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TOPIC:

General Personal Jurisdiction Over Institutions of Higher Education: *Daimler*'s Impact on the Traditional Exception, Maintaining Registered Agents, and Online Institutions

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INTRODUCTION:

A process server arrives at your East Coast university's main campus with a Summons and Complaint filed in California by a former student or faculty member who used to reside or work at the university's main campus. The allegations in the Complaint are based on events that occurred at the East Coast campus, but the plaintiff asserts that jurisdiction in California is proper because of the East Coast university's extensive "national" activities (including many in California) recruiting students and faculty, raising funds from alumni, sending sports teams and speakers out-of-state, maintaining a registered agent in California, and making distance learning available to students nationwide. Is your East Coast university required to defend this Complaint on the merits in California, at great expense and far from home?

Historically, courts have applied an exception to the assertion of general personal jurisdiction[2] over institutions of higher education (referred to collectively in this NACUANOTE as "colleges and universities" or "institutions").[3] Under this exception, courts refuse to exercise general personal jurisdiction over colleges and universities merely because they engage in activities that are typical for such institutions, such as out-of-state recruitment, fundraising, alumni events, and symposia. These types of activities have been deemed insufficient to confer general personal jurisdiction.[4] When a college or university has a registered agent in a state other than the one where the institution is primarily located, however, courts are split on whether the college and university exception remains applicable. Further, the case law is developing and somewhat

uncertain with respect to the impact that engaging in distance learning has on the jurisdictional analysis. Although institutions that have both "brick and mortar" campuses plus online educational offerings seem to enjoy the traditional college and university exception, there is little case law concerning online-only institutions, so clear principles have not yet been set.

This NACUANOTE proceeds in three parts. The first part details the contours of the guidelines used for determining general personal jurisdiction over colleges and universities. The second part explores conflicting decisions on how to treat registered agents for purposes of general personal jurisdiction. The third part notes that distance education has led to some litigation over general personal jurisdiction in the university context, but no definitive decisions or trends have yet emerged. The purpose of the NACUANOTE is to discuss which activities subject institutions to general personal jurisdiction in foreign fora and to aid colleges and universities in determining the extent to which they might wish to engage in activities that may subject them to general personal jurisdiction outside of their home state.

DISCUSSION:

A. General Personal Jurisdiction

In 2014, the United States Supreme Court ruled in *Daimler AG v. Bauman* that an entity is only subject to general personal jurisdiction when its activities within the forum are so "continuous and systematic as to render [it] essentially at home" in the forum state.[5] Pre-*Daimler*, a court properly exercised general personal jurisdiction when an entity had "systematic and continuous" contacts with the forum state such that it "enjoy[ed] the benefits and protection of the laws of the state."[6] General personal jurisdiction was appropriate when a defendant might reasonably expect to be haled into court in a foreign state.[7] *Daimler*, however, significantly narrowed the scope of general personal jurisdiction.[8] That case involved a group of Argentinian plaintiffs who sued the German-based Daimler Auto Group in a California court; their claims arose from actions that took place in Argentina, and they asserted personal jurisdiction based on the substantial physical presence of Daimler's subsidiary, Mercedes-Benz USA, LLC, in California. *Daimler* rejected the exercise of general personal jurisdiction in that scenario and held that general personal jurisdiction is only appropriate when the entity has contacts with the forum that render it "at home" in the state.[9] According to the Court, an entity is typically only "at home" in the place where it is incorporated and/or where it has its principal place of business.[10] *Daimler* thus drastically narrowed the scope of general personal jurisdiction which, prior to *Daimler*, had been properly exercised over any entity that had "continuous and systematic" contacts with the forum state.[11] *Daimler*'s narrowing of general personal jurisdiction has strengthened educational institutions' arguments opposing the exercise of general personal jurisdiction in foreign jurisdictions.[12]

B. College and University Exception

Prior to *Daimler,* colleges and universities enjoyed an exception to the broad exercise of general personal jurisdiction.[13] Although "systematic and continuous" contacts with the forum state used to subject entities to out-of-state jurisdiction[14], education has always been regarded as a distinct activity.[15] By their very nature, colleges and universities often maintain contacts with many states and, indeed, rely on these out-of-state contacts, at least in part, to function. Thus,

if there were no special general personal jurisdiction considerations for colleges and universities, a so-called "national" institution could arguably be subject to general personal jurisdiction in virtually every state. Concerned with the impact of such unfettered general personal jurisdiction in the education context, courts have held that a college or university is only subject to general personal jurisdiction in the state where the institution is principally located even when the institution engages in significant activities in a foreign state, as long as those activities are "typical of nationally prominent universities."[16] This limitation on general personal jurisdiction over colleges and universities applies to private, public, for-profit, and not-for-profit institutions alike.[17]

Courts consider a variety of activities to be "typical of nationally prominent universities," and thus insufficient to establish general personal jurisdiction over a college or university engaging in such activities in a foreign state.[18] These activities in or connected to the forum state include:[19]

- Fundraising
- Receiving tuition payments or donations
- Maintaining a trust or a bank account
- Advertising
- Recruiting students, athletes, or academic or administrative employees
- Contacting prospective students, current students, or alumni
- Engaging with research contacts
- Entering into clinical trial agreements
- Participating in athletic contests, or in academic or professional events
- Offering study abroad programs
- Sending guest lecturers
- Sending professors on sabbatical
- Purchasing goods or services
- Maintaining a website and selling institutional merchandise

The "at home" standard adopted in *Daimler* strengthens the arguments in support of the college and university exception to general personal jurisdiction.[20] Indeed, recent cases continue to construe general personal jurisdiction over colleges and universities narrowly.[21]

C. Does Maintaining a Registered Agent Expose a College or University to General Personal Jurisdiction?

Registered Agents and General Personal Jurisdiction Generally

Prior to *Daimler*, there was a split in authority over whether maintaining a registered agent in a state, absent other material contacts, was sufficient to establish general personal jurisdiction over an entity.[22] Courts which held that merely maintaining a registered agent to receive process was sufficient did so on the basis that maintaining a registered agent in the forum state was a manifestation of consent to the forum state's exercise of general personal jurisdiction.[23] Other courts, however, held that merely registering to do business in a state and maintaining a registered agent there was insufficient to confer general personal jurisdiction over the entity in that state.[24]

Thus, for example, courts including the Fifth Circuit held that general jurisdiction first and foremost required constitutionally sufficient contacts and that maintenance of a registered agent, without more, was insufficient to confer general personal jurisdiction.[25] Courts taking this view held that although maintaining a registered agent may suggest that the entity had constitutionally sufficient contacts with the forum state, the presence of a registered agent alone was insufficient proof of such contacts.[26]

On the other hand, several courts held (pre-*Daimler*) that merely maintaining a registered agent was sufficient to confer general personal jurisdiction because maintaining a registered agent constituted the entity's consent to be subject to general personal jurisdiction in the forum state.[27] These courts held that a registered agent conferred general jurisdiction wherever the state statute was explicit or broad enough to alert the entity that registering to do business in the state would subject it to general jurisdiction there and/or wherever courts had interpreted the state's long-arm statute to provide for general jurisdiction based on maintaining a registered agent in the state.[28] These cases support that conclusion by noting that maintaining a registered agent for service of process is strong proof that an entity availed itself of the benefits of the forum state and expected to be "haled" into court in the foreign forum.[29]

In the wake of *Daimler*, the impact of registered agents on the exercise of general personal jurisdiction has become even murkier. At its core, this is a disagreement about whether consent remains an exception to the general personal jurisdiction analysis post-*Daimler*, or whether *Daimler* requires that an entity actually be "at home" in the forum state regardless of whether it has supposedly "consented" to jurisdiction by maintaining a registered agent there.

Some courts interpret *Daimler* broadly and understand it to mean that, in all evaluations of general personal jurisdiction, the entity must be "at home" in the forum state.[30] These courts maintain that there is no exception for consent to general personal jurisdiction.[31] Unless an entity has other contacts with a forum state that render it "at home" – and the Supreme Court signaled in *Daimler* that exceptions to the place of incorporation and principal place of business "at home" analysis would be extremely rare[32] – merely maintaining a registered agent does not confer general personal jurisdiction.[33]

Others, however, interpret *Daimler* more narrowly and maintain that *Daimler* does not necessarily apply to questions of general personal jurisdiction involving consent.[34] Those adopting this analysis note that pre-*Daimler* Supreme Court precedent demonstrates that consent is a valid way to establish general personal jurisdiction and that *Daimler* did not change

that analysis because the facts in *Daimler* apparently did not involve consent to general personal jurisdiction.[35] Thus, they conclude that because *Daimler* did not address the issue of consent, an entity may still consent to general personal jurisdiction in a forum state.[36] These courts use a two-step process to determine whether merely having a registered agent in the forum state establishes such consent.[37] First, they look to the state registration statute to determine whether it equates registration with consent.[38] If the state statute is silent or ambiguous on this issue, the courts analyze whether case law supports interpreting the state statute as equating registration with consent. If either the statute or precedent treats registration as consent, courts that approve of consent-based general personal jurisdiction will find that maintaining a registered agent is sufficient to confer general personal jurisdiction over the entity.[39]

Registered Agents and Institutions of Higher Education

Given the conflict among the lower courts on the application of *Daimler* when the defendant has a registered agent in the forum, it is unclear what impact maintaining a registered agent has on general personal jurisdiction over colleges and universities. This uncertainty exists because of the paucity of cases dealing with colleges and universities that maintain registered agents. Before *Daimler*, the Eastern District of Pennsylvania found in *Duchesneau* that Cornell University's substantial business activities **plus** the university's registration to do business in the forum state were sufficient to establish general personal jurisdiction.[40] By contrast, the Northern District of California declined to find that the University of Chicago's registered agent in California constituted grounds for general personal jurisdiction.[41]

Judicial outcomes are similarly mixed after *Daimler*. Dicta in *Isaacs v. Trustees of Dartmouth College* references *Duchesheau* and acknowledges that, in the past, maintaining a registered agent was found to be sufficient grounds to establish general personal jurisdiction over a college or university.[42] Dartmouth College, however, did not maintain a registered agent in the forum state, so the court declined to rule on the issue.[43] No court after *Daimler* has addressed whether merely maintaining a registered agent constitutes sufficient grounds to establish general personal jurisdiction over a college or university in a foreign state, and the question thus remains unsettled.

An institution could argue that maintaining a registered agent is insufficient to nullify the historical exemption from general personal jurisdiction afforded to colleges and universities. For example, institutions that appoint registered agents in a foreign jurisdiction because they are required to do so in order to engage in fundraising activities, or to host an alumni club, would be performing traditional college or university activities away from their "home." There is a strong argument that appointing a registered agent for these limited purposes should not supplant the extensive case law under *Gehling* and its progeny. Further, *Daimler* (recently reaffirmed by *Bristol-Myers Squibb*) articulates the Court's view that general personal jurisdiction should be exercised only in rare circumstances for all entities who are "at home" outside the forum.[44] Along with the historical exceptions afforded to colleges and universities, *Daimler*'s limited view of general personal jurisdiction implies that the exercise of general personal jurisdiction over colleges and universities that maintain registered agents away from their homes is inappropriate.

Nonetheless, the question of how maintaining a registered agent impacts general personal jurisdiction over colleges and universities remains open. Institutions that wish to be cautious

and to avoid potentially being subjected to general personal jurisdiction away from their home state may choose to decline to maintain registered agents in foreign fora. If a foreign state requires an institution to have a registered agent in order to conduct a charitable annuity program, for example, but there is only a small handful of alumni in that state who would participate in that program, the institution may conclude that the possibility of having to defend a lawsuit far from home is not worth maintaining a registered agent in order to engage in the small annuity program. Colleges and universities can further protect themselves from exercises of general personal jurisdiction away from their homes while still taking advantage of the benefits of maintaining a registered agent in foreign fora by only maintaining registered agents in states in which the registration statute does not explicitly confer general personal jurisdiction, and/or where the courts of that foreign state have not historically treated entities with registered agents as being subject to general personal jurisdiction in that forum. Despite the uncertainty around the registered agent issue, institutions should generally feel free to continue to engage in activities "typical of nationally prominent universities" without undue fear of exposure to general personal jurisdiction.[45]

D. Online-Education and the College and University Exception to General Personal Jurisdiction

There is little case law that addresses general personal jurisdiction in the context of online education. Further, at least some case law suggests that different standards may apply to online-only institutions, as compared with traditional "brick and mortar" institutions that also offer online education. Given the paucity of case law, it is difficult to draw definitive conclusions; however, the existence and logical extension of *Daimler,* in combination with the longstanding college and university exception, give institutions strong arguments against the broad exercise of general personal jurisdiction even where online education is at the heart of the dispute.

Pre-*Daimler*, courts were split on whether to exercise general personal jurisdiction based on distance education programs, at least with regard to online-only institutions. In *Watiti v. Walden University*, the court declined to exercise general personal jurisdiction over Walden University, an online-only institution, based on its online distance learning program.[46] Notably, the court in *Watiti* stated that an online-only institution is "certainly distinguishable" from a traditional institution and suggested that these distinctions "may be jurisdictionally relevant … and could potentially lead to a finding of general jurisdiction over an online institution."[47] Subsequently, the court in *Perrow v. Grand Canyon Education, Inc.*, citing *Watiti,* exercised general personal jurisdiction over Grand Canyon Education, another online-only university.[48]

The Third Circuit addressed the exercise of general personal jurisdiction over an online education program offered by an institution that also had a traditional "brick and mortar" campus in *Kloth v. Southern Christian University*.[49] In *Kloth*, the court found Southern Christian University's distance learning program to be merely an extension of the university's physical classroom, and declined to exercise general personal jurisdiction in Delaware, where the student who took online courses resided, when the university's main campus was in Alabama.[50]

Since the decision in *Daimler*, only one appellate court has decided the issue. In *Camphina-Bacote v. Hudson*, involving a nursing program available only online, the Sixth Circuit declined to exercise general personal jurisdiction, but the Court did not provide a rationale or even cite *Daimler*.[51] The post-*Daimler* courts have not yet addressed where they would come out on

the question of general personal jurisdiction over an institution with both a "brick and mortar" and an online-education program.

With so few courts examining the question post-*Daimler*, it would be inappropriate to draw broad or firm conclusions from a single case. Nevertheless, based on the sweeping nature of the "at home" analysis in *Daimler* and the longstanding college and university-exception, colleges and universities have strong arguments that they should be protected from the exercise of general personal jurisdiction based on online programs. That is especially the case with regard to institutions that maintain traditional "brick and mortar" campuses in addition to their distance education programs. Although the case law suggests that online-only institutions may be more vulnerable than "brick and mortar" institutions to the broad exercise of general personal jurisdiction, such institutions may plausibly argue that they should be covered by the traditional exemption from general personal jurisdiction for colleges and universities, as they both supply the same societally important "product": education.[52] Accordingly, even though uncertainty persists, online-only institutions, as well as those with both traditional campuses and distance education programs, may avail themselves of strong arguments in opposition to the exercise of general personal jurisdiction.

CONCLUSION:

Daimler's impact on the application of general personal jurisdiction to colleges and universities is far-reaching. *Daimler*'s "at home" standard, which makes exercising general personal jurisdiction far more difficult, reaffirms and strengthens the traditional jurisdictional exception for colleges and universities.

Uncertainty persists, however, over the issue of whether maintaining a registered agent in a foreign forum is sufficient to establish general personal jurisdiction. Generally, courts are split on how, if at all, *Daimler* should impact that analysis. Courts are similarly undecided regarding whether colleges and universities that provide their educational product exclusively online enjoy the defenses to general personal jurisdiction afforded to more traditional colleges and universities. Although there is no definitive answer to either of these questions, *Daimler*'s limitation on general personal jurisdiction strengthens the historical deference afforded to colleges and universities in the area of general personal jurisdiction.

END NOTES:

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The authors represented the University of Chicago in the matter of *Pop Test Cortisol, LLC v. Univ. of Chi.*, No. 14-CV-7174, 2015 WL 3822237 (D.N.J. June 18, 2015) (motion to dismiss for lack of personal

jurisdiction granted), cited in this NACUANOTE. The authors acknowledge the contributions of Karen L. Courtheoux, an associate of Franczek Radelet P.C., for early research into these issues.

[2] Colleges and universities enjoy no similar exception with regard to specific personal jurisdiction. To the extent jurisdiction is based on forum-state activities that gave rise to the specific claim, there is no distinction in courts' analyses between cases involving colleges and universities and those involving other entities. This NACUANOTE does not, therefore, address claims of specific personal jurisdiction over colleges and universities. We note, however, that the United States Supreme Court has recently applied strict tests against plaintiffs who attempt to force out-of-state defendants to litigate a case purportedly arising from specific activities in the forum. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court of California*, No. 16-466, 137 S. Ct. 1773 (2017).

[3] *See Gallant v. Trs. Of Columbia Univ. in the City of N.Y.*, 111 F. Supp. 2d 638, 643 (E.D. Pa. 2000) (limiting general personal jurisdiction over "nationally prominent universities" to avoid subjecting universities to "general jurisdiction in most, if not all, states").

[4] *See id.*

[5] *See Daimler AG v. Bauman,* 134 S.Ct. 746, 754 (2014), reaffirmed in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

[6] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 320 (1945).

[7] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

[8] *Daimler*, 134 S.Ct. 746. The first use of the "at home" phrase by the Supreme Court was in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), but the Court's expansive use of that test to the facts in *Daimler* (billions of dollars of car sales and multiple facilities in California were not sufficient for general personal jurisdiction because even that substantial amount of activity did not meet the "at home" test) showed that *Daimler* was a sweeping decision.

[9] *Id*.

[10] *Daimler* acknowledged that there could be exceptional circumstances where "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." *Id.* at 770 n.9, 761 n.19 (identifying the Philippine company at issue in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), as an example of the "exceptional case"). In *Perkins*, the company at issue was displaced by war and temporarily located in Ohio. Ohio was thus treated as "a surrogate for the place of incorporation or head office." *Id.* at 756 n.8.

[11] *See Int'l Shoe Co.*, 326 U.S. at 319, 320.

[12] *See, e.g.*, *Isaacs v. Trs. of Dartmouth Coll.*, No. 13-5708, 2014 WL 4186536 at *12 (E.D. Pa. Aug. 25, 2014) (citing *Gallant*, 111 F. Supp. 2d at 641–44), *aff'd sub nom Isaacs v. Arizona Board of Regents*, 608 F. App'x 70 (3d Cir. 2015).

[13] *See Gehling v. St. George's Sch. of Med., Ltd.*, 773 F.2d 539, 541–43 (3d Cir. 1985), the seminal case in this area. The Third Circuit's 1985 decision in *Gehling* is cited in virtually every college and university-exception opinion that followed, but the Supreme Court of the United States has never ruled on general personal jurisdiction in the college and university context. It should be noted that the college- and university-exception cases often involve private institutions, but the cases do not discuss any distinction between public and private institutions. Indeed, there are a number of college- and university-exception cases involving public institutions which cite to and rely on the Third Circuit's 1985 seminal opinion in *Gehling*. *See, e.g., Meyer v. Bd. of Regents of Univ. of Oklahoma*, No. 13-3128, 2014 WL 2039654 (S.D.N.Y. May 14, 2014); *Corrales Martin v. Clemson Univ.*, No. 07-536, 2007 WL 4531028 (E.D. Pa.

Dec. 20, 2007); and *Scherer v. Curators of the University of Missouri*, 152 F.Supp.2d 1278 (D. Kan. 2001).

[14] *See Int'l Shoe Co.*, 326 U.S. at 319, 320.

[15] *See Severinsen v. Widener Univ.*, 768 A.2d 200, 206 (N.J. Super. Ct. App. Div. 2001).

[16] *Corrales Martin,* 2007 WL 4531028, *5. *See also Gehling*, 773 F.2d at 542–43 (distinguishing advanced educational institutions from other out-of-forum defendants); *Gallant*, 111 F. Supp. 2d at 643 (cautioning against subjecting universities to general jurisdiction "in most, if not all, states"); *Pop Test Cortisol, LLC v. Univ. of Chi.*, No. 14-CV-7174, 2015 WL 3822237 at *5 (D.N.J. June 18, 2015); *Wesly v. The Nat'l Hemophilia Found.*, 77 N.E. 3d 746, 755 (Ill. App. 2017) (Georgetown University was not subject to general personal jurisdiction in Illinois despite the following activities in Illinois: recruiting, interviewing, admitting students, fundraising, locating an alumni club, and hosting alumni events).

[17] *See Kendall v. Trs. of Amherst Coll.*, No. 06-4983, 2007 WL 172396 (E.D. Pa. Jan. 18, 2007); *Kober v. Am. Univ. of Carribean NV, Inc.*, No. 11–cv–0623, 2012 WL 2317029 (W.D. La. May 25, 2012); *Corrales Martin*, 2007 WL 4531028.

[18] *Corrales Martin*, 2007 WL 4531028 at *5.

[19] *Gehling*, 773 F.2d at 541–43; *Am. Univ. Sys., Inc. v. Am. Univ.*, 858 F. Supp. 2d 705, 713–14 (N.D. Tex. 2012); *Kendall*, 2007 WL 172396 at *3–5; *Antoine v. Syracuse Univ.*, No. cv 030473601, 2003 WL 22481407 at *3–4 (Conn. Super. Ct. Oct. 20, 2003); *Gallant*, 111 F. Supp. 2d at 641–43; *Park v. Oxford Univ.*, 35 F. Supp. 2d 1165, 1167 (N.D. Cal. 1997).

[20] *See, e.g.*, *Thackurdeen v. Duke Univ.*, 130 F. Supp. 3d 792 (S.D.N.Y. 2015).

[21] *See, e.g., id.* at 799–800; *Wesly v. The Nat'l. Hemophilia Found.*, 77 N.E. 3d 746, 755 (Ill. App. 2017).

[22] *Lanham v. Pilot Travel Ctrs., LLC*, No. 03:14–cv–01923–HZ, 2015 WL 5167268 at *5 (D. Or. Sept. 2, 2015) (citing *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. 14–508–LPS, 2015 WL 880599 at *9 (D. Del. Feb. 26, 2015) and *Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 468 (D.N.J. 2015).

[23] *See, e.g.*, *Forest Labs., Inc.*, 2015 WL 880599 (citing cases); *see also Bane v. Netlink Inc.*, 925 F.2d 637, 640 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199-1200 (8th Cir. 1990).

[24] *See, e.g.*, *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990).

[25] *See Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992).

[26] *See Sofrar, S.A. v. Graham Eng'g Corp.*, 35 F. Supp. 2d 919, 920 (S.D. Fla. 1999).

[27] *See Knowlton*, 900 F.2d at 1200; *Constr. Prods. Distb., LLC v. Onward Tech. Inc.*, No. 4:07–CV–00343–JAJ, 2007 WL 3287299 at *5 (S.D. Iowa Nov. 6, 2007).

[28] *See id.*

[29] *Knowlton*, 900 F.2d at 1199.

[30] *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488 at *4 (E.D. Mo. July 1, 2015). *See also Addelson v. Sanofi, S.A.*, No. 4:16CV01277 ERW, 2016 WL 6216124 at *1-5 (E.D. Mo. Oct. 25, 2016) (basing general personal jurisdiction on registering to do business in Missouri "would not comport with the principles of personal jurisdiction the Supreme Court established in *Daimler.*").

[31] *Id*.

[32] *See supra n. 10.*

[33] *Id*.

[34] Notably, although the majority in *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016), did not reach the issue of general personal jurisdiction, Judge O'Malley addressed consent to general personal jurisdiction in his concurrence. Specifically, Judge O'Malley pointed out that, like all privileges, personal jurisdiction may be lost. Accordingly, he opined that a defendant may waive its right to contest general personal jurisdiction by consent. Judge O'Malley reasoned that as *Daimler* did not expressly eliminate consent as a method of establishing general personal jurisdiction, it remains valid. Therefore, he stated in his concurring opinion that registering an agent in a forum state may establish general personal jurisdiction through consent. Judge O'Malley's concurrence is significant in that it constitutes the only affirmation of consent to general personal jurisdiction post-*Daimler* in a Circuit Court of Appeal. In comparison, the Second Circuit declined to decide "whether consent to general jurisdiction via a registration statute would be similarly effective notwithstanding *Daimler*'s strong admonition against the expansive exercise of general jurisdiction." *Brown v. Lockheed Martin Corp*., 814 F.3d 619, 640 (2d Cir. 2016). The Second Circuit indicated that the exercise of general personal jurisdiction based on a state statute "that expressly required consent to general jurisdiction as a condition on a foreign corporation's doing business in the state" might be an exercise of the State's coercive power that "may be limited by the Due Process Clause" under Supreme Court precedent. *Id.* at 641.

[35] *Otsuka*, 106 F. Supp. 3d at 467 (citing *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917) and *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 165 (1939)); *see also Novartis Pharm. Corp. v. Mylan Inc.*, No. 14–777–RGA, 2015 WL 1246285 at *3 (D. Del. Mar. 16, 2015). The district court in *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 557, n.5 (D. Del. 2014) indicated that Mercedes-Benz USA, LLC, the entity at issue in *Daimler*, did have a registered agent in California. The district court acknowledged that, despite this fact, the Supreme Court did not note this in its opinion, so the Supreme Court has not yet directly addressed the issue of whether having a registered agent in the forum constitutes consent.

[36] *Forest Labs. Inc.*, 2015 WL 880599 at *13–14.

[37] *See Mitchell v. Eli Lilly & Co.*, 159 F. Supp. 3d 967, 976-77 (E.D. Mo. 2016).

[38] *See, e.g., Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) (holding that Connecticut's business registration statute did not expressly state that registration constituted consent and therefore did not confer general jurisdiction, and noting that "[i]f mere registration and the accompanying appointment of an in-state agent – without an express consent to general jurisdiction – nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief."); *Aspen American Insurance v. Interstate Warehousing*, 2017 IL 121281 ¶¶22-27 ("the fact that a foreign corporation has registered to do business in Illinois… in no way suggests that the foreign corporation has thereby consented to general jurisdiction over all causes of action"). *Cf. State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W. 3d 41, 52 (Mo. 2017) (Missouri statute does not mention consent to personal jurisdiction, so registration itself does not create general personal jurisdiction). It is interesting to note that courts in Missouri have decided the "registered agent/consent issue" in different ways: *Keeley* and *Addelson* (decided by the same judge) held that merely having a registered agent did not constitute consent to general personal jurisdiction, and that a holding to the contrary would run afoul of *Daimler*; by contrast, *State ex rel. Norfolk Southern* avoided the constitutional question by holding that the Missouri registration statute was not a consent to general personal jurisdiction. These Missouri decisions are examples of the confusion of the case law in this area.

[39] *See Lanham*, 2015 WL 5167268 at *8.

[40] *See Duchesneau v. Cornell Univ.*, No. 08–4856, 2009 WL 3152125 (E.D. Pa. Sept. 30, 2009). The district court stated that the following activities by Cornell in Pennsylvania did NOT support the exercise of general personal jurisdiction in the forum: (a) legal actions; (b) occasional use of contractors and

vendors; (c) number of Cornell students from Pennsylvania; and (d) participation of Cornell athletic teams in activities in the state. By contrast, the district court relied on the following activities by Cornell in Pennsylvania to assert general personal jurisdiction: (1) registration to do business in Pennsylvania since 1952; (2) operation of leased office of 1,300 square feet for alumni relations and fundraising activities; (3) fax and telephone lines; (4) the Cornell staff located at the leased office were paid $1.3 million over three years; and (5) Cornell's payment of state and local taxes, workers compensation insurance, and gas and electric bills. The district court considered all of these factors, but relied most heavily on the registration in Pennsylvania, and the lease of real property in the state. It seems unlikely that *Duchesneau* would be decided the same way today, especially in light of *Daimler*. The activities of the Daimler subsidiary in California, including the use of numerous facilities and car sales in the multi-billions of dollars, were far more extensive than the Cornell activities in Pennsylvania, yet the Court held that *Daimler* was not "at home" in California. Applying the logic of the *Daimler* holding, it seems clear that Cornell was not "at home" in Pennsylvania. The registration in Pennsylvania, however, could tip the balance, as explained elsewhere in this NACUANOTE.

[41] *See Nanoexa Corp. v. Univ. of Chicago*, No. 10–CV–2631–LHK, 2010 WL 4236855 (N.D. Cal. Oct. 21, 2010). It should be noted, however, that the Third Circuit previously construed the Pennsylvania business statute at issue in *Cornell University* as providing that the maintenance of a registered agent constitutes consent to general personal jurisdiction in the state. *See Bane v. Netlink, Inc.*, 925 F.2d at 637, 640 (3d Cir., 1991). In contrast, California courts have consistently held that the maintenance of a registered agent does not constitute consent to jurisdiction. *See, e.g.*, *World Lebanese Cultural Union, Inc. v. World Lebanese Cultural Union of N.Y., Inc.*, No. C 11-01442 SBA, 2011 WL 5118525, *4 (N.D. Cal. Oct. 28, 2011); *DVI, Inc. v. Superior Court*, 104 Cal. App. 4th 1080, 1095 (2002); *Gray Line Tours of Se. Nev. v. Reynolds Elect. & Eng'g Co.*, 193 Cal. App. 3d 190, 193–95 (1987).

[42] *Isaacs v.Trs. of Dartmouth Coll.*, No. 13-5708, 2014 WL 4186536 at *12 n.1 (E.D. Pa. Aug. 25, 2014).

[43] *See id.* at *14 n.2.

[44] *See* discussion in text at nn.5-11.

[45] *Corrales Martin*, 2007 WL 4531028 at *5.

[46] *Watiti v. Walden Univ.*, No. 07–4782 (JAP), 2008 WL 2280932 (D.N.J. May 30, 2008).

[47] *Id*. at *6.

[48] *Perrow v. Grand Canyon Educ., Inc.*, No. 2:09–cv–670, 2010 WL 271298, at *5 (S.D. Ohio Jan. 15, 2010)

[49] *Kloth v. S. Christian Univ.*, 320 F. App'x 113 (3rd Cir. 2008).

[50] *Id*. at 116-17.

[51] *See Camphina-Bacote v. Hudson*, 627 F. App'x 508 (6th Cir. 2015).

[52] *See Severinsen v. Widener Univ.*, 768 A.2d 200, 206 (N.J. Super. Ct. App. Div. 2001).

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