PERSONAL JURISDICTION: A JOURNEY THROUGH *DAIMLER* AND ITS POTENTIAL IMPACT
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I. INTRODUCTION

Daimler AG v. Bauman, 134 S.Ct. 746 (2014), was decided in 2014. It is the Supreme Court's most recent pronouncement concerning the permissible scope of general personal jurisdiction, and it is widely considered to have restricted significantly the potential use of general jurisdiction. Since *Daimler* was decided in 2014, its impact continues to percolate through the lower courts with decisions being issued with regularity (and irregularity) as to how the case should be applied to particular situations.

With respect to maritime practitioners, one of the more critical issues raised by *Daimler* relates to whether registration to do business in a state establishes general jurisdiction, as this has the potential to impact the ability to utilize the maritime attachment remedy under Supplemental Admiralty Rule B.

Another critical issue concerns *Daimler*'s impact on Jones Act claims. A case is currently pending before the Supreme Court in which the Court is examining *Daimler*'s applicability to cases filed in state court and governed by FELA. *See BNSF Railway Co. v. Tyrrell*, No. 16-405 (S.Ct.). On April 25, 2017, the Supreme Court held oral argument in *Tyrrell*, which was decided by the Supreme Court of Montana. A decision is accordingly expected within the year. As you know, FELA decisions apply equally in a Jones Act context and hence attention should be paid to *Tyrrell*.

These issues will be discussed later today but before turning to those issues, we return to the basics.

II. PERSONAL JURISDICTION – THE BASICS (A/K/A "TRIP BACK TO LAW SCHOOL").

A. Generally

Courts in the United States must have two kinds of jurisdiction to hear a case, personal jurisdiction and subject matter jurisdiction.

Subject matter jurisdiction refers to whether a court can hear a case on a particular subject. In the case of maritime claims, it is clear that federal courts have subject matter jurisdiction. A full discussion of federal subject matter jurisdiction over maritime claims is beyond this paper, but the following is noted.

- Article III of the Constitution vests in federal courts original jurisdiction over "all Cases of admiralty and maritime jurisdiction." Constitution, Art. III, cl. 2 , § 1.
- This concept was reinforced by the Judiciary Act of 1789 in which Congress enacted the precursor to 28 U.S.C. § 1333 — which has remained substantively unchanged since that time.
- Section 1333 confirms that the federal district courts have original jurisdiction, "exclusive" of the state courts, "saving to suitors in all cases all other remedies to which they are otherwise entitled." This provision has long been interpreted as vesting state courts with concurrent subject matter jurisdiction in certain maritime matters.

Personal jurisdiction, in contrast, is the court's ability to exercise authority over the parties to the litigation. *See, e.g.*, 4 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. §1063 (3d ed. 2013). The concepts of in rem and quasi in rem jurisdiction are similar; in rem jurisdiction refers to the court's ability to exercise jurisdiction over the thing before it. Quasi in rem jurisdiction is a form of personal jurisdiction based on the presence of property within the court's jurisdiction, but the court's power is limited to the value of the property.

While personal jurisdiction was traditionally based on the defendant's presence within the territorial jurisdiction of the court, over time the personal jurisdiction inquiry has gradually expanded to take into account a number of factors. *Id.*

B. Types of Personal Jurisdiction

Specific jurisdiction: specific personal jurisdiction can be exercised over a defendant if "the suit arises out of or relates to the defendant's contacts with the forum." *Daimler*, 134 S.Ct. at 754 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)); *Int'l Shoe Co. v. Washington*, 134 S.Ct. 746 (2014). It must be shown that the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

General jurisdiction: general jurisdiction can be exercised over a defendant if its "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Daimler*, 134 S.Ct. at 754.

C. Overall Limitation to an Exercise of Personal Jurisdiction

The primary limit of a court's exercise of personal jurisdiction is the Due Process Clause of the Fourteenth Amendment. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The personal jurisdiction analysis is thus often phrased as whether an exercise of such jurisdiction comports with Due Process. While fairly straightforward in formulation, the concept has been less than clear in application.

III. HISTORIC DEVELOPMENT

Pennoyer v. Neff, 95 U.S. 714 (1878) – generally stands for territorial principle of jurisdiction.

Int'l Shoe Co. v. State of Washington, 326 U.S. 310 (1945) –involves specific personal jurisdiction, finding jurisdiction appropriate.

The commissioner responsible for the assessment and collection of contributions to the Washington state unemployment fund served a notice of assessment on International Shoe, a manufacturer and seller of shoes and footwear, for failure to pay into the fund during the years 1937-1940. International Shoe was a Delaware corporation with its principal place of business in Missouri. The Commissioner served the assessment notice upon a salesman employed by International Shoe in Washington State. International Shoe sought to set aside the notice on the grounds that it was not a corporation doing business in Washington, had no registered agent within the state, and was not an employer and did not furnish employment within the state as defined under state law.

In addressing the jurisdictional issues, the Supreme Court explained that due process requires only that a defendant, otherwise not present in the forum, have certain minimum contacts with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The Court added that "presence" in this sense "has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given." Conversely, the casual presence of the corporate agent, or even his conduct of single or isolated activities in a state on the corporation's behalf, are not enough to subject the corporation to suit on causes of action unconnected with the activities there. "To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."

Applying these standards, the Court found an exercise of jurisdiction to be appropriate. The activities carried on behalf of the corporation in Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which the corporation received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The Court also noted that the obligation sued upon arose out of those very activities. To this extent, *Int'l Shoe* can be considered as case involving an exercise of specific jurisdiction.

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) – general jurisdiction case described by the Supreme Court as "textbook case of general jurisdiction", where jurisdiction was considered appropriate.

Suit filed in Ohio state court against a Filipino corporation for unpaid dividends and damages. All of the corporation's activities giving rise to the suit were conducted outside Ohio. The court thus examined whether the corporation carried on "continuous corporate operations within Ohio that were "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." The court found numerous contacts with Ohio including the following: while the Philippine mining activities were suspended during WWII, the corporation's president returned to his home in Ohio. From there, he distributed salaries, supervised the board, and oversaw much of the corporation's rehabilitation efforts. He also maintained two active bank accounts in Ohio. The Court concluded that the corporation "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." *Id.* at 448. As a result, an exercise of general personal jurisdiction would be consistent with the Constitution.

Helicopteros, 466 U.S. 408 (1984) – general jurisdiction case, finding contacts insufficient.

The case arose out of a helicopter crash in Peru in which four United State citizens were killed. The decedents filed suit in Texas state court against Helicopteros, a Colombian corporation. The lower court rejected Helicopteros' jurisdictional motion. Trial proceeded and judgment entered against Helicopteros. Appeals made their way through the Texas state system, and eventually, the case found its way before the Supreme Court. The Supreme Court acknowledged the case presented the question of whether general , as opposed to specific, jurisdiction existed. Accordingly, the Court examined whether Helicopteros had "continuous and systematic general business contacts" with the state. Those contacts included: sending its CEO to Texas for a contract negotiation, accepting money from a bank account in the state, and purchasing various parts and materials from vendors in Texas. These contacts were insufficient to establish a basis for the exercise of jurisdiction.

Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102 (1987) – specific jurisdiction / stream of commerce, finding jurisdiction inappropriate.

This case involved a products liability suit filed in California state court by Gary Zurcher who was severely injured in a motorcycle accident. He alleged that the motorcycle tire, tube and sealant were defective and named as defendants, among others, Taiwanese manufacturer of the tube. This manufacturer then filed a cross- claim against Asahi Metal, the manufacturer of the tube's valve assembly. Asahi was a Japanese corporation that manufactured tire valve assemblies in Japan and sold them to the Taiwanese tube manufacturer and others for use as components in finished tire tubes. Asahi moved to dismiss the suit against it for lack of jurisdiction, which was denied by the California court. The Supreme Court reversed in a dual plurality opinion.

A four-justice plurality led by Justice O'Connor held that Due Process requires more than a defendant's awareness of its product's entry into the forum state through the stream of commerce. The defendant must have purposefully directed its products toward the forum state. *Id.* at 112. A four-justice plurality led by Justice Brennan agreed with the end result (i.e., no jurisdiction), but disagreed with the reasoning of the O'Connor plurality. The Brennan plurality felt a defendant could be subject to personal jurisdiction under a stream of commerce theory merely where it was foreseeable that the defendant's products would enter the forum, and the defendant need not have necessarily taken any acts directed to the forum in order to be subject to personal jurisdiction there. *Id.* at 117.

J. McIntyre Machinery v. Nicastro, 564 U.S. 873 (2011) – specific jurisdiction/stream of commerce, finding jurisdiction lacking.

This case arose from a products-liability suit filed in New Jersey state court by Robert Nicastro who lost four of his fingers at work in New Jersey when his hand was accidently caught in the blades of a metal cutting machine. The machine was manufactured in England by J. McIntyre Machinery, a company incorporated in England. J. McIntyre sold machines, including the one that injured Nicastro, to an American distributor that it knew sold the products in many regions of the U.S. Nicastro's employer purchased the machine that injured him at a trade show in Las Vegas.

In a 6-3 decision, the Supreme Court reversed the New Jersey court, holding that the state court did not have jurisdiction. According to Justice Kennedy's plurality opinion, there were insufficient facts to show that J. McIntyre Machinery. Although the company targeted the United States *as a whole*, only its distributor targeted the specific states. The plurality determined that the stream of commerce theory is insufficient to give rise to jurisdiction without specific targeting of a specific state. The plurality explained that a "defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." The plurality held that although the "facts may reveal an intent to serve the U.S. market," New Jersey was without jurisdiction because the defendant did not engage in any activities in New Jersey that revealed an intent to benefit from the protections of its laws.

Justice Breyer, joined by Justice Alito, concurred in the judgment on narrower grounds. Rather than announce a broad rule, Breyer determined that based on the facts of this specific case New Jersey did not have jurisdiction because so few machines wound up in the state. However, Breyer was open to the possibility that if many machines were flowing into the state, the state might have jurisdiction even absent specific targeting.

Justice Ginsburg, joined by Justices Sotomayor and Kagan dissented. They argued that by targeting the United States as a whole, the company had targeted every state sufficiently to subject itself to New Jersey's jurisdiction. The dissent however noted the Court's unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts.

Goodyear Dunlop Tires Operations S.A. v. Brown, 131 S.Ct. 2846 (2011) – general jurisdiction, no jurisdiction.

This case arose of out a bus crash outside of Paris, France, in which two United States minor citizens were killed. The parents of each of the two children filed suit in North Carolina state court against the manufacturer of the bus' tires, Goodyear USA, and a number of Goodyear's foreign subsidiaries. While Goodyear USA had a number of contacts with North Carolina and regularly conducted business there, the foreign subsidiaries did not. Nonetheless, the North Carolina courts found a sufficient basis for the exercise of jurisdiction over the subsidiaries. Those courts reasoned, in part, that because some of the tires manufactured by Goodyear's subsidiaries likely reached North Carolina in the stream of commerce, an exercise of jurisdiction was appropriate. The Supreme Court reversed. In a well-reasoned opinion authored by Justice Ginsburg, the Court explained that "for a corporation, [its paradigm forum] is an equivalent place, one is which the corporation is fairly regarded as at home" such as the corporation's place of incorporation and principal place of business. 131 S.Ct. at 2853-54.

Then came *Daimler* ….

But before turning to *Daimler*, mention should be made of Rule 4(k)(2).

IV. FEDERAL RULE OF CIVIL PROCEDURE 4(K) – "NATIONWIDE CONTACTS"

A. The Rule's Text and General Applicability

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.

* * *

(2) *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

The Rule's application can be summarized as follows:

The due process inquiry consists of a two-step process. The first step is "whether the defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction." Generally, that inquiry depends on "whether the defendant purposefully established 'minimum contacts' in the forum State." When personal jurisdiction is asserted under Fed. R. Civ. P. 4(k)(2), however, the relevant inquiry is whether the defendant "has sufficient affiliating contacts with the United States in general, rather than with [the forum State] in particular." If the defendant has sufficient minimum contacts with the forum, the second step is "whether the assertion of personal jurisdiction is reasonable under the circumstances."

Minimum contacts may be satisfied either on the basis of general jurisdiction or specific jurisdiction. General jurisdiction arises out of the defendant's general business contacts with the forum while specific jurisdiction exists when the suit arises out of or is related to the defendant's contacts with the forum.… Specific jurisdiction exists when a defendant "purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there."

Where "the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff," the Second Circuit uses an "effects test" to establish personal jurisdiction, by which "the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum." "The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the [forum] seeking to assert jurisdiction over him." Courts look to the quality and nature of the defendants' contacts with the forum under a totality of the circumstances test.

In re Aluminum Warehousing Antitrust Litig., 13-md-2481, 2015 U.S. Dist. LEXIS 145598, *42-44 (S.D.N.Y. Oct. 23, 2015) (internal citations omitted).

B. The Rule's Origins

As recognized by the Fifth Circuit in *World Tanker Carriers Copr. V. M/V Ya Mawlaya*, 99 F.3d 717. 721 (5th Cir. 1996), the enactment of Rule 4(k)(2) stems from Justice Blackmun's opinion in *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, 107-09 (1987). Justice Blackmun identified what he perceived to be a gap in the jurisdiction of the federal courts. This gap occurred when a defendant likely had sufficient contacts with the United States as a whole but also likely had insufficient contacts with any single state to satisfy the requirements of due process. Although the Supreme Court recognized this gap, it felt that any filling of this gap was better left to "those who propose the Federal Rules of Civil Procedure and with Congress." *Id.* at 111. Congress heeded the call and enacted Rule 4(k)(2) as part of the 1993 amendments to the Federal Rules of Civil Procedure.

C. The Rule's Three Requirements

Three requirements must be satisfied to allow a party to resort to Rule 4(k)(2) to establish jurisdiction over a defendant. *See Porina v. Marward Shipping Co.*, 521 F.3d 122, 126 (2d Cir. 2008).

1. The claim must arise "under federal law."

- It is essentially settled that maritime claims arise "under federal law" for purposes of Rule 4(k)(2)'s application. *See, e.g., M/V Ya Mawlaya*, 99 F.3d at 719. *Ya Mawlaya* involved a collision off the coast of Portugal. The district court interpreted this element as requiring the claim to present a federal question, and because maritime claims arise under the general maritime law and are not considered federal questions, Rule 4(k)(2) was not implicated. The Fifth Circuit reversed, finding that Rule 4(k)(2) is meant to encompass all federal aw including general maritime law.
- Since *Ya Mawlaya*, the courts have uniformly accepted that the rule applies to maritime claims. *Porina*, 521 F.3d at 127; *Norvel Ltd. v. Ulstein Propellor AS*, 161 F.Supp.2d 190, 200 (S.D.N.Y. 2001).

2. The defendant cannot be subject to the general jurisdiction of any one state.

- Both the Fifth and Seventh Circuits have recognized that in evaluating the existence of this second requirement, "a piecemeal analysis of the existence *vel non* of jurisdiction in all fifty states is not necessary. Rather, so long as a defendant does not concede to jurisdiction in another state, a court may use 4(k)(2) to confer jurisdiction." *Adams v. Unione Mediterranea di Sicurta,* 364 F.3d 646, 651 (5th Cir. 2004); *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001).

- The Second Circuit has not addressed this point, but district courts within the Circuit have indicated that the defendant need not concede jurisdiction in another state to address this prong, but rather the plaintiff must certify, based on the information that is readily available to the plaintiff and his counsel, that the defendant is not subject to suit in the courts of general jurisdiction of any particular state. *See, e.g. Porina v. Marward Ship. Co.*, 05-cv-5621 (RPP), 2006 U.S.Dist. LEXIS 60535 *10 (S.D.N.Y. Aug. 24, 2006), *aff'd*, 521 F.3d 122, 130 (2d Cir. 2008); *see also Aqua Shield, Inc. v. Inter Pool Cover Team*, No. 05-CV-4880 (CBA), 2007 U.S. Dist. LEXIS 90319 (E.D.N.Y. Dec. 7, 2007); *Cordice v. Liat Airlines*, 2015 U.S. Dist. LEXIS 126704, 14-15 (E.D.N.Y. Sept. 22, 2015).

3. The exercise of jurisdiction over the defendant must be consistent with both the United States Constitution and the laws of the United States.

- Contacts are analyzed with the United States as a whole.

- Applies in specific and general jurisdiction contexts.

D. <u>Case Examples</u>

Fortis Corp. Ins. v. Viken Ship Mgmt., 450 F.3d 214 (6th Cir. 2006) –
The Sixth Circuit held that personal jurisdiction was proper under Rule 4(k)(2) over the Norwegian owners of a chartered vessel, on a claim for cargo damaged on Lake Erie and delivered to Toledo, Ohio. The defendants had confirmed in the charter agreement that "the vessel is suitable for Toledo" and had outfitted and rigged the ship for the Great Lakes. These facts were deemed sufficient to show that the *Fortis* defendants had purposefully availed themselves of the benefits of doing business in the forum. Moreover, *Fortis* involved a claim that arose out of the ship's contacts with the United States, and hence entailed the application of the less stringent test applicable to assertions of specific jurisdiction.

Porina v. Marward Shipping Co., 521 F.3d 122 (2d Cir. 2008) – a vessel's repeated port calls to the United States were not contacts attributable to vessel owner and did not constitute owner purposely availing itself of doing business in the United States. Port calls were made "by the ship's charterers, who were free under the charters to take the ship to any safe port in the world." The calls were thus "unilateral activities of third parties" that could not be used to satisfy the requirement of purposeful availment. Similarly, the Second Circuit rejected the argument that the financial benefit of the charterers' course of conduct accrued to the owner and hence should count. The court noted that the owner was contractually entitled to benefit from the charter party regardless of where the vessel was directed to sail by the charterer.

In re MS Angeln GmbH & Co. KG, 510 Fed. App'x 90 (2d Cir. 2013) – the courts declined to exercise general jurisdiction over ship's technical and commercial manager.

Patterson v. Aker Solutions Inc., 826 F.3d 231, 234 (5th Cir. 2016) – the Fifth Circuit explained that to assert general personal jurisdiction under Rule 4(k)(2), a defendant's contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States. The ABA description of the import of *Patterson* is as follows:

> The Fifth Circuit also recently addressed personal jurisdiction issues in Patterson v. Aker Solutions Inc., wherein the plaintiff filed suit against several defendants alleging the defendants' negligence caused injuries he suffered while working aboard a Luxembourg-flagged vessel off the coast of Russia. After the completion of jurisdictional discovery, the district court granted Aker's motion to dismiss for lack of specific or general personal jurisdiction. The plaintiff appealed, arguing that the defendant had sufficient contacts with the United States to establish general jurisdiction under Federal Rule of Civil Procedure 4(k)(2). The Fifth Circuit disagreed, holding that under Rule 4(k)(2), in order to satisfy due process, the defendant's "contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States." Personal jurisdiction did not exist over the defendants because its business contacts with the United States were limited to eleven secondment agreements over a three-year period. The court concluded that, when viewing the contacts as a whole,"[s]ending eleven employees to the United States over a brief period does not rise to the level of making [the defendant] at home in the United States[,]" and thus cannot satisfy due process concerns.

We also should add that the Fifth Circuit said that since the defendant's PPB and place of incorporation were in Norway, that the contacts with the U.S. under which the plaintiff was relying need to yield an "exceptional case."

V. *DAIMLER AG V. BAUMAN* (JAN. 2014)

A. The Case Itself

The plaintiffs in Daimler were a group of Argentine citizens who claimed that Daimler's Argentine subsidiary collaborated with state security forces to commit various human rights violations during Argentina's "Dirty War." Suit was filed in California against Daimler AG, the corporate head of the Daimler group. Daimler AG was organized under and had its principal place of business located in Germany. The district court granted Daimler's motion to dismiss, but the Ninth Circuit reversed. The Ninth Circuit reasoned that Daimler's distribution agreement with Mercedes-Benz USA, a Delaware corporation with its principal place of business in New Jersey, established an agency relationship between the two entities. As a result, Mercedes' contacts with California were attributed to Daimler making it subject to jurisdiction there. The Supreme Court reversed.

The Supreme Court began its analysis by restating its holding in Goodyear and clarified that Goodyear does not stand for the proposition that a corporation is subject to general jurisdiction only where it is incorporated or has its principal place of business. Instead, Goodyear stands for the proposition that those two bases represent the "paradigm all-purpose forums." A corporation can still be subject to general jurisdiction in another forum if its "**affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum state**." 134 S.Ct. at 760 (emphasis added). The Court explained in a footnote that a corporation's contacts with a forum must be judged "in their entirety", i.e., within the context of all the corporation's "nationwide and worldwide" contacts. Id. at n.20. Applying these standards to Daimler, the Court concluded that jurisdiction was lacking.

Justice Sotomayer authored a concurring opinion, because while she agreed with the ultimate conclusion (that Daimler was not subject to jurisdiction in California), she disagreed with the majority's use of the "nationwide and worldwide" contacts analysis. She explained that the majority had effectively deemed Daimler "too big for general jurisdiction" by focusing its contact analysis on the "extensive nationwide and worldwide operations" of Daimler. Justice Sotomayer would have focused solely on Daimler's contacts with California. She added, nevertheless, that because the suit was filed by foreign plaintiffs against a foreign defendant for acts committed in a foreign jurisdiction, she agreed that Daimler was not subject to general jurisdiction in California. *Id.* at 763.

B. Specific Jurisdiction in Post-Daimler World

Walden v. Fiore, 134 S.Ct. 1115 (Feb. 2014) – highlights standards required to demonstrate specific personal jurisdiction.

As explained by the Court, this case addresses the "minimum contacts" necessary to create specific jurisdiction. The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant "focuses on 'the relationship among the defendant, the forum, and the litigation.'" For a State to exercise jurisdiction consistent with Due Process, the defendant's suit-related conduct must create a substantial connection with the forum State. The Court added the following important guidelines:

- First, the relationship must arise out of contacts that the "defendant *himself*" creates with the forum State.

- Second, the "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. The plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.

134 S. Ct. at 1121-1122.

Bristol-Myers Squibb Co. v. Superior Court (Anderson), pending in the Supreme Court

In this case, 592 nonresident plaintiffs joined 86 residents of California in suing Bristol-Myers Squibb (BMS) over alleged injuries resulting from a BMS-manufactured drug, Plavix. None of the nonresident plaintiffs suffered injuries in California and none were treated in California. Also, BMS did not manufacture Plavix in California at any time. BMS, however, has significant business activities in California, although it is incorporated and headquartered outside of California. The California courts held that they have jurisdiction to hear the nonresident plaintiffs' complaints.

The trial court denied BMS' dismissal motion and held that the company was subject to the California court's general jurisdiction because it had "wide-ranging, continuous, and systematic activities in California." The California Court of Appeal rejected the trial court's assessment that BMS was subject to general jurisdiction in California, but held that the nonresident plaintiffs' claims were sufficiently related to BMS's California activities to support specific jurisdiction. The California Supreme Court affirmed and held that BMS's nationwide marketing and distribution created a "substantial nexus" between the nonresident plaintiffs' claims and BMS's activities in California because the claims were based on the same allegedly defective product and misleading marketing that

allegedly caused injury both in and outside of California. Essentially, the California Supreme Court held that adjudicating a merged litigation of the nonresident and California plaintiffs was not an unreasonable exercise of special, or case-specific, jurisdiction.

The case is on appeal to the Supreme Court with argument held on April 25, 2017.

VI. ISSUES IMPLICATED BY DAIMLER

1. Is Daimler limited to international defendants? – most likely no

- *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 630 (2d Cir. 2016) ("We perceive no sound basis for restricting *Daimler*'s (or *Goodyear*'s) teachings to suits brought by international plaintiffs against international corporate defendants.")

- *Lanham v. Pilot Travel Ctrs. LLC*, No. 03:14-cv-01923-HZ, 2015 U.S. Dist. LEXIS 117497, at *8 (D. Or. Sep. 2, 2015) (rejecting plaintiff's attempt to distinguish *Daimler* factually on basis that the case involved a domestic plaintiff and defendant, whereas *Daimler* involved foreign plaintiffs, a foreign defendant, and actions that occurred in a foreign country).

- *Hid Glob. Corp. v. Isonas*, No. SA CV 14-0052-DOC, 2014 U.S. Dist. LEXIS 56024, at *9 (C.D. Cal. Apr. 21, 2014) ("Although HID argues that *Daimler* is inapposite because it refers to an international corporation being sued in the United States, this distinction is immaterial. The *Daimler* opinion makes clear that a 'foreign' corporation is one either outside the United States *or* [in] a sister state to the forum state.").

- *Young v. Daimler AG*, 228 Cal. App. 4th 855, 865 (Cal. App. 2014) (rejecting argument that *Daimler* "should be confined to its particular facts—that is, to cases involving foreign parties 'based on events occurring entirely outside the United States.'").

2. Does registration to do business in a state qualify? – may depend on statute - a sampling of post Daimler decisions.

- *Perrigo Co. v. Merial Ltd.*, No. 8:14-CV-403, 2015 U.S. Dist. LEXIS 45214, at *18 (D. Neb. Apr. 7, 2015) ("*Daimler* only speaks to whether general jurisdiction can be appropriately exercised over a foreign corporation that *has not consented to suit* in the forum. It does nothing to affect the long-standing principle that a defendant may consent to personal jurisdiction."

- *Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 469 (D.N.J. 2015) ("[D]esignation of an in-state agent for service of process in accordance with a state registration statute may constitute consent to personal jurisdiction, if supported by the breadth of the statute's text or interpretation.")

- *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 437 (D.N.J. 2015) ("[*Daimler*] did not disturb the consent-by-in-state service rule . . . .")

- *Forest Labs., Inc. v. Amneal Pharms. LLC*, Civil Action No. 14-508-LPS, 2015 U.S. Dist. LEXIS 23215, at *20 (D. Del. Feb. 26, 2015) (same).

- *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) ("After *Daimler*, with the Second Circuit cautioning against adopting 'an overly expansive view of general jurisdiction,' the mere fact of [defendant's] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.")

- *Astrazeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) ("In light of the holding in *Daimler*, the court finds that Mylan's compliance with Delaware's registration statutes—mandatory for *doing business* within the state—cannot constitute consent to jurisdiction....")

- *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 144 n.115 (Del. 2016) (same).

- *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016) (while not directly confronting the issue, remarking that if presented with the question, it might reach the conclusion that consent-by-registration is insufficient under *Daimler*)

- *Famular v. Whirlpool Corp.*, 2017 U.S. Dist. LEXIS 8265, 12-13 (S.D.N.Y. Jan. 19, 2017) (espite the uncertain status of the law in this area, a foreign defendant is not subject to the general personal jurisdiction of the forum state merely by

registering to do business with the state, whether that be through a theory of consent by registration or otherwise).

- *Gulf Coast Bank & Trust Co v. Designed Conveyor Sys., LLC***,** 2017 U.S. Dist. LEXIS 4711 (M.D. La. Jan. 11, 2017), in which the court reasoned as follows:

  > A state's interpretation of its registration statute is important because determining whether registering to do business establishes consent to general jurisdiction requires a court to perform a two-step analysis. First, a court must determine whether the applicable registration statute, here the Louisiana statute, equates compliance with consent to general jurisdiction (like the Kansas statute), or whether it is only a means to provide notice to defendants that they have been sued in a certain state (like the Arkansas statute). This first step is a matter of statutory interpretation. Second, if compliance with the Louisiana statute constitutes consent to general jurisdiction, this Court must consider whether such an interpretation of consent comports with the due process clause of the United States Constitution
  >
  > Second, even assuming that the Louisiana registration statute means that a company consents to general jurisdiction, this would be an unconstitutional interpretation of the statute based on the Fifth Circuit case *Siemer v. Learjet*.
  >
  > Third, even if *Siemer* was not a due process case and was a limited statutory holding, this Court finds that, in light of *Daimler*, interpreting a registration statute as giving consent to general jurisdiction is untenable.

- *Figueroa v. BNSF Railway Co.*, 361 Or. 142 (Or. 2017) (Appointing a registered agent to receive service of process for a foreign corporation authorized to transact business in the state merely designates a person upon whom process may be served; it does not constitute implied consent to the jurisdiction of the state courts).

QUERY: What impact does resolution of this issue have on Rule B?

Legislative responses:

A New York Bill has been proposed to extend jurisdiction to defendants registering to do business in New York because "Daimler *threatens the longstanding policy of New York court administrators of bolstering the commercial division, and trying to funnel as much litigation into those business savvy trial level courts as possible. We want to encourage businesses to litigate in New York."*

**the bill has advanced to the third reading (3/9/2017)*

3. How does Daimler impact FELA and hence Jones Act cases?

The Tyrrell case:

Robert Nelson, a North Dakota resident and a BNSF fuel truck driver, filed suit in 2011 over knee injuries he allegedly sustained in the course of his employment. He did not allege that he had ever worked in Montana or that his injuries were suffered in the state. His case was dismissed by a Montana state district judge, and Nelson appealed.

Brent Tyrrell's suit was brought by the administrator to his estate, Kelli Tyrrell, in 2014. The suit claimed that Brent Tyrrell was exposed to chemical carcinogens while working at BNSF that ultimately led to his kidney cancer and death. The plaintiff never claimed that Tyrrell had worked in Montana and never said he suffered injuries in the state. However, BNSF's motion to dismiss the case was denied. BNSF appealed.

The Supreme Court of Montana consolidated both cases to decide whether Montana courts have personal jurisdiction over BNSF under Montana law. BNSF argued that under Daimler, the Montana state courts have no general jurisdiction. The Montana Supreme Court rejected that argument and held that, because BNSF does business in Montana, Montana courts have personal jurisdiction under FELA. Montana's Supreme Court also held that the state has general personal jurisdiction over BNSF under Montana law because BNSF "maintains substantial, continuous, and systematic" contacts with Montana.

But see Barrett v. Union Pacific Railroad Co., 361 Or. 115 (Or. 2017), in which en banc Oregon court reached opposite conclusion of the Montana court in *Tyrrell*. Oregon court held that the 14th Amendment Due Process Clause did not permit exercise of general jurisdiction over interstate railroad for negligence claim brought by employee that was unrelated to railroad's activities in state, even though railroad had engaged in substantial, continuous, and systematic course of business in state; railroad was incorporated in another state and railroad's activities in state were only small part of its larger business activities in 23 states.

The Supreme Court has granted certiorari in *Tyrrell*. Oral argument was held on April 25, 2017. The issue to be addressed by the Supreme Court is whether a state court may decline to follow *Daimler* in a suit against an American defendant under the Federal Employers' Liability Act.

Potential impact on Jones Act cases: The ABA describes the potential impact of *Tyrrell* on Jones Act cases as follows:

> In a decision that may have ramifications concerning personal jurisdiction in Jones Act and general maritime law actions, *Tyrell v. BNSF Railway Co.*, the plaintiffs filed suit against their employer-railroad operator in Montana state court for violations of the Federal Employers' Liability Act (FELA), relating to injuries they sustained in U.S. states other than Montana. The railroad moved to dismiss the plaintiffs' lawsuits on the basis that the U.S. Supreme Court's decision in Daimler AG v. Bauman ("Daimler") prohibits a state court from exercising general personal jurisdiction over an out-of-state defendant, except where the defendant is essentially "at home" in the forum state. The Montana Supreme Court interpreted Daimler narrowly, as only addressing the authority of a U.S. court to entertain claims brought by a foreign plaintiff against a foreign defendant, based on events that occurred outside the U.S., and did not involve a FELA claim or a railroad defendant. The court reasoned that because the Congressionally-enacted FELA venue provision (45 U.S.C. § 65) fixes venue where the defendant was an inhabitant, and other U.S. Supreme Court cases have consistently interpreted the venue provision as allowing state courts to hear cases brought under FELA even where the only basis for jurisdiction is the railroad's doing business in the forum, the court did not believe its decision conflicted with Daimler or FELA's venue provision. Since the railroad operator did business in Montana, under FELA and Montana's jurisdiction statute, Montana courts had general personal jurisdiction over the defendant. The court believed its conclusion was "in line with the U.S. Supreme Court's 'liberal construction' of the FELA in favor of injured railroad workers." A petition for writ of certiorari has been filed with the U.S. Supreme Court.