

Client Alert

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More Than Another Alien Tort Statute Case: The Supreme Court May Limit Personal Jurisdiction

By Grant J. Esposito and Brian R. Matsui

On October 15, the Supreme Court heard oral argument in the first of two significant personal jurisdiction cases on the docket: *DaimlerChrysler AG v. Bauman*, No. 11-965 (cert. granted Apr. 22, 2013). At first glance, *DaimlerChrysler* may appear to be yet another Alien Tort Statute case. But *DaimlerChrysler* is poised to address far more than that—the issues in the case involve the standard for general personal jurisdiction based on imputing the contacts of in-forum subsidiaries to foreign parent corporations. The question presented 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.”

At argument, most Justices appeared highly skeptical of the Ninth Circuit ruling. But at least from the tenor of the argument, there was no obvious consensus on *how* to resolve the case. Some Justices expressed concern over the interplay between the California long-arm statute and California corporate law; other Justices questioned whether and to what extent certain jurisdictional arguments may not have been preserved below. Yet while it is never wise to predict an outcome from the oral argument, it seemed unlikely the Supreme Court believed that due process permitted a German corporation to be sued in California by Argentine citizens for events that occurred in Argentina, as the Ninth Circuit had allowed.

The fireworks may continue next month. In November, the Supreme Court will hold argument in *Walden v. Fiore*, No. 12-574 (cert. granted Mar. 4, 2013). *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. 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.”¹

Both *DaimlerChrysler* and *Walden* 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. The Court held in 2011 that foreign corporate subsidiaries were not subject to general personal jurisdiction in a State because they were not “essentially at home” in that State. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2887 (2011). *Goodyear*, however, declined to address whether subsidiaries and parent corporations might be treated as a “unitary business” for jurisdictional purposes. But until the *Goodyear* decision (and the *J. McIntyre*

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.

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Machinery v. Nicastro, 131 S. Ct. 2780 (2011), decision the same 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). A ruling in both *DaimlerChrysler* and *Walden* is expected no later than the end of June 2014.

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DaimlerChrysler addresses the circumstances in which a subsidiary's contacts with the forum State are sufficient for the forum State to have general jurisdiction over the foreign parent corporation.

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, the plaintiffs and their relatives were employed by DaimlerChrysler's subsidiary in Argentina. 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 wholly-owned subsidiary incorporated in Delaware (Mercedes-Benz USA LLC). The Delaware subsidiary, which has its principal place of business in New Jersey, 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 dismissed the case for lack of jurisdiction.

The Ninth Circuit reversed, and held that DaimlerChrysler was subject to general jurisdiction under California's long-arm statute and the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit considered two separate tests for determining whether a subsidiary's in-state 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 plaintiffs acknowledged that the subsidiary was not an alter ego of the parent corporation.

The other test, known as the agency test, provided the basis for jurisdiction. That test requires two showings: (1) that the subsidiary was established for, or is engaged in, activities of sufficient importance that the parent would have to undertake similar activities itself, but for the existence of the subsidiary and (2) whether the parent has actual control over, or "the right to control," the subsidiary's internal affairs or day-to-day operations.

At oral argument, there was little defense of the Ninth Circuit's ruling. And much of the questioning concerned the basis to reverse or vacate the Ninth Circuit decision. Justices Ginsburg and Kagan expressed significant skepticism over the exercise of general jurisdiction over the German corporation. Justice Ginsburg emphasized that in *Goodyear* general jurisdiction applies only where a corporation is "at home"—such as the place of incorporation or principal place of business. After plaintiffs acknowledged that under the Ninth Circuit's ruling a hypothetical design defect suit could be brought against DaimlerChrysler in California, based on an accident taking place in Poland and injuring a Polish driver and passenger, Justice Kagan dismissed that argument as

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“obviously in error.”

Justices Scalia and Breyer expressed skepticism that the Ninth Circuit even had correctly interpreted California’s long-arm statute, given that California law generally respects the distinction between a corporate parent and its subsidiary. Both Justices expressed concern that the Ninth Circuit’s approach would dramatically expand the scope of corporate and shareholder liability.

Justice Alito asked whether a better rule would be that a subsidiary’s acts are not attributable to its parent unless it is an alter ego. Justice Sotomayor questioned whether it would be appropriate to apply the federal rules used in tax cases, which look to the activities of both parent and subsidiary. The Justices also questioned how it could be appropriate for a jurisdictional test to turn on the portion or percentage of sales made in the forum State—as such a test might require a particular numerical threshold. And Justice Breyer asked whether the case should be remanded to the Ninth Circuit for reconsideration in light of the Court’s subsequent holdings in *Goodyear* and *Kiobel v. Royal Dutch Petroleum*, an Alien Tort Statute case decided last Term.

WHAT COMES NEXT

Unless the Court decides to dismiss the case or vacate it in light of *Goodyear* and/or *Kiobel*, the Supreme Court likely will take several months to decide *DaimlerChrysler*. But in any event, an opinion should be released no later than by the end of June 2014.

Should the Court affirm the Ninth Circuit, the door might be opened for corporate defendants being subject to a broad range of civil suits in more places. Indeed, here, the Ninth Circuit found general jurisdiction against a large foreign corporation based upon a small portion of the corporation’s products being sold in the forum State. If adopted by the Supreme Court, such a ruling could permit foreign corporations to be subject to suit in any State where their products are sold, and such a suit could be for any claim, from any time, or anywhere in the world. If the Supreme Court reverses, *DaimlerChrysler* may make it more difficult for United States courts to exercise general jurisdiction over non-state defendants. The Court may use this opportunity to clarify the standard governing if and when an independent subsidiary’s activities may subject its foreign parent to suit in the United States.

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