Interstate Commerce Versus State Interest

Personal Jurisdiction, Registration as Consent, and the Commerce Clause

By T. Peyton Smith

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Seeking dismissal based on lack of personal jurisdiction has become a critical component of any defense, particularly when litigating in unfavorable jurisdictions. While defendants have experienced extraordinary success in recent years, some state courts and legislatures have found an end-run around the recent personal jurisdiction case law: business registration statutes that require consent to general jurisdiction. Challenges to these statutes have had varying degrees of success, but defendants may be litigating this issue while leaving their best argument on the shelf. This article assesses the personal jurisdiction landscape, the treatment of registration as consent, and the potential for using the Commerce Clause to attack registration-as-consent statutes.

The Turning Tides of Personal Jurisdiction Jurisprudence

In recent years the United States Supreme Court has set out to clarify the constitutional parameters of personal jurisdiction—the basis upon which a particular court can exercise power over a particular party. In the process, much of what many of us learned in Civil Procedure was turned on its head.

For many attorneys and judges, the long-standing lens through which we analyzed personal jurisdiction was "minimum contacts." Cases such as *International Shoe*, *Worldwide Volkswagen*, *Asahi Metal*, and *Burger King* taught that if a party's contacts with a forum were sufficient enough to conclude that the party had "availed itself" of the benefits of the forum's laws—even if the contact simply came through the flow of the "stream of commerce"—then that party was subject to suit in that forum. In practice, this standard was easily met when litigation involved a large corporation with

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operations all over the country. As a result, successful personal jurisdiction challenges were rare and, particularly in the mass tort context, fell off the radar of many litigators.

The 2011 U.S. Supreme Court term is when the seeds of change were planted, when the Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown,* and *J. McIntyre Machinery, Ltd. v. Nicastro*. In *Goodyear*, the Court set out to clarify the "blending" of specific jurisdiction and general jurisdiction. *Goodyear*, 564 U.S. 915, 920 (2011). The Court explained that general jurisdiction (jurisdiction over a party for any and all litigation) is limited to jurisdictions where a party's contacts "render it essentially at home in the forum State." *Id.* at 919. Meanwhile, in *Nicastro*, the Court explained that the placement of a product in the stream of commerce, without more, is not enough to create specific jurisdiction because actual contacts with the forum, not foreseeability, are the touchstone of jurisdiction. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 883 (2011).

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The narrowing of personal jurisdiction was thrust into the defense bar's public consciousness when the Supreme Court decided *Daimler AG v. Bauman* in 2014. Relying on the cases discussed above, the Supreme Court explained that a corporation is "at home" only where it is incorporated or has its principal place of business (barring exceptional circumstances), and therefore, those are the only jurisdictions in which a corporation is subject to general jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). As a result, general jurisdiction became a rare basis for establishing personal jurisdiction.

Then, in *Walden v. Fiore,* and *Bristol-Myers Squibb v. Superior Court of California,* the Supreme Court further clarified the parameters of specific jurisdiction. In these two cases, the Court made it unmistakable that for specific jurisdiction to exist there must be a relationship between the defendant, the forum, and the particular plaintiff's claim with the lawsuit arising out of, or related to, the defendant's contacts with the forum. *See Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773, 1780 (2017). In other words, the plaintiff's relationship to the forum cannot create specific jurisdiction; the relationship to the forum must be one initiated by the defendant. *See Walden v. Fiore*, 571 U.S. 277, 284–86 (2014). Importantly, this remains true even for mass torts, in which plaintiffs across the country currently sue defendants for a nationwide pattern of tortious conduct. *See Bristol-Myers Squibb*, at 1783–84.

In the wake of these decisions, there has been a resurgence of dismissals based on lack of personal jurisdiction. An issue that was previously dormant has become a vibrant part of the litigation landscape, particularly in multi-defendant mass torts through which plaintiffs try to bring a wide array of defendants (all with different "homes") into one court. But, the plaintiffs' bar continues to search for an avenue to stretch out the ever-narrowing scope of personal jurisdiction.

The Plaintiffs' Bar's Latest Campaign: Registration as Consent

As the scope of general jurisdiction and specific jurisdiction narrowed, plaintiffs began to home in on a caveat offered by the Supreme Court in *Daimler*—describing the "textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum*." *Daimler AG*, 571 U.S. at 129. The possibility of consent to jurisdiction created an end-run around any general or specific jurisdiction analysis. It did not take the plaintiffs' bar long to latch on to registering to do business as a basis for consenting to personal jurisdiction in the forum, which—if embraced—would effectively nullify the effect of *Daimler.*

Before the Supreme Court clarified the constitutional bounds of personal jurisdiction, several state courts had addressed whether personal jurisdiction was created by registering to do business. For example, the Delaware Supreme Court, in *Sternberg v. O'Neil*, concluded that the appointment of an agent for service of process constitutes express consent to general jurisdiction, based on the theory that this constituted a "presence" in the state. 550 A.2d 1105, 1124 (Del. 1988). This reading was consistent with the historic treatment of personal jurisdiction, under which an individual was amenable to suit in a forum if he or she was "tagged" with service of process while physically present in the forum. *See Burnham v. Superior Court of California*, 495 U.S. 604, 610–14 (1990) (discussing the issue); *see also Pennoyer v. Neff*, 95 U.S. 714 (1878).

These cases gave ample support for plaintiffs' attorneys to contend that registration as consent remained a viable theory of personal jurisdiction.

Registration as Consent Has Mixed Reviews Post-*Daimler*

After *Daimler* and its progeny clarified the due process parameters of personal jurisdiction, defendants began to raise due process challenges to registration-as-consent claims by plaintiffs. These challenges found varying degrees of success.

Several Courts Have Found that Daimler Ends Registration as Consent

One of the first successful post-*Daimler* challenges to registration as consent was a direct attack on the previously discussed *Sternberg* case in Delaware. As the Delaware Supreme Court explained in *Genuine Parts Co. v. Cepec*, the *Daimler* case represented a shift in personal jurisdiction jurisprudence that "undermines the key foundation upon which prior [] cases" relied. 137 A.3d 123, 133 (Del. 2016).

In *Genuine Parts*, the Delaware Supreme Court engaged in an exhaustive analysis of the turning tides of personal jurisdiction jurisprudence, placing a particular emphasis on the transformation that has occurred in our economy and in corporate organization since the seminal personal jurisdiction cases were decided. *See* 137 A.3d at 137. The Court noted, "It is in the context of this global economy that the U.S. Supreme Court issued its rulings in *Goodyear* and *Daimler*." *Id.* More importantly, "the Court made clear that it is inconsistent

with principles of due process for a corporation to be subject to general jurisdiction in every place it does business." *Id.* In view of this narrowing scope of personal jurisdiction, the Delaware Supreme Court found that registration as consent constituted "an unacceptably grasping and exorbitant exercise of jurisdiction" inconsistent with *Daimler*'s teachings. *Id.* at 141. Because *Sternberg* interpreted the Delaware registration statute by referencing cases now undermined by *Daimler*, the reasoning in *Sternberg* is no longer sound. 137 A.3d at 133. As a result, registration as consent no longer exists in Delaware.

Another state that previously was favorable to registration as consent was Missouri, where the *Pennsylvania Fire* case was originally decided. *See Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93 (1917) (holding that service of process on an agent appointed pursuant to Missouri statute was sufficient to convey jurisdiction). But post-*Daimler,* the Missouri Supreme Court decided that the registration as consent was no longer viable in the state. Relying on the reasoning in *Daimler* and *Genuine Parts*, the Missouri Supreme Court concluded in *State ex rel. Norfolk Southern Railway Co. v. Dolan,* that its registration statute "does not provide an independent basis for broadening Missouri's personal jurisdiction" where other bases for general jurisdiction are lacking. 512 S.W.3d 41, 52 (Mo. 2017) (*en banc*). As the court put it, "a broad inference of consent based on registration would allow national corporations to be sued in every state, rendering *Daimler* pointless." *Id.* at 51.

Several courts around the country have rejected similar registration-as-consent arguments by embracing the restrictive view of general jurisdiction in *Daimler. See, e.g., Lanham v. Pilot Travel Centers, LLC*, 2015 WL 5167268, at *4–10 (D. Or. 2015). *see also Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639–40 (2d. Cir. 2016).

Others Have Rejected *Daimler*-based Challenges

While dozens of courts around the country have rejected registration as consent post-*Daimler,* plaintiffs' attorneys have still had some success. Typically, the courts that embrace registration as consent follow pre-*Daimler* precedent and simply conclude that *Daimler* was not the sea change that defendants claim. For example, in *Spanier v. American Pop Corn Co.*, the United States District Court for the Northern District of Iowa relied on Eighth Circuit precedent that previously held, "[o]ne of the most solidly established ways of giving such consent is to designate an agent for service of process within the State." 2016 WL 1465400, at *4 (N.D. Iowa 2016) (relying on *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990)). Recognizing that neither *Daimler* or *Goodyear* "contain[] any meaningful discussion of consent to jurisdiction," the court reasoned that those cases have little bearing on the registration-as-consent analysis. *Spanier*, 2016 WL 1465400, at *4. District courts throughout the Eighth Circuit have embraced similar reasoning. *See, e.g., Perrigo Co. v. Merial Ltd.*, 2015 WL 1538088, at *7 (D. Neb. 2015) (*Daimler* "does nothing to upset well-settled law regarding what acts may operate to imply consent"); *Ally Bank v. Lenox Financial Mortgage Corp.*, 2017 WL 830391, at *3 (D. Minn. 2017) (holding that *Daimler* did not address "the limits of a defendant's capacity to consent to personal jurisdiction").

Likewise, federal and state courts in Pennsylvania have rejected *Daimler*-based challenges to registration as consent. Pennsylvania courts consistently have found that "[t]he Supreme Court did not eliminate consent" in *Daimler*, and "consent remains a valid form of establishing personal jurisdiction." *Webb-Benjamin, LLC v. International Rug Group, LLC*, 192 A.3d 1133, 1138–39 (Pa. Super. Ct. 2018) (quoting *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 655 (E.D. Pa. 2016)). As the Pennsylvania Superior Court stated, the *Daimler* opinion "makes a clear distinction between jurisdiction by consent, and the method of establishing personal jurisdiction that forms the basis of its analysis and holding." *Webb-Benjamin, LLC*, 192 A.3d at 1138.

While this view is in the minority, several courts around the country have given a limited reading to *Daimler* and its progeny with respect to registration as consent.

A Clear Reasoning Emerges

Despite a split existing among courts around the country, a common thread has emerged that gives a sound rule of thumb when analyzing registration-as-consent issues. Over and over, courts have focused on the particular language of the registration statute and whether it expressly provides for consent to general jurisdiction. For example, in Pennsylvania the statute "specifically advises the registrant of its consent by registration." *Id.* Courts rejecting registration as consent have latched onto this distinction between the law of their state and that of Pennsylvania. *See, e.g., Genuine Parts*, 137 A.3d at 140.

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As the Missouri Supreme Court has explained, "[t]he extent of any consent inferred from a registration statute is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given." *Dolan*, 512 S.W.3d at 52. This focus on the particular language of the registration statute brings this line of cases into harmony with the older line of registration-as-consent cases from the United Supreme Court and intuitively makes sense from a due process perspective. *See, e.g., Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917).

State Legislatures Exploring Expansion of Registration-as-Consent

Latching onto this emerging logic in the registration-as-consent jurisprudence, some state legislatures have sought to amend their registration statutes to add clear consent language. Most prominently, New York's legislature has pushed for a

modified registration statute that provides for express consent to general jurisdiction. *See, e.g.,* A.B. 5918 (N.Y. 2017). To date, this effort has been unsuccessful. But as other state courts overturn registration as consent and their legislatures follow New York's lead, it is not inconceivable to imagine a litigation landscape that has had many of the post-*Daimler* gains reversed by plaintiff-friendly state legislatures. Given the aforementioned case law and the potential movement toward rewriting registration statutes, it is important for the defense bar to recognize a potent weapon in its arsenal when fighting against registration as consent.

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An Open Question: Does Registration as Consent Violate the Commerce Clause?

All in all, a clear jurisprudential doctrine appears to have emerged post-*Daimler* around registration as consent, finding that this basis for jurisdiction remains viable as long as a state's registration statute is explicit in its requirement for consent to suit in the forum. Nothing in the *Daimler* opinion or its progeny suggests that this is out of step with due process, the typical touchstone of personal jurisdiction challenges. But no appellate court has addressed whether registration as consent runs afoul of a different constitutional doctrine: the Commerce Clause.

Basics of the Commerce Clause Argument

At the most fundamental level, if "the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade," the regulation at issue may run afoul of the Commerce Clause. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1988). The Supreme Court has made clear that "state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny." *Id.* at 894. While due process is the basis for most modern personal jurisdiction challenges, in the early twentieth century, the Commerce Clause was regularly incorporated into personal jurisdiction challenges. John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 Iowa L. Rev. 121, 131 (2016).

In fact, in *Davis v. Farmers' Co-Op Equity Co.*, 262 U.S. 312 (1923), the Supreme Court found that Minnesota's exercise of personal jurisdiction based on a registration statute was unconstitutional based on the Commerce Clause. *See* Preis, *supra*, at 132. Concluding that "litigation in states and jurisdictions remote from that in which the cause of action arose" requires "absence of employees from their customary occupations" and thereby "impairs efficiency in operation," the Supreme Court determined that a registration statute requiring a party to submit to personal jurisdiction places an undue burden on interstate commerce and violates the Commerce Clause. *Davis*, 262 U.S. at 315–17. Challenges of this nature were not uncommon before the Court expanded personal jurisdiction in *International Shoe*. *See* Preis, *supra*, at 132.

Post-*International Shoe,* the challenges dwindled but did not become extinct. In *Bendix*, the Supreme Court analyzed the constitutional validity Ohio's statute of limitations because it included a provision tolling the statute of limitations for claims against any out-of-state company that was not registered to do business in the state. 486 U.S. at 890, 893. This statute is particularly relevant to the analysis here because Ohio's registration statute required consent to general personal jurisdiction. *Id.* The Court stated that a "State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain." *Id.* To do so would "impose[] a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations." *Id*. at 894.

These cases lay out the basics of the argument: it is unconstitutional to discriminate against or unduly burden out-of-state companies. Requiring multi-state, national, and international corporations to submit to general personal jurisdiction to do business in a given state places a burden on such companies that is not borne by local companies—namely that they are forced to be "at home" in jurisdictions outside of the paradigmatic home jurisdictions. The alternatives for these out-of-state companies are to blackout an entire market (thereby restricting interstate commerce), or refuse to register and face an array of penalties. It is difficult to conceive of a legitimate state interest in a post-*Daimler* world to justify this discrimination.

How Courts Have Received the Commerce Clause Argument Post-*Daimler*

After *Daimler*, courts have not entertained many Commerce Clause challenges to personal jurisdiction, but when the argument is raised, it has been met with mixed reviews. Early on courts gave reason for optimism. For example, the Delaware Supreme Court states in dicta in *Genuine Parts* that "in our federal republic exacting such a disproportionate toll on commerce is itself constitutionally problematic." *Id.* 137 A.3d at 142. In a footnote, the Delaware Supreme Court went on to quote two Commerce Clause opinions from the Supreme Court. *Id*. at n.108.

One month after *Genuine Parts*, the United States District Court for the District of Kansas addressed the issue head-on. In *In re Syngenta AG MIR 162 Corn Litigation*, Syngenta relied heavily on *Davis,* arguing that treating registration as consent to jurisdiction created an undue burden on interstate commerce. 2016 WL 2866166 (D. Kan. 2016). The plaintiffs in this case argued that Syngenta failed to present evidence showing that there was any burden placed on the company or interstate commerce as a result of the registration statute. *Id.* But the court ultimately agreed with Syngenta, finding that the Supreme Court's holding in *Daimler* "implicitly recognized"

the burden to companies that are unfairly subject to personal jurisdiction. *Id*.

More recently, however, courts have criticized these constitutional attacks on registration as consent. For example, a New Mexico appellate court rejected a Commerce Clause challenge to a registration statute because the plaintiff was a New Mexico resident who was injured in the state. *Rodriguez v. Ford Motor Co.*, ____ P.3d ____, 2018 WL 6716038, at *7 (N.M. Ct. App. 2018). These facts gave New Mexico an "interest in providing a forum for its residents and those injured [t]here" that made any purported burden on interstate commerce constitutionally "justified." *Id*.

In *Hegna v. Smitty's Supply, Inc.*, the United States District Court for the Eastern District of Pennsylvania followed a similar logic, concluding that a Commerce Clause challenge failed where the plaintiff was a resident of Pennsylvania. 2017 WL 2563231, at *5 (E.D. Pa. 2017). The court in *Hegna* particularly focused on the Supreme Court's dicta discussion of the issue in *Davis*, which stated, "It may be that a statute like that here assailed would be valid… if the plaintiff was, when [the action] arose, a resident of the state." *See Hegna*, 2017 WL 2563231, at *4 (citing *Davis*, 262 U.S. at 316–17). The *Hegna* court went on to state that the defendant "has not identified any authority" invalidating a registration statute that imposes general personal jurisdiction based on a Commerce Clause challenge when "[the] lawsuit was brought by a state resident." *Hegna*, 2017 WL 2563231, at *5.

The Pathway for Success

In view of this admittedly limited case law, the crux of any Commerce Clause challenge to a registration-as-consent statute will be balancing the burden imposed on interstate commerce with the purported state interest in obtaining general jurisdiction via registration. As the case law stands, the dividing line has been whether the plaintiff is a resident of the forum state. Therefore, a clear blueprint for success exists in matters involving out-of-forum plaintiffs. This should be encouraging. A recent report suggests that only sixteen percent of new pharmaceutical cases filed in Philadelphia—a jurisdiction subject to a registration-as-consent statute—involve Pennsylvania residents. *See* Nicholas Malfitano, *In Philadelphia, Only 16 Percent of New Pharma Cases Are from Pennsylvania Residents*, PennRecord (July 2018).

That said, defendants should not accept the reasoning in *Rodriguez* and *Hegna* without a fight. The Supreme Court's statements in *Davis* on this issue were equivocal. While a state may have an interest "in providing a forum to its residents and those injured [t]here," this interest does not justify unlimited discrimination against out-of-state companies. First and foremost, the Supreme Court has found that a law is "*per se* invalid" under the Commerce Clause when there is "different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of State of Or.*, 511 U.S. 93, 99 (1994). A registration statute that requires consent to general jurisdiction is arguably facially discriminatory because in-state corporations are already "at home" in the state, and therefore, they are not "consenting" to anything new. This operates as a deterrent to out-of-state participation in the market, thereby protecting competing in-state economic interests.

If a court concludes that such a statute is "nondiscriminatory" but merely has "incidental effects on interstate commerce," then the statute is valid "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* Here, we find the balancing test applied in the cases discussed above. The question ultimately presented is whether a state's interest in providing a *local* forum to its own residents is outweighed by the burden placed on interstate commerce by requiring out-of-state companies to consent to suit in states with no connection to the state other than the residence of the plaintiff.

Mass tort defendants should be able to quantify this burden in real dollars and cents by looking to their litigation expenses and settlement demands in a given forum (such as Philadelphia) compared to their "home" jurisdictions. Defendants should also focus on the truly narrow state purpose presented here. The registration statute is not necessary to provide a resident with a forum; personal jurisdiction will exist *somewhere* for that resident to file suit against the defendant. Also, the registration statute is not necessary to provide a local forum for a resident in most cases. Specific jurisdiction will often provide a local forum for an in-state resident. Instead, the interest is simply in providing a local, convenient forum for residents involved in litigation that is not otherwise connected to the forum.

When challenging registration statutes based on the Commerce Clause, defendants can tell a compelling story about how the Supreme Court in *Daimler* contemplated the overwhelming burden imposed on defendants by the statutes when they are subject to general jurisdiction where they are not "at home." But defendants must not stop there. The Commerce Clause challenge must illustrate that burden in detail while appropriately framing the truly limited state interest in demanding consent to jurisdiction. By highlighting the stark contrast between the burden imposed and the interest protected, defendants can continue to win battles in the war over personal jurisdiction. FD