"INCONCEIVABLE!"[1]: THE UNINTENDED CONSEQUENCES OF *DAIMLER* ON BANKING AND CREDITORS' RIGHTS

By

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In 2014, the United States Supreme Court forever altered the test for long-arm jurisdiction when it decided the *Daimler*[3] case. While the decision was unanimous, and was one that was clearly meant to clarify when a court has personal jurisdiction over out-of-state corporations, we have only begun to feel the ripple effects of *Daimler*'s unintended consequences.

Personal Jurisdiction

Before delving into the main thesis of this article, a brief overview of personal jurisdiction jurisprudence in Illinois is necessary, because, in order to understand how it has been affected by *Daimler*, we must first grasp the general notion of personal jurisdiction.

"Personal jurisdiction" refers to the power over the person of a defendant in contrast to the jurisdiction of a court over a defendant's property or his interest therein.[4] Jurisdiction over the person is sometimes referred to as *in personam* jurisdiction, but jurisdiction over someone's property is called *in rem* jurisdiction. In order for a court to exercise control over a person (person, corporation, limited liability company, etc.)[5] for the purposes of entering judgment against her, ordering her to refrain from certain

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[3] Daimler AG v. Bauman, 571 U.S. 117 (2014).
[4] *Personal jurisdiction*, BLACK'S LAW DICTIONARY (6th ed. 1990).
[5] For simplicity, I will refer to any legal entity as a "person" rather than the overly-formal "legal entity."

conduct, or otherwise, a court must have *in personam* jurisdiction over that person. Generally speaking, a court obtains personal jurisdiction over a person once that person has been properly served with a summons to appear in court.[6] While there are other methods by which a court could obtain personal jurisdiction other than with the service of summons, such discussions that are relevant to this paper will be discussed in detail later; other methods that are not germane to this paper will be left for discussion on another day.

Specific vs. General

Specific Jurisdiction. In order for an Illinois court to have personal jurisdiction over an out-of-state party, the court must find that it has either specific or general jurisdiction under Illinois' long-arm statute.[7] Specific jurisdiction may exist over an out-of-state party if the lawsuit arises out of or is connected to the party's purportedly wrongful activities within the forum state.[8] In other words, the underlying litigation itself must have been based on the party's conduct in the forum state in order for a court in Illinois to have specific jurisdiction over that party. While at least one trial court has found that generally doing business in Illinois subjects those businesses to the specific

[6] There are many exceptions to this general statement, and the ones that are relevant for this discussion are fleshed out later in this paper.

[7] 735 ILL. COMP. STAT. ANN. 5/2-209 is the Illinois statute on long-arm jurisdiction.

[8] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8 (1984) ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."); *see also* Cardenas Mktg. Network, Inc. v. Pabon, 972 N.E.2d 680, 689 (1st Dist. 2012) (noting that "a court can exercise specific jurisdiction over a defendant only if the suit arises out of its contacts with the forum state"); Roiser v. Cascade Mountain, 855 N.E.2d 243, 247 (1st Dist. 2006) (citing Borden Chemicals and Plastics, L.P. v. Zehnder, 726 N.E.2d 73, 78 (1st Dist. 2000) (noting that specific jurisdiction means personal jurisdiction in a suit related to a defendant's contacts with the forum state).

jurisdiction in Illinois courts,[9] most courts do not. In *Roiser*, the court found that, because the litigation at issue was not based on any alleged wrongful activity of the defendant in Illinois, specific jurisdiction principles did not apply.[10]

General Jurisdiction. "When a suit neither arises from nor relates to a defendant's activities within the state where the suit has been filed, the court is limited to exercising general jurisdiction of the out-of-state defendant."[11] A plaintiff in litigation bears the burden of establishing a *prima facie* basis for exercising a court's *in personam* jurisdiction over a non-resident party.[12] In order to determine if a *prima facie* case for personal jurisdiction has been met, courts are to evaluate personal jurisdiction under Illinois' long-arm statute, and due process under both the Illinois and United States Constitutions.[13] If the contacts between the party and Illinois are sufficient to satisfy both federal and state due process concerns, the requirements of Illinois' long-arm statute have been met, and no other inquiry is necessary.[14] When federal due process concerns regarding a court's exercise of personal jurisdiction over a party are satisfied, so are Illinois' due process concerns.[15] Because both state and federal due process requirements must be met for a court to be able to properly obtain personal jurisdiction over a party, federal decisions applying federal due process concerns are applicable.[16] In addition, if a party does not argue that the Illinois Constitution imposes any greater restraints on the

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[9] *See, e.g.*, Speedy Cash Illinois, Inc. v. Rashea Gavin, 19 M1 115255 (Cook Cty. Cir. Ct. Dec. 30, 2020)(indicating that Illinois' long-arm jurisdiction statute allows a court to exercise specific jurisdiction over any defendant that conducts business in the State of Illinois).
[10] *Roiser*, N.E.2d at 247.
[11] *Id.*
[12] Sabados v. Planned Parenthood of Greater Ind., 882 N.E.2d 121, 124 (1st Dist. 2007).
[13] *Id.*
[14] *Cardenas Mktg. Network, Inc.*, 972 N.E.2d at 689.
[15] Keller v. Henderson, 834 N.E.2d 930, 941 (1st Dist. 2007).
[16] *See Keller*, 834 N.E.2d at 941.

exercise of such jurisdiction than does the federal Constitution, courts consider only federal constitutional principles.[17]

How Daimler Changed the Landscape

Daimler held that a corporation is "at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business."[18] While this language may seem innocuous, the consequences of this holding will have ripple effects over litigation for decades to come. *Daimler* dramatically changed the law regarding general jurisdiction by narrowing the scope of a previous Supreme Court decision – *International Shoe*.[19]

In *International Shoe*, the Court held that due process, for determining general personal jurisdiction of an out-of-state corporation, depended on

> the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[20]

This has become what is commonly known as the "Minimum Contact Doctrine."[21]

Daimler has since clarified the Minimum Contact Doctrine by holding that a corporation may be subject to general jurisdiction in a state only where its contracts are so continuous and systematic, judged against the corporation's national and global

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[17] Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 90 N.E.3d 440, 444 (Ill. 2017).
[18] Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 134 (2d Cir. 2014) (citing Daimler AG v. Bauman, 571 U.S. 117 (2014)).
[19] Int'l Shoe Co. v. State of Wash. Office of Unemployment Comp. and Placement, 326 U.S. 310 (1945).
[20] *Id.* at 319.
[21] *Minimum contacts*, BLACK'S LAW DICTIONARY (6th ed. 1990). ("Minimum contacts. A doctrine referring to the minimum due process requirement for subjecting a non-resident civil defendant to a court's personal jurisdiction. The defendant must have sufficient contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.").

activities, that it is essentially "at home" in that state.[22] The Court continued by defining what it meant by "at home" in holding that "a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business.[23] While this may appear to be a bright-line rule, the Court indicated that it was possible for an exception to be made regarding corporate personal jurisdiction where the party's contacts are so continuous and systematic as to render it *essentially* at home in the forum. The Court cited to its own precedent in *Perkins* as an example of what type of conduct could qualify for a deviation from the bright-line rule of *Daimler*.[24] In *Perkins*, the defendant corporation was forced to relocate from the Philippines to Ohio due to World War II. Ohio became the center of the corporation's wartime activities and, effectively, a "surrogate for the place of incorporation or head office."[25] As such, the defendant in *Perkins* was subject to the general jurisdiction of Ohio.[26] The defendant had moved, albeit temporarily, its headquarters and operations to Ohio. If the defendant had had its headquarters in Ohio from the beginning, it would have been subjected to general jurisdiction in Ohio because the location of its headquarters in Ohio meant that it was subject to general jurisdiction in all Ohio courts.

The Illinois Supreme Court had an opportunity to apply *Daimler*'s clarification of the "Minimum Contacts" test noted in *International Shoe* in *Aspen American.*[27] In *Aspen American* the plaintiff filed suit in Cook County, Illinois against an Indiana

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22 *Daimler*, 571 U.S. at 138.
23 *Id.*
24 *Id.* at 129.
25 *Id.* at 130 n.8.
26 Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952).
27 Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 90 N.E.3d 440 (Ill. 2017).

corporation that engaged in alleged unlawful conduct in its Michigan warehouse. The Indiana corporation also maintained a warehouse in Joliet, Illinois, among other places, which was the basis for the plaintiff's claim of jurisdiction over the corporate defendant. The defendant filed a motion to quash service and dismiss the complaint for lack of personal jurisdiction. The defendant did not dispute that it was doing business in Illinois, but argued that under *Daimler*, the plaintiff was required to show that the defendant was domiciled or "at home" in Illinois, and that the plaintiff had failed to do so.[28] The plaintiff argued that, because the defendant was doing business in Illinois through the Joliet warehouse, it was subject to the general jurisdiction of this state and therefore could be sued on causes of action unrelated to its activities in Illinois.[29]

The Illinois Supreme Court overruled the lower courts that had denied the motion to quash and dismiss. The court noted that only general jurisdiction could be considered because none of the defendant's complained-of activities occurred in Illinois.[30] The court specifically disagreed with the plaintiff's argument that the court could exercise general jurisdiction over a defendant "where the defendant has continuous and systematic general business contacts with the forum state."[31] In doing so, the court relied upon *Daimler* and noted that the Supreme Court held that "under federal due process clause … a court may assert general jurisdiction over [a] foreign *** corporation [ ] to hear any and all claims against [it] when [its] affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum state."[32] The court continued by indicating

[28] *Id.* at ¶ 6.
[29] *Id.* at ¶ 8.
[30] *Id.* at ¶ 14.
[31] *Id.* at ¶ 15.
[32] *Id.* at ¶ 16.

that the Supreme Court explained that the paradigm fora in which corporations are "essentially at home" are the corporation's place of incorporation and its principal place of business.[33] The court further noted that the Supreme Court held that in "an exceptional case," a corporate defendant's "activities in a forum outside of its place of incorporation or principal place of business 'may be so substantial and of such a nature as to render that corporation at home in that State.'"[34] The "exceptional case" example given by the Supreme Court, and referenced by the Illinois Supreme Court, was the *Perkins*[35] case, and the defendant in *Aspen America* did not have its headquarters in Illinois, even temporarily.

Federal courts within and without Illinois have also applied the "essentially at home" test to determine if a corporation was subject to personal jurisdiction in the forum state. In *Gucci America*[36] the court found that, even though a bank had two branches physically located in the State of New York, the New York District Court lacked general jurisdiction over it[37] because only a small portion of the bank's business was conducted in New York.[38] The court held that the subpoena-recipient bank's activities, like the defendant in *Daimler*, plainly did not approach the required level of contact with the forum state.[39]

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33 *Id.* at ¶ 17.
34 *Id.*
35 Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952).
36 Gucci Am., Inc. v. Weixing Li, 768 F.3d 122 (2d Cir. 2014).
37 The bank was not a party to the case in *Gucci America* but was served with a subpoena by one of the parties to the case.
38 The bank had 10,145 domestic branches, 689 overseas branches and subsidiaries in 27 countries around the world, and 1200 correspondent banks.
39 *Gucci Am.*, 768 F.3d at 135.

In *Electronic Payment Systems*,[40] the court, citing to *Daimler*, refused to find that it had general jurisdiction in Colorado over Wells Fargo Bank despite the fact that Wells Fargo had 275 ATMs and 154 separate Wells Fargo Bank branches in the State of Colorado, which was far more than the 45 bank branches and 56 ATMs that Wells Fargo had in South Dakota, the state of its incorporation. *Electronic*, in heavy reliance on *Daimler*, stated that "for a corporation, the place of incorporation and principal place of business are 'paradigm … bases for general jurisdiction' since 'those affiliations have the virtue of being unique -- that is, each ordinarily indicates only one place – as well as easily ascertainable."[41] It further quoted *Daimler* by stating "'simple jurisdictional rules … promote greater predictability,' and that 'these bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.'"[42]

In *Electronic*, the court was "far from persuaded that Wells Fargo was 'essentially at home' in Colorado simply by virtue of the existence of bank branches and ATM machines in the state."[43]

In *Hill,*[44] the district court in the Northern District of Illinois found that Capital One Bank operated bank branches only in Connecticut, Delaware, Louisiana, Maryland, New Jersey, New York, Texas, Virginia, and Washington D.C. and noted that *Daimler* held that, with respect to a corporation, affiliations supporting general jurisdiction are typically limited to the corporation's place of incorporation and principal place of

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[40] Elec. Payment Sys., LLC v. Elec. Payment Solutions of Am., Inc., 2015 WL 5444278 (Dist. Colo. Sept. 16, 2015).
[41] *Elec. Payment Sys.*, 2015 WL 5444278, at *4.
[42] *Id.*
[43] *Id.*
[44] Hill v. Capital One Bank (USA), N.A., 2015 WL 468878, at *6 (N.D. Ill. Feb. 3, 2015).

business. *Hill* held that the court did not have general jurisdiction over Capital One Bank, despite some evidence of business activity in Illinois.[45] Following *Daimler*, the court found that Capital One Bank was neither incorporated in Illinois nor had its principal place of business in Illinois, and that Illinois courts lacked general jurisdiction over it. In quoting *Daimler*, the court said "a corporation that operates in many places can scarcely be deemed at home in all of them."[46]

Impact of Daimler on Creditor's Rights

In the creditor's rights area of the law, a commonly-heard refrain is "getting a judgment is one thing, but collecting on it is an entirely different matter." One of the most utilized tools by creditors to collect on judgments in Illinois is the citation to discover assets ("CDA").[47] This statutory vehicle gives judgment creditors the ability to, *inter alia*, summon the judgment debtor to court to be deposed, freeze the debtor's bank accounts and seek a turnover of the funds contained therein, garnish wages, direct third parties holding property of the debtor to turn the property over to be sold, subpoena documents related to the debtor's assets, etc.[48]

What is likely the most common use of a CDA is to attempt to freeze the judgment debtor's bank account in order to obtain the funds held by the bank that belong to the judgment debtor. Such a use of the CDA makes it the most efficient tool for collection since the creditor is legally owed the amount of the judgment by the debtor,

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[45] *Id.*
[46] *Id.*
[47] BMO Harris Bank, N.A. v. Joe Contarino, Inc., 74 N.E.3d 1091, 1098 (2d Dist. 2017) ("'A citation to discover assets, also known as a supplementary proceeding, is the predominant procedure for enforcing judgments.'") (quoting Robert G. Markoff, Jeffrey A. Albert, Steven A. Markoff & Christopher J. McGeehan, *Citations to Discover Assets*, in Creditor's Rights in Illinois § 2.42, ILL. INST. FOR CONT. LEGAL EDUC. (2014) (citing 735 ILL. COMP. STAT. ANN. 5/2-1402(c) (West 2019).
[48] *Citation Aggravation: Clarifying Orders Regarding Citations to Discover Assets*, IN BRIEF (McHenry County Bar Assoc.), Aug. 2017, at 4.

and most people keep their money in a financial institution of one kind or another. If the debtor has sufficient funds in the bank to pay the judgment in-full, the creditor, with some exceptions,[49] should be able to collect the judgment by simply serving the bank with a CDA, obtain an answer on the amount of funds held by the bank for the debtor, and get an order from the court for the bank to turn the debtor's funds sufficient to satisfy the judgment over to the creditor.

While this process appears on its face to be relatively straightforward, and it usually is, did *Daimler* throw a wrench into the proverbial gears?

Creditor's rights activities directed toward third parties, like banks, are generally considered to be proceedings against the third party, not the judgment debtor.[50] What happens when a creditor serves a CDA on a financial institution that is neither incorporated nor headquartered in a state other than Illinois?

It was previously discussed that courts since *Daimler* have held that banks in particular are not subject to general jurisdiction of the state if they are not incorporated or headquartered in that state. Because citations and garnishments are considered to be actions against the third party, the court must be able to obtain jurisdiction over the bank

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[49] There are multiple state and federal exemptions that would prevent a judgment creditor from attaching funds belonging to a judgment debtor that have been found in the possession of a third party. There might also be other obstacles to the attachment of funds in a judgment debtor's bank account, like a lien priority dispute with another creditor or a question of the actual ownership of the funds in the account. While these are interesting discussion points, they are not relevant to the thesis of this paper and will therefore not be explored any further.

[50] *See* Hayward v. Scorte, 2020 IL App (1st) 190476, at *7 (1st Dist. Jan. 24, 2020) (Westlaw) ("...section 2-1402 may allow the trial court to enter a judgment against a third party..."); *see also* Hageman v. Barton, 817 F.3d 611, 617-18 (8th Cir. 2016) (finding that an Illinois garnishment action is not against the judgment debtor, but is against the third-party garnishee); Jackson v. Blitt & Gaines, P.C., 833 F.3d 860, 864 (7th Cir. 2016) (garnishment is against a garnishee); Randall v. Maxwell & Morgan, 321 F.Supp.3d 978, 982 (D. Ariz. 2018) (citing to *Jackson v. Blitt & Gaines* that found that Illinois garnishment actions are against the garnishee because Illinois law requires service on the garnishee, the judgment debtor is only entitled to notice, only the garnishee is required to respond, and the garnishee may be found liable if it does not respond).

in order to control its actions in any way.[51] Without jurisdiction over the bank, courts do not have the authority to order accounts frozen, the turning over of funds, etc.

For example, if a creditor obtains a judgment against a debtor in Illinois, in order to obtain a court-ordered turnover of the debtor's funds in the bank, the Illinois court must have jurisdiction over the bank.[52] Prior to *Daimler*, creditors needed not be overly concerned over whether the Illinois court could claim general jurisdiction over the bank that was headquartered in a different state but had a branch location in Illinois because, under *International Shoe*, there was little argument that a bank operating in Illinois had "substantial contacts" with the state in order to grant Illinois courts general jurisdiction over it.[53] Since *Daimler*, however, Illinois courts can only claim general jurisdiction over the bank if it is incorporated or headquartered in Illinois.[54] The creditor in our example could still use a CDA to gain access to the debtor's bank accounts, but only if the bank is incorporated or headquartered in Illinois.

<u>Unintended Consequence #1</u>. An unintended consequence of *Daimler* is that a judgment creditor can only access a judgment debtor's bank accounts if the judgment exists in the state in which the particular financial institution is "essentially at home."[55] A large financial institution such as Wells Fargo Bank appears to be a safe harbor for judgment debtors in Illinois to deposit funds since Wells Fargo Bank is incorporated in Delaware and has its headquarters in California.[56] Since the judgment exists in Illinois, where Wells Fargo Bank is not "essentially at home," Illinois courts cannot obtain

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[51] Poplar Grove State Bank v. Powers, 578 N.E.2d 588, 597 (2d Dist. 1991).
[52] *Jackson*, 833 F.3d at 864.
[53] *See* Int'l Shoe Co. v. State of Wash. Office of Unemployment Comp. and Placement, 326 U.S. 310, 319 (1945).
[54] *See* Daimler AG v. Bauman, 571 U.S. 138 (2014).
[55] *Id.*
[56] Wells Fargo & Company, Quarterly Report (Form 10-Q) 1 (November 20, 2020).

general jurisdiction over it.[57] In this example, the creditor could not issue a CDA to any financial institution that is not "essentially at home" in Illinois under the *Daimler* standard because Illinois courts have neither specific nor general jurisdiction over them.

Unintended Consequence #2. Illinois has also codified the right of its citizens to privacy in their banking activities in the Illinois Banking Act ("Banking Act").[58] While there are many exceptions in the Banking Act for disclosure of a customer's banking information,[59] a bank that is subject to the Banking Act can only disclose "financial records … in response to a lawful subpoena, summons, warrant, citation to discover assets, or court order …"[60] A *lawful* CDA.

Asking whether a bank can disclose private banking information in response to a lawfully *issued* CDA is the wrong question if the court does not have jurisdiction over the bank in the first place. Every jurisdictional challenge by defendants begins with a lawfully filed complaint and a lawfully issued summons, but just because these documents were lawfully filed, issued, and served does not mean that courts have proper and lawful jurisdiction over the defendant named therein. A CDA is a court order directing the recipient to engage in some activity, and the only way that a court can do that is if the court has jurisdiction over it, as discussed earlier. The court order directing the corporation to do something is void and therefore not *lawful* if the court does not have the jurisdiction to issue the order in the first place.[61]

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[57] A judgment creditor could, of course, domesticate the judgment in the state of the bank's incorporation or headquarters and collect on it that way.
[58] 205 ILL. COMP. STAT. ANN. 5/48.1 (West 2019).
[59] *Id.*
[60] 205 ILL. COMP. STAT. ANN. 5/48.1(c)(2) (West 2019).
[61] *See* Ford Motor Credit Co. v. Sperry, 827 N.E.2d 422, 428 (Ill. 2005)("A void order … is, generally, one entered by a court without jurisdiction of the subject matter or the parties, or by a court that lacks the inherent power to make or enter the order involved").

Under Illinois law, it is a violation of the Banking Act to "knowingly and willfully" furnish financial records outside of the parameters of the Banking Act.[62] In addition, it is also a violation to "knowingly and willfully" induce or attempt to induce any officer or employee of a bank to disclose financial records in violation of the Banking Act.[63] Simply put, it appears that it would be a crime[64] for a judgment creditor's attorney to issue a CDA to a financial institution and obtain a judgment debtor's private banking information if the financial institution is not subject to the court's general jurisdiction making any response by the financial institution a response to an unlawful CDA.[65]

Unintended consequence #3. In addition to its being illegal to attempt to induce a financial institution to disclose a debtor's private banking information in violation of the Banking Act, it could also subject the judgment creditor and its attorneys to civil liability for invasion of privacy.

In order for a plaintiff to state a cause of action for the public disclosure of private facts, which is a branch of the tort of invasion of privacy, a plaintiff's complaint must state that 1) the defendant gave publicity 2) to the plaintiff's private, not public, life; 3) the matter publicized was highly offensive to a reasonable person; and 4) the matter published was not of legitimate public concern.[66]

Giving publicity. When a financial institution responds to a CDA, it completes written interrogatories that state, among other things, the types of accounts that the

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[62] 205 ILL. COMP. STAT. ANN. 5/48.1(e) (West 2019).
[63] 205 ILL. COMP. STAT. ANN. 5/48.1(f) (West 2019).
[64] *Id.* ("Any person who knowingly and willfully induces or attempts to induce any officer or employee of a bank to disclose financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than $1,000.")
[65] *Id.*
[66] Green v. Chi. Trib. Co., 675 N.E.2d 249, 252 (1st Dist. 1996).

judgment debtor has, the amount of money in each account, and whether the judgment debtor has a safety deposit box.[67] Those interrogatories are then sent to the judgment creditor's attorney and also filed with the court. With such court filings being a matter of public record once they are filed with the court, it is clear that such answers are given publicity.

Private, not public, life. As is made quite clear by the Banking Act, a person's financial records or financial information is private and can only be disclosed to third parties under rather limited circumstances.[68] It is a crime not only to disclose such private information if the disclosure does not fall into one of the Banking Act's exceptions[69] but also to attempt to induce an officer of a financial institution to make such disclosures.[70] Banking information is private, not public.

Highly offensive. Banking information is private, and the Banking Act codifies it as such. If it were not highly offensive to publish someone's private banking information for public consumption, why would the legislature create protection for this information, going so far as to make it a crime to do so? Whether information is "highly offensive" is a question of fact for a jury to determine.[71] The test to determine if something is "highly offensive" is whether "the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity."[72] In *Lovgren*, the Illinois Supreme Court held that the plaintiff's allegation that the defendant had placed notices in the newspaper stating that the plaintiff was going to sell his farm at

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[67] *See* ILL. SUP. CT. R. 277(c)(4).
[68] 205 ILL. COMP. STAT. ANN. 5/48.1(c)(2) (West 2019).
[69] 205 ILL. COMP. STAT. ANN. 5/48.1(e) (West 2019).
[70] 205 ILL. COMP. STAT. ANN. 5/48.1(f) (West 2019).
[71] Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (1st Dist. 1990).
[72] Lovgren v. Citizens First Nat. Bk. of Princeton, 534 N.E.2d 987, 990 (Ill. 1989)(quoting RESTATEMENT (SECOND) OF TORTS § 625E, cmt. c, at 396 (1977)).

a public auction when he had no intention of doing so, which publication made it practically impossible to obtain refinancing of his mortgage loan, was sufficient to plead facts that a jury could find "highly offensive."[73] The fact that it is a business offense[74] to disclose a person's private banking information surely means that disclosure of such information meets the test of being "highly offensive."

Public concern. A person's banking information is hardly of public concern.[75] Even public figures or politicians are not required to disclose any of their private banking information to the public. Prior to and after being elected, President Trump has flouted norms of the presidency by famously refusing to release his federal income tax returns for the public to view and scrutinize. If the income tax returns of a person running for the highest office in the land are private and not of public concern, how can it be argued that the average judgment debtor's banking information is any different?

Beyond just the prospect of civil liability for this alleged tortious conduct, judgment creditors and their counsel could possibly be named as defendants in class action litigation. A class of plaintiffs consisting of every judgment debtor that had her private banking information improperly and illegally released into the public sphere could wreak havoc on the bottom line of each and every financial institution that finds itself defending against such a cause of action.

Unintended consequence #4. The analysis above regarding a judgment creditor or her attorney being subject to defending against a suit sounding in tort for invasion of

[73] Lovgren, 534 N.E.2d at 990.
[74] 205 ILL. COMP. STAT. ANN. 5/48.1(e) (West 2019).
[75] Lovgren, 534 N.E.2d at 991 (In discussing whether the financial information that was disclosed was public or private, the Illinois Supreme Court stated "… the interest is purely a private one involving only the plaintiff and his bank.")

privacy also applies to employees of financial institutions themselves. Just as it is unlawful to induce a financial institution to disclose private banking information,[76] it is also unlawful for an officer or employee of a financial institution to make the same disclosures after being so induced.[77] If disclosure of such private banking information could make a judgment creditor liable under the tort of invasion of privacy, it is likely that the financial institution making the unlawful disclosure would be equally liable under the law.

Solution

Some of the unintended consequences of *Daimler* are noted above, but the parade of horribles listed herein is limited to just this author's research and imagination. Regardless of the number of possible issues related to *Daimler*, a simple and elegant solution to these problems exists: corporate registration to do business in the state could consent to the general jurisdiction of Illinois courts, and federal regulatory agencies could do the rest.

Corporate registration would cure some, but not all of, the problem.

Every state in the Union, including Illinois, has a statute that requires a corporation that is doing business in the state to register and appoint an agent for service of process.[78] Every foreign corporation that transacts business must register with each state in which they do business. Some argue that such registration is sufficient for courts

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[76] 205 ILL. COMP. STAT. ANN. 5/48.1(f) (West 2019).

[77] 205 ILL. COMP. STAT. ANN. 5/48.1(e) (West 2019)("Any officer or employee of a bank who knowingly and willfully furnishes financial records in violation of this Section is guilty of a business offense and, upon conviction, shall be fined not more than $1,000").

[78] Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*. 36 CARDOZO L. REV. 1343, 1363 (2015).

in those states to assert general jurisdiction over foreign corporations, but there is disagreement amongst the states.

Courts across the country are divided on how they have approached this issue, and generally rule in one of three different ways: 1) corporate registration confers general jurisdiction over the corporation; 2) corporate registration confers specific jurisdiction over the corporation with respect to its in-state activities; or 3) corporate registration is a procedural mechanism for service of process but has no effect on jurisdiction.[79] In 2017, the Illinois Supreme Court ruled that Illinois fell into the third category.

In *Aspen American Insurance Company,*[80] the plaintiff filed a complaint in the Circuit Court of Cook County in which "it alleged that the roof of a Michigan warehouse owned by the defendant … had collapsed, causing the destruction of goods owned by plaintiff's insured."[81] The defendant, Interstate Warehousing, an Indiana corporation, moved to dismiss the complaint for lack of personal jurisdiction.[82] The circuit court denied the motion, and a divided appellate court affirmed. The Illinois Supreme Court reversed both lower courts and remanded the case for entry of an order dismissing the case relying primarily on *Daimler* for authority.[83]

In *Aspen American Insurance Company*, the plaintiff argued that, because the defendant was registered to do business in Illinois, it had subjected itself to the jurisdiction of the laws of the state.[84] This argument falls in line with the states that have ruled that registration to do business as a foreign corporation confers general jurisdiction

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[79] *Id*. at 1369.
[80] Aspen Am. Ins. v. Interstate Warehousing, Inc., 90 N.E.3d 440 (Ill. 2017).
[81] *Id.* at ¶ 1.
[82] *Id.*
[83] *Id.* at ¶ 29.
[84] *Id.* at ¶ 22.

over the corporation. The Illinois Supreme Court, however, held that none of the registration requirements for foreign corporations require or imply that they consent to general jurisdiction or waive any due process on the state's exercise of personal jurisdiction.[85] Succinctly stated, the Illinois Supreme Court ruled that statutory requirements of registration to do business in the state, without any language to the contrary, does not mean that a corporation has consented to general jurisdiction of Illinois courts.[86]

Even though *Aspen American Insurance Company* is clear that the current form of Illinois' corporate registration does not mean that the foreign corporation has consented to jurisdiction in Illinois courts, the court hinted at how such a ruling could change. The court stated "we hold, however, *that in the absence of any language to the contrary*, the fact that a foreign corporation has registered to do business under the Act does not mean that the corporation has thereby consented to general jurisdiction … ."[87] The door is open to side-step the ruling of *Aspen American Insurance Company* if the right language can be found and utilized, and a statute in Pennsylvania provides the needed language.

Pennsylvania's Long-Arm Statute

The Commonwealth of Pennsylvania is the only state in the union[88] that specifically states in its statutes that qualifying as a foreign corporation in the commonwealth will subject the corporation to the general jurisdiction of courts in the state. Pennsylvania's long-arm statute[89] states:

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85 *Id.* at ¶ 24.
86 *Id*. at ¶ 27.
87 *Id*. (emphasis added).
88 Monestier, *supra* note 78, at 1366.
89 42 PA. CONS. STAT. ANN. § 5301 (West 2019).

> (a) General rule. – The existence of any of the following relationships between a person and the Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction …
>
> (2) Corporations. (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

This statutory language avoids any questions of whether registration as a foreign corporation consents to the jurisdiction of the courts because such consent is expressly stated, rather than implied.

Illinois could amend the Business Corporation Act of 1983[90] and use similar language as is found in Pennsylvania law in order to confer general jurisdiction to Illinois courts for any corporation that registers to do business in the state. This is likely the language hinted at by the Illinois Supreme Court in *Aspen American Insurance Company* when the court held that "in the absence of any language to the contrary" the registration of a foreign corporation to do business in Illinois does not confer personal jurisdiction. With a simple statutory amendment, if a corporation desires to conduct business in the State of Illinois, it must waive any due process regarding jurisdiction and consent to personal jurisdiction in Illinois courts. Such language could also be inserted into Illinois' statute on long-arm jurisdiction,[91] and should also be clearly delineated as consenting to general jurisdiction in Illinois' statute on the registration of foreign businesses to conduct business in Illinois.[92] In fact, to make it overtly clear to any corporation that seeks to register to do business in Illinois as a foreign corporation, language could be put into the

[90] 805 ILL. COMP. STAT. ANN. 5/1.01-15.97 (West 2019).
[91] 735 ILL. COMP. STAT. ANN. 5/2-209 (West 2016).
[92] 805 ILL. COMP. STAT. ANN. 5/13.05 (West 2001).

form to be submitted to the state for registration that the foreign corporation expressly consents to the general jurisdiction of Illinois courts by such registration.

Modification of Illinois' statutes to explicitly state that a corporation consents to general jurisdiction of the courts does not run afoul of due process. Consent is a traditional basis for assertion of jurisdiction and has long been held as being constitutional.[93] If a corporation consents to general jurisdiction in any particular state, it can be sued in that state even if it conducts no other business within the confines of the foreign state's borders.[94] Pennsylvania's long-arm statute that confers jurisdiction upon registration has been on the books since 1978, and has been upheld as constitutional by multiple courts.[95]

Since *Daimler* was decided, one court has held that the decision invalidated Pennsylvania's long-arm statute.[96] However, despite pertaining directly to general jurisdiction over corporations, *Daimler* did not invalidate Pennsylvania's statute because it simply did not address the "interplay between consent to jurisdiction and the due process limits of general jurisdiction."[97] The *Daimler* case focused on when corporations can be subject to general jurisdiction based on contacts with the state, and made no holdings on whether a corporation could subject itself to general jurisdiction by

[93] Bane v. Netlink, Inc., 925 F.2d 637, 641 (3d Cir. 1991).
[94] Gorton v. Air & Liquid Sys. Corp., 303 F.Supp.3d 278, 295 (M.D. Pa. 2018).
[95] *See, e.g.*, *Bane,* 925 F.2d at 641.; *Gorton*, 303 F.Supp.3d at 295.; Replica Auto Body Panels and Auto Sales Inc. v. Intech Trailers Inc., 454 F.Supp.3d 458 (M.D. Pa. 2020); Kraus v. Alcatel-Lucent, 441 F.Supp.3d 68 (E.D. Pa. 2020).
[96] Sullivan v. A.W. Chesterton, 384 F.Supp.3d 532 (E.D. Pa. 2019) (holding that cases that have held Pennsylvania's statute that required consent to general jurisdiction were irreconcilable with the teachings of *Daimler*).
[97] *Kraus*, 441 F.Supp.3d 68., (quoting Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.,, 2017 WL 3129147, at *11 (E.D. Pa. July 24, 2017)).

consent.[98] Therefore, *Daimler* had no effect on the constitutionality or enforceability of Pennsylvania's statutorily-mandated consent to general jurisdiction.

Monestier Article

While courts have held that Pennsylvania's long-arm statute is constitutional, some have argued that express consent by registration violates due process. Professor Monestier argues that requiring consent to general jurisdiction in order to register to do business is not actual consent because "the sine qua non of consent – that a party have the genuine choice not to consent – is missing in the registration context."[99] Monestier appears to have insufficient faith in the business acumen of commercial enterprises, but I find her "lack of faith, disturbing."[100] She compares a requirement to consent to the doctrines of economic duress and contracts of adhesion.[101]

The argument claiming economic duress is that, if a corporation lacks "reasonable alternatives but to accede to the bargain presented,"[102] the contract could possibly be invalidated because it was formed under economic duress. The argument claiming that a contract of adhesion exists if a state requires consent in order to register is based upon a corporation's apparent lack of choice,[103] thereby making the required consent so unconscionable that the terms unreasonably favor the other party.[104]

With both claims, Monestier argues that corporations lack true consent to jurisdiction because they are being forced to consent and simply have no choice if they

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[98] *Kraus*, 441 F.Supp.3d at 75.
[99] Monestier, *supra* note 78, at 1393.
[100] STAR WARS: EPISODE IV - A NEW HOPE (20th Century Fox 1977).
[101] Monestier,, *supra* note 78, at 1391-93.
[102] *Id.* at 1391.
[103] The only choices would be to submit to the general jurisdiction of the court by registering to do business, or do not register and conduct no business in the state.
[104] Monestier, *supra* note 78, at 1392.

desire to conduct business in the state. While it cannot be argued that requiring consent in order to conduct business in the state removes the ability to make a different choice in that particular state, it also cannot be argued that corporations have the right to conduct business in any state they wish. A corporation has a *choice* on whether or not to conduct business in a particular state, and that choice could be determined in part on whether or not a state requires that it submit to jurisdiction in the state's courts.

Just because a contract is a contract of adhesion does not, by itself, render the contract unenforceable. Such contracts are simply a way of life in today's society.[105] "'Consumers routinely sign such agreements to obtain credit cards, rental cars, land and cellular telephone service, home furnishing and appliances, loans, and other products and services.'"[106] Even if a contract is a contract of adhesion due to the lack of choices contained in it, in order to be unenforceable it must be so unconscionable that a court should not enforce it. For example, in *Kinkel*, the Illinois Supreme Court held a contract of adhesion to be unconscionable not because it was a contract of adhesion, but because in addition to being such a contract the plaintiff proved that the contract represented a degree of procedural unconscionability because key information regarding the contract was incorporated only by reference.[107] In contrast, clearly stating in the law that registration as a foreign corporation submits the corporation to the general jurisdiction of the state does not hide information or incorporate a provision only by reference – it states the requirement as black letter law.

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[105] Phoenix Ins. Co. v. Rosen, 949 N.E.2d 639, 654 (Ill. 2011).

[106] *Id*. (quoting Kinkel v. Cingular Wireless, LLC, 857 N.E.2d 250, 266 (Ill. 2006)).

[107] *Id.*

In addition, corporations are commercial enterprises and generally are not seen as needing the same legal protections as consumers. Take, for example, the Fair Debt Collection Practices Act.[108] This federal law only protects consumers who acquire consumer debt[109] from unfair debt collection practices, and specifically exempts from its purview any debt that is not for personal, family, or household purposes.[110] The Truth in Lending Act[111] and its attendant regulations[112] only apply to consumer debt and do not apply to any debt that is not consumer by nature.[113] The law recognizes that corporations are generally considered savvy business entities that do not need legal protections the same way that ordinary consumers need them. If corporations needed the protections of the law, financial protection statutes would not be limited only to protecting consumers and would be applicable to consumer and non-consumer debts alike.

To be blunt, if a corporation does not wish to consent to the jurisdiction of the courts of the state, then they can choose not to do business in that state. It is easy to envision states that want to try to attract more businesses making solicitations to corporations by codifying laws that clearly indicate that foreign registration does <u>not</u> submit the corporation to the state's general jurisdiction. States like Delaware are

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[108] 15 U.S.C.A. § 1692-1692p (West 2011).
[109] 15 U.S.C.A. § 1692(e) (West 2011) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.")
[110] 15 U.S.C.A. § 1692a(5) (West 2011) ("The term 'debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.")
[111] 15 U.S.C.A. § 1601-1692p (West 2011).
[112] 12 C.F.R. § 226.1-226.59 (Regulation Z) (2021).
[113] *See, e.g.*, People's Bank of Arlington Heights v. Atlas, 2015 IL App (1st) 133775, ¶ 29 (1st Dist. June 18, 2015) (Westlaw) (finding that the loan in question was commercial, rather than consumer, so the Truth in Lending Act did not apply).

considered to be "business friendly"[114] and have therefore attracted many businesses to legally incorporate there, so logic dictates that some states may determine that forced submission to jurisdiction is antithetical to the attraction of businesses and refuse to codify such a law. Free enterprise could determine if required registration is beneficial to a state or not.

A state has the power to exercise jurisdiction over a corporation that has consented,[115] and a corporation may consent to jurisdiction by registering to do business and appointing a registered agent for service.[116] This shows that corporations can possibly consent without necessarily expressly consenting,[117] so express consent by stating clearly in the law that registration equals agreement to the submission of general jurisdiction avoids any confusion or arguments about what was and was not implied with the registration.

Unfortunately, out-of-state businesses that engage in banking do not have the ability to register as a foreign corporation in order conduct business in Illinois.[118] In addition, nationally-chartered banks are regulated by the National Bank Act[119] and its regulations are enforced and overseen by the Office of the Comptroller of the Currency,[120] not the Illinois Secretary of State. Because of both of these issues,

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[114] *See, e.g.*, Round Rock Research v. Dell, Inc., 904 F.Supp.2d 374, 378 n. 6 (D. Del. 2012)("The State of Delaware Division of Corporations, on its website, prominently asks, 'Why Choose Delaware as Your Corporate Home?' The answer follows: 'More than 900,000 business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 63% of the Fortune 500. Businesses choose Delaware because we provide a complete package of incorporation services including modern and flexible corporate laws, our highly-respected Court of Chancery, a business-friendly State Government, and the customer service-oriented Staff of the Delaware Division of Corporations.'").

[115] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 43 (1971).

[116] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 43 cmt. a (1971).

[117] Some states like Illinois reject this interpretation.

[118] 805 ILL. COMP. STAT. ANN. 5/13.05 (2001).

[119] 12 U.S.C.A. § 21-216d (West 2020).

[120] *Id.* at §§ 24, 93(a).

amending the foreign registration statute would only solve the unintended consequences of *Daimler* for businesses other than banks, like wealth management companies. The question then remains on how to resolve *Daimler* issues for financial institutions such as banks, thrifts, savings and loans, credit unions, etc. that do not register as foreign corporations in Illinois.

Deposit Insurance

While existing banks and credit unions[121] are not required to insure deposits with the Federal Deposit Insurance Corporation ("FDIC") or the National Credit Union Administration ("NCUA"), most do.[122] These federal entities are regulatory bodies that monitor banks and credit unions for safety and soundness and enact regulations that these entities must adhere to in order to maintain their deposit insurance protections.[123] Because *Daimler* has inadvertently put the safety of these financial institutions in jeopardy, it behooves these agencies to enact regulations that allow financial institutions to maintain their safety and soundness. Both the FDIC and the NCUA could amend their regulations to require that, in order to maintain deposit insurance, their respectively regulated entities must consent to the general jurisdiction of any state in which they have a physical branch.[124]

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[121] Any *de novo* financial institution would likely be required to have deposit insurance coverage in order to obtain a charter from the relevant governing body.
[122] While is it not a requirement for existing financial institutions to purchase and maintain such insurance, as a practical matter regulatory agencies may consider the lack of such insurance an unsafe or unsound practice.
[123] 12 U.S.C.A. § 1784 (West 2020) pertains to the examination of insured credit unions, and 12 U.S.C.A. § 1828 (West 2020) pertains to insured national banks.
[124] Some financial institutions do not have physical branches and operate entirely over the internet. Regulators should determine if new regulations should apply to these online institutions or limit such regulations to apply only to brick-and-mortar entities.

Neither banks nor credit unions are required to have and maintain deposit insurance, but, if they desire to have such protections, they must be willing to consent to general jurisdiction in order to resolve the *Daimler* dilemma. By consenting to the general jurisdiction of the State of Illinois, these financial institutions avoid the harsh but unintended consequences of *Daimler*. It is a relatively simple solution that protects consumers and financial institutions alike, and avoids concerns over criminal and civil liability that banks, thrifts, savings and loans, credit unions, etc. may not even realize are possible.

Conclusion

Daimler forever changed the landscape on analyses regarding personal jurisdiction and in doing so unleashed consequences that were certainly unintended. Among those consequences in Illinois are possible financial institution liability for providing private banking information about a customer to a creditor when the financial institution was not legally allowed to because the court that issued the order did not have personal jurisdiction over the third party financial institution. Resolution of this legal conundrum in Illinois would require relatively simple acts of the state legislature, the Federal Deposit Insurance Corporation, and the National Credit Union Administration. The Illinois legislature needs to amend the Business Corporation Act of 1983 to specifically state that, in order to qualify as a foreign business that can do business in the state, any such corporation must consent to the general jurisdiction of courts in Illinois. The FDIC and NCUA need to amend their regulations to require that one condition of keeping deposit insurance is that every financial institution they regulate must specifically consent to the general jurisdiction of the courts of every state in which these

institutions have locations. Such changes in the law would cure any *Daimler* problems noted herein or others conjured by creative plaintiff's attorneys.

The unintended consequences of *Daimler* are real and in need of correction. The failure of the Illinois legislature and federal regulators to act to cure these issues "would be absolutely, totally, and in all other ways inconceivable."[125]

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[125] THE PRINCESS BRIDE (20th Century Fox 1987).