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Case Study: *Bauman v. DaimlerChrysler Corp.*

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Recently, the Ninth Circuit issued its decision in *Bauman v. DaimlerChrysler Corp.*, ---F.3d ---, 2011 WL 1879210, a potentially transformative case that expands the use of "agency theory" to impose general jurisdiction over foreign corporations that do business in the U.S. solely through their U.S. subsidiaries.

In a decision by Justice Stephen Reinhardt, the Ninth Circuit held that personal jurisdiction existed over DaimlerChrysler Aktiengellschaft (DCAG), a German company, because DCAG maintained the right to control its wholly owned U.S. subsidiary, Mercedes-Benz USA LLC (MBUSA), such that DCAG could be haled into court in California due to MBUSA's contacts with that state.

Notably, the *Bauman* decision subjects DCAG to California's jurisdiction despite the fact that the events giving rise to the lawsuit did not take place in the U.S. or involve the contacts relied upon by the court in exercising general jurisdiction over DCAG in the first place. As such, this opinion — if it stands — has the potential to affect any foreign company that does business in the U.S. through subsidiaries regardless of whether those subsidiaries have anything to do with the parent's alleged actions giving rise to the lawsuit.

A Civil Procedure Conundrum

In *Bauman*, the plaintiffs were 22 Argentine nationals who claim that DCAG's Argentine subsidiary — Mercedes-Benz Argentina (MB") — collaborated with Argentina's government during its "Dirty War" to break the unions at an MBA manufacturing plant through kidnapping, torture, detentions and murder.

The plaintiffs brought suit against DCAG in the Northern District of California under the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victims Prosecution Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350.

This case landed in California thanks in part to the long chain of subsidiaries that makes up DCAG's global business, a chain no doubt familiar to almost every large international company that does business in the U.S. DCAG owns DaimlerChysler North America Holding Corp., an American subsidiary that in turn owns MBUSA, a Delaware limited liability company with its principal place of business in New Jersey.

The relationship between DCAG and MBUSA is governed by a general distributor agreement, which establishes the requirements for MBUSA to act as a general distributor of Mercedes-Benz cars in the U.S. MBUSA was the single largest supplier of luxury vehicles in the California market, and it maintained a regional office in Costa Mesa, Calif., a vehicle preparation center in Carson, Calif., and a classic center in Irvine, Calif. Because of MBUSA's extensive contacts in California, it did not dispute that MBUSA is subject to general jurisdiction in California.

The federal district court granted DCAG's motion to dismiss for two reasons. First, it found that DCAG did not maintain "systematic and continuous" contact with California sufficient to support personal jurisdiction. Second, it found that both Argentina and Germany provided plaintiffs with adequate alternative forums for their claims. Plaintiffs then appealed to the Ninth Circuit, which took a markedly different view.

Finding General Jurisdiction Exists Because MBUSA Was DCAG's Agent

On appeal, the Ninth Circuit recognized that there was no basis for exercising specific jurisdiction over DCAG because the claims did not "arise out of DCAG's contacts with California."

General jurisdiction, however, was a different matter. As the Ninth Circuit explained, courts should first examine "whether the defendant had the requisite contacts with the forum state to render it subject to the forum's jurisdiction" by considering either "substantial" or "continuous and systematic" contact with the forum state. If it does, courts next should examine whether the assertion of jurisdiction was fair and reasonable.

While there was little doubt that MBUSA had extensive contacts with California, the central question was whether MBUSA's contacts should be attributed to DCAG such that the district court could exercise general jurisdiction over DCAG. To decide this, the Ninth Circuit held that if either of two separate tests — the "alter ego" test or the "agent" test — were met, then it could "find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company."

The alter ego test requires a showing of actual control by the parent company, that "there is such unity of interest and ownership that the separate personalities of the two entities no longer exist, and … that failure to disregard their separate identities would result in fraud or injustice."

As those facts were not present, the Ninth Circuit turned to the second test, which evaluates whether the subsidiary acts as an "agent" for the parent company. The agency test is substantially easier to meet, and "is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation" such that the parent would step in and perform the same services if the subsidiary could not.

The Ninth Circuit also explained that while the agency test requires that plaintiffs show "an element" of control, this is "not as much control as is required to satisfy the 'alter ego' test." In fact, the court went a step further and concluded that sufficient control is shown so long as a right to control exists.

With this framework in place, the rest of the Ninth Circuit's opinion essentially writes itself. The court noted that MBUSA plays a role of "sufficient importance" to DCAG because the subsidiary sells a lot of vehicles in California (2.4 percent of DCAG's total worldwide sales), and that DCAG had a right to control MBUSA as evidenced by the general distributor agreement between them.

Having decided that the agency test allowed a federal court in California to exercise general jurisdiction over DCAG based on MBUSA's activities, the Ninth Circuit then turned to whether this exercise of jurisdiction would be reasonable. To analyze this, the court focused again on the importance of the California market to DCAG, as well as MBUSA's prior litigation in the state.

The court concluded that DCAG had used MBUSA to purposefully avail itself of the California market. It found DCAG was a large, sophisticated company that could easily defend itself in California, and it brushed aside Germany's sovereignty concerns by focusing on DCAG's interest in maintaining its connections to America's vast markets.

With respect to California's interest in adjudicating a case involving events that took place in Argentina, the Ninth Circuit made it clear that even though the alleged acts took place outside of California, "American federal courts, be they in California or in any other state, have a strong interest in adjudicating and redressing international human rights abuses."

Finally, the court rejected the argument that Argentina was an adequate available forum over doubt that Argentina would allow a civil lawsuit alleging torture to move forward given that nation's statute of limitations on "Dirty War" civil claims, and expressed doubts that Germany was an adequate available forum because a German court had stayed service of a related pre-lawsuit subpoena while it evaluated the impact on its sovereignty.

In sum, the court concluded that DCAG's connections to California through MBUSA supported the exercise of personal general jurisdiction, as did California's interest in adjudicating questions of human rights and its substantial doubt about whether any alternative forums exist.

Practical Concerns for Foreign Companies and Their American Subsidiaries

Bauman is significant and merits attention because it increases the likelihood that foreign corporations will be sued in American courts based on the activities of their U.S. subsidiaries. While some will argue that this case will help bring American-style justice to those wronged in other countries without recourse to any court, the decision is not limited to cases involving allegations of extraordinary human rights issues.

Rather, use of the "agency test" to establish general jurisdiction over foreign companies with U.S. subsidiaries makes every foreign corporation potentially vulnerable to lawsuits in America, even on issues having nothing to do with the U.S. subsidiary.

Bauman's reach, however, may soon be curtailed depending on what the U.S. Supreme Court holds in *Goodyear Dunlop Tires SA v. Brown*, which should be decided before the end of the term in June. In Goodyear, the Supreme Court is expected to rule on whether the Constitution prohibits the exercise of general jurisdiction over a foreign company when the lawsuit does not arise from events in the U.S.

Depending on the Supreme Court's decision in Goodyear, it may limit or undermine the validity of *Bauman*. Until the Supreme Court speaks, however, foreign companies should tread carefully if they, or their subsidiaries, act within the U.S.

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