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Recent Decisions Have Shed Light on General Jurisdiction, But Ambiguity Remains for Defendants That Are Members of Affiliated Groups

*By Joseph Cioffi and James R. Serritella**

Corporate and banking groups operating in multiple jurisdictions in particular should be mindful of the parameters of the current state of the law regarding personal jurisdiction. The authors of this article discuss several recent decisions addressing jurisdiction and opportunities for companies to plan activities of subsidiaries and branch offices in a manner that will not automatically subject the corporate parent to general jurisdiction in the states in which such subsidiaries or branches are organized or located.

In 2014, the U.S. Supreme Court in *Daimler AG v. Bauman*¹ clarified the parameters of general jurisdiction where a court is asked to assert personal jurisdiction over a foreign corporate parent based on the contacts of its subsidiary with the forum state. During the past two years, district courts and bankruptcy courts, including in *Gucci America v. Bank of China*² and *Hosking v. Hellas Telecommunications (Luxembourg) II SCA (In re Hellas Telecommunications (Luxembourg) II SCA)*,³ have followed or expounded upon the high court's reasoning when determining their ability to exercise jurisdiction over a defendant that is part of an affiliated group that has operations in multiple locations, including in the forum. As the principles of personal jurisdiction are clarified in these contexts, opportunities exist within corporate groups to plan and shape activities among affiliated entities and branch offices to minimize the risk of suit in an unlikely forum.

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¹ 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

² 768 F.3d 122 (2d Cir. 2014).

³ 524 B.R. 488 (Bankr. S.D.N.Y. 2015).

PERSONAL JURISDICTION

As opposed to subject matter jurisdiction, which relates to a court's authority to hear a particular type of matter, personal jurisdiction relates to a court's ability to exercise power over a defendant and generally rests upon the defendant's contacts within the forum. Personal jurisdiction, in turn, may be based on "specific jurisdiction," where the claim arises from the defendant's conduct within the forum, and "general jurisdiction," which hinges upon whether the defendant's conduct in the forum was so continuous and systematic that the defendant can be said to be "at home" in the forum.⁴ In instances where specific jurisdiction is lacking, plaintiffs have argued courts can exercise general jurisdiction over defendants that have a subsidiary or branch office in the forum. As explained by the Supreme Court in *Daimler*, specific jurisdiction has been the subject of numerous decisions over decades and progressively liberalized such that there has been less need for courts to address general jurisdiction.⁵

DAIMLER AG V. BAUMAN

In *Daimler*, the plaintiff sued a foreign parent in California for tortious conduct allegedly committed by a foreign subsidiary in a foreign country. Plaintiff based jurisdiction on the presence of the parent in California and California operations of a domestic subsidiary. In declining to expand the test for general jurisdiction, the Court acknowledged the paradigm bases for general jurisdiction as the location of the defendant's principal office and its state of incorporation, neither of which existed in the forum state.⁶ In a footnote, it further explained that such bases were not exclusive and that general jurisdiction could be found in an "exceptional case," but did not address what type of activity would constitute such an "exceptional case."⁷ Although the Supreme Court left open the possibility for the presence of an affiliate of defendant acting as defendant's agent in the forum to impact the analysis, the test for whether the parent corporation was "at home" in California was determined by looking at the contacts in the forum of the parent itself, and not of its subsidiary.

⁴ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

⁵ *Daimler*, 134 S. Ct. at 754, 755.

⁶ *Id.* at 761; see also *Goodyear*, 131 S. Ct. at 2853–54.

⁷ *Daimler*, 134 S. Ct. at 761 n.19.

GUCCI AMERICA V. BANK OF CHINA

Following the *Daimler* decision, the Second Circuit in *Gucci*, adhered to the high court's admonition regarding expansion of general jurisdiction where the plaintiff asserted that a New York court had general jurisdiction over a foreign bank based on its maintenance of two branches in New York. In finding general jurisdiction lacking and remanding on the question of specific jurisdiction, the court addressed the question left unanswered by the Supreme Court regarding what constitutes an "exceptional case" by analyzing the defendant's contacts with the forum in the context of its entire global activities.⁸ The court determined that the defendant's conduct through the two branches was a small portion of its worldwide business given that it had over 10,000 domestic branches and over 600 branches overseas in 27 countries.⁹ As a result, the defendant's activities in New York were not so continuous and systematic that the defendant could be said to be at home in the state.¹⁰

HOSKING V. HELLAS TELECOMMUNICATIONS (LUXEMBOURG) II SCA

More recently, in *Hosking*, the bankruptcy court for the Southern District of New York interpreted *Daimler* expansively against several entities, including Deutsche Bank ("DB"), but did not refer to the *Gucci* decision. As an initial matter, the court noted that in litigation commenced in bankruptcy court, under existing case law, the sovereign exercising authority over the defendant is the United States, not the state in which the court is located.¹¹ Accordingly, the test for sufficiency of the defendants' conduct with the forum required an analysis of their contacts with the United States as a whole, and not New York, specifically. Therefore, general jurisdiction existed over defendants that had their paradigm bases for jurisdiction within the United States.¹²

However, determining whether DB, a bank organized and headquartered in Germany, had adequate contacts in the United States in order for the court to exercise general jurisdiction over it required further analysis. Unlike in *Daimler* and *Gucci*, plaintiff did not allege that jurisdiction against DB was proper based

⁸ *Gucci*, 768 F.3d at 135.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Hosking*, 524 B.R. at 506–07.

¹² *Id.*

on the contacts of DB's subsidiary or affiliate.¹³ Nevertheless, the court found plaintiff alleged "a substantial, longterm [sic] presence in the United States and New York" through its commitment to a long-term lease in New York.¹⁴ Although the court did not expressly find an "exceptional case" existed, it found such allegations of long-term presence by DB sufficient to establish DB "at home" in the United States for purposes of general jurisdiction.¹⁵ We note the *Hosking* decision has been criticized by at least one court in the Southern District of New York due to its emphasis on the magnitude of defendant's operations in the forum without any analysis of such operations relative to the size of defendant's global business.¹⁶

CONCLUSION

Based on the few cases addressing general jurisdiction, it appears likely appellate review in subsequent cases will be necessary before there is further guidance regarding what may constitute an "exceptional case" and when a defendant may be considered "at home" in the forum. Regardless of how these questions are ultimately answered, going forward, courts may be expected to continue to analyze the relative size of operations of foreign defendants in the forum compared to their global activities when determining whether they have general jurisdiction. In bankruptcy cases, the forum at issue may be more expansive than the state in which the court exists and extend to the United States, generally. However, in keeping with *Daimler* and *Gucci*, the question of contacts should generally be applied to the defendant itself, rather than its affiliates.

¹³ *Id.* at 508.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2015 U.S. Dist. LEXIS 107225 (S.D.N.Y. Aug. 4, 2015). In addition, the plaintiffs in the *Hosking* filed an amended complaint and in response DB filed another motion to dismiss arguing again, in part, that the court lacks personal jurisdiction. DB relied on recent decisions, including *LIBOR*, in its motion papers. As of the writing of this article, the court had not yet decided the motion to dismiss.