
GENERAL JURISDICTION AND WAIVER IN A
NEW ERA:
AMERICAN FIDELITY ASSURANCE CO.
V. BANK OF NEW YORK MELLON

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I. INTRODUCTION

Questions of jurisdiction are not the most contentious of issues, but this has recently started to change as the importance and complexity of establishing and clearly defining where an individual or corporation might be subject to suit cannot be overstated.¹ These concerns precede every other step of the litigation cycle because questions of jurisdiction determine whether it is constitutional to subject a particular potential defendant to the courts of a particular domain.² The Supreme Court has repeatedly offered guidance on what this determination should hinge upon, but there have been many ambiguities along the way.³ In *American Fidelity Assurance Co. v. Bank of New York Mellon*,⁴ the Tenth Circuit Court of Appeals had the opportunity to opine on a recent Supreme Court ruling *Daimler AG v. Bauman*⁵ concerning certain jurisdictional bases for

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1. See Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995) (discussing the growing complexities and importance of personal jurisdiction).

2. See JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 3.1, at 99 (4th ed. 2005) [hereinafter FRIEDENTHAL].

3. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 209–11 (2014) (discussing the Supreme Court’s decisions’ nonobvious influence).

4. *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234 (10th Cir. 2016).

5. 134 S. Ct. 746 (2014).

corporate defendants.⁶

This Comment begins with a historical account of how personal jurisdiction has developed since the second half of the 20th century, particularly the concept of general jurisdiction and its implications on corporate defendants according to the Supreme Court. Next, this Comment proceeds with a discussion of *American Fidelity* and how the Tenth Circuit has attempted to rationalize the Supreme Court's most recent ruling on general jurisdiction regarding its retroactive effect on ongoing litigation. This Comment concludes with an analysis of the recent development of general jurisdiction and discusses the viability of allowing previously waived presentments of a general jurisdiction defense in light of changing constitutional authority.

II. HISTORY AND DEVELOPMENT OF GENERAL JURISDICTION

Traditionally, acquiring personal jurisdiction over a defendant was limited.⁷ As *Pennoyer v. Neff*⁸ illustrated in 1877, personal jurisdiction can be established by simply serving a defendant who is physically present in the jurisdiction or, alternatively, by entering suit in the forum of the defendant's domiciliary state,⁹ i.e., the state in which the defendant is present with an intent to remain.¹⁰ Likewise, consent and voluntary appearance were valid ways to obtain jurisdiction, just as they still are today.¹¹ However over the first half of the 20th century, the U.S. infrastructure developed rapidly, resulting in people and businesses becoming farther apart.¹² Following this increasing geographic dispersion of persons and entities across the country, the Supreme Court was forced to establish a more flexible standard for determining when defendants could be haled into the courts of different forums where they were neither domiciled nor physically present.¹³

6. *Am. Fid. Assurance Co.*, 810 F.3d at 1241.

7. See FRIEDENTHAL, *supra* note 2, § 3.17, at 168.

8. 95 U.S. 714 (1877).

9. FRIEDENTHAL, *supra* note 2, § 3.17, at 168.

10. See *id.* § 3.6, at 112–14.

11. *Id.* § 3.5, at 106.

12. See *id.* § 3.10 at 125–26; Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to International Shoe*, 10 GEO. MASON L. REV. 59, 59–60 (2001).

13. FRIEDENTHAL, *supra* note 2, § 3.10, at 125–26; Sawyer, *supra* note 12, 59–60.

A. *New Era in Personal Jurisdiction*

The Supreme Court fashioned just such a test in *International Shoe Co. v. Washington*,¹⁴ a landmark case with extremely far-reaching implications.¹⁵ In order to establish in personam jurisdiction outside of the traditional bases of actual presence and domicile, a plaintiff bringing suit in a particular forum must establish that the defendant has “minimum contacts” with the forum.¹⁶ The minimum contacts inquiry is meant to preserve the Due Process Clause of the Fourteenth Amendment in assuring that no party shall be subject to “binding judgments of a forum with which he has established no meaningful ‘contacts.’”¹⁷ Established minimum contacts can obviate the potential to offend “traditional notions of fair play and substantial justice,” and the jurisdictional basis for the suit is deemed constitutional.¹⁸

The cornerstone of the minimum contacts analysis is whether defendants purposefully availed themselves of the forum in question through specific conduct or action, meaning that the defendants have behaved in such a way that they have benefitted from the laws of that particular state and therefore should answer to the state’s courts.¹⁹ A defendant is allowed to challenge the validity of personal jurisdiction if the defendant believes he lacks the requisite minimum contacts.²⁰ If the defendant can prove there are no minimum contacts, the case might be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).²¹ There are several ways an individual or entity can avail itself of a forum, and the

14. 326 U.S. 310 (1945).

15. See Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 110–11 (2015) (discussing the role of *International Shoe Co.* entirely replacing old conceptions of presence).

16. *Int’l Shoe Co.*, 326 U.S. at 316 (“[D]ue 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.’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

17. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1984) (quoting *Int’l Shoe Co.*, 326 U.S. at 319).

18. *Int’l Shoe Co.*, 326 U.S. at 316, 319–20 (quoting *Milliken*, 311 U.S. at 463).

19. See FRIEDENTHAL, *supra* note 2, § 3.11, at 135 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

20. See *id.* §§ 3.25–.26, at 195, 197.

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

degree to which the individual or entity has continuously engaged in a particular conduct can produce ambiguities.²² However, more vexing is the question of relatedness between a defendant's actions in a forum and the cause of action being brought in the forum.²³

B. General Jurisdiction

International Shoe Co. established that certain behaviors qualifying as availment must relate to the action being brought against the defendant.²⁴ Nevertheless, this begs the question of how related is related enough.²⁵ In positing varying forms of activity and their relatedness to the suit in question, one particular and important formulation mentioned by the Court would later come to be understood as the precept for what is now referred to as general jurisdiction²⁶: “[T]here have been instances in which the continuous corporate operations within a state were thought *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.”²⁷

In *Perkins v. Benguet Consolidated Mining Co.*,²⁸ the Supreme Court clarified when contacts were systematic and continuous enough to rise to the level of general jurisdiction, despite the defendant mining company's status as a foreign corporation.²⁹ The Philippine mining corporation had conducted much of its wartime business activity in Ohio, including maintaining the president's office in the state and supervising the corporation's activities from that office.³⁰ The Court determined these contacts presented an instance where a defendant corporation was, for all intents and purposes, using the forum as its home.³¹ The Court later formally distinguished general jurisdiction from specific jurisdiction by clarifying that only the latter jurisdictional basis requires that the suit arise

22. See FRIEDENTHAL, *supra* note 2, § 3.11, at 133–139.

23. See *id.* § 3.11, at 144–45.

24. See *id.* §§ 3.10–.11, at 126–27, 145 (quoting *Int'l Shoe Co.*, 326 U.S. at 319).

25. See *id.* (quoting *Int'l Shoe Co.*, 326 U.S. at 319).

26. See *Int'l Shoe Co.*, 326 U.S. at 318.

27. *Id.* (emphasis added).

28. 342 U.S. 437 (1952).

29. *Id.* at 447–48 (detailing Benguet Consolidated Mining Company's contacts with Ohio).

30. *Id.*

31. *Id.*

out of the contacts with the specific forum.³² In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,³³ the Court reasoned that the Colombian defendant corporation's contacts with the State of Texas were not enough to support a suit in Texas when the events giving rise to the suit occurred in Peru.³⁴ The corporation's negotiations, purchases, and employee training in Texas were not continuous and systematic enough to warrant a determination of valid general jurisdiction.³⁵ This outcome only slightly limited what is considered continuous and systematic enough to warrant general jurisdiction.³⁶

C. Goodyear Onward

At the time *American Fidelity* commenced, *Goodyear Dunlop Tires Operations, S.A. v. Brown*³⁷ was the guiding Supreme Court precedent on general jurisdiction.³⁸ In *Goodyear*, the plaintiff brought suit in a North Carolina court against defendant subsidiaries of the Ohio corporation Goodyear USA: Goodyear Luxemburg, Turkey, and France.³⁹ The suit in question arose from a bus accident that occurred in France, the cause of which the plaintiff attributed to Goodyear's negligent manufacturing of tires.⁴⁰ The Court reasoned that although Goodyear USA was within the jurisdiction of the North Carolina court, its European subsidiaries' activities within the forum were not systematic and continuous enough to give rise to general jurisdiction.⁴¹ Unlike in *Perkins*, the defendants' principal places of business were not only outside the forum, they were not even on the same continent—and neither were their places of

32. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–16, 414 nn.8–9 (1984).

33. 466 U.S. 408.

34. *Id.* at 409–10, 415–16, 418.

35. See *id.* at 416–17 (summarizing *Helicopteros*'s limited contacts with Texas).

36. See Cornett & Hoffheimer, *supra* note 15, at 113 (“*Helicopteros* held that even significant and regular purchases did not establish sufficient contacts for general jurisdiction.”).

37. 564 U.S. 915 (2011).

38. See *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1235–36 (10th Cir. 2016).

39. *Goodyear*, 564 U.S. 915, 918, 920.

40. *Id.* at 918.

41. *Id.* at 929.

incorporation.⁴² Additionally, the Court hinted that the defendants' contacts with the forum might not even suffice for specific jurisdiction, let alone be considered systematic and continuous enough to constitute general jurisdiction in North Carolina.⁴³ Furthermore, the Court elaborated that the defendant corporations' actions must be not only continuous and systematic but also so pervasive as to "render them essentially at home in the forum State."⁴⁴

While the Court noted that a corporation's principle place of business and place of incorporation are the places where corporate defendants are deemed at home, akin to an individual's domicile, the Court also acknowledged that certain behaviors can render the corporation constructively "at home", as was most aptly demonstrated by *Perkins*.⁴⁵ Whatever these actions and behaviors might be, the Court concluded these did not exist in *Goodyear*.⁴⁶ As such, the Court reinforced earlier established bases for general jurisdiction by maintaining a high threshold of contacts and also promulgated the new at home standard.⁴⁷ However, "how extensive would the contacts need to be, in order to render the corporation 'essentially at home'" in a given forum?⁴⁸

III. AMERICAN FIDELITY ASSURANCE CO. V. BANK OF NEW YORK MELLON

A. Facts

American Fidelity challenged the Western District of Oklahoma's

42. *Id.* at 920, 929.

43. *See id.* at 921 (detailing the defendants' limited contacts with North Carolina).

44. *Id.* at 919.

45. *Id.* at 924 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 782 (1988)); *see also* Cornett & Hoffheimer, *supra* note 15, at 124-25 (discussing Justice Ginsberg's lack of acknowledgement that "contacts-based general jurisdiction" could still occur post-*Goodyear*).

46. *See* Ariel G. Atlas, *Who Says You Can't Go "Home"? Retroactivity in a Post-Daimler World*, 101 CORNELL L. REV. 1597, 1604 (2016) (discussing *Goodyear*'s determination that the petitioner was not at home based on insufficient contacts).

47. *See* Rhodes & Robertson, *supra* note 3, at 217-18 (quoting *Goodyear*, 564 U.S. at 919); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-17 (1984) (holding *Helicopteros*'s contacts were insufficient to justify general jurisdiction).

48. Rhodes & Robertson, *supra* note 3, at 218 (quoting *Goodyear*, 564 U.S. at 919) (discussing the question of just how extensive a corporation's contacts need to be to render it at home).

ruling that the law regarding general jurisdiction remained unchanged after the Supreme Court decided *Daimler AG v. Bauman*.⁴⁹ The original dispute arose out of an alleged breach of contractual and fiduciary duties by trustee, Bank New York Mellon (BNYM), adversely impacting beneficiary, American Fidelity.⁵⁰ American Fidelity brought suit against BNYM in Oklahoma.⁵¹ BNYM was “chartered under New York law and its principle place of business [was] New York.”⁵² “Countrywide Financial Corporation . . . sold mortgage-backed securities” to American Fidelity and had previously appointed BNYM as the trustee over these securities.⁵³ Specifically, American Fidelity held certificates in mortgage securitization trusts which were later collateralized by sub-prime mortgages across the United States.⁵⁴ “The [specific] tranches of certificates purchased by American Fidelity were all senior tranches, meaning that American Fidelity had the right to receive distributions prior to the certificate holders in the subordinated tranches”⁵⁵ BNYM, as trustee, had the fiduciary duty of reviewing the documentation underlying the collateralized certificates.⁵⁶ BNYM was also tasked with acting as the intermediary between American Fidelity and the credit rating agencies with respect to reporting any default.⁵⁷ American Fidelity asserted that by failing to act on its fiduciary duties as trustee, BNYM was responsible for the dramatic devaluation of its certificates.⁵⁸

B. Procedural History

“American Fidelity filed its initial Complaint on November 1, 2011.”⁵⁹ The original complaint was dismissed pursuant to defendant BNYM’s successful Federal Rule of Civil Procedure 12(b)(6) motion to

49. *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1235–36 (10th Cir. 2016).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Brief of Appellee at 2, *Am. Fid. Assur. Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234 (10th Cir. 2016) (No. 15-6009), 2015 WL 3544643, at *2.

55. *Id.*

56. *Id.* at 2–3.

57. *Id.* at 3.

58. *Id.*

59. *Id.* at 4.

dismiss for failure to state a claim filed in April 2012.⁶⁰ American Fidelity filed a second amended complaint to which BNYM again moved to dismiss for failure to state a claim in May 2013; however, this motion was denied.⁶¹ In both of these pre-answer motions to dismiss, defendant BNYM did not raise any personal jurisdiction defenses.⁶² BNYM eventually answered the complaint in January 2014 and for a third time omitted a personal jurisdiction defense.⁶³ A mere four days later, *Daimler AG v. Bauman* was decided by the Supreme Court, prompting BNYM to file a third motion to dismiss, this time asserting there was no basis for general jurisdiction, citing to that case.⁶⁴ In the same motion, BNYM, for the first time, asserted that there was no basis for specific jurisdiction, arguing BNYM did not have the requisite minimum contacts with Oklahoma as a forum state; soon after, the parties stipulated jurisdictional facts via jurisdictional discovery.⁶⁵

The U.S. District Court for the Western District of Oklahoma denied BNYM's motion to dismiss, reasoning BNYM had "waived [its] general jurisdiction defense under Federal Rule of Civil Procedure 12(h)."⁶⁶ The district court asserted that *Daimler* merely reiterated the standards for establishing general jurisdiction already determined in *Goodyear*, meaning that BNYM had the same opportunity to challenge general jurisdiction before and after the *Daimler* decision.⁶⁷ Likewise, the court refused to address BNYM's new arguments about specific jurisdiction given that BNYM had failed to assert them in its prior two motions and answer, and so they were waived.⁶⁸

Bank of New York Mellon responded by seeking an interlocutory appeal by the Tenth Circuit Court of Appeals.⁶⁹ In its appeal, BNYM asserted that its complaint could not have been dismissed for lack of general personal jurisdiction prior to *Daimler* but that afterwards it could

60. *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1235 (10th Cir. 2016).

61. *Id.* at 1236.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

have raised such a defense, contending that the decision effectively “narrowed the basis for general jurisdiction.”⁷⁰

C. Opinion

After considering the plausibility of BNYM’s contentions, the Tenth Circuit sided with the federal district court, agreeing that the general jurisdiction defense was in fact available to BNYM from the outset of the suit.⁷¹ The court reasoned that because *Daimler* merely solidified the previous standard articulated in *Goodyear*, BNYM was able to assert the defense prior to the decision; essentially, the court maintained that the standard BNYM relied upon in asserting the defense was unaltered by *Daimler*.⁷²

The court preliminarily discussed the relevant procedural history and developments regarding general jurisdiction doctrine at the Supreme Court level;⁷³ the previous discussion detailed *International Shoe* through *Goodyear*.⁷⁴ However, BNYM argued that there was Tenth Circuit precedent for finding a want of general jurisdiction.⁷⁵ Bank of New York Mellon relied on two cases in particular:⁷⁶ *Grynberg v. Ivanhoe Energy, Inc.*⁷⁷ and *Monge v. RG Petro-Machinery (Group) Co.*⁷⁸ In *Grynberg*, the defendant’s contacts were found to be insufficient for a finding of general jurisdiction.⁷⁹ The only other contacts the defendant had with the forum of Colorado were being named a party to other actions brought in the forum.⁸⁰ *Monge* saw a similar conclusion regarding a Chinese defendant corporation whose only contacts with the Oklahoma forum were a small portion of its sales in the state and a representative who had visited once for a few hours.⁸¹ Both of the Tenth Circuit cases invoked the use of the at

70. *Id.* at 1237.

71. *Id.*

72. *Id.* at 1241.

73. *Id.* at 1237–39 (summarizing the U.S. Supreme Court’s general jurisdiction holding).

74. See discussion *supra* Sections II.B to II.C.

75. See *Am. Fid.*, 810 F.3d at 1239–41.

76. *Id.*

77. 490 F. App’x 86 (10th Cir. 2012).

78. *Monge v. RG Petro–Mach. (Grp.) Co.*, 701 F.3d 598 (10th Cir. 2012).

79. *Am. Fid.*, 810 F.3d at 1240; *Grynberg*, 490 F. App’x at 95–96.

80. *Grynberg*, 490 F. App’x at 95–96.

81. *Am. Fid.*, 810 F.3d at 1240; *Monge*, 701 F.3d at 620.

home test articulated in *Goodyear*.⁸²

While the cases are important precedents and might have helped BNYM assert a general jurisdiction defense, the court maintained that BNYM had simply missed the boat in its reliance on them.⁸³ The court reasoned it was irrelevant what precedent might have helped distinguish BNYM's case because it had already forfeited its right to raise such a defense.⁸⁴ Furthermore, both of these cases denied general jurisdiction based on a *Goodyear* analysis.⁸⁵ The court claimed that because *Daimler* merely reaffirmed the previously existing standard for establishing general jurisdiction, the opportunity to raise such a defense was the same as before,⁸⁶ meaning the defense was waived and could not be retroactively asserted.⁸⁷ The court further elaborated, "*Grynberg* and *Monge* both applied *Goodyear* and are consistent with *Daimler*. Neither case established Tenth Circuit precedent preventing BNYM from raising its general jurisdiction defense because both employed the same standard that the Supreme Court reaffirmed and applied in *Daimler*."⁸⁸

The court's interpretation of *Daimler* emphasized that the decision did nothing to rework the previous standard laid out by *Goodyear*.⁸⁹ *Daimler* expressly referenced *Goodyear* in its jurisdictional assessment and particularly cited the importance of the principal place of business and place of incorporation while simultaneously admitting that they are not the sole determinants.⁹⁰ Because of the *Daimler* Court's reliance on the previously articulated standard in *Goodyear*, the Tenth Circuit concluded that BNYM's waiver of its personal jurisdiction defense was valid and affirmed the district court's decision, denying BNYM's motion to dismiss.⁹¹

82. See *Am. Fid.*, 810 F.3d at 1240 (analyzing the holdings of *Grynberg* and *Monge*).

83. See *id.* at 1241 (stating BNYM waived its general jurisdiction defense).

84. See *id.* at 1241-42 ("Neither [*Grynberg* nor *Monge*] established Tenth Circuit precedent preventing BNYM from raising its general jurisdiction defense because both employed the same standard that the Supreme Court reaffirmed and applied in *Daimler*.").

85. *Id.* at 1241-42.

86. *Id.* at 1242.

87. *Id.*

88. *Id.*

89. See *id.* at 1241-42 (asserting "*Daimler* reaffirmed the *Goodyear* standard").

90. *Id.* at 1240 (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)).

91. *Id.* at 1241-43.

IV. AN ANALYSIS

The troubling question the Tenth Circuit's analysis never quite fully addressed is what it means to be at home under the *Goodyear* standard. While the Tenth Circuit was explicit in its assertion that *Daimler* only restated *Goodyear*'s at home standard, it is still unclear whether this previous standard—cemented eventually by *Daimler*—was a more permissive standard when the action in *American Fidelity* commenced.⁹² It is undeniable that on its face BNYM waived its general jurisdiction defense, but if *Daimler* did anything more than merely state word for word what *Goodyear* asserted, there is a legitimate question of what effect *Daimler* may have on present litigants relying on *Goodyear*.⁹³

A. *Daimler*: A Brief Overview

In order to properly assess the Tenth Circuit's application of *Daimler* in *American Fidelity*, a brief overview of the facts and reasoning in *Daimler* is necessary. *Daimler*, like *Goodyear*, dealt with a foreign defendant, Daimler-Chrysler Aktiengesellschaft (Daimler), based in Germany, whose subsidiary, Mercedes-Benz USA, was sued in a federal district court in California.⁹⁴ Mercedes-Benz Argentina, another Daimler subsidiary, was alleged to have conspired with Argentinian security forces to torture and kill its own employees who were family members of the Argentinian plaintiffs during the 1970s and 1980s.⁹⁵ Personal jurisdiction over Daimler was contingent upon Mercedes-Benz USA's contacts with California.⁹⁶ Mercedes-Benz USA had multiple California-based facilities used to import and distribute Daimler-produced automobiles and was also responsible for a substantial percentage of automobile sales in the state.⁹⁷ Despite both its place of incorporation and principle place of business

92. See Brooke A. Weedon, Note, *New Limits on General Personal Jurisdiction: Examining the Retroactive Application of Daimler in Long-Pending Cases*, 72 WASH. & LEE L. REV. 1549, 1563–64 (2015) (discussing *Goodyear*'s lack of clear guidance resulting in courts and litigants believing the test was more lenient than it was).

93. See *id.* at 1563, 1576, 1578–79 (“There should be relief from consent-based jurisdiction when the consenting defendant did not have notice of an available jurisdictional defense.”).

94. *Daimler AG v. Bauman*, 134 S. Ct. 746, 750–51 (2014).

95. *Id.* at 751.

96. *Id.*

97. *Id.* at 752.

being located on the East Coast, the Ninth Circuit affirmed that California had general jurisdiction over Daimler, and the Supreme Court granted certiorari.⁹⁸

At the outset, the Court faced the question of whether the contacts of an agent, Mercedes-Benz USA, can be imputed to its principal, Daimler, for jurisdictional purposes.⁹⁹ The Court quickly noted that the Ninth Circuit's "important" test was entirely too permissive.¹⁰⁰ Under this agency test, anytime there is a subsidiary-affiliate performing a function important to the principal and that the principal cannot do itself, an agency relationship exists.¹⁰¹ Regardless of the validity of this nearly all-encompassing test, the Court dismissed its relevancy by concluding that even if Mercedes-Benz USA's contacts were "imputable to Daimler," Mercedes-Benz USA's contacts with California were far too weak to consider Daimler at home in the forum.¹⁰²

The Court in *Daimler* unequivocally resolved the dispute brought before it by the Ninth Circuit by merely reiterating and citing its own precedent.¹⁰³ The Court maintained that the plaintiffs had argued for an overly embracing standard that would allow a proclamation of general jurisdiction in nearly any forum where a defendant corporation had substantial and continuous contacts, effectively undermining *International Shoe Co.*¹⁰⁴ However, the Court pointed out the plaintiffs had forgotten that it is not enough to have systematic and continuous contacts with a certain forum under *Goodyear*, even if those contacts are substantial and attributable to multiple forums.¹⁰⁵ The test is whether or not the defendant can be rendered at home in a particular forum.¹⁰⁶ The Court once again stated that this theoretically could be something other than a place of incorporation or principal place of business, but it would be rare and even

98. *Id.* at 752–53.

99. *Id.* at 758–59.

100. *See id.* at 759 (finding the Ninth Circuit's test "stacks the deck" towards "a pro-jurisdiction answer").

101. *Id.* at 759–60.

102. *Id.* at 760.

103. *See id.* at 761–62 (finding Daimler was not at home in California according to prior U.S. Supreme Court jurisdictional tests).

104. *Id.*

105. *Id.* at 761 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

106. *Id.* (quoting *Goodyear*, 564 U.S. at 919).

more unlikely to exist in multiple forums.¹⁰⁷

The Court maintained that in the current instance, there was nothing particularly salient about Mercedes-Benz USA's contacts with California, relative either to other states in which it also engaged in commerce or to other countries where Daimler engaged in commerce.¹⁰⁸ The Court swiftly concluded that if the plaintiff's proposed test for general jurisdiction were to stand, then Daimler would essentially be at home in many different states, a proposition *International Shoe Co.* was never meant to entertain.¹⁰⁹ The Court likewise noted concerns of international comity, explaining that the United States would have the broadest known test for subjecting foreign defendants to suit, by allowing the suits of foreign plaintiffs even when the underlying events occurred elsewhere.¹¹⁰ The Supreme Court reasoned this sort of influence would not likely be received well by the United States's global counterparts.¹¹¹

B. Daimler Changed Goodyear

While the Tenth Circuit adamantly repeated that *Daimler* added nothing new to the *Goodyear* general jurisdiction standard for corporate defendants, one scholar felt that in reality *Daimler* took a dramatic step by effectively slamming the door shut on cases where a defendant doing business would usually be enough to warrant a finding of general jurisdiction.¹¹² Until *Daimler*, a majority of courts were likely to find a large, nationwide corporation that had substantial "continuous and systematic" business contacts with a forum to be subject to general

107. See *id.* at 760–61, 761 n.19 ("We do not foreclose the possibility that in an exceptional case a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question" (citation omitted)).

108. See *id.* at 761–62, 762 n.20 ("General jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide.").

109. *Id.*

110. See *id.* at 763.

111. *Id.*

112. See Tanya J. Monestier, *Where Is Home Depot "At Home"?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 236 (2014) (discussing *Daimler* as a radical departure from decades of case law in which corporations doing substantial business in forums was considered to subject them to general jurisdiction).

jurisdiction in that forum.¹¹³ Some commentators even maintain that there are few appellate decisions expressly dealing with questions of “contacts-based general jurisdiction,” because it was already well established in these jurisdictions that general jurisdiction over a defendant corporation was not arduous to establish prior to *Daimler*.¹¹⁴ It follows that in many instances where a defendant corporation had in fact been engaging in business in a substantial and continuous manner in a particular forum, general jurisdiction was rarely contested.¹¹⁵

Given that *Goodyear* dealt with facts that demonstrated when a defendant corporation was very clearly not at home and provided little other guidance on what being “at home” looked like, it was not at all unforeseeable that many courts would interpret significant degrees of business activity within a forum as rendering them “at home.”¹¹⁶ Considering these facts, it becomes significantly more understandable why BNYM would not feel compelled to, or even be able to, assert a general jurisdiction defense. BNYM was merely relying on the prevailing practice in which many defendant corporations did not contest general jurisdiction, because it was implicitly understood to exist where corporations engaged in substantial business in the forum.¹¹⁷ *Daimler*, in limiting general jurisdiction, effectively could have provided an avenue for presenting a general jurisdiction defense previously thought to be unavailable.¹¹⁸

113. See Rhodes & Robertson, *supra* note 3, at 214 (discussing nationwide corporations nearly always were considered to possess “continuous and systematic contacts” qualifying for general jurisdiction).

114. See Deborah J. Challener, *More Uncertainty After Daimler AG v. Bauman: A Response to Professors Cornett and Hoffheimer*, 76 OHIO ST. L.J. FURTHERMORE 67, 75 (2015) (discussing the frequency of corporations assuming that they cannot challenge general jurisdiction); Cornett & Hoffheimer, *supra* note 15, at 111 (discussing a lack of appellate decisions dealing with the issue of whether corporations were subject to general jurisdiction simply by doing business in the forum).

115. Cornett & Hoffheimer, *supra* note 15, at 111.

116. See Challener, *supra* note 114, at 75 (discussing *Goodyear*’s lack of guidance, causing courts and commentators to reach different conclusions about how to apply the standard).

117. See *id.* (“[T]here was no legal authority that made it futile for defendants to raise their jurisdictional arguments until after *Daimler* was decided.”).

118. See Weedon, *supra* note 92, at 1563 (claiming *Daimler* created a new general personal jurisdiction test).

C. A Not-So-Bright Bright-Line

The Tenth Circuit would likely respond that this line of reasoning misses the mark.¹¹⁹ The question of whether a district court would have been persuaded by a general jurisdiction defense and the question of whether a general jurisdiction defense was available are entirely different.¹²⁰ The Tenth Circuit insisted on a strict adherence to and interpretation of Federal Rule of Civil Procedure 12.¹²¹ Under the Federal Rules of Civil Procedure, a defendant is allowed a certain time frame to raise an available personal jurisdiction defense, and when a defendant fails to raise its defense within the allotted period, it is henceforth barred from asserting the defense in future motions.¹²² However, the absoluteness of Rule 12 is questionable.¹²³ “[L]imited circuit case law in this area” points to the conclusion that if the defense were not warranted by existing precedent, then the defense must be considered functionally unavailable, and an unavailable defense can not logically be subject to waiver under Rule 12.¹²⁴ It follows that when the defense does become available via a change in the “controlling legal authority,” the newly available defense should be able to be raised so long as it is raised timely.¹²⁵ In *American Fidelity*, BNYM raised its newly available general jurisdiction defense two months after *Daimler* was decided.¹²⁶ Because the defense was raised so closely following the *Daimler* decision, a strong implication of veracity arose when BNYM asserted it legitimately understood the defense to have previously been unavailable.

The court might have agreed with the appellant’s contention that it should be allowed to raise a general jurisdiction defense because the legal standard under *Daimler* was colorably different than that under *Goodyear*;

119. See *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1241 (10th Cir. 2016) (asserting the general jurisdiction defense was available when defendant filed its answer, despite *Daimler*’s later ruling).

120. See *id.* (“BNYM waived its defense based on *Daimler* because the same defense was available to BNYM when it filed its motions to dismiss and its answer.”).

121. See *id.*

122. FED. R. CIV. P. 12(a), (h)(1).

123. See *Challener*, *supra* note 114, at 74 (discussing the availability of a personal jurisdiction defense as it relates to Rule 12).

124. *Id.*

125. *Id.* (discussing changes in controlling legal authority that actuate availability of a defense).

126. See *Am. Fid.*, 810 F.3d at 1236.

after all, if BNYM believed a general jurisdiction defense was not available, it follows that it believed a specific jurisdiction defense was also unavailable.¹²⁷ While it may, at first glance, seem peculiar that BNYM would forgo asserting a specific jurisdiction defense in the beginning of litigation then later assert the defense post-*Daimler*, it is important to remember that in everyday practice, general jurisdiction was usually assumed to be valid where a corporate defendant's role in a forum was relatively expansive.¹²⁸ If this is true, and *Daimler* narrowed the basis for establishing general jurisdiction, then it is worthwhile to look at the stipulated jurisdictional facts of both parties in *American Fidelity*.¹²⁹ The Tenth Circuit, "[h]aving concluded BNYM waived its defense as to general jurisdiction," never actually assessed the extent of the contacts in its decision.¹³⁰ The agreed-upon contacts include the following provisions:

- a. BNYM has conducted corporate trust business or services for clients that are located in the State of Oklahoma;
- b. BNYM has conducted commercial indenture trust business for clients that are located in the State of Oklahoma;
- c. BNYM has provided investment services for trusts, insurance companies, and/or banks that are located in the State of Oklahoma;
- d. BNYM has provided commercial broker-dealer services for clients that are located in the State of Oklahoma;
- e. BNYM has solicited business from municipal or state governmental organizations that are located in the State of Oklahoma; and
- f. BNYM has provided investment services for municipal or state governmental organizations that are located in the State of Oklahoma.¹³¹

127. See Brief of Appellee, *supra* note 54, at 19 ("BNYM's decision not to raise [a specific or general jurisdiction defense] at the appropriate time mandates a finding of waiver.").

128. See Challenger, *supra* note 114, at 75 (discussing well established general jurisdiction law in the context of substantial corporate contacts with a forum).

129. See Weedon, *supra* note 92, at 1591 (discussing the narrowing effect *Daimler* had on general jurisdiction).

130. *Am. Fid.*, 810 F.3d at 1243 n.6.

131. *Id.* at 1236 (quoting Appellant's Appendix at 51-52, *Am. Fid.*, 810 F.3d 1234

The extent of the various contacts and the many different roles BNYM fulfills for its fiduciaries in Oklahoma would likely be deemed systematic, continuous, and substantial under the pre-*Daimler* “doing business” model.¹³² Given this fact, it would be very unlikely that BNYM would have moved to dismiss for lack of specific personal jurisdiction if they in fact believed they were likely already subject to general jurisdiction.¹³³ If *Daimler* limited the basis for establishing general jurisdiction such that BNYM fell out of its scope, it only makes sense that BNYM would then raise a specific jurisdiction defense, as this standard would now be the basis by which personal jurisdiction would be established.

The Tenth Circuit in *American Fidelity* contended that BNYM’s reliance on *Grynberg* and *Monge* was misplaced because the court rejected the general jurisdiction argument in both decisions.¹³⁴ However, considering the relatively weak contacts presented in each case, it is unlikely specific jurisdiction even existed, let alone general jurisdiction, no matter which standard of general jurisdiction is being employed.¹³⁵ The Tenth Circuit misses the mark on these cases too because they are both inapplicable in determining whether substantial, systematic corporate actions in a forum would be interpreted as general jurisdiction under *Goodyear*’s at home test.

D. Adjudicating Retroactivity

The Tenth Circuit, while acknowledging that *Daimler* affirms the *Goodyear* standard, refused to recognize that the more specific proclamation of *Daimler* should be considered a “constitutional pronouncement”—a tightening of a pre-existing standard that provides an objective basis that was not previously available.¹³⁶ *Daimler* didn’t only

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132. See Monestier, *supra* note 112, at 240–41 (discussing corporations “doing business in a forum with a degree of permanence and regularity” satisfying the substantial and continuous standard for general jurisdiction).

133. See Appellant’s Reply Brief at 10, *Am. Fid.*, 810 F.3d 1234 (No. 15-6009), 2015 WL 3883142, at *10.

134. See *Am. Fid.*, 810 F.3d at 1241 (“The fundamental flaw in BNYM’s argument is its failure to recognize that *Grynberg* and *Monge* denied general jurisdiction.”).

135. See *id.* at 1240 (stating that, in both *Grynberg* and *Monge*, the defendants’ contacts with the forums were minimal).

136. See Weedon, *supra* note 92, at 1563–64, 1584 (discussing the district court’s failure to understand *Daimler* as “constitut[ing] a new constitutional pronouncement”).

clarify and reiterate *Goodyear*, but it also gave a new level of guidance which *Goodyear* lacked, as noted by many commentators.¹³⁷ This means that the Tenth Circuit incorrectly rested its argument on the supposition that *Daimler* did nothing to change *Goodyear*.¹³⁸ Additionally, other circuits have also noted that a previous waiver may be excused where raising a defense would not have gotten the defendant anywhere under current precedent, so long as the litigation is still pending.¹³⁹

Likewise, it is also worth considering that the Supreme Court has previously held that when a new interpretation of a constitutional question arises, the new interpretation, if altering a former rule, has the superior effect on all cases still open to review, even retroactively.¹⁴⁰ *Daimler* did just that: It clarified a previously existing interpretation.¹⁴¹ There is no reason why this holding should not also apply to the procedural function of waiver and be accessible to defendant BNYM and others in ongoing, open litigation.¹⁴² The Tenth Circuit concluded that this line of reasoning holds no merit because BNYM had already consented to a waiver of its general jurisdiction defense by not raising it.¹⁴³ But many courts have acknowledged the importance of placing limits on consent-based waivers, recognizing the danger behind the ability to disable the issuance of a valid defense because it simply was not there until later case law developed.¹⁴⁴ If litigation is currently ongoing and the law changes to provide an opportunity to raise a defense that was not available at the time of consent, it simply follows that the defendant should be “relie[ved] from [the prior] consent-based jurisdiction.”¹⁴⁵

137. *Id.* at 1563-64 (discussing how *Daimler* provided its own distinct test after *Goodyear* was criticized for being unclear).

138. *See id.* at 1586 (demonstrating that the court’s assumption that *Daimler* didn’t change *Goodyear* is erroneous).

139. *See id.* at 1582 (explaining other circuits’ recognition that a defense waiver which “would have been futile under binding precedent” is excused by the precedent’s changing (quoting *Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004))).

140. *Id.* at 1567 (stating U.S. Supreme Court precedence applies its interpretation of law retroactively).

141. *Id.* at 1585 (stating that the district court claimed *Daimler* clarified *Goodyear*).

142. *See id.* at 1576 (discussing retroactivity generally).

143. *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, 810 F.3d 1234, 1241 (10th Cir. 2016).

144. *See Weedon, supra* note 92, at 1579 (discussing importance of limits on consent-based waivers).

145. *Id.* at 1580 (discussing the availability of a retroactively utilized defense after a consent-based waiver of defense).

V. CONCLUSION

The Tenth Circuit's decision in *American Fidelity Assurance Co. v. Bank of New York Mellon* employs an overly simplistic approach to resolving the dispute before it. *Daimler* was more than a restatement of the *Goodyear* standard for general jurisdiction; it clarified and narrowed what "at home" meant for corporate defendants.¹⁴⁶ In altering the currently existing standard, *Daimler* directly impacted the constitutional precedent regarding when a corporate defendant would be subject to general jurisdiction, which in turn impacted many ongoing cases beyond those in *American Fidelity*.¹⁴⁷ The availability of a general jurisdiction defense for many corporate defendants arose only after *Daimler* narrowed the basis for general jurisdiction.¹⁴⁸ Where a present litigant's defense is directly affected by constitutional decisions, retroactive effect should be applied in order to preserve the litigant's right to the defense.¹⁴⁹

146. See Rhodes & Robertson, *supra* note 3, at 218 (asserting that *Daimler* specified what qualifies as "at home" but *Goodyear* did not).

147. See Monestier, *supra* note 112, at 284 (summarizing Justice Sotomayor's claim that *Daimler* places restrictions on where litigants can bring suit); Weedon, *supra* note 92, at 1565–66 (discussing the effect of changes in "procedural or remedial" legislation, including due process, long-arm statutes, and their potential retroactive effect).

148. See Weedon, *supra* note 92, at 1586 (claiming that the waiver argument in *American Fidelity* directly depended on a false notion that *Daimler* changed *Goodyear*).

149. See *id.* at 1572–73, 1582 (discussing the reinstatement of a defense when the Supreme Court decision ruled the current personal jurisdiction law unconstitutional and action is still pending).