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WHAT'S INSIDE

Letter from the Chair

by: Jeffrey A. Crapko

Spring and Summer were busy times for the Litigation Section. In March, we sponsored ICLE's annual Masters in Litigation Seminar with Larry Pozner. Larry gave a fantastic and entertaining presentation on advanced techniques for cross-examination. As one might expect, Larry held the room's attention, mixing in entertaining war stories with practical instruction on how to refine and hone one's cross-examination technique.

Then, in early May, we kicked off Michigan's warm(er) season with our first inaugural bench/bar mixer at the Detroit Institute of Arts! Lawyers from across the state gathered to network and mingle with judges from a broad spectrum of the state and federal bench. The event was a rousing success, with delicious food, great music, fantastic art, and most important of all, true opportunities for our membership to network and converse with members of the bench. We are hoping to make this event an annual affair, and are already beginning to think of next year. So if you were not able to make it this year — don't worry! Keep your eyes out for a save-the-date in the early part of 2020. But make sure to register early, as we anticipate a continued high level of enthusiasm for this event!

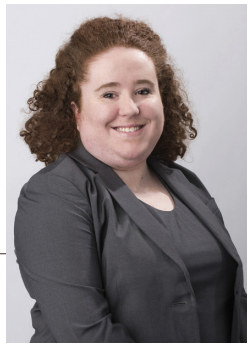
In June, our section gathered for its annual conference at the Grand Hotel on Mackinac Island for our annual conference. As usual, the Grand Hotel did not disappoint. We held an in-person meeting following our conference speaker, and began brainstorming new ideas for next year, including a contemplated new format for our annual conference which will emphasize networking and team-building over in-conference classroom time.

And with that, my tenure as Chair is nearly at an end. In September, I will be handing over the Chair Position to R.J. Cronkhite from Maddin Hauser. R.J. and the rest of the Governing Council will continue to build and improve the Litigation Section, and I will continue to help them do so in any way I can. But in the meantime, if you would like to get involved, please contact any of us. We would love to have you assist us with our efforts at revamping and improving the services and events that our section offers its membership.

Jeffrey A. Crapko
Chair
Litigation Section, State Bar of Michigan

Personal Jurisdiction Based On Domestic Subsidiaries

by: Rebecca M. Klein*



In 2014 the Supreme Court issued a landmark case in the realm of personal jurisdiction. *Daimler AG v. Bauman* strictly limited the circumstances in which a court may assert general personal jurisdiction over a corporate entity.[1] A court may assert jurisdiction "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'"[2] For a corporation, the "paradigm" home states are "the place of incorporation and the principal place of business."[3]

This holding has received much attention as an important limitation on personal jurisdiction over corporations. But in a lesser-noticed move, *Daimler* also raised, but did not decide, another crucial personal jurisdiction question: When may a court assert personal jurisdiction over a foreign parent corporation based **solely** on the contacts of a domestic subsidiary?[4] This article attempts to answer that question with respect to courts within the Sixth Circuit.

Although this issue comes up fairly frequently in the district courts, the Supreme Court has not yet directly addressed the issue.[5] While the *Daimler* Court rejected the Ninth Circuit's broad test, which mainly considered "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,"[6] it declined to address any of the other tests employed by the other Courts of Appeal.

The Sixth Circuit has adopted the "alter-ego theory," "which provides that a non-resident parent corporation is amenable to suit in the forum state if the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction."[7]

This article aims to provide guidance on when a foreign parent corporation will be subject to personal jurisdiction in the Sixth Circuit based **solely** on the contacts of a domestic subsidiary within the forum state.

The Sixth Circuit's Alter-Ego Theory

The Sixth Circuit's approach, acknowledged, but not adopted, by *Daimler,* is that "a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego."[8] Notably, the Sixth Circuit has stayed true to this test post-*Daimler*.[9]

> To satisfy the alter-ego test under federal law, "a plaintiff must make out a prima facie case (1) that there was such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate entities] would result in fraud or injustice."[10]

"The crux of the alter-ego theory of personal jurisdiction . . . is that courts are to look for two entities acting as one."[11] The alter-ego analysis focuses on "what the parent corporation has done, not its subsidiary" and it is the plaintiff's

burden to show that the two companies are acting as one.[12] The inquiry is fact-intensive.[13]

The Sixth Circuit considers seven factors when evaluating the alter ego test:

> 1) sharing the same employees and corporate officers; 2) engaging in the same business enterprise; 3) having the same address and phone lines; 4) using the same assets; 5) completing the same jobs; 6) not maintaining separate books, tax returns and financial statements; and 7) exerting control over the daily affairs of another corporation.[14]

Stated otherwise, "[t]o satisfy the alter-ego test, [the plaintiff] must demonstrate 'unity of interest and ownership' that goes beyond mere ownership and shared management personnel.'"[15] The mere fact that the parent owns 100% of a subsidiary in the forum state is not enough to confer jurisdiction.[16] "[M]erely doing business as a parent entity does not make a subsidiary an alter-ego of the parent company."[17]

In Michigan federal courts, Michigan law governs whether the court may pierce the corporate veil.[18] "Under Michigan law, there is a presumption that 'absent some abuse of the corporate form, parent and subsidiary corporations are separate and distinct entities.' Like under federal law, to rebut this presumption a party must show that a subsidiary is a 'mere instrumentality' of the parent."[19] Michigan courts consider multiple factors, including:

> "Facts tending to show the existence of an alter ego relationship include if the parent and subsidiary share principal offices, if they share board members or executives, if all of the parent's revenue comes from the subsidiary's sales, if all capital for the subsidiary is provided by the parent, if the subsidiary purchases supplies exclusively from the parent, if the subsidiary is seriously undercapitalized, if the parent regularly provided gratuitous services to the subsidiary, if the parent handled the subsidiary's payroll, if the parent directed the policies and decisions of the subsidiary, and if the parent considered the subsidiary's project to be its own."[20]

Inquiries into these factors can be very fact intensive.[21] There is no definitive list of facts that a court will examine, but surveying cases within the Sixth Circuit applying the alter-ego test reveals some common facts:

- Common control[22]
- Shared business location[23]
- Using the same phone lines and office materials[24]
- Interchanging services[25]
- Parent controls the daily affairs of the parent [26]
- Shared board members or executives[27]
- All of the parent's revenue comes from the subsidiary's sales[28]
- All capital for the subsidiary is provided by the parent[29]
- Subsidiary purchases **supplies** exclusively from the parent [30]
- Subsidiary is seriously undercapitalized[31]
- Parent handles subsidiary's payroll[32]
- Parent directs the policies and decisions of the subsidiary[33]

Examining these facts will help determine how to proceed on an alter-ego issue.[34]

Conclusion

While personal jurisdiction may not be the first thing that corporate decision-makers are thinking about when forming subsidiaries, it could later turn out to be a crucial factor in litigation. Counsel on both sides of the aisle should be aware of the alter-ego test and its factors when they proceed on matters of personal jurisdiction.

ENDNOTES

1 571 U.S. 117 (2014). Although *Daimler* speaks of "corporations," its holding may be applied to other business entities as well. *See First Nat. Bank of Pa. v. Transamerica Life Ins. Co.,* No. 14-1007, 2016 WL 520965, at *5 (W.D. Pa. Feb. 10, 2016).

2 *Daimler,* 571 U.S. at 122 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 919 (2011)).

3 *Id.* at 137 (internal quotation marks omitted).

4 *See id.* at 133-36. This article only addresses the question of when a court may exercise personal jurisdiction over a foreign parent based **solely** on the fact that it has a subsidiary in the forum state. Of course if the foreign parent has other contacts with the forum state, the jurisdictional analysis may be much different.

5 *Id.* at 134.

6 *Id.* (internal quotation marks omitted); *Anwar v. Dow Chem. Co.,* No. 15-cv-12708, 2016 WL 304741, at *4 (E.D. Mich. Jan. 26, 2016) ("The *[Daimler]* Court expressly rejected the Ninth Circuit's holding that the finding of an 'agency' relationship between a foreign parent entity and a local subsidiary was sufficient to impute personal jurisdiction to the parent.").

7 *Carrier Corp. v. Outokumpu Oyj,* 673 F.3d 430, 450-51 (6th Cir. 2012) (internal quotation marks omitted). *Accord Anwar v. Dow Chem. Co.,* 867 F.3d 841, 848 (6th Cir. 2017) ("This court has held that the alter-ego theory provides for personal jurisdiction if the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction.") (internal quotation marks omitted)); *Indah v. U.S. S.E.C.,* 661 F.3d 914, 921 (6th Cir. 2011); *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide,* 545 F.3d 357, 361-62 (6th Cir. 2008).

8 *Daimler,* 571 U.S. at 134-35.

9 *See Anwar,* 867 F.3d at 848.

10 *Anwar,* 2016 WL 304741, at *4 (quoting *Ranza v. Nike,* 793 F.3d 1059, 1073 (9th Cir. 2015)).

11 *Anwar,* 876 F.3d at 848.

12 *Odish v. Peregrine Semiconductor, Inc.,* No. 13-cv-14026, 2015 WL 1119951, at *4 (E.D. Mich. Mar. 11, 2015).

13 *In re Refrigerant Compressors Antitrust Litig.,* No. 09-MD-2042, 2014 WL 4678048, at *2 (E.D. Mich. Sept. 18, 2014).

14 *Anwar,* 2016 WL 304741, at *4.

15 *Anwar,* 876 F.3d at 849 (quoting *Ranza,* 793 F.3d at 1073).

16 *See Leadford v. Bull Moose Tube Co.*, No. 15-cv-13565, 2016 WL 4089130, at *3 (E.D. Mich. Aug. 2, 2016).

17 *Id.*

18 *Torongo v. Dolce Int'l German Mgmt. GmbH,* No. 13-12343, 2014 WL 12660032, at *4 (E.D. Mich. June 24, 2014).

19 *Anwar,* 2016 WL 304741, at *4 (quoting *Seasword v. Hilti, Inc.,* 449 Mich. 542, 547 (1995)).

20 *Id. (*quoting *Seasword,* 449 Mich. at 547).

21 *In re Refrigerant Compressors Antitrust Litig.,* 2014 WL 4678048, at *2.

22 *See, e.g., Anwar,* 876 F.3d at 849.

23 *See, e.g., id.; Kuhnmuench v. LivaNova PLC,* No. 17-11719, 2017 WL 5479610, at *5 (E.D. Mich. Nov. 15, 2017).

24 *See, e.g., Anwar,* 876 F.3d at 849.

25 *See, e.g., id.*

26 See*, e.g., id.* at 850.

27 *See, e.g., id.* at 849; *Estate of Thomson,* 545 F.3d at 362; *Kuhnmuench,* 2017 WL 5479610, at *5; T*orongo,* 2014 WL 12660032, at *4; *Quantum Sail Design Group, LLC* v. *Jannie Reuvers Sails, Ltd.,* No. 1:13-CV-879, 2014 WL 266409, at *4 (W.D. Mich. Jan. 23, 2014).

28 *See, e.g., Estate of Thomson,* 545 F.3d at 362; *Kuhnmuench,* 2017 WL 5479610, at *5; *Torongo,* 2014 WL 12660032, at *4; *Quantum Sail,* 2014 WL 266409, at *4.

29 *See, e.g., Estate of Thomson,* 545 F.3d at 362; *Kuhnmuench,* 2017 WL 5479610, at *5; *Quantum Sail,* 2014 WL 266409, at *4.

30 *See, e.g., Estate of Thomson,* 545 F.3d at 362; *Kuhnmuench,* 2017 WL 5479610, at *5; *Torongo,* 2014 WL 12660032, at *4; *Quantum Sail,* 2014 WL 266409, at *4.

31 *See, e.g., Estate of Thomson,* 545 F.3d at 362; *Kuhnmuench,* 2017 WL 5479610, at *5; *Torongo,* 2014 WL 12660032, at *4; *Quantum Sail,* 2014 WL 266409, at *4.

32 *See, e.g., Estate of Thomson,* 545 F.3d at 362; *Kuhnmuench,* 2017 WL 5479610, at *5; *Quantum Sail,* 2014 WL 266409, at *4.

33 *See, e.g., Estate of Thomson,* 545 F.3d at 362; *Kuhnmuench*, 2017 WL 5479610, at *5; *Quantum Sail,* 2014 WL 266409, at *4.

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ICLE's Litigation Toolbox

by: Jenni Colagiovanni, Staff Lawyer, Institute of Continuing Legal Education (ICLE)

Two Essential Tips for Skillfully Handling a Daubert Challenge

Have you been faced with a *Daubert* challenge in your practice? A successful *Daubert* challenge can result in a dismissal or dramatically push the parties to a settlement. ICLE's on-demand seminar, "Demonstration: *Daubert* Hearing," uses mock-courtroom visual examples featuring experienced practitioners to prepare you to raise or respond to *Daubert* challenges. View a quick preview featuring Chad Engelhardt, Tim Dardas, Steve Goethel, and Hon. Elizabeth Gleicher.

Here are two key takeaways from ICLE's on-demand seminar:

1. **Be strategic with expert witness selection.** From both the plaintiff and defense perspective, it's imperative that you incorporate the relevant factors of MCL 600.2955 and MRE 702 as part of a comprehensive background review of your proposed expert.

2. **Understand the role of the judge in a *Daubert* hearing.** Michigan Court of Appeals judge Elizabeth Gleicher says that practitioners can effectively use supporting literature and summaries to educate the judge on the scientific issues in the case. She recommends providing the following:

   - a list of the experts who will testify, accompanied by each expert's curriculum vitae
   - a description of the specific subject matter of the expert's testimony
   - a summary of the opinions the expert is expected to relay, and with regard to each an identification of the legal factor or factors relevant to the testimony
   - copies of all articles on which the attorney intends to rely, with the most pertinent sections highlighted
   - proposed findings of fact and conclusions of law, including an explanation of why some factors are not relevant to the ultimate inquiry

Want to see what other successful litigators would do? ICLE's on-demand seminar, "Demonstration: *Daubert* Hearing," shows you how an experienced plaintiff's attorney guides the expert through the applicable Daubert and MRE factors on direct. Then watch a skilled defense attorney cross-examine the expert on his methodology and emphasize the weakest parts of his testimony.

This on-demand seminar is free for ICLE Premium Partners. Other Michigan lawyers can purchase it for $95: www.icle.org/daubertdemo. To learn about additional litigation resources that can help your practice, contact us at icle@umich.edu.

Giving the Best Answer the First Time: Berman's *Reinventing Witness Preparation*

by: David C. Sarnacki*

"A bird doesn't sing because it has an answer, it sings because it has a song."

— Maya Angelou

Advocacy involves singing a song that resonates with the trier of fact. For witness examinations– direct and cross, – advocacy requires us to help our witnesses hit all the right notes. And that requires us to prepare our witnesses.

This book review provides a summary of **Reinventing Witness Preparation,** an exposé on the failings of traditional witness preparation and the benefits of a more modern, enlightened approach. Kenneth R. Berman focuses on being proactive rather than reactive and on delivering the witness's core message – the song – rather than avoiding any responsive information – gagging the witness. That goal leads to Berman's theme: giving the best answer the first time.

Better preparation delivers better outcomes. "How you prepare your clients will make the difference in how they answer [deposition and trial questions], and how they answer them is critical to whether they win or lose." Berman wants lawyers to teach the witness how to use what he or she already knows about communication and, by doing so, gain an advantage.

The traditional approach emphasizes teaching the witness new skills in an awkward dance to avoid delivering any meaningful information. That's hard. Picking up from where this particular witness is at and moving forward is simpler. It "gives witnesses the skill, confidence and frame of mind to answer the questions in ways that will help their cases, develop their case themes, and get their stories out."

Since most cases settle, persuasion before trial can be a more important influence on the outcome than a nuanced performance for a trial that never happens. Empowering the witness will add confidence and aid performance, whether in a deposition or at a trial. "Witnesses need to give answers that actually help their cases, and the best time to give the best answer is when the question is first asked, whether on direct, on cross, or in deposition."

Traditional witness preparation often involves taking a witness's established conversational skills, turning them inside out, and imposing a fear of giving one bad answer. That fear funnels the witness into a path of saying virtually nothing and often failing to say the right thing. Berman's advice? Give the best answer the first time. "By offering the explanation when the question is first asked, it bolsters the witness' credibility. Spontaneity is more believable than something that seems like an after-the-fact orchestration between the witness and the lawyer."

Berman has an abiding faith in the witness as a human being. He is confident that the person has

answered numerous questions in the course of daily life, regularly clarifying and instinctively answering with "common conversational courtesy." "[A] properly prepared client can be very well positioned to decide, on the spot, whether to volunteer an explanation, using her intuition and judgment, her understanding of the facts and issues, and her sense of whether the failure to volunteer will leave a misleading impression or permit the opposing counsel to take her words and put them into a narrative where they do not belong."

The triers of fact are in a state of constant evaluation in search of the story. They have a job to do and have no interest in games, wasting their time, hiding or misleading or spinning or otherwise insults to their intelligence. They are pleased when an attorney helps make their job easier. A properly prepared witness can take control.

Berman shows three key advantages of what he calls the enlightened approach. First, it empowers the witness to give answers that actually help tell the witness' story. Second, it promotes getting facts on the table as an aid to understanding, something the factfinder and braces. And third, it enables the witness to manage and control his or her testimony.

Reinventing Witness Preparation is 250 pages of principles and examples, spread across 18 chapters. There is no index and no appendix or forms. Berman is a litigation partner in Boston, Massachusetts and a regular contributor to litigation section journals in the local, state, and American bar associations.

Chapter 9, knowing and preparing your witness, includes detailed texts demonstrating the enlightened approach in practice. Those demonstration examples continue in other chapters that address particular types of questions and problems witnesses and counter. Berman uses the Tom Brady deflate gate incident to demonstrate the importance of having a theory of the case and a theme, as well as ensuring the witness understands and can communicate that core message.

So sing. Sing a song, sing out loud, sing out strong. And help your witnesses sing the winning song that wins the case.

K. Berman, Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success (2018 American Bar Association). $64.95.

*David C. Sarnacki practices family law, mediation and collaborative divorce in Grand Rapids, Michigan. He is a past Chairperson of three State Bar Sections: Family Law, Litigation, and Law Practice Management Section. He is listed in Best Lawyers in America.

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