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The Other *Shoe* Drops on General Jurisdiction: Making the Most of Supreme Court's *Bauman* & *Goodyear* Rulings

by James M. Beck and Michelle Lyu Cheng

Doing business in all 50 states no longer subjects a corporation to suit in all 50 states, and *International Shoe*[1] is not the last word on general jurisdiction. Based on the Supreme Court's 2011 decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*[2], and this term's *Daimler AG v. Bauman*[3] opinion, "general" personal jurisdiction has been limited. Such jurisdiction should not be assumed, as it has been, to extend to any non-resident corporation engaging in substantial, continuous, and systematic business in any state. These recent decisions establish that *general* jurisdiction can be asserted against corporations only in three limited places: (1) the corporate defendant's state of incorporation, (2) its principal place of business, and (3) "in an exceptional case" where the corporation's in-state activities are "so substantial and of such a nature as to render the corporation at home in that State." In *Bauman*, Justice Ginsburg expounded upon this "at home" formulation, with nearly unanimous support from other justices by explaining:

> A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of…activity" having no connection to any in-state activity.[4]

By virtue of this re-calibration of general jurisdiction principles, corporate defendants doing business nationally should closely examine each plaintiff's selected forum, particularly on jurisdictional grounds, lest lack of personal jurisdiction be inadvertently waived.

Specific Jurisdiction and General Jurisdiction. The contours of general and specific jurisdiction are limited by the "due process constraints on the assertion of adjudicatory authority."[5] *International Shoe* and its progeny organized the exercise of personal jurisdiction into specific, or "conduct-linked" jurisdiction, and general, or "all-purpose" jurisdiction.[6] Specific jurisdiction has been the subject of much analysis, including a new decision from this past term.[7] Guidance concerning general jurisdiction since *International Shoe* has been sparse and factually

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[1] *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).
[2] 131 S. Ct. 2846 (2011).
[3] *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
[4] *Id.* at 762, n.20 (citations omitted).
[5] *Id.* at 751.
[6] *Id.*
[7] *See Walden v. Fiore*, 134 S. Ct. 1115 (2014).

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driven, with little specificity beyond an oft-repeated mantra that general jurisdiction exists where a corporation conducts "continuous and systematic" business in that state.[8]

The 2011 *Goodyear* decision provided the first clear guidance on general jurisdiction in the modern era. The plaintiffs, two North Carolina residents killed in a French bus accident, alleged that the defendant's tire caused the accident. The plaintiffs sued the American parent and several of its foreign subsidiaries. The Supreme Court reversed lower court decisions holding that there was general jurisdiction over the subsidiaries, finding that they were not "at home" in North Carolina, such that all-purpose jurisdiction (or another coined phrase, "dispute-blind" jurisdiction) could not be asserted over them.[9]

This past term's decision in *Bauman* clarified when a corporation was not "at home." The jurisdictional facts in *Bauman* were attenuated. The plaintiffs were Argentinians suing a German corporation over the alleged conduct of its subsidiary in Argentina. They brought suit in California federal court. Reversing a U.S. Court of Appeals for the Ninth Circuit finding of general jurisdiction on an "agency" theory, the Supreme Court did not reach the agency question. Assuming agency, the Court held that even the defendant's subsidiary's contacts with California failed to establish general jurisdiction. The subsidiary had multiple California-based facilities and was the largest supplier of luxury vehicles to that state's market.[10] For general jurisdiction, however, "continuous and substantial" business activity as the sole test was "exorbitant," as such contacts were not nearly enough.[11] Substantial business was necessary, but not sufficient. The relevant jurisdictional test is not merely "continuous and substantial" business, but whether a corporation's affiliations with a state are so "continuous and systematic as to render [it] essentially at home" there.[12] Imposing general jurisdiction over a foreign corporation merely because it engaged in substantial, continuous and systematic business in that state, concluded the Court, was "unacceptably grasping."[13]

For corporate entities, "the place of incorporation and principal place of business" are "paradig[m] bases for general jurisdiction."[14] These places are "unique" in that "each ordinarily indicates only one place—as well as easily ascertainable."[15] *Bauman*'s general jurisdictional test provides "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."[16] The Court did not offer much more. *Bauman* noted that it was "not foreclos[ing] the possibility" of what it described as an "exceptional" case where contacts with some other jurisdiction could be "so substantial and of such a nature as to render the corporation at home in that State."[17] The example given, *Perkins v. Benguet Consolidated Mining*, was an extreme situation of a Philippines corporation that became a war refugee during World War II, and had moved its entire operations to another location for the duration.[18] Mere conduct of "continuous and substantial business" "do[es] not approach that level."[19]

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[8] *See e.g.*, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).
[9] 131 S. Ct. at 2857.
[10] 134 S. Ct. at 752.
[11] *Id.* at 760 and 761-62 ("If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to 'structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'") (citation omitted).
[12] *Id.*at 761 (quotation marks omitted).
[13] *Id.*.
[14] *Id.* at 760 (citation and quotation marks omitted).
[15] *Id.*
[16] *Id.*
[17] *Id.* at 761 n.19.
[18] *See* 342 U.S. at 447-48.
[19] 134 U.S. at 761 n.19.

Bauman *Substantially Restricts Forum-Shopping*. *Bauman*'s impact on litigation practices, particularly in mass torts, could be dramatic. The basis for what plaintiffs call "magnet jurisdictions" and what defendants call "Judicial Hellholes®" is that any large corporation—say, an asbestos defendant in Madison County, Illinois or a pharmaceutical corporation in Philadelphia, Pennsylvania—can be sued anywhere it does business. *Bauman* undermines this assumption: even large-scale sales, without more, do not matter. Doing business is no longer dispositive, so unless the facts of a particular mass tort plaintiff's case are sufficient to establish "specific" personal jurisdiction, defendants sued in such locations should succeed with jurisdictional challenges, provided they are not incorporated/do not have their principal place of business in that state.[20]

Thus, most mass tort plaintiffs will have only three available forum choices: state of defendant's incorporation/its principal place of business, or a forum appropriate under a "specific" jurisdiction rubric (usually the plaintiff's domicile). Attempts to assert *Bauman*'s "exceptional circumstances" footnote loophole will require facts on the order of *force majeure*. However, personal jurisdiction is a waivable defense. If a defendant does not raise it at or near the outset of litigation, it is gone. To take advantage of *Bauman*, defendants must be vigilant and assert it promptly.

Bauman's *Impact on Unrelated, Multi-Plaintiff Actions*. With the passage of the Class Action Fairness Act ("CAFA"), mass tort plaintiffs seeking to avoid federal jurisdiction have increasingly resorted to multi-plaintiff complaints—purporting not to be class actions—filed in state court with just a few less than CAFA's 100-plaintiff cutoff for mass actions.[21] After *Bauman*, such complaints can only be filed where the plaintiffs live, or where the defendant has its principal place of business/state of incorporation. Thus, the linchpin of litigation will shift from the single, non-diverse plaintiff (where it now rests) to whether there is personal jurisdiction over the defendants. Furthermore, since personal jurisdiction is defendant specific, plaintiffs will not be able to resort to "fraudulent misjoinder" of a single "in-state" defendant to satisfy *Bauman*.

Even if the action is not removable to federal court, most of the 100 or so defendants in a typical asbestos action filed by a non-resident plaintiff will ordinarily escape jurisdiction because the plaintiffs cannot meet the "at home" standard emphasized in *Bauman*. Questions of "specific" personal jurisdiction, particularly attenuated "stream of commerce" theories, will become the lifeline on which the existence of major litigation "hellholes" will depend. Even then, in multi-plaintiff actions, defendants can assert jurisdiction defenses on a claim-by-claim basis in some suits, which comports with longstanding law that the exercise of specific jurisdiction over claims can and should be examined individually.[22] Specific personal jurisdiction based on minimum contacts should require that unrelated plaintiffs merely bootstrapping claims to the linchpin jurisdictional plaintiff be dismissed for lack of personal jurisdiction.[23]

Bauman's *Impact on Fraudulent Misjoinder in Removals*. A second form of a multi-plaintiff action is one intended to defeat diversity, rather than CAFA. *Bauman* can put a serious crimp in the plaintiff bar's continuing efforts to undermine defendants' rights to remove diversity-jurisdiction lawsuits from state court to federal court.

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[20] Once personal jurisdiction exists in a state, whether a defendant can be sued in a particular county of that state is a question of state venue rules, not constitutional jurisdiction principles.

[21] The Class Action Fairness Act requires removing to federal court "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i).

[22] *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (noting that each plaintiff must show that his or her claims arise out of or are related to the defendant's contacts with the state); *see also Phillips Exeter Academy v. Howard Phillips Fund, Inc.*, 196 F.3d 284 (1st Cir. 1999) (examining the contract and tort claims separately for the specific jurisdiction analysis, noting that "[q]uestions of specific jurisdiction are always tied to the particular claims asserted"); *In re Auto. Antitrust Cases I & II*, 135 Cal. App. 4th 100, 113 (2005) (personal jurisdiction is based on each non-resident's acts in the state); *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1290, n.8 (9th Cir. 1977), citing 6 C. Wright & A. Miller, Federal Practice and Procedure § 1588, at p. 816 (1971).

[23] Alternatively, a more complicated procedure could be employed: move to sever each of the plaintiffs' claims and simultaneously file a motion to dismiss each of the unrelated plaintiffs based on lack of personal jurisdiction.

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These cases involve "fraudulent misjoinder," the admixture of one, or a few, non-diverse plaintiffs in a complaint with far more diverse plaintiffs and defendants. Often such complaints include plaintiffs from dozens of jurisdictions.

Washington Legal Foundation has helped fight numerous suits in which plaintiffs' counsel combine the claims of numerous plaintiffs in a single lawsuit filed in a favored state-court forum and then add one plaintiff whose citizenship corresponds with the corporate defendant's principal place of business. The plaintiffs' intent is to forum-shop and to defeat removal rights by eliminating complete diversity of citizenship. But if the defendant is not "at home" in the selected forum state, and if the added plaintiff cannot assert a claim arose within that forum state, then *Bauman* dictates that the claims of the non-diverse plaintiff must be dismissed—thereby restoring the defendant's removal rights.

Bauman's *Impact on Class Actions*. *Bauman* adds even more complexity to jurisdictional matters in class actions. In most nationwide class actions, the claims of most class members will not arise in the forum state. Procedural rules allowing class actions cannot expand substantive law, including the law of personal jurisdiction. Thus, most of the claims in a nationwide class action, unless brought in a jurisdiction where all corporate defendants are "at home," should be subject to dismissal on jurisdictional grounds after *Bauman*—unless the claims are brought under some federal statute that relaxes jurisdictional requirements (such as by aggregating nationwide contacts[24]). Thus, jurisdiction in the class-action context will turn on specific jurisdiction analysis.

One example, is *Bates v. Bankers Life & Casualty Co.*,[25] a post-*Bauman* decision in which the court found that the class plaintiffs' claims could not survive against the parent company of the target defendant due to lack of general jurisdiction. Specific jurisdiction was more successful as, on a claim-by-claim basis, most claims survived.[26]

Bauman*'s Impact on Litigation Targeting Remotely Situated Defendants*. In some litigation, most notably that involving climate change, plaintiffs in one part of the country have deliberately targeted defendants that conduct their business in other parts of the country or even (analogously to *Bauman*) other parts of the world. After *Bauman*, such litigation is no longer possible under state law, since remotely situated defendants satisfy none of the constitutional requirements for personal jurisdiction. In *American Electric Power Co. v. Connecticut*,[27] the Supreme Court already rejected a federal basis for climate change litigation. After *Bauman*, the ability of climate change plaintiffs to obtain jurisdiction over remotely-situated defendants is extremely questionable, particularly since a single defendant's contribution to any alleged harm is minimal at best.

Bauman's *Impact on Industry-Wide Theories of Liability*. Certain novel state-law theories of liability, such as market-share liability and public nuisance, seek to target entire industries. They are implicitly predicated, in many instances, on all or at least a large percentage of an industry being subject to personal jurisdiction in the same court. A market share plaintiff, for example, by definition cannot establish actual injury caused by a particular defendant—upon which specific personal jurisdiction is typically established. *Bauman* eliminates such a plaintiff's ability to predicate general jurisdiction on the mere fact of the non-resident corporation's doing business in the forum state. While *Bauman* is not a rule of substantive tort law, to the extent that joinder of all or most of an entire industry is a substantive or even practical requirement of a novel tort claim, the effect of this decision in practice may be to preclude application of such theories.

Conclusion. Corporate defendants facing hordes of lawsuits in forums where they are not "at home" should immediately incorporate *Bauman* into their litigation strategies. Because objections to personal jurisdiction are waived if not asserted in the first instance, this must be done early in litigation.

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[24] For example, the Federal False Claims Act provides that "[a]ny action under section 3730 may be brought in any judicial district in which any defendant … can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." 31 U.S.C. § 3732(a).

[25] ___ F. Supp.2d ___, 2014 WL 292508, at *7 (D. Or. Jan. 27, 2014).

[26] *Id.* at *14.

[27] 131 S. Ct. 2527 (2011).

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