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Client Alert

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Courts Continue to Struggle with Jurisdiction by Consent

Introduction[1]

On January 26, 2017, the U.S. District Court for the Southern District of New York (S.D.N.Y.) decided *Famular v. Whirlpool Corp.*,[2] a case addressing the circumstances in which an out-of-state corporation may be deemed to have consented to the jurisdiction of New York courts. Specifically, *Famular* dealt with the "consent-by-registration" theory, which holds that a foreign corporation may consent to the general jurisdiction of a state's courts by registering to do business in that state and appointing an in-state agent for service of process. The key issue addressed by the district court was whether consent-by-registration theory, which had been recognized in several previous decisions, remains valid the wake of the U.S. Supreme Court's 2014 decision in *Daimler AG v. Bauman*,[3] which greatly limited courts' ability to exercise general personal jurisdiction over a non-domiciliary defendant on the basis that the defendant was "doing business" within the forum state. The continued validity of the consent-by-registration theory after *Daimler* has been a point of disagreement among U.S. federal courts,[4] and resolution of this disagreement is likely to have significant implications for plaintiffs seeking to bring suit against foreign defendants in U.S. courts. In *Famular*, the district court ultimately concluded that the consent-by-registration theory is no longer a valid basis for the exercise of general personal jurisdiction after *Daimler*. This decision thus narrows the ability of plaintiffs to bring suits against foreign defendants in New York federal courts, and may have further implications for the theory of consent-by-registration if its reasoning is found persuasive in other jurisdictions.

History of Consent-by-Registration

The notion that a court may exercise jurisdiction over an out-of-state defendant *solely* on the basis of that defendant's registration to do business in the forum state has a long history. It stems largely from the 1917 case of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, in which the U.S. Supreme Court ruled that a company that had registered to do business in Missouri – and that had designated a Missouri public official as agent for the service of process – had consented to the jurisdiction of Missouri state courts.[5]

While *Pennsylvania Fire* was decided prior to many of the seminal Supreme Court cases addressing personal jurisdiction, many lower federal courts have

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continued to apply the consent-by-registration theory up to the present day. For instance, in the 2008 case of *Rockefeller University v. Ligand Pharmaceuticals*,[6] the U.S. District Court for the Southern District of New York considered that a company's "unrevoked authorization to do business and its designation of a registered agent" in New York was sufficient to establish personal jurisdiction over that company, even though the company was not actually transacting any business within the state.[7]

Nevertheless, even prior to *Daimler*, certain federal and state courts questioned whether the theory of consent-by-registration could be squared with the evolving law on personal jurisdiction. An emblematic example is *Freeman v. Second Judicial District Court*,[8] in which the Nevada Supreme Court analyzed the leading cases on jurisdiction at length, and concluded that the U.S. Supreme Court had "abandoned the reasoning" of *Pennsylvania Fire*.[9] In the 2009 case of *Viko v. World Vision Inc*, a federal judge noted disagreement as to the validity of the consent-by registration theory, and stated that the viability of *Pennsylvania Fire* had been "cast into doubt" as a result of changing Supreme Court jurisprudence.[10]

In sum, at the time *Daimler* was decided, there was already disagreement among U.S. courts concerning whether a corporation's registration to do business in a state subjected it to the jurisdiction of that state's courts. However, New York courts – including the Southern District – continued to embrace this notion.

The New York Business Corporation Law and Consent to Jurisdiction

Section 1304 of New York's Business Corporation Law (BCL) provides that a foreign corporation may apply for authority to do business within New York.[11] An integral part of this application is a designation by the foreign corporation "of the secretary of state as its agent upon whom process against it may be served. . ."[12] Additionally, Section 304 of the BCL provides that "[n]o domestic or foreign corporation may be formed or authorized to do business in this state under this chapter unless in its certificate of incorporation or application for authority it designates the secretary of state" as its agent upon whom process may be served.[13]

While these provisions do not expressly state that a foreign corporation must consent to the general jurisdiction of New York courts as a prerequisite to doing business in New York, courts repeatedly have construed them as embodying such consent. In *Serov v. Kerzner International Resorts*, a New York state trial court summarized the caselaw, noting that "[i]t has been held that 'a foreign corporation is deemed to have *consented* to personal jurisdiction over it when it registers to do business in New York and appoints the Secretary of State to receive process for it pursuant to Business Corporation Law §§ 304 and 1304.'"[14] Prior to *Daimler*, therefore, Sections 304 and 1304 provided a sound basis for the consent-by-registration theory as a matter of New York law.

The *Daimler* Effect on Jurisdictional Analysis

On January 14, 2014, the U.S. Supreme Court decided *Daimler*, a decision that is widely considered to have sharply narrowed the scope of general personal jurisdiction.[15] Justice Ginsburg, writing for an eight-Justice majority, held that general jurisdiction over corporations is limited to situations in which that corporation is "fairly regarded as at home."[16] A corporation is "at home" in the state in which it is incorporated, or where it has its principal place of business.[17] *Daimler* found expressly that allowing a corporation to be subjected to general personal jurisdiction in each state where it "engages in a substantial, continuous and systematic course of business" would be "unacceptably grasping."[18] As such, *Daimler* effectively declared a "doing business" standard to be incompatible with constitutional principles of due process, and greatly narrowed courts' ability to exercise general personal jurisdiction over foreign corporations.

Daimler did not explicitly address whether jurisdiction could still be founded on an act of consent, such as registration to do business in a state. Thus, lower courts have been left to make this determination for themselves. The U.S. Court

of Appeals for the Second Circuit (Second Circuit), whose decisions are binding on all New York federal courts, has yet to make a definitive ruling on this issue. In one post-*Daimler* case, the Second Circuit expressed doubts that the consent-by-registration theory remained valid, but explicitly declined to rule one way or the other.[19]

Federal district court and state court decisions on the issue have been inconsistent. In *Beach v. Citigroup*,[20] a decision rendered shortly after *Daimler*, the district court mentioned in dictum that "a corporation may consent to jurisdiction in New York […] by registering as a foreign corporation and designating a local agent."[21] Two state court cases later invoked *Beach* for the proposition that *Daimler* did not change the law with respect to consent-by registration.[22]

However, a federal district court ruled in 2015 that "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."[23]

None of the above post-*Daimler* cases directly analyzed the relevant portions of the Business Corporation Law.

In the 2016 case of *Serov v. Kerzner International Resorts*, a New York trial court upheld the notion that the defendants had consented to the jurisdiction of New York courts by registering to do business under Sections 304 and 1304 of the Business Corporation Law, but relied almost exclusively on pre-*Daimler* case law and did not consider *Daimler*'s effect on those statutory provisions.[24]

Those New York cases that had examined the interaction between *Daimler* and the Business Corporation Law in the immediate aftermath of *Daimler* each concluded that Section 1304 was no longer a valid basis for general jurisdiction. One federal district court held that because the BCL lacks "an explicit indication that registration subjects a registrant to general jurisdiction in New York, an exercise of general personal jurisdiction based on registration alone would be counter to the principles of due process articulated in *Daimler*."[25] Another district court similarly noted that "New York's business registration statutes do not expressly require consent to general jurisdiction," and that in the absence of any clearer legislative or post-*Daimler* authority to the contrary, it would decline to find that designation of the Secretary of State as agent for service of process constituted consent to general jurisdiction.[26]

Therefore, the status of the consent-by-registration theory under New York law remained unclear at the time the *Famular* case was decided, although several courts had begun to reject the theory outright.

The *Famular* Decision

Famular v. Whirlpool involved a class action lawsuit brought by a number of plaintiffs against several corporate defendants.[27] The plaintiffs alleged claims for breach of express warranty, unjust enrichment, and violations of various states' consumer-protection statutes in connection with the plaintiffs' purchases of home washing machines.[28]

Whirlpool conceded that it was subject to specific personal jurisdiction in New York with respect to the claims raised by one of the named plaintiffs.[29] Otherwise, however, each of the four defendants moved to dismiss the case on various grounds, including lack of personal jurisdiction.[30] Notably, none of the defendant corporations were either incorporated in New York, or had their principal place of business in New York.[31]

In an attempt to establish jurisdiction, the plaintiffs argued that each of the four defendants was subject to general personal jurisdiction in New York under a consent-by-registration theory. Specifically, plaintiffs claimed that "because Defendants have registered with the New York Department of State, and have designated an agent to receive process in New York, they have consented to general jurisdiction" in New York.[32] In support of this proposition, the plaintiffs cited *Beach*, and also relied on two post-*Daimler* New York state court cases that had followed it. The defendants

argued in response that the consent-by-registration theory of general personal jurisdiction "is no longer viable in light of *Daimler*."[33]

The court ruled in favor of the defendants, holding that "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."[34] The court noted that most of the cases on which the plaintiffs relied predated *Daimler*, and therefore their reasoning was incomplete and unpersuasive.[35] The court then criticized the *Beach* decision, noting that its discussion of consent-by registration was limited to one sentence of analysis that drew upon irrelevant pre-*Daimler* precedent.[36] Having rejected plaintiff's arguments regarding general personal jurisdiction, the court dismissed the vast majority of the plaintiffs' claims.[37]

Regrettably, the *Famular* court did not explicitly mention any relevant portions of the Business Corporation Law in its analysis.

Implications of the Decision

The *Famular* decision adds weight to the growing body of post-*Daimler* caselaw rejecting consent-by-registration as a basis for establishing personal jurisdiction over a foreign company. In fact, a very recent New York state case cited the *Famular* decision in holding that registration to do business under Sections 304 and 1304 of the Business Corporation Law does not constitute consent to general personal jurisdiction.[38] That decision also noted that "a bill was introduced in the State Assembly to make plain that registration constituted consent to the general jurisdiction of the courts of this state (2014 NY Assembly Bill S7078). The proposed statute was not enacted."[39]

The significance of the *Famular* case is heightened by the fact that it was issued by a court seated in New York City, a location critical to cross-border and transnational litigation. Plaintiffs who may seek to bring a case against a defendant in New York – perhaps due to the fact that the defendant maintains office in New York, or assets in New York-based banks – already face substantial difficulties in establishing the requisite personal jurisdiction over non-New York based corporations. Inasmuch as it represents a growing trend among lower federal courts, the *Famular* decision may serve to compound these difficulties by restricting one of the few paths to general jurisdiction arguably left open after *Daimler*.

It bears noting, however, that courts in many other U.S. jurisdictions continue to uphold the validity of consent-by registration in the wake of *Daimler*.[40] In the words of a federal district court in Delaware, "in the one instance in which *Daimler* mentions consent to jurisdiction – in the context of a discussion regarding general jurisdiction – it does so to *distinguish* the concept of consent from the circumstances relevant to its decision."[41]

It is therefore clear that, notwithstanding *Famular* and a growing body of New York case law rejecting consent-by-registration, this remains a controversial legal issue that will ultimately need to be addressed definitively by appellate courts and, perhaps, the U.S. Supreme Court.

[1] The authors would like to thank Timothy McKenzie, an associate in King & Spalding's Global Disputes practice (New York) for his contributions to this client alert.
[2] *Famular v. Whirlpool Corp*., No. 16 CV 944, 2017 U.S. Dist. LEXIS 8265, at *1 (S.D.N.Y. Jan. 26, 2017).
[3] *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
[4] *See* Kevin D. Benish, Note, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U.L. Rev. 1609, 1612 (2015).
[5] *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co*., 243 U.S. 93, 94–96 (1917).
[6] *Rockefeller Univ. v. Ligand Pharms. Inc*., 581 F.Supp. 2d 461 (S.D.N.Y. 2008).
[7] *Id*. at 467.
[8] *Freeman v. Second Judicial Dist. Court*, 1 P.3d 963, (Nev. 2000).
[9] *Id*. at 965–68.
[10] *Viko v. World Vision, Inc*., No. 2:08-cv-221, 2009 U.S. Dist. LEXIS 133923, at *22–31 (S.D.N.Y. Apr. 27, 2009).
[11] N.Y. Bus. Corp. L. § 1304.
[12] *Id*. at § 1304(6).
[13] *Id*. at § 304(a)-(b).
[14] *Serov ex rel. Serova v. Kerzner Intern. Resorts, Inc*., No. 162184/2015, 2016 WL 4083725, at *4 (Sup. Ct. N.Y. Co. July 26, 2016) (emphasis in original).
[15] *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
[16] *Id*. at 760.
[17] *Id*.
[18] *Id*. at 761.
[19] *Brown v. Lockheed Martin Corp*., 814 F.3d 619, 637–40 (2d Cir. 2016) ("[W]e decline to decide here whether consent to general jurisdiction via a registration statute would be similarly effective notwithstanding *Daimler*'s strong admonition against the expansive exercise of general jurisdiction.").
[20] *Beach v. Citigroup Alternative Invs. LLC*, 12 Civ. 7717 (PKC), 2014 U.S. Dist. LEXIS 30032, at *18 (S.D.N.Y. Mar. 7, 2014).
[21] *Id*.
[22] *Bailen v. Air & Liquid Systems Corp.*, No. 190318/12, 2014 WL 3885949, at *4 (Sup. Ct. N.Y. Co. Aug. 5, 2014); *Corporate Jet Support, Inc. v. Lobosco Insurance Group, L.L.C.*, No. 651976/2015, 2015 WL 5883026, at *2 (Sup. Ct. N.Y. Co. Oct. 7, 2015).
[23] *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015).
[24] *Serov ex rel. Serova v. Kerzner Intern. Resorts, Inc*., No. 162184/2015, 2016 WL 4083725, at *4–5 (Sup. Ct. N.Y. Co. July 26, 2016)
[25] *Minholz v. Lockheed Martin Corp.*, No: 1:16–CV–154, 2016 WL 7496129, at *9 (N.D.N.Y. Dec. 30, 2016).
[26] *Taormina v. Thrifty Car Rental*, 16-CV-3255 (VEC), 2016 WL 7392214, at *7 (S.D.N.Y. Dec. 21, 2016).
[27] *Famular v. Whirlpool Corp*., No. 16 CV 944, 2017 U.S. Dist. LEXIS 8265, at *1 (S.D.N.Y. Jan. 26, 2017).
[28] *Id*.
[29] *Id*. at *7.
[30] *Id*. at *4.
[31] *Id*.
[32] *Id*. at *8.
[33] *Id*. at *9.
[34] *Id*.
[35] *Id*. at *10.
[36] *Id*.
[37] *Id*. at *2–3.
[38] *Mischel v. Safe Haven Enterprises, LLC*, No. 653651/2016, 2017 WL 1384214, at *2 (Sup. Ct. N.Y. Co. Apr. 17, 2017).
[39] *Id*.
[40] *Otsuka Pharmaceutical Co., Ltd. v. Mylan Inc.*, 106 F.Supp.3d 456, 468 (D.N.J. 2015); *Forest Laboratories, Inc. v. Amneal Pharmaceuticals LLC*, No. 14–508–LPS, 2015 WL 880599, at *13 (D. Del. Feb. 26, 2015); *Bors v. Johnson & Johnson*, 208 F.Supp.3d 648, 655 (E.D. Pa. 2016); *Snyder Insurance Services, Inc. v. Sohn*, No. 16-CV-2535-DDC-GLR, 2016 WL 6996265, at *3 (D. Kan. Nov. 30, 2016); *Chalkey v. Smithkline Beecham Corp.*, No. 4:15 CV 1838 DDN, 2016 WL 705134, at *4 (E.D. Mo. Feb. 23, 2016); *Spanier v. American Pop Corn Company*, No. C15-4071-MWB, 2016 WL 1465400, at *4 (N.D. Ia. Apr. 14, 2016); *Acorda Therapeutics Inc. v. Mylan Pharmaceuticals, Inc.*, 817 F.3d 755, 769 (Fed. Cir. 2016) (O'Malley, J., concurring).
[41] *Forest Laboratories, Inc. v. Amneal Pharmaceuticals LLC*, No. 14–508–LPS, 2015 WL 880599, at *13 (D. Del. Feb. 26, 2015).