CARLTON FIELDS

Post-Daimler: Are Non-U.S. Companies Safe from Suit in U.S. Courts? What if the Non-U.S. Parent Registers to Do Business in a State?

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For decades, U.S. courts have been preferred venues for plaintiffs' lawyers seeking to sue non-U.S. companies. This is due to the perception that American juries award vastly greater recoveries than those outside the United States, and also because of the expansive discovery opportunities U.S. courts offer (despite recent efforts to narrow federal discovery rules, discovery is unlikely to be limited anytime soon). However, globalization, which makes highly-desirable U.S. markets accessible to non-U.S. providers of goods and services, has enhanced concerns over the consequences of offshore companies availing themselves of the U.S. market. Perhaps surprisingly, U.S. courts have been slow to provide guidance. The U.S. Supreme Court did not issue its decision in *Daimler AG v. Bauman* (clarifying the Court's 2011 decision in *Goodyear Dunlop Tires Opns, S.A. v. Brown*), until early 2014. *Daimler* declined to permit the exercise of personal general jurisdiction over the parent company (the German Mercedes manufacturer) of a U.S. subsidiary (MBUSA in a case where Argentine plaintiffs sought to sue the German company for claims arising out of activities in Argentina). The Court essentially ruled that if a company is not (1) incorporated in, or (2) headquartered in the United States, it cannot be sued here for any claim unrelated to specific conduct by the foreign company in the United States. The *Daimler* decision appears to have inspired confidence that non-U.S. companies need no longer be so concerned about being hauled into U.S. courts they deem hostile—even where they establish local U.S. subsidiaries to conduct business important, or even critical, to the parent company's business. Such confidence may, or may not, be warranted. First, it is important to understand the difference between general and specific jurisdiction. Generally, pursuant to specific jurisdiction, a non-U.S. company can always be sued in the

United States in the federal or local courts of a state where it has engaged in activity, or to which it has directed activity, for claims arising out of such conduct. The *Daimler* case addressed only general jurisdiction, the ability of a U.S. court to exercise personal jurisdiction over a non-U.S. company on *any* claim, irrespective of the situs of the conduct. That question turns on U.S. constitutional principles analyzed in *Daimler*. But the *Daimler* analysis occurred where the plaintiff sought to justify jurisdiction on an "agency" theory, claiming Mercedes' U.S. subsidiary was the German manufacturing company's agent, and thus a representative through which the non-U.S. parent could be sued. The Supreme Court ultimately rejected that argument. But *Daimler* did not address, among other things, circumstances that might constitute a waiver of any objection to personal jurisdiction. Under longstanding U.S. law, subject matter jurisdiction (the ability of the court to entertain a specific type of controversy) cannot be waived; but *personal* jurisdiction can always be waived. So what happens, for example, if the non-U.S. company, in order to conduct specific, narrowly focused activities in a U.S. state, is compelled to register to do business, and to do that, must appoint an agent specifically to accept service of process directed to the foreign company? Can the foreign company now be sued for conduct *unrelated* to any in-state activity based on consented-to in-state service of process on the appointed designated agent? The answer is not so clear. Indeed, relatively recently in Delaware, two federal judges reached opposite conclusions. The issue was resolved only this year by the Delaware Supreme Court in *Genuine Parts Co. v. Cepec*. The Delaware court reasoned that its state's registration statute could not be read "as a broad consent to personal jurisdiction in any cause of action, however unrelated to the foreign corporation's activities in Delaware." But this case interprets Delaware's statute only. The court recognized that all 50 states and the District of Columbia have enacted their own registration statutes, all requiring foreign corporations to register and appoint an in-state agent for service of process. And while disagreeing on the outcome of cases in other states, the court conceded that, even post-*Daimler,* some courts have held "that implied consent by virtue of simple registration ... remains a constitutionally valid basis for general jurisdiction over a nonresident corporation." *Daimler* addressed facts particularly unsympathetic to the most liberal jurisdictional principles. Future decisions will likely test its holding under more compelling facts. And waiver/consent issues, such as those presented by corporate registration statutes, have yet to be addressed definitively. For these reasons, non-U.S. companies that avail themselves of U.S. markets should approach *Daimler* with caution, and seek advice from U.S. counsel to assess their jurisdictional exposure.

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