

## Outside Counsel

# Personal Jurisdiction And Venue Transfer

**W**hile the first question most, if not all, New York litigators ask when evaluating a new complaint filed against their corporate clients is whether there is a viable motion to dismiss, all too often that question focuses on the merits of the case. A motion to dismiss for failure to state a claim can result in complete dismissal of some cases and force plaintiffs to replead other claims, but it frequently requires the defense to spend a significant amount of money on attorneys' fees for, at best, a dismissal without prejudice.

In today's business climate with clients continuing to look for ways to minimize litigation costs, the reluctance to fund a low percentage pre-answer motion is increasing. If litigation remains inevitable, many corporate decision-makers prefer to pursue the less costly route of answering and focus on ways to defend the merits cost effectively. Recent developments in jurisdictional jurisprudence warrant rethinking this approach.

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Until recently, corporate clients with a New York, multistate or national presence assumed that personal jurisdiction in an inconvenient forum was a *fait accompli*, given the broad nature of New York's long-arm statute and that due process jurisprudence seemed to favor individual plaintiffs over big corporations.

Defending out-of-state litigation was the price of doing business. The United States Supreme Court landmark decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and *Daimler A.G. v. Bauman*, 571 U.S. 117 (2014) have shifted the jurisdictional balance of power toward the defendant, and as such have armed commercial litigators with litigation strategies to employ on behalf of their clients. In today's post *Goodyear* and *Daimler* world, commercial litigators should assess three things at the outset of every case: (1) is there general jurisdiction, (2) is there specific jurisdiction, and (3) is there a basis to transfer venue, either under state

statutes, if applicable, or in federal court pursuant to 28 U.S.C. § 1404.

At first glance, a motion to dismiss for lack of personal jurisdiction or a motion to transfer venue may seem like a "half win" because the case can be refiled and litigated on the merits in the proper forum. But its impact is far greater, particularly for individual plaintiffs who may need to seek new counsel in an unfamiliar forum – an exercise that may not be worthwhile depending on the size and nature of the case. If the plaintiff does retain new counsel and refile, he is now

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litigating on the defendant's home turf (or at least away from plaintiff's home base), where institutional and public biases often favor the defendant and where the cost of litigating is typically far lower for the defendant than in New York.

### History of Litigating Personal Jurisdiction

Courts exercise personal jurisdiction over litigants on one of two due process-based grounds – general jurisdiction, where the defendant is subject to jurisdiction regardless of where the underlying events

occurred, and specific jurisdiction, where the defendant can only be sued in the state where the events underlying the claim arose.

For many years, making a motion to dismiss for lack of general personal jurisdiction was not a desirable strategy to pursue, especially for corporate defendants with a prominent presence in the state in which they were sued. The inquiry into jurisdiction was highly fact sensitive, creating a high threshold for a pre-answer motion to dismiss. Moreover, entities that regularly conducted business in a given state were likely subject to jurisdiction therein, regardless of where the cause of action arose.

Enter *Daimler A.G. v. Bauman*, the watershed U.S. Supreme Court decision that upended personal jurisdiction jurisprudence by sharply narrowing the circumstances in which corporate (and even possibly individual) defendants could be brought into court on a theory of general jurisdiction.

Building on her previous decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, which dictated that corporate defendants are only subject to general jurisdiction where they are considered “at home,” Justice Ruth Bader Ginsburg defined “at home” as *only* the state or states where a defendant is incorporated or has its principal place of business. This decision effectively ended the fact-intensive inquiry into jurisdiction in favor of a cut-and-dry analysis, which was easily and inexpensively demonstrated by the defendant and eliminated all but at most two states from general jurisdiction coverage.

### Practical Effects of 'Daimler'

The implications of *Daimler* for corporate defendants cannot be overstated. Let's say, for example,

that a person/plaintiff who lives in New York was injured at a restaurant/defendant while vacationing in California. The person returns to New York and decides to sue for his injuries. The restaurant chain is headquartered in Wisconsin, maintains its corporate headquarters in Ohio and has restaurants throughout New York. Before *Daimler*, the “continuous and systematic contacts” test likely would have permitted New York courts to exercise general jurisdiction over the company based on their significant presence in the state, even when the cause of action did not arise in New York and New York's only connection to the facts underlying the litigation is the plaintiff's residence there.

Under the *Daimler* test, however, that action now must be brought in Wisconsin or Ohio on the grounds of general jurisdiction or California on the grounds of specific jurisdiction. The defendant in this instance would be wise to make a pre-answer motion to dismiss for lack of personal jurisdiction in New York. If it prevails, the plaintiff must seek counsel in a far-away state, commence a new action and litigate in a much less familiar and potentially less favorable forum.

The above example begs an important question – Is *Daimler* only concerned with the defendant? What about the plaintiff's convenience and desire to litigate in his/her home state? The answer, which plaintiff's attorneys often overlook, is that the plaintiff's convenience is irrelevant because the constitutional due process analysis is focused solely on the defendant.

Furthermore, because personal jurisdiction is a matter of constitutional due process, the U.S. Supreme Court's *Daimler* “general jurisdiction” test should be controlling in

all jurisdictions. And that is exactly what New York courts have done by expressly adopting the “at-home” test with open arms. See e.g., *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Jackson Transit Auth.*, 4 N.Y.S.3d 527 (1st Dep't 2015) (citing *Daimler A.G.* while holding that defendant's contacts did not confer personal jurisdiction); *IMAX Corp. v. The Essel Grp.*, 62 N.Y.S.3d 107, 109 (1st Dep't 2017) (relying on *Daimler* in denying personal jurisdiction). Other states, including New Jersey, also

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have adopted the *Daimler* standard. See e.g., *Collins v. Sandals Resorts Int'l, Ltd.*, No. A-0924-16T4, 2018 WL 817143 (N.J. App. Div. Feb. 12, 2018).

### New York Court Expansion Of 'Daimler'

New York courts seem to be extending the *Daimler* test even further than the U.S. Supreme Court requires. In *Amelius v. Grand Imperial LLC*, 64 N.Y.S.3d 855 (N.Y. Cty. Sup. Ct. 2017), the court found that, in the wake of *Daimler*, the long-accepted paradigm of “consent” jurisdiction (whereby courts consider parties who have registered to do business in a state to have consented to general jurisdiction therein) was also no longer a black-and-white issue. Pre-*Daimler*, a defendant's registration to do business in New York effectively ended the inquiry into jurisdiction. But under newly established

precedent, that low threshold is no longer sufficient on its own to comport with due process.

Additionally, in *Ford v. Bhatoe*, 58 Misc.3d 1201(A) (Kings Cty. Sup. Ct. 2017), a New York trial court extended the *Daimler* analysis beyond the scope of only corporate defendants – opining that *Daimler* applied to natural persons as well (*i.e.*, courts cannot assert general jurisdiction over individuals in New York unless they are domiciled therein). The court went even further to imply the longstanding notion of “presence” (*i.e.*, if you are served in-state, you are subject to general jurisdiction) also is no longer a viable basis for the assertion of jurisdiction.

### Venue Transfer as an Alternative Means of Dismissal

While a motion to dismiss for lack of personal jurisdiction should be considered in every case brought outside a defendant’s home state(s), sometimes the fact pattern does not lend itself to this approach. This is particularly true in cases involving economic transactions, which may present tricky questions about specific jurisdiction through the application of New York’s long-arm statute.

In those situations, another option that should be considered is a motion to transfer venue, which offers many of the same practical benefits as a dismissal for lack of personal jurisdiction. It forces plaintiffs to litigate outside their “home turf,” which often means finding new counsel. It also may force plaintiff’s counsel to reconsider pursuing a weak claim entirely or take a seat at the bargaining table.

The biggest difference between the personal jurisdiction analysis and the venue transfer analysis is

that the plaintiff’s convenience is considered for the purposes of the change of venue. However, that convenience is just one of many factors considered in a motion to change venue, and a well-crafted motion can overcome it.

In federal court, 28 U.S.C. § 1404(a) vests a court with discretion to transfer a case for the convenience of parties/witnesses, and in the interests of justice to prevent the litigants’ and courts’ waste of time and resources. Courts weigh a multitude of factors, including the convenience of witnesses, the location of relevant evidence and the convenience of all parties. That multi-prong analysis offers a defense attorney numerous opportunities to sway the court in favor of transfer notwithstanding the plaintiff’s choice of forum.

In state court, a motion to transfer venue may enable the defendant to bounce the case from one county to another even if there is specific jurisdiction in the state. In New York, for example, CPLR § 503 provides that venue lies in the county in which either of the parties resides, which for corporate defendants is where their principal office is located. If a plaintiff sues in a county in which neither party resides, the defendants have the right to transfer the case to a proper county of its choosing.

Finally, in cases where a motion to dismiss is advisable but not a guaranteed victory, defense counsel might consider moving to transfer venue. This approach gives the court an opportunity to give all parties, including the court itself, a victory: the plaintiff moves forward with his case, the defendant gets a more desirable forum and the court removes the case from its docket.

### Tips for Jurisdiction and Venue Motions

While no two cases are the same, it is good practice for defense counsel to perform an initial inquiry into jurisdiction and venue at the outset of every case. One should not assume that opposing counsel has chosen a jurisdictionally proper forum. Litigators should consult with their clients to answer three questions:

- Has suit been brought in their client’s home state – the state of incorporation or the state in which its headquarters are located?
- Where did the conduct underlying the action occur and does the defendant have sufficient contacts with the forum to satisfy that state’s long-arm statute?
- Is there a more convenient forum? Where are witnesses and evidence located? Can those witnesses be compelled to appear in the current forum? Will a site visit be required such that suit needs to be brought in the venue where the incident occurred? How congested are the competing forums dockets?

If the answers to any of these questions offer the possibility of dismissal or transfer, defense counsel should seriously consider making a motion to dismiss and/or transfer venue. While the analysis underlying the motions is relatively perfunctory, and the motions themselves are not particularly laborious, the benefits to a defendant’s bottom line can be significant.



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