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Client Alert

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New York Courts Continue to Reject Consent-By-Registration Theory of Personal Jurisdiction Post-Daimler[1]

Introduction

On October 18, 2017, the U.S. District Court for the Southern District of New York (S.D.N.Y.) decided *Sae Han Sheet Co. v. Eastman Chemical Corp.*,[2] the latest in a series of cases to examine whether an out-of-state corporation may be deemed to have consented to the jurisdiction of New York courts by virtue of its registration to do business within the state. The *Sae Han* court followed the lead of several recent S.D.N.Y. cases which have held that this "consent-by-registration" theory is no longer a valid basis for general jurisdiction over an out-of-state defendant in the wake of the U.S. Supreme Court's 2014 decision in *Daimler AG v. Bauman*.[3] In one of several attempts to circumvent the restrictions on general personal jurisdiction imposed by *Daimler*, the plaintiff in *Sae Han* invoked another Supreme Court decision – *Burnham v Superior Court of California*.[4] In *Burnham*, the Supreme Court found that a California trial court had properly exercised personal jurisdiction over an individual who was served with process while visiting the state for reasons unrelated to the suit.[5] The Supreme Court reasoned that the typical jurisdictional analysis applied to out-of-state defendants (which would later be further developed in *Daimler*) did not apply where a defendant was served while physically present in a state, even if such presence was only temporary.[6]

In *Sae Han*, the plaintiff argued that the question of consent-by-registration is more properly analyzed according to the standards established in *Burnham*, and that *Daimler* does not apply.[7] The S.D.N.Y. dismissed this argument in summary fashion, with little analysis. Nevertheless, the *Sae Han* case raises the interesting question of whether a corporation which has registered to do business within a state – and has appointed an in-state agent to receive service of process on its behalf – should be treated more like the defendant in *Burnham* than the defendant in *Daimler*. New York courts may yet have additional opportunities to address this question – particularly as the Second Circuit Court of Appeals has yet to issue any definitive ruling on this point.

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. In the 1917 case of *Pennsylvania Fire*

For more information, contact:

James E. Berger
+1 212 556 2202
jberger@kslaw.com

Charlene C. Sun
+1 212 556 2107
csun@kslaw.com

King & Spalding
New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100
Fax: +1 212 556 2222

www.kslaw.com

Insurance Co. v. Gold Issue Mining & Milling Co., the 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.[8]

However, the state of the law changed dramatically over the course of the 20th century as the Supreme Court repeatedly ruled that constitutional notions of due process placed limitations on courts' ability to exercise personal jurisdiction over defendants located outside of the forum state. Consequently, more recent judicial decisions have appeared divided on the question of whether consent-by-registration can still form the basis for a court's exercise of general personal jurisdiction.

For instance, in the 2008 case of *Rockefeller University v. Ligand Pharmaceuticals*, the S.D.N.Y. held 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.[9] The following year, however, the same court stated that the viability of *Pennsylvania Fire* – and the consent-by-registration theory in general – had been "cast into doubt" as a result of changing Supreme Court jurisprudence.[10]

Thus, even prior to the Supreme Court's decision in *Daimler*, the precise legal status of the consent-by-registration theory remained uncertain. However, New York courts – including the S.D.N.Y. – continued to apply this theory from time to time.

The New York Business Corporation Law and Consent to Jurisdiction

Section 304 of New York's Business Corporation Law (BCL) provides that "[n]o domestic or foreign corporation may be formed or authorized to do business in this state […] 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.[11] Section 1304 of the BCL grants foreign corporations the ability to apply to do business within New York.[12]

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. However, New York courts have often held that foreign corporations which register to do business pursuant to Sections 304 and 1304 of the BCL provide such consent. For instance, in *Serov v. Kerzner International Resorts*, a New York State court noted 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."[13]

While some judges had expressed misgivings about this theory prior to *Daimler*, it nevertheless remained a generally viable argument that a plaintiff could employ in an attempt to subject out-of-state corporations to the jurisdiction of New York courts.

***Daimler* and its Effect on General Jurisdiction**

On January 14, 2014, the U.S. Supreme Court issued its 8–1 decision in *Daimler*, ruling that general jurisdiction over corporations is limited to situations in which that corporation is "fairly regarded as at home."[14] According to the Court, a corporation may only be considered "at home" in the state in which it is incorporated, or where it has its principal place of business.[15] This ruling effectively did away with the "doing business" standard for general personal jurisdiction, as the Supreme Court found that subjecting a corporation to general jurisdiction in each state where it "engages in a substantial, continuous, and systematic course of business" would be "unacceptably grasping."[16]

The Supreme Court did not expressly address the consent-by-registration theory anywhere in the *Daimler* decision. The Court *did* mention the more general concept of consent to jurisdiction once in passing – and in so doing appears to have drawn a distinction between the ordinary standards governing general jurisdiction and those applicable to a situation in which a party has consented to the jurisdiction of the forum state's courts.[17]

In the absence of any specific guidance from the Supreme Court as to how the *Daimler* decision affects consent-by-registration, lower courts have been left to make this determination for themselves. The Second Circuit Court of Appeals – whose decisions are binding on all New York federal courts – has similarly not issued any definitive ruling on this subject. However, in its 2016 decision in *Brown v. Lockheed Martin Corp.*, it expressed doubt that a corporation's registration to do business in a state could validly subject that corporation to the general personal jurisdiction of that state's courts after *Daimler*.[18] Several New York district court decisions have gone further, and have expressly found that the consent-by-registration theory is no longer applicable.[19]

Burnham and "Tag" Jurisdiction

Well before *Daimler* was decided, the Supreme Court made an equally important finding in the 1990 case of *Burnham v. Superior Court of California*. The *Burnham* case involved a divorce action that was filed in California state court against an individual – the petitioner – who resided in New Jersey.[20] The petitioner was served with a summons and complaint while visiting his children in California, and thereafter moved to quash service of process on the ground that the California court lacked personal jurisdiction over him.[21] He argued that his only contacts with California were a few short visits to the State for purposes of conducting business and visiting his children, and that the court's exercise of jurisdiction over him on the basis of those limited contacts would violate due process.[22]

All nine Justices agreed that the California court could properly exercise jurisdiction over the petitioner in these circumstances, thereby upholding the validity of what has been called "transient jurisdiction" or "tag" jurisdiction. In a plurality opinion issued by Justice Scalia, the Supreme Court ruled that the California court could properly exercise personal jurisdiction over the petitioner based on the fact that he was served with process while temporarily present in the state.[23] Justice Scalia's plurality opinion held that the "minimum contacts" test developed in 20th century Supreme Court jurisprudence is not applicable where a defendant is physically present in the forum state.[24] Notably, Justice Scalia's opinion referred to registration statutes and the requirement that corporations appoint in-state agents to receive service of process as examples of the "relaxation of the strict limits on state jurisdiction."[25]

Justice Brennan wrote a concurring opinion for four Justices. He agreed with Justice Scalia that the Constitution "generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum state."[26] He disagreed with Justice Scalia with regard to the appropriate test for assessing the fairness of "transient" or "tag" jurisdiction, but nevertheless found that the exercise of such jurisdiction was appropriate in the circumstances of the case at hand.

The _Sae Han_ Decision

Sae Han Sheet Co. v. Eastman Chemical Corp. stemmed from a dispute over a product called "Suntek," a glass tinting film commonly applied to automobiles and office windows.[27] The plaintiff, Sae Han Sheet Company, Limited, is a Korean company with its principal place of business in Seoul, South Korea. Defendant Eastman Chemical Corporation is incorporated in the State of Delaware, and has its principal place of business in the State of Tennessee.[28] At all relevant times, Eastman was registered to do business in New York pursuant to Sections 304 and 1304 of New York's Business Corporation Law.

Sae Han brought suit against Eastman in the State of New York, alleging that defects in Eastman's "Suntek" products had damaged its resale business in Korea.[29] Eastman moved to dismiss the case for lack of personal jurisdiction.[30]

The bulk of the court's analysis concerned whether it had general personal jurisdiction over Eastman by virtue of the latter's registration to do business in New York. The court sided with Eastman on this issue, and dismissed the case for lack of jurisdiction. The court noted that "[i]n light of *Daimler* and [the Second Circuit's decision] in *Brown*, the more recent authority in this district has held that corporations do not consent to general jurisdiction when they register under the various New York registration statutes."[31] It declined to follow two post-*Daimler* cases cited by Sae Han, explaining that those cases pre-dated the Second Circuit's decision in *Brown* and therefore did not address that case's discussion of the impact of *Daimler* upon the consent-by-registration theory.[32]

The court also rejected Sae Han's contention that the consent-by-registration theory should be evaluated in light of *Burnham*, and that *Daimler* was inapplicable.[33] It devoted little attention to this argument, simply noting that *Burnham* did not explicitly mention the consent-by-registration theory. The Court further noted that the Second Circuit had already affirmed the applicability of *Daimler* to a consent-by-registration analysis.

Implications of the *Sae Han* Decision

The *Sae Han* case does not differ materially from other recent S.D.N.Y. decisions in terms of its end result.[34] However, it differs from its predecessors in that it considered (albeit in an apparently cursory manner) and rejected an argument that consent-by-registration is better analyzed according to the standards set forth in *Burnham* as opposed to those established in *Daimler*. Given that the Supreme Court in *Burnham* expressly recognized that the typical "contacts-based" analysis is not always necessary in order to ascertain a court's jurisdiction (*e.g.* when a defendant is served with process while temporarily present within the forum state), this argument merits further attention. A corporation's appointment of an agent to receive service of process within a state could conceivably be analogized to the physical presence required for "tag" jurisdiction.

Unfortunately, the S.D.N.Y.'s analysis of this point in *Sae Han* was not rigorous. Given that neither the Second Circuit nor the Supreme Court have definitively ruled on this issue, it remains possible for plaintiffs to make the same argument in the future, and New York courts may yet have the opportunity to thoroughly analyze whether *Daimler* provides the appropriate framework through which to analyze arguments concerning consent-by registration.

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[2] *Sae Han Sheet Co. v. Eastman Chemical Corp.*, No. 17 Civ. 2734 (ER), 2017 WL 4769394 (S.D.N.Y. Oct. 18, 2017).

[3] *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

[4] *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

[5] *Id* at 628.

[6] *Id* at 621.

[7] *Sae Han Sheet Co. v. Eastman Chemical Corp.*, No. 17 Civ. 2734 (ER), 2017 WL 4769394, at *7 (S.D.N.Y. Oct. 18, 2017).

[8] *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94–96 (1917).
[9] *Rockefeller Univ. v. Ligand Pharms. Inc.*, 581 F.Supp. 2d 461, 467 (S.D.N.Y. 2008).
[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. § 304.
[12] *Id*. at § 1304.
[13] *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).
[14] *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).
[15] *Id*.
[16] *Id*. at 761.
[17] *Id*. at 755–56 ("Our post *International Shoe* opinions on general jurisdiction, by contrast, are few. [The Court's] 1952 decision in *Perkins v. Benguet Consol Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.") (emphasis added) (internal quotation marks and citations omitted).
[18] *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640–41 (2d Cir. 2016).
[19] *See Taormina v. Thrifty Car Rental*, 16-CV-3255 (VEC), 2016 WL 7392214, at *7 (S.D.N.Y. Dec. 21, 2016); *Famular v. Whirlpool Corp.*, No. 16 CV 944, 2017 U.S. Dist. LEXIS 8265, at *1 (S.D.N.Y. Jan. 26, 2017).
[20] *Burnham v. Superior Court of California*, 495 U.S. 604, 607–08 (1990).
[21] *Id*. at 608.
[22] *Id*.
[23] *Id*. at 604.
[24] *Id*. at 621.
[25] *Id*. at 617.
[26] *Id*. at 628–29.
[27] *Sae Han Sheet Co. v. Eastman Chemical Corp.*, No. 17 Civ. 2734 (ER), 2017 WL 4769394 (S.D.N.Y. Oct. 18, 2017).
[28] *Id*. at *1.
[29] *Id*. at *2.
[30] *Id*.
[31] *Id*. at *6.
[32] *Id*.
[33] *Id*. at *7.
[34] *See, e.g.*, *Famular v. Whirlpool Corp.*, No. 16 CV 944, 2017 U.S. Dist. LEXIS 8265, at *1 (S.D.N.Y. Jan. 26, 2017) (finding the consent-by-registration theory invalid in light of *Daimler*).