REPORT ON LEGISLATION

A.7595  M. of A. Weinstein
S.6352  Sen. Kaplan

AN ACT to amend the civil practice law and rules, the business corporation law, the general associations law, the limited liability company law, the not-for-profit corporation law and the partnership law, in relation to consent to jurisdiction by foreign business organizations authorized to do business in (New York Office of Court Administration (Internal # 59 - 2019))

THIS BILL IS OPPOSED

The New York City Bar Association does not support this legislation because the rationales presented in favor of the legislation do not outweigh the constitutional issues the bill raises. The proposed legislation raises significant issues under the Due Process and Commerce Clauses of the United States Constitution. The continuing appellate litigation over these issues of personal jurisdiction and the further pronouncements from the United States Supreme Court confirm that further judicial precedent is necessary before this legislation might be enacted.

DUE PROCESS CONCERNS

The exercise of general, all-purpose jurisdiction over an out-of-state entity raises due process questions under the United States Constitution. In Daimler AG v. Bauman, the United States Supreme Court held that exercising "general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business" is "unacceptably grasping" and thus violates due process. Daimler AG v. Bauman, 134 S. ct. 746, 760-61 (2014) (internal quotation marks and citation omitted).

Many federal courts considering statutes similar to the proposed legislation have held that, under Daimler, imposing general jurisdiction over out-of-state entities based on state registration requirements violates due process. After Daimler a defendant's mere registration to conduct business in a state is insufficient to confer general personal jurisdiction in a state that is neither the defendant's state of incorporation nor its principal place of business. Gucci America, Inc. v. Lui, 768 F.3d 122, 135 (2d Cir. 2014); Chatwal Hotels & Resorts LLC v. Dollywood Co., 2015 WL 539460, at *6 (S.D. N.Y. Feb. 6, 2015).


The proposed legislation also raises an issue under the due process doctrine of unconstitutional conditions. "[T]he government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property" right given up. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (regulatory taking). Pickering v. Board of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968) (public school teachers' First Amendment rights). “It is settled law that the government may not, as a general rule, 'grant even a gratuitous benefit on condition that the beneficiary relinquish a constitutional right.'” O’Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) (quoting United States v. Oliveras, 905 F.2d 623, 628 n. 7 (2d cir. 1990)).

Before Daimler, the due process implications of requiring out-of-state entities conducting business in New York to register, thus subjecting themselves to general jurisdiction, may not have been apparent. Daimler now makes clear, however, that, if out-of-state business entities subject themselves to general jurisdiction in New York, they are relinquishing a substantial, valuable constitutional defense. Although the only penalty out-of-state entities may face for conducting business in New York without registering is loss of the right themselves to sue in the New York courts, N.Y. Bus. Corp. Law §§ 1312(a), 1314(b), it is questionable whether there is a reasonable relationship, for due process purposes, between that penalty and consent to general jurisdiction over actions arising outside New York. See Kevin D. Benish, Note, Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman, 90 N.Y.U. L. Rev. 1609 (2015) (determining, based on a survey of decisions, that an out-of-state corporation's registration to conduct business in a state may not constitute consent to general jurisdiction under due process principles after Daimler).

COMMERCE CLAUSE CONCERNSS

The "dormant Commerce Clause" doctrine invalidates state laws that discriminate against or place impermissible burdens on interstate commerce." Department of Revenue of Ky. v. Davis, 553 U.S. 328, 338-39 (2008). The United States Supreme Court has condemned the conditioning of the right to conduct business in a state on consent to general jurisdiction over claims arising outside the state as an undue burden on interstate commerce under the Commerce Clause. E.g., Michigan Cent. R. Co. v. Mix, 278 U.S. 492, 494 (1929); Atchison, T. & s. F Ry. co. v. Wells, 265 U.S. 101, 103 (1924); Davis v. Farmers' Co-op. Equity Co. 262 U.S. 312, 315
The Association is concerned that this doctrine similarly proscribes the proposed legislation.

New York Business Corporation Law § 1312(a), cited above, denies unregistered out-of-state entities conducting business in New York capacity to sue here. Before Daimler, New York courts held that § 1312(a) did not impose undue burdens on interstate commerce, because the statute applied only to businesses engaged in "systematic and regular" activity here, implicating intrastate regulation rather than interstate commerce. Airtran N.Y. LLC v. Midwest Air Group, Inc., 46 A.D.3d 208, 214 (1st Dep't 2007); Acno-Tec Ltd. v. Wall St. Suites L.L.C., 24 A.D.3d 392, 393 (1st Dep't 2005). This interpretation of § 1312(a) employed "a heightened 'doing business' standard, fashioned specifically to avoid unconstitutional interference with interstate commerce under the Commerce Clause," Airtran N.Y. LLC v. Midwest Air Group, Inc., 46 A.D.3d at 214 (citing Tauza v. Susquehanna Coal co., 220 N.Y. 259, 267-68 (1917)), "since a lesser showing might infringe on Congress's constitutional power to regulate interstate commerce." Airtran N.Y., LLC v. Midwest Air Group, Inc. 46 A.D.3d at 214.

This saving interpretation offered by New York courts for the bar against unregistered out-of-state entities availing themselves of New York courts, that it applies only to businesses systematically and regularly active in New York and therefore considered functionally in New York, no longer may be viable for personal jurisdiction purposes. Daimler now expressly has overruled the "doing business" theory of presence in a state for purposes of general jurisdiction. Therefore that theory no longer may save an interpretation or amendment of the Business Corporation Law that treats out-of state entities' registration to conduct business in New York as consent to personal jurisdiction here from conflict with the Commerce Clause.

**POLICY RATIONALES OFFERED FOR THE PROPOSED LEGISLATION**

According to the Sponsor's Memorandum, "the measure serves a substantial public interest. Being able to sue New York-licensed corporations in New York on claims that arose elsewhere will save New York residents and others the expense and inconvenience of traveling to distant forums to seek the enforcement of corporate obligations." The legislation also is advanced as a means to provide certainty regarding personal jurisdiction over out-of state businesses, a certainty disrupted by Daimler; Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011); and other decisions in the wake of those decisions. The Sponsor's Memorandum anticipates that the measure may provide "the certainty of a forum with open doors for the enforcement of obligations of New York-licensed corporations without the expense and burden of proving jurisdiction on a case-by-case basis."

The City Bar recognizes, as does the Sponsor's Memorandum, that: "From 1916 to the present, New York courts-State and Federal--have held that a foreign corporation's registration to do business in New York constitutes consent by the corporation to general personal jurisdiction in the New York courts." While the policy this measure embodies was embraced by New York for many years, Daimler and Goodyear Dunlop Tires changed the due process analysis for personal jurisdiction and provide out-of state entities conducting business in New York that are defendants in actions commenced here a new defense to personal jurisdiction based on due process.
The policy rationales offered do not counteract or outweigh the constitutional impediments to the bill. Other policy considerations, moreover, weigh against the bill. The possibility of saving New York residents and unidentified "others" the trouble of traveling to distant forums may be beneficial, but ignores the costs of processing litigation with only tangential ties to New York and of increasing exposure to civil liability of out-of-state entities conducting business in New York. New York residents' interests are not necessarily served by giving out-of-state entities increased access to New York courts to sue both New York residents and nonresidents, without regard to such lawsuits' lack of connection to New York. A further, likely unintended consequence of the legislation may be, for example, that it will provide out-of-state entities a significant disincentive to register and appoint a New York agent for service of process, increasing the difficulties of effecting service of summonses and subpoenas on those entities. If this measure serves as a model to other states to enact similar legislation, New York entities would be subject to suits in various forums around the country to which, without such legislation, those entities retain a jurisdictional defense.

Although the legislation may be intended to provide certainty, its questionable constitutionality makes that outcome unlikely. Substantial litigation over the constitutional issues raised by the legislation already is occurring in New York trial and appellate courts and other courts across the country. The constitutional impediments posed by Daimler constrained the federal Second Circuit Court of Appeals from construing out-of-state corporations' registration and appointment of an agent for service in Connecticut, under the current Connecticut registration statute, as consent to general jurisdiction in Connecticut over claims arising outside the state. Brown v. Lockheed Martin Corp., 814 F.3d 619, 631 (2d Cir. 2016). This result is similar to the decisions cited above, but the Second Circuit specifically acknowledged that it was rejecting for Connecticut's statute the construction of New York's registration statute that New York courts, before Daimler, had adopted. Brown v. Lockheed Martin Corp., 814 F.3d at 640. Noting the New York Legislature's consideration of this bill, the Second Circuit expressed concern that even "a carefully drawn state statute that expressly required consent to general jurisdiction as a condition on a foreign corporation's doing business in the state" may violate due process. Id., at 640-41.

In 2017, the United States Supreme Court only reinforced Daimler's constraints that drove the Second Circuit. The only recognized bases for general jurisdiction over a corporate entity are its place of incorporation and its principal place of business. BSNF Ry. co. v. Tyrrell, 137 S. ct. 1549, 1558-59 (2017); Daimler AG v. Bauman, 134 S. Ct. at 760. A corporation that conducts business in many states outside the corporation's states of incorporation and principal place of business will register in all or most of those other states. Applying Daimler's standard that a corporation must be "at home" in a state to confer general jurisdiction there, the Court concluded that a "corporation that operates in many places can scarcely be deemed at home in all of them." BSNF Ry. Co. v. Tyrrell, 137 S. Ct. at 1559. Yet the proposed legislation's very result renders an out-of-state corporation that operates and hence registers in New York, as well as in any other states, "at home" here and in any of those other states: an untenable result under Daimler as interpreted and applied by BSNF Ry.. In sum, using registration to conduct business to establish general jurisdiction equates "at home" with "doing business," the result that Daimler expressly proscribed. Daimler AG v. Bauman, 134 S. Ct. at 762 n. 20.
At best, the constitutional questions that the proposed legislation raises currently are unsettled. Absent any demonstrated need to enact this legislation now, it only would invite additional expense and uncertainty until the courts settle these questions. In the meantime the policy rationales for the proposed legislation must be subject to further debate.

**CONCLUSION**

The current policy rationales do not justify the proposed legislation's potential conflicts with the Due Process and Commerce Clauses of the United States Constitution. These constitutional issues already are being litigated in New York and other courts, so that it is only prudent to await further judicial clarification before enacting this legislation. For these reasons, the City Bar does not support the legislation.¹

Reissued June 2019

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¹ We also refer you to the correspondence from the Association's Banking Law Committee to the bill's sponsors dated June 9, 2014, commenting on A.9576/S.7078 (2014 Sess.). The Banking Law Committee also cautioned that the bill's proposed amendment to the Business Corporation Law raised jurisdictional issues with regard to foreign banking corporations conducting business in New York, because Article 5 of the Banking Law includes specific provisions addressing jurisdiction over those corporations as well as related issues (citing N.Y. Banking Law §§ 200 et seq.). See [https://www2.nycbar.org/pdf/report/uploads/20072741-GeneralJurisdictionForeignBusiness.pdf](https://www2.nycbar.org/pdf/report/uploads/20072741-GeneralJurisdictionForeignBusiness.pdf).