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PERSPECTIVE

'Consent' is the next big battle over personal jurisdiction

By Michael Huston, Sean Cooksey and David Casazza

In several recent cases, the Supreme Court has held that the due process clause tightly restricts where a defendant is subject to personal jurisdiction in state court. As a result, in lawsuits against corporations, plaintiffs are now likely to argue that the defendant "consented" to personal jurisdiction in the forum. Defense counsel need to be prepared to rebut these arguments by showing both that state law does not require consent to general jurisdiction and that any attempt to extract such consent would be unconstitutional.

The Recent Cases

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 2011 DJDAR 9436, and Daimler AG v. Bauman, 2014 DJDAR 444, the Supreme Court held that a defendant can be subject to general personal jurisdiction — that is, jurisdiction on claims arising anywhere in the world — only where the defendant is "at home," which for a corporation is virtually always limited to the place of incorporation or principal place of business. In BNSF *Railway Co. v. Tyrrell*, 2017 DJDAR 4906, decided this term (and litigated by our team at Gibson Dunn), the Supreme Court further clarified that a company is not "at home" in another state even if it has very substantial operations there.

The Supreme Court has also taken a narrow view of specific personal jurisdiction — which allows a state court to adjudicate claims arising in that state. In *Walden v. Fiore*, 2014 DJDAR 2263, and then this term in *Bristol-Myers Squibb Co. v. Superior Court of California*, 2017 DJDAR 5867, the Supreme Court held that specific jurisdiction requires both some intentional act by the defendant directed at the forum state and some "connection between the forum and the specific claims at issue."

The Next Battle

With both general and specific personal jurisdiction now severely contracted, plaintiffs have turned to arguing that defendant corporations "consented" to personal jurisdiction in the forum. Personal jurisdiction is a waivable right, and plaintiffs will argue that when the out-of-state corporation registered to do business in the forum and appointed an agent for service of process — as all 50 states require — that corporation consented to general personal jurisdiction no matter where the plaintiff's claim arises.

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Eighteen states reject this position. Most of these have adopted the Model Registered Agents Act, which provides that "the appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the entity in this state." But even in these states, plaintiffs have recently attempted to assert general jurisdiction by consent.

One state, Pennsylvania, has a statute providing that "qualification as a foreign corporation under the laws of this Commonwealth" "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction."

The remaining states have statutes that do not address what effect corporate registration has on general jurisdiction. Courts have divided over how to interpret these statutes. For example, the Kansas Supreme Court has held that its registration statute "provides a basis for general jurisdiction over foreign corporations." But the Kansas Supreme Court has not had an opportunity to revisit that interpretation in light of *Daimler*. And every state supreme court since *Daimler* to consider the matter has interpreted its own statute not to require consent to general jurisdiction. This includes the California Supreme Court in *Bristol-Myers* (before the Supreme Court took up that case regarding specific jurisdiction).

The Looming Constitutional Challenge

Defense counsel facing an argument for general jurisdiction by registration can rely on longstanding Supreme Court precedent to argue that the purpose of registration and appointment statutes is to ensure that plaintiffs with claims *arising in the state* can locate out-of-state defendants; the statutes were not meant to enable plaintiffs to sue on claims arising anywhere in the world. Interpreting state registration statutes to require consent to general jurisdiction also produces the absurd consequence of giving *more* protection to companies that operate illegally without registering.

Nevertheless, some courts that have read their registration statutes broadly to create general jurisdiction may be unwilling to change course, and thus will soon need to confront whether it is constitutional for a state to mandate consent to general personal jurisdiction. Given the Supreme Court's recent precedents, the best answer is "no."

In 1917 in P*ennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, the Supreme Court concluded in a very brief opinion that a Missouri statute requiring consent to general jurisdiction was consistent with due process. But Pennsylvania Fire is no longer good law, as suggested by the 2nd U.S. Circuit Court of Appeals in *Brown v. Lockheed Martin Corp.*, and by the Delaware Supreme Court in *Genuine Parts Co. v. Cepec*.

Pennsylvania Fire pre-dates International Shoe, the Supreme Court's groundbreaking decision mandating that any exercise of jurisdiction must satisfy "traditional notions of fair play and substantial justice." The court said in *Daimler* that cases in the era before *International Shoe* "should not attract heavy reliance today." *Pennsylvania Fire* is also inconsistent with the holdings of *Goodyear, Daimler* and *BNSF*, all of which limited general jurisdiction to a corporation's place of incorporation or principal place of business. The Supreme Court has rejected as "unacceptably grasping" a theory of general jurisdiction that would permit a corporation to be sued on any claim anywhere it does business. Yet that is exactly the outcome that would result if every state attempted to require consent to general jurisdiction.

Consent by registration is unconstitutional for the additional reason that the defendant's "consent" is a fiction — the company's ability to do business in the state depends on it. As the Supreme Court explained in *Koontz v. St. Johns River Water Management District*, 2013 DJDAR 8221, a state may not require a corporation, "as a condition precedent to obtaining a permit to do business within [that] State, to surrender a right and privilege secured to it by the Constitution."

In sum, state registration laws that are interpreted to require consent to be sued anywhere in the world as the price for doing business in the state would create exactly the sort of jurisdictional system that the Supreme Court has condemned as contrary to due process.

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