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Bauman, the Supreme Court, and the Gutting of General Jurisdiction

By Casey Kaufman and Jason Friedman

The Supreme Court continued to erode our clients' rights with its recent decision significantly limiting the application of general jurisdiction to foreign entities. This decision has and will have significant effects on cases because personal jurisdiction is required in every lawsuit, in every court in the United States. In *Daimler AG v. Bauman*¹, authored by Justice Ginsberg, the Court addressed the venues where corporations may be sued, and restricted the reach of general jurisdiction to either the state of incorporation or the state of the entity's principal place of business.

In simple terms, *Bauman* allows a foreign manufacturer who designs and manufactures the product outside of the United States to use a local distributor to make massive profits from the United States in California without fear of liability for product defect. Procedurally, the Ninth Circuit had held that Daimler AG (Daimler) had the right to control Mercedes-Benz, USA LLC (MBUSA)'s day-to-day conduct and therefore it was fair to extend personal jurisdiction to Daimler by virtue of this agency relationship. The Supreme Court disagreed and held that Daimler, the designer and manufacturer of Mercedes-Benz vehicles, is not subject to general jurisdiction by virtue of its relationship with MBUSA. The Court's holding negated the application of agency principles to support a finding of personal jurisdiction over foreign corporations.

The opinion exists in a fictional vacuum without consideration of today's global marketplace filled with enormous transnational corporations. It will have an immediate and massive impact on product liability cases, an impact that will grow as our global economy expands.

This article is intended to shed some light on the general jurisdiction issue and allow readers to anticipate issues before they arise, so as to act accordingly by filing in the right court and pleading in the right manner.

Specific and General Personal Jurisdiction and the Judicially Created Agency and Representative Services Doctrines

You may recall from law school that courts may assert personal jurisdiction over an individual or entity with sufficient minimum contacts purposefully directed towards the forum state such that the particular suit does not offend "traditional notions of fair play and justice."² Without sufficient minimum contacts to the forum state, the Due Process Clause of the Fourteenth Amendment prohibits jurisdiction.

There are two types of personal jurisdiction relevant to this article, specific and general. Specific jurisdiction is based upon the purposeful availment of a party via the privilege of

doing business in a state, i.e. the defendant's activities in the state gave rise to the claim. In the product liability context, specific personal jurisdiction exists over a defendant whose defective product sold in California injures a person in California.³

General personal jurisdiction exists when a party may be haled in a state for any reason based solely upon residency. Corporations generally have two residences, the state of incorporation and the state which houses their principal place of business. General personal jurisdiction exists when a party's affiliations are so continuous and systematic as to render them essentially at home in the forum state.⁴ For example, any person can sue Google in California for any reason or cause of action that arises in any state because Google's principal place of business is within California.

Since these types of personal jurisdiction were judicially described, courts have expanded general jurisdiction to address our evolving global



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economy. One such expansion was through the incorporation of the doctrine of agency. When a foreign corporation maintains a level of control over a subsidiary that is so extensive that the subsidiary can only be described as a means through which the parent acts, then the subsidiary is really an agent of the parent and if the court has jurisdiction over the subsidiary, it will be extended to the parent.⁵ The agency analysis focuses on the extent of control exercised by the parent and the doctrine is triggered when that control goes beyond the establishment of policy and direction for the subsidiary and into the realm of day-to-day control.

Another such doctrine is the representative services doctrine. While it is generally described as a sub-doctrine of agency, general agency principles are absent and there is no need for a parent/subsidiary relationship to exist for jurisdiction to flow to the foreign defendant. The representative services doctrine is triggered when the local entity performs a function that is compatible with and assists the parent in the pursuit of the parent's own business.⁶ Rather than focusing on the control between the local and foreign entities, this doctrine looks at the nature of the services provided. It will be triggered when the local entity performs a task that the foreign entity would have to do itself if it were to do business in California and the local entity did not exist.

Before the *Bauman* decision, these doctrines were used, albeit often unsuccessfully, to try to bring foreign corporations that were otherwise beyond the reach of California's long arm statute to justice in California courts. Now, it appears that the *Bauman* decision has determined that these agency doctrines are no longer valid exercises of jurisdiction.

The Bauman Case and Holding

In *Daimler AG v. Bauman* (2014) 134 S.Ct. 746, the Supreme Court unanimously ruled that Daimler, a German corporation, could not be sued in California federal court for lack of personal jurisdiction. The Court reiterated that general jurisdiction exists only where the corporation is "at home," where it is incorporated and where it has its principal place of business.

While *Bauman* was factually constrained to a foreign corporation being sued for conduct that occurred in Argentina, the potential consequences of the Court's holding cannot be overstated. *At its core, this decision suggests that corporations may no longer be sued in a particular forum simply because they do business there.* The decision strengthens the litigation protection foreign corporations may enjoy by exploiting our corporate law structure. The result is injured plaintiffs left without any remedy regardless of the culpability of a foreign defendant. To fully understand the holding of the case and its potential implications, a bit of background is required.

Factual Background – Daimler and Mercedes-Benz Argentina's Collaboration With the Argentinean Government During the "Dirty War"

Daimler AG ("Daimler") is a German corporation whose vehicles are sold world-wide. Daimler designs and manufactures Mercedes Benz vehicles for sale in the United States. Its vehicles are specifically designed to comply with Califor-

nia emission standards. Daimler considers the nature of the U.S. and California markets in designing its vehicles.

Consistent with the practices of many global corporations, Daimler has established a number of wholly-owned subsidiaries throughout the world. The plaintiffs in *Bauman* were 22 residents of Argentina who were former employees (or representatives of deceased employees) of Mercedes-Benz Argentina, Daimler's wholly owned subsidiary.⁷

Plaintiffs alleged they were victims of numerous human rights violations by the Argentinean Government during the "Dirty War" that took place in the 1970's and 1980's. Mercedes-Benz Argentina was accused of collaborating with government security forces to commit these violations. Plaintiffs filed suit in 2004 in the Northern District of California, asserting claims under the Alien Tort Statute and the Torture Victim Protection Act, as well as under California and Argentina law. They felt that there was no avenue to justice in the courts of Argentina. The lawsuit named the predecessor to Daimler as a defendant, claiming that the parent corporation should be held responsible for the actions of its Argentinean subsidiary.

Daimler moved to dismiss the action for lack of personal jurisdiction. Plaintiffs responded that Daimler was subject to general jurisdiction through its agency relationship to distributor and wholly owned subsidiary, Mercedes-Benz USA, LLC (MBUSA). MBUSA conceded that it was subject to general jurisdiction in California and the plaintiffs claimed that the jurisdiction should be imputed to Daimler via the agency theory.

MBUSA was and remains the sole distributor of all Mercedes-Benz vehicles sold in the United States. It is a wholly owned subsidiary of Daimler and it apparently "buys" vehicles in Germany and then ships them to the U.S. to be distributed to Mercedes-Benz dealerships that have approved by MBUSA. There are no other avenues of distribution for Mercedes-Benz vehicles in the U.S.. The district court granted Daimler's motion to dismiss, finding that plaintiffs failed to demonstrate that MBUSA acted as Daimler's agent, and therefore, its contacts with California could not be imputed to Daimler.

The Ninth Circuit Reversed, Finding Extensive Control By Daimler

On appeal, the Ninth Circuit reversed and held that Daimler was subject to personal jurisdiction in California through the contacts of its subsidiary MBUSA.⁸ The court analyzed a document entitled the General Distributor Agreement which detailed the control that Daimler had over MBUSA. Dieter Zetsche was simultaneously the Chairman of Daimler and MBUSA.

The General Distributor Agreement between Daimler and MBUSA explicitly defined the following:

- Daimler could Control and unilaterally reject any dealer or dealer location.
- Daimler created manuals and guidelines regarding dealership matters for MBUSA.
- Daimler must approve of the accounting, order, inventory, control and warranty claims processing systems, data storage, transmission, and communication system used by MBUSA.

- Daimler could obtain customer financial information.
- Daimler was to define MBUSA employee positions and approve replacement of key personnel at MBUSA.
- Daimler had a right to review MBUSA's comprehensive advertising and marketing plan and was required to approve advertising strategies.
- Daimler could unilaterally set and change prices at any time, effective immediately and could modify prices that MBUSA charged dealerships.
- Daimler could require MBUSA or dealerships to execute any reasonable agreement adopted by Daimler at any time.

Based on these facts, the Ninth Circuit held that MBUSA was so critically important to Daimler that Daimler would take on MBUSA's activities itself if MBUSA could not. Moreover, the distribution agreement between MBUSA and Daimler gave Daimler the "right to control nearly every aspect of MBUSA's operations." Accordingly, MBUSA was found to be Daimler's "agent" for purposes of establishing general personal jurisdiction, and MBUSA's extensive California presence could be imputed to Daimler.

The Supreme Court Rejects the Ninth Circuit's Agency Analysis

In an opinion authored by Justice Ginsburg in which seven other Justices joined, the Supreme Court held that due process prevented the exercise of general jurisdiction over Daimler based on MBUSA's California contacts. The Court began by rejecting the Ninth Circuit's agency analysis, noting that it "stacks the deck, for it will always yield a pro-jurisdiction answer." *Bauman*, 134 S.Ct. 746, 759.

The Court explained that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction." In the case of a corporation, the state of incorporation and the principal place of business are the "paradigm" examples of where the corporation is "at home." Because Daimler was neither incorporated nor headquartered in California, it was not "at home" in the state. While the Court did not "foreclose the possibility that in an exceptional case" a corporation's operations in a third forum "may be so substantial and of such a nature as to render the corporation at home in that State," it found Daimler's activities did not approach that level.

Regarding the agency theory itself, the Court held that its application would subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate. This, to the Court, is an outcome that would impermissibly sweep beyond previously rejected general jurisdictional doctrines and must be rejected.⁹

How *Bauman* Limits Our Client's Rights and Effects Our Practices

How does this decision affect our clients? In many cases personal jurisdiction is never in dispute, but this opinion will wreak havoc on product liability actions in the United States.

Forbes opines that the decision's impact on tort litigation in this country will be immediate and dramatic by greatly reducing forum-shopping, increasing defendants' rights

to remove matters to federal court, and potentially ending nationwide multiple defendant class-actions filed anywhere other than states where all defendants are at home.¹⁰

Any multinational corporation that has design and/or manufacturing hubs outside of United States will certainly take advantage of the holding of the *Bauman* case. In essence, the bigger the company, the bigger risk they have to not use a corporate shell game with a local distributor to avoid liability. All they have to do is create a U.S. subsidiary to act as its exclusive distributor, conduct the sale to this distributor outside the U.S., and then have the U.S. entity ship the products to the U.S. for sale.

This scheme has been used by Daimler with regard to Mercedes-Benz vehicles for years and has already served as an effective buffer in many automotive product liability cases that refused to find jurisdiction via agency.

Daimler designs and manufactures Mercedes-Benz vehicles in Germany, where it "sells" them to MBUSA. MBUSA ships the vehicles to the U.S. for distribution and sale. Profits flow the opposite direction, with 19% of Daimler's revenue generated from the sale of its vehicles in the United States with 2.4% coming from sales in California alone.

Imagine an action alleging design or manufacturing defect of a Mercedes-Benz vehicle sold in California and injuring a California resident in California. Given the product liability law in this state, that person would sue MBUSA (as distributor) and Daimler. Daimler would be dismissed, based upon *Bauman*, but the case could proceed against MBUSA.¹¹ Upon serving discovery to expose the defect, MBUSA will (and has for many years) claim that it has no information about the design or manufacture of the vehicle and that information is in the hands of another entity, namely Daimler.

We currently have two automotive product liability matters on appeal wherein Daimler alleged a lack of personal jurisdiction. In one matter, the trial court granted Daimler's motion to quash subpoena, and in the other, the trial court denied the same motion. In both matters, the Court of Appeal stayed the case pending the *Bauman* decision and we now wait to see if the Court of Appeal will follow *Bauman* and dismiss Daimler.

In another matter, we represent the children (California residents) of a man killed in a Cuban air crash of a French built airplane. The French company has had substantial, continuous and systematic contacts with California for over three decades including: a \$225+ million contract for the sale of up to 20 aircraft to a California corporation; multiple million dollar contracts with 11 different component part suppliers in California (some dating back to 1985) to supply critical aircraft components; frequent travel to California for the purpose of sponsoring shows, making presentations, promoting its products and meeting with suppliers; providing technical and parts support for a fleet of 16 aircraft operated by an airline that maintains regular routes in California; and advertising in numerous aviation trade magazines that are distributed in California. This matter was recently argued in front of the Ninth Circuit following the trial court's granting the motion to quash and a decision is pending.

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Conclusion

The decision in *Bauman* hurts the everyday consumer and benefits foreign and multinational corporations. It fails to address the realities of our global economy and guts current notions of general jurisdiction. Unfortunately, the worst effects from this opinion have yet to be seen or even imagined and it is critical to be aware of this case and its possible ramifications. **tl**

End Notes

1. (2014) 134 S.Ct. 746.
2. *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement* (1945) 326 U.S. 310.
3. Certainly, this is a generalized description of specific jurisdiction and there is a wealth of information regarding the intricacies of the subject.
4. *Perkins v. Benguet Consol. Min. Co.* (1952) 342 U.S. 437.
5. *Sonora Diamond Corp v. Superior Court* (2000) 83 Cal.App.4th 523
6. *Paneno v. Centres for Academic Programmes Abroad Ltd.* (2004) 118 Cal. App. 4th 1447
7. At the time, Daimler AG was known as DaimlerChrysler AG. The name of the German corporation changed when it sold its interest in Chrysler to Cerberus Capital Management for \$7.4 billion on 2007. In this article, I will refer to the German entity as Daimler or Daimler AG even though it may have had a different name at the time.
8. *Bauman v. DaimlerChrysler Corp.* (9th Cir. 2011) 644 F.3d 909.
9. See also *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S.Ct. 2846.
10. With *Bauman v. DaimlerChrysler*, High Court May Have Put Brakes on Forum Shopping - <http://www.forbes.com/sites/wlf/2014/02/04/with-bauman-v-daimlerchrysler-high-court-may-have-put-brakes-on-forum-shopping/2/>
11. One may say, "what about specific jurisdiction?" Many courts have held that, given Daimler's nuanced distribution scheme, it never purposefully availed itself in California so there is no basis for specific jurisdiction.

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