Daimler Decision Topples
Longstanding New York Cases
by Leslie R. Bennett

Almost one hundred years ago, Benjamin Cardozo, then a Judge on the New York Court of Appeals, rendered a decision in *Tauza v. Susquehanna Coal Co.*[1] That decision withstood the test of time, and has been a centerpiece on the subject of general jurisdiction for New York courts since 1917. On Tuesday, January 14, 2014, Justice Ruth Bader Ginsburg, joined by seven other Justices, essentially rendered that decision and its progeny moot by their ruling in *Daimler AG v. Bauman*.[2] In toppling *Tauza*, the Supreme Court drastically narrowed the opportunities for asserting jurisdiction in New York, particularly over large multinational and multistate corporations and other entities.

Tauza

The central question in *Tauza* was whether New York could assert jurisdiction over the defendant, Susquehanna Coal, a Pennsylvania company whose principal place of business was in Philadelphia. Plaintiff, a New York resident, sued Susquehanna Coal on a cause of action that was not related to any of the company's business activities in New York. Since the action was filed long prior to New York's adoption of its long-arm statute as part of the Civil Practice Law and Rules in 1963, the only basis for jurisdiction over Susquehanna Coal was due to the company's alleged presence in New York under principles of general jurisdiction.

Judge Cardozo concluded that Susquehanna was subject to New York's jurisdiction, because the company was in fact "here."[3] Judge Cardozo summarized the facts leading to this conclusion as follows:

> In brief, the defendant maintains an office in this state under the direction of a sales agent, with eight salesmen, and with clerical assistance, and through these agencies *systematically and regularly* solicits and obtains orders which result in continuous shipments from Pennsylvania to New York.

(Emphasis added.)[4] Continuing in his inimitable style, Judge Cardozo stated: "To do these things is to do business within this state in such a sense and in such a degree as to

[1] 220 N.Y. 259 (1917).

[2] 2014 WL 113486 (January 14, 2014).

[3] 220 N.Y. at 267.

[4] *Id.* at 265.

subject the corporation doing them to the jurisdiction of our courts."[5] Other facts were cited by later decisions and other authorities: all sales made to New York customers required confirmation by the main office in Philadelphia, the company had a bank account in New York, and the funds from that account were used to pay for the salaries of the employees in New York, including the eight salesmen operating out of the New York branch office.

No information was provided in *Tauza* as to the amount of coal sales generated in New York for the Pennsylvania company, either absolutely or relative to sales in Pennsylvania or elsewhere. The linchpin of the decision, as recognized in many analyses of *Tauza*, was Cardozo's conclusion that the company was here "not occasionally or casually, but with a fair measure of permanence and continuity."[6] Judge Cardozo added that there was "no precise test of the nature and extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the company is here."[7] Lastly, Judge Cardozo observed: "We hold further, that the jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted."[8]

Interestingly, in rendering his decision, Judge Cardozo cited and relied upon prior decisions of the United States Supreme Court, at least one of which was described as going "farther than we need to go to sustain the service here."[9] Since *Tauza* was decided long before the due process standard articulated in *International Shoe v. Washington,*[10] the Court of Appeals did not address any due process issues.

Bryant

The Court of Appeals revisited the reach of general jurisdiction in New York in 1965 in *Bryant v. Finnish National Airline*.[11] The case is notable, because the Court of Appeals sustained jurisdiction over the defendant corporation even though the

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[5] *Id.* at 266.

[6] *Id.* at 267.

[7] *Id.* at 268.

[8] *Id.*

[9] *Id.* at 266.

[10] 326 U.S. 310 (1945).

[11] 15 N.Y.2d 426 (1965).

corporation's activities in, and relationship to, New York was much skimpier than in *Tauza*.

In *Bryant*, Chief Judge Desmond, speaking for the Court of Appeals, upheld jurisdiction over the defendant foreign corporation arising from a suit by a New York resident arising from a personal injury in Paris, France. Plaintiff, a stewardess for TWA, alleged she was injured when she was struck by a baggage cart that was blown across the tarmac at Orly airport by a blast of air from one of defendant's planes.

Finnish National Airline was a corporation organized under the laws of Finland with a principal place of business in Helsinki. The airline was not licensed to do business in the United States, none of its officers, directors or shareholders were citizens of the United States, and none of its planes flew within the United States. It maintained a one and a half room office in Manhattan, staffed by three full-time and four part-time employees, that did not sell any airline tickets for the Finnish airline. It did, however, transmit reservations on the airline from international air carriers or travel agencies to the airline's European office and at times transmitted confirmations back to the international carriers or travel agencies. The New York office also did some publicity and advertising for the airline, including some ads regarding the airline's European services, and maintained a $2000 bank account for payment of staff salaries, rent and office expenses.

Citing and quoting from *Tauza*, the Court of Appeals held that this limited footprint in New York was enough to conclude that the airline was here for jurisdictional purposes. Chief Judge Desmond observed: "The test for 'doing business' is and should be a simple and pragmatic one" and the factual record was enough to conclude that the defendant was suable in New York.[12]

Bryant may well be considered at or near the outside perimeter of the doctrine articulated in *Tauza*, i.e., that all that is required is proof of activities conducted "not occasionally or casually, but with a fair measure of permanence and continuity." In any event, *Tauza* and *Bryant* have routinely been offered up to law students and the bar as standard fare in determining whether a New York court may assert jurisdiction over an unlicensed foreign corporation where the cause of action did not arise out of activities by the defendant in New York.[13]

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[12] *Id.*at 432.

[13] *See, e.g.,* D. Siegel, New York Practice, § 82 (5th ed. 2013); O. Chase & R. Barker, Civil Litigation in New York, pp. 26, 28 (6th ed. 2013). For an excellent discussion on this subject and related issues, *see* V. Alexander, "Doing Business" Jurisdiction: Some Unresolved Issues, N.Y.L.J., Mar. 29, 2001, p. 3.

Enter *Daimler*. Cutting to the chase, the Supreme Court explicitly described the assertion of general jurisdiction pursuant to the principles articulated in *Tauza* – based on activities conducted "not occasionally or casually, but with a fair measure of permanence and continuity" – as *"unacceptably grasping"* and *"exorbitant exercises of all-purpose jurisdiction"* (emphasis added).[14] For New York practitioners, this characterization of a standard that has been applied for almost 100 hundred years, and authored by a legendary jurist is, quite simply, breathtaking.

Daimler

Daimler has effectively changed the landscape for suits based on general jurisdiction, or as it has lately come to be known, all-purpose jurisdiction. As the phraseology suggests, general jurisdiction denotes the ability to sue a particular defendant in the forum state for any claim whatsoever, whether it pertained to the defendant's activities in the forum state, or not. By contrast, specific jurisdiction, also known as long-arm jurisdiction, denotes the ability to sue a particular defendant in the forum state as a result of (or arising from) the defendant's activities in the forum state.

In *Daimler*, the acts complained of occurred in Argentina, i.e., alleged collaboration between Mercedes-Benz Argentina and Argentina security forces during the 1976-83 "Dirty War." The plaintiffs claimed that the collaboration led to a variety of brutal actions against workers at the MB Argentina plant, including kidnaping, torture, and murder. Plaintiffs commenced suit against Daimler AG in the United States District Court for the Northern District of California under the Alien Tort Statute and the Torture Victims Protection Act of 1991.[15] Daimler AG moved to dismiss based on lack of personal jurisdiction.

Plaintiffs asserted jurisdiction over Daimler AG, a German company headquartered in Stuttgart, premised on an alleged agency relationship between the German company and its indirect U.S. subsidiary, Mercedes-Benz USA ("MBUSA"). MBUSA was a Delaware corporation with a principal place of business in New Jersey, and was the exclusive importer and distributor of Mercedes-Benz vehicles in the United States. By almost any measure, MBUSA's connection to, and arguable "presence" in, California was substantial. MBUSA had three offices in California, including a regional headquarters. Total sales of Mercedes-Benz vehicles in California at the time the suit was filed were $4.6 billion, constituting 2.4% of Daimler's worldwide sales of $192 billion.

[14] 2014 WL 113486 at *11 and *12.

[15] 28 U.S.C. § 1350.

Daimler AG conceded from the outset that general jurisdiction could be asserted over MBUSA in California notwithstanding that MBUSA was incorporated and had its principal place of business elsewhere. Daimler AG argued, however, that the assertion of jurisdiction over Daimler premised on the purported agency relationship between Daimler AG and MBUSA was unconstitutional, in violation of the due process clause.

The Supreme Court majority opinion surprisingly elided the agency due process issue.[16] Instead, the Court held that, even assuming that MBUSA was present in California for purposes of general jurisdiction, and even assuming that an agency relationship existed between Daimler AG and MBUSA, there was no basis for the assertion of general jurisdiction over Daimler AG.[17]

The Court stated that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there."[18] The "paradigm" bases for the assertion of general jurisdiction over a corporation are its state of incorporation and principal place of business. In so limiting the typical fora for the assertion of all-purpose jurisdiction over a foreign corporation, the Court referred back to *dicta* in its decision three years earlier in *Goodyear Dunlop Tires Operations v. Brown*,[19] which suggested that the Court might be headed in this direction, but certainly did not so hold and were not generally taken as so holding.[20] Describing that opinion as "pathmarking",[21] the Court stated that these limitations on general jurisdiction were "made clear" in *Goodyear*.[22] Be that as it may, these limitations are quite clear now.

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[16] This was one of the reasons for Justice Sotomayor's concurring opinion.

[17] 2014 WL 113486 at *11.

[18] *Id.*

[19] 564 U.S. __, 131 S. Ct. 2846 (2011).

[20] Some, however, including Professor Oscar Chase, did suspect that Justice Ginsburg's remarks in *Goodyear* on general jurisdiction indicated that she may well be moving in the direction she ultimately took in *Daimler,* although he apparently did not believe that *Tauza* itself would be supplanted. *See* O. Chase & L. Day, Re-Examining New York's Law of Personal Jurisdiction After *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicastro,* 76 Albany L. Rev. 1009, 1016-17, 1050 (2012-13).

[21] 2014 WL 113486 at n.16. The actual holding in *Goodyear,* however, was unremarkable. *Goodyear* involved an alleged assertion of personal jurisdiction over a foreign corporation with no ties whatsoever to the forum state other than limited sales.

[22] *Id.* at *11.

Justice Ginsburg explained that the state of incorporation and principal place of business were plainly fora where a corporation could fairly be considered as being "at home" and, accordingly, were predictable locations for the assertion of all-purpose jurisdiction. By contrast, the *Tauza* formula – activities conducted "not occasionally or casually, but with a fair measure of permanence and continuity" – was more properly suited to long-arm jurisdiction, where the cause of action arose from activities within the forum.

The Court added that it did not "foreclose the possibility" that general jurisdiction could exist, "in an exceptional case," in states other than the place of incorporation or principal place of business.[23] However, the Court declined to spell out the parameters of such exceptional cases, other than to discuss the Court's decision in *Perkins v. Benguet Consol. Mining Co.*[24] In *Perkins*, a Philippines mining firm was held subject to general jurisdiction in Ohio, where the firm's president supervised company operations while the Japanese occupied the Philippines during World War II. As the Court noted, Ohio effectively became the company's principal, albeit temporary place of business.[25]

The Court further added that in order to measure when general jurisdiction may be applicable the focus should not be "solely on the magnitude of the defendant's in-state contacts", but instead "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide."[26] Significantly, as Justice Sotomayor stated in her concurring opinion, this analysis will make it much more difficult to obtain general jurisdiction over multistate and multinational corporations as opposed to smaller concerns with fewer far-flung activities.[27] At bottom, this seems to be the aim of the majority opinion in light of its expressed concern that if Daimler AG were subject to general jurisdiction in California pertaining to events originating in Argentina, "the same global reach would presumably be available in every other State where MBUSA's sales are sizable."[28] And, underscoring this point, the majority added: "A corporation that operates in many places can scarcely be deemed at home in all of them."[29]

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[23] *Id.* at n.19.

[24] 342 U.S. 437 (1952).

[25] 2014 WL 113486 at *8.

[26] *Id.* at n.20.

[27] *Id.* at *20.

[28] *Id.* at *12.

[29] *Id.* at n.20.

Some Closing Thoughts

To sum up, for purposes of general jurisdiction under a due process analysis, it is not enough for a corporation to be "here," per Judge Cardozo; it must be essentially "at home," per Justice Ginsburg.

Daimler has thus radically undone and rearranged the application of general jurisdiction to foreign corporations in New York, and elsewhere. Of course, since the decision was made under the rubric of due process, arguably this new approach may only be addressed if the jurisdictional objection is asserted by the defendant. However, it seems unlikely that the *Daimler* due process objection will fail to be asserted routinely, particularly by counsel for multistate and multinational entities, who are mainly served by the new standard.

As a consequence of the decision, numerous other jurisdictional underpinnings may likewise become unsettled. For example, if general jurisdiction must be narrowed for corporations, why not for individuals? Why should individuals be subject to general jurisdiction in any state where they may be found under longstanding territorial principles that appear to have been undermined by *Daimler*?[30] Likewise, is it time to reassess whether corporations should be subject to general jurisdiction, under the rubric of consent, merely because they are licensed to do business in a given state?[31]

These and other questions are sure to be asked in light of *Daimler*. The objective here has been merely to demonstrate the sea change *Daimler* has effected on New York law.

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[30] *See Burnham v. Superior Court of California,* 495 U.S. 604 (1990) (defendant held subject to jurisdiction after only fleeting presence in state); *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (jurisdiction upheld based on service in airplane passing over Arkansas). Justice Sotomayor pointed out the potential incongruity of treating large corporations better than individuals in this context. 2014 WL 113486 at *21.

[31] *Compare Laumann Mfg. Corp. v. Castings, USA, Inc.*, 913 F. Supp. 712 (E.D.N.Y. 1996), *citing Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173 (3rd Dep't 1983), *with Bellepointe, Inc. v. Kohl's Dep't Stores, Inc.*, 975 F. Supp. 562 (S.D.N.Y. 1997); *see also* V. Alexander, "Doing Business" Jurisdiction: Some Unresolved Issues, N.Y.L.J., Mar. 29, 2001, p. 3.