Client Alert

April 29, 2013

The Supreme Court Again Revisits (And May Rein In) Personal Jurisdiction: Two Cases Now Up Next Term

By Grant J. Esposito and Brian R. Matsui

On April 22, 2013, the Supreme Court granted review in another personal jurisdiction case: *DaimlerChrysler AG v. Bauman*, No. 11-965 (cert. granted Apr. 22, 2013). The question presented in *DaimlerChrysler* is "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." And earlier this Term, the Supreme Court granted certiorari in a specific personal jurisdiction case—*Walden v. Fiore*, No. 12-574 (cert. granted Mar. 4, 2013). The question presented in *Walden* is "[w]hether due process permits a court to exercise personal jurisdiction over a defendant whose sole 'contact' with the forum State is his knowledge that the plaintiff has connections to that State." Both *DaimlerChrysler* and *Walden* arise from the Ninth Circuit. They will be argued in fall 2013, with a decision expected no later than the end of June 2014.[1]

Both of these cases are of significant interest to businesses, as personal jurisdiction delimits a court's ability to hale a defendant into court and subject that defendant to the court's power and punishment. The Supreme Court has frequently declined to engage in issues of personal jurisdiction. Indeed, until its pair of decisions during the October 2010 Term, the Supreme Court had not significantly addressed personal jurisdiction since 1987, when the Court splintered in its decision governing specific personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987).

- *DaimlerChrysler* will address the standard for general personal jurisdiction based on imputing the contacts of in-forum subsidiaries to foreign parent corporations.
- *Walden* will address what it means for a defendant to "expressly aim" its conduct at a forum, such that a State has specific personal jurisdiction over an alleged intentional tortfeasor.

These two grants follow closely on the heels of the Supreme Court's rulings in June 2011 in *Goodyear Dunlop Tires Operations* and *J. McIntyre Machinery*—where the Supreme Court limited the ability of state courts to assert personal jurisdiction over foreign defendants. (Our prior client alert on those cases is available here.)

DaimlerChrysler

DaimlerChrysler will address the circumstances in which an in-state subsidiary's contacts with the forum State are sufficient for the forum State to have general jurisdiction over the foreign parent corporation.

[1] *Walden* also addresses a separate venue question presented: "Whether the judicial district where the plaintiff suffered injury is a district 'in which a substantial part of the events or omissions giving rise to the claim occurred' for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant's alleged acts and omissions all occurred in another district." This article does not address the venue question presented.

In *DaimlerChrysler*, the plaintiffs are residents of Argentina who allege human-rights violations against them and their relatives at the hands of Argentina's military dictatorship during the "Dirty War" in the late 1970s and early 1980s. During that time, plaintiffs were employed by DaimlerChrysler's subsidiary in Argentina. Plaintiffs claimed the Argentine subsidiary collaborated with the Argentine military in carrying out the alleged abuses. DaimlerChrysler is a German company that manufactures Mercedes-Benz automobiles in Germany. It does not manufacture, market, or sell any products in the United States.

Plaintiffs filed suit in California, maintaining that DaimlerChrysler was subject to general personal jurisdiction in California not because it was present in California, but rather on an agency theory by attributing to DaimlerChrysler the California contacts of a different, indirect subsidiary incorporated in Delaware (Mercedes-Benz USA LLC). The Delaware subsidiary takes title to the luxury cars in Germany and then distributes those cars in the United States, including through dealerships in California. Plaintiffs thus argued that DaimlerChrysler was subject to general jurisdiction in California based on the contacts its Delaware subsidiary has with California, and, as a result, the German parent company could be forced to defend itself in California against the human-rights violations allegedly committed by its Argentine subsidiary in Argentina.

The district court permitted discovery into the jurisdictional question. The court found that there was no agency relationship and granted DaimlerChrysler's motion to dismiss for lack of personal jurisdiction.

In a curious turn of events at the Ninth Circuit, that decision was first affirmed in a divided panel opinion and then, nine months later, reversed by the same panel. DaimlerChrysler's petition for rehearing en banc was denied, although eight judges dissented from that denial.

In the Ninth Circuit there are two separate tests for determining whether a subsidiary's contacts can be imputed to a parent corporation for purposes of general jurisdiction. One test examines whether the subsidiary merely is an alter ego of the parent. The other test—the agency test—is at issue in *DaimlerChrysler*. That test requires two showings: (1) whether the subsidiary was established for, or is engaged in, activities that the parent would have to undertake itself, but for the existence of the subsidiary and (2) whether the parent effectively controls the subsidiary's internal affairs or day-to-day operations. *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001). The Second Circuit generally applies this test as well. *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000). Where the foreign defendant is a holding company that, by definition does not conduct operations itself and can only do business through subsidiaries, the agency test ordinarily is not satisfied. Yet, here, the Ninth Circuit reformulated the agency test so that, as Judge O'Scannlain dissenting from the denial of rehearing en banc explained, the court "now seemingly rejects respect for corporate separateness, a well-established 'principle of corporate law deeply ingrained in our economic and legal systems.'" (citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)).

At least five other circuits—the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits—have rejected the agency test for general jurisdiction. Those courts require the subsidiary to be an alter ego of the foreign parent—in other words, due process requires a plaintiff to show that the foreign parent so controlled and dominated the day-to-day activities of its domestic subsidiary that the corporate form should be disregarded and the two should be treated as alter egos. *See Newport News Holdings Corp. v. Virtual City Vision, Inc*., 650 F.3d 423, 433 (4th Cir. 2011); *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 586 (5th Cir. 2010); *Dalton v. R & W Marine, Inc.*, 897 F.2d

1359 (5th Cir. 1990); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp*., 230 F.3d 934, 943-945 (7th Cir. 2000); *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011). These circuits generally view the following as indicia of corporate separateness sufficient to reject imputing jurisdictional contacts of a domestic entity to a foreign parent: separate books and records, separate offices, bank accounts and tax returns, separate boards of directors and employees, observing corporate formalities, and proof that the domestic entity ran the actual day-to-day operations, such as marketing and sales.[2]

Plaintiffs, now respondents before the Court, argue that the facts here, specifically that DaimlerChrysler and its indirect, wholly-owned Delaware subsidiary have the same Chairman, DaimlerChrysler sets prices for the cars sold in the United States, and has rights under a distribution agreement to exert control over the subsidiary's business activities, as applied to the Ninth Circuit's agency test, support the holding below that DaimlerChrysler is subject to personal jurisdiction in this case. Plaintiffs also maintain that it is not unreasonable for DaimlerChrysler to defend itself in California in light of the revenue it generates from sales in California, that DaimlerChrysler has litigated in the California courts, has a research center in the State and trades on the Pacific Stock Exchange. Plaintiffs further noted that technological advancements have lessened the traditional burdens on foreign defendants litigating in this country and that neither Argentina nor Germany provides an adequate forum.

Walden

Walden will address when a forum State has specific jurisdiction over an alleged intentional tortfeasor. Here, the only contact between the tortfeasor and the forum State was his knowledge that the victims of his tort resided in the forum State.

In *Walden*, the plaintiffs are two professional gamblers who were detained in Atlanta, Georgia by a DEA agent. Plaintiffs' destination was Las Vegas, Nevada. Plaintiffs maintained that they were residents of both Nevada and California, but provided the DEA agent only with California identification. The DEA agent suspected that the significant cash the plaintiffs possessed—approximately $97,000—was evidence of illegal narcotics transactions, rather than the legitimate proceeds of legal gambling. The DEA agent seized the money. The DEA agent subsequently filed a probable cause affidavit for the forfeiture of the funds. Ultimately, the United States Attorney's office determined there was no probable cause for the forfeiture, and returned the money to plaintiffs.

Plaintiffs brought suit against the DEA agent responsible for seizing the cash in the United States District Court for the District of Nevada. The DEA agent moved to dismiss for lack of personal jurisdiction—citing his absolute absence of contacts with the State. He never contacted anyone in Nevada, owned no property in Nevada, and conducted no personal business in Nevada. The district court dismissed the case for lack of personal jurisdiction.

The Ninth Circuit reversed in a divided opinion. The court held that Nevada had specific jurisdiction over the DEA agent. The Ninth Circuit concluded that the DEA agent had purposefully directed his conduct to the forum State,

[2] Two other circuits effectively follow the alter ego approach, but those courts describe the test as one of "agency." The courts require a showing that the parent and subsidiary are so interrelated that they cannot in fairness be considered separate companies, which, in practice, is calling the two alter egos. *See Miller v. Honda Motor Co.*, 779 F.2d 769, 773 (1st Cir. 1985); *Stubbs v. Wyndham Nassau Resort & Crystal Palace*, 447 F.3d 1357, 1361 (11th Cir. 2006); *Consolidated Development Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000).

here Nevada, because the DEA agent knew that the plaintiffs had a connection with Nevada at the time the probable cause affidavit had been filed. Specifically, the court of appeals held that the DEA agent had committed an intentional act—the filing of a false affidavit—expressly aimed at Nevada (where plaintiffs resided). The court further concluded that the DEA agent's intentional act had foreseeable effects in the forum.

Eight judges on the Ninth Circuit dissented from the denial of a petition for rehearing en banc in two separate dissents. As Judge McKeown's dissent explained:

With the stroke of a pen, our circuit returns to a discredited era of specific personal jurisdiction, where foreseeability reigns supreme and purposeful direction is irrelevant. That approach was, of course, rejected in *Burger King Corp. v. Rudzewicz*; the Supreme Court was unequivocal that "foreseeability is not a sufficient benchmark for exercising personal jurisdiction." 471 U.S. 462 (1985). Instead, the Due Process Clause requires that before a distant state exercises specific jurisdiction over a defendant, the defendant must purposefully direct activities at forum residents resulting in injuries arising out of or relating to those activities. Under the majority's construct, mere knowledge of the potential out-of-state plaintiff's residence, along with a wrongful act, confers specific personal jurisdiction. This virtually limitless expansion of personal jurisdiction runs afoul of both due process guarantees and Supreme Court precedent.

As the Ninth Circuit's opinions and the briefing at the certiorari stage suggest, the courts of appeals have divided over what it means to "expressly aim" one's conduct at a forum State. At least six circuits have required that a defendant expressly aim his conduct at the forum State—not merely at a known forum resident. *See, e.g.*, *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997); *Panda Brandywine Corp. v. Potomac Elec. Power Co*., 253 F.3d 865 (5th Cir. 2001); *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A*., 623 F.3d 440 (7th Cir. 2010); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008). Meanwhile, the Ninth Circuit, along with the Eleventh Circuit, has embraced a seemingly broader standard permitting specific personal jurisdiction where a defendant has undertaken intentional acts with the knowledge that the plaintiff resides in the forum State. *See, e.g.*, *Fiore v. Walden*, 688 F.3d 558 (9th Cir. 2012); *Bancroft & Masters, Inc. v. Augusta Nat'l Inc*., 223 F.3d 1082, 1087 (9th Cir. 2000); *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. 2008). The Supreme Court in *Walden* aims to resolve this confusion.

Next steps

Briefing in both *DaimlerChrysler* and *Walden* will occur over summer 2013, and the cases are likely to be argued in fall 2013. Decisions in the two cases will occur by June 2014.

The Supreme Court has demonstrated respect for corporate form in recent years, and this likely will shape the Court's consideration of *DaimlerChrysler*. Ultimately, if the Supreme Court reverses in these two cases, it will further limit the ability of state courts (and federal courts exercising diversity jurisdiction) to assert personal jurisdiction over non-state defendants. On the other hand, should the Court affirm the Ninth Circuit in either decision, this would potentially open corporate defendants to broader assertions of jurisdiction, requiring corporate defendants to defend against a broader range of civil suits in more places.

Finally, because multinational companies generally organize themselves through separate corporations to achieve benefits ranging from limited liability to favorable tax treatment, those advising such companies should pay particular attention to the Court's reasoning when it decides *DaimlerChrysler*. Should the Court weaken in any way the traditional principles of corporate separateness, the consequences could be far broader than merely increasing the cost and burden of defending litigation in a foreign forum.

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