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JURISDICTION AND PROCEDURE

Emerging Lessons for Businesses from *Daimler AG v. Bauman*: New Limits To Jurisdictional Discovery, but State Registration Statutes Still an Obstacle

By Chad M. Eggspuehler

The Supreme Court's landmark 2014 decision in *Daimler AG v. Bauman* was a major victory for business organizations. No longer could they be haled into court in any state, regardless of the events alleged in the case, simply because they had continuous and systematic contacts in a state. The Court's reframing of general personal jurisdiction has had positive aftershocks for businesses too, as they have begun persuading courts to rein in expansive and burdensome jurisdictional discovery in line with *Bauman*'s teaching. Yet, while *Bauman* provides helpful tools for companies resisting forum-shopping plaintiffs, state registration requirements for out-of-state businesses remain an obstacle and source of unpredictability.

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Bauman as a Barrier To Jurisdictional Discovery

The Fifth Circuit has taken the lead in applying *Bauman* to limit jurisdictional discovery. In *Monkton Insurance Services, Ltd. v. Ritter*, 768 F.3d 429 (5th Cir. 2014), the court of appeals affirmed the personal-jurisdiction-based dismissal of an action against a bank incorporated in and principally operated out of the Cayman Islands. Importantly, the court also affirmed the district court's denial of jurisdictional discovery, explaining that ''[m]ore evidence of wire transfers, phone calls, or other [bank] customers with a tie to Texas will not establish jurisdiction.'' A handful of district courts from the Fifth Circuit and the federal district court for the District of Columbia have followed *Monkton*'s lead in denying jurisdictional discovery pertaining to out-of-state corporations' sales, marketing and communications in a forum state. So has a Delaware trial court—*In re Asbestos Litig. Master Asbestos File*, 2016 BL 433018 (Del. Super. Court 2016).

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These developments should come as no surprise in light of *Bauman*'s clarification that general jurisdiction does not turn on a simple aggregation of ''continuous and systematic'' contacts. The proper inquiry, the Court

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instructed, ''is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic,'' but ''whether that corporation's *affiliations* with the State are so continuous and systematic as to *render it essentially at home* in the forum State.'' *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014) (emphasis added, citation and internal quotation marks omitted). Not only did the *Bauman* Court refashion the personal jurisdiction paradigm, it did so in a way that the Justices anticipated would minimize the need for jurisdictional discovery. According to the eight-Justice majority, ''it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home.''

Still, *Bauman* does not portend the end of general jurisdiction discovery. Some courts may be slow to embrace *Bauman*'s more stringent standard for general jurisdiction. Beyond that, *Bauman* left the door open for ''exceptional'' situations where a corporation's forum ''operations'' are ''so substantial and of such a nature as to render the corporation at home in that State.''

The World War II era decision in *Perkins v. Benguet Consolidated Mining Co.*, 437 U.S. 437 (1952)—where the president of a Philippine mining company temporarily relocated the entire business to Ohio during the Japanese occupation, including its principal office, accounts and files—''remains the textbook case of general jurisdiction.'' *Bauman*, 134 S. Ct. at 755 (citation omitted). But the *Bauman* Court cautioned that *Perkins* was an ''exceptional'' case, where ''[a]ll of [the company's] activities were directed by the company's president from within Ohio'' during the war. *Id.* at 756 n.8, 762 n.19. ''Given the wartime circumstances,'' the Court explained, ''Ohio could be considered 'a surrogate for the place of incorporation or head office.' '' *Id.* at 756 n.8 (citation omitted). ''Ohio was *the center* of the corporation's wartime activities.'' *Id.* (emphasis added). Thus, the atypical company that primarily operates its business in a state other than its place of incorporation or designated principal place of business should be on notice that it will be subject to general jurisdiction there.

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With this instruction from *Bauman* and the recent developments in the Fifth Circuit and elsewhere, businesses now have strong arguments for resisting broad jurisdictional discovery of forum-state sales data, advertisements and general expenses. Such facts, though crucial to the erstwhile continuous-and-systematic-contacts analysis, likely have no bearing on the relevant at-home/center-of-operations analysis post-*Bauman*. Further, *Bauman*'s narrow focus on where a company is ''at home'' should enable companies to withstand broad general jurisdiction theories that would subject them to personal jurisdiction in several states or even nationwide.

For corporate defendants worried that plaintiffs will exploit the *Perkins* exception to obtain costly jurisdictional discovery in routine cases, there is some reason for comfort. Basic pleading standards should serve to sort out implausible and conclusory jurisdictional allegations much the same way that they do with legal claims. To this end, many federal courts require that the party seeking jurisdictional discovery make out a prima facie case that the discovery sought matters—*i.e.*, that the evidence sought actually could support a finding of general jurisdiction. *E.g.*, *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 249–50 (D.D.C. 2015) (denying request for jurisdictional discovery where requested discovery—''information about defendants' public advocacy and fundraising activities in the United States''—would not satisfy *Bauman* personal jurisdiction standard). When coupled with *Bauman*'s stricter general personal jurisdiction requirements, such pleading standards lend a greater degree of predictability to whether a company's forum-state activities will support, at a minimum, jurisdictional discovery.

Registered for Business = Consent to Jurisdiction?

Though *Bauman* gives corporate defendants new tools for fighting personal jurisdiction and burdensome jurisdictional discovery, various states' registration statutes remain an obstacle and, in some jurisdictions, a source of uncertainty. Some, like Pennsylvania's registration statute, 42 Pa. Cons. Stat. Ann. § 5301(a), expressly state that the foreign business is subjecting itself to general jurisdiction in the state by registering to do business, and others, like Delaware's registration statutes, have been judicially interpreted to have the same effect. *Bauman*, for its part, did not address business registration statutes or how a company consents to personal jurisdiction.

The U.S. Courts of Appeals that have considered the issue have split on the effect of business registration statutes on personal jurisdiction, with the First, Third and Eighth Circuits construing registration and/or appointment of an agent for service of process under New Hampshire, Pennsylvania and Minnesota law, respectively, as the out-of-state company's consent to personal jurisdiction. *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984); *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199–1200 (8th Cir. 1990). These decisions adhere to the view embraced by the Supreme Court in two early 20th century decisions that compliance with a state's business registration requirements can amount to consent to personal jurisdiction. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), and *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

The Fourth and the Seventh Circuits have taken a different view, concluding that compliance with business registration statutes, alone, does not defeat an out-of-state company's objection to personal jurisdiction. *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990). These cases highlight the

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due process principles animating the modern era of personal jurisdiction jurisprudence ushered in by the Supreme Court's seminal decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Most recently, the Second Circuit reexamined the due process concerns with registration-as-consent through the lens of *Bauman* in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016). ''If mere registration and the accompanying appointment of an in-state agent . . . sufficed to confer general jurisdiction by implicit consent,'' the court warned, ''every corporation would be subject to general jurisdiction in every state in which it registered, and [*Bauman*'s] ruling would be robbed of meaning by a back-door thief.'' *Id.* at 640. Though the court questioned the continuing vitality of the *Pennsylvania Fire* consent rule in light of *Bauman*, *id.* at 639, it held that the Connecticut registration statute did not require consent to general jurisdiction because it lacked express language to that effect, *id.* at 637, 641. Thus, unlike the Pennsylvania counterpart deemed to confer general jurisdiction by consent in *Bane* the Connecticut statute ''gives no notice to a corporation registering to do business in the state that the registration might have the sweeping effect'' of general jurisdiction. *Id.* at 637. The *Brown* court recognized that dicta from a 2009 Connecticut appellate decision arguably supported an expansive take on jurisdiction-by-consent, but concluded that due process concerns required a narrow construction of the registration statute in the absence of a controlling decision by the Connecticut Supreme Court. *See id.* at 635, 641.

Following *Brown*, federal district courts in Illinois, Oklahoma and New Jersey have construed their states' registration statutes narrowly, rejecting jurisdiction-by-consent arguments in the absence of statutory language indicating that registration constitutes consent to general jurisdiction.

Because *Bauman* did not address the effect of business registration statutes on jurisdiction-by-consent, parties and court-watchers should expect this circuit split to continue. As the Second Circuit's *Brown* decision demonstrates, much depends on the wording of the relevant registration statutes. In states like Pennsylvania where the registration statute expressly states that registration will subject the company to general jurisdiction in the state, *see* 42 Pa. Cons. Stat. Ann. § 5301(a), the company will have a difficult time arguing that it lacked notice that it was consenting to personal jurisdiction. After all, constitutional rights—including the due process protections animating a personal jurisdiction defense—may be knowingly and voluntarily waived. Less specific state registration statutes may receive the same treatment if binding judicial interpretations deem compliance with them tantamount to consent, but companies should have strong counter-arguments concerning the scope of their consent depending on the language of the relevant statute and its history of judicial interpretation. *Brown* and likeminded decisions show that, absent a longstanding judicial gloss, federal courts will be reluctant to construe ambiguous registration statutes as tacit waivers of personal jurisdiction.

Another option remains for out-of-state businesses challenging general jurisdiction in states with broad consent-based registration statutes: a Dormant Commerce Clause challenge to the mandatory waiver of personal jurisdiction. This spring, a district court in Kansas sustained a Dormant Commerce Clause challenge to that state's registration statute, concluding that it discriminated against interstate commerce. *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2016 WL 2866166, 2016 BL 156186 (D. Kansas May 17, 2016). Central to that court's decision was the Supreme Court's 1923 decision in *Davis v. Farmers' Co-operative Equity Co.*, 262 U.S. 312, which struck down Minnesota's registration statute that had been interpreted as requiring consent to general jurisdiction. It remains to be seen how federal courts will receive Commerce Clause arguments that, like *Pennsylvania Fire*, predate the modern due-process approach to personal jurisdiction issues ushered in by *International Shoe*.

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Practice Tips:

- Use *Bauman*'s at-home/center-of-operations standard to prevent burdensome and irrelevant discovery of forum-state contacts, sales and advertisements.
- Beware of state registration statutes that condition a business's ability to conduct business on consent to general jurisdiction.
- Due process concerns and lack of notice may persuade a court that ambiguous registration statutes do not require consent to general jurisdiction.
- Consider a Dormant Commerce Clause challenge to state registration statutes that require consent to general jurisdiction, especially where the matter is brought by out-of-state plaintiffs.