

S.7476 (Gianaris)/A.7351 (Weinstein) @ request of the Office of Court Administration

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<p>BILL</p> <p>S.7476 (Gianaris)/A.7351 (Weinstein) @ request of the Office of Court Administration</p>
<p>SUBJECT</p> <p>Consent to General Jurisdiction</p>
<p>DATE</p> <p>May 22, 2023</p>
<p>OPPOSE</p>

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The Business Council continues to oppose this legislation that would provide that a non-New York business or non-profit that secures authorization to conduct business in

New York could be sued in New York State courts for an action completely unrelated to its activities in New York (i.e., be subject to the general jurisdiction of the state's courts).

Two important developments have occurred since The Business Council began its advocacy in opposition to this legislation:

- Identical legislation was vetoed after its passage by the Senate and Assembly in the 2021 legislative session (see S.7253/A.7769 and Veto Message #79). Among concerns raised by Governor Hochul in her veto message were “this bill would deter out-of-state companies from doing business in New York entirely . . . [or] limit their business in New York, “this bill would instantaneously create substantial uncertainties for businesses, thereby increasing their risks, including the prospect of increased and unforeseen litigation in New York,” and “this bill would also cause an increase in lawsuits over disputes that may bear no nexus to New York, thereby overwhelming an already taxed judiciary and impeding due process.”
- The issue of state authority to impose general jurisdiction through registration statutes, such as proposed in this bill, is under legal review. The bill's statement of support argues cites Pennsylvania's registration statute that “has for years provided that ‘qualification’ of a foreign corporation ‘shall constitute a sufficient basis of jurisdiction to enable the tribunals of [the] Commonwealth to exercise general personal jurisdiction.” Importantly, however, that statute is subject to a legal challenge now before the United States Supreme Court. *Mallory v. Norfolk Southern Railway Company* was argued before the Supreme Court on November 8, 2022 and should be decided by the end of June 2023. In that case, the Supreme Court is reviewing a decision by the Pennsylvania Supreme Court, which held that the state's jurisdictional statute, deeming a party's registration to do business as consent to general jurisdiction, violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

This bill is proposed by the state Office of Court Administration (OCA) to address perceived ambiguities in the case law in the wake of the U.S. Supreme Court's unanimous decision in *Daimler AG v. Bauman* (134 S.Ct. 746, 760, 2014). In *Daimler*, the workers and relatives of workers of Mercedes Benz Argentina, a wholly owned subsidiary of German-based DaimlerChrysler AG, sued the company in California State Court for violations of the Torture Victims Protection Act of 1991 for actions taken

court for violations of the Torture Victims Protection Act of 1991 for actions taken during Argentina's "Dirty War" of 1976-1983. The Supreme Court found that the defendant was not "at home" in California, and therefore - based on due process considerations - was not subject to the general jurisdiction of California's courts.

In clarifying the constitutional limits on a court's assertion of general jurisdiction over a corporate defendant, the Supreme Court differentiated from other cases where it had held that general jurisdiction applied to a corporate defendant because it was "at home" (i.e., was incorporated in or had its principal place of business in a state, or its affiliations with the state were so continuous, systematic and substantial "as to render it essentially at home,") regardless where the action that gave rise to a case occurred. The *Daimler* decision focused on, and clarified, the meaning of continuous, systematic and substantial activity that would subject a company that is not incorporated in the state and does not have its principal place of business in the state to the general jurisdiction of that state's courts.

Even without this bill, any non-NY entities doing business in this state would be subject to the jurisdiction of the state's courts for actions occurring in New York. Moreover, entities established under the laws of New York are already subject to the general jurisdiction of this state's courts.

The Business Council has subjected this proposal to detailed legal review, including discussions with OCA staff and members of the OCA's CPLR advisory committee.

Based on this review, we have several significant concerns regarding this proposed legislation.

While consent-based jurisdiction was not specifically addressed in *Daimler*, this legislation is inconsistent with the Supreme Court's long-stated principle, repeated in *Daimler*, that general jurisdiction is the exception and not the norm.

It is imprudent for New York or other states to move to codify pre-*Daimler* case law before the effect of *Daimler* on consent-based jurisdiction is realized.

Concerns have been raised that this legislation may be unconstitutional under the *Daimler* decision, and that it would reflect unfavorably upon New York State if this legislation is successfully challenged on Federal constitutional grounds.

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by making consent to general jurisdiction a requirement for being authorized to do business in New York, “foreign” companies and non-profits currently doing limited business in New York could decide to terminate these activities rather than consent to general jurisdiction.

We are concerned that this legislation would result in an excessive number of cases being brought in New York State courts that are unrelated to business activity in the state.

Finally, this legislation could encourage other states to adopt similar legislation that would disadvantage New York-created companies that do limited business in those states.

The OCA states that New York case law holds that a foreign corporation’s registration to conduct business constitutes its consent to general jurisdiction, and that this bill simply codifies New York law as it existed before *Daimler*. It is further argued that such mandatory consent is a fair trade for accessing New York’s marketplace and courts. As explained below, we disagree with the OCA.

Given the U.S. Supreme Court’s decision in *Daimler*, the legislature should question the appropriateness of allowing suits to be brought in New York State against non-NY incorporated companies for actions occurring elsewhere, and having no particular relationship to New York other than the fact that it involves a business or non-profit that conducts any business here.

Interestingly, courts in other states are issuing decisions that are consistent with our opposition to this legislation. Most recently, in April 2016, the Delaware Supreme Court (that state’s highest court), in *Genuine Parts v. Cepic*, found that Delaware’s corporate registration statute does not provide a basis for asserting general personal jurisdiction over foreign corporations in Delaware. That decision contains the following explanations, which are very relevant to the CPLR amendments now being considered in New York

In our republic, it is critical to the efficient conduct of business, and therefore to job- and wealth-creation, that individual states not exact unreasonable tolls simply for the right to do business.... An incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state’s

market. Daimler makes plain that it is inconsistent with principles of due process to exercise general jurisdiction over a foreign corporation that is not —essentially at home in a state for claims having no rational connection to the state.

As discussed above, we disagree with the OCA’s position that this legislative proposal for “coerced” consent to general jurisdiction is good public policy. Moreover, we question whether this legislation is consistent with the outcome of Daimler and other federal cases. We believe that it is not appropriate for New York to adopt a heavy-handed coercive provision that would very likely be subject to a successful constitutional challenge. For these reasons, we respectfully oppose adoption of this legislation.

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