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REPORT ON LEGISLATION

A.6714 **M. of A. Weinstein**
S.4846 **Sen. Bonacic**

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

THIS BILL IS OPPOSED

The New York City Bar Association has determined not to support this legislation because the rationales presented in favor of the legislation do not outweigh the potential constitutional issues the bill would raise. In the Association's view, the proposed legislation raises significant potential issues arising from the Due Process Clause and the Commerce Clause of the United States Constitution.

DUE PROCESS CONCERNS

The exercise of general (all-purpose) jurisdiction over an out-of-state entity raises questions of due process under the U.S. 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 violates due process.[1] At least three federal district courts considering statutes similar to the proposed legislation have held that, under *Daimler*, imposing general all-purpose jurisdiction over foreign entities, based on state registration requirements, violates due process.[2]

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[1] *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 (2014) (internal quotation marks and citation omitted).

[2] *See Chatwal Hotels & Resorts LLC v. Dollywood Co.*, No. 14-cv-8679(CM), 2015 WL 539460, at *6 (S.D.N.Y. Feb. 6, 2015) ("After *Daimler* . . . the mere fact of [defendant's] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.") (citing *Gucci America, Inc. v. Li*, 768 F.3d 122, 135 (2d Cir. 2014)); *Brown v. CBS*, 19 F. Supp. 3d 390, 397-400 (D. Conn. 2014) (imposition of general jurisdiction on foreign registered entity, pursuant to Connecticut's statute providing general jurisdiction over such entities, violated due process); *AstraZeneca AB v. Mylan Pharms., Inc.*, No. 14-696-GMS, ___ F. Supp. 3d ___, 2014 WL 5778016, at *5 (D. Del. Nov. 5, 2014) (foreign entity's compliance with Delaware registration "cannot constitute consent to jurisdiction" and state court precedent to the contrary "can no longer be said to comport with federal due process") (citing *Daimler*, 134 S. Ct. at 761-62), *appeal granted*, App. No. 2015-117 (Fed. Cir. Mar. 17, 2015). *But see Acorda Therapeutics, Inc. v. Mylan Pharms, Inc.*, ___ F. Supp. 3d

The proposed legislation could also raise a potential issue under the due-process doctrine of "unconstitutional conditions," pursuant to which "the 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."[3] Prior to *Daimler*, the due process implications of requiring companies "doing business" in New York State to register, and thereby subjecting themselves to general jurisdiction, may have seemed slight or non-existent, but *Daimler* now makes clear that a substantial and valuable constitutional defense is at stake. Although the only apparent sanction a foreign entity would face for failing to register would be the loss of the right to avail itself of the New York courts (known as a "door-closing" statute because it "closes the courthouse doors" to such non-registered foreign entities),[4] it is not clear whether there is a reasonable relationship, for due process purposes, between that penalty and consent to general jurisdiction for actions arising outside of New York.

COMMERCE CLAUSE CONCERNS

The "dormant Commerce Clause" doctrine invalidates state laws that discriminate against, or place impermissible burdens on, interstate commerce.[5] Conditioning the right to "do business" in a state on consent to general jurisdiction for non-state-based claims has been specifically condemned by the Supreme Court as an undue burden on interstate commerce under the Commerce Clause.[6] The Association is concerned that the proposed legislation may raise issues under this doctrine.

Previously, New York courts had held that the New York "door-closing" statute did not impose undue burdens on interstate commerce because it applied only to companies "doing business" in New York, implicating "intrastate" regulation rather than interstate commerce.[7] This "doing business" standard was "fashioned specifically to avoid unconstitutional interference with interstate commerce under the Commerce Clause."[8]

___, No. 14-935-LPS, 2015 WL 186833, at *13-*14 (D. Del. Jan. 14, 2015) (disagreeing with *AstraZeneca*, and asserting general jurisdiction based on Delaware registration); *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. 14-508, 2015 WL 880599, at *15 (D. Del. Feb 26, 2015) (same); *Otsuka Pharm. Co. v. Mylan Inc.*, Civ. A. No. 14-4508 (JBS/KMW), 2015 WL 1305764, at *11 (D.N.J. Mar. 23, 2015) (same).

[3] *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (regulatory taking); *see also Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (First Amendment right of public school teachers); *O'Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) ("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.'") (quoting *United States v. Oliveras*, 905 F.2d 623, 628 n.7 (2d Cir. 1990)).

[4] *See* N.Y. BUS. CORP. LAW §§ 1312(a), 1314(b).

[5] *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008).

[6] *See, e.g., Mich. 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 (1923).

[7] *See, e.g., Airtran N.Y., LLC v. Midwest Air Group, Inc.*, 46 A.D.3d 208, 214 (1st Dep't 2007) ("The burden of showing 'doing business' [under BCL §§ 1301 and 1312] is . . . a heavy one since a lesser showing might infringe on Congress's constitutional power to regulate interstate commerce.").

[8] *Id.* (citing *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267-68 (1917)).

The saving interpretation offered by New York courts for the statute barring non-registered foreign entities from availing themselves of New York courts – that it applies only to entities "doing business," and therefore deemed to be functionally "present" within New York State, for personal jurisdiction purposes – may no longer be viable. Now that *Daimler* has expressly overruled the "doing business" theory of "presence" for purposes of general jurisdiction, that theory may no longer save the New York "door-closing" statute 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." In addition, the legislation is being advanced as a way to provide certainty regarding personal jurisdiction over foreign entities, which has been disrupted by the *Daimler* decision, by *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011), and by other cases decided in the wake of those decisions. As the Sponsor's Memorandum notes, the measure could 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 Association also recognizes, as the Sponsor's Memorandum notes, that "[f]rom 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." However, while the policy embodied by this measure was the policy of New York for many years, *Daimler* and *Goodyear* changed the due-process analysis for general personal jurisdiction, and provide foreign entity defendants doing business in New York with a due process defense to jurisdiction that did not previously exist.

The Association believes that the stated policy rationales do not outweigh the potential constitutional problems of the bill, and that there may be additional policy considerations that weigh against passage of the bill. The possibility of saving New York residents "and others" the trouble of traveling to distant forums may be beneficial, but there are also costs associated with processing cases with only tangential ties to the State or imposing increased exposure to civil liability on foreign entities doing business in New York. Moreover, it is not clear that the public policy interests of New York residents are enhanced by giving "others" increased access to New York courts to sue non-New York entities, without regard to whether such lawsuits have a significant New York nexus. There could also be unintended consequences of the legislation that may have not been considered; for example, by providing foreign entities with a significant disincentive to register and appoint a New York agent for service of process, the legislation may serve to increase the difficulties of effecting service of summons and subpoenas on foreign entities. In addition, if other states enact similar legislation, perhaps in response to this measure, New York entities could end up subject to suits in various forums around the country as to which they currently would have a jurisdictional defense.

Moreover, although the legislation may be intended to provide certainty, its questionable constitutionality makes such an outcome unlikely. Substantial litigation over the constitutional issues raised by the legislation is already occurring in New York trial and appellate courts, and in other courts across the country. In the Association's view, the constitutional law questions raised by the legislation are at best unsettled, and it is not clear that there is a need to enact this legislation now, inviting additional expense and uncertainty.

CONCLUSION

The Association believes that the policy rationales for the proposed legislation should be subject to further debate.[9] These rationales do not seem to justify the potential conflicts with the Due Process and Commerce Clauses of the United States Constitution. These constitutional issues are already being litigated in New York and other courts, and it would be prudent to await further judicial clarification before enacting this legislation. For these reasons, the Association does not support the legislation.

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[9] In that connection, we note that, by letter to the bill's sponsors dated June 9, 2014, commenting on A.9576/S.7078 (2014 Sess.), the Association's Banking Law Committee stated its view that the bill's proposed amendment to the Business Corporation Law raised jurisdictional issues with regard to foreign banking corporations doing business in New York because Article 5 of the Banking Law includes detailed and specific provisions addressing jurisdictional and related matters for such corporations (citing N.Y. BANKING LAW §§ 200 *et seq.*). *See* http://www2.nycbar.org/pdf/report/uploads/20072741-GeneralJurisdictionForeignBusiness.pdf.