ceased during World War II and the company’s president ran the company from Ohio until after the war ended. The Supreme Court later explained it reached this conclusion in *Perkins* because “Ohio was the corporation’s principal, if temporary, place of business.” *Daimler*, 134 S. Ct. at 756 (citing *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 780 n. 11 (1984)); see also *id.* at 756 n. 8. Thus, *Perkins*, the case uniformly cited to illustrate the contours of the “exceptional case,” is rather unexceptional. It simply reflects that a company is subject to general jurisdiction in the state in which it maintains its principal place of business. See also *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 48 (Mo. 2017) (quoting *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016)) (“For this reason, 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.’”).

<sup>7</sup> See *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 377 P.3d 874, 884 (Cal. 2016), rev’d on other grounds, 137 S. Ct. 1773 (2017); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016); *Dolan*, 512 S.W.3d at 44; *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 898 N.W.2d 70, 77 (Wis. 2017). The highest state courts in Colorado, Oregon and Tennessee, moreover, have held that exercising general jurisdiction over a foreign corporation on the basis that it complied with their respective state’s registration statute would violate the due process clause, although they declined to address whether registration could comprise consent. See *Magill v. Ford Motor Co.*, 379 P.3d 1033 (Colo. 2017); *Figuroa v. BNSF Ry. Co.*, 390 P.3d 1019, 1021 (Or. 2017); *First Cmty. Bank NA v. First Tenn. Bank NA*, 489 S.W.3d 369 (Tenn. 2015); see also *Wal-Mart Stores Inc. v. LeMaire*, 395 P.3d 1116, 1119-1120 (Ariz. Ct. App. 2017); *Dutch Run-Mays Draft LLC v. Wolf Block LLP*, No. L-2690-14, 2017 WL 2854420 (N.J. Super. Ct. App. Div. July 5, 2017); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016).

<sup>8</sup> See *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 655 (E.D. Pa. 2016); *Kearns v. N.Y. Cmty. Bank*, No. 115,470, 2017 WL 1148418, at \*5 (Kan. Ct. App. Mar. 24, 2017) (unpublished) (citing *Merriman v. Crompton Corp.*, 146 P.3d 162, 177 (Kan. 2006)) (“When a corporation applies to do business in Kansas, it consents to personal jurisdiction. Consenting to jurisdiction in Kansas by applying to do business in the state does not violate the requirements of due process.”).

<sup>9</sup> *Segregated Account of Ambac Assurance Corp.*, 898 N.W.2d at 77; 42 Pa. Cons. Stat. Ann. § 5301. Notably, this provision is found in a jurisdictional statute in Pennsylvania’s Judicial Code, not its registration statute, which is located in Pennsylvania’s Business Code; see, e.g., *Bors*, 208 F. Supp. 3d 648; *Hegna v. Smitty’s Supply Co.*, No. 16-cv-3613, 2017 WL 2563231 (E.D. Pa. Jun. 13, 2017). One judge in Philadelphia’s Court of Common Pleas, however, recently sustained preliminary objections for a lack of personal jurisdiction even though the defendants had registered to conduct business in Pennsylvania. See *Rodi v. Johnson & Johnson*, No. 160804126 (Pa. Ct. Com. Pl., Phila. Cty. May 2, 2017) (Cohen, J.).

<sup>10</sup> See, e.g., *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2016 WL 2866166, at \*4-6 (D. Kan. May 17, 2016) (citing *Davis v. Farmer's Coop. Equity Co.*, 262 U.S. 312 (1923)) (holding that, where the claim is brought by a nonresident plaintiff against a foreign corporate defendant, construing the defendant's compliance with Kansas' registration statute to permit the exercise of general jurisdiction would violate the commerce clause as it "discriminates against interstate commerce in practical effect.").

<sup>11</sup> See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 206, 212 (1977) ("It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*. ... We ... conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."); *Id.* at 212 n. 39 ("It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled.").

<sup>12</sup> See, e.g., *Wal-Mart Stores Inc.*, 395 P.3d at 1120 ("Today, specific jurisdiction accomplishes the same goal as jurisdiction by implied consent, but rather than focusing on a corporation's "presence" in a forum state, specific jurisdiction is based on the relationship between the forum, the defendant, and the facts giving rise to the cause of action."). Before the Supreme Court adopted specific jurisdiction, states could exercise jurisdiction over corporations only if the corporation was "present" within its borders. As corporations were considered present only in the state in which they were incorporated, they could not be sued anywhere else, regardless of where the alleged misconduct or injury occurred. To remedy this problem, states enacted business registration statutes permitting service on foreign corporations through designated in-state agents, and courts accepted the fiction that corporations complying with a state's registration statute or doing business in the state had impliedly consented to the state's exercise of jurisdiction over it. See *Brown*, 814 F.3d at 631-632; Tanya J. Monestier, *Registration Statutes, General Jurisdiction, & the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015).

<sup>13</sup> *Daimler*, 134 S.Ct. at 761 n. 18 (internal citation omitted).

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