NUTTER LITIGATION BULLETIN
LITIGATION DEPARTMENT
July 2014

In this Issue

SCOTUS Shortens the Reach of Long-Arm Statutes

The Court has now made clear that general jurisdiction over a foreign (sister-state or foreign country) corporation requires affiliations establishing that the forum state is "home" to the corporation, and a specific jurisdiction analysis is not applicable to this decision.

International Shoe Co. v. Washington, 326 U. S. 310 (1945), was the canonical case that led to enactment of state long-arm statutes. The cases that followed "differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." General jurisdiction means a court may hear any case against the corporate defendant just as though it had been incorporated in the forum state. Specific jurisdiction means a court may exercise jurisdiction over the defendant in the particular case before the court because the case arose out of activity of the corporate defendant in the forum state. Most decisions after ***International Shoe*** focused on specific jurisdiction, but with unpredictable results. More recently, unpredictability was spreading to general jurisdiction cases. In ***Daimler AG v. Bauman,*** 134 S. Ct. 746 (2014), and ***Goodyear Dunlop Tires Operations, S.A. v. Brown,*** 131 S. Ct. 2846 (2011), the Court tried to halt the trend and add predictability: neither a state nor a federal court may exercise general jurisdiction over a foreign (sister-state or foreign-country) corporation unless the corporation is essentially at home in the forum state.

In ***Goodyear,*** the Supreme Court reversed because the lower court, after "[c]onfusing or blending general and specific jurisdictional inquiries," had erroneously concluded that North Carolina had general jurisdiction over the defendant foreign corporations. A bus accident outside Paris resulted in the deaths of two boys from North Carolina. Their parents sued a US corporation and three of its foreign subsidiaries, claiming that tires designed or manufactured by one or more of the foreign subsidiaries were on the bus in France, were defective, and caused the accident. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina. Using a "stream-of-commerce" analysis, the North Carolina Court of Appeals concluded the foreign subsidiaries were amenable to general jurisdiction.

The Supreme Court said the lower court's "stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction." The Court added that ties which may bolster specific jurisdiction "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant."

Writing for a unanimous court, Justice Ginsburg explained the paradigms of general jurisdiction. For an individual, the paradigm forum for general jurisdiction is the individual's domicile. For a corporation, the paradigm fora are the states of incorporation and principal place of business—places in which the corporation is fairly regarded as "at home."

The issue arose again in ***Daimler AG v. Bauman.*** The Ninth Circuit had held that the federal district court in California could exercise general *(continued on page 2)*

GENERAL JURISDICTION

(continued from page 1) jurisdiction over Daimler, a German corporation with no presence in California. Plaintiffs were Argentinians who claimed that Daimler's Argentinian subsidiary had collaborated with state security forces to torture and kill some of the subsidiary's employees during Argentina's 1976–1983 "Dirty War."

Jurisdiction over Daimler was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), another Daimler subsidiary, incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributed Daimler-manufactured vehicles to independent dealerships throughout the US, including California.

The Ninth Circuit concluded that Daimler's subsidiary, MBUSA, had "engaged in a substantial, continuous, and systematic course of business" in California such that MBUSA was subject to general jurisdiction in California. The Court attributed the contacts of MBUSA to its parent, Daimler, under an agency theory. Therefore, Daimler was also subject to general jurisdiction in California.

The Supreme Court reversed. It criticized the Ninth Circuit's agency theory, which was simply to ask whether the in-state subsidiary was performing services sufficiently important to the parent that if the subsidiary were not performing them, the parent would undertake to perform substantially similar services. The Supreme Court rejected this analysis saying it "stacks the deck, for it will always yield a pro-jurisdiction answer." Anything a corporation does through an independent contractor, subsidiary or distributor is presumably something that the corporation would accomplish by other means if these entities did not exist.

> The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in ***Goodyear***.

Beyond this, the Court returned to its central point, which was that regardless of what the subsidiary's contacts were and whether they could be attributed to the parent, it could not be said that the parent was at home in California. It noted that in ***Goodyear*** it had made clear that only a limited set of affiliations with a forum would create general jurisdiction. And the paradigmatic affiliations of incorporation and principal place of business "have the virtue of being unique and easily ascertainable."

The Court added that general jurisdiction is not always limited to the state(s) of incorporation and principal place of business. But it rejected the Ninth Circuit's erroneous and expansive formulation.

> Plaintiffs would have us look beyond the exemplar bases ***Goodyear*** identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business"...That formulation, we hold, is unacceptably grasping.

It was error for the Ninth Circuit "to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California."

Daimler and ***Goodyear*** teach that general jurisdiction over a foreign (sister-state or foreign-country) corporation requires bases or affiliations establishing that the defendant is at home in the forum state. In making this determination, a specific jurisdiction analysis will not suffice.

Best Practice: Unconditional Response to Rule 34 Request

The use of a conditional response to a document request under Fed. R. Civ. P. 34 is commonplace, but it is now so wrought with peril that a better practice would be to end its use. A conditional response sets forth objections and states that documents are being produced "subject to the stated objections." The trend of the federal courts is to hold that a conditional response to a document request is improper and constitutes a waiver of objections. *E.g.*, ***Sprint Comm. Co., L.P. v. Comcast Cable Comm., LLC, (D. Kan. Feb. 11, 2014)***.

Moreover, the Proposed Amendments to the Federal Rules that are expected to take effect in December 2015, will almost certainly put an end to the practice. The Proposed Amendments would require that an objection in a response be made with specificity and that the response state whether any documents are being withheld on the basis of the objection. The most recent version of the proposed amendments emerged from the Advisory Committee's Meeting in Portland, OR, in April 2014.

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

Judgment for Reading Co-operative Bank Upheld on Appeal

A jury in the Business Litigation Session of Suffolk Superior Court in Boston returned a verdict in favor of Nutter's client, Reading Co-operative Bank, and against Suffolk Constr. Co., Inc. Suffolk appealed and the SJC affirmed the verdict. A major issue before the SJC was *(continued on page 3)*

READING CO-OPERATIVE BANK

(continued from page 2) whether Article 9 of the UCC displaced the common law on the question of the proper measure of a secured creditor's recovery under G. L. c. 106, § 9-405. The SJC held that it did and that "[w]here an account debtor receives notification of an assignment but nonetheless makes payments to the assignor, it remains obligated in full under the operative contract." And the proper measure of the assignee's recovery is the total value of all payments wrongfully misdirected.

***Reading Co-op Bank v. Suffolk Constr. Co., Inc.*, 464 Mass. 543, 552-53 (2013).**

Massachusetts: A Judicial Hellhole?

The American Tort Reform Foundation gave Massachusetts a "Dishonorable Mention" in the Foundation's annual report on "judicial hellholes," citing the Supreme Judicial Court's opinion in ***Klairmont v. Gainsboro Restaurant, Inc.,*** 465 Mass. 165 (2013). This was a wrongful death action by the parents of a college student who, after a night of drinking, was found unconscious at the foot of a staircase in a bar/restaurant. He died two days later.

Plaintiffs' theory was that the student had walked from the main bar into a hallway leading to the rear door, seeking a quieter place to receive a call on his cell phone. Off the hallway to the right was the kitchen, and on the left a staircase to the basement. The presence of the stairs was obscured by hanging vinyl strips. There was no door behind the vinyl strips. Plaintiffs' contended the student had lost his balance and fallen down the stairs.

The complaint set forth counts for wrongful death and violation of the Consumer Protection Act, M.G.L. c. 93A. As to the latter count, plaintiffs alleged that the stairs as built and repaired failed to comply with the State Building Code, and that a violation of the Building Code constituted a violation of c. 93A. Plaintiffs relied on a regulation of the Attorney General that said failure to comply with any law or regulation intended to protect the public's health, safety or welfare constituted a violation of c. 93A.

Concluding that the condition of the staircase was not a cause of the student's death, the jury returned a defense verdict on the wrongful death count. The trial judge reserved and decided plaintiffs' c. 93A claim on her own. Disregarding the jury finding of no causation, the judge concluded the stairs were the cause of death and found the bar liable. She awarded $2.25 million in compensatory damages. Finding a "willful" violation of c. 93A, she tripled that amount to bring the award up to $6.7 million for a "willful" violation of c. 93A, and added $2.3 million in attorneys' fees.

On appeal, the SJC held the trial judge was not bound by the jury's findings and had decided correctly that a Building Code violation could also be a violation of c. 93A.

The American Tort Reform Foundation was troubled that a judge could (1) disregard the jury findings and (2) conclude that, because the stairway had been "constructed decades earlier without a permit and was not up to code, the bar had somehow willfully committed an unfair business practice."

Recent Massachusetts Decisions Break New Ground

Public Policy Voids Indemnification Clause

In ***Crown v. Kobrick Offshore Fund, Ltd.***, 85 Mass. App. Ct. 214 (2014), a stock subscription agreement contained an indemnification clause in favor of the issuer. The defendant/issuer prevailed on a securities fraud claim, and sought recovery of its legal fees in a counterclaim alleging this indemnification clause. The Appeals Court rejected the issuer's claim even while acknowledging that the issue was one of "uncertainty in Massachusetts, given the dearth of appellate guidance on this issue." After examining Federal and Massachusetts cases, it concluded that Massachusetts public policy aligns with the public policy of the Federal Securities Act as set forth by those federal district courts that have refused to enforce such indemnification provisions.

Litigating the Merits Causes Forfeiture of Personal Jurisdiction Defense Set Forth in Answer

In ***American Int'l Ins. Co. v. Seuffer***, 468 Mass. 109 (2014), the SJC held that a defendant can forfeit a personal jurisdiction defense raised in its answer, by actively participating in a merits defense. Acknowledging that "Massachusetts case law had not squarely addressed the point," the SJC nonetheless concluded that "the weight of precedent fairly put [defendant] on notice that merely asserting the jurisdictional defense in its answer, without more, might be insufficient to preserve the defense." Whether forfeiture has occurred is "fact-sensitive" and several factors "could be relevant:"

- the amount of time that has elapsed;
- the changed procedural posture of the case;
- the extent of discovery on the merits; and
- the active engagement of defendant in pretrial litigation activities.

RECENT MASS. DECISIONS

Chapter 93A Permits the Recovery of Legal Fees for In-House Counsel's Work

In ***Holland v. Jachmann***, 85 Mass. App. Ct. 292 (2014), the Appeals Court concluded that the trial court has discretion under G.L. c. 93A to award attorneys' fees for legal work performed by in-house counsel. In this case of first impression, the Court noted that the General Counsel "actively participated at all stages of this matter as lead counsel." The Court noted by contrast the case of ***Arthur D. Little Intl., Inc. v. Dooyang Corp.,*** 995 F.Supp. 217, 225 (D.Mass.1998), where there was no fee award for in-house counsel who "was merely the client," with little participation in the trial proceedings.

Employer May be Liable if It Negligently Allows *Quid Pro Quo* Sexual Discrimination by a Non-Supervisory Co-worker to Result in Wrongful Discharge

In ***Velázquez-Pérez v. Developers Diversified Realty Corp.,*** No. 12-2226 (1st Cir. May 23, 2014), the 1st U.S. Circuit Court of Appeals broke new ground as to employer liability under Title VII for sexual discrimination in the workplace. The Court expanded *quid pro quo* sexual discrimination beyond a supervisory relationship; it also concluded that an employer's negligence in permitting such discrimination to cause a wrongful discharge may render the employer liable.

Thus, in the 1st Circuit at least, an employer can be liable under Title VII if (1) the employee's co-worker makes statements maligning the employee for discriminatory reasons and with the intent to cause his firing; (2) the co-worker's discriminatory acts proximately cause the employee to be fired; and (3) the employer acts negligently by allowing the co-worker's acts to achieve their desired effect even though it knows (or reasonably should know) of the discriminatory motivation.

Recent Seminars & Publications

"Social Media Policies for Your Employees, Donors and Constituents"
Chris Lindstrom, presented at Lawyers Clearinghouse Legal Workshop for Nonprofits.

"Mitigating the Risks and Unintended Consequences of Employee Social Media Use While Remaining NLRA Compliant"
David Rubin, presented at ACI Annual Summit on Digital Advertising Compliance: Sweepstakes, Social Media and Promotions.

"Technology and the Workplace"
Liam O'Connell, presented at 2014 Human Resources Conference of Property & Casualty Insurers.

"The Corporation As Victim: Cyber Crime, Hacking & Data Breach"
Jonathan Kotlier and Allison Burroughs, moderated and presented at June 2014 ACC Northeast Program.

"Anatomy of a Products Liability Case"
Robyn Maguire, moderated at the American Bar Association's Biotech Regional Workshop, held at the Massachusetts Biotechnology Council, June 2014.

"Non-Competes to Become Unenforceable in MA?"
Nutter's Labor, Employment and Benefits Group, presented at its Spring Breakfast Briefing.

"The War on Buckyballs: Park Doctrine Gone Awry"
Allison Burroughs and Dahlia Rin, published in Bloomberg BNA's *Product Safety & Liability Reporter*, June 5, 2014.

"Ruling Significantly Expands Employer Liability for Bias"
David Henderson in *Massachusetts Lawyers Weekly*, June 19, 2014, discussing ***Velázquez-Pérez v. Developers Diversified Realty Corp.,*** noted above.

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