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# General Jurisdiction 2.0: The Updating and Uprooting of the Corporate Presence Doctrine

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# GENERAL JURISDICTION 2.0: THE UPDATING AND UPROOTING OF THE CORPORATE PRESENCE DOCTRINE

*Edward D. Cavanagh*[*]

## I. INTRODUCTION

For well over a century, state courts have exercised personal jurisdiction over foreign corporations if they engage in commerce within the state "not occasionally or casually, but with a fair measure of permanence and continuity."[1] This assertion of judicial power, referred to as general jurisdiction[2] and also as the corporate presence doctrine,[3] permitted courts to entertain claims that had no nexus with the forum state[4] against foreign companies "doing business" within that state.[5] The United States Supreme Court, however, sent this line of cases "careening into the abyss"[6] in *Daimler AG v. Bauman*,[7] wherein the Court held that "the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business' . . . is unacceptably grasping."[8] Redefining general jurisdiction, the Court ruled that a foreign corporation may be sued on a claim arising outside the forum state only where the foreign corporation can be said to be "at home" in the forum state.[9] Absent exceptional circumstances, "at home" means the state of incorporation or the state of defendant's principal place of business.[10]

Not since the wholesale dismantling of *quasi in rem* jurisdiction in *Shaffer v. Heitner*[11] has the Supreme Court acted so dramatically and decisively to curtail the

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1. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267 (1917).

2. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966).

3. In *EED Holdings v. Palmer Johnson Acquisition Corp.*, 387 F. Supp. 2d 265, 271-72 (S.D.N.Y. 2004), the court described the corporate presence doctrine as follows:

> Pursuant to case law codified by section 301 of New York's Civil Practice Law and Rules ("CPLR"), an unlicensed foreign corporation is subject to the general personal jurisdiction of the courts of New York if such corporation is "doing business" in the state. A defendant corporation is deemed to be "doing business" in New York if it has engaged in "such a continuous and systematic course of [business] here that a finding of its 'presence' in this jurisdiction is warranted[.]"

(citations omitted).

4. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853-54 (2011); *see generally* DAVID D. SIEGEL, NEW YORK PRACTICE § 82 (5th ed. 2011).

5. *EED Holdings*, 387 F. Supp. 2d at 271-72.

6. David D. Siegel, *U.S. Supreme Court Severely Circumscribes "Presence" as Basis for Personal Jurisdiction of Foreign Corporation*, SIEGEL'S PRAC. REV. Jan. 2014, at 1.

7. 134 S. Ct. 746 (2014).

8. *Id.* at 761 (citation omitted).

9. *Id.* at 769 (Sotomayor, J., concurring).

10. *Id.* at 760.

11. 433 U.S. 186 (1977).

exercise of jurisdiction under a long-recognized legal doctrine. In the ongoing battle between plaintiffs for access to the courts and defendants for fairness, *Daimler* has given the defendants a leg up.

In the wake of *International Shoe Co. v. Washington*,[12] the principal focus of jurisdictional analysis has been specific jurisdiction; that is, jurisdiction based on claims arising out of defendant's activities within the forum state. As a result, "general jurisdiction has come to occupy a less dominant place in the contemporary scheme."[13] Still, the Court in *Daimler*, focusing on the international aspects of the case, saw the need to rein in the exercise of general jurisdiction; otherwise, a foreign corporation could be sued everywhere that it had substantial business interests.[14] *Daimler* will severely curb, if not eliminate from the American courts, suits by foreign plaintiffs against foreign defendants arising outside of the United States. Where there is a United States nexus—an American defendant or a claim arising here—the *Daimler* decision will likely be of less import, especially since *Daimler* makes clear that an American defendant can always be sued where the claim arises as well as in its state of incorporation or principal place of business.[15]

Nevertheless, the decision is bound to invite future litigation. The *Daimler* Court avoided the question of whether the acts of a subsidiary in the forum state should be imputed to the parent for jurisdictional purposes.[16] The Court was unclear on the facts needed to establish exceptional circumstances that would permit the exercise of general jurisdiction in a forum other than defendant's state of incorporation or principal place of business. The Court was also unclear on the extent to which fairness considerations are relevant in deciding whether general jurisdiction is proper. In short, *Daimler* is most likely not the last word on general jurisdiction from the Supreme Court.

This article will (1) trace the evolution of general jurisdiction; (2) analyze the *Daimler* holding; (3) examine the impact of *Daimler*; and (4) discuss issues regarding general jurisdiction that courts must resolve going forward.

## II. EVOLUTION OF PERSONAL JURISDICTION

### *A. Common Law*

The common law recognized only two bases for the exercise of *in personam* jurisdiction: presence and consent.[17] Jurisdiction based on presence turned on whether the defendant had been served with process while physically present within the bounds of the bailiwick. *Pennoyer v. Neff*[18] is the seminal case on personal jurisdiction in the United States. There, the Supreme Court embraced the common law's theory of territoriality governing the exercise of personal

12. 526 U.S. 310 (1945).

13. *Daimler*, 134 S. Ct. at 758.

14. *Id.* at 760-61.

15. *Id.* at 761.

16. *Id.* at 759-60.

17. For *in personam* jurisdiction to attach, a defendant "must be brought within [the court's] jurisdiction by service of process within the State, or his voluntary appearance." Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

18. *Id.*

jurisdiction.[19] In holding that Oregon courts lacked jurisdiction over a California resident who had been served with process via publication in a local Oregon newspaper, the Court stated "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[20] Conversely, "no tribunal established by [the State] can extend its process beyond [its] territory so as to subject either persons or property to its decisions."[21] Any attempt to do so "is a mere nullity, and incapable of binding" persons or property outside of the State.[22]

Thus, at common law, physical power over the defendant provided the basis for the exercise of personal jurisdiction. A state was all-powerful with respect to defendants served with process within the physical bounds of its territory. On the other hand, a state had no power with respect to a defendant located outside of its bounds. Under the common law approach, any attempt to exercise jurisdiction over a defendant located outside the physical boundaries of the forum was viewed as an affront to the sovereignty of a sister state.[23]

Consent, on the other hand, was a more flexible concept. Consent could be express or implied and could be manifested in several ways.[24] Express consent may be created by the execution of a forum selection clause in a contract.[25] Implied consent exists where a defendant files a notice of appearance or simply participates in the proceedings, without challenging personal jurisdiction, in which case any objection to personal jurisdiction is deemed waived.[26] Consent need not be voluntary and may be exacted by the state.[27] For instance, states typically require foreign corporations to appoint a state officer as an agent for service of process and thus to submit to personal jurisdiction as a condition of being granted license to do business in a given state.[28]

### *B. Erosion of Limiting Common Law Principles and Expansion of Personal Jurisdiction*

As the twentieth century dawned, it became increasingly apparent that the restrictive common law rules governing personal jurisdiction no longer meshed with the needs of a changing society. In the early 1900s, America was in the state of transition. The automobile made it easy for people to move from place to place; no longer were people anchored for life to their birth places. The pace of urbanization of America, which had begun in the nineteenth century, accelerated as

19. *Id.* at 722.
20. *Id.*
21. *Id.*
22. *Id.* at 722-23.
23. *Id.* at 723-24.
24. *See* R.R. Co. v. Harris, 79 U.S. (12 Wall) 65, 81 (1870).
25. Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964).
26. Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for A.W. Galadari, 810 F. Supp. 1375, 1389 (S.D.N.Y.) (citing Grammenos v. Lemos, 457 F. 2d 1067, 1070 (2d Cir. 1972)).
27. St. Clair v. Cox, 106 U.S. 350, 356 (1882) ("The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just.").
28. N.Y. BUS. CORP. LAW § 1314 (McKinney, Westlaw through L.2016, chapter 1).

immigrants flocked to the United States and soldiers returned from fighting the First World War[29] in Europe.

The introduction of the automobile in the twentieth century underscored the inadequacies of the common law's restrictive approach to personal jurisdiction. For example, a New Jersey resident could drive an automobile into New York, negligently cause a collision on New York roads that gave rise to both personal injuries and property damage to New York citizens, but under *Pennoyer*, still not be answerable in the New York courts by simply driving back to New Jersey and not returning to New York. Beginning in 1923, state legislatures then undertook to protect their citizens by enacting non-resident motor vehicle statutes.[30] For example, New York's Vehicle and Traffic law, enacted in 1929, would make a New Jersey driver answerable in a New York court for harm caused to New York residents by its negligent acts in New York.[31] Today, non-resident motor vehicle statutes are universal.[32]

These statutes, which sustained the exercise of personal jurisdiction beyond the bounds set by *Pennoyer*, were tested in the courts. The United States Supreme Court upheld the constitutionality of non-resident motor vehicle statutes in *Hess v. Pawloski*.[33] *Hess* involved an action in Massachusetts by a Massachusetts plaintiff who had been injured when hit by a car driven in Massachusetts by the defendant, a Pennsylvania domiciliary.[34] Jurisdiction was based on a Massachusetts statute which provided that the Massachusetts Registrar of Motor Vehicles is deemed as a matter of law to be the agent for service of process for any out-of-state driver sued in Massachusetts courts for negligent operation of a motor vehicle on the Massachusetts roads and that an action against any out-of-state driver so accused may be commenced by service of process on the Registrar of Motor Vehicles.[35] The Massachusetts statute further required the Registrar of Motor Vehicles to forward a copy of the summons and complaint via registered mail to the defendant, and the Commissioner in *Hess* did so.[36]

Plaintiff thus complied with the statute and although the defendant had notice of the lawsuit, he nevertheless challenged the jurisdiction as void under *Pennoyer* because Massachusetts process was served outside of Massachusetts boundaries.[37] The Supreme Court disagreed and ruled that jurisdiction was proper, even under *Pennoyer*, because defendant had impliedly consented to Massachusetts jurisdiction by using Massachusetts roads,[38] was properly served through a statutory agent, and had actual notice of the lawsuit.[39] In so ruling, the Court noted

29. Indeed, a popular post-World War I song was entitled "How Ya Gonna Keep 'em Down on the Farm (After They've Seen Paree)."

30. *See* Marshall J. Jox, *Non-Resident Motorists Service of Process Act*, 33 F.R.D. 151, 153 (1963-1964).

31. *See, e.g.*, N.Y. VEH. & TRAF. LAW §§ 253-54 (McKinney, Westlaw through L.2016, chapter 1).

32. Jox, *supra* note 30, at 153.

33. 274 U.S. 352 (1927).

34. *Id.* at 353.

35. *Id.* at 353-54.

36. *Id.* at 354.

37. *Id.*

38. *Id.* at 356.

39. *Id.*

that automobiles are "dangerous machines" that pose "serious dangers to persons and property," and that a state may make and enforce reasonable regulations to promote due cause on the part of residents and non-residents alike in driving on state highways.[40]

Arguably, the implied consent theory stressed in the *Hess* opinion was merely an incremental expansion of existing personal jurisdiction standards set forth in *Pennoyer*. After all, *Pennoyer* recognized the validity of consent-based jurisdiction. Clearly, however, *Hess* involved much more than consent. Implied consent was a mere legal fiction. If *Hess* truly turned on implied consent, then out-of-state motorists who *expressly* stated (in writing or otherwise) that they were *not* consenting to personal jurisdiction in Massachusetts by using the roads there could not, and would not, be deemed to have impliedly consented to Massachusetts jurisdiction. Express statements supersede implied statements. In *Hess*, however, no amount of actual protest of Massachusetts jurisdiction by the defendant would have changed the result. The real basis for the exercise of jurisdiction in *Hess* was not consent, but rather the defendant's commission of a tortious act in Massachusetts.[41] The *Hess* ruling thus foreshadowed the major changes in jurisdictional rules that were down the road.

In addition to enacting non-resident motor vehicle statutes, legislators also sought to expand on common law principles by passing laws that would make domiciliaries of a state subject to jurisdiction in that state, even if personally served elsewhere.[42] Although domicile is only a stone's throw from presence and hence only a modest extension of a forum's jurisdictional reach, the issue was litigated up to the Supreme Court, in *Milliken v. Meyer*.[43] There, the Supreme Court held that the exercise of personal jurisdiction based on the defendant's domicile did not offend due process.[44] The case involved a commercial dispute between the parties.[45] Milliken commenced an action in Wyoming state court seeking cancellation of alleged contracts with Meyer and for an accounting.[46] Jurisdiction over Meyer was premised on a Wyoming statute authorizing the exercise of personal jurisdiction over Wyoming domiciliaries.[47] Meyer was personally served with Wyoming process in Colorado.[48] Meyer did not appear in the Wyoming

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40. *Id.*

41. In *Oberding v. Ill. Cent. R.R. Co.*, 346 U.S. 338, 340-41 (1953), Justice Frankfurter underscored the fact that the consent theory in *Hess* was legal fiction, stating:

> It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has "impliedly" consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. The defendant may protest to high heaven his unwillingness to be sued and it avails him not.

(citation omitted).

42. *See generally Conflict of Laws: Jurisdiction to Render Personal Judgment Against Absent Domiciliary. Personal Service Outside the State*, 41 COLUM. L. REV. 724 (1941).

43. 311 U.S. 457 (1940).

44. *Id.* at 463-64.

45. *Id.* at 459-60.

46. *Id.* at 459.

47. *Id.* at 461.

48. *Id.* at 459.

action, and the court entered a default judgment.[49] Thereafter, Meyer brought an action in Colorado seeking to enjoin enforcement of the Wyoming judgment for lack of *in personam* jurisdiction, claiming that service of Wyoming process on him in Colorado did not confer jurisdiction and that any judgment rendered thereon violated due process.[50]

The Colorado trial court agreed with Milliken and dismissed Meyer's attempt to collaterally attack the Wyoming judgment.[51] The Colorado Supreme Court, without passing on the jurisdictional issue, reversed "because of an irreconcilable contradiction between the findings and the decree."[52] The United States Supreme Court reversed and upheld the Wyoming judgment.[53]

First, the Court held that "[d]omicile in the state alone is sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."[54] In so holding, the Court found that "the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state."[55] The Court explained that a domiciliary, though absent from a state, still enjoys the benefits of citizenship.[56] Enjoyment of the privileges of domicile creates reciprocal duties on the domiciliary's part, including the duty to answer any claim lodged against it in the courts of its domicile.[57]

Second, the Supreme Court rejected Meyer's argument that extraterritorial service of Wyoming process violated the due process clause.[58] The Court held that Meyer, having been personally served with process in Colorado, had actual notice of the lawsuit and that such service had met the due process standard of "traditional notions of fair play and substantial justice."[59]

### *C. The Revolution: International Shoe*

The Supreme Court ushered in the modern era of jurisdictional analysis with its landmark decision in *International Shoe*.[60] In that case, the State of Washington sued International Shoe, a Delaware corporation with its principal place of business in Missouri, for unpaid contributions to the state's unemployment compensation fund.[61] International Shoe denied any liability for employment taxes, claiming that it was not doing business in Washington and had no employees there.[62] The record revealed International Shoe's carefully constructed business model for conducting its Washington activities, specifically designed to avoid any claims for payment

49. *Id.*
50. *Id.* at 460.
51. *Id.* at 458.
52. *Id.* at 461.
53. *Id.* at 462.
54. *Id.*
55. *Id.* at 463.
56. *Id.*
57. *Id.* at 463-64.
58. *Id.* at 462-63.
59. *Id.* at 463.
60. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
61. *Id.* at 311-12.
62. *Id.* at 312.

under Washington's unemployment tax and to provide a factual basis supporting its claims that it was not doing business in Washington.[63]

Thus, International Shoe:

- Had no employees in Washington but sold its goods through a network of independent agents;
- paid no wages to these agents, but rather paid them commissions based on orders obtained;
- had no offices in Washington, but did rent hotel rooms and other space where its agents could display International Shoe wares;
- made no sales within the state of Washington but instead took orders for shoes from customers; those orders were processed and approved at the home office in Missouri;
- maintained no inventory within the state but periodically displayed its line of shoes for prospective customers in local hotel rooms;
- made no deliveries in intrastate commerce; all goods were shipped into Washington via common carrier from Missouri;
- maintained no bank accounts in Washington; and
- salesmen had no power over the price of goods offered by International Shoe.[64]

On the other hand, additional facts suggested a significant presence within the state:

- International Shoe maintained a sales force of eleven to thirteen individuals to display shoes in Washington and to receive orders;
- the sales force was paid on the basis of commissions earned on sales made within Washington;
- all sales personnel lived in Washington; and
- their sales territories were confined to Washington.[65]

In short, International Shoe argued that it was not doing business in Washington and that, at most, it was merely soliciting business, which would not have been enough to subject the company to the jurisdiction of the State of Washington under *Pennoyer* and its progeny.[66] The Supreme Court rejected that reasoning, focused on the substance rather than on the form of International Shoe's business model, and reformulated the constitutional standards governing a state's assertion of *in personam* jurisdiction over a foreign business entity, stating:

> Now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[67]

In so holding, the Supreme Court rejected the formalistic standards enunciated in *Pennoyer*, which focused on territoriality and physical power over the defendant, in

63. *Id.* at 313-14.
64. *Id.*
65. *Id.* at 313-15.
66. *Id.* at 315-16.
67. *Id.* at 316.

favor of a more flexible standard based on the defendant's "minimum contacts" with the state and fairness.[68] The test "cannot be simply mechanical or quantitative;"[69] rather, the question of "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws of which it was the purpose of the due process clause to insure."[70] Whether or not there are minimum contacts with the forum state thus turns on two factors: (1) the systematic and continuous nature of the activity in the forum state; and (2) the relationship between that activity and the claim for relief asserted by the plaintiff.[71] This, in turn, creates a matrix consisting of four areas of analysis:

**Area 1** - no systematic and continuous activities and the cause of action is unrelated to defendant's forum activities.[72] Here exercise of personal jurisdiction would offend due process.[73] The Court ruled that "the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there."[74] The Court further observed that due process "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."[75]

**Area 2** - systematic and continuous activities in the forum state and the claim for relief arises out of those activities.[76] The Court found that the propriety of exercising personal jurisdiction over a foreign entity under these circumstances "has never been doubted."[77]

**Area 3** - no systematic and continuous activities in the forum state but the claim for relief arises out of defendant's contacts with the forum.[78] In dicta, the Court noted that prior decisions had gone both ways on the question of whether committing a single act within a state giving rise to the plaintiff's claim is constitutionally sufficient to warrant the exercise of personal jurisdiction over a foreign entity.[79] The test for the exercise of jurisdiction "cannot be simply mechanical or quantitative," but "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[80]

**Area 4** - systematic and continuous activities within the state but the claim is unrelated to defendant's forum activities.[81] Again in dicta, the Court recognized

68. *Id.*
69. *Id.* at 319.
70. *Id.*
71. *See id.* at 317.
72. *See id.*
73. *Id.*
74. *Id.*
75. *Id.* at 319.
76. *See id.* at 317.
77. *See id.*
78. *Id.* at 318-19.
79. *Id.* at 318.
80. *Id.* at 319.
81. *Id.* at 318.

that there are cases where a foreign corporation's local activity is "so substantial and of such nature to justify suit against it on causes of actions arising from dealings entirely distinct from those activities."[82] By contrast, the Court also recognized that prior cases had held that "continuous activity of some sort[] within a state" was not enough to support the exercise of personal jurisdiction on a claim unrelated to forum activities.[83] As was the case with Area 3, the Court left determination of Area 4 issues for another day.

### *D. The Cases Post-International Shoe*

Not surprisingly, the cases decided after *International Shoe* have arisen in Area 3 and Area 4, which the Court had acknowledged were unsettled territories.

#### *1. Area 3 - Specific Jurisdiction*

Area 3, often referred to as specific jurisdiction, has garnered most of the attention from the courts. This is not surprising, given the globalization of commerce and the explosion of products liability litigation dating back to the mid-twentieth century. As legislatures enacted long-arm statutes to take advantage of the broader jurisdictional bases permitted by *International Shoe*,[84] the courts sought to flesh out the meaning of, and the constitutional limitations imposed by, the minimum contacts test. In *Hanson v. Denckla*,[85] decided thirteen years after *International Shoe*, the Supreme Court acknowledged that the constitutional standards governing the exercise of jurisdiction had evolved since the days of *Pennoyer* but then stated that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[86] The Court further stated that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of [minimum] contact with the forum State."[87] Rather, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[88]

Over a decade later, in *World-Wide Volkswagen*,[89] ("*WWV*") the Court recapitulated virtually verbatim its holding in *Hanson*. In *WWV*, the Court held that the state of Oklahoma lacked personal jurisdiction over a New York wholesaler who distributed cars in New York, New Jersey and Connecticut and a New York auto dealer who had sold plaintiffs an allegedly defective car in a products liability action arising from an accident occurring in Oklahoma.[90] In its decision, the Court stressed the absence of any meaningful affiliating circumstances between the

82. *Id.*
83. *Id.*
84. *See, e.g.*, N.Y. C.P.L.R. 302(a) (MCKINNEY, Westlaw through L.2016, chapter 1).
85. 357 U.S. 235 (1958).
86. *Id.* at 251.
87. *Id.* at 253.
88. *Id.*
89. World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).
90. *Id.* at 288-91.

defendants and the forum state.[91] The Court rejected the argument that because the automobile could be driven almost anyplace, it was foreseeable that the car would wind up in Oklahoma and that such foreseeability was sufficient for Oklahoma to exercise personal jurisdiction over the New York wholesaler and retailer.[92] In so ruling, the Court did not hold that foreseeability was irrelevant to the jurisdictional analysis. Rather, it held that the foreseeability that is relevant to the exercise of long-arm jurisdiction in the due process context is not the likelihood that the car in question could find its way to Oklahoma, but whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[93] The Court emphasized that the burden on the defendant is a primary concern in measuring reasonableness but also set forth a list of factors that must be considered in determining whether the exercise of jurisdiction over a foreign defendant comports with traditional notions of fair play and substantial justice, including: "the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief[;] . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."[94]

Still, the *WWV* Court sent a mixed message. On the one hand, the Court made clear that *International Shoe* had not rendered state boundaries irrelevant for jurisdictional purposes and that, quoting language from *Hanson* reminiscent of *Pennoyer*, restrictions on a state's power to exercise jurisdiction "are a consequence of territorial limitations on the power of the respective States."[95] On the other hand, the Court suggested that the Constitution still allows the states broad powers in adjudicating actions arising from conduct occurring outside their borders, stating that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[96] The "stream of commerce" reference suggests that,

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91. *Id.* at 289. The Court found that the wholesaler distributed autos, parts and accessories to retailers located in New York, New Jersey and Connecticut. *Id.* The retailer was a New York corporation that sold cars to customers locally in Massena, New York. *Id.* at 288, 298. The Court concluded:

> Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations with each other and with Volkswagen and Audi are contractual only. Respondents adduced no evidence that either World-Wide or Seaway does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma. In fact, as respondents' counsel conceded at oral argument, there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case.

*Id.* at 289.

92. *Id.* at 295-96.

93. *Id.* at 297. The Court further noted that this approach "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit." *Id.*

94. *Id.* at 292 (citations omitted).

95. *Id.* at 294 (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

96. *Id.* at 297-98.

notwithstanding the limiting language elsewhere in the opinion, long-arm statutes still have a very broad reach.

Yet, perhaps because the Court concluded that jurisdiction was lacking, the extent of that reach was not explored in *WWV*. For over three decades, the so-called stream of commerce theory has been the focus of the debate on the limits of the exercise of specific jurisdiction. How do courts square the notion that state boundaries place inherent limitations on the exercise of jurisdiction with the view that a defendant who places its goods in the stream of commerce should be answerable to lawsuits brought in states where a product is purchased by consumers?

That question has divided the Supreme Court. In *Asahi Metal Industry Co. v. Superior Court*,[97] a plurality of four urged that due process requires more than that a defendant simply deliver its products into the stream of commerce with the understanding that they will be used there; it must "purposefully direct" its activities at the forum state.[98] Under this view, a seller who engaged in interstate commerce but consciously chose not to market its products in a given state would not be amenable to suit there, even if its products wound up in the forum state and caused injury to the plaintiff in the forum.[99] The other five members of the Court in *Asahi*, in two separate opinions, seemed to be of the view that *WWV*'s stream of commerce theory did not limit the exercise of personal jurisdiction to those cases in which defendant's conduct is purposefully directed at the forum state.[100]

All of the Justices agreed, however, that it would offend traditional notions of fair play and substantial justice for California to exercise *in personam* jurisdiction over *Asahi* on the record before it.[101] Accordingly, the discussion concerning the continuing viability of the *WWV*'s stream of commerce theory can be best described as dicta. However, the battle lines had been drawn in *Asahi*, and it was only a matter of time before the Court revisited the issue.

That happened in 2011 in *J. McIntyre Machinery, Ltd. v. Nicastro*.[102] In that case, the New Jersey Supreme Court had upheld the state's exercise of jurisdiction over an English machine manufacturer that had sold a machine to a New Jersey manufacturer at a trade show in Las Vegas.[103] The new owner shipped the machine to its New Jersey factory.[104] Nicastro, an employee, suffered a severe injury while operating the machine and later brought a product liability claim against the

97. 480 U.S. 102 (1987).

98. *Id.* at 111-12.

99. *Id.* at 112-13.

100. *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) ("[M]ost courts and commentators have found that jurisdiction premised on the placement of a product in the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct."); *see also id.* at 122 (Stevens, J., concurring in part and concurring in the judgment) ("In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world.").

101. *Id.* at 116.

102. 131 S. Ct. 2780 (2011).

103. *Id.* at 2785.

104. *Id.* at 2786, 2791.

English manufacturer in New Jersey state court.[105]

In a 6-3 decision, the Supreme Court reversed the New Jersey Supreme Court and held that the English defendant lacked sufficient minimum contacts with New Jersey.[106] Four of the six Justices would have struck down the stream of commerce theory and concluded that the plaintiff must show that the defendant had targeted the state or purposefully directed its activities at the state before the defendant could be said to have purposefully availed itself of the privilege of conducting activities within the forum state.[107]

The concurring Justices, Breyer and Alito, agreed that minimum contacts with New Jersey were lacking in the case, but felt that the targeting standard proposed by the four Justice plurality was too demanding.[108] They agreed with the majority that something more than putting goods into the stream of commerce with the expectation that consumers would buy and use those goods in the forum state had to be demonstrated.[109] Precisely what additional acts beyond putting goods into the stream of commerce—but short of targeting—would serve to satisfy the minimum contacts standard remains unclear. For example, would some advertising or promotional activity by the defendant within the forum state, in addition to the actual sale of goods, suffice? Clearly, the constitutional standards for measuring minimum contacts have been recalibrated, and putting goods into the stream of commerce with the expectation that they will be used in the forum state is no longer enough to satisfy Due Process.

### *2. Area 4 - General Jurisdiction*

In marked contrast to Area 3 jurisdiction, Area 4 jurisdiction, often referred to as general jurisdiction, has gotten relatively little attention—until very recently. In *International Shoe*, the Supreme Court declined to address the constitutionality of Area 4 jurisdiction, but did recognize that some courts had upheld the exercise of *in personam* jurisdiction over foreign entities having a substantial presence in the forum on claims unrelated to any activities within the forum state.[110]

The Supreme Court first explicitly addressed the issue of Area 4 jurisdiction directly in *Perkins v. Benguet Consolidated Mining Co.*[111] Defendant Benguet operated mines in the Philippines, which, prior to World War II, was a territory of the United States.[112] Following the Japanese invasion of the Philippines in December of 1941, Benguet suspended mining operations there; management relocated to Ohio, where its president conducted the business activities of the company.[113] Plaintiff was a shareholder who sued the company in Ohio state court

105. *Id.* at 2786.
106. *Id.* at 2785.
107. *Id.* at 2790-91.
108. *Id.* at 2792-93.
109. *Id.* at 2792-94.
110. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).
111. 342 U.S. 437 (1952).
112. *See* Recinto v. U.S. Dep't of Veterans Affairs, 706 F. 3d 1171, 1173 (9th Cir. 2012) (when World War II began, the Philippines were still a United States territory).
113. *Id.* at 447-48.

for failure to pay dividends or issue stock.[114] Plaintiff's claim did not arise out of any activities by the defendant in the forum state.[115]

The Supreme Court upheld the exercise of general jurisdiction, concluding that although mining activities had been suspended during the Japanese occupation, many of Benguet's wartime activities "were directed from Ohio and were being given the personal attention of the president in that State[.]"[116] Benguet maintained an office in Ohio where company files were kept and two secretaries were employed.[117] Directors' meetings were held in Ohio.[118] Company business decisions were made in Ohio, and the rehabilitation of property in the Philippines, once the war ended, was directed from Ohio.[119] The company maintained substantial bank accounts in Ohio and retained an Ohio bank to serve as transfer agent for stock in the company.[120] In short, Benguet's president "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."[121] As the Court later explained, general jurisdiction existed in *Perkins* because "Ohio was the corporation's principal, if temporary, place of business."[122]

However, the factual circumstances giving rise to this suit in Ohio—specifically, the intervention of World War II and the Japanese invasion of the Philippines that effectively rendered the Philippines civil justice system inaccessible—left some doubt as to whether *Perkins* was a carte blanch endorsement of general jurisdiction or simply *sui generis*. Over three decades later, in its *Helicopteros Nacionales de Colombia v. Hall*[123] decision, the Supreme Court suggested that the *Perkins* holding is not limited to the peculiar facts in that case.[124] In *Helicopteros*, the plaintiffs were the survivors and representatives of construction workers employed by a Texas entity who had been killed in a helicopter crash in Peru while being ferried from a worksite.[125] Plaintiffs brought a wrongful death action in Texas state court, and the Texas courts ultimately upheld the exercise of jurisdiction over the Colombia-based defendant.[126] The Supreme Court concluded that "the kind of systematic and continuous general business contacts the Court found to exist in *Perkins*" did not exist in *Helicopteros*.[127]

The Court pointed out two key distinctions between *Perkins* and *Helicopteros*. First, in *Perkins*, defendant was conducting all of its business activities out of Ohio;

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114. *Id.* at 439.
115. *Id.*
116. *Id.* at 448.
117. *Id.* at 447-48.
118. *Id.* at 448.
119. *Id.*
120. *Id.*
121. *Id.*
122. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2854 (2011).
123. 466 U.S. 408 (1984).
124. *See id.* at 414 ("Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum state, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the state and the foreign corporation.").
125. *Id.* at 409-10.
126. *Id.* at 412-13.
127. *Id.* at 416.

its contacts with Ohio were systematic and continuous.[128] In *Helicopteros*, on the other hand, defendant's contacts with the forum state were isolated and sporadic, consisting of trips to Texas to negotiate a contract and to buy helicopters, spare parts and training services.[129] Second, whereas defendant in *Perkins* was a seller of commodities, defendant in *Helicopteros* entered Texas to *purchase* goods and services.[130] The Court concluded that visits to a state to purchase, "even if occurring at regular intervals," would not warrant the inference that the corporation was present within the jurisdiction.[131]

Although the Court ultimately held that the plaintiff failed to make the case for general jurisdiction, the upshot of *Helicopteros* seemed to be that *Perkins* was not *sui generis*.[132] The exercise of personal jurisdiction over foreign corporations engaged in substantial and continuous activity would be constitutional even with respect to claims that are unrelated to defendant's activities within the forum state. Still, the Court remained hazy on precisely what constituted substantial and continuous activity sufficient to warrant the exercise of general jurisdiction. On the one hand, the opinion suggests that plaintiff need not show that the forum was the defendant's principal place of business.[133] On the other hand, the Court did not budge from its earlier ruling in *International Shoe* that "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity."[134]

## III. GENERAL JURISDICTION REVISITED AND RESTATED

### *A. Confusion in the Law*

Throughout the twentieth century, the law with respect to the exercise of general jurisdiction over corporations remained confused.[135] Part of the confusion stemmed from the fundamental differences between individuals and corporations. Historically, the bases for exercising *in personam* jurisdiction have been the same with respect to individuals and corporations, with one important exception: presence, the archetypical grounds for exercising jurisdiction over an individual, is not a basis on which to proceed against corporations.[136] Whereas an individual can be in only one place at any given time, a corporation—an artificial entity that can act only through individuals—is theoretically "present" in any and every location in which the corporation conducts business activities.[137] Courts have long recognized the unfairness inherent in forcing a corporation to defend an action wherever it conducts operations, particularly where the alleged activities

128. *Id.* at 415.
129. *Id.* at 416.
130. *Id.*
131. *Id.* at 418.
132. *Id.* at 414; *see supra* note 125 and accompanying text.
133. *See id.* at 414-15.
134. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).
135. *See* Daimler AG v. Bauman, 134 S.Ct. 746, 755-58 (2014) (tracing the trajectory of general jurisdiction).
136. SIEGEL, *supra* note 4, § 82, at 139-40.
137. *Id.*

underlying the plaintiff's claim are unrelated to corporate activities in the forum state.[138] Courts have long recognized that a corporation could be subject to general jurisdiction in its state of incorporation, that is, its domicile.[139] Accordingly, a New York corporation could be sued in New York on a claim arising in Texas, but a Florida corporation could not be sued in New York on the same claim.

As the territorial approach to jurisdiction espoused in *Pennoyer* began to wane, states looked for ways to subject foreign corporations to general jurisdiction. As discussed below,[140] one avenue was consent. States would require foreign corporations to appoint agents for service of process as a quid pro quo for authorization to do business within the state and assert jurisdiction on a consent or implied consent theory.[141]

Although that approach may be effective against foreign corporations that actually registered to do business,[142] it would not capture those companies that did not register. To fill this gap, state courts began to assert general jurisdiction over foreign corporations having continuous and substantial presence within the state on the theory that such a company is "present" within the state.[143] Hence, the so-called corporate presence doctrine emerged. The New York Court of Appeals decision in *Tauza v. Susquehanna Coal Co*.[144] illustrates that corporate presence doctrine.

*Tauza* involved a claim by a New York domiciliary against a Pennsylvania corporation, headquartered in Philadelphia with offices in New York City, on a claim totally unrelated to defendant's New York activities.[145] Defendant's New York office was run by a sales agent who supervised eight salesmen as well as clerical staff.[146] The salesmen met daily to receive instructions from their superiors and to systematically and regularly solicit orders for coal, which were then transmitted to corporate headquarters in Pennsylvania for approval and which resulted in continuous shipments of coal from Pennsylvania to New York.[147] On these facts, the Court of Appeals held that "[t]o do these things is to do business within this state in such a sense and in such a degree as to subject the corporation doing them to the jurisdiction of our courts."[148] The general jurisdiction principles embodied in *Tauza* were subsequently codified in New York's procedural code.[149]

Although the question of sufficiency of in-state activity necessary to establish

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138. *See Int'l Shoe Co.*, 326 U.S. at 319; *see also* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1066 (4th ed.), Westlaw (database updated December 2015).

139. *Daimler*, 134 S.Ct. at 760.

140. *See infra* notes 200-237 and accompanying text.

141. *See* D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based On Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 2 (1990) (A majority of courts "have applied various forms of consent theory to hold that by [appointment of an agent] a foreign corporation automatically submits itself to unlimited assertion of a state's jurisdiction.").

142. *See* SIEGEL, *supra*, note 4, § 82, at 143.

143. *Id.* at 140.

144. 115 N.E. 915 (1917).

145. *Id.* at 265, 268.

146. *Id.* at 265.

147. *Id.*

148. *Id.* at 266.

149. N.Y. C.P.L.R. 301 (MCKINNEY, Westlaw through L.2016 chapter 1).

that a foreign corporation is in New York "with a fair measure of permanence and continuity"[150] has not been free from doubt, the New York courts have generally focused on the following factors: (1) the existence of an office in New York; (2) the solicitation of business in New York; (3) the presence of bank accounts or other personal property within the state; and (4) the presence of employees or agents in the state.[151]

The Supreme Court in *International Shoe* cited *Tauza* as an example of an instance "in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities" but did not rule at that point on the constitutionality of general jurisdiction.[152] *Tauza* was subsequently cited with approval by the Supreme Court in *Perkins*, wherein it upheld the constitutionality of general jurisdiction.[153]

Nevertheless, the parameters of the exercise of jurisdiction under the corporate presence doctrine remained fuzzy. Judge Learned Hand expressed that uncertainty:

> Possibly the maintenance of a regular agency for the solicitation of business will serve without more . . . . In Tauza v. Susquehanna Coal Co., . . . there was no more, but the business was continuous and substantial. Purchases, though carried on regularly, are not enough . . . nor are the activities of subsidiary corporations . . . or of connecting carriers . . . . The maintenance of an office, though always a make-weight, and enough, when accompanied by continuous negotiation, to settle claims . . . is not of much significance . . . . It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass.[154]

More recently, the federal courts have seen an influx of foreign-based claims against foreign defendants by plaintiffs from outside of the United States, many of which involve general jurisdiction.[155] In addition to the due process concerns that mirror those in domestic general jurisdiction cases, these cases raise more fundamental concerns of comity and international cooperation.[156]

In two recent decisions, the Supreme Court has addressed the issues left open in *Helicopteros* and clarified the constitutional standards for the exercise of general jurisdiction.

### *1. Goodyear*

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[157] plaintiffs, whose sons died in a bus accident outside Paris, France, brought a wrongful death action in North Carolina state court against an American tire manufacturer and three foreign subsidiaries, alleging that the accident had been caused by defective tire

150. *See* Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917 (1917).

151. *See* Rates Tech., Inc. v. Cequel Commc'ns, 15 F. Supp. 3d 409, 415 (S.D.N.Y. 2014) (quoting Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039, 1043 (2d Cir. 1990)).

152. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

153. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1951) (stating that exercise of jurisdiction in both *Perkins* and *Tauza* would not offend *Int'l Shoe*).

154. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (citations omitted).

155. *See infra* notes 258-263 and accompanying text.

156. *See* Daimler AG v. Bauman, 134 S.Ct 746, 762-63 (2014).

157. 131 S. Ct. 2846 (2011).

manufacture.[158] Plaintiffs sought to assert general jurisdiction in North Carolina over the three foreign subsidiaries.[159] The Court found that the foreign subsidiaries carried on no business activities in North Carolina.[160] Nor were the tires involved in the accident ever distributed in North Carolina by the foreign subsidiaries, although a small percentage of tires manufactured by the foreign subsidiaries did find their way into North Carolina through other Goodyear USA affiliates.[161] The North Carolina courts upheld the exercise of general jurisdiction noting that the tires manufactured by the foreign subsidiaries reach North Carolina through the stream of commerce as a consequence of a "highly-organized distribution process" involving Goodyear USA subsidiaries and defendants made "no attempt to keep these tires from reaching the North Carolina market."[162]

The Supreme Court reversed, rejecting the "sprawling view" of general jurisdiction enunciated by the North Carolina court that "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed."[163] Writing for the Court, Justice Ginsburg reiterated the language of *International Shoe* that "continuous activity of some sort[]" within a state is not enough to warrant the exercise of general jurisdiction.[164] Rather, general jurisdiction may be exercised in "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[165] The key to the exercise of general jurisdiction for Justice Ginsburg was whether the corporation's activities were such that it was "at home" in the forum state.[166] Justice Ginsburg suggested that a corporation may be fairly regarded as "at home" in the state of incorporation or principal place of business,[167] noting that jurisdiction in *Perkins* had been upheld because "Ohio was the corporation's principal, if temporary, place of business."[168] The Court, however, did not rule that state of incorporation and principal place of business are the exclusive bases for the exercise of general jurisdiction and left open the question of whether a corporation may be viewed as "at home" in another state where it had substantial business activities.[169]

### *2. Daimler*

Three years later, in *Daimler AG v. Bauman*,[170] the Court revisited the question of when a foreign defendant's forum activities are sufficient to justify the exercise

158. *Id.* at 2850.
159. *Id.*
160. *Id.* at 2852.
161. *Id.*
162. *Id.* (citations omitted).
163. *Id.* at 2856.
164. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).
165. *Id.* at 2853 (alteration in original) (quoting *Int'l Shoe Co.*, 326 U.S. at 318).
166. *Id.* at 2853-54.
167. *Id.*
168. *Id.* at 2856 (citation omitted).
169. *Id.* at 2853; *see also id.* at 2854 (referring to place of incorporation and principal place of business as "'paradig[m]' bases for the exercise of general jurisdiction") (citation omitted).
170. 134 S. Ct. 746 (2014).

of personal jurisdiction with respect to claims unrelated to the defendant's forum activities.

The facts in *Daimler* were unusual. Plaintiffs, twenty-two residents of Argentina, sued Daimler, a German corporation, in a California federal court, under the Alien Tort Statute and the Torture Victim Protection Act of 1991, alleging that MB Argentina, Daimler's Argentinian subsidiary, had collaborated with Argentinian state security forces "to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983[.]"[171] The alleged illegal acts occurred in Argentina; none of the acts complained of took place in California or any place else within the United States.[172] Nor did the plaintiffs charge that any American company acted unlawfully.[173] Plaintiffs claimed that Daimler, the only named defendant, was vicariously liable for the conduct of its Argentinian subsidiary.[174]

California jurisdiction over Daimler was predicated on the California acts of MBUSA, Daimler's North American subsidiary, a Delaware limited liability corporation with its principal place of business in New Jersey.[175] MBUSA served as Daimler's exclusive distributor in the United States purchasing cars manufactured in Germany by Daimler, importing them and distributing them to independent dealerships located throughout the United States.[176] MBUSA had multiple California-based facilities, including an office in Costa Mesa, a vehicle preparation center in Carson, and a Classic Center in Irvine. MBUSA's California sales accounted for 2.4% of Daimler's sales worldwide.[177]

The trial court dismissed the case for lack of jurisdiction.[178] The Ninth Circuit initially agreed, but upon rehearing, reversed and upheld jurisdiction over Daimler on an agency theory.[179] In so ruling, the Ninth Circuit relied on prior Circuit precedent focusing on "whether the subsidiary 'performs services that are 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.'"[180] The Ninth Circuit concluded that they were.[181] The Supreme Court, without passing judgment directly on the viability of the agency theory, rejected the Ninth Circuit approach because it would "stack the deck" in favor of the exercise of jurisdiction and would uphold jurisdiction over foreign corporations whenever they have an in-state subsidiary performing services for the parent.[182] That is so because presumably anything that the corporation does through a subsidiary is something that it would do itself were the subsidiary

171. *Id.* at 750-51.
172. *Id.* at 751-52.
173. *Id.* at 751.
174. *Id.* at 752.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 753.
180. *Id.* at 758-59.
181. *Id.* at 759.
182. *Id.*

unavailable.[183] Such a result would go beyond "even the 'sprawling view of general jurisdiction'. . . rejected in *Goodyear*."[184]

The Court then recapitulated its *Goodyear* holding chapter and verse, stressing that "the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are *so* 'continuous and systematic' as to render [it] *at home* in the forum State."[185] The Court reiterated that the "paradig[m] . . . bases" for exercising general jurisdiction over a foreign corporation are the state of incorporation and the state of principal place of business, since both these affiliations are unique, easily ascertainable, and allow for development of simple, predictable jurisdictional rules.[186] The Court also stated explicitly what had been implicit in *Goodyear*: although the place of incorporation and principal place of business are paradigm bases for the exercise of general jurisdiction, they are not the exclusive bases; a foreign corporation may be subject to general jurisdiction in a state other than the state of incorporation or the state of its principal place of business.[187]

Still, the Court shed little light on the nature and quality of activities within a state to establish that a foreign corporation is "at home" there. Plaintiffs in *Daimler* had argued that the foreign corporation would be subject to general jurisdiction in every state in which it had a substantial, continuous, and systematic course of business, a view the Court dismissed, observing that "[i]f Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other state in which MBUSA's sales are sizable."[188] The Court reasoned that "[s]uch exorbitant exercises of all-purpose jurisdiction" make it difficult for foreign corporations to structure their conduct of business in a manner that would enable them to predict with some certainty where they will or will not be amenable to suit as required by due process.[189]

Moreover, the Court reasoned that the international context in which the claims arose militated against the exercise of general jurisdiction.[190] The Court was troubled by the fact that claims asserted under United States law by twenty-two

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183. *Id.* at 759-60.

184. *Id.* at 760 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856 (2011)).

185. *Id.* at 761 (emphasis added).

186. *Id.* at 760 (alterations in original).

187. The Court stated:

> We do not foreclose the possibility that in an exceptional case, . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, . . . quite another to expose it to suit on claims having no connection whatever to the forum State.

*Id.* at 760-61 n.19.

188. *Id.* at 761.

189. *Id.* at 761-62.

190. *Id.* at 763 ("Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.").

Argentinian residents against a German corporation for conduct occurring in Argentina had been entertained by a California federal court in the first place.[191] In the Court's view, to allow these cases to proceed would pose a serious risk to international comity.[192] The expansive view of general jurisdiction adopted by the Ninth Circuit is at odds with the more limited view of jurisdiction based on domicile that many trading partners of the United States hold.[193] The Court noted that in the past, the broad view of personal jurisdiction asserted by some United States courts has hampered international negotiations on reciprocal recognition and enforcement of judgments.[194] The Court further noted that attempts to sue foreign entities based on the acts of their domestic subsidiaries under principles of general jurisdiction could discourage foreign investment and generate international friction.[195] Accordingly, exercise of jurisdiction on the facts before the court would offend traditional notions of "fair play and substantial justice."[196]

## IV. IMPACT OF *DAIMLER*

### *A. Death of the Corporate Presence Doctrine*

*Daimler* strikes the death knell to the corporate presence doctrine. The *Daimler* court marginalized *Tauza*, noting that it was "decided in an era dominated by *Pennoyer's* territorial thinking" and "should not attract heavy reliance today."[197] In short, *Tauza*, to the extent that it ever reflected a majority view, is no longer good law.[198] After *Daimler*, the doctrine of general jurisdiction has little independent significance. Corporations could always be sued on any claim in their state of incorporation or the functional equivalent, the principal place of business. There will be the occasional *Perkins*-like case that the courts may deem exceptional; however, by and large, general jurisdiction after *Daimler* has gone the way of *quasi in rem* jurisdiction after *Shaffer*. That is, it exists more in theory than in reality, and that is not necessarily bad. There may be cases where *Daimler* inconveniences plaintiffs, but *Daimler* does not prevent plaintiffs from invoking personal jurisdiction based on acts within the forum state or consent.

*Daimler*, of course, applies only to corporations. Nevertheless, it raises an interesting question. If general jurisdiction over a corporation can be exercised only where the corporation is "at home," should not the same be true regarding individuals? The next logical step is for the Court to revisit its ruling in *Burnham* that fortuitous presence within a state is a sufficient basis upon which to exercise *in personam* jurisdiction.

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191. *See id.* at 762-63.
192. *Id.* at 763.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* (citations omitted).
197. *Id.* at 761 n.18.
198. Vincent C. Alexander, Supp. Practice Commentaries, McKinney's Cons. Laws of NY, 2015 Electronic Update, CPLR C301:8 ("[*Daimler*] has brought an end to doing business jurisdiction of the type manifested in [*Tauza*]."); *see generally* Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction,* 63 S.C. L. REV. 671 (2012).

### *B. General Jurisdiction Based On Corporate Registration Statutes*

*Goodyear* and *Daimler* call into question the extent to which state courts can exercise general jurisdiction over foreign corporations based on state registration statutes. For a variety of reasons, states require foreign corporations to register with state authorities to conduct business activities within that state.[199] All states require that, as part of the registration process, the foreign corporation designate an agent, who may be a state official, for service of process within the state.[200] Failure to register typically means that the state's courthouse doors will be closed to the delinquent company;[201] therefore, corporations have a strong incentive to comply with the registration process in order to assure that they can enforce contracts and other obligations entered into in a given state.[202] The courts have historically disagreed about whether the foreign corporation would subject itself to general jurisdiction by the act of registration.[203]

#### *1. Implied Consent*

The early cases upheld the exercise of jurisdiction over the foreign corporation that had registered to do business in a state on the theory that by appointing an agent for service of process, it impliedly consented to the exercise of general jurisdiction and thus could be sued in a state where it had registered on claims unrelated to its in-state activities. In the leading case of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*,[204] the Supreme Court, per Justice Holmes, upheld jurisdiction in an action where an Arizona plaintiff sued a Pennsylvania corporation in Missouri state court based on an insurance claim arising in Colorado.[205] In that 1917 opinion, Justice Holmes reasoned that by registering to do business in Missouri, the defendant foreign corporation had consented to service of process in Missouri.[206] The Court rejected defendant's argument that the exercise of jurisdiction by the Missouri court on a matter that did not involve a Missouri contract was a denial of due process.[207] It ruled that the defendant, by complying with the statute and designating an agent for service of process, ran the "risk of the interpretation that might be put upon [the statute] by the [Missouri] courts,"[208] thus "hardly leav[ing] a constitutional question open."[209] The decision made no mention of the defendant's in-state activities.

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199. *See* SIEGEL, *supra* note 4 at § 30, p. 36.

200. *See generally* Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1 (1990).

201. *See, e.g.*, N.Y. BUS. CORP. LAW § 1312 (McKinney, Westlaw through L.2016, chapter 1).

202. *Id.*

203. *Compare* Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917) (holding that registration confers consent), *with* King v. Am. Family Mut. Ins. Co., 632 F.3d 570, 579 (9th Cir. 2011) (holding that the appointment of an agent is helpful in determining amenability to suit, but general jurisdiction principles must govern).

204. 243 U.S. 93 (1917).

205. *Id.* at 94.

206. *Id.* at 96.

207. *Id.* at 94-95.

208. *Id.* at 96.

209. *Id.* at 95.

*Pennsylvania Fire Insurance* has not been directly overruled by the Supreme Court, but its rationale has been severely undermined by subsequent Supreme Court decisions.[210] The *Pennsylvania Fire Insurance* decision was cut from the *Pennoyer* mold, which limited the exercise of personal jurisdiction to situations where the defendant was present within the state when served or consented to jurisdiction. That approach is clearly out of step with the Court's later jurisdictional pronouncements in *International Shoe* and its progeny, which shift the focus of jurisdictional analysis away from concepts of physical power and territoriality and toward a more flexible standard focusing on the "quality and nature" of the defendant's forum activities, the relationship between those forum activities and the plaintiff's claim for relief, and fundamental principles of fairness.[211]

Not surprisingly, the lower courts have not been in agreement on the continuing vitality of *Pennsylvania Fire Insurance* post-*International Shoe*. Some courts[212] continue to view that case as authoritative and uphold that compliance with the registration process constitutes implied consent to general jurisdiction. Other courts,[213] focusing on post-*International Shoe* developments have held that compliance with the registration process does not by itself establish consent to the exercise of general jurisdiction.[214] Under this view, service of process on the designated agent may establish the requisite notice of suit but does not provide a basis for jurisdiction.[215]

The Supreme Court has never explicitly addressed the continuing vitality of *Pennsylvania Fire Insurance* in the wake of *International Shoe*. However, in

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210. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (noting that the quality and nature of defendant's forum activities as well as fundamental fairness determine whether the exercise of jurisdiction comports with due process).

211. *Id.*

212. *See, e.g.*, Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991) ("We need not decide whether authorization to do business in Pennsylvania is a 'continuous and systematic' contact with the Commonwealth . . . because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania."); Knowlton v. Allied Van Lines, Inc. 900 F.2d 1196, 1200 (8th Cir. 1990) ("We conclude that appointment of an agent for service of process under [the Minnesota statute] gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum–contacts or due-process analysis to justify the jurisdiction is unnecessary.").

213. *See, e.g.*, Ratliff v. Cooper Labs, Inc., 444 F.2d 745, 748 (4th Cir. 1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes."); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) ("Not only does the mere act of registering an agent not create Learjet's general business presence in Texas, it also does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter.").

214. *See* Brown v. Lockheed Martin Corp., No. 14-4083, 2016 WL 641392, at *17 (2d Cir. Feb. 18, 2016). The Court stated:

> So, here we believe that the holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general "consent" has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the Court's 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.

215. *See* King v. Am. Family Mut. Ins. Co., 632 F.3d 570, 579 (9th Cir. 2011).

*Shaffer v. Heitner*,[216] the Court did rule in the context of a due process challenge to the exercise of *quasi in rem* jurisdiction, that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[217] The Court in *Shaffer* also stressed that the focus of jurisdictional analysis subsequent to *International Shoe* had shifted away from the narrow formalistic concepts of in-state service and consent advocated by *Pennoyer* to an examination of "the relationship among the defendant, the forum and the litigation."[218] A foreign corporation may well be registered in a state but have no meaningful business activities within that state. The foreign corporation's only nexus with the forum would be its registration, and there would be no connection among the defendant and forum, on the one hand, and the litigation on the other hand. The exercise of jurisdiction in that circumstance would seemingly run contrary to the standards enunciated in *International Shoe* and reiterated in *Shaffer* that only after evaluating the defendant-foreign corporation's contacts with the forum can jurisdiction be determined.[219]

The Supreme Court's recent decisions in *Goodyear* and *Daimler* reinforce this view. Again, neither case specifically addresses the issue of whether appointment of an agent for service of process, as part of the registration process implies consent to the exercise of general jurisdiction. In fact, both cases involved defendants that had been incorporated outside of the United States, who had neither registered with any state authority nor sought authorization to do business in any state.

Nevertheless, the reasoning of these cases, particularly the Court's mandate that any jurisdictional analysis must be based on the nature and quality of a company's contacts with the forum, strongly suggests that general jurisdiction would not be upheld on the basis of implied consent through mere compliance with state corporate registration statutes. The lower courts, however, have not been uniform in their assessment of the impact of *Daimler* and *Goodyear* on assertions of general jurisdiction over foreign companies based on compliance with state registration statutes.

An interesting split of authority has emerged in the District of Delaware with respect to the exercise of general jurisdiction over the *very same company*, Mylan Pharmaceuticals.[220] In *AstraZeneca AB v. Mylan Pharmaceuticals, Inc*., the court held that under *Daimler*, a foreign corporation's mere compliance with corporate registration statutes does not give rise to general jurisdiction over that foreign corporation.[221] First, the court concluded "[b]oth consent and minimum contacts . . . are rooted in due process [and that] [j]ust as minimum contacts must be present so as not to offend 'traditional notions of fair play and substantial justice,' the

216. 433 U.S. 186 (1977).

217. *Id.* at 212.

218. *Id.* at 204.

219. *King*, 632 F.3d at 578-80.

220. *Compare* AstraZeneca AB v. Mylan Pharms., Inc., 72 F. Supp. 2d 549, 554-57 (D. Del. 2015) (finding no general jurisdiction under *Daimler*) *with* Acorda Therapeutics Inc., v. Mylan Pharms. Inc.,78 F. Supp. 2d 572, 588-92 (D. Del. 2015) (distinguishing *Daimler* and upholding jurisdiction based on consent).

221. *AstraZeneca AB*, 72 F. Supp. 3d at 556-57.

defendants alleged 'consent' to jurisdiction must do the same."[222] In finding that a simple showing of "continuous and systematic contacts" could not establish general jurisdiction, *Daimler* "rejected the idea that a company could be haled into court merely for 'doing business' in a state."[223] Under that theory, out of state corporations could not "structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit."[224] Second, were compliance a basis of jurisdiction, companies with a nationwide presence would be subject to suit all over the country, an outcome that *Daimler* specifically sought to avoid.[225] Third, the Court reasoned that a contrary holding would create "perverse incentives": companies that complied could be sued in that state, but companies that disobeyed the law would be immune from suit.[226] Fourth, the court found that Delaware's registration statutes merely outline procedures for doing business in Delaware and do not address jurisdictional issues.[227] On the other hand, the court in *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*[228] upheld jurisdiction based compliance with the Delaware registration statutes.[229] The *Acorda* court reasoned that the *Daimler* holding was directed at the issue of the foreign defendant's minimum contacts, not at the issue of consent.[230] The *Acorda* court further reasoned that *Daimler*, by its reference to *Perkins*, recognized consent as an independent basis for *in personam* jurisdiction.[231]

In so ruling, the *Acorda* court took issue with the earlier decision in *AstraZeneca*.[232] The *Acorda* court distinguished between "doing business" in a state and compliance with registration statutes.[233] It urged that a company that is registered in a state, as opposed to merely doing business, has notice of potential amenability to suits and can structure its conduct so as to avoid law suits in a given state.[234] The *Acorda* court did acknowledge the conceptual strain in accepting the *Daimler* holding that a foreign corporation cannot be subject to general jurisdiction for merely "doing business" in that state, on the one hand, but that the very same corporation can be subject to general jurisdiction in any state where the corporation complies with the registration statutes, irrespective of its contacts, on the other hand.[235]

On appeal, the Federal Circuit concluded that the Delaware District Court had specific jurisdiction over the defendant and sidestepped the general jurisdiction issue.[236]

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222. *Id.* at 556.
223. *Id.*
224. *Id.*
225. Daimler AG v. Bauman, 134 S.Ct. at 761-62 (2014).
226. *Astra Zeneca AB*, 72 F. Supp. 3d at 557.
227. *Id.*
228. 78 F.Supp. 2d 572 (D.Del. 2015).
229. *Id.* at 584-85.
230. *Id.* at 581-82, 588-89.
231. *Id.* at 589.
232. *Id.* at 590-91.
233. *Id.*
234. *Id.* at 591.
235. *Id.*
236. Acorda Therapeutics Inc. v. Mylan Pharmaceuticals Inc., Nos. 2015-1456, 2015-1460, 2016 WL 1077048, at *1 (Fed. Cir. Mar. 18, 2016).

*2. Express Consent*

Several states, as part of the registration process, require express consent to jurisdiction, irrespective of where the claim arises.[237] The question of whether this express consent cures the jurisdictional defects that arise with respect to implied consent has not been addressed by the courts. A pro-jurisdiction argument might be crafted by analogy to the Supreme Court's decision in *Burnham v. Superior Court*.[238] The issue in *Burnham* was whether the fortuitous presence of a defendant within a given state was sufficient to confer *in personam* jurisdiction over that defendant.[239] In *Burnham*, the defendant was a New Jersey domiciliary whose former wife and child lived in California.[240] The defendant travelled to California to visit his child and also to conduct other business.[241] While in California, he was served with process in an action commenced by his former wife in California state court.[242] The defendant argued that under *Shaffer*, jurisdiction was void.[243] *Shaffer* had held that the fortuitous presence of *property* within a state was by itself an insufficient basis for that state to proceed *quasi in rem* against the defendant.[244] Given the *Shaffer* holding, defendant argued, fortuitous presence of an *individual* within a state could not confer *in personam* jurisdiction.[245]

The Supreme Court in *Burnham* disagreed with the defendant and held that California's exercise of personal jurisdiction over him based on personal service of process while present with the state did not violate due process.[246] The Court, however, could not piece together a majority opinion supporting its ruling. Writing for the plurality, Justice Scalia reasoned that presence is a jurisdictional principle that "is both firmly approved by tradition and still favored" and that "its validation is its pedigree, as the phrase '*traditional notions* of fair play and substantial justice' makes clear."[247] Justice Scalia also distinguished *International Shoe*, noting that that case involved an action against a foreign corporation, served outside of the state, and not service of process on an individual present within the state.[248] Writing separately, Justice Brennan maintained that jurisdiction based on fortuitous presence in California be upheld because defendant had minimum contacts with the state by virtue of the fact that his physical presence within the state entitled him to all protections of California law.[249]

From *Burnham*, one can argue that consent, like presence, is a traditionally recognized basis for the exercise of *in personam* jurisdiction and shares the same pedigree. However, the analogy of consent to presence is flawed. First, it is a

237. *See, e.g.*, N.Y. BUS. CORP. LAW § 304 (McKinney, Westlaw through L.2016, chapter 1).
238. 495 U.S. 604 (1990).
239. *Id.* at 608.
240. *Id.* at 607-08.
241. *Id.* at 608.
242. *Id.*
243. *Id.* at 619-20.
244. Shaffer v. Heitner, 433 U.S. 186, 209, 212 (1977).
245. *Burnham*, 495 U.S. at 620.
246. *Id.* at 620-21.
247. *Id.* at 621-22.
248. *Id.* at 619.
249. *Id.* at 637-39 (Brennan, J., concurring).

*Pennoyer*-esque argument that honors form over substance, and is at odds with the mandate of *International Shoe* to analyze the exercise of jurisdiction in accordance with the nature and quality of the defendant's contacts with the forum.[250] Second, statutorily coerced consent requiring foreign corporations to defend any and all claims in that state, irrespective of where the claims arise, is unreasonable and contrary to the rule of *International Shoe* that assertion of jurisdiction over foreign entities must comport with fair play and substantial justice.[251] Accordingly, it violates due process to force a foreign corporation, not "at home" in the forum, to defend a claim arising elsewhere. This is not to suggest that all statutes that coerce personal jurisdiction are unconstitutional. Law, by its very nature, is coercive. Only when a state statute is unreasonably coercive would enforced consent offend a foreign corporation's due process rights.

Third, coerced general jurisdiction is unnecessary. Even under *Goodyear* and *Daimler*, domestic corporations would still be subject to jurisdiction somewhere in the United States—either in the state of incorporation or the state of its principal place of business, irrespective of any consent. In both *Goodyear* and *Daimler*, defendants were incorporated abroad, operating abroad and not seeking to do business in the United States. Given this fact, it is difficult to see how a forum's subjecting defendants in either case to personal jurisdiction with respect to claims arising overseas serves any legitimate interest of that forum, beyond perhaps seeing justice done. Nor does exercise of such jurisdiction serve the interests of the interstate civil justice system. It is one thing to subject a foreign corporation to jurisdiction based on claims arising in the forum state, it is quite another to force that corporation to defend claims unrelated to any forum activities simply to see that justice is done. *Goodyear* and *Daimler* do make it more difficult to sue corporations formed and operating outside of the United States in American courts on a general jurisdiction theory. That is not necessarily bad.

### *C. Concerns for International Comity*

The fact that the defendant was an overseas corporation doing business on an international scale played no small part in *Daimler's* decision denying general jurisdiction. The Court pointedly criticized the Ninth Circuit because "[it] paid little heed to the risks to international comity its expansive view of general jurisdiction posed."[252] The Court noted that "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case," pointing out that in Europe, jurisdiction over corporations is largely limited to the country of a corporation's domicile.[253]

The Court also cited instances where the expansive view of general jurisdiction expressed by United States domestic courts had in the past "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments" and led to international friction.[254] The Court, in addition, noted

250. Int'l Shoe Co. v. Washington, 342 U.S. 310, 319 (1945).
251. *Id.* at 316.
252. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).
253. *Id.*
254. *Id.* (citation omitted).

concerns that exercising general jurisdiction over foreign companies based on the activities of American-based subsidiaries could discourage foreign investors.[255] Accordingly, it concluded that "subjecting Daimler to general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands."[256]

The *Daimler* decision is consistent with other recent Supreme Court rulings shutting the doors of American courts to foreign plaintiffs suing on claims arising abroad against foreign defendants. For example, in *F. Hoffman LaRoche Ltd. v. Empagran, S.A.*,[257] the Court held that principles of prescriptive comity militated against an expansive reading of the American antitrust laws that would allow United States courts to hear private treble damage actions brought by foreign plaintiffs against foreign defendants on claims arising outside of the United States.[258] Similarly, in *Morrison v. National Australia Bank Ltd.*,[259] the Court ruled that the American securities laws do not provide a claim for relief by foreign plaintiffs against foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.[260] Most recently, in *Kiobel v. Royal Dutch Petroleum*,[261] an action under the Alien Tort Statute ("ATS") brought in the Southern District of New York by Nigerian Nationals against British, Dutch and Nigerian corporations alleging that defendants aided and abetted torture by the Nigerian government, the Court ruled that that ATS did not apply to violations of the law of nations occurring within the territory of a sovereign other than the United States.[262]

The plaintiffs' principal motivation in choosing United States venues in these cases was apparently to get the benefit of more favorable American law. The upshot of the decisions in *Empagran*, *Morrison*, and *Kiobel* was to (1) prevent blatant forum shopping in the United States by foreign plaintiffs; (2) demonstrate mutual respect for the legal systems of other sovereign nations; and (3) minimize the influx of foreign cases into the United States, thereby preventing the American court system from becoming a magnet for international disputes that should be litigated elsewhere.

## V. QUESTIONS AFTER *DAIMLER*

### *A. Attributing Contacts of Subsidiaries to the Parent Corporation*

The Court in *Daimler* did not systematically address the question of whether, or the extent to which, general jurisdiction may be exercised over a parent corporation on the basis of the forum contacts of a subsidiary. It is black letter law that the mere existence of a parent-subsidiary relationship is not enough to create personal jurisdiction over the parent on the basis of the subsidiary's contacts with

255. *Id.* (citation omitted).
256. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
257. 542 U.S. 155 (2004).
258. *Id.* at 164-66.
259. 561 U.S. 247 (2010).
260. *Id.* at 265.
261. 133 S. Ct. 1659 (2013).
262. *Id.* at 1663.

the forum.[263] Accordingly, the courts will generally respect the separate identities of a parent and its subsidiaries; and a parent "may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is consistent with the parent's investor status."[264] A parent may (1) monitor the subsidiary's performance; (2) supervise the subsidiary's finances; and (3) articulate policies and procedures for the subsidiary.[265]

On the other hand, courts may disregard the separateness between parent and subsidiary, and impute the forum contacts of the subsidiary to the parent for jurisdictional purposes—where the subsidiary is an agent of the parent[266] or where the subsidiary is the mere alter ego of the parent.[267]

### *1. Alter Ego*

A subsidiary is the alter ego of its parent where the parent controls the subsidiary "to such a degree as to render the latter the mere instrumentality of the former."[268] A parent treats its subsidiary as a mere instrumentality where the parent disregards corporate formalities and exercises control over day-to-day operations of the subsidiary.[269] The amount of control exercised must exceed the usual supervision that a parent exercises over a subsidiary.[270] In assessing whether the degree of control exercised by the parent is sufficient to render the subsidiary an alter ego, the courts take into account a variety of factors.[271]

The Court in *Daimler* did not reach the question of whether MBUSA was the alter ego of Daimler because the Ninth Circuit in upholding general jurisdiction

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263. Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001); Transure, Inc. v. Marsh & McLennan, Inc. 766 F.2d 1297, 1299 (9th Cir. 1985); *see generally* United States v. Bestfoods, 524 U.S. 51, 69 (1998), where the Supreme Court, in analyzing corporate separateness for liability purposes, explained:

> [I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts. This recognition that the corporate personalities remain distinct has its corollary in the "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership."

(alteration in original) (citations omitted).

264. *Unocal Corp.*, 248 F.3d at 926 (citing *Bestfoods*, 524 U.S. at 69).

265. *Id.*

266. El-Fadi v. Central Bank of Jordan, 75 F.3d 669, 676 (D.C. Cir. 1996).

267. AT&T Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir. 1996).

268. Calvert v. Huckins, 875 F. Supp. 674, 678 (E.D. Cal. 1995) (quoting Inst. of Veterinary Pathology, Inc. v. California Health Labs., Inc., 172 Cal. Rptr. 74 (1981)).

269. *See* Insolia v. Philip Morris Inc., 31 F. Supp. 2d 660, 669 (E.D. Wis. 1998).

270. *See In re* Chocolate Confectionary Antitrust Litig., 641 F. Supp. 2d 367, 386-87 (M.D. Pa. 2009).

271. *Id.* at 384-85. These factors include (1) whether the parent owns all or most of the subsidiary's stock; (2) whether the two companies share the same officers and directors; (3) whether both companies have a unified marketing image and common branding; (4) whether corporate trademarks are the same for both companies; (5) whether the two firms have common employees; (6) whether the two firms have an integrated distribution system; (7) whether the two companies share supervisory personnel; (8) whether the subsidiary performs business functions that would normally be performed by the parent; (9) whether the parent uses the subsidiary as its exclusive distributor; and (10) whether the parent directs the activities of the subsidiaries officers and directors. *Id. See also* 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069.4 (4th ed.), Westlaw (database updated December 2015).

over Daimler did not rely on this theory.[272] Nevertheless, the Court will undoubtedly be faced with the alter ego issue in the near future. How the Court would resolve the alter ego issue in light of its *Daimler* holding is an interesting question. Assume that a foreign parent treats its wholly owned American subsidiary as a mere instrumentality so that the alter ego doctrine is clearly in play. Assume further that the American subsidiary is a Delaware corporation with its principal place of business in Delaware and thus at home in that state. The Court would likely find that foreign parent subject to general jurisdiction in Delaware under the alter ego theory.[273]

Alternatively, suppose the foreign parent has multiple subsidiaries in the United States, incorporated in different states and having principal places of business in a variety of states, each of which is treated as a mere instrumentality by the parent. On those facts, would the Court find the kind of "exorbitant exercises of all-purpose jurisdiction"[274] that it condemned in *Daimler*? Or, would the Court put the onus on the parent to restructure its American operations so as to make amenability to suit more certain and predictable?

### *2. Agency*

Nor did the *Daimler* Court directly address the agency issues. The Ninth Circuit had upheld jurisdiction over Daimler based on the California activities of MBUSA, ruling that MBUSA "performs services that are sufficiently important to [Daimler] that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."[275] The Supreme Court, however, declined to "pass judgment on the invocation of an agency theory in the context of general jurisdiction, for in no event [could] the appeals court's analysis be sustained."[276] The Court found that "the inquiry into importance stacks the deck for it will always yield a pro-jurisdiction answer."[277] Of course, when something is important to a company, it will undertake the task itself if it cannot get someone else to perform that task. Accordingly, the Ninth Circuit's agency theory would create general jurisdiction over a principal whenever the principal has an in-state subsidiary or agent, "an outcome that would sweep beyond even the 'sprawling view of general jurisdiction' we rejected in *Goodyear*."[278] Thus, even if MBUSA is at home in California and its California contacts are imputable to Daimler, general jurisdiction over Daimler is lacking because Daimler's "slim contacts with the State hardly render it at home there."[279] Although the Court chose not to confront the agency issue directly, the opinion

272. Daimler AG v. Bauman, 134 S.Ct. 746, 758-59 (2014).

273. *See, e.g.*, George v. Uponor Corp., 988 F. Supp. 2d 1056, 1078-80 (D. Minn. 2013) (holding that alter ego jurisdiction over parent company may be exercised under *Daimler* as long as the forum state is the subsidiary's principal place of business because parent is not subject to jurisdiction in all states where subsidiary conducts business); *see generally* Alexander, *supra* note 198, at C301:8.

274. *Daimler*, 134 S.Ct. at 761.

275. *Id.* at 758-59.

276. *Id.* at 759.

277. *Id.* at 759.

278. *Id.* at 759-60 (quoting *Goodyear*, 131 S. Ct. at 2856).

279. *Id.* at 760.

leaves little room for the successful invocation of that theory where general jurisdiction is involved.

### *B. The Role of Fair Play in the General Jurisdiction Analysis*

The Supreme Court has never directly addressed the question of whether the fairness prong of the *International Shoe* analysis applies with the same force in general jurisdiction cases as in specific jurisdiction cases.[280] Still, there is little reason to doubt that fairness is a critical element of both specific and general jurisdiction. The lower courts have uniformly so held.[281] Moreover, the Supreme Court has heard only a handful of general jurisdiction cases.

In her *Daimler* concurrence, Justice Sotomayor called the majority to task for failure to focus on the fairness issue and failure to dispose of the matter on fairness grounds, as the Court had done is *Asahi* in the context of specific jurisdiction.[282] Justice Sotomayor seemed particularly troubled by the fact that the majority decision turned on the sufficiency of Daimler's California contacts, an issue that she maintained had not been briefed or argued to the Court.[283] She also criticized the majority for adopting the "at home" standard, which she viewed as (1) at odds with the "'continuous and systematic' contacts inquiry that has been taught to generations of first-year students" and (2) "a new rule of constitutional law that is unmoored from decades of precedent."[284]

Justice Sotomayor's criticism of the majority may have been overly harsh. First, the issue on which the Court granted certiorari fairly encompasses the question of whether Daimler was "at home" in California.[285] Moreover, the question of sufficiency of Daimler's contacts was briefed both in the Circuit Court and the Supreme Court.[286] Second, *Asahi* does not hold that a court must address the fairness issue at the outset. *Asahi* turned on fairness because all the Justices agreed that the exercise of long-arm jurisdiction by a California court in a third-party action involving a Taiwanese company suing a Japanese entity on transactions occurring outside of the United States would be unreasonable.[287] The Court in *Asahi* could not forge a majority on the issue of whether the defendant had the requisite minimum contacts with the forum state.[288] By contrast, in *Daimler*,

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280. *Id.* at 764-65 (Sotomayor, J., concurring).

281. Justice Sotomayor observed:

> The Courts of Appeals have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context. Without the benefit of a single page of briefing on the issue, the majority casually adds each of these cases to the mounting list of decisions jettisoned as a consequence of today's ruling.

*Id.* at 764 n.1 (citations omitted).

282. *Id.* at 762 n.20; *see* Asahi Metal Indus. Co. v. Superior Court of Cal, Sonoma Cty., 480 U.S. 102, 113-14 (1987).

283. *See Daimler,* 134 S.Ct. at 766 (Sotomayor, J. concurring).

284. *Id.* at 770, 773. (citations omitted).

285. *Id.* at 762 n.20.

286. *Id.* at 762.

287. *Asahi*, 480 U.S. at 114, 121 (Stevens, J., concurring).

288. *Id.* at 105, 108-13 (only four Justices joined in that part of the opinion that found minimum contacts lacking).

the majority did agree that the requisite minimum contacts were absent.[289] Accordingly, there was no need to address the fairness prong of the *International Shoe* test in *Daimler*.

Third, courts have traditionally analyzed contacts before reaching the fairness issue simply because it is more efficient to do so. In *Burger King v. Rudzewicz*,[290] the Court held that where the minimum contacts prong of the *International Shoe* test has been met, the exercise of personal jurisdiction is presumptively fair.[291] Justice Ginsburg echoed this view in *Daimler*, observing that "[w]hen a corporation is genuinely at home in the forum [s]tate[,] . . . any second-step inquiry would be superfluous."[292]

Fourth, as discussed above, the majority in *Daimler* did acknowledge fairness considerations in denying general jurisdiction.[293] Although the majority's conclusions on fairness supported its holdings, fairness concerns were not central to the outcome.

### *C. Meaning of "At Home"*

The *Daimler* Court made clear that a corporation is presumptively at home, and hence subject to general jurisdiction, in its state of incorporation and where it has its principal place of business.[294] At the same time, the Court acknowledged that there may be additional factual scenarios where a defendant is "at home" in a state, citing *Perkins* as an example.[295] *Daimler* thus offers the lower courts little guidance on when a corporation is at home beyond the two paradigm cases set forth in the opinion. The issue of what additional facts might satisfy the at home criterion is thus likely to come back to the Court in the not too distant future.

### *D. Too Big for General Jurisdiction?*

As Justice Sotomayor points out, the *Daimler* holding creates the anomalous situation whereby a large multinational firm with significant business activities outside of the forum state may escape the exercise of general jurisdiction, while a smaller company, whose principal place of business is within the forum, but whose business activities within the forum are far less than those of the multinational firm, may be subject to general jurisdiction.[296] The majority did not dwell on this anomaly but rather stressed the need for simple, predictable jurisdictional rules that would permit out of state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[297] The upshot is that large multinational firms will be amenable to general

289. *See Daimler*, 134 S.Ct. at 759.

290. 471 U.S. 462 (1988).

291. *Id.* at 476-78.

292. *Daimler*, 134 S. Ct. at, 762 n.20.

293. *Id.* at 763 ("Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of the courts in California would not accord with the 'fair play and substantial justice' due process demands.") (citations omitted).

294. *See id.* at 760-61.

295. *Id.* at 761 n.19.

296. *Id.* at 772 (Sotomayor, J., concurring).

297. *Id.* at 762.

jurisdiction in a very limited number of forums and will thus be "too big" for general jurisdiction.

### *E. Individual Proprietors*

Also unclear is the impact of *Daimler's* at home standard on the exercise of general jurisdiction over individual proprietors who are neither domiciled in the forum state nor present there when served with process. Given that an individual could conduct systematic and continuous business operations in multiple states at the same time, that individual may well be faced with the kind of "unacceptably grasping" jurisdictional reach that *Daimler* eschewed.[298] At the same time, an individual doing business in only one location would be "at home" and hence subject to general jurisdiction in the state where the business is located.[299]

## VI. CONCLUSION

*Daimler* redefines general jurisdiction and significantly limits its exercise involving claims arising outside of the United States against foreign corporations. *Daimler* also sounds the death knell for the corporate presence doctrine, whether defendants are domestic or foreign. At the same time, Daimler makes clear that domestic corporations are always subject to general jurisdiction in their state(s) of incorporation and where they have their principal place of business, thus clarifying and simplifying a jurisdictional doctrine that for many generations lurked in the shadows. The Court adopted the "at home" standard to create a measure of clarity and predictability for corporations engaged in interstate or international commerce. However, it may in the end have created more confusion than certainty and simply invited more litigation to clarify limits of general jurisdiction. Under the old "doing business" test not every corporation "doing business" within a state is "at home" there. *Daimler*, however, offers little guidance on where to draw the line.

298. *Id.* at 761.

299. Alexander, *supra* note 198, at C301:9.