

9th Circ. Cracks Door Ajar To Imputed Jurisdiction

Law360, New York (September 21, 2015, 2:05 PM ET) --



William E. Thomson



Dylan Mefford

In a decision having potentially significant implications for U.S. multinationals, a panel of the Ninth Circuit has held that a plaintiff may establish general personal jurisdiction over a foreign subsidiary in the United States based on its U.S. parent's jurisdictional contacts, even where the alleged conduct by the subsidiary occurred abroad, provided the plaintiff can establish the parent and subsidiary are alter egos.

Courts long have recognized that a plaintiff may, under certain circumstances, impute a foreign subsidiary's contacts to a U.S. parent for purposes of establishing personal jurisdiction over the parent, if the relationship between parent and subsidiary is so intertwined as to render the subsidiary the "alter ego" of the parent.[1] But few decisions have permitted plaintiffs to reverse course, establishing jurisdiction over foreign subsidiaries based on their U.S. parents' contacts.[2]

In a recent decision, however, a panel of the Ninth Circuit adopted that novel approach, permitting the plaintiff to argue that Nike's Dutch subsidiary could be subject to general personal jurisdiction in Oregon based on Nike's contacts in the state, if Nike and the subsidiary were alter egos.

In *Ranza v. Nike Inc.*,[3] the plaintiff sued her former employer Nike European Operations Netherlands BV ("NEON"), and its parent company, Nike Inc., in federal court in Oregon, alleging sex and age discrimination in the workplace in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623. The district court dismissed the claims against NEON for lack of personal jurisdiction. The Ninth Circuit affirmed, but in so doing, adopted a novel theory of alter ego jurisdiction and confirmed the U.S. Supreme Court's rejection of an agency theory of jurisdiction.

"Applying the Alter Ego Test in Reverse"

In holding that the alter ego test could apply just as easily to exercise jurisdiction over the foreign subsidiary based on the parent's contacts, the court noted that, because the alter ego relationship equates the two entities, it saw no principled reason to restrict it as unidirectional. "Because we treat the parent and subsidiary as 'not really separate entities' if they satisfy the alter ego analysis, there is no greater justification for bringing the parent into the subsidiary's forum than for doing the reverse." [4] Indeed, the court asserted that the novel application of the alter ego test could be even more defensible than the traditional application: "In fact, exercising general jurisdiction over both entities in the parent's forum is just as defensible (if not more so) under due process principles as haling the parent into the subsidiary's forum. If the two entities are to be treated as a single enterprise, the stronger candidate for the 'home' of that enterprise is likely where the controlling parent most closely affiliates." [5]

Accordingly, the court held that "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." [6]

The court articulated the following test for establishing an alter ego relationship: "To satisfy the alter ego test, a plaintiff must make out a prima facie case: (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." [7] The court emphasized the difficulty of proving and relative rarity of a true alter ego relationship. "The 'unity of interest and ownership' prong of this test requires a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former." [8] The routine indicia of corporate parental control such as "[t]otal ownership and shared management personnel" fall far short of what is required. [9] On the contrary, "This test envisions pervasive control over the subsidiary, such as when a parent corporation dictates every facet of the subsidiary's business — from broad policy decisions to routine matters of day-to-day operation." [10]

The court's application underscores the standard's rigorous character. Ranza failed to show an alter ego relationship despite the court's conclusion that "Nike is heavily involved in NEON's operations. Nike exercises control over NEON's overall budget and has approval authority for large purchases; establishes general human resource policies for both entities and is involved in some hiring decisions; operates information tracking systems all of its subsidiaries utilize; ensures the Nike brand is marketed consistently throughout the world; and requires some NEON employees to report to Nike supervisors on a 'dotted-line' basis." [11] While finding Nike's involvement in NEON to be "substantial," [12] the court concluded that "Ranza has not shown Nike 'dictates every facet of [NEON's] business,' including 'routine matters of day-to-day operation.'" [13]

Though the court held that Ranza had not established the requisite alter ego relationship to subject NEON to general personal jurisdiction in Oregon based on Nike's contacts, the adoption of the novel theory of alter ego jurisdiction is a development with significant implications.

Sole Remaining Potential Basis for Imputed General Jurisdiction

Ranza acknowledges that, after *Daimler*, only the alter ego test remains as a potential basis for imputing general jurisdiction between affiliated corporations. "Before the Supreme Court's *Daimler* decision, this circuit permitted a plaintiff to pierce the corporate veil for jurisdictional purposes and attribute a local

entity's contacts to its out-of-state affiliate under one of two separate tests: the 'agency' test and the 'alter ego' test." [14] But in *Daimler*, "[t]he Supreme Court invalidated this [agency] test," which had "required a plaintiff to show the subsidiary "perform[ed] services that [were] sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." [15] The *Ranza* panel noted that the Supreme Court had found that the agency theory swept "too broadly to comport with the requirements of due process." [16]

While the adoption of the novel alter ego theory thus may be considered an opening of one door to establishing general personal jurisdiction, the confirmation that the Supreme Court rejected the broader agency test seems to reinforce the closing of another.

Decision May Encourage Forum Shopping

Among the potential implications of the decision is the risk that it might encourage forum shopping. Indeed, the Ninth Circuit recognized the issue in *Ranza*, where the plaintiff previously had litigated her claims in the Dutch forum: "[T]hat Ranza unsuccessfully litigated her claims before the Dutch E[qual] T[reatment] C[ommission] and now pursues a remedy in federal court raises an inference, at least, that she is engaging in forum shopping[.]" [17]

Plaintiffs may seek to sue foreign subsidiaries in U.S. courts because the U.S. may offer greater remedies than foreign jurisdictions. *Ranza* is illustrative. The plaintiff sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623. Title VII of the Civil Rights Act of 1964 broadly prohibits discrimination on the basis of race, color, religion, sex or national origin, while the ADEA prohibits discrimination on the basis of age for employees 40 year old or older. Both laws have strong enforcement provisions, and U.S. courts frequently award significant damages on discrimination claims.

In contrast, the Dutch Equal Treatment Commission ("ETC"), where Ranza previously filed claims, has more limited powers. Though the Ninth Circuit found the ETC, together with Dutch courts, provided an adequate alternative forum for purposes of dismissing the claim as to Nike on *forum non conveniens* grounds, it appeared to recognize the Dutch procedures and potential remedies may have been less favorable than those available under U.S. law: "Even if these remedies proved less generous than those available to a prevailing plaintiff in a Title VII and ADEA action in the United States, they nevertheless represent "some remedy" and are therefore adequate under the *forum non conveniens* inquiry." [18]

Plaintiffs allegedly injured while working for foreign subsidiaries may well compare the procedures and remedies in those jurisdictions to those available in the U.S. and find a U.S. action advantageous.

Looking Ahead

In adopting the novel theory of alter ego jurisdiction, the Ninth Circuit noted that the Supreme Court has not yet decided the issue, specifically declining to address it in *Goodyear Dunlop Tires Operations SA v. Brown*, 131 S. Ct. at 2857, where the plaintiffs asked a North Carolina court to exercise general personal jurisdiction over Goodyear USA's foreign subsidiaries who manufactured allegedly defective tires, because the plaintiffs there waived the argument by failing to raise it in the lower court proceedings. [19] It will be interesting to see if the Supreme Court addresses the alter ego theory of jurisdiction in a future decision.

More broadly, the Supreme Court, in *Daimler*, noted that several courts employ the alter ego test for imputing general jurisdiction, but did not opine on the issue.[20] A future case could permit the court to address either the Ninth Circuit's novel application of the alter ego theory of jurisdiction or the viability and scope of the alter ego test.

In the meantime, U.S. parent companies should take a close look at their relationships with their foreign subsidiaries, ensuring proper corporate formalities and separateness, lest those foreign subsidiaries be dragged into U.S. courts.

—By William E. Thomson and Dylan Mefford, Gibson Dunn & Crutcher LLP

William Thomson is a partner in Gibson Dunn & Crutcher's Los Angeles office, where he is co-chairman of the firm's transnational litigation practice group.

Dylan Mefford is an associate in Gibson Dunn & Crutcher's Los Angeles office, where he is a member of the firm's transnational litigation practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *See, e.g., Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (“[I]f the parent and subsidiary are not really separate entities, or one acts as an agent of the other, the local subsidiary’s contacts with the forum may be imputed to the foreign parent corporation.”) (quotation omitted).

[2] The Ninth Circuit relied on an out-of-circuit district court decision that noted the absence of controlling circuit precedent. *In re Chocolate Confectionary Antitrust Litig.*, 674 F. Supp. 2d 580, 598-99 & n.25 (M.D. Pa. 2009).

[3] 793 F.3d 1059, 2015 U.S. App. LEXIS 12290 (9th Cir. July 16, 2015).

[4] *Ranza*, 793 F.3d at 1072 (quoting *Unocal*, 248 F.3d at 926).

[5] *Ranza*, 793 F.3d at 1072 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (“With respect to a corporation, the place of incorporation and principal place of business are ‘paradigm[m] . . . bases for general jurisdiction.’”) (alterations in original). Gibson Dunn represented Daimler AG before the Supreme Court.

[6] *Ranza*, 793 F.3d at 1073 (emphasis in original) (citation omitted).

[7] *Id.* (quotations, citations, and alterations omitted).

[8] *Id.* (quotations and citations omitted).

[9] *Id.* (citation omitted).

[10] *Id.* at 1074 (quotation and citation omitted).

[11] *Id.* at 1073-74.

[12] *Id.* at 1075.

[13] *Id.* at 1074 (quoting *Unocal*, 248 F.3d at 926).

[14] *Id.* at 1071 (citing *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011), *rev'd sub nom. Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)).

[15] *Ranza*, 793 F.3d at 1071 (quoting *Unocal*, 248 F.3d at 928).

[16] *Ranza*, 793 F.3d at 1071 (citing *Daimler AG*, 134 S. Ct. at 759-60).

[17] *Ranza*, 793 F.3d at 1077 (citation omitted).

[18] *Ranza*, 793 F.3d at 1078 (citations omitted).

[19] *Ranza*, 793 F.3d at 1071 n.4.

[20] *Daimler AG*, 134 S. Ct. at 758-59.