

# Who Says You Can't Go Home: Retroactivity in a Post-Daimler World

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# NOTE

## WHO SAYS YOU CAN'T GO "HOME"? RETROACTIVITY IN A POST-*DAIMLER* WORLD

*Ariel G. Atlas*<sup>†</sup>

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### INTRODUCTION

Federal Rule of Civil Procedure 12(g)(2) is a simple rule. A party that makes a motion under Rule 12 must not make another motion under the rule that could have been available to it

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<sup>†</sup> Cornell University College of Human Ecology, B.S., 2011; Cornell Law School, J.D., 2016; Managing Editor, *Cornell Law Review* Volume 101. Many thanks to Professor Kevin Clermont for sparking my interest in civil procedure and for contributing inspiration and comments to this Note. I am incredibly grateful to my family and friends for their support during law school and the note-writing process.

at the time the previous motion was filed.<sup>1</sup> This tiny subsection of Rule 12 prevents piecemeal considerations of various defenses throughout the lifespan of a litigation and allows cases to move quickly to their merits. But how should a court decide whether a motion was “available” to a party at a given time? If the doctrine underlying a defense changes slightly or even drastically since the initial motion was filed, can this change disrupt years of litigation and potentially free a party from a case years after filing?

Rule 12(b)(2) provides an example of one such defense—the defense of lack of personal jurisdiction. If, based on current precedent, a party (generally a defendant) believes that the court does not have constitutional authority over it, that party can seek relief by making a motion.<sup>2</sup> The court will then determine whether it can or cannot hear the case or if the case should be transferred. Personal jurisdiction, however, is an area of law that sees frequent development and change. A court could have personal jurisdiction over a certain defendant who has the requisite contacts with a state one year and then not have jurisdiction the next.

On January 14, 2014, the Supreme Court decided *Daimler AG v. Bauman*,<sup>3</sup> adding to its recent body of cases reviewing the boundaries of constitutional reach over corporate defendants. *Daimler* was a case originally brought in the Northern District of California by Argentinian plaintiffs against Daimler, a public German company, arising from events that occurred during Argentina’s Dirty War.<sup>4</sup> The plaintiffs premised jurisdiction in California on the United States contacts of a Daimler subsidiary that distributed cars throughout the country, including to California.<sup>5</sup> Justice Ruth Bader Ginsburg, writing for a unanimous Court, held that it was error for the Ninth Circuit to conclude that Daimler was subject to suit by foreign plaintiffs “having nothing to do with anything that occurred or had its principal impact” in the state of California.<sup>6</sup>

Given the extreme facts of the case, this outcome was not surprising. Prior decisions would suggest that allowing U.S. courts to reach large corporate defendants that have only minimal contacts to the state and are tangentially involved in dis-

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1 FED. R. CIV. P. 12(g)(2).

2 See FED. R. CIV. P. 12(b)(2).

3 134 S. Ct. 746 (2014).

4 *Id.* at 751.

5 See *id.*

6 *Id.* at 762.

putes between foreign parties could open jurisdiction wider than the Constitution permits. The Court reaffirmed its "at home" test for determining sufficient contact—defendants' contacts must be "so 'continuous and systematic' as to render [it] essentially at home in the forum State."<sup>7</sup> To give lower courts guidance, Justice Ginsburg suggested "paradigm" examples of where a corporation is at home, including the state where the defendant is incorporated and its principal place of business.

Since *Daimler*, corporate defendants across the country have begun to raise motions for reconsideration in pending cases asking judges to take into account this new, narrower reading of personal jurisdiction and dismiss their claims for lack of jurisdiction. Many of these defendants have been litigating claims for several years, and some did not previously bring motions to dismiss for lack of personal jurisdiction under Federal Rule 12(b)(2). This forces lower courts to decide whether waiver of the defense prejudices the defendant or if *Daimler* represents a sufficient change in law as to have made it "unavailable" to the defendant at a prior time in the litigation. It is dangerous to have courts ruling differently on the question of whether *Daimler* represented a large enough shift in law for parties to claim it is a new iteration of the lack of personal jurisdiction defense. It is clear that a defense premised upon *Daimler* was "available" to parties at the time *Goodyear* was decided.

Regardless of whether a defendant raised a 12(b)(2) motion with its initial answer or pre-answer motion and regardless of whether the case predates *Goodyear* or is currently on appeal, no precedent exists for allowing courts to retroactively expand or detract from personal jurisdiction. In most currently pending cases, defendants had not brought prior motions based on lack of personal jurisdiction. But even considering the strongest case for a defendant—a situation where a defendant has litigated the issue of lack of personal jurisdiction both before and after *Goodyear* and has raised the issue again before final judgment—a renewed motion of lack of personal jurisdiction should still not result in a complete motion to dismiss years into a litigation.

This Note will examine retroactivity in applying changing Supreme Court personal jurisdiction doctrine through motions for reconsideration in pending civil cases. The central question will be how retroactivity is and should be applied in pending

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<sup>7</sup> *Id.* at 761 (alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

civil cases where challenges to personal jurisdiction are brought, using *Daimler* as an example. Defendants should not be able to bypass Rule 12(g)(2) and bring renewed motions for lack of personal jurisdiction years into a litigation by arguing that their specific defense was not “available” at the time of filing. Courts should not apply new developments in personal jurisdiction jurisprudence retroactively to dismiss claims against defendants for lack of personal jurisdiction. Instead, courts should consider a transfer under 28 U.S.C. § 1406<sup>8</sup> or other applicable provisions if the court finds itself with a case now in an improper venue.

Part I will provide an overview of general jurisdiction and when the defense of lack of personal jurisdiction can be raised. Part II will examine the cases leading up to the *Daimler* case and the *Daimler* case itself. Part III will examine procedural vehicles, including motions for reconsideration, for seeking relief based on the new *Daimler* standard. Part IV will argue that courts should not apply personal jurisdiction law retroactively in pending cases and provide advice and alternatives for courts on how to address these motions. Part V will be a conclusion.

## I

### WHAT IS GENERAL PERSONAL JURISDICTION, AND WHEN CAN THE LACK OF IT BE RAISED?

Personal jurisdiction, in its simplest form, refers to the reach of a court over the parties involved in a lawsuit under the Constitution or other relevant governing law.<sup>9</sup> For a court’s rulings to have effect in a given case, a court must be permitted under the Constitution and relevant statutes to exercise its authority.<sup>10</sup> It is especially important for corporations, especially multinational ones, to know what activities will subject them to suits in a given state or jurisdiction. As the Court acknowledged in two early personal jurisdiction cases, *World-Wide Volkswagen*<sup>11</sup> and again in *Burger King v. Rudzewicz*,<sup>12</sup> consistency under the Due Process Clause allows corporations to organize their business with some “minimum assurance as to where [their] conduct will and will not render them liable to

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<sup>8</sup> 28 U.S.C. § 1406 (2012).

<sup>9</sup> See Danielle Tarin & Christopher Macchiaroli, *Refining the Due-Process Contours of General Jurisdiction over Foreign Corporations*, 11 J. INT’L BUS. & L. 49, 50 (2012).

<sup>10</sup> See RICHARD D. FREER, CIVIL PROCEDURE 50–51 (3d ed. 2012).

<sup>11</sup> 444 U.S. 286, 297 (1980).

<sup>12</sup> 471 U.S. 462 (1985).

suit.”<sup>13</sup> As such, clear Supreme Court rulings can provide important guidance to corporations and are necessary for proper corporate organization.

General jurisdiction subjects the corporation to a broader scope of liability than specific jurisdiction but still respects constitutional boundaries.<sup>14</sup> It refers generally to an exercise of authority over a corporation that arises from “continuous corporate operations within a state” that are “so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>15</sup> General jurisdiction gives the state the power to adjudicate any personal claim whether or not it arises from or relates to defendant’s contact with the forum state. *Daimler* represents the Supreme Court’s most recent word on how a court should perform a general jurisdiction analysis.

To raise a claim that a court lacks jurisdiction to hear a case against a corporate defendant, a motion to dismiss for lack of personal jurisdiction is brought as a motion under Rule 12(b)(2) of the Federal Rules of Civil Procedure or can be filed as a defense within a defendant’s answer.<sup>16</sup> If a defendant chooses to bring the defense in a motion, it must be brought before an answer is filed, within twenty-one days after being served with the summons and complaint.<sup>17</sup> Along with other defenses, a party waives its 12(b)(2) defense for lack of personal jurisdiction if it fails to either make a timely motion or include the defense in a responsive pleading or amendment.<sup>18</sup> The Federal Rules also claim that a party making a motion under Rule 12(b) must not make another motion that raises a defense or objection available to the party at the time but was omitted from its earlier motion.<sup>19</sup>

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<sup>13</sup> *Id.* at 472.

<sup>14</sup> For a summary of general jurisdiction and its use in federal courts, see CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, 4 FEDERAL PRACTICE & PROCEDURE § 1067.5 (4th ed. 2015).

<sup>15</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

<sup>16</sup> FED. R. CIV. P. 12(b)(2).

<sup>17</sup> See FED. R. CIV. P. 12(a)(1)(A)(i).

<sup>18</sup> FED. R. CIV. P. 12(h)(1)(B)(i)–(ii).

<sup>19</sup> FED. R. CIV. P. 12(g)(2). This provision becomes important to the retroactivity of *Daimler* because courts are forced to consider whether the decision was an intervening change in law sufficient to allow parties to bring new motions.

## II

## DAIMLER AND THE LEGAL LANDSCAPE LEADING UP TO THE DECISION

## A. Development of General Jurisdiction

Each Supreme Court decision on personal jurisdiction builds off a previous expansion of the doctrine, and understanding where the Court is now requires a review of where the Court has been. Even in the *Daimler* case decided in 2014, Justice Ginsburg did an extensive review of all foundational cases decided in this area.<sup>20</sup> *Pennoyer v. Neff*<sup>21</sup> is where the discussion of general jurisdiction begins. While the facts of the case are fairly complicated, the holding is simple—the court in which a defendant is sued must be proper.<sup>22</sup> When a party is within a territory, he can then be subject to its jurisdiction.<sup>23</sup> Instead of serving Neff or attaching his land to the judgment, Mitchell seized the property and only offered minimal notice.<sup>24</sup> The focus in the 1878 case was on presence.<sup>25</sup> Because the defendant was not himself or through his property present, the Court held that the state of Oregon had no jurisdiction over the action.<sup>26</sup>

*International Shoe Co. v. Washington*,<sup>27</sup> decided in 1945, is where the Court first grappled with the differences between specific and general jurisdiction. *International Shoe* also gave rise to the common use of the terms “minimum contacts” and “fair play and substantial justice.”<sup>28</sup> The defendant was a Dela-

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<sup>20</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 753–58 (2014). Several state and federal court opinions on personal jurisdiction questions begin with a general history of these foundational cases.

<sup>21</sup> 95 U.S. 714 (1877).

<sup>22</sup> *See id.* at 720.

<sup>23</sup> *See id.* at 724.

<sup>24</sup> *See id.* at 719–20.

<sup>25</sup> *See id.* at 724. The Court presented two ways in which a party could be subject to a court’s jurisdiction—presence in person and presence by owning property alone. If a party is physically within a territory and served with process or his property compels his appearance, then a judgment will bind him.

<sup>26</sup> *See id.* at 736.

<sup>27</sup> 326 U.S. 310 (1945).

<sup>28</sup> *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court explained that history suggested that personal jurisdiction had previously only been premised on power over the defendant’s person, requiring presence within the jurisdiction. Now, however, the Court reasoned that because of ease of service of process,

due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’

*Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

ware corporation, engaged in shoemaking, with its principal place of business in Missouri.<sup>29</sup> The corporation had no office in Washington state and did not sell or purchase merchandise in Washington.<sup>30</sup> However, the company employed several salesmen who resided in Washington and were compensated for their sales.<sup>31</sup> The Supreme Court of Washington held that the "regular and systematic solicitation" by these salesmen was sufficient to constitute doing business in the state and thus specific personal jurisdiction was constitutional.<sup>32</sup> The Supreme Court agreed and held that these activities were systematic and continuous.<sup>33</sup>

In *Perkins v. Benguet Consolidated Mining Co.*,<sup>34</sup> decided in 1952, the Court ruled that the Ohio courts could exercise personal jurisdiction over a mining corporation based in the Philippines, but whose president lived, worked, and oversaw company activities in Ohio.<sup>35</sup> Perkins had enough contact with Ohio for Ohio to exercise its jurisdiction, since the company's mining activities were shut down by the war.<sup>36</sup> The business done in Ohio was "sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation."<sup>37</sup>

*Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>38</sup> was the most recent word from the Supreme Court on general jurisdiction before the *Daimler* decision. The plaintiffs in *Goodyear* were North Carolina residents and parents of two boys who were killed in a bus accident outside Paris.<sup>39</sup> The parents alleged that the accident was caused by a defective tire manufactured in Turkey at the plant of Goodyear USA.<sup>40</sup> Goodyear USA,

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<sup>29</sup> See *id.* at 313–14.

<sup>30</sup> See *id.* at 313.

<sup>31</sup> See *id.* at 313–14.

<sup>32</sup> *Id.* at 314.

<sup>33</sup> See *id.* at 320. The Court also wrote that "[the activities] resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state." *Id.*

<sup>34</sup> 342 U.S. 437 (1952).

<sup>35</sup> *Id.* at 447–49.

<sup>36</sup> The Court wrote that

if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service . . . we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process.

*Id.* at 444–45.

<sup>37</sup> *Id.* at 447.

<sup>38</sup> 131 S. Ct. 2846 (2011).

<sup>39</sup> *Id.* at 2850.

<sup>40</sup> See *id.*



an Ohio corporation, and three of its subsidiaries were named as defendants.<sup>41</sup> Goodyear USA's foreign subsidiaries argued that North Carolina did not have personal jurisdiction over them because the activity took place abroad and the company had no contacts with the state of North Carolina.<sup>42</sup>

The Court agreed with Goodyear and ruled that general jurisdiction did not reach the petitioner.<sup>43</sup> Justice Ginsburg looked at several factors:

[P]etitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.<sup>44</sup>

For these reasons, the Court ultimately concluded that petitioners are in no sense "at home" in North Carolina.<sup>45</sup>

### B. *Daimler v. Bauman*

The Court's next opinion came in *Daimler AG v. Bauman*. The plaintiffs were twenty-two residents of Argentina who filed suit in the Northern District of California against DaimlerChrysler Aktiengesellschaft (DCAG).<sup>46</sup> They claimed that, in violation of the Alien Tort Statute and Torture Victims Protection Act of 1991, one of DCAG's subsidiaries, Mercedes-Benz (MB) Argentina, worked with security forces during Argentina's "Dirty War" to harm MB Argentina workers including the plaintiffs and those closely related to the plaintiffs.<sup>47</sup> Plaintiffs either worked at or had relatives who worked at an Argentinian plant of MB Argentina.<sup>48</sup>

The plaintiffs argued that jurisdiction was proper because Daimler, the parent company to Mercedes-Benz USA (MBUSA), is a United States corporation that distributed cars across the country, including across California.<sup>49</sup> MB Argentina was a wholly-owned subsidiary owned by Daimler's successor in in-

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<sup>41</sup> See *id.*

<sup>42</sup> See *id.* at 2852.

<sup>43</sup> See *id.* at 2851.

<sup>44</sup> *Id.* at 2852.

<sup>45</sup> *Id.* at 2857.

<sup>46</sup> See *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 912 (9th Cir. 2011), *rev'd sub nom. Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>47</sup> *Id.* at 911-12.

<sup>48</sup> See *id.* at 912.

<sup>49</sup> See *id.* at 914.

terest.<sup>50</sup> MBUSA, the plaintiffs argued, was acting as Daimler's agent. MBUSA had its principal place of business in New Jersey and several offices in California.<sup>51</sup>

Defendant Daimler filed a motion to dismiss for lack of personal jurisdiction, but the plaintiffs maintained that jurisdiction was proper because of MBUSA's California and United States contacts, and the court allowed plaintiffs to take limited discovery.<sup>52</sup> Specifically, over 10% of all sales of new vehicles of MBUSA in the United States took place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.<sup>53</sup> In an annual report filed with the SEC, DCAG disclosed that a "*significant* portion of our business . . . depends in part on export sales to the United States."<sup>54</sup> These contacts, the plaintiff suggested, were sufficient to subject the defendants under vicarious liability to California courts.<sup>55</sup>

The district court ultimately granted the motion to dismiss after a period of discovery,<sup>56</sup> but the Ninth Circuit reversed on rehearing after initially affirming.<sup>57</sup> The Ninth Circuit ultimately decided the case on the basis of agency law, arguing that MBUSA acted as Daimler's agent and its contacts made Daimler amenable to the court's jurisdiction.<sup>58</sup> The Ninth Circuit was deciding the case before the Supreme Court considered *Goodyear*. The applicable procedure was a two-prong test—first, whether or not the defendant has requisite contact

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<sup>50</sup> See *id.* at 912.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*; see *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472, at \*9 (N.D. Cal. Nov. 22, 2005) (holding that "plaintiffs' allegations do not establish that DCAG has continuous and systematic contacts with California"), *rev'd sub nom.* *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *rev'd sub nom.* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>53</sup> *Bauman*, 134 S. Ct. at 746, 752.

<sup>54</sup> *Id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2007 WL 486389, at \*2 (N.D. Cal. Feb. 12, 2007) (holding that "DCAG's contacts with California are not 'systematic and continuous' and that the court lacks personal jurisdiction over DCAG"), *aff'd sub nom.* *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009), *reh'g granted & vacated*, 603 F.3d 1141 (9th Cir. 2010), *rev'd sub nom.* *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *rev'd sub nom.* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>57</sup> *Bauman*, 644 F.3d at 930 ("[W]e conclude that it is reasonable to exercise jurisdiction over DCAG in California . . .").

<sup>58</sup> See *id.* at 920–21 ("We conclude that DCAG has more than enough control to meet the agency test, because DCAG has the right to control nearly every aspect of MBUSA's operations.").

with the forum state,<sup>59</sup> and, if so, whether exercising personal jurisdiction would be reasonable.<sup>60</sup>

For the first prong of the test, the Ninth Circuit was persuaded by the plaintiff's argument that agency law could support a finding of personal jurisdiction.<sup>61</sup> The Ninth Circuit relied on its and the Second Circuit's precedent outlined in *Doe v. Unocal Corp.*, which looks at whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a *representative* to perform them, the corporation's own officials would undertake to perform substantially similar services."<sup>62</sup> This test, the court reasoned, allows a determination of whether the actions of the subsidiary are a "manifestation of the parent's presence."<sup>63</sup>

If it can be established that the parent is "present," this allows the court to use presence in a state as it had been used previously—as a way to establish general jurisdiction. The Ninth Circuit used this test and concluded that the subsidiary was of "sufficient importance."<sup>64</sup> The court found that DCAG relied on selling Mercedes-Benz cars, especially in the United States where that market accounted for 19% of the sales of cars worldwide.<sup>65</sup> Even more importantly, MBUSA's sales in California accounted for 2.4% of DCAG's total worldwide sales.<sup>66</sup> On this basis, the Ninth Circuit concluded that the plaintiffs established the importance of MBUSA to DCAG and its operations.

For the second prong of the test, as per *Burger King Corp. v. Rudzewicz*, the court shifted the burden to the defendants to show that jurisdiction would be unreasonable.<sup>67</sup> The Ninth Circuit examined seven factors to determine whether or not this threshold is met:

the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defen-

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<sup>59</sup> See *id.* at 921–24.

<sup>60</sup> See *id.* at 924–30.

<sup>61</sup> The relevant question for the Ninth Circuit was determining if the services provided by MBUSA were sufficiently important to DCAG that if MBUSA was no longer solvent, would DCAG continue selling cars somehow. In answering this question in the affirmative, the court was satisfied that the minimum contacts test was satisfied.

<sup>62</sup> *Bauman*, 644 F.3d at 920 (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001)).

<sup>63</sup> *Id.* at 921.

<sup>64</sup> *Id.* at 922.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* at 924–25.

dant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiff; and the existence of an alternative forum.<sup>68</sup>

On the whole, the Ninth Circuit found that the first, third, six, and seventh factors favored reasonableness and the second (slightly) and third (slightly) went against reasonableness. The fifth factor was a draw, favoring neither party. Overall, the court found that exercising personal jurisdiction over DCAG "comports with fair play and substantial justice."<sup>69</sup> The Court also spoke generally about California, calling it "a state that has itself become a major hub for world commerce."<sup>70</sup> Thus, jurisdiction in California was proper.<sup>71</sup>

Although the Ninth Circuit addressed several issues, Justice Ginsburg framed the question as a narrow one: Consistent with the Fourteenth Amendment, is Daimler amenable to suit in California for claims involving only foreign plaintiffs relating to conduct abroad?<sup>72</sup> Having the benefit of *Goodyear*, decided after the Ninth Circuit reversal, the plaintiffs relied on the test for general jurisdiction espoused in *Goodyear* and argued again that, in line with general jurisdiction ideals, California is a place where Daimler can be sued for any claims against it that occur anywhere in the world.<sup>73</sup>

Justice Ginsburg reviewed the Ninth Circuit's holding based on agency action and concluded that this reasoning would impermissibly expand the understanding of general jurisdiction.<sup>74</sup> The Ninth Circuit concluded that MBUSA's services were sufficiently important because Daimler would have done them itself if not for MBUSA. This reasoning, Justice Ginsburg explained, will always result in a court finding juris-

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<sup>68</sup> *Id.* at 925 (quoting *Sinatra v. Nat. Enquirer, Inc.*, 854 F.2d 1191, 1198–99 (9th Cir. 1988)).

<sup>69</sup> *Id.* at 929–30.

<sup>70</sup> *Id.* at 930.

<sup>71</sup> In summary, Judge Reinhart wrote that

[i]n light of DCAG's pervasive contacts with the forum state through MBUSA, including the extensive business operations of that subsidiary, the interest of California in adjudicating important questions of human rights, our substantial doubt as to the adequacy of Argentina as an alternative forum, and the various issues discussed above with respect to Germany, we hold that DCAG 'has not met its burden of presenting a *compelling case* that the exercise of jurisdiction would not comport with fair play and substantial justice.'

*Id.* at 930 (quoting *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003)).

<sup>72</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

<sup>73</sup> See *id.* at 751.

<sup>74</sup> See *id.* at 759–60.

diction.<sup>75</sup> Why would a corporation have a subsidiary if not for a need that it could not otherwise accomplish?<sup>76</sup> Justice Ginsburg explained that this theory would expose a foreign corporation to general jurisdiction whenever they have a subsidiary in any state and this “would sweep beyond even the ‘sprawling view of general jurisdiction’ [the court] rejected in *Goodyear*.”<sup>77</sup>

Justice Ginsburg continued to argue that, even if MBUSA is at home in California based on this agency theory, there would still be no general jurisdiction over it because Daimler’s contacts “hardly render it at home there.”<sup>78</sup> The Court took the opportunity to review its holding in *Goodyear*. *Goodyear*, Justice Ginsburg wrote, was clear in its holding that the places where a corporation would be subject to general jurisdiction are limited.<sup>79</sup> What plaintiffs want here—to expose the corporation to general jurisdiction in any state where it engages in a “substantial, continuous, and systematic course of business”—is “unacceptably grasping.”<sup>80</sup>

To further clarify the Court’s holding in *Goodyear*, Justice Ginsburg explained that the inquiry in *Goodyear* is not whether the contacts are “continuous and systematic” but whether the corporation’s “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”<sup>81</sup> In the present case, neither Daimler nor MBUSA was incorporated or had its principal place of business in California. It could not possibly be the case that personal jurisdiction could extend to any state where MBUSA had sales. This would not contribute to the consistency that the doctrine had sought to create.<sup>82</sup>

Two other aspects of the majority’s decision are worth noting. First, Justice Ginsburg, in a footnote responding to Justice Sonia Sotomayor’s concurrence, provided guidance to courts on how to determine exactly where a corporation is con-

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<sup>75</sup> *See id.*

<sup>76</sup> Justice Ginsburg borrowed this logic from Justice O’Scannlain, who dissented from the denial of rehearing in the Ninth Circuit. *See* *Bauman v. Daimler-Chrysler Corp.*, 676 F.3d 774 (9th Cir. 2011).

<sup>77</sup> *Daimler*, 134 S. Ct. at 760 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011)).

<sup>78</sup> *Id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Id.* at 761 (quoting Brief for the Respondents at 17, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965)).

<sup>81</sup> *Id.* at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

<sup>82</sup> *See id.* at 761.

sidered "at home."<sup>83</sup> This passage will likely be important guidance for lower courts. Second, Justice Ginsburg made reference to international comity and a respect for other countries' approaches to personal jurisdiction analysis.<sup>84</sup> Justice Ginsburg even went so far as to cite to sources that expose "international friction" between countries arising from personal jurisdiction considerations.<sup>85</sup> This is yet another factor courts could consider when ruling on a motion relating to foreign corporations. If exercising jurisdiction over the particular foreign entity would go against traditional concepts of international comity, a court could invoke this passage of the opinion.<sup>86</sup>

### C. What *Daimler* Added (or Did Not Add) to the Doctrine

Whether or not *Daimler* was a significant decision has consequences for how judges should treat motions for reconsideration. If *Goodyear* and not *Daimler* was the true shift and represented the creation of the "at home" test still used today, a lack of personal jurisdiction defense was available in 2011 and cannot now be used to represent a significant change in controlling law. If *Daimler* significantly narrowed the doctrine and changed the outcome of a personal-jurisdiction analysis that a court would use with respect to a given party, it would be proper for defendants to bring such motions at this time.

The decision itself gives some hints as to whether the Court intended to shift the doctrine in a significant way. In the majority opinion, there are indications of whether or not the Court intended to create significantly new doctrine or simply expand upon its decision in *Goodyear*. Justice Ginsburg writes that the Court, "[i]nstructed by *Goodyear*, . . . conclude[s] *Daimler* is not 'at home' in California."<sup>87</sup> Justice Ginsburg continues to explain how *Goodyear* is informing the Court's decision. She later writes,

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<sup>83</sup> *Id.* at 762 n.20 ("[T]he general jurisdiction inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.' General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." (second alteration in original) (quoting *id.* at 767 (Sotomayor, J., concurring)).

<sup>84</sup> See *id.* at 763.

<sup>85</sup> *Id.* (quoting Brief for the Respondents at 35, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965)).

<sup>86</sup> This argument, however, does not appear to be incredibly persuasive. The *Daimler* decision arguably does not improve international relations in the way Justice Ginsburg argues it may.

<sup>87</sup> *Daimler*, 134 S. Ct. at 751 (quoting Brief for the Respondents at 17, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965)).

*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. 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.”<sup>88</sup>

When parties (usually defendants) attempt to convince a judge that *Daimler* represented a significant change in the law, they point to Justice Sotomayor’s characterization of the decision as “a new rule of constitutional law that is unmoored from decades of precedent.”<sup>89</sup> Justice Sotomayor ends her concurrence by saying that “[t]he Court rules against respondents today on a ground that no court has considered in the history of this case.”<sup>90</sup>

While scholars and the media may debate *Daimler*’s importance,<sup>91</sup> nothing in *Daimler* suggests that the Court was taking a novel approach to personal jurisdiction analysis. In a note written before *Daimler* was decided, one scholar wrote that the *Daimler* decision “will have serious consequences for US plaintiffs” because plaintiffs used to look to a defendant’s “continuous and systematic” business activities in the forum state. If

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<sup>88</sup> *Id.* at 760–61.

<sup>89</sup> *Id.* at 773 (Sotomayor, J., concurring). A *New York Times* article written on the day the *Daimler* decision was announced uses this quotation from Sotomayor’s concurrence in its first paragraph, presumably to gain interest from readers. See Adam Liptak, *Justices Raise Bar for Suing Foreign Companies*, N.Y. TIMES (Jan. 14, 2014), [http://www.nytimes.com/2014/01/15/business/supreme-court-raises-bar-for-us-suits-against-foreign-companies.html?\\_r=0](http://www.nytimes.com/2014/01/15/business/supreme-court-raises-bar-for-us-suits-against-foreign-companies.html?_r=0) [https://perma.cc/5LUK-KY7Y].

<sup>90</sup> *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring).

<sup>91</sup> Many news outlets and legal publications reported on the *Daimler* decision. Even if the decision was not significant as a matter of law, news coverage portraying the decision as important could have an impact on how parties proceed in litigation. See, e.g., DWIGHT HEALY & OWEN C. PELL, *DAIMLER AG v. BAUMAN: The US Supreme Court Significantly Limits Where Companies May Be Sued for Claims Unrelated to Their Activities in a State 1* (2014), <http://www.whitecase.com/sites/whitecase/files/files/download/publications/alert-diamler-ag-v-bauman-012014.pdf> [https://perma.cc/EK5B-D3X3] (writing that the US Supreme Court issued “a major ruling that will significantly limit where corporations may be sued”); PAUL LARKIN, *CLOSING THE DOOR TO FOREIGN LAWSUITS: Daimler AG v. Bauman 1* (2014), <http://www.heritage.org/research/reports/2014/06/closing-the-door-to-foreign-lawsuits-daimler-ag-v-bauman> [https://perma.cc/C5NU-AF28] (summarizing the *Daimler* decision); Rich Samp, *With Bauman v. DaimlerChrysler, High Court May Have Put Brakes on Forum Shopping*, FORBES (Feb. 4, 2014, 9:00 AM), <http://www.forbes.com/sites/wlf/2014/02/04/with-bauman-v-daimler-chrysler-high-court-may-have-put-brakes-on-forum-shopping/> [http://perma.cc/JY7V-4K6B] (arguing that the decision could result in “major upheavals in standard operating procedures for much of the plaintiffs’ bar”).

jurisdiction was truly unreasonable, the Court could decline jurisdiction on that basis alone.<sup>92</sup> General jurisdiction, Bonacorsi writes, was the “sole door to relief for US plaintiffs when the minimum contacts approach was otherwise too narrow” and the door is “now officially closed.”<sup>93</sup> Other scholars write that *Daimler* is likely to be a “disruptive case” because the “‘connectedness’ or ‘relatedness’ requirement is likely to emerge as the central battleground.”<sup>94</sup> The authors continue to explain that the decision will most affect large multinational corporations who are sued outside of their state.<sup>95</sup> *Daimler* now gives corporations a ground to contest jurisdiction in other ways, including through specific jurisdiction.<sup>96</sup>

In contrast, some scholars have noted that *Daimler* is simply a reaffirmation of *Goodyear*. One scholar writes that “[t]he Supreme Court in *Daimler AG* essentially affirmed its decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*. Throughout its opinion, the Court relied heavily on its previous 2011 opinion and emphasized how precedent in the realm of general jurisdiction is controlling.”<sup>97</sup> Other scholars have joined *Goodyear* and *Daimler* as similar in a discussion of the progression of the personal jurisdiction doctrine.<sup>98</sup>

All that *Daimler* did to aid lower courts in making decisions on motions to dismiss for lack of personal jurisdiction was provide examples of where a corporation will be “at home” in a given state. The underlying analysis was unaffected. Justice Ginsburg left open the possibility that exceptional circum-

<sup>92</sup> See Kate Bonacorsi, Note, *Not at Home with “At-Home” Jurisdiction*, 37 FORDHAM INT’L L.J. 1821, 1853 (2014) (concluding that U.S. plaintiffs will lose the benefits of the U.S. judicial system if they cannot now use general jurisdiction as a fallback).

<sup>93</sup> *Id.*

<sup>94</sup> Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 228 (2014). This Article was written before *Daimler* was decided by the Supreme Court.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 228–30.

<sup>97</sup> Stephanie Denker, Comment, *The Future of General Jurisdiction: The Effects of Daimler AG v. Bauman*, 20 FORDHAM J. CORP. & FIN. L. 145, 162 (2014) (footnote omitted).

<sup>98</sup> See The Harvard Law Review Association, *Personal Jurisdiction—General Jurisdiction—Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 311 (2014) (“Although some have viewed *Daimler* as in keeping with a series of recent Court decisions limiting plaintiffs’ access to the courts, closer examination reveals that Justice Ginsburg continues to apply a theory of personal jurisdiction . . . initially introduced in *Goodyear* . . . .”); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs,”* CORNELL L. REV. 1129, 1136–37 (2015) (noting that in *Goodyear* and *Daimler*, the Court articulated a “similar test for corporations” and discussing general jurisdiction “[b]efore *Goodyear* and *Daimler*”).



stances may exist, and parties can and undoubtedly will use this opening to argue jurisdiction. Any party that brought a case or filed a motion for lack of personal jurisdiction after *Goodyear* was decided by the Court should come out the same way under *Daimler*.

#### D. *Daimler* Retroactivity

Since the *Daimler* decision, corporate defendants across the country have begun to raise motions for reconsideration in pending cases asking judges to take into account this new, narrower reading of personal jurisdiction and dismiss their claims for lack of such jurisdiction. Many of these defendants have been litigating claims for several years, and some had not previously brought motions to dismiss for personal jurisdiction under Federal Rule 12(b)(2).<sup>99</sup> This forces lower courts to decide whether waiver of the defense prejudices the defendant or if a defendant can raise such a motion at any time regardless of the case's procedural history.

The Supreme Court has often considered the question of retroactivity in the context of criminal cases, but has not had as much of an opportunity to consider the issue in civil cases. In criminal cases, where the stakes are arguably higher than in civil cases, retroactivity is generally disfavored. If courts are reluctant to revive procedural rights in criminal cases, it appears that courts should be even less willing to revive them in civil cases.<sup>100</sup>

Since a finding of lack of personal jurisdiction is grounds for dismissal of claims or even an entire case, defendants were quick to use the *Daimler* decision in an attempt to revive previously-filed motions to dismiss or newly raise a lack of personal jurisdiction defense. Most defendants filed motions for reconsideration asking judges to revisit denials of 12(b)(2) motions that were filed at the beginning of the case.

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<sup>99</sup> FED R. CIV. P. 12(b)(2).

<sup>100</sup> For example, under *Teague v. Lane*, the Supreme Court announced that new constitutional rules of criminal procedure are not retroactively applicable to cases that become final before the decision was announced unless two narrow exceptions apply: (1) if the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" As to the second exception, the Court noted that it should be limited to those new procedures without which the likelihood of an accurate conviction "is seriously diminished." *Teague v. Lane*, 489 U.S. 288 (1989).

Judges reacted differently to these motions. Some ruled that *Daimler* was not a change in law that would warrant reconsideration—that the defense was available when the Court first announced the *Goodyear* test in 2011. Others argued that defendants had waived the right to bring such a claim because they had not brought a previous motion to dismiss within the time period allotted by the Federal Rules (before a responsive pleading) or because of their conduct during the litigation (years of litigating without raising the issue). Some plaintiffs argued that the claims could and should be transferred to another court.

### 1. *Timeline of Decisions*

The first case to raise *Daimler* on a motion for reconsideration was *Gilmore v. Palestinian Interim Self-Government Authority*, a case that involved jurisdiction over a group, not a corporate defendant.<sup>101</sup> Plaintiffs, family members and the estate of Esh Kodesh Gilmore, a United States national killed in a shooting in Jerusalem, Israel, initially filed the action in April 2001.<sup>102</sup> The case was brought against the Palestinian Interim Self-Government Authority and the Palestine Liberation Organization pursuant to the Anti-Terrorism Act of 1991 and other theories.<sup>103</sup> After initial motions and discovery for years, Defendants filed a motion for judgment on the pleadings for lack of personal jurisdiction on February 10, 2014—only one month after *Daimler*.<sup>104</sup>

In their motion, Defendants argued that after *Daimler*, they could not be considered “at home” in the United States. Plaintiffs argued that Defendants waived their jurisdictional defense by litigating the case for such a long period of time (more than a decade).<sup>105</sup> On June 23, 2014, Judge Gladys Kessler denied Defendants’ motion for judgment on the pleadings for lack of personal jurisdiction. Judge Kessler agreed with Plaintiffs and ruled that Defendants had waived their personal jurisdiction defense under the Federal Rules.<sup>106</sup> As Rule 12(g)(2) provides, a party that makes a motion under Rule 12 cannot make another motion raising a defense or objection that was available to the party but omitted from its earlier motion.

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<sup>101</sup> 8 F. Supp. 3d 9, 11 (D.D.C. 2014).

<sup>102</sup> *See id.*

<sup>103</sup> *See id.* at 11–12.

<sup>104</sup> *See id.* at 12.

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

A personal jurisdiction defense, Judge Kessler explained, was available in 2002 when the initial motions were filed, and the defendants declined to make it.<sup>107</sup> Even if it wasn't available then, she argued, it became available with the Court's decision in *Goodyear*. The "at home" standard, Judge Kessler reasoned, was "unmistakably announced in *Goodyear* . . . , more than two and a half years before Defendants filed the instant Motion."<sup>108</sup> By not raising it then, Defendants had waived their rights. Judge Kessler's opinion reaches the correct result. In a case where no personal jurisdiction defense was originally raised, and when the case has been in litigation for several years, such a motion to retroactively apply *Daimler* should be denied.

An absence of change in intervening law is not the only reason for denial of a motion for reconsideration. On August 7, 2014, Defendants in *Laydon v. Mizuho Bank, Ltd.* brought a motion to reconsider previous rulings denying motions to dismiss for lack of personal jurisdiction. The court agreed with Defendants that their Rule 12(b)(2) jurisdictional defense was not available before *Daimler*.<sup>109</sup> However, the court reasoned that any personal jurisdiction defense was waived through the parties' conduct after *Daimler* was issued. There were several opportunities for the parties to raise the issue before the court, and they failed to do so.<sup>110</sup>

In *American Fidelity Assurance Co. v. Bank of New York Mellon*,<sup>111</sup> a pending case in the Western District of Oklahoma, Defendant brought a motion to dismiss for lack of personal jurisdiction, both general and specific. The case was originally filed in November 2011, and after amendments to the complaints, an answer was filed on January 10, 2014. Defendant argued to the court that in *Daimler*, the Supreme Court announced a change in law and that they were precluded from raising such a defense any earlier even though the Federal Rules require that a 12(b)(2) motion be brought before an an-

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<sup>107</sup> Defendants argued that *Daimler* was a "game-changing decision," which was "so 'widely viewed as changing the legal landscape for personal jurisdiction'" that they could not have raised their defense until after it was decided. See *id.* at 15 (quoting Defendants' Reply to Plaintiffs' Opposition to Motion for Judgment on the Pleadings for Lack of Personal Jurisdiction at 1, 8, *Gilmore*, 8 F. Supp. 3d 9 (D.D.C. 2014) (No. 01-cv-853 (GK))).

<sup>108</sup> *Id.*

<sup>109</sup> See *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD), 2015 U.S. Dist. LEXIS 44005, at \*23 (S.D.N.Y. Mar. 31, 2015).

<sup>110</sup> See *id.* at 24-25.

<sup>111</sup> No. Civ-11-1284-D, 2014 WL 4471606 (W.D. Okla. Sept. 10, 2014), *aff'd*, *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234 (10th Cir. 2016).

swer.<sup>112</sup> Substantively, defendant argued that *Daimler* narrowed the predicates for personal jurisdiction only to the place of incorporation or principal place of business.<sup>113</sup>

On September 10, 2014, Judge Timothy Degiusti issued an opinion on Defendant's motion to dismiss. The court disagreed with Defendant on both procedural and substantive grounds but ultimately decided the case on procedural grounds.<sup>114</sup> Judge Degiusti decided that the lack of personal jurisdiction defense was waived when not brought initially.<sup>115</sup> Because *Goodyear* was decided more than two years earlier, the court ruled that it was *Goodyear* that signified a change in law, not *Daimler*.<sup>116</sup> The defense was therefore waived under Rule 12(h). On January 20, 2016, the decision was affirmed by the Tenth Circuit.<sup>117</sup>

While most judges agree that *Daimler* did not represent a change in law, some courts will attempt to make a determination of whether or not *Daimler* represented a change in law based on the facts of each individual case as well as the law of each individual circuit. The Second Circuit, for example, mistakenly held in *Gucci America, Inc. v. Weixing Li*, that *Daimler* "expressly cast doubt" on previous Supreme Court and New York Court of Appeals cases that permitted jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum.<sup>118</sup>

But it was *Goodyear* that, several years earlier, changed the legal landscape and disrupted precedent. Surely a bank with a branch in New York would not meet the test set forth in *Goodyear* that requires affiliations with the state that are so "continuous and systematic" as to render them essentially at home in the forum state.<sup>119</sup> Simply because Justice Ginsburg provided two concrete examples of how a corporation could be

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<sup>112</sup> See *id.* at \*1-2.

<sup>113</sup> See *id.* at \*2-3. Defendant was not incorporated nor had its principal place of business in Oklahoma. Jurisdiction was premised on Defendant's systematic and continuous contact with the state.

<sup>114</sup> See *id.* at \*3-5.

<sup>115</sup> See *id.* at \*5.

<sup>116</sup> See *id.*

<sup>117</sup> See *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1235 (10th Cir. 2016).

<sup>118</sup> See *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d. Cir. 2014) (holding that *Daimler*, decided three years after *Goodyear*, represented a change in personal jurisdiction law).

<sup>119</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011).

“at home” in *Daimler* does not change how a court should carry out its analysis.<sup>120</sup>

In *Gucci America*, the Second Circuit reasoned that the district court no longer had general personal jurisdiction over the bank. Similar to the defendant in *Daimler*, the nonparty bank had branch offices in the forum but was headquartered and incorporated elsewhere.<sup>121</sup> Despite not having previously raised the defense that the court lacked personal jurisdiction, the court ruled that the bank did not waive its exercise of general jurisdiction.<sup>122</sup> Prior to *Daimler*, controlling precedent made it clear that a foreign bank with a branch in New York *was* subject to general jurisdiction in the Circuit because of the activity of its New York branch. *Gucci* was wrongly decided and will create dangerous precedent.

On September 30, 2014, Judge George O’Toole in the District of Massachusetts ruled in favor of Defendants who made a similar motion to dismiss in *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*<sup>123</sup> In that case, only one party—the rating agency defendants—argued that the court lacked personal jurisdiction over Plaintiff’s claims against them. Defendants argued that *Daimler* represented a shift in the way a court should analyze personal jurisdiction, and Judge O’Toole agreed.<sup>124</sup> Plaintiff had argued in response that if the court was willing to recognize that it no longer had jurisdiction over Defendants, it should at least transfer the claims in the interest of justice.<sup>125</sup> After reviewing the various transfer statutes, Judge O’Toole ultimately decided that none could save Plaintiff’s claims.<sup>126</sup> Judge O’Toole dismissed Plaintiff’s claims en-

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<sup>120</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014).

<sup>121</sup> See *Gucci Am.*, 768 F.3d at 126.

<sup>122</sup> See *id.* at 135.

<sup>123</sup> No. 11-10952-GAO, 2014 WL 4964506 (D. Mass. Sept. 30, 2014).

<sup>124</sup> Specifically, Judge O’Toole noted that “[t]he *Daimler* decision requires a tighter assessment of the standard than perhaps was clear from *Goodyear*.” He continued to explain that the defendants do have “continuous and systematic” contacts with Massachusetts, but are not incorporated or have their principal place of business in the state. Finally, this case was not one of the “exceptional” ones described by Justice Ginsburg. See *id.* at \*2.

<sup>125</sup> See *id.* at \*3. Plaintiff argued that the court could transfer the claims pursuant to 28 U.S.C. § 1631 or § 1406(a), both of which would provide for a change of venue and not a dismissal of claims entirely.

<sup>126</sup> See *id.* at \*4. Judge O’Toole ruled that 28 U.S.C. § 1631 should be read to only include transfer for lack of subject-matter jurisdiction and § 1406 only used when venue is improper, which it was not in this case. Because of the uncertainty of the law surrounding these statutes, Judge O’Toole allowed the plaintiffs to file an immediate appeal.

tirely.<sup>127</sup> The decision is currently on appeal in the First Circuit Court of Appeals.

On October 29, 2014, Judge Richard Leon of the District Court for the District of Columbia ruled on a motion for reconsideration of a personal jurisdiction order filed in 2005.<sup>128</sup> Defendants asked the judge to reconsider the order and dismiss plaintiffs' claims in their entirety. Judge Leon ruled that personal jurisdiction is waivable and that case law of the D.C. Circuit supports such waiver. Through their conduct, Judge Leon explained, Defendants had "repeatedly manifested their consent to the Court's jurisdiction."<sup>129</sup>

On December 1, 2014, Judge George Daniels of the Southern District of New York decided a similar motion in *Sokolow v. Palestine Liberation Organization*.<sup>130</sup> Defendants, the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA), moved for summary judgment for lack of personal jurisdiction after Judge Daniels had previously denied a motion for reconsideration. Defendants argued that *Daimler* served as an intervening change in the controlling law and that there was no longer jurisdiction over them. Defendants further argued that *Gucci* changed the Second Circuit's view, namely that parties such as Defendants in this case should not be subject to personal jurisdiction.<sup>131</sup> Judge Daniels ultimately decided that this case was one that could be categorized as an "exceptional case" because the parties, although not foreign corporations, were "at home" in the United States and could not show that they were "at home" in any other location.<sup>132</sup>

On March 3, 2015, Judge Paul Friedman issued an order dismissing a case for lack of personal jurisdiction.<sup>133</sup> The case centered on a 2002 terrorist attack that killed an American schoolteacher. The teacher's estate brought an action against the PA and the PLO for violations of the Antiterrorism Act. In 2006, the court had determined that it could exercise general personal-jurisdiction over the PA and the PLO based on their

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<sup>127</sup> See *id.* at \*5; see also David McAfee, *Daimler Frees Moody's, S&P from Bank's \$5.9B MBS Suit*, LAW360 (Oct. 1, 2014, 9:04 PM), <http://www.law360.com/articles/583381/daimler-frees-moody-s-s-p-from-bank-s-5-9b-mbs-suit> [http://perma.cc/95JJ-EWEN].

<sup>128</sup> See *Shatsky v. Syrian Arab Republic*, No. 02-02280 (RjL), slip op. at 2-3 (D.D.C. filed Oct. 29, 2014).

<sup>129</sup> *Id.* at 2.

<sup>130</sup> No. 04 Civ 397(GBD), 2014 WL 6811395 (S.D.N.Y. Dec. 1, 2014).

<sup>131</sup> See *id.* at \*1-2.

<sup>132</sup> See *id.* at \*2.

<sup>133</sup> See *Estate of Esther Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 240 (D.D.C. 2015).

“continuous and systematic” contacts with the United States.<sup>134</sup> After *Daimler*, Defendants raised a motion for reconsideration arguing that *Daimler* was an intervening change in the law.<sup>135</sup> The court agreed. The court reasoned that *Good-year’s* “at home” test was not fully solidified until *Daimler* and Defendants in the case had actively fought personal jurisdiction throughout the litigation of the case.<sup>136</sup>

Yet another district court judge in New York used *Gucci* as controlling precedent to hold that personal jurisdiction was lacking. On March 31, 2015, Judge Paul Gardephe in *7 West 57th Street Realty Co., LLC v. Citigroup, Inc.*<sup>137</sup> wrote that *Gucci America* “unequivocally holds” that *Daimler* effected a change in the law, providing Defendants with a personal jurisdiction defense that was previously unavailable to them.<sup>138</sup> As the court was bound by that decision, Defendants did not waive their personal jurisdiction objection by not bringing a motion earlier.<sup>139</sup>

### III

#### COURTS SHOULD DENY MOTIONS FOR RECONSIDERATION AND NOT APPLY PERSONAL JURISDICTION LAW RETROACTIVELY IN PENDING CASES

In pending cases, parties can use a motion for reconsideration based on a change in controlling law as a vehicle to retroactively apply a new rule to a current litigation. The standard for granting motions for reconsideration varies by court.<sup>140</sup> Generally, a party cannot bring a motion for reconsideration to

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<sup>134</sup> *Id.* at 242.

<sup>135</sup> *See id.* at 239.

<sup>136</sup> *See id.* at 242–43.

<sup>137</sup> No. 13 Civ 981(PGG), 2015 WL 1514539 (S.D.N.Y. Mar. 31, 2015).

<sup>138</sup> *Id.* at \*7.

<sup>139</sup> *See id.*

<sup>140</sup> For a summary of standards in courts across the country, see LAWYERS COOP. PUBL’G, 3 MOTIONS IN FEDERAL COURT § 9.53 (Wayne F. Foster & Lora Siegler, 3d eds. 1996) (presenting standards for a motion for reconsideration of ruling). A 2012 Second Circuit case noted that

‘Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a “second bite at the apple” . . . .’ Rather, ‘the standard for granting [a Rule 59 motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked.’

Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (alteration in original) (citation omitted) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

simply relitigate an issue. A party must present evidence of a change in controlling law. Often the standard for granting a motion for reconsideration in a given district is high, as judges are infrequently willing to revisit prior decisions.<sup>141</sup>

Because the original motions to dismiss, if made, likely would have been decided several years prior, defendants rely on different provisions of the Federal Rules of Civil Procedure to argue that judges have the power to alter such rulings.<sup>142</sup> One such rule, Rule 54(b),<sup>143</sup> says that

any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.<sup>144</sup>

Defendants in the *Federal Home Loan Bank* case argued that if their motion for reconsideration were denied, it should then be certified for interlocutory appeal,<sup>145</sup> a procedural mechanism that the district court would ultimately accept.<sup>146</sup> While the Rule, as written, appears to allow such motions, the following section will illustrate the problems with this approach.

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<sup>141</sup> See 56 Am. Jur. 2d *Motions, Rules, and Orders* § 40 (2016) ("A trial court has jurisdiction to reconsider a prior ruling and may examine several factors in determining the propriety of such reconsideration, including whether: a matter is presented in a different light or under different circumstances; there has been change in governing law; a party offers new evidence; manifest injustice will result if the court does not reconsider its prior ruling; the court needs to correct its own errors; or an issue was inadequately briefed when first contemplated by court." (footnote omitted)).

<sup>142</sup> For an example of this argument, see *Shatsky v. Syrian Arab Republic*, No. 02-02280 (RJL), slip op. at 1 (D.D.C. filed Oct. 29, 2014) (arguing that the court's denials of jurisdictional motions serve as interlocutory orders, which may be revisited). The court ultimately decided that Defendants had waived their personal jurisdiction defense.

<sup>143</sup> FED R. CIV. P. 54(b).

<sup>144</sup> *Id.*; see also *Nieves-Luciano v. Hernandez-Torres*, 397 F.3d 1, 4 (1st Cir. 2005) ("Interlocutory orders . . . remain open to trial court reconsideration' until the entry of judgment.") (quoting *Geffon v. Micrion Corp.*, 249 F.3d 29, 38 (1st Cir. 2001)).

<sup>145</sup> See McGraw Hill Fin., Inc.'s & Standard & Poor's Fin. Servs. LLC's Memorandum of Law in Support of Their Motion for Reconsideration or, in the Alt., for Certification Pursuant to 12 U.S.C. § 1292(B) at \*2, *Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, No. 11-10952-GAO (D. Mass. Sept. 30, 2014), ECF No. 382. Defendants also listed several other courts of appeals that have accepted interlocutory appeals from the denial of a motion to dismiss based on personal jurisdiction. See *id.* at \*4 n.3.

<sup>146</sup> See *Fed. Home Loan Bank of Boston*, 2014 WL 4964506, at \*4.



## IV

HOW COURTS SHOULD ADDRESS RENEWED MOTIONS TO  
DISMISS CASES OR CLAIMS FOR LACK OF  
PERSONAL JURISDICTION

There is no clear answer available for judges who are presented with motions for reconsideration of previously-filed 12(b)(2) motions or summary judgments revisiting similar issues.<sup>147</sup> Defendants use different arguments in an attempt to persuade judges to reconsider prior rulings. There are several grounds on which a judge could premise a denial of such a motion, including waiver of the 12(b)(2) defense because of the absence of a change in controlling law.<sup>148</sup> The exact grounds largely depend on the procedural history of the case and the types of arguments that defendants or other parties put before the court. There are three reasons why, regardless of persuasive arguments to the contrary, judges should categorically deny such untimely motions for reconsideration.<sup>149</sup>

First, motions for lack of personal jurisdiction, also known as 12(b)(2) motions, involve one of the disfavored defenses available for parties by Rule 12 of the Federal Rules of Civil Procedure. Unlike subject-matter jurisdiction, which must be present at the beginning of a case and can then be lost, personal jurisdiction over a party must be established at the outset and can only be raised and litigated at that time, not subsequently.

Second, in the interest of fairness, plaintiffs should not be subject to motions made based on the frequent changes in Supreme Court doctrine in an area that could influence the venue in which a case is heard, which is an incredibly important factor for all parties but especially for plaintiffs. Allowing defendants to succeed on such motions is incredibly disruptive after years of litigation in one venue.

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<sup>147</sup> Ideally the problem could be solved if the Supreme Court, whenever it hears a case impacting personal jurisdiction, issues clear guidance as to whether it means to disrupt the current doctrine and substantially change the way personal jurisdiction is analyzed. However, it is difficult for the Supreme Court to identify which cases will have what effect.

<sup>148</sup> See, e.g., *Am. Fid. Assurance Co. v. Bank of New York Mellon*, No. Civ-11-1284-D, 2014 WL 4471606, at \*1, \*3-5 (W.D. Okla. Sept. 10, 2014) (dismissing a motion for reconsideration of personal jurisdiction on the grounds that the defendant waived their 12(b)(2) defense where there was no change in controlling law), *aff'd*, *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234 (10th Cir. 2016).

<sup>149</sup> Even if there were a valid reason why a court would not have jurisdiction over a defendant post-*Daimler* that did have jurisdiction pre-*Daimler*, a judge should still consider fairness to the plaintiffs or determine if transfer was feasible.

Finally, judges have several alternative options if they are inclined to rule that personal jurisdiction is now lacking but that a particular claim should be preserved for any of these reasons. If applicable law allows, a judge can transfer or sever claims against certain defendants with the hopes of keeping litigation alive.

A. The 12(b)(2) Lack of Personal Jurisdiction Is a Disfavored, Waivable Defense

The 12(b)(2) defense is known as a disfavored defense.<sup>150</sup> If the defense is not raised in a motion before the filing of the answer or in the answer itself, the defense is lost.<sup>151</sup> In denying motions for reconsideration for lack of personal jurisdiction, judges have argued that defendants, in not bringing a motion to dismiss for lack of personal jurisdiction originally, waived the defense. A determination of whether the personal jurisdiction defense is waivable derives from federal law and will vary by jurisdiction.<sup>152</sup>

An ideal way to solve the confusion surrounding whether a defense of lack of personal jurisdiction is waived would be to amend the Federal Rules or a statutory provision. The Federal Rules make clear that either a party or the court can raise

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<sup>150</sup> See 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, at Rule 12 (2016) ("There are four defenses—lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process—that are forfeited if not raised in the defendant's first response to the complaint . . .").

<sup>151</sup> See *id.* There are several additional ways for a party to lose the defense. See *id.* ("The defense of lack of personal jurisdiction can be forfeited (waived) in several ways. First, a defendant forfeits the defense under Rule 12(h)(1) by not raising it in the answer or a pre-answer motion. Second, a defendant can forfeit the defense, even if it is included in a pre-answer motion, if the court denies the motion on the basis of a *prima facie* analysis and the defendant thereafter does nothing to renew the objection and demand that the plaintiff make a factual showing of personal jurisdiction. Third, a defendant can forfeit the defense, even if it is included in the answer, by failing to press the issue to the court. Fourth, the defendant can forfeit the defense by his conduct in the litigation." (footnotes omitted)).

<sup>152</sup> Two recent decisions in pending cases show this variation. In *Gucci America, Inc. v. Weixing Li*, the Second Circuit ruled that defendants' objection to personal jurisdiction was not waived because it was not available at the time. Under prior precedent, the court argued, a foreign bank with a branch in New York was subject to personal jurisdiction. After *Daimler*, one branch in New York would not make the bank "at home" in New York. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134–35 (2d. Cir 2014). In contrast, Judge Richard Leon in the District of Columbia ruled that the D.C. Circuit recognizes waiver when a defendant has engaged in litigation and brought several motions without raising a personal jurisdiction defense. *Shatsky v. Syrian Arab Republic*, No. 02-02280 (RJJ), slip op. at 1–2 (D.D.C. filed Oct. 29, 2014).

subject-matter jurisdiction at any time during the course of litigation.<sup>153</sup> The Federal Rules should specify that Rule 54(b) cannot be applied to a change in constitutional doctrine that impacts a change in venue or involves the dismissal of a party. As written, Rule 54(b) is too broad and invites parties to challenge all rulings, even those that would disrupt years of litigation.<sup>154</sup>

Judges should not rule simply based on whether or not a party had previously brought a motion to dismiss for lack of personal jurisdiction. If it were the case that a party could not raise a 12(b)(2) defense in a pending litigation because the party had not previously done so before filing a responsive pleading, this would have a negative effect. It would create an incentive for parties to bring a 12(b)(2) motion or preserve the defense initially even if it were not clear that it could win or were warranted. Parties would be bringing such motions just to preserve the possibility that the law could change (and it probably will over a lengthy litigation). This will lead to unnecessary motion practice and overall inefficiency. Additionally, under Rule 11, lawyers are not encouraged to bring motions that they know will not succeed.<sup>155</sup>

#### B. The Interest of Fairness for Plaintiffs Must Be Considered

Even if *Daimler* represented a tightening of or change in the doctrine,<sup>156</sup> fairness dictates that a change in the doctrine of personal jurisdiction should not be an interlocutory order that can be revised. In almost every pending case considering this

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<sup>153</sup> FED. R. CIV. P. 12(h)(3).

<sup>154</sup> It is odd that parties have not attempted to file similar motions for reconsideration based on changes in prior Supreme Court doctrine in realms other than personal jurisdiction. And these motions beg the question of whether parties can bring motions for reconsideration on any of the other disfavored defenses and have a court dismiss claims. For example, if the Supreme Court interpreted the requirements for service or motions to dismiss (which they have several times recently), could a party bring a similar motion? Halfway into a litigation, could a party raise a motion for reconsideration that the complaint no longer adheres to current Supreme Court or applicable circuit court standards? This cannot be the effect that Rule 54(b) was intended to have on parties in pending cases.

<sup>155</sup> See FED. R. CIV. P. 11(b)(2). Rule 11 says that an attorney, in filing a pleading, certifies that the "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument."

<sup>156</sup> Judges who are ruling that the "at home" test and subsequent defense for lack of personal jurisdiction in *Goodyear* was the change in controlling law are misguided. While *Goodyear* certainly represented a shift in Supreme Court analysis of the reach over corporate defendants, *Daimler* was the true tightening and limiting of the "paradigm" places where a corporation could be subject to jurisdiction of the courts. *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014).

issue, plaintiffs filed the complaint years prior to any motion to dismiss for lack of personal jurisdiction. Even in cases where such a motion was made initially, judges decided in the plaintiffs' favor years ago. Allowing a judge to entirely dismiss claims of a defendant who has litigated for years is unfair to plaintiffs who rely on the Federal Rules to set up a structure to ensure that such motions are brought in a timely fashion. Several statutory provisions give judges the ability to consider fairness in deciding issues of venue or jurisdiction.<sup>157</sup>

### C. Courts Can Transfer Cases or Claims

In arguing that claims can be preserved if transferred and not dismissed, plaintiffs in opposition to motions for reconsideration argue that courts have other options besides dismissal.<sup>158</sup> Plaintiffs look to 28 U.S.C. § 1404,<sup>159</sup> 28 U.S.C. § 1406,<sup>160</sup> and 28 U.S.C. § 1631<sup>161</sup> as fallback options for transfer of claims.<sup>162</sup>

28 U.S.C. § 1404(a) explains that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”<sup>163</sup> The trial court has discretion to transfer an action and the burden of showing the necessity of transfer.<sup>164</sup> The court can consider many factors,

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<sup>157</sup> Each transfer statute contemplates transfer “in the interest of justice.” See 28 U.S.C. §§ 1404(a), 1406(a), 1631 (2012). Presumably, the avoidance of dismissing claims that parties have been litigating for several years would be considered a ruling in the interest of justice.

<sup>158</sup> The struggle for plaintiffs in such motions is the difficulty of overcoming both the procedural and substantive hurdles. The plaintiff must convince the judge that the personal jurisdiction defense is waived for some reason previously discussed. However, in the chance that the judge allows the motion to continue, a plaintiff must then persuade the judge that, under the *Daimler* test, the defendant is or is not “at home” in a given state.

<sup>159</sup> 28 U.S.C. § 1404 (2012).

<sup>160</sup> 28 U.S.C. § 1406 (2012).

<sup>161</sup> 28 U.S.C. § 1631 (2012).

<sup>162</sup> For an overview of these transfer statutes, available to courts when they lack personal jurisdiction, see Jeremy Jay Butler, Note, *Venue Transfer when a Court Lacks Personal Jurisdiction: Where Are Courts Going with 28 U.S.C. § 1631?*, 40 VAL. U. L. REV. 789, 792–99 (2006).

<sup>163</sup> 28 U.S.C. § 1404(a) (2012).

<sup>164</sup> See Annotation, *Questions as to Convenience and Justice of Transfer Under Forum non Conveniens Provision of Judicial Code (28 U.S.C.A. § 1404(a))*, 1 A.L.R. FED. 15, § 2[a] (2014).

including convenience of the parties and where the events in question took place.<sup>165</sup>

28 U.S.C. § 1406 is another means by which a judge could transfer a case. Section 1406(a) states that “[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”<sup>166</sup> One of the difficulties with section 1406 transfers, however, is that one of the parties in the litigation could be a foreign party. Therefore, the places in which the case could have been brought are most likely limited.

Finally, 28 U.S.C. § 1631, usually used to transfer cases for which there is a lack of subject-matter jurisdiction, could be invoked as a transfer vehicle if the relevant jurisdiction reads it expansively. Section 1631 states that

[w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed.<sup>167</sup>

Some could argue that the benefits to plaintiffs in denying motions for reconsideration or transferring claims do not outweigh the costs of having cases in an improper venue. Constitutional arguments are undoubtedly more important to consider than fairness arguments. However, the two are not mutually exclusive. With the ability to transfer cases comes the ability to maintain both proper venue and ensure fairness to all parties.

#### CONCLUSION

The Federal Rules give parties one chance to bring a motion for lack of personal jurisdiction in response to a complaint. It is improper for courts to hold that *Daimler* or any change in the constitutional boundaries of personal jurisdiction creates an opportunity for parties to renew these motions for lack of personal jurisdiction. Rule 12(g)(2) specifically disallows motions made that could have been made if the defense was previously available to a party. And although *Daimler* may have

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<sup>165</sup> See *id.*; see also *Snyder v. Ply Gem Indus., Inc.*, 200 F. Supp. 2d 246, 248–51 (S.D.N.Y. 2001) (granting a motion to transfer venue based on such factors as convenience to the parties and the location of operative events, among others).

<sup>166</sup> 28 U.S.C. § 1406 (2012).

<sup>167</sup> 28 U.S.C. § 1631 (2014).

provided more guidance on how a court can determine whether a party is "at home," its holding did not fundamentally change the doctrine from *Goodyear*, a case decided three years earlier.

Courts should categorically deny motions to reconsider previous rulings upholding jurisdiction and resist dismissing claims entirely for procedural and fairness reasons. If a court does decide that it lacks personal jurisdiction because of extraordinary circumstances, there are other options that it can consider. Depending on applicable law in the district or circuit, a judge can use a transfer under 28 U.S.C. § 1404, 28 U.S.C. § 1406, or 28 U.S.C. § 1631 if he or she believes the court is wrongfully exercising jurisdiction over a corporate defendant or particular claims. A court can also attempt to fit the facts of the case into one of Justice Ginsburg's "exceptional cases" to find jurisdiction, a category that will undoubtedly be shaped in the coming years and one that could be used to "save" cases or claims in danger of being entirely dismissed. As cases against corporate defendants are generally some of the cases that spend the most time on the courts' dockets, it is especially important for judges to be mindful of any and all unfairness to parties.

