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## General Jurisdiction after Bauman

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# General Jurisdiction After *Bauman*

*Donald Earl Childress III\**

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## I. INTRODUCTION

On January 14, 2014, the Supreme Court handed down its decision in *Bauman v. DaimlerChrysler AG*.<sup>1</sup> Like all of the contributors to this Roundtable, all of the Justices agreed that California (and thus a federal district court in California)<sup>2</sup> could not assert general personal jurisdiction over a foreign corporation (DaimlerChrysler or “Daimler”) for human rights violations allegedly carried out in Argentina by Daimler’s Argentinian subsidiary, Mercedes-Benz Argentina (“MBA”), where jurisdiction was based solely on the contacts of another of Daimler’s U.S. subsidiaries, Mercedes-Benz USA (“MBUSA”), in California. Writing for all members of the Court except Justice Sotomayor (who concurred only in the judgment), Justice Ginsburg explained (following her opinion for a unanimous Court in *Goodyear*)<sup>3</sup> that general jurisdiction is only available over a corporate defendant in the place of its incorporation, the place of its principal place of business, or, “in an exceptional case,” in another forum where it is “essentially at home.”<sup>4</sup> Since none of these affiliations applied to the relationship between Daimler and California, the Court held that Daimler could not be sued in California.

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1. 134 S. Ct. 746 (2014).
2. See FED. R. CIV. P. 4(k)(1)(A).
3. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).
4. *Bauman*, 134 S. Ct., at 761 n.20.

The Court sidestepped the precise issue it was asked to decide by Daimler in its certiorari petition (and the issue the contributors addressed for this Roundtable): whether a subsidiary's contacts can be imputed to a parent corporation to establish general personal jurisdiction.<sup>5</sup> Perhaps heeding Professor Sherry's contribution, the Court "ducked" the imputation issue.<sup>6</sup> If the Court did not decide the precise issue it was asked to decide, then what did it decide?

In this brief response, I do two things. First, I review what the Court decided in *Bauman* and point to some hints the Court has given to lower courts. In so doing, I examine the ways in which the Court's opinion resonates with the contributions to this Roundtable. Second, I explain what the Court did not do in the case, and I will point to future battlegrounds concerning general jurisdiction.

## II. GUIDANCE FROM *BAUMAN*

In *Bauman*, the Supreme Court held that Daimler was not subject to general jurisdiction in California for injuries allegedly caused by a subsidiary of Daimler in Argentina. Before reaching this conclusion, the Court made several points designed perhaps to send not-so-subtle hints to lower courts.

First, the Court reviewed in significant detail its precedents regarding specific and general jurisdiction. While specific jurisdiction was never at issue in the case, the Court thought it helpful to make plain the differences between the two and to explain that "general jurisdiction has come to occupy a less dominant place in the contemporary scheme."<sup>7</sup> More so, the Court tried to clear up terminological confusion regarding the words "continuous and systematic" contacts. In short, the Court observed that the test for general jurisdiction is not whether a foreign corporation's contacts with the forum state are "continuous and systematic," rather the question is "whether that corporation's 'affiliations with the State are

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5. The question presented by Daimler's certiorari petition was "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Pet. for a Writ of Cert., *Bauman*, 134 S. Ct. 746, at i (No. 11-965).

6. Suzanna Sherry, *Don't Answer That! Why (and How) the Supreme Court Should Duck the Issue in DaimlerChrysler v. Bauman*, 66 VAND. L. REV. EN BANC. 111, 114–19 (2013). Professor Sherry's proposal was that the Court "hold[] that MBUSA's contacts with California did not give rise to personal jurisdiction." *Id.* at 118. The Court's ultimate conclusion was less straightforward. As will be discussed in the main text, the Court assumed that MBUSA was "at home" in California, also assumed that its contacts could be imputed to Daimler, and yet found that Daimler was still not subject to general jurisdiction in California.

7. *Bauman*, 134 S. Ct. at 758 (footnote omitted).

so continuous and systematic as to render [it] essentially at home in the forum State.’”<sup>8</sup>

Hint #1: The Court meant what it said in *Goodyear*: general jurisdiction should be limited, except in an exceptional case, to a corporation’s state of incorporation and principal place of business.<sup>9</sup> The Court appears to be saying that lower courts should not take the “at home” language and use it to find general jurisdiction, on a “continuous and systematic theory,” as some courts had done following *Goodyear*.<sup>10</sup> Notwithstanding this hint, courts may continue to use the “at home” language to justify expansive assertions of general jurisdiction.<sup>11</sup>

Second, the Court declined to address directly the issue whether a subsidiary’s contacts with a forum state could be imputed to the parent to establish personal jurisdiction. While noting that the courts of appeals have taken different approaches to the question, the Court did “not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court’s analysis be sustained.”<sup>12</sup> The Court also explained that while the Ninth Circuit imputed MBUSA’s contacts to Daimler, at no point was it ever shown that MBUSA was an alter ego of the company.<sup>13</sup>

Hint #2: The Court appears to be calling into doubt whether a subsidiary’s contacts can ever be imputed to establish general jurisdiction as opposed to specific jurisdiction, but it leaves the door open to decide the question in another case. At a minimum, the Court may be sending a message that to the extent imputation is available at all, it can only be done in the alter ego context. This could have ramifications for imputation questions concerning both general and specific jurisdiction.

Third, the Court failed to take Professor Sherry’s suggestion to find directly that MBUSA was not itself subject to general jurisdiction in California in light of *Goodyear*. According to the Court, this was a point that had been conceded by Daimler below, and thus the Court

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8. *Id.* at 761 (quoting *Goodyear*).

9. *Id.* at 761 nn.17 & 18.

10. *See, e.g.*, *J.B. ex rel. Benjamin v. Abbott Labs.* 2013 WL 452807 (N.D. Ill. 2013); *Ashbury Intern. Group v. Cadex Defence, Inc.*, 2012 WL 4325183 (W.D. Va. 2012).

11. *See* *Barriere v. Juluca*, 2014 WL 652831, at \*8–\*9 (S.D. Fla. 2014) (finding general jurisdiction over an Anguillan corporation where the corporation maintains a sales office and heavily markets in Florida and noting that “[w]hile *Daimler* has undoubtedly limited the application of general jurisdiction to foreign defendants” declining jurisdiction “would effectively deprive American citizens from litigating in the United States”).

12. *Bauman*, at 759.

13. *Id.*

assumed, “for purposes of this decision only, that MBUSA qualifies as at home in California.”<sup>14</sup>

Hint #3: Under *Goodyear*, MBUSA is not really “essentially at home” in California. But, since we are stuck with the concession, we will assume MBUSA meets the “at home” language even if it does not meet the test for general jurisdiction.

The Court also took account of the transnational elements of the case. As Professor Silberman and I each explained in our contributions to this Roundtable, much could be learned from a comparative look at jurisdiction.<sup>15</sup> As the Court explained, “[c]onsiderations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of the courts in California would not accord with the ‘fair play and substantial justice’ due process demands.”<sup>16</sup>

Hint #4: The Court is not insensitive to the well-developed views of other countries, at least when those views confirm a prior decision already reached by the Court.

So, what did the Court decide? The Court sought to clear up any confusion remaining after *Goodyear* that a corporation is subject to general jurisdiction in its state of incorporation and its principal place of business, and, in an exceptional case, in another forum where it is essentially at home. This was the approach proposed by Professor Erichson in his contribution to this Roundtable, although the Court did not go as far as he urged and also hold that agency could never establish jurisdiction.<sup>17</sup> In coming to this conclusion, the Court also seemed to accept Professor Erichson’s suggestion that the reasonableness prong should be jettisoned in the context of general jurisdiction.<sup>18</sup> According to the Court, the reasonableness check “was to be essayed when *specific* jurisdiction is at issue,” yet “[w]hen a corporation is genuinely at home in the forum State, however, any second-step [reasonableness] inquiry would be superfluous.”<sup>19</sup>

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14. *Id.* at 758.

15. Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123, 134 (2013); Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 77–79 (2013).

16. *Bauman*, 134 S. Ct. at 763.

17. Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 87 (2013).

18. *Id.* at 93.

19. *Bauman*, 134 S. Ct. at 762 n.20. The Court thus did not take Professor Neuborne’s (and Professor Sherry’s) suggestion that reasonableness could resolve this case. The Court never considered Professor Neuborne’s suggestion that the Court lacked subject matter jurisdiction.

Hint #5: Courts should not use reasonableness to police exorbitant assertions of general jurisdiction. Rather, general jurisdiction should be limited to provide jurisdictional clarity.<sup>20</sup>

Importantly, the Court reached its holding in a somewhat circuitous way. Let's look at the Court's reasoning. "Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."<sup>21</sup>

Just reading the language of the opinion, one might have expected the result to be that Daimler *was* subject to general jurisdiction because, as was assumed, MBUSA was subject to general jurisdiction because it was "at home" in California and, as was assumed, that was imputable to Daimler. Or, at a minimum, that since MBUSAs contacts could be attributed to Daimler that the Court would be forced to use reasonableness to reverse.

In contrast, the Court explained that simply being at home is not enough to establish general jurisdiction since "neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there."<sup>22</sup> In other words, just because MBUSA was at home in California that did not mean Daimler was at home in California because that forum was not Daimler's principal place of business or state of incorporation.

At bottom, the Court reiterated its language in *Goodyear* that general jurisdiction should be limited to a corporation's state of incorporation or principal place of business and reconfirmed that outside of these fora a corporation is only subject to general jurisdiction in an exceptional case.

### III. QUESTIONS UNANSWERED

As already alluded to above, the Court did not resolve several important issues that will be subject to further investigation by courts and scholars.

First, the Court declined to answer whether imputation of contacts is viable for establishing general personal jurisdiction. As such, this theory still survives in several circuits. This raises an interesting question: would Daimler be subject to general jurisdiction in Delaware or New Jersey, where MBUSA would be subject to

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20. *Id.* (citing *Hertz*).

21. *Bauman*, 134 S Ct. at 760.

22. *Id.* at 761.

general jurisdiction, as these are its places of incorporation and principal place of business? Given that under the Court's test MBUSA is at home in these fora, can its contacts be imputed to Daimler? We do not know the answer to that question in light of the Court's silence on imputation. But, I suspect that the answer would be no in light of the Court's strong language limiting general jurisdiction.

Second, the Court in reiterating a clear rule for assertions of general jurisdiction has given a strong signal that the "doing business" theory of general jurisdiction is of questionable vitality going forward.<sup>23</sup> However, a strong signal may not stop lower courts from continuing to apply this theory. Thus, it may take another case in another term to clarify the parameters of that theory.

Third, the Court did not define the term "exceptional circumstances." Of course, one wonders whether what is "exceptional" is in the eye of the district court. This thus presents the possibility for creative lawyering and continued uses of general jurisdiction beyond what the Court appears to intend.

Finally, what are courts to make about the relevance of the transnational context of a case for their decisionmaking? Should purely domestic cases be treated differently from cases with transnational elements? More attention needs to be paid to this question.

#### IV. CONCLUSION

As I conclude this brief response, I want to make a practical point. Academics often tend to treat Supreme Court opinions as the final statement of affairs. Of course, what good would a Supreme Court be if it were not final? Yet, as shown above, there remain openings for expansive assertions of general jurisdiction. I have no doubt that lower courts will continue to find general jurisdiction in situations beyond what the Court has intended in its *Goodyear* and *Bauman* decisions.<sup>24</sup> The reason for this is that the jargon of personal jurisdiction obscures what is really at stake in individual cases: the competing demands of access to justice for plaintiffs and fairness for defendants. Hopefully, the Court's recent forays into personal jurisdiction will encourage greater consideration of these demands.

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23. *Id.* at n. 18.

24. See *Barriere v. Juluca*, 2014 WL 652831, at \*8-\*9 (S.D. Fla. 2014) (finding general jurisdiction over an Anguillan corporation where the corporation maintains a sales office and heavily markets in Florida).