New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 257—NO. 79
WEDNESDAY, APRIL 26, 2017

Outside Counsel

Expert Analysis

# A.5918: Unconstitutional, Unwise and Futile Effort to Expand N.Y. Courts' Jurisdiction

By **Marc J. Gottridge**

And **Lisa J. Fried**

In 2014, the U.S. Supreme Court decided *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), holding that the 14th Amendment's Due Process Clause prohibits state courts from exercising general jurisdiction over a corporation—i.e., jurisdiction for claims unrelated to its contacts with the state—unless it is "essentially at home" there. Justice Ruth Bader Ginsburg's opinion in *Daimler* established a bright-line rule: A corporation is "essentially at home" *only* where it is incorporated or has its principal place of business, absent "exceptional" circumstances.[1] *Daimler* relegated to the scrap heap New York's century-old *Tauza v. Susquehanna Coal*[2] test for general jurisdiction: whether the foreign corporation's contacts with New York were sufficiently continuous and systematic to support a judicial finding that it was "doing business" here.

Over the past three years, plaintiffs' lawyers have repeatedly attempted an end-run around *Daimler*, arguing—based on authority tracing back to other *Tauza*-era cases[3]—that a foreign corporation registering to do business in a state is *deemed* to have consented to general jurisdiction there. Trial-level federal and state courts in New York have split on whether this argument comports with the current understanding of Due Process.[4] In a 2016 decision involving Connecticut's registration statute, however, the U.S. Court of Appeals for the Second Circuit explained that "[i]f mere registration and the accompanying appointment of an in-state agent" sufficed to "confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief." *Brown v. Lockheed Martin*, 814 F.3d 619, 640 (2d Cir. 2016).

> This ill-advised and unconstitutional legislation does not deserve to be enacted.

Nevertheless, the Office of Court Administration (OCA) now proposes to undo *Daimler* in New York through legislation. Assembly bill A.5918 would amend BCL §1301 and certain other business-registration statutes to codify the hoary fiction that applying for registration to do business in New York "constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation."[5] This proposal is a legal fool's errand. If enacted, the legislation would almost certainly be held unconstitutional. And even if A.5918 could survive

MARC J. GOTTRIDGE *and* LISA J. FRIED *are litigation partners at Hogan Lovells US in New York. Mr. Gottridge heads the firm's financial services litigation practice in the United States.*

constitutional challenge, punishing out-of-state companies for doing business here is poor public policy, undermining Albany's boast that the "climate for doing business in New York has never been better."[6]

### A.5918 Is Unconstitutional

As the bill's sponsor admits, *Daimler*'s clear constitutional command could not be evaded "by amending the CPLR to explicitly confer jurisdiction over foreign corporations simply because they are doing business in the state."[7] Because the federal Constitution, as interpreted by the U.S. Supreme Court, has supremacy over state law, New York's legislature could no more deprive out-of-state corporations of their Due Process rights than southern legislatures in the 1950s could wrest from minority children the Equal Protection rights recognized in *Brown v. Board of Education*.

Nor can this constitutional bar be sidestepped simply by declaring that a foreign corporation "consents" to general jurisdiction when it registers to do business here. As the Second Circuit observed last year, judicial decisions *implying* "consent" to general jurisdiction rob *Daimler* of its effect through the back door; there is no principled difference if the state accomplishes the theft through legislation *declaring* such "consent." Either way, the government-compelled "consent" is merely a fig leaf for what Justice Ginsburg called an "unacceptably grasping" approach to general jurisdiction. *Daimler*, 134 S. Ct. at 761. Such fictitious "consent" bears little resemblance to the kind of true, bargained-for consent to jurisdiction that commercial parties may include in a negotiated contract.

The bill also violates the "unconstitutional conditions" doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. John's River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). "Understood at its most basic level, the doctrine aims to prevent the government from achieving indirectly what the Constitution prevents it from achieving directly." *Planned Parenthood of Ind. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012). If New York could not *directly* override *Daimler* (as the Sponsor's Memorandum concedes), it cannot constitutionally accomplish the same result *indirectly* by requiring out-of-state businesses to forfeit their Due Process rights as a condition to doing business here. In addition, the U.S. Constitution, through the "dormant Commerce Clause" doctrine, prohibits states from enforcing laws that discriminate against, or impose impermissible burdens on, interstate commerce. See generally *New Energy Co. v. Limbach*, 486 U.S. 269, 273-79 (1988). That is precisely what A.5918 would do.

The Assembly bill, then, is unconstitutional, and will almost surely be struck down. Yet merely enacting it will necessarily engender litigation over its unconstitutionality, creating years of legal uncertainty—despite *Daimler*'s plain holding—about which out-of-state corporations are subject to general jurisdiction in New York. The bill's supporters proclaim that the bill "would remove the uncertainty caused by *Daimler*,"[8] but the opposite is true. *Daimler* substantially *reduced* uncertainty by establishing a clear, easy-to-apply test for determining which corporations are subject to such jurisdiction, in place of the multi-factor *Tauza* test, which the New York Court of Appeals long ago admitted was not "precise" and required "[e]ach case [to] be decided on its own particular facts." *Sterling Novelty v. Frank & Hirsch Distrib.*, 299 N.Y. 208, 210 (1949). By attempting to circumvent *Daimler* despite serious constitutional problems, the proposed legislation will muddy for New York an area of the law that the Supreme Court recently clarified for the entire country.

### Bill Represents Bad Public Policy

Constitutionality aside, enacting A.5918 would be contrary to the public interest. The bill would

aggressively impose general personal jurisdiction—for claims arising anywhere in the world, without any New York connection (in favor of foreign as well as local plaintiffs)—on out-of-state corporations as though *Daimler* had not been decided. Meanwhile, other states, which compete with New York for business, would simply follow the U.S. Supreme Court's decision. By increasing litigation risk and expense, the bill would discourage foreign and out-of-state investment here, undermining Albany's much-trumpeted message that "New York is open for business."[9] It would be counterproductive to enact such anti-growth legislation when New York suffers from population decreases,[10] the country's highest state tax burden,[11] and rankings of 44th for "cost of doing business" and 45th for "business friendliness."[12]

This poorly conceived bill is also riddled with anomalies. For example, it does not purport to impose general jurisdiction on out-of-state corporations doing business in New York without authorization and thus perversely discriminates against companies that follow the rules by registering here. Moreover, it subjects to general jurisdiction companies that have not even done business here, but have merely proactively applied for registration. In addition, it would apply retroactively to corporations that have already registered in New York, burdening out-of-state corporations that have established or expanded their presence in New York in justifiable reliance on *Daimler*. Finally, although the Sponsor's Memorandum touts the dubious benefit of opening our courts to claims (even those brought by non-New Yorkers) against foreign corporations, even when those claims have nothing to do with this state, it fails even to acknowledge the obvious costs of doing so—such as the additional court congestion that will inevitably delay adjudication of other cases that do have a substantial relationship to New York.

Similar bills, introduced in the past two legislative sessions, were justly criticized by the New York City Bar and other bar associations, including on grounds mentioned above.[13] Yet the OCA and A.5918's sponsor have made no effort to meet those concerns. This ill-advised and unconstitutional legislation does not deserve to be enacted.

1. Id. at 760, 761 n.19. The exception is exceedingly narrow: The only example provided by the *Daimler* court involved a Philippine company that, during Japan's wartime occupation of its home country, established temporary de facto headquarters in Ohio. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

2. 220 N.Y. 259 (1917).

3. See, e.g., *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916).

4. Many of these decisions are collected in Jason P. Gottlieb and Michael Mix, "Registration and Jurisdiction After 'Daimler': Awaiting Clarity," N.Y.L.J. (Dec. 30, 2016), http://www.newyorklawjournal.com/id=1202775867013/Registration-and-Jurisdiction-After-Daimler-Awaiting-Clarity.

5. A.5918, §2. Assemb. Reg. Sess. 2017-2018. (N.Y. 2017). The other statutes that would be affected are N.Y. GEN. ASS'NS LAW §18, LIM. LIAB. CO. LAW §802, NOT-FOR-PROFIT CORP. LAW §1301 and P'SHIP LAW §§121-902 and 121-1502.

6. EMPIRE STATE DEV. CORP., "Doing Business in NY: Welcome to the State of Opportunity," NEW YORK STATE (last visited April 12, 2017), https://esd.ny.gov/doing-business-ny.

7. Mem. in Supp. of A.5918, Assemb. Reg. Sess. 2017-2018. (N.Y. 2017).

8. Joel Stashenko, "Bill Seeks Clarity on Court Jurisdiction Over Corporate Disputes," N.Y.L.J. (Feb. 27, 2017), http://www.newyorklawjournal.com/id=1202780025531/Bill-Seeks-Clarity-on-Court-Jurisdiction-Over-Corporate-Disputes.

9. See Vivian Yee, "Cuomo's Start-Up Program, Meant to 'Supercharge' Economy, Has Created 408 Jobs," N.Y. TIMES (July 1, 2016).

10. E.J. McMahon, "More People Left NYS in 2015-16," EMPIRE CENTER (Dec. 20, 2016).

11. Ashley May, "These are the states where you pay the most and least in taxes," USA TODAY (April 5, 2017).

12. America's Top States for Business 2016, CNBC (last visited April 12, 2017).

13. NEW YORK CITY BAR, REPORT ON LEGISLATION A.6714, S.4846 (2016).