

Professional Perspective

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# Mitigating Risks of Consent-by-Registration Personal Jurisdiction

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The U.S. Supreme Court's landmark decision in *Daimler AG v. Bauman*, [571 U.S. 117](#) (2014), redefined the circumstances in which a corporation can be subject to general personal jurisdiction (all-purpose jurisdiction) within a forum. The *Daimler* court substantially limited the reach of general personal jurisdiction by holding that a corporate defendant can be sued in a forum's courts only if it is "essentially at home" there.

In most instances, a corporation is "essentially at home" only in the states where it is incorporated and operates its principal place of business. Thus, unless a corporation's conduct relates specifically to its activities in the state (specific jurisdiction), a corporation cannot be sued within the bounds of due process in any other forum.

After *Daimler*, plaintiffs have attempted to expand on other theories to establish personal jurisdiction in their preferred forums over out-of-state corporate defendants. One such theory is called "consent-by-registration," whereby a corporate defendant can be deemed to have consented to be sued in a state simply by registering to do business there. Although the theory has met mixed success in jurisdictions across the country, recent opinions should prompt corporations to assess the forums in which they may be subject to general personal jurisdiction.

This article overviews four recent state high court decisions on the consent-by-registration theory, and provides guidance on how companies can minimize risk as personal jurisdiction jurisprudence evolves.

## Four State High Courts' Analyses

In the last four months of 2021, state supreme courts in Georgia, New York, New Mexico, and Pennsylvania considered the consent-based theory of personal jurisdiction. The theory was rejected in New York (*Aybar v. Aybar*, [37 N.Y.3d 274](#) (N.Y. 2021)), New Mexico (*Chavez v. Bridgestone Americas Tire Operations, LLC*, --- P.3d ---, [2021 BL 438048](#) (N.M. 2021)), and Pennsylvania (*Mallory v. Norfolk Southern Railway Company*, [266 A.3d 542](#) (Pa. 2021)). However, it was upheld by the Georgia Supreme Court in *Cooper Tire & Rubber Co. v. McCall*, [863 S.E.2d 81](#) (Ga. 2021). The defendant in *Cooper Tire* and the plaintiff in *Mallory* have filed petitions for writ of certiorari, asking the U.S. Supreme Court to consider the cases.

The Georgia Supreme Court concluded that general jurisdiction existed over the defendant because its registration to conduct business made it a "resident" under Georgia's personal jurisdiction statutes. The upshot of this holding is that any corporation registered to do business in Georgia can be sued in Georgia, on any matter, regardless of whether that matter has any connection to the state. This expansive holding, if adopted by other states, would essentially undo *Daimler* by making corporate defendants subject to suit in any state where they are registered to do business.

The converse holding by the Pennsylvania high court in *Mallory* was particularly significant given the uniqueness of Pennsylvania's business registration statute. That statute provides express notice that by registering in the state, an out-of-state entity consents to the exercise of general personal jurisdiction there. Despite this notice, the Pennsylvania Supreme Court unanimously struck down the statute as unconstitutional on the basis it violated due process and interstate federalism post-*Daimler*.

The *Mallory* court recognized that nationwide, both federal and state courts have grappled with consent-by-registration jurisdiction, "and have reached disparate results." The constitutionality of this theory will remain uncertain—at least in the near term—and create associated risk for companies. Moreover, if the U.S. Supreme Court were to endorse the theory, we would expect to see a broad expansion in lower courts, opening the door to strategic forum shopping by plaintiffs.

## Why Forum Choice Matters

It is no secret that a plaintiff's forum choice can determine the success of a lawsuit. Demographic and ideological differences among jurisdictions create vastly different jury pools. Further, state substantive law varies widely on dispositive issues, and states' procedural and evidentiary rules can create differences in whether and how certain evidence is

presented to a jury at trial. These differences impact verdict potential and drive up settlement values in those jurisdictions viewed as more “unfavorable” to corporate defendants.

To a certain extent, forum selection risks are unavoidable. A corporation can always be sued in the state where it is incorporated or the state where it operates its principal place of business. In addition, a company can appropriately be sued in those jurisdictions where it specifically directed its conduct that results in the injuries alleged in a lawsuit. However, corporate entities may be able to take steps to minimize their risk of facing suit outside of these states—including in jurisdictions known for presenting significant litigation risk.

## Minimizing Risk

Monitoring evolving law on personal jurisdiction and adapting business practices accordingly can minimize the risk that a company is forced to defend a lawsuit in an unfavorable forum.

### **Withdraw Any Business Registrations That Are No Longer Necessary**

In light of the risk that consent-by-registration jurisdiction presents, companies should reassess the states in which they have registered to do business, and withdraw any registrations that are no longer needed.

For instance, a company may have registered in a state decades ago for the purpose of maintaining a satellite office that has since been sold or is no longer in use. Companies can avoid jurisdictional risks and potential litigation costs by withdrawing registrations in such situations.

Similarly, companies should review applicable laws to determine whether registration is truly necessary for their business objectives. States typically require registration only where a company “conducts business” in the state within the meaning of applicable statutes and case law.

For instance, the Georgia Court of Appeals recently held in *Universal Industrial Gases, Inc. v. Action Industries, Inc.*, [864 S.E.2d 121](#) (Ga. Ct. App. 2021), that the presence of a single employee does not suffice to establish that a company transacts business in Georgia such that it is required to register there. Companies should check for—and take advantage of—these types of limitations on the registration requirement and only register where necessary to do so.

### **Carefully Review Contractual Provisions**

Consent to jurisdiction can take other forms aside from business registration. The U.S. Supreme Court has advised that there are multiple legal arrangements whereby a litigant provides express or implied consent to the personal jurisdiction of the court.

Common examples include contract forum selection clauses, agreements to arbitrate, and stipulations entered into during the course of litigation. Companies should carefully consider the risk presented by any jurisdiction in which they expressly agree to litigate future disputes. Further, these types of contractual clauses present an opportunity for companies to select affirmatively their preferred forum for suit.

### **Monitor Daimler's 'At Home' Jurisprudence**

In *Daimler*, the U.S. Supreme Court recognized that an “exceptional” case may arise in which a corporation's business operations elsewhere could be substantial enough to render the corporation “at home” there without incorporation or a principal place of business.

To date, the Supreme Court has identified just one example of such “exceptional” circumstances: *Perkins v. Benguet Consol. Mining Co.*, [342 U.S. 437](#) (1952). In *Perkins*, World War II invasions forced the president of a company incorporated and operating in the Philippines to stop its operations there and relocate to Ohio, where the president “kept an office, maintained the company's files, and oversaw the company's activities.” The court held that the relocation created general jurisdiction in Ohio, which had become “the corporation's principal, if temporary, place of business.”

The global pandemic created by Covid-19 has likewise proven to be “exceptional.” Pandemic-inspired relocations could provide a new “home” for certain businesses within the meaning set forth in *Daimler*, especially those with small or primarily remote staff.

Additionally, as the U.S. Court of Appeals for the Fifth Circuit noted in *Frank v. P N K (Lake Charles)*, [947 F.3d 331](#) (5th Cir. 2020), neither the Supreme Court nor a federal court of appeals “has directly addressed whether the type of artificial entity, e.g., partnership or limited liability company, affects the ‘at home’ analysis.” This open question may likewise create jurisdictional risk for companies going forward.

***Raise the Personal Jurisdiction Defense Early***

Lastly, and perhaps most importantly, defendants should always assess whether jurisdiction exists at the outset of any lawsuit, and raise any applicable personal jurisdiction defenses in the first appearance in the case to avoid potential waiver. Staying apprised of jurisdictional trends and evolving case law will place a company in the best position to do so—and to secure early dismissals and save litigation costs wherever possible.