

Cross-Border Discovery Trends 1 Year After 2nd Circ. Ruling

By **James Goldfarb, Alexandra Maritzel and Sharon O'Shaughnessy**

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For more than 50 years, U.S. law has provided a way to obtain U.S. court-ordered discovery to parties in overseas proceedings. The law, Title 28 of the U.S. Code, Section 1782, generally is used to obtain documents in the U.S. from a person or entity that resides or is found in the federal judicial district where the Section 1782 application is made.

Just over a year ago, a ruling from a three-judge panel of the U.S. Court of Appeals for the Second Circuit signaled a potential expansion of Section 1782's use and geographic reach.

In *In re: del Valle Ruiz*,^[1] the court held as a matter of first impression that a district court may order Section 1782 discovery from companies over which the court has general or specific personal jurisdiction and that documents located offshore are not necessarily off-limits. A year later, we examine whether *del Valle Ruiz* has resulted in greater use of Section 1782 and more expansive discovery.

We conclude that *del Valle Ruiz* appears to have generated more Section 1782 applications, based on a comparison of the number of Section 1782 applications filed before and after the decision relative to all civil cases filed in federal court in the same periods. Correlation is not causation. But we are hard-pressed for an explanation that does not at least include *del Valle Ruiz*.

Apart from the numbers, the decision's impact has been felt mostly in the Second Circuit.

Courts outside the Second Circuit have applied *del Valle Ruiz*'s rulings on specific personal jurisdiction or extraterritorial discovery in only four cases. One of those decision seems to expand *del Valle Ruiz*'s specific personal jurisdiction ruling. Two other decisions indicate that statutory and court-made safeguards have kept, and should keep, extraterritorial discovery under Section 1782 in check.



James Goldfarb



Alexandra Maritzel



Sharon
O'Shaughnessy

The del Valle Ruiz Decision

Section 1782 permits parties and interested persons involved in or contemplating non-U.S. proceedings to request a U.S. district court to order discovery from a person or entity that resides or is found in the district in which that court sits.

For a court to compel discovery pursuant to 1782, the person or entity from whom discovery is ordered must reside or be found in the federal judicial district in which the application is made. In *del Valle Ruiz*, the court addressed how the resides-or-is-found requirement applies to a corporate respondent, Banco Santander SA.

The bank argued that a court may order a company to produce documents pursuant to Section 1782 only if the company is subject to the court's general — not specific — personal jurisdiction, meaning that the company is at home in the jurisdiction, such as by having its principal place of business there or by being incorporated in the state in which the district court sits. Neither condition was satisfied as to it, Santander argued.

The court rejected that argument.

Citing to precedent that construed the "resides or is found" language flexibly and Congress' intent that Section 1782 be interpreted broadly, the court held that the "statutory scope of 'found' extends to the limits of personal jurisdiction consistent with due process."^[2] Accordingly, a company may be found in a district for Section 1782 purposes if a district court has general or specific personal jurisdiction over the company.

The court explained that specific jurisdiction for Section 1782 purposes means jurisdiction by virtue of the company's systematic and continuous activities in the district connected to the discovery sought. The district court had determined that it lacked such specific personal jurisdiction over Santander and denied the application seeking discovery from Santander. The appeals court affirmed that ruling.^[3]

Next, the court affirmed the lower court's order directing another respondent — one subject to personal jurisdiction — to produce documents located abroad. The respondent argued that Section 1782 did not apply extraterritorially, and the discovery sought was intrusive and burdensome. The court rejected both arguments.

First, it observed that Section 1782 "authorizes discovery pursuant to the Federal Rules of Civil Procedure [and] [t]he Federal Rules of Civil Procedure in turn authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody, or control." Thus, it held, "a district court is not categorically barred from allowing discovery under [Section] 1782 of evidence located abroad."^[4]

The court then found that the discovery sought would not be intrusive or burdensome. But in words suggesting restraint, the court noted that Section 1782 has discovery safeguards, including those set forth in the Federal Rules of Civil Procedure and precedent.^[5]

The panel also observed that "a court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery."^[6]

Implications of del Valle Ruiz

Del Valle Ruiz prompted concern that U.S. companies, and non-U.S. companies with a U.S. presence, could become conduits for discovering documents held outside the U.S. But those concerns have not been borne out, based on a review of Section 1782 activity and decisions since del Valle Ruiz.

In the five months preceding the decision, Section 1782 applications accounted for roughly 0.074% of civil case filings in the federal courts. In the five months following the decision, that figure was roughly 0.085% — a nearly 15% increase.[7] The del Valle Ruiz order might explain why, at least in part.

In terms of substantive law, del Valle Ruiz's impact has mainly been in the Second Circuit itself. The case's jurisdictional or extraterritorial discovery rulings have been cited in at least 12 decisions, including one from another Second Circuit panel[8] and seven from lower courts in the Second Circuit.

Of the four decisions from outside the Second Circuit, one applies del Valle Ruiz's jurisdictional ruling expansively. Two others apply its extraterritorial discovery ruling to permit limited extraterritorial discovery, consistent with the result in del Valle Ruiz.

In the first case, *In re: De Leon*, U.S. District Judge Tanya Chutkan in the U.S. District Court for the District of Columbia granted a Section 1782 application for discovery from a Maryland-based accounting firm.[9] The discovery was connected to the accounting firm's work for a Washington, D.C.-based company that managed an entity whose ownership and value were at issue in Cayman Islands lawsuits.

The respondent argued that it was not found in the district because it was a Maryland entity. But the court rejected that argument. Applying del Valle Ruiz's jurisdictional ruling as a matter of first impression, the court held that "specific personal jurisdiction exists because of the relationship between [the accounting firm], this forum, and the [underlying] litigation." [10]

In re: De Leon suggests that even if general personal jurisdiction is lacking, a respondent still may be found, for Section 1782 purposes, in the district where it performed work related to the underlying overseas litigation for a client or customer connected to that litigation.

As for del Valle Ruiz's extraterritorial discovery ruling, at least two orders from outside the Second Circuit have granted Section 1782 applications for documents located abroad. Both courts noted the discovery safeguards addressed in del Valle Ruiz.

In *Illumina Cambridge Ltd. v. Complete Genomics Inc.*, U.S. Magistrate Judge Thomas Hixson in the U.S. District Court for the Northern District of California denied a motion to quash or limit subpoenas issued pursuant to Section 1782.[11] The subpoenas sought documents from Complete Genomics and other U.S.-based affiliates of a Chinese biotech conglomerate in connection with overseas patent infringement proceedings.

Citing del Valle Ruiz, the court declined to limit the production to documents located in the U.S., as long as the documents were in the respondents' possession, custody or control. The court also rejected the respondents' concerns about the burden of producing documents located offshore because the respondents themselves had disclosed that the documents were stored electronically and could be accessed from anywhere.

In the *Matter of Application of De Leon*, U.S. District Judge Timothy Black in the U.S. District Court for

the Southern District of Ohio affirmed a magistrate judge's order granting De Leon's application for the production of documents from Procter & Gamble Co. for litigation in Saudi Arabia.[12] The documents sought by De Leon primarily concerned the financial performance and ownership of two Saudi entities that are jointly owned by Al Safwa, a Saudi entity, and a Swiss entity that itself is wholly owned by Procter & Gamble, an Ohio entity.

Procter & Gamble argued that its production should be limited to material located in the U.S. Citing *del Valle Ruiz*, the court rejected that argument and granted De Leon's application for documents in Procter & Gamble's possession, custody or control, regardless of where the documents were located. However, sensitive to the potential undue burden resulting from the production of documents located abroad, the court ordered De Leon to reach an agreement with Procter & Gamble as to the proper scope of discovery.

Conclusion

The roughly 15% increase in Section 1782 applications as a percentage of all civil cases filed in federal courts since *del Valle Ruiz* suggests that the decision resulted in greater use of Section 1782 to develop proceedings and potential proceedings abroad. Whether applicants can obtain more geographically far-reaching discovery than before remains to be seen.

Based on indications from district courts in other circuits, courts are sensitive to the burden of producing documents located overseas and will limit discovery when production of overseas materials imposes a significant burden based on consideration of all factors, including the materials' location. But when production of overseas material involves little more than "pushing a few electronic buttons," courts will be more likely to order production.

Companies with a presence in the U.S. that could provide a foothold for Section 1782 discovery requests should monitor these developments closely and consider how they maintain documents outside the U.S. and whether those documents are in the possession, custody or control of their U.S. affiliates.

James K. Goldfarb, Alexandra Marinzel and Sharon O'Shaughnessy are partners at Murphy & McGonigle PC.

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[1] *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019).

[2] *Id.* at 527-28.

[3] See *id.* at 530-31. Because the panel affirmed an order denying the application, it did not have to decide the jurisdictional issue; and its decision on that issue arguably is dicta.

[4] *Id.* at 533.

[5] See *id.* at 530, 533-34. See also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256-57 (2004) (setting forth non-exclusive factors by which lower courts should consider whether to exercise discretion and grant Section 1782 applications).

[6] 939 F.3d at 533; accord *id.* at 528 (holding that there is no reason to read "resides or is found" narrowly, "especially given the district court's ability to exercise discretion in deciding whether, and in what manner, to order discovery in particular cases.") (citation, internal quotation marks omitted).

[7] We obtained the number of Section 1782 applications through Westlaw. We derived the number of civil case filings from Transactional Records Access Clearinghouse, netting out an anomalous number of product liability actions filed by veterans against a single medical device manufacturer.

[8] See *In re Accent Delight Int'l v. Sotheby's Inc.*, 791 Fed. App'x 247 (2d Cir. 2019) (affirming order granting Section 1782 application; citing *del Valle Ruiz* and rejecting an argument that discovery pursuant to Section 1782 does not extend extraterritorially).

[9] *In re: De Leon*, No. 19-mc-0197, 2020 WL 1047742 (D.D.C. Mar. 4, 2020).

[10] *Id.* at *2. See also *Att'y Gen. of British V.I. v. Hyman*, No. 19-MC-164, 2020 WL 2615519, at *5 (D.D.C. May 23, 2020) (granting a Section 1782 application; citing *del Valle Ruiz* and *De Leon* and holding that specific or general jurisdiction is sufficient).

[11] *Illumina Cambridge Ltd. v. Complete Genomics Inc.*, No. 19-mc-80215, 2020 WL 820327 (N.D. Cal. Feb. 19, 2020).

[12] *In the Matter of Application of De Leon*, No. 19-mc-15, 2020 WL 1180729 (S.D. Ohio Mar. 12, 2020). The two *De Leon* cases are connected.